

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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 16, 2017

Hearing Officer:

Kerry Bonner, Esq.

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

HEARING OFFICER'S DECISION

Summary

- 1 The issues in these consolidated cases are whether the City of Boston (City or
- 2 Employer) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts
- 3 General Laws Chapter 150E (the Law) by implementing a mediation program without

1 bargaining to resolution or impasse with the Boston Police Patrolmen's Association
2 (BPPA or Association) and the Boston Police Superior Officers Federation (BPSOF or
3 Federation) over the decision and the impacts of the decision on employees' terms and
4 conditions of employment. Based on the record and for the reasons explained below, I
5 conclude that the City violated the Law by failing to bargain over the impacts of the
6 decision to implement the Mediation Program to resolution or impasse, but I dismiss the
7 decisional bargaining allegations.

Statement of the Case

8 On June 23, 2016, the BPPA filed a Charge of Prohibited Practice, alleging that
9 the City violated Sections 10(a)(1) and 10(a)(5) of the Law. The Department of Labor
10 Relations (DLR) docketed the charge as MUP-16-5315. On July 5, 2016, the BPSOF
11 filed a Charge of Prohibited Practice, also alleging that the City violated Sections 10(a)(1)
12 and 10(a)(5) of the Law.¹ By letter dated July 6, 2016, the DLR notified the parties that it
13 had consolidated the two charges because they both raised the same allegations. A DLR
14 investigator held an in-person investigation of the charges on August 9, 2016, and issued
15 a Complaint of Prohibited Practice for each charge on August 22, 2016 (Complaints).²
16 On August 23, 2016, the City filed its Answers to the Complaints. Also on August 23,
17 2016, the City filed Motions to Dismiss the Complaints. On August 24, 2016, the City filed

¹ The BPSOF had withdrawn an earlier charge involving similar allegations.

² The Complaints noted that the cases would also be consolidated for hearing.

1 Motions to Bifurcate the cases for hearing. On August 29, 2016, the BPPA and BPSOF
2 (collectively, the Unions) filed an Opposition to the City's Motions to Dismiss. On August
3 30, 2016, the DLR denied the City's Motions to Dismiss and Bifurcate. On September 7,
4 2016, the City filed a Motion for Reconsideration and Request for Review of its Motions
5 to Dismiss. On September 8, 2016, the DLR ruled that its regulations do not permit a
6 respondent to request the review of a complaint. The DLR also advised that any motion
7 to dismiss should be directed to the hearing officer after the mediation scheduled for
8 September 12, 2016.

9 The parties were unable to resolve the cases at the DLR mediation. On November
10 9, 2016, I held a pre-hearing conference for the cases. At the pre-hearing, the City
11 renewed its Motions to Dismiss and Bifurcate. I advised the parties that I would issue a
12 ruling based on the documents that they had already filed in connection with the motions
13 and that they need not file any additional documents. On November 29, 2016, I denied
14 the City's Motions to Dismiss and Motions to Bifurcate. Also on November 29, 2016, the
15 City filed a Motion to Reconsider its Motions to Dismiss. I denied the Motion to
16 Reconsider on December 1, 2016.

17 I conducted a hearing on April 3, 2016. The parties were afforded a full opportunity
18 to be heard, to examine and cross-examine witnesses, and to introduce evidence.
19 Following the close of hearing, the BPPA, BPSOF, and City each timely filed post-hearing
20 briefs.

Stipulations of Fact

1. The BPSOF and the City met on the following dates about a proposed mediation program:
 - a. May 18, 2013
 - b. August 7, 2013
 - c. December 3, 2013
 - d. April 24, 2015
 - e. June 25, 2015
2. The BPPA and the City met on the following dates about a proposed mediation program:
 - a. July 11, 2013
 - b. July 30, 2014
 - c. April 24, 2015
 - d. July 24, 2015
3. The BPSOF met with representatives of Harvard Mediation Program on September [4], 2015.³

Admissions of Fact

1. The City is a public employer within the meaning of Section 1 of the Law.
2. The BPPA is an employee organization within the meaning of Section 1 of the Law.
3. The BPPA is the exclusive representative for all patrol officers employed in the City's Police Department (Department).
4. The BPSOF is an employee organization within the meaning of Section 1 of the Law.
5. The BPSOF is the exclusive representative for all sergeants, lieutenants, and captains employed in the Department.
6. On January 6, 2016, the City implemented Rule 109A, Mediation Program.

³ Although the parties stipulated that this meeting took place on September 5, witness testimony and exhibits clarify that the correct date of the meeting was September 4.

Findings of Fact

1 By letter dated May 9, 2013, the City notified the Unions that it was considering
2 instituting a "Mediation Program Rule" (Mediation Program), and attached a draft policy.⁴
3 The City also advised the Unions that the Office of Labor Relations (Labor Relations) was
4 available to discuss any issues with the program, and requested that the Unions contact
5 Labor Relations by May 15, 2013 if they wished to meet on the matter.

6 The attached draft Mediation Program set forth the following, in relevant part:

7 **SUBJECT: MEDIATION PROGRAM**
8

9 This rule is issued to establish an alternative complaint resolution
10 procedure, specifically Mediation, which may be utilized by complainants
11 and employees who are eligible to participate under the requirements listed
12 below.
13

14 **Sec. 1 General Considerations**
15

16 Mediation is a voluntary alternative complaint resolution process that aims
17 to assist two (or more) disputants in reaching an agreement. The parties
18 themselves determine the conditions of any settlements reached.
19 Independent and impartial mediators serve to facilitate, in a purely advisory
20 role, dialogue between disputants during mediation, aiming to help the
21 parties reach an agreement on the disputed matter.
22

23 A mediation session is a face-to-face meeting in which the parties engage
24 in a healthy, respectful discussion of the events that led to the complaint so
25 as to encourage a resolution which satisfies both parties. The ideal
26 environment for Mediation is one of equanimity and impartiality.
27

28 Mediation can also function as a means of dispute prevention by serving as
29 a mechanism to foster communication, interaction and problem solving, all
30 of which support the community policing philosophy. Mediation offers the

⁴ Prior to the eventual implementation of the Mediation Program in 2016, the City did not have a mediation program for citizen complaints against officers.

1 opportunity for participants to develop a mutual understanding of the
2 situation that led to the complaint. The mediation process is completely
3 voluntary and confidential, and gives participants control over the final
4 resolution unique to their dispute. An agreed upon understanding of the
5 circumstances which led to a complaint can prevent a similar conflict from
6 arising in the future.

7 8 **Sec. 2 Confidentiality**

9
10 Confidentiality is the key ingredient in mediation, allowing for trust of the
11 process. Mediation will not be successful unless the parties can participate
12 fully and communicate openly. At the start of a Mediation, the mediator
13 must inform the participants that all communications and intake discussions
14 between them will be private and confidential. No information gained during
15 Mediation can be used for or against either party outside of the mediation
16 except as required by law (*see Sec. 4.5. Guidelines for Mediation Session*).

17 18 **Sec. 3 Eligibility**

19 20 Sec. 3.1. Complaint Received at IAD – Initial Review

21
22 When an external complaint is filed within the Internal Affairs Division [IAD],
23 the case is assigned to an investigator. Once assigned, the investigator
24 interviews the complainant. At the interview, the investigator shall evaluate
25 the elements of the complaint and determine whether the complaint is
26 appropriate for Mediation. If the investigator determines that Mediation is
27 appropriate, he/she shall complete the Mediation Recommendation
28 Package. The investigator shall also create a task in the complaint tracking
29 system documenting the investigator's recommendation for mediation.

30 31 Sec. 3.2. Complaint Received at District – Initial Review

32
33 When an external complaint is filed within a District, the District intakes the
34 complaint, and refers the complaint to IAD for review. During the initial
35 intake, should a District supervisor believe that the complaint is appropriate
36 for Mediation, that supervisor may make a recommendation to IAD that the
37 complaint be handled through Mediation. The recommendation for
38 Mediation shall be submitted to IAD along with the complaint form. The IAD
39 investigator assigned to that complaint shall review the complaint and
40 determine whether he/she agrees the case is appropriate for Mediation.
41

Sec. 3.3. Mediation Recommendation Package

The Mediation Recommendation Package is the most essential tool in gathering the information needed to determine whether a complaint is appropriate for Mediation. Once completed, this package shall be submitted to the investigator's team leader or supervisor. This package shall include:

- Initial complaint (official form)
- Complaint Information Form (if applicable)
- 1.1 Incident Report of the incident which is the subject of the complaint (if applicable)
- Any other documents or materials related to the incident
- Mediation Recommendation Form: This form includes a checklist of the document requirements needed to recommend Mediation. The form is comprised of the following information:
 - Case Management Reference Number
 - Complainant(s) Name
 - Complainant(s) Contact Information
 - Employee(s) Name
 - Employee(s) ID#
 - Employee(s) Rank (if applicable)
 - Employee(s) Assignment
 - Mediation Screening Criteria
 - Investigator Recommendation

Sec. 3.4. Complaint Eligibility

Complaints may only be considered for Mediation where:

- The employee has not had a sustained case of similar misconduct within the past year
- The employee has not engaged in the mediation process within the past year

The eligibility for a complaint to be handled for Mediation is ultimately at the discretion of Chief of the Bureau of Professional Standards, or his designee.

Sec. 3.5. Secondary Review

Once received, the IAD team leader shall make a determination within seventy-two (72) hours whether the complaint will be recommended for Mediation.

If the complaint is approved for Mediation by the IAD team leader, a notation shall be made on the Mediation Recommendation Form, and the package shall be forwarded to the Assistant Chief of the Bureau of Professional Standards, or his designee, for review. Once received, the Assistant Chief of Professional Standards shall make a determination within seventy-two (72) hours whether the complaint will be recommended for Mediation.

If the complaint is approved for Mediation by the Assistant Chief of the Bureau of Professional Standards, a notation shall be made on the Mediation Recommendation form and the package shall be forwarded to the Chief of the Bureau of Professional Standards for final review and determination. The Chief of the Bureau of Professional Standards shall make a determination within seventy-two (72) hours whether the complaint will be referred to Mediation.

