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

In the Matter of:	*	
	*	Case Number: MUP-16-5532
CITY OF NEWTON	*	
	*	
and	*	Date Issued: August 20, 2019
	*	
NEWTON POLICE SUPERIOR OFFICERS ASSOCIATION, MASSCOP LOCAL 401	*	

CERB Members Participating:

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

Appearances:

Jeffrey A. Honig, Esq.	Representing City of Newton
Alan H. Shapiro, Esq.	Representing Newton Police Superior Officers Association, MASSCOP Local 401

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

The City of Newton (City) and the Newton Police Superior Officers Association, MASSCOP Local 401 (Union) have filed cross-appeals from a Department of Labor Relations (DLR) Hearing Officer decision concluding that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when the City failed to bargain on demand about the criteria and procedure for fitness for duty examinations, and when it imposed a fitness for duty policy as a condition of employment without first giving the Union notice and an opportunity to bargain to resolution or impasse

about the decision and the impacts of the decision on employees' terms and conditions of employment.[1] On appeal to the Commonwealth Employment Relations Board (CERB), the City continues to contest that any aspect of its decision to order a police captain to undergo fitness for duty testing was subject to mandatory bargaining. The Union appeals from the Hearing Officer's failure to include a make-whole remedy.

For the reasons discussed below, the CERB affirms the decision in its entirety. The procedure by which an employer determines that an employee is physically and mentally fit for duty, including, but not limited to the selection of the evaluator, the information provided to the evaluator, the testing protocol, the results generated, and how that information will be used, are mandatory subjects of bargaining. None of the City's arguments on appeal persuade us that its unilateral action or subsequent refusal to bargain on demand over these issues were justified under the circumstances of this case. We also affirm the Hearing Officer's remedy.

FACTS

The Hearing Officer made comprehensive and detailed findings that are not in material dispute except for one issue discussed below. We adopt these findings and briefly summarize them.

On September 27, 2016, the City's Chief of Police David MacDonald (MacDonald), in consultation with the City's Employment Manager Therese Struth (Struth), placed Captain Doe (Doe),[2] a long-time member of the Union's superior officers' bargaining unit

[1] The Hearing Officer's decision is reported at 45 MLC 106 (January 30, 2019). In that decision, the Hearing Officer dismissed two other counts of the Complaint that were not appealed.

[2] A pseudonym.

and employee of the City's Police Department (Department), on paid administrative leave pending the results of physical and psychological fitness for duty exams. MacDonald memorialized his order in a letter he handed to Doe at the meeting. The letter indicated that Doe had an appointment to see Dr. Reed Boswell (Boswell) that same day at 1:00 p.m., and that the Human Resources Department (HR) would notify Doe about the date of the second appointment it was scheduling with Dr. John Madonna (Madonna) from Chandler Psychological Services. The hearing record reflects that MacDonald ordered the fitness for duty tests due to his concerns over the amount of vacation and sick leave that Doe had recently taken, and MacDonald's belief that, prior to taking the leave, Doe had not been acting like himself.[3] MacDonald did not give the Union notice and an opportunity to bargain to resolution or impasse before ordering the exams.

During the meeting with Doe and his Union representatives,[4] MacDonald stated that he had just cause under the Newton Police Department Code of Conduct and Appearance (Code of Conduct) to order Doe to undergo the fitness for duty examinations.[5] MacDonald also claimed authority under a City Ordinance.[6] MacDonald

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[3] In July 2015, Doe suffered a concussion after he was in an off-duty motor vehicle accident. During that same summer, two of Doe's close family members passed away. Doe was out of work until October 2015, when a neurologist cleared him to return to work. Upon his return, he continued to experience some health issues, but they abated by January/February 2016.

[4] Doe requested and obtained Union representation after he received the letter.

[5] The Code of Conduct states in pertinent part:

> 29. Physical or Psychological exam – An employee shall submit to a physical, mental or psychological examination, at the expense of the Newton Police Department, when so ordered for just cause as determined by the Chief of Police.