Sec. 4 Mediation**Sec. 4.1. Case Assignment**

If the complaint is approved for Mediation, a notation is made on the Mediation Recommendation Form and the package is then forwarded to the Mediation Coordinator for assignment.

The Mediation Coordinator will then create a Mediation case file with unique identification to house the Mediation Recommendation Package and any future documents used in the Mediation process. The Mediation Coordinator will create a task in the case management system that the complaint has been approved for Mediation. A form delineating that the case has been submitted to mediation will be completed and given to the investigator initially assigned the case to put into the IAD case file pending the outcome of Mediation.

Sec. 4.2. Notification

Once the Mediation case file has been created, the Mediation Coordinator will notify the parties of the option for Mediation within fourteen (14) calendar days. This communication will include an explanation of the process of Mediation and the rights and responsibilities associated with the process.

If either party opts not to partake in this option, then the Mediation Coordinator will notify the other party, and the investigator originally assigned the case, that the case will continue per the traditional investigative track. The Mediation Coordinator will also make a notation in the case management system of the party's choice to reject Mediation.

If both parties choose to participate in Mediation, then the Mediation Coordinator will schedule the Mediation.

Sec. 4.3. Scheduling of Mediation

The Mediation Coordinator is responsible for scheduling the Mediation. If the complainant does not feel comfortable participating in the Mediation held at Boston Police Headquarters, than [sic] other arrangements should be made to accommodate the complainant.

The complained-of employee must participate in the Mediation on a scheduled tour-of-duty. Arrangements must be made through the employee's unit or a division commander to accommodate the Mediation (i.e., District Commanders would have to arrange to change hours for last half personnel.) Overtime is not permitted for participation in Mediation.

Sec. 4.4 Mediator Criteria

A volunteer mediator cannot be currently employed by the Boston Police Department or the City of Boston.

A mediator cannot be associated with either of the parties involved in the mediation. Where a conflict of interest exists between the assigned mediator and any party, the mediator will recuse himself/herself and another mediator will be selected.

A mediator must have received a minimum of thirty (30) hours of training in mediation in accordance with M.G.L. Chapter 233 section 23C.

1 Sec. 4.5. Guidelines for Mediation Session

2
3 Sec. 4.5.1. Officer Attire: In order to encourage equality amongst the
4 mediation participants, officers shall not attend the mediation in uniform.
5 Business or business casual attire is appropriate. Officers carrying their
6 department issued firearms to the Mediation shall ensure their weapon is
7 concealed.
8

9 Sec. 4.5.2. Mediator Explanation of Process: Upon arrival of the parties
10 to the Mediation, the mediator will commence by thoroughly explaining the
11 rights and responsibilities of the participants, along with the rules of conduct
12 and confidentiality of a mediation session.
13

14 Sec. 4.5.3. Confidentiality Agreement: Once both parties are in agreement
15 and communicate to the mediator an understanding of these rights and
16 responsibilities, the mediator, along with both parties, shall sign a
17 confidentiality agreement prior to the start of the session. No information
18 relayed at any point during the course of the mediation shall be revealed
19 outside of the mediation. (Exception: Information protected under
20 mandatory reporting laws as specified by M.G.L. c. 119 Sections 51A (Child
21 Abuse), M.G.L. c. 19A Section 15A (Elder Abuse), and/or M.G.L. c. 19C
22 Section 10 (Abuse of Person with Disability), or as otherwise required by
23 law.)
24

25 Sec. 4.5.4. Mediator Role: The mediator will proceed by facilitating the
26 mediation in an attempt to help the parties arise to a resolution that satisfied
27 both. There should be no pressure put on either party to agree to a
28 resolution.
29

30 Sec. 4.5.5. Withdrawal from Mediation: Agreement is completely voluntary.
31 Should no common resolution occur during the course of the mediation,
32 either party is free to withdraw at any point without prejudice. Should a
33 withdrawal occur, the mediator shall remind both parties of the
34 confidentiality agreement and end the Mediation session. The mediator will
35 return the case to the Mediation Coordinator. The Mediation Coordinator
36 will then notify the investigator originally assigned the case that the case
37 was not successfully mediated and the investigator should proceed per the
38 traditional investigative track. A notation in the complaint tracking system
39 shall be made to that effect.
40

1 Sec. 4.5.6. Mutual Resolution: Should the parties come to a common
2 resolution, the mediator will have both parties sign a form to that effect.
3 Further, the mediator will have the complaining party sign a complaint
4 withdrawal form per successful Mediation. The case shall be returned to
5 the Mediation Coordinator with all the pertaining documents and a notation
6 will be made in the complaint tracking system to that effect. Further, the
7 Mediation Coordinator shall return the withdrawal form to the Assistant
8 Chief of the Bureau of Professional Standards.

9 Facts Specific to BPSOF

10 Following the City's notification to the Unions of the draft Mediation Program, by
11 email dated May 21, 2013, the BPSOF requested to meet. The City agreed to meet, while
12 reserving its rights to implement the policy.⁵ The BPSOF and City first met on May 18,
13 2013.⁶

14 The parties' second meeting took place on August 7, 2013. At this meeting, the
15 parties discussed:

- 16 • The confidentiality of mediation, such as where the files would be kept and
17 whether IAD would have access to the files;
18
- 19 • How the mediators would be paid;
20
- 21 • How officers would dress for the mediation;
22
- 23 • The training of mediators; and
24
- 25 • The reasons why certain types of complaints would be excluded from the program.
26 Superintendent Frank Mancini (Superintendent Mancini), the Superintendent of
27 the Department's Bureau of Professional Standards, said he would review other

⁵ Witnesses for both the City and Unions testified that it was common practice for the parties to "reserve their rights" prior to discussions on issues.

⁶ There is no information in the record about what the parties discussed at this meeting.

1 large city mediation programs, with an emphasis on their exclusions and
2 restrictions.

3
4 By email to the City dated September 16, 2013, the Union stated, in relevant part,
5 "the Federation has yet to receive a response to the multi-subject meeting that dealt with
6 issues pertaining to mental illness, transgender policy, mediation, and harassment.
7 Please advise to [sic] the status." The City responded by email dated September 17,
8 2013, stating, "We thought we responded face to face on all the other relevant issues.
9 Can you write up what you believe to be outstanding?" By email dated September 18,
10 2013, the BPSOF responded, "The Department said it would take our concerns into
11 consideration on all issues discussed, respond in writing and then invite the union to
12 respond if such concerns did not address all outstanding concerns."

13 By letter to the BPSOF dated September 30, 2013, the City stated, in pertinent
14 part:⁷

15 This letter responds to your email dated September 8, 2013 regarding the
16 policies discussed at the August 7, 2013 meeting with the Union. At that
17 meeting, the Union expressed certain concerns regarding the Emotionally
18 Disturbed Persons, Mediation, Transgender and Harassment policies and
19 the Department responded. With this letter, the Department will summarize
20 the issues the Federation raised at the August 7, 2013 [sic], and provide the
21 answers given at the meeting as well as respond to any issues not
22 answered at the time.

23 ***
24
25

⁷ This letter, and others below, also reference other topics that the parties were discussing that are not relevant to the issues before me. Where possible, I have redacted detailed discussion of such topics from the parties' correspondence in this decision.

1 With regard to the Mediation Policy, the Union had a number of concerns.
2 First, the Union asked who would pay the mediator involved. The Union
3 inquired about the reasoning behind the two exclusions in Section 3.4 of the
4 policy. The Union also asked where the mediation files would be kept. The
5 Department is still in the process of doing some research on these issues
6 and once it has a response will inform the Union of its position.

7 ***

8
9
10 With this letter the Department believes it has answered all the Union's
11 concerns stated at the August 7, 2013 meeting regarding the above
12 mentioned policies with the exception of the mediation policy. If the Union
13 has further questions or concerns, please place them in a written response
14 and contact this office to schedule a follow up meeting. . . .

15
16 In response, by email dated October 1, 2013, the BPSOF stated in relevant part:

17 Contrary to your letter, the Federation does not review [sic] the issues as
18 resolved. Neither could the Department, given that a) the Department
19 admits that mediation policy is unresolved . . . In any event, the Federation
20 does not view these issues as resolved and demands to meet to continue
21 bargaining. We decline to provide any concerns or questions in a written
22 response, given the obligation of the City under Chapter 150E, Section 6 to
23 "meet at reasonable times" and therefore in person.

24 By letter to the BPSOF dated October 10, 2013, the City stated in relevant part:

25 This letter serves to follow up on the status of bargaining between the
26 Department and the Federation on the issues of the following policies:
27 Emotionally Disturbed Persons, Mediation, Transgender and Harassment.

28
29 In relation to the Mediation and Transgender policies, the Department
30 formally noticed the Union on May 9, 2013 and attached a copy of the draft
31 policies for review. Additionally, during a meeting held at BPD
32 Headquarters on May 7, 2013 to discuss issues related to the Marathon
33 Bombing, the Department made the Union aware informally that a notice
34 letter would be sent out in the next day or two regarding mediation and
35 transgender prisoners as well as that the Department was seeking to
36 implement these policies soon. At that May 7, 2013 meeting, the Union
37 members present were Captain Kervin, Lt. Sweeney, and Lt. Hosein.

1 In the formal notice letter dated May 9, 2013, the Department informed the
2 Union of the Department's desire to implement these two policies as soon
3 as possible and requested a response from the Union by May 15, 2013 to
4 determine if the Union had any concerns. The Union did not respond until
5 May 21, 2013 via email, and the Department still agreed to meet with the
6 Union in order to discuss the policies. However, in that response email on
7 May 23, 2013 to the Union the Department made clear that it had reserved
8 all its rights to implement these policies, but was still willing to discuss any
9 concerns the Union may have. A meeting was scheduled on May 28, 2013.

10
11
12 * * *

13
14 ...The Mediation and Harassment policies have still not been issued
15 because the Department believed further bargaining was needed.

16
17 * * *

18
19 ...The Mediation policy is on hold pending further review by Superintendent
20 Mancini. ...

21
22 * * *

23
24 ...In an email response dated October 1, 2013, the Union makes clear that
25 it is not in agreement with the Department regarding the Transgender,
26 Harassment and Mediation policies, but still refuses to provide the
27 Department with any guidance on what outstanding issues or concerns the
28 Union has. For that reason, this office will schedule a follow up meeting in
29 order to try and extract from the Union the remaining concerns with these
30 three policies.

31
32 In response, by email to the City dated October 10, 2013, the BPSOF stated:

33 Please be advised that any continued implementation of the four policies by
34 the Department is done so at its peril. For the sake of brevity, I will ignore
35 the Department's self-serving summary of bargaining history, except to note
36 that the Department clearly informed the Federation that BPD would
37 correspond with us the Department's updated position following the August
38 7 meeting. The Department indicated we should review any letter to
39 determine if issues remained as a result of the response that necessitated

1 bargaining. The Department never did so, even if we were to adopt the
2 Department's implausible suggestion that the only outstanding issue was a
3 closeout letter, such as on Transgender.
4

5 On September 16, I inquired of the Department about the promised written
6 response for this multi-subject meeting. The Department repudiated its
7 earlier promise, and asked the Federation, instead, to provide the summary.
8 The Department's response, two weeks later, suggested that all issues
9 were closed, despite the City admitting that substantial issues remained
10 unresolved in three of the four proposed policies. We declined the City's
11 request to set forth our bargaining position in writing, given our statutory
12 right to insist upon face-to-face meetings for negotiations.
13

14 * * *

15
16 In sum, the Department has unilaterally implemented policies despite a
17 timely demand to bargain, prematurely concluded bargaining multiple times,
18 and failed to act as promised.
19

20 The Department has only itself to blame for being clueless about the
21 Federation's continued concerns. The Federation's position is based, in
22 part upon responses that the Department has yet to provide. There is no
23 conceivable reason why it has taken this long for the Department to be
24 prepared to address issues raised at the last session. We remain available
25 to meet October 30 and November 1, provided that the Department is
26 prepared to respond to its open issues.
27

28 By letter dated October 24, 2013, the City responded by letter as follows, in

29 relevant part:

30 This letter serves as a follow up to your email received on October 10, 2013.
31 The Department's only desire is to meet its bargaining obligations regarding
32 the above policies. The Department does not feel it is unreasonable to
33 request the Union send a written response informing the Department of
34 what concerns and issues the Union has with each policy. This would
35 enable the Department to hold internal meetings to discuss and craft a
36 response to each Union concern. The Department could then have a
37 productive meeting with the Union and answer all questions and concerns.
38

1 Therefore, the Department would request from the Union, for the third time,
2 to have any outstanding issues or concerns on each policy in writing. The
3 Department is requesting the Union's assistance in understanding their
4 issues and concerns. This would allow the Department to properly address
5 the Union's issues during a scheduled follow up face to face meeting.
6

7 By email dated October 30, 2013, the BPSOF stated, in relevant part:
8

9 The Federation seeks to address its concerns in a meeting. In addition, the
10 Department has promised, and failed, to provide additional information and
11 updates about issues at the last meeting. Please indicate whether the
12 Department is willing to meet to continue discussing these policies, or
13 whether it will meet only if the Federation presents its concerns and
14 positions in advance in writing (even though, as noted, the Department's
15 positions on multiple policies remain unstated or unresolved). The
16 Department's refusal to meet unless the Federation places its position on
17 various policies [sic], especially where the policy is incomplete, constitutes
18 a refusal to "meet at reasonable times" as required under Chapter 150E. If
19 the Department has authority that it may insist upon such a precondition,
20 we are willing to receive it and reconsider our position. Also, please tell us
21 when we can expect the Department to resolve the issues it acknowledged
22 to be outstanding from the last meeting. We'd prefer the Department to
23 focus its energies on developing a proposal we can counter or discuss,
24 rather than demanding we articulate positions in anticipation of incomplete
25 proposals.
26

27 In response, by letter dated November 15, 2013, the City stated in relevant part:

28 The Department considers the email dated of [sic] October 30, 2013 [sic]
29 4:45 p.m. to be inaccurate in the claim that the Department is refusing to
30 meet or is placing barriers in the way of another meeting about proposed
31 policy changes and rules. The Department has provided a comprehensive
32 response to impact bargaining issues the Union raised during meetings on
33 these policies. The Department also considers the Union's claim that the
34 policies presented to the Union are incomplete to be inaccurate as well.
35 The policies were revised based upon concerns the Union brought up. The
36 Department's changes were in response to those concerns.
37

38 Regarding the Mediation Policy the Union voiced that it wanted a revision
39 to Section 3.4 in order to allow more officers to take part in mediation.
40 Superintendent Mancini is doing research on this issue. However, if the

1 Union is no longer making an issue on Complaint Eligibility, the Department
2 considers its impact bargaining obligation with the Union fulfilled and knows
3 of no other reason to delay implementation on this policy. The other
4 concerns that arose from the meetings between the Union and Department
5 on this policy dealt more with clerical issues of where will files be stored,
6 how will the mediator be chosen and compensated and finally around
7 confidentiality of the process. The Department has answered those
8 questions.
9

10 ***
11

12 The Department is unaware of what additional information the Union is
13 looking for as mentioned in the email. At this time it is the Department's
14 belief that all information requested has been provided. If the Union could
15 state what information has not been produced the Department will comply
16 to the best of its ability.
17

18 The Department has availability to meet with the Federation to continue
19 impact bargaining on the following dates: Nov. 22, 25, 26 or Dec. 3, 2013.
20 The union may offer additional dates that it is available prior to December
21 6, 2013. As a professional courtesy, the Department would again ask the
22 Union to please provide as much advance notice of what agenda items the
23 Federation wishes to raise. The request for an agenda is to help the
24 Department prepare a timely response and ensure a productive meeting. It
25 is a request, not a precondition. The Department presumes the union
26 shares a desire to come to a conclusion on this impact bargaining in a
27 timely, efficient, and professional manner.
28

29 The parties met on December 3, 2013. At this meeting, the BPSOF raised its
30 concerns that eligibility for the Mediation Program would be limited to officers who had
31 not engaged in mediation or received a complaint on a similar issue during the previous
32 year. It expressed that it wanted more cases to be eligible for mediation, and that it was
33 concerned about the potential for the City to play favorites in its selection of officers to

1 participate in the program.⁸ The parties did not reach agreement at this meeting, and the
2 City advised the BPSOF that it would look at the policy and make revisions.

3 The City did not follow up on the Mediation Program until July 16, 2014, at which
4 time it notified the Union of the following by letter, in relevant part:

5 The Department is seeking to implement the Mediation Program Policy that
6 was discussed previously.
7

8 We would like to meet to resolve your concerns. Please contact this office
9 prior to July 25, 2014 at 617-343-5029 if you would like to schedule a
10 meeting.
11

12 For your convenience, please see below for a timeline of previous
13 correspondence about the Mediation Program Policy.
14

15 **May 9, 2013** – Letter advising the Federation that the Department is
16 considering instituting the Mediation Program.

17 **October 10, 2013** – Letter to Patrick Bryant from Deputy Andres about
18 policies being bargained, including the mediation policy.

19 **October 24, 2013** – Letter to Patrick Bryant from Deputy Andres requesting
20 a written response of issues or concerns with the policies mentioned in the
21 October 10th letter.

22 **November 15, 2013** – Letter to Patrick Bryant from Deputy Andres
23 responding to October 30th email.

24 **December 3, 2013** – Meeting between Federation representatives and
25 BPD Office of Labor Relations concerning the Mediation Policy.
26

27 The next communication about the Mediation Program came from a City letter on
28 April 7, 2015, in which it notified the BPSOF of the following, in relevant part:⁹

⁸⁸ Borana Hajnaj (Hajnaj), an attorney in the City's Office of Labor Relations, could not recall whether the BPSOF raised this issue at this meeting or a later meeting. The specific meeting at which the issue was first raised is not critical as there is no dispute that it was an ongoing BPSOF concern.

⁹ The City also sent this letter to the BPPA.

1 The Department is seeking to implement the Mediation Program Policy
2 previously discussed. An updated DRAFT policy is attached to this
3 correspondence for your review.
4

5 The office is available to meet on the below dates and times to meet [sic]
6 and resolve any remaining issues or concerns:
7

- 8 • April 8th: 2pm – 3pm or 3pm – 4pm
- 9 • April 10th: Anytime between 10am – 1pm or 2pm – 4pm

10
11 Please contact this office at 617-343-5029 to confirm your availability and
12 participation.
13

14 The City and BPSOF met on April 24, 2015.¹⁰ The City advised the BPSOF that

15 Superintendent Mancini had drafted the revised Mediation Program. The parties
16 discussed the following:

¹⁰ Although the BPSOF describes this meeting as “purely informational” because it was the first time discussing the revisions to the Mediation Program, I consider this a bargaining meeting as the BPSOF made at least one proposal, i.e., that the City put the factors for recommending a case for mediation in writing, as referenced below.

- 1 • The BPSOF requested that the factors for recommending a case for mediation be
2 in writing so that it was transparent and fair, and open to all;¹¹
- 3
- 4 • BPSOF noted its concern that officers had no recourse if their case was not
5 selected for mediation, and the City suggested that the BPSOF put together a
6 proposal on that issue;¹²
- 7
- 8 • BPSOF explained that it had a “big problem” with the role the Chief of the Bureau
9 of Professional Standards would have in deciding which officers would be eligible
10 for the Mediation Program;
- 11
- 12 • BPSOF asked what would happen if confidentiality was violated, and the City
13 responded that it wanted to do research on this issue and get back to the BPSOF;
- 14
- 15 • The City stated that it would look into whether an IAD investigation was considered
16 an administrative proceeding at which statements made at mediation could not be
17 used; and
- 18

¹¹ Sergeant Mark Parolin (Sergeant Parolin) testified that Superintendent Mancini “seemed quite for it,” when asked that the factors by which an officer was chosen for mediation be in writing. Superintendent Mancini, on the other hand, testified that he did not recall agreeing to put the factors in writing. Hajnaj’s notes from the meeting that were entered as a joint exhibit state the following with respect to Superintendent Mancini’s response to this issue:

- Likelihood of mediation being successful
- There will be a record – if facts are identical
- We will provide a record of cases that went to mediation or not
- The recommendation will include all these factors

Based on the testimony, notes from the meeting, the fact that Superintendent Mancini discussed this issue with the Police Commissioner prior to the next meeting, and the response of Patrick Bryant (Bryant), attorney for the BPSOF, at the next meeting when learning that the City would not put the factors in writing, as described below, I conclude that Superintendent Mancini indicated his approval of the proposal at this meeting.