[6] Section 2-46 of the Newton Ordinances- Administration states in pertinent part:

did not, however, invoke any portion of the collective bargaining agreement (CBA) between the City and the Union.

After the meeting, Doe proceeded to the first fitness for duty examination, where Boswell examined him. Doe also took a breathalyzer test and provided hair and urine samples for a drug test.[7] Later that day, Boswell informed the City that he had cleared Doe to return to work without restrictions pending the results of the drug test. Doe ultimately passed both the drug and alcohol tests.

On September 28, 2016, Struth forwarded a referral letter for Doe to Madonna.[8] The letter provided some background information about Doe and asked for a fitness for duty exam "out of concern" for him.

Also on September 28, 2016, the Union sent a letter to MacDonald seeking certain information[9] and demanding to bargain. The letter states in pertinent part:

> (c) Upon determination by a department head, the director of human resources or the mayor that an employee, while engaged in the performance of their duty, appears to be suffering from sickness or injury so as to constitute a hazard to their health or the health of other persons, the director of human resources may order such employee to discontinue their duties for such time as the director deems desirable and may require such employee to undergo an examination by a qualified health care provider(s) without charge to the employee.

[7] Neither MacDonald nor Struth specifically requested a drug or alcohol test. When scheduling Doe's appointment with Boswell, however, Struth was aware Boswell frequently includes drug and alcohol testing as part of his fitness for duty evaluations.

[8] For unexplained reasons, the referral letter is dated September 20, 2016.

[9] The timing of the City's response to the information request formed the basis of Count II of the Complaint in this matter. The Union's claim that the fitness for duty exams repudiated various provisions of the CBA formed the basis of Count I of the Complaint. The Hearing Officer dismissed both counts, and the Union did not appeal the dismissals to the CERB. We therefore do not address the merits of Count I or Count II, or of the

> . . . [P]resuming that Dr. Madonna is being requested to perform a fitness for duty examination, the Union requests the Newton Police Department/City of Newton negotiate over certain aspects of this mandated examination ***before*** it is undertaken. (Emphasis in original). Specifically, the Union requests negotiations over the following:
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> 1. The selection of the evaluator;
> 2. The information which is transmitted to the evaluator;
> 3. The testing protocol to be used by the evaluator;
> 4. What results are to be generated by the evaluator and to whom they are to be communicated.

In the final paragraph of this letter, the Union cited Massachusetts Port Authority (MassPort), 36 MLC 5, UP-04-2669 (June 30, 2009) *aff'd sub nom.* Massachusetts Port Authority v. CERB, 78 Mass. App. Ct. 1122 (January 25, 2011)(unpublished ruling issued pursuant to Massachusetts Appeals Court Rule 1:28) in support of its claim that all four topics were mandatory subjects of bargaining.

The City did not bargain with the Union over these or any other matters either before or after scheduling Doe's October 4, 2016 appointment with Madonna. On October 6, 2016, Struth notified Doe that HR had received written confirmation of his fitness for duty from both medical providers. The letter instructed Doe to report back to work on the morning of October 7, 2016, which he did.

Although the City had previously sent employees from every City department for fitness for duty examinations, the record contained no credible evidence that the City ever notified the Union on any prior occasion when it sent a superior officer for a fitness for

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Hearing Officer's unappealed denial of the City's post-hearing motion to defer to an arbitration award, which pertains to Count I of the Complaint.

duty evaluation.[10]

On October 3, 2016, the Union filed the prohibited practice charge that resulted in the complaint and hearing in this matter.

Opinion[11]

City's Appeal

As it did to the Hearing Officer, the City argues that it had no legal obligation to bargain over the decision to send a superior officer for a fitness for duty examination, or the impacts of implementing its decision, including the criteria and procedures for fitness for duty examinations. The City provides a litany of reasons as to why this is so, many of which are grounded in its claim that fitness for duty examinations implicate public safety and the right of a police chief to assign officers for purposes of public safety. The City argues that its decision and the impacts of its decision to order Doe to submit to fitness for duty examinations was a matter of public safety that cannot be fettered by bargaining obligations.