¹² Although Hajnaj testified that it was possible that Superintendent Mancini requested that the Federation make such a proposal, she did not know. However, her notes indicate that he said “you might want to have a proposal” in response to Sergeant Parolin’s question, “what recourse if someone denied mediation; I have a union member saying I’m the victim.”

- The BPSOF asked whether things that were said during mediation could lead to discipline. The City's response was that only things discussed at mediation that were related to the topic at hand were confidential.

The parties did not reach an agreement at the end of this meeting.

The next meeting was held on June 25, 2015. At the outset of the meeting, Stephen Sutliff (Sutliff), Deputy Director of the Office of Labor Relations, stated that the City had made a lot of changes in response to the Federation's questions. The following issues were discussed:

- In response to the Federation's concern that the factors for selecting an officer for mediation be in writing, Superintendent Mancini stated that he discussed the issue with the Police Commissioner who said he will not produce a written rationale. Bryant responded that the City had "volunteered last time" and Sutliff said that they did not believe they agreed, and that the team made the request to the Police Commissioner, who said no.¹³ The City did not explain why the Commissioner refused to provide a written rationale;
- The BPSOF requested that the City provide it with notice that an officer would be going to mediation, and the City agreed;¹⁴
- The BPSOF advised the City that the BPSOF wanted to be able to give 30 days' notice to withdraw from the policy if it was not going well;
- Regarding confidentiality, the City stated that confidentiality would be governed by the laws, and that it would not be 100% protected because it would be subject to criminal procedure. The BPSOF asked what would happen if an officer

¹³ Although her notes do not reflect that this was discussed at the meeting, Hajnaj testified that the decision to not provide a written rationale as to why an officer was recommended for mediation was considered by the Department Rules Committee, a legal advisor, and Labor Relations, in addition to the Police Commissioner. There is no evidence that this information was provided to the BPSOF.

¹⁴ There is a dispute between the parties as to whether the BPSOF requested that the City provide it with notice of mediation *instead* of the officer, or *in addition to* the officer. This point is not relevant to my analysis.

1 admitted "that he did it" during the mediation. The City explained that it could not
2 find any case law to determine whether an IAD investigation would be considered
3 an administrative proceeding where statements made at mediation would be
4 legally inadmissible, but that it was taking the position that an IAD investigation
5 would be considered an administrative proceeding, although a court could make
6 a different determination; and
7

- 8 • The Federation raised concerns about the City's selection of Harvard Law
9 School's mediation program (Harvard Program) as the mediators because it
10 believed that Harvard faculty and students were critical of the police.¹⁵
11

12 At the end of the meeting, the parties had not reached an agreement, and the City did not
13 declare impasse. The City requested that the Federation put its concerns in writing.

14 By letter dated August 28, 2015, the City notified the BPSOF that the
15 representatives of the Harvard Program would have an informational meeting on
16 September 4, 2015 from 2:00 PM to 4:00 PM.¹⁶ Sergeant Parolin attended this meeting
17 and discussed his concerns. Following this meeting, he believed that the City would
18 follow up with the Federation or schedule another meeting.

19 By letter dated September 10, 2015, the City advised the Unions of the following,
20 in relevant part:

21 As you are aware, the Department intends to offer any sworn officer
22 selected an opportunity to mediate low level Internal Affairs complaints
23 beginning in September of 2015. The Department notified all sworn unions
24 on May 9, 2013 of its intent to use mediation as an alternative to internal
25 affairs investigation for selected complaints. The Department started

¹⁵ Superintendent 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.

¹⁶ Representatives from other unions also attended the meeting. Superintendent Mancini credibly testified that the representatives from the Harvard Program answered questions from union representatives.

1 meeting with the sworn unions in summer of 2013. The Department listened
2 to the unions' suggestions and made numerous changes to its initial draft
3 mediation policy. The Department also answered numerous questions that
4 the various unions raised during this time period.
5

6 Most recently, an informational meeting was held at BPD headquarters for
7 the unions to hear directly from the people who run the Harvard Mediation
8 Program and all of the questions that were raised during the meeting were
9 answered.
10

11 Participation in the program will always be at the officer's discretion,
12 therefore, there is no reason to delay implementation of the policy. Cases
13 will start to be considered for mediation this month. Since this is a new
14 program, the Department will notify the union if a member is selected for
15 mediation.
16

17 Following this letter, the Federation filed the instant prohibited practice charge.

18 The City did not contact the Federation about the Mediation Program after the Federation
19 filed the charge.

20 On January 6, 2016, the City issued the following finalized version of the Mediation
21 Program,¹⁷ effective immediately:

22
23 **Sec. 1. MEDIATION PROGRAM OVERVIEW**
24

25 Mediation is a voluntary and confidential process guided by a trained,
26 qualified, and independent Mediator. Mediation is an alternative to the
27 standard complaint intake and internal investigation process which may
28 lead to discipline. Mediation provides an opportunity for police officers and
29 community members to meet and give their perspectives on the
30 circumstances that led to the complaint, in a respectful and fair manner.
31 Additionally, it allows the parties to improve communication and
32 understanding between the parties while crafting mutual agreements and
33 resolving conflict. Mediation reinforces the Community Policing philosophy

¹⁷ The finalized version of the policy included Sec. 3.2, Time to Request Mediation and Sec. 3.4, Parties Present for Mediation, which were not part of the April 2015 draft.

1 of the Boston Police Department by encouraging communication and
2 understanding between police and the public.

3
4 **Sec. 2. CASES SELECTED FOR MEDIATION**

5
6 **Sec. 2.1. Mediation Recommendation.** Recommendations for possible
7 Mediation will be on a case by case basis, following a review of a complaint
8 by the Internal Affairs Unit and a recommendation for Mediation by the
9 Chief, Bureau of Professional Standards, to the Police Commissioner, or
10 his designee, based on the totality of the circumstances.

11
12 **Sec. 2.2. Mediation Recommendation Factors.** Factors considered in
13 determining the suitability of a case for Mediation include, but are not limited
14 to, nature of the complaint, voluntary agreement by both parties, likelihood
15 of a successful Mediation, whether a Mediation in a particular case is likely
16 to improve police-community relations, the possibility, or existence, of
17 criminal charges, whether the allegation against the officer is related to
18 corruption or criminal activity, whether there is a civil lawsuit related to the
19 incident, if an arrest was made, if use of force tactics was used, if injuries
20 were sustained by any party, existence of property damage, the complaint
21 and disciplinary history of the involved officer, whether the complainant
22 alleged racial, ethnic, or gender discrimination or slurs, and any history of
23 prior Mediations by the officer or complainant.

24
25 **Sec. 3. MEDIATION PROTOCOLS**

26
27 **Sec. 3.1. Mediators.** Cases approved for Mediation will be referred to a
28 qualified Mediation program by the Chief, Bureau of Professional
29 Standards. Selected Mediators will be independent of the Department, and
30 will not be employees of the Department or the City of Boston. Mediation
31 sessions will not be conducted in a Department office or facility, unless all
32 parties agree. Voluntary participants in a Mediation session will be required
33 to sign an agreement to voluntarily consent to mediate, a confidentiality
34 agreement, and any documents related to Mediation that are considered
35 standard or accepted practice in Mediation.

36
37 **Sec. 3.2. Time to Request Mediation:** The involved Department employee
38 will be notified by their commanding officer, and by Department email, that
39 they have fourteen (14) calendar days to notify the Mediator of their decision
40 to mediate. All necessary contact information for the Mediator will be
41 included in the Department email. The complainant will be notified by the

1 Bureau of Professional Standards that they have fourteen (14) calendar
2 days to notify the Mediator of their decision to mediate, and will be provided
3 with the necessary Mediator contact information. Should the Department
4 employee and/or the complainant choose not to opt for Mediation, a
5 standard Internal Affairs investigation will be conducted in the usual
6 manner.
7

8 Sec. 3.3. Mediator Responsibilities: Once the parties have opted for
9 Mediation, cases will proceed under the direction of the Mediator, and the
10 Mediator will be responsible for contacting the participants, scheduling the
11 Mediation session, determining a location for the Mediation session, and
12 conducting the Mediation session, without participation from the Bureau of
13 Professional Standards, or the Department. Mediation sessions will not be
14 conducted on an overtime pay basis by Department employees.
15

16 Sec. 3.4. Parties Present for Mediation: Only the complainant, the involved
17 officer, and the Mediator(s) shall participate in the Mediation.
18

19 Sec. 3.5. Report of Mediation Results: At the conclusion of a Mediation
20 session, the Mediator will report in writing to the Chief, Bureau of
21 Professional Standards, the date of the Mediation session, and whether the
22 Mediation session was successfully completed or whether the Mediator
23 determined that the Mediation session was unsuccessful.
24

25 Sec. 3.5.1. Successful Mediation: A successful Mediation will result in an
26 entry into the Internal Affairs record that the case was successfully
27 mediated, the investigation will be deemed closed, and no Internal Affairs
28 investigation will be conducted, nor will discipline result in the case. No
29 information or documentation regarding discussions held during the
30 Mediation session by the participants will be entered in the Internal Affairs
31 record of the Department employee if the Mediation is reported successful
32 by the Mediator to the Chief, Bureau of Professional Standards.
33

1 Sec. 3.5.2. Unsuccessful Mediation: An unsuccessful Mediation reported
2 by the Mediator to the Chief, Bureau of Professional Standards, will result
3 in an Internal Affairs investigation being conducted in the usual manner.¹⁸
4

5 Sec. 4. CONFLICTS OF INTEREST: Mediators will not conduct a
6 Mediation session if there is a possibility of a conflict of interest between the
7 Mediator and any of the involved participants.
8

9 Sec. 5. MEDIATOR TRAINING: Mediators will have the required training
10 as outlined in Massachusetts General Laws c. 233 §23C, or as required by
11 the Judiciary.
12

13 Sec. 6. EMPLOYEE ATTIRE DURING MEDIATION: Employees will be
14 required to participate in Mediation sessions in business or business casual
15 attire, and will not attend a Mediation session wearing a uniform, or any part
16 of a uniform. Officers will not attend a Mediation session while wearing any
17 equipment issued by the Department that is visible. Officers will not attend
18 a Mediation session while wearing any insignia, badge, patch, or pin that is
19 visible and that is indicative of policing or the Department.
20

21 Sec. 7. WITHDRAWAL FROM MEDIATION PROCESS: The Mediation
22 process is voluntary for both parties. Participants can withdraw from the
23 process at any point. If any participant withdraws from the process prior to
24 a successfully completed Mediation session as determined by the Mediator,
25 the Mediator will notify the Chief, Bureau of Professional Standards in
26 writing that the Mediation session was not successfully completed due to a
27 withdrawal from the process by one or more of the participants. A standard
28 Internal Affairs investigation will then proceed upon notification of an
29 unsuccessful Mediation by the Mediator.
30

¹⁸ 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."

1 Sec. 8. MEDIATION RECORDS: No notes, or other documentation
2 reflecting the issues discussed during the Mediation session by the
3 participants will be maintained by the Department, unless required by
4 Federal or Massachusetts law, as part of a criminal investigation, or
5 pursuant to mandatory reporting under Federal or Massachusetts law.
6

7 Sec. 9. CONFIDENTIALITY: Pursuant to Massachusetts General Laws c.
8 233, § 23C, all memoranda, and other work product prepared by a Mediator
9 and the Mediator's case files shall be confidential and not subject to
10 disclosure in any judicial or administrative proceeding involving any of the
11 parties to any Mediation to which such materials apply. Any communication
12 made in the course of and relating to the subject matter of any Mediation
13 and which is made in the presence of such Mediator by any participant,
14 Mediator or other person shall be a confidential communication and not
15 subject to disclosure in any judicial or administrative proceeding.
16 Communication and discussion related to the subject matter during
17 Mediation will not be shared or made available to the Department by the
18 Mediator, unless required by Federal or Massachusetts law, as part of a
19 criminal investigation, or by mandatory reporting under Federal or
20 Massachusetts law.
21

22 In a pamphlet entitled "A Message from Police Commissioner William B. Evans" to

23 the citizens of Boston, the City explains its reasons for implementing the Mediation

24 Program:

25 Mediation is an alternative to the traditional internal affairs process that will
26 lead to timely and satisfactory resolutions of citizens' complaints. A
27 successful mediation program can result in increased trust from the
28 community, and a strengthening of police and community relations. This
29 trust is built by inviting the citizen complainant and the police officer to
30 discuss the issues that led to the complaint in a mutually respectful manner
31 outside the Department, instead of moving forward with a formal
32 investigation.

1 Facts Specific to BPPA

2 After the City notified the BPPA of its intention to implement a Mediation Program
3 and provided a draft policy on May 9, 2013, the parties met for a bargaining session on
4 July 11, 2013. At this meeting, the parties discussed the following topics:

- 5 • Mediation was voluntary for both individuals;
- 6
- 7 • The participants would sign a confidentiality agreement;
- 8
- 9 • Where the signed mediation agreement would be kept and whether it would be
- 10 tracked by IAD;
- 11
- 12 • Eligibility for mediation;
- 13
- 14 • The fact that mediation was not connected to the Early Intervention System (early
- 15 intervention or EIS);¹⁹ and
- 16
- 17 • How a mediator would be selected.
- 18

19 By letter dated August 7, 2013, the BPPA advised the City of the following, in
20 relevant part:

21 I am writing to confirm what was discussed on July 11, 2013, and to continue
22 the parties' bargaining obligations.

23
24 In relation to Section 2 (Confidentiality), the BPPA asks that the following
25 be added: "For example, any and all communications and information
26 exchanged during mediation cannot be used as a basis for discipline or IA
27 investigation or for any other matter. Confidentiality shall also be adhered
28 pursuant to M.G.L. Chapter 23 [sic] section 23C."
29

¹⁹ The EIS is a system whereby the City will look more closely when an officer receives two or more citizen complaints within a year to determine if further action is needed, such as counseling or a monitoring plan. Citizen complaints that are found not sustained after an IAD investigation can still be counted toward EIS.

1 In relation to Section 3.4, we discussed a clarification regarding when an
2 employee is eligible for mediation. The current language states that an
3 employee may only be considered for mediation where he/she "has not
4 engaged in the mediation process within the past year." However, neither
5 party could figure out the rationale for this exclusion. The parties discussed
6 certain areas where employees may be subject to more complaints by virtue
7 of the area (e.g., high ticket areas), the fact that the complainant may have
8 ulterior or false intentions for agreeing to participate in mediation that are
9 not revealed until the mediation process is under way, and the principle that
10 employees should not be penalized for participating in successful
11 mediations. As the ultimate discretion of whether a complaint is eligible for
12 mediation is with the Chief of the Bureau of Professional Standards, the
13 BPPA asks that no limits be put on employee eligibility. This can be
14 achieved by removing the bulleted points in Section 3.4.

15
16 In relation to the selection of the mediator (Sec. 4.4), Superintendent
17 Mancini confirmed that this process has not been established yet. Although
18 this section specifies some criteria for the volunteer mediator, the BPPA
19 asks that an organization such as the Labor Relations Connection (LRC) or
20 the Federal Mediation and Conciliation Service (FMCS) be considered for
21 utilization so that the parties can have some assurance regarding the quality
22 of mediators used for this Program and that the City be responsible for any
23 corresponding fees.

24
25 Superintendent Mancini clarified that mediation would circumvent Early
26 Intervention. The BPPA asks that a sentence be added to the policy so that
27 is evident from the language.

28
29 We also discussed the issue of where the mediation documents would be
30 kept. If the mediation is successful and the complaint is resolved, the BPPA
31 wants to make sure that the complaint is not used against the officer in any
32 way. Accordingly, the BPPA asks that these mediation documents not be
33 housed in the officer's personnel file or at IA. The BPPA also asks that the
34 following sentence be added to Section 4.5.6: "A complaint that has been
35 resolved through mediation cannot be used or cited by the Department as
36 a basis for progressive discipline or in any way in a future discipline or IA
37 investigation."

38
39 The BPPA also asks that a section or sentence be added regarding how
40 and what the mediator reports back from the mediation. The parties had
41 discussed the need for the mediator to be able to communicate to

1 Superintendent Mancini – e.g., a complainant trying to blackmail an officer,
2 swear, commits/reveals a crime, or any other unusual activity/conduct – so
3 that the employee/officer is not penalized in any way for a mediation not
4 being successful.

5
6 In response, by letter dated December 20, 2013, the City advised the BPPA of the
7 following, in relevant part:

8 This letter responds to your August 7, 2013 correspondence regarding the
9 Mediation Policy.

10
11 First, to address your Section 2, “Confidentiality” concerns, the Department
12 notes that the section explicitly states: “No information gained during the
13 Mediation can be used for or against either party outside of the mediation
14 except as required by law.” This provision addresses the Union’s concerns
15 in relation to this section because it provides confidentially [sic] can be
16 breached only when required by law. The Department was unable to
17 reference the statute you cite in your letter, M.G.L. c. 23 Sec. 23C.

18
19 Second, the Department disagrees with the assertion in the letter that
20 “neither party could figure out the rationale for the exclusion” referring to
21 Section 3.4 bullet point restrictions on eligibility for mediation. Mediation is
22 designed to benefit officers when a complaint against them is a rare
23 occurrence. The Department has also reviewed mediation policies from
24 other police departments and believes that the restrictions in its policy are
25 reasonable and are in place in other major police departments.

26
27 With regard to the selection of the mediators covered in Section 4.4 the
28 Department has not yet decided the organization it will use to obtain
29 mediators, but when it makes that decision it will take into consideration the
30 Labor Relations Connection (LRC) and the Federal Mediation and
31 Conciliation Service (FMCS) that the BPPA suggested. The Department
32 would pay the fees associated with the mediation process.

33
34 The Department declines to add a sentence to the policy regarding
35 mediation circumventing Early Intervention because that is a completely
36 separate process from mediation which relates to complaints made to IAD.

37
38 The Department understands that the BPPA believes the mediation
39 documents should not be housed in the officer’s personnel file or at [the]

1 Internal Affairs Division. Superintendent Mancini is in agreement that
2 mediation files should be located in an off-site location. However, the
3 Department notes that the mediation process and the mediation coordinator
4 will be managed by the Chief of the Bureau of Professional Standards who
5 oversees IAD. The Department must be notified about whether the
6 mediation was successful or not.

7
8 In relation to the BPPA's suggestion for adding to Section 4.5.6 a section
9 preventing complaints used in mediation from being used in progressive
10 discipline or in future IA investigations, the Department states that the
11 confidentiality agreement provides the protections necessary for officers
12 involved in the process and therefore declines to add section 4.5.6.

13
14 The Department will consider the BPPA's recommendation about the
15 information the mediator will be able to report back to the Chief of the
16 Bureau of Professional Standards in addition to what is allowed under
17 Section 4.5.6.

18
19 With this correspondence the Department believes it has answered all the
20 Union's questions and no further bargaining is necessary on the policy. If
21 the Union desires another meeting please contact this office to schedule a
22 meeting prior to January 17, 2014.

23
24 By letter dated July 16, 2014, the City advised the BPPA of the following, in
25 relevant part:

26 The Department is seeking to implement the Mediation Program that was
27 discussed previously.

28
29 Please find attached our last correspondence regarding the Mediation
30 Program and the most recently revised policy.

31
32 In response to an August 7, 2013 letter (Letter from Jennifer Rubin to
33 Deputy Andres, Superintendent Mancini and Attorney Sutliff regarding
34 BPPA recommendations to policy changes) (See Attached), the
35 Department clarified its position and invited the Union to meet again through
36 a **December 20, 2013** letter (letter to Jennifer Rubin from Deputy Andres
37 responding to BPPA recommendations) (See Attached). (Emphasis in
38 Original)
39

1 Please contact this office....prior to July 25, 2014 if you would like to meet.

2
3 The parties next met on July 30, 2014. At this meeting, the parties discussed the
4 following:

- 5 • The BPPA asked whether a mediation would be considered a tour of duty if it
6 occurred at a time other than the officer's regular shift. The City agreed that the
7 mediation would be considered a tour of duty for the attending officer;
8
- 9 • The BPPA stated its concern that the Civilian Board would review a complaint
10 post-mediation. The City responded that it would not if the mediation was
11 successful, and that the Civilian Board would not have a right to review whether a
12 complaint should go to mediation;
13
- 14 • The BPPA asked whether the Mediation Program would affect EIS, and whether
15 EIS would be triggered by sustained complaints. The City responded that it is the
16 total number of complaints that triggers EIS;
17
- 18 • In response to the BPPA's question about what would happen if the mediation
19 was not successful because the citizen was not responding, the City stated it
20 would need to put more thought into it;
21
- 22 • The City stated that an officer's record and type of complaint would determine
23 whether an officer could mediate, and that certain types of complaints, such as
24 those involving race, gender, and excessive use of force would not be eligible for
25 mediation; and
26
- 27 • The BPPA objected to permitting an officer to use the Mediation Program only
28 once in a 12 month period because officers who work in high crime areas could
29 get frivolous complaints. The City responded that it was "not married" to one year.
30

31 By letter dated April 7, 2015, the City advised the BPPA that it intended to
32 implement a revised Mediation Program policy, which it attached, and suggested times it
33 was available to meet. The next bargaining session between the parties was held on
34 April 24, 2015. The following topics were discussed:

- 35 • The City agreed to provide a record of all cases that were approved for mediation;

- The BPPA asked that the selection or denial for mediation be subject to the grievance process;
- The BPPA suggested a pilot program, and Superintendent Mancini responded that he had no objection to that;
- The issue of whether IAD is considered an administrative proceeding for the purpose of confidentiality;
- The City stated that mediation would be with the Harvard Program, but that it might change and the BPPA might want to weigh in;
- The BPPA noted that officers might not be comfortable with a student calling them, and Superintendent Mancini responded that the officer could call the mediator;
- The BPPA noted that there was no language about early intervention in the revised policy, and Superintendent Mancini responded that he would consult with the Police Commissioner about whether they would count complaints going to mediation toward early intervention; and
- The BPPA requested copies of other mediation programs throughout the country that the City looked at in drafting the Mediation Program.²⁰

The parties met again on July 24, 2015. The topics of discussion included the following:

- The BPPA expressed concerns regarding the City's plan to use mediators from the Harvard Program, such as who the mediators were and how they were trained, and questioned whether they knew Departmental policies. It again suggested using the Labor Relations Connection for mediation. There was also discussion about potential anti-police bias, and the BPPA provided the City with an article written by a Harvard Law School student that the BPPA felt was biased against police. The City agreed that police bias was a legitimate concern and advised that it would hold a meeting between the Harvard Program and the BPPA;
- The BPPA requested that the City change the confidentiality language to what had been used in the 2013 draft;

²⁰ The City provided the BPPA with these policies on July 13, 2015.

- 1 • The parties continued to discuss what the criteria would be to determine who was
2 eligible for the Mediation Program, and what categories of complaints would be
3 qualify for mediation. The City responded that it eliminated the requirement that
4 an officer could not have had a mediation or similar complaint for 12 months,²¹ and
5 that the categories of eligible complaints included respectful treatment, but not
6 racial, sexual assault, or excessive force complaints. He also stated that mediation
7 eligibility would be decided on a case by case basis, and that the Police
8 Commissioner would have the final say;
9
- 10 • The City advised the BPPA that a mediation session would be considered the
11 officer's tour of duty. BPPA requested that this be included in the policy, and the
12 City agreed; and
13
- 14 • The BPPA requested that the meeting with the Harvard Program be arranged, and
15 noted that it would not be available to meet until after August 10.
16

17 By email dated July 27, 2015, the City advised the Unions that it had set up a
18 meeting for them with the Harvard Program. On July 31, 2015, the BPPA requested
19 different dates for a meeting because it did not want to coalition bargain.²² By letter dated
20 August 28, 2015, the City notified the Unions that the meeting with the Harvard Program
21 would be held on September 4, 2015. When the BPPA President and Vice-President
22 arrived for the meeting on September 4, they learned that there had been a scheduling
23 miscommunication and the meeting did not occur. The City informed them that the
24 meeting would be rescheduled, but they did not receive any further notice of a new date

²¹ Michael Leary (Leary), Vice President of the BPPA, testified that although the BPPA was happy that the City expanded eligibility beyond the one mediation per 12 month limit, it would like to see eligibility expanded further.

²² There is nothing in the record about whether the City responded to the BPPA's statement that it did not want to meet with the Harvard Program with other unions because it did not want to coalition bargain.

1 prior to the letter notifying the Unions that the Mediation Program would be
2 implemented.²³ The parties did not have any further meetings, discussions, or
3 correspondence about the Mediation Program before it was implemented on January 6,
4 2016,²⁴ and the City did not reschedule the meeting with the BPPA and Harvard Program.

5 Opinion

6 Legal Standards

7 **Unilateral Change**

8 A public employer violates Sections 10(a)(5) and (1) of the Law when it unilaterally
9 changes wages, hours, or other terms and conditions of employment without first
10 bargaining to resolution or impasse with the employees' exclusive bargaining
11 representative. School Committee of Newton v. Labor Relations Commission, 388 Mass.
12 557 (1983); Town of Arlington, 21 MLC 1125, MUP-8966 (August 1, 1994). To establish
13 a unilateral change violation, a charging party must show that: 1) the respondent has
14 changed an existing practice or instituted a new one; 2) the change affected employee
15 wages, hours, or working conditions and thus implicated a mandatory subject of
16 bargaining; and 3) the change was implemented without prior notice or an opportunity to
17 bargain. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass.

²³ The text of this letter begins on page 22 of this decision.

²⁴ The final Mediation Program begins on page 23 of this decision.

1 124, 127 (1989); School Committee of Newton at 572; City of Boston, 20 MLC 1603,
2 1607, MUP-7976 (May 20, 1994).

3 *New Practice*

4 The City does not dispute that the Mediation Program is a new policy and that it
5 did not offer mediation for citizen complaints against officers prior to 2016.

6 *Mandatory Subject*

7 The obligation to refrain from unilateral action applies only to mandatory subjects
8 of bargaining. Town of Danvers, 3 MLC 1559, MUP-2292 (April 6, 1977). In determining
9 whether a subject is a mandatory subject of bargaining, a balance must be struck between
10 the interest of the public employer in maintaining its managerial prerogatives to manage
11 the enterprise and the interest of employees in bargaining over terms and conditions of
12 employment. Id.

13 The Complaints allege that the City violated the Law by failing to bargain to
14 resolution or impasse over the decision to implement the new Mediation Program, and
15 the impacts of the decision. I find that the decision to establish the Mediation Program is
16 a managerial right, and, therefore, not a mandatory subject of bargaining. In balancing
17 the interests of the City with those of the Unions, I find that the City's interests in providing
18 a forum for citizens and officers to settle their issues with a mutually-agreeable solution
19 outweighs the interest of the Unions to bargain about the decision to create the program.

20 As articulated by the Court in Local 346, International Brotherhood of Police
21 Officers v. Labor Relations Commission, few institutions depend as heavily on integrity

1 and credibility for the effective performance of their duties as do police departments. 321
2 Mass. 429 (1984). Although that case involved the City's requirement that officers
3 suspected of criminal conduct be subjected to lie detector tests, the rationale that such a
4 requirement furthers law enforcement objectives that override the employees' interest in
5 negotiations applies here as well. Indeed, the Mediation Program policy describes the
6 program as reinforcing "the Community Policing philosophy of the [Department] by
7 encouraging communication and understanding between the police and the public."
8 Further, the City's message to the community about the Mediation Program describes it
9 as "an alternative to the traditional Internal Affairs process that will lead to timely and
10 satisfactory resolutions of citizens' complaints. A successful mediation program can
11 result in increased trust from the community, and a strengthening of police and community
12 relations." See also, City of Boston and Boston Police Superior Officers Federation, 21
13 MLC 1725, MUP-9234 (April 11, 1995), aff'd. 24 MLC 89 (April 1, 1998) (hearing officer
14 finds that the creation of a Community Appeals Board, which reviews IAD investigations
15 after completion and acts in an advisory role to the Police Commissioner, is not a
16 mandatory subject of bargaining, which the BPSOF concedes in its appeal to the hearing
17 officer's impact bargaining obligation decision).

18 *Impact Bargaining Obligation*

19 Even when an employer is not obligated to bargain over a decision, it may still be
20 required to bargain over the impacts of the decision on mandatory subjects of bargaining.
21 City of Worcester v. Labor Relations Commission, 434 Mass. 177 (2002); Newton School

1 Committee, 5 MLC 1016, MUP-2501 (June 2, 1978), aff'd sub nom. School Committee of
2 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The Mediation Program
3 impacts employee discipline because citizen complaints that are successfully resolved
4 through mediation do not progress to an IAD investigation and potential discipline.
5 Typically, disciplinary procedures are a mandatory subject of bargaining, and the
6 Mediation Program offers a procedure whereby an officer could avoid potential discipline
7 after receiving a citizen complaint. Boston Police Superior Officers Federation, 24 MLC
8 89, MUP-9234 (April 1, 1998).

9 Here, the City argues first that the Department's disciplinary procedures are not a
10 mandatory subject of bargaining because M.G.L. c. 31, Sections 41 – 45 (civil service
11 law) and St. 1962, c. 322 (Police Commissioner's statute)²⁵ control and exclude
12 disciplinary procedures from the scope of bargaining. With regard to civil service law, as
13 an analogy, the City cites City of Leominster, 3 MLC 1579, 1581, MUP-2562 (April 11,
14 1977), explaining that "...in the absence of civil service law, the length of an employee's

²⁵ The City cites the following language from the Police Commissioner's Statute in support of its position: The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police; provided, however, that no such rule or regulation shall forbid any officer or member of said police from organi[z]ing or belonging to any organization composed solely of officers or members, or both, of said police and not affiliated with any outside organization other than the Massachusetts Police Association, and having among its objects the improvement of their conditions of employment, including leaves of absence, hours of labor and compensation. (Emphasis by City)

1 probationary period might be subject to collective bargaining, but given that M.G.L. c. 31,
2 Section 61 requires police officers to serve a twelve month probationary period, a
3 collective bargaining agreement or a labor arbitration award that purports to shorten the
4 probationary period of a police officer is illegal and unenforceable.” The difference here
5 is that there is nothing in civil service law that sets forth the requirements of a Mediation
6 Program, or even addresses a Mediation Program at all.

7 With respect to the City’s argument about the Police Commissioner’s statue, it
8 relies on City of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210
9 (2013), where the Court held that a contractual prohibition on the involuntary transfer of
10 police union representatives was a nullity because the prohibition conflicted with the
11 Police Commissioner’s nondelegable right of assignment. However, bargaining over the
12 Mediation Program would not change the Commissioner’s right to make disciplinary
13 decisions and to determine the appropriate discipline for certain offenses.²⁶ Rather,
14 bargaining would determine the procedures for allowing officers to participate in, and for
15 administering, the Mediation Program. If mediation is unsuccessful, the complaint would
16 proceed through an IAD investigation, and the officer would be subject to potential
17 discipline as with any other citizen complaint.

²⁶ I also note that the Supreme Judicial Court recently rejected the City’s contention that the Police Commissioner’s Statute grants the Commissioner sole authority over discipline as explained further below.

1 I must also reject the City's argument that because civil service law and the Police
2 Commissioner's Statute are not enumerated in Section 7(d) of the Law, it was not
3 obligated to bargain over the impacts of the Mediation Program. First, the Court recently
4 determined that the Police Commissioner's statute *is* superseded by collective
5 bargaining. See City of Boston v. Boston Police Patrolmen's Association, 477 Mass. 434
6 (July 12, 2017).²⁷

7 Moreover, as explained above, there is no conflict between the City's bargaining
8 obligations and either statute, and the cited statutes and Chapter 150E can be read "so
9 as to constitute a harmonious whole," as the Court did when it interpreted Chapter 31 and
10 Chapter 150E in Town of Dedham v. Labor Relations Commission, 365 Mass. 392 (1974)
11 (where a municipal civil service firefighter suspended for insubordination sought relief
12 both under civil service law and by a complaint of prohibited practice against the
13 municipality and its fire chief, the Court held it was error for the Superior Court to
14 determine that the matter was exclusively within the jurisdiction of the Civil Service
15 Commission). More recently, in a case where the City argued that it had conflicting legal
16 obligations, the Court recognized the City's duty to bargain over its decision to adopt the

²⁷ In this case, the Court highlights courts' reluctance to allow broad discretionary powers to subsume bargained-for provisions, citing School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 546 – 566 (1983) for the proposition that "to recognize [a] statutory authority as exclusive would substantially undermine the purpose of G.L. c. 150E, Section 6, to provide for meaningful collective bargaining." To hold that the City is not obligated to bargain over the impacts of a Mediation Program on disciplinary procedures would do just that.

1 partial public safety exemption for overtime compensation under the Fair Labor Standards
2 Act (Act) where the Act provides the employer with the option of using the exemption,
3 and, if it chooses to use it, a wide range of choices regarding the length of the work period
4 it may use for overtime calculations. City of Boston v. Commonwealth Employment
5 Relations Board, 453 Mass. 389 (2009). Likewise here, where there is no statutory
6 authority mandating the details of the Mediation Program, the City must bargain over the
7 impacts of the program on employees' terms and conditions of employment.

8 The City also argues that the Mediation Program does not impact employees'
9 terms and conditions of employment because mediation is voluntary, the officer can
10 withdraw from mediation at any time, and if mediation is unsuccessful, the complaint
11 proceeds to an IAD investigation as it would have without mediation. In support of its
12 argument, the City relies on Boston Police Superior Officers Federation v. City of Boston,
13 21 MLC 1725, in which the Commonwealth Employment Relations Board (Board) held
14 that the City did not violate the Law by failing to impact bargain over the creation and
15 implementation of a Community Appeals Board (CAB) to review IAD investigations and
16 disciplinary hearings involving unit members.

17 As I ruled in response to the City's Motions to Dismiss, a critical distinction between
18 the CAB and the Mediation Program is that while the Board found that the CAB did not
19 have an effect on disciplinary procedures because the Police Commissioner continued to
20 be the person to evaluate the underlying conduct of any superior officer and decide
21 whether disciplinary action was warranted, the Mediation Program very well could have

1 an effect on disciplinary procedures because a successful mediation would result in the
2 officer not being subject to an IAD investigation and potential resultant discipline.
3 Moreover, although the City characterizes the Mediation Program as voluntary because
4 an officer does not have to participate and can withdraw from participating, not every
5 officer has the opportunity to participate. Rather, the Chief of the Bureau of Professional
6 Standards or his/her designee has to recommend the case for the Mediation Program,
7 and the Police Commissioner or designee makes the final decision. Thus, the Mediation
8 Program is not completely voluntary as an officer first has to be selected by the City to
9 participate.²⁸

10 In response, the City argues that “to the extent that voluntary mediation is not
11 available for certain types of complaints, there is no change. In the absence of Rule
12 109A, mediation is unavailable to all officers.” This circular reasoning overlooks the
13 significant fact that while the Mediation Program has never been available for certain
14 types of complaints and still is not, it is a new opportunity for certain officers, whom the
15 City alone selects, to potentially avoid discipline as described above. Further, the City’s
16 argument presupposes that a change must impact all employees uniformly to be an actual

²⁸ Moreover, as raised by the Unions, a policy that impacts employees’ terms and conditions of employment, even if voluntary, is a mandatory subject of bargaining. See, e.g., Commonwealth of Massachusetts, 22 MLC 1459, SUP-3922, SUP-3944 (February 2, 1996) (Board found that employer violated the Law by implementing voluntary catastrophic illness leave bank without first providing the unions with notice and an opportunity to bargain, specifically rejecting the employer’s argument that implementing a voluntary program does not change employees’ conditions of employment).

1 change, and this contention is logically and legally incorrect. The Mediation Program did
2 not need to affect every officer to be a change; it is enough that the program changed the
3 available disciplinary procedures for a select few. See, e.g., City of Boston, 35 MLC 289,
4 MUP-04-4077 (May 20, 2009) (City violated the Law by unilaterally changing one unit
5 member's job duties).

6 *Failure to Bargain to Resolution or Impasse*

7 The City argues that to the extent that it had a bargaining obligation, it bargained
8 to impasse or resolution on every issue that the Unions raised at bargaining. After good
9 faith negotiations have exhausted the prospects of concluding an agreement, an
10 employer may implement changes in terms and conditions of employment that are
11 reasonably comprehended within its pre-impasse proposals. City of Leominster, 23 MLC
12 62, 66, MUP-8528 (August 7, 1996) (citing Hanson School Committee, 5 MLC 1671,
13 MUP-2196 (February 27, 1979)). Factors considered in determining whether impasse has
14 been reached include: bargaining history; the good faith of the parties; the length of
15 negotiations; the importance of the issues to which there is disagreement; and the
16 contemporaneous understanding of the parties concerning the state of negotiations.
17 Ashburnham-Westminster Regional School District, 29 MLC 191, 195, MUP-01-3144
18 (April 9, 2003). Impasse exists only where both parties have bargained in good faith on
19 negotiable issues to the point where it is clear that further negotiations would be fruitless
20 because the parties are deadlocked. Id. An analysis of whether the parties are at

1 impasse requires an assessment of the likelihood of further movement by either side and
2 whether they have exhausted all possibility of compromise. Id.

3 **BPSOF**

4 The City and BPSOF met for bargaining on May 28, 2013, August 7, 2013,
5 December 3, 2013, April 24, 2015, and June 25, 2015. While the parties reached
6 resolution on certain issues over the course of the negotiations,²⁹ there were issues that
7 were still unresolved. At the final bargaining session between the parties on June 25,
8 2015, in response to the BPSOF's request that the specific factors used in selecting an
9 officer for mediation be in writing, to ensure that the process would be fair and open to all
10 and that the City could not play favorites, Superintendent Mancini stated that he
11 discussed it with the Police Commissioner who refused to provide a written rationale.
12 Further, in response to the BPSOF's inquiry, the City would not explain why it changed
13 its position on providing a written rationale from its position at the April 2015 meeting.
14 Such an explanation of the City's reasoning could have helped the parties to reach, or at
15 least consider, a compromise.

16 Another issue that the BPSOF raised at the June 2015 session was its concern
17 with the selection of the Harvard Program and its belief that Harvard was critical of police.
18 In response, the City arranged a meeting between the BPSOF (and other unions), and

²⁹ For example, the City removed the limitation that officers would not be eligible for the Mediation Program if they had a similar complaint or mediation within the prior year.

1 representatives of the Harvard Program on September 4, 2015. Although the BPSOF
2 attended the meeting, it had no opportunity to follow up with the City before the City
3 advised it, only six days later, on September 10, 2015 that it was implementing the
4 policy.³⁰

5 I conclude that the parties did not reach impasse during their negotiations on the
6 impacts of the Mediation Program. The issues, described above, especially the written
7 rationale for selecting an officer for the Mediation Program, and the choice of the Harvard
8 Program, were of primary concern to the BPSOF. Although bargaining had begun in
9 2013, there was a large time gap between December 2013 and April 2015 where no
10 bargaining took place. After this delay, the City proposed a revised policy which led the
11 BPSOF to request that the City provide a written rationale for officers selected for
12 mediation. Following the proposed revised policy, the parties met for only two bargaining
13 sessions. At one session the City indicated its willingness to provide a written rationale,
14 but at the next session it informed the BPSOF that it would not do so and failed to explain
15 the Commissioner's reasons for refusing.³¹ The City also did not propose any alternative

³⁰ Other issues that remained outstanding were Superintendent Mancini's suggestion that the BPSOF make a proposal to address its concern that officers had no recourse if they were not selected for mediation, and the BPSOF's request that it be permitted to withdraw from the Mediation Program if it was not going well.

³¹ Although the City argues that it never agreed to provide a written rationale, I have found otherwise. Even if the City had never outright agreed to it, however, I still would have not found impasse on this issue as the City did not provide an explanation for refusing the BPSOF's request and this was the first time that the City refused the request.

1 ways to alleviate the BPSOF's concerns that the process would not be open and fair for
2 all, and that the City might engage in favoritism in its selection of officers for mediation.

3 With respect to the Harvard Program, although the City arranged a meeting
4 between BPSOF and Harvard, it never followed up with the BPSOF after the meeting to
5 determine if the BPSOF's concerns were resolved, and if not, discuss the issue further
6 before implementing the policy. It also did not provide the BPSOF with sufficient time to
7 follow up with the City regarding its remaining concerns before implementing the policy
8 six days after the meeting. The City argues in its post-hearing brief that the BPSOF's
9 concerns were not valid and:

10 [t]here is no evidence that the mediators of the [Harvard Program] are
11 biased. The Unions engaged in stereotypical thinking and labeled an entire
12 institution on the basis of one person's op-ed piece to the Globe. The
13 Union's allegation that Harvard is biased had no support in the record. It
14 was a baseless suspicion and a groundless fear. The fact that the Unions
15 adamantly hold their viewpoint against Harvard only goes to demonstrate
16 the existence of impasse on this issue.
17

18 Contrary to the City's argument, the Union does not have to support its concerns with the
19 Harvard Program with evidence in the record for it to constitute a valid issue for
20 bargaining. Nor does the City's disagreement with the BPSOF's reasoning obviate its
21 obligation to bargain about the issue. Further, Superintendent Mancini himself admitted
22 that although he did not agree, the concerns were legitimate. The fact that he could
23 understand the BPSOF's concerns shows that there was potentially room for further

1 negotiations and the possibility that the parties could have found a solution to lessen
2 those concerns.

3 Lastly, at the conclusion of the June 25, 2015 meeting, the City requested that the
4 BPSOF put its concerns in writing, which indicates that the City itself did not believe that
5 the parties had reached impasse, but rather anticipated further bargaining. But then
6 without any further communication, other than the informational meeting with the Harvard
7 Program, the City implemented the Mediation Program, which was largely unchanged
8 from the policy that the City proposed prior to its final two bargaining sessions with the
9 BPSOF.

10 For these reasons, I find that the BPSOF and City did not reach impasse.³²

11 ***BPPA***

12 The City and BPPA met for bargaining on July 11, 2013, July 30, 2014, April 24,
13 2015, and July 24, 2015. Similar to the bargaining with the BPSOF, while certain issues

³² Although the BPSOF makes further arguments that the parties did not reach impasse because the City did not bargain in good faith, arguing that it instead engaged in regressive and surface bargaining and that its representatives did not have the necessary authority to engage in good faith bargaining, I need not address these arguments as I found that the parties had not reached impasse for the reasons explained above. In addition, the BPSOF argues that even if I were to find that the parties reached impasse, I should follow National Labor Relations Board precedent that an employer cannot implement a proposal that excludes a union from meaningful bargaining as to the procedures and criteria governing its plan, as it has done with the Mediation Program. I decline to address this allegation as it was raised for the first time in the BPSOF's post-hearing brief, and I have determined that the parties did not reach impasse, as described above.

1 were agreed to by the parties,³³ other issues remained unresolved when the City
2 implemented the Mediation Program. The primary unresolved issues that the BPPA was
3 concerned with were the Harvard Program, confidentiality, and including explicit language
4 in the policy that attending a mediation would be considered an officer's tour of duty.

5 At the parties' final meeting on July 24, 2015, the BPPA expressed concern with
6 the Harvard Program and potential bias against the police, and requested that the City
7 use the Labor Relations Connector for mediation. The City agreed that this was a
8 legitimate concern and agreed to hold a meeting between the Harvard Program and the
9 BPPA. The BPPA also requested that the City change the confidentiality language to
10 reflect what was in the prior draft, and include explicit language in the policy that a
11 mediation session would be considered an officer's tour of duty, to which the City agreed.

12 However, the City then implemented the Mediation Program without rescheduling
13 the meeting between Harvard and the BPPA after a scheduling miscommunication. Thus,
14 the BPPA never had any opportunity to discuss its concerns with the Harvard mediators,
15 as promised by the City. Further, the City did not include language in the policy specifying
16 that mediation would be considered an officer's tour of duty as it agreed to do. It also did
17 not advise the BPPA that it would not make these changes and give them the opportunity
18 to respond or discuss the issues further. Agreeing to the BPPA's requests, and then

³³ For example, the City agreed that an officer would call the mediator, rather than the other way around, as requested by the BPPA.

1 implementing the Mediation Program without complying with its agreement, cannot be
2 considered bargaining to impasse.

3 In addition, the City did not change the confidentiality language as requested by
4 the BPPA, or provide the BPPA an opportunity to discuss it further or explore options to
5 alleviate its concerns about the confidentiality of mediation. Lastly, the City never
6 indicated that it considered that the parties were at impasse or expressed its belief that
7 they were deadlocked on any issue.

8 For the reasons explained above, I find that the City also did not reach impasse
9 with the BPPA.

10 Conclusion

11 Based on the record and for the reasons explained above, I find that the City
12 unilaterally implemented the Mediation Program without bargaining to resolution or
13 impasse with the BPSOF or BPPA over the impacts of the program on employees' terms
14 and conditions of employment in violation of Section 10(a)(5) and, derivatively, Section
15 10(a)(1) of the Law, but did not violate the Law for failing to bargain over the decision to
16 implement the program.

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³⁴ The Mediation Program is also available to The Boston Police Detectives' Benevolent Society and the Boston Police Detectives' Benevolent Society Superior Officers' Unit. Neither union has a pending challenge to the program at the DLR.

1 MUP-5247 (June 21, 1985). However, if the bargaining obligation involves only the
2 impacts of a decision to alter a mandatory subject of bargaining, but not the decision itself,
3 the appropriate remedy must strike a balance between the right of management to carry
4 out its lawful decision and the right of an employee organization to have meaningful input
5 on impact issues while some aspects of the status quo are maintained. Town of
6 Burlington, 10 MLC 1387, 1388-89, MUP-3519 (February 1, 1984). The usual remedy for
7 a failure to bargain over the impacts of a decision involving a managerial prerogative is a
8 prospective order to bargain to resolution or impasse over the impacts of the decision on
9 mandatory subjects of bargaining. Id. In cases where an employer's refusal to negotiate
10 is limited to the impact of a managerial decision, the Board traditionally orders restoration
11 of the status quo ante applicable to those affected mandatory subjects rather than to the
12 decision itself. Commonwealth of Massachusetts, 26 MLC 116, 121-22, SUP-4158
13 (February 15, 2000). In this respect, the Board seeks to restore the parties to their
14 bargaining and economic positions that existed prior to the unlawful conduct. City of
15 Malden, 20 MLC 1400, 1406-07, MUP-7998 (February 23, 1994).

16 Here, it is not possible to restore the status quo ante on only certain aspects of the
17 Mediation Program without rescinding the program in its entirety (e.g., restoring the
18 selection of mediators to the status quo ante would effectively end the program).
19 Therefore, I am ordering rescission of the Mediation Program for the BPSOF and BPPA³⁵

³⁵ This remedy does not rescind the Mediation Program for any union other than the BPSOF and BPPA.

1 for any new citizen complaints against their members³⁶ until the City fulfills its bargaining
2 obligation as described in the Order below. See Commonwealth of Massachusetts, 25
3 MLC 201, SUP-4075 (June 4, 1999).³⁷

4 Order

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

7 1. Cease and desist from:

- 8
9 a) Implementing the Mediation Program for the BPSOF and BPPA for any new
10 citizen complaints against their members until it has bargained with each
11 union to resolution or impasse over the impacts of the program on terms
12 and conditions of employment.
13
14 b) Otherwise interfering with, restraining or coercing employees in the exercise
15 of their rights guaranteed under the Law.
16

17 2. Take the following affirmative action that will effectuate the purposes of the Law:

- 18
19 a) Offer to bargain in good faith with the BPSOF and BPPA over the impacts
20 on employees' terms and conditions of employment before implementing
21 the Mediation Program for any new citizen complaints against their
22 members, and, upon request by the Unions, bargain in good faith to
23 impasse or resolution over the impacts of the program.
24
25 b) Post immediately in all conspicuous places where members of the Unions'
26 bargaining units usually congregate and where notices to these employees
27 are usually posted, including electronically, if the City customarily

³⁶ Any complaints that have already been selected for the Mediation Program should continue through the program.

³⁷ I distinguish this situation from the City of Boston less-lethal force case cited above as that case impacts public safety. In addition, the Mediation Program impacts employee discipline, which is of great importance to employees.

1 communicates to its employees via intranet or email, and maintain for a
2 period of thirty (30) consecutive days thereafter, signed copies of the
3 attached Notice to Employees; and
4

- 5 c) Notify the DLR in writing of the steps taken to comply with this decision
6 within ten days of receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


KERRY BONNER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations 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).