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[10] The City challenges the Hearing Officer's finding that the record contains no evidence that the City notified the Union on any prior occasion when it sent a superior officer for a fitness for duty examination. The City relies on MacDonald's testimony at pages 48-49 and 99-104 of the hearing transcripts as evidence that a former Union president had actual knowledge of at least one instance when a superior officer other than Doe was sent to a psychological fitness for duty examination. After reviewing this testimony, we decline to disturb the finding. For the reasons set forth in the Hearing Officer's decision and the Union's response to the City's supplementary statement, we agree that these excerpts do not establish actual knowledge by the former Union president. Even if they did, the CERB has also held that a single instance of an event is insufficient to establish a binding past practice. See City of Haverhill, 42 MLC 273, 275, MUP-13-3066 (May 24, 2016).

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

This case, however, is not about whether MacDonald had the right to ascertain whether Doe was fit for duty. We agree, as a matter of well-established precedent, and for all of the public safety reasons articulated in the City's supplementary statement, that a public employer has a nonbargainable prerogative to decide that it will employ only physically and psychologically healthy persons. City of Haverhill, 16 MLC 1077, 1081, MUP-7194 (H.O. July 6, 1989), *aff'd* 17 MLC 1215 (August 21, 1990). As the City recognizes in its appeal, however, a public employer still has an obligation to bargain over the means and impacts of implementing a managerial decision to the extent they impact mandatory subjects of bargaining. See generally School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 563-564 (1983).

This principle applies with equal force to fitness for duty examinations. Thus, in City of Haverhill, the Hearing Officer found that "notwithstanding the City's genuine and legitimate interest in securing a healthy police force," 16 MLC at n. 2, "the standards and methods by which it will determine whether individuals are thus fit for employment. . . are . . .subject to collective bargaining." Id. at 1081. The Hearing Officer thus concluded, and the CERB affirmed that the employer had a duty to give its police union prior notice and an opportunity to bargain over the decision and the impacts of the decision to impose psychological testing on police officers as a condition of continued employment. 17 MLC at 1217.

More recently, and in accord with City of Haverhill, supra, the CERB held that, "The criteria and procedures by which an employer determines whether individuals are fit for employment have a direct and profound effect on employees' job security and are therefore, quintessential conditions of employment subject to bargaining." MassPort, 36

MLC at 11-12. In MassPort, the CERB held that matters such as the time, date, and method of a fitness for duty examination as well as the selection of the evaluator were subject to mandatory bargaining. Id. at 12.

Notably, in its September 28, 2016 letter to the City, the Union did not challenge the City's right to ascertain *whether* Doe was fit for duty - rather, expressly relying on MassPort, it sought to bargain over the methods by which the City would do so, i.e., the selection of the evaluator, the information to be transmitted to the evaluator, the testing protocol, what results were to be generated by the evaluator and to whom they would be communicated. As stated in Haverhill and MassPort, these topics have a direct and profound impact on job security and are thus mandatory subjects of bargaining, both prior to implementation and upon demand. City of Haverhill, 16 MLC at 1081; MassPort, 36 MLC at 12.

The City nevertheless claims that prior bargaining with the Union over these subjects would impact public safety by frustrating its ability to make assignments or to quickly remove a superior officer from an assignment. The record does not support this assertion, however, because the City removed Doe from duty by placing him on paid administrative leave at the same time it ordered him to undergo testing. Where the Union did not seek to bargain over the City's decision to place Doe on paid leave, the City's concerns that bargaining would impact its ability to assign or impact public safety are generally unfounded.

The City's contention that bargaining over fitness for duty issues would "stop the [evaluation] process in its tracks" are also overstated. As a practical matter, once the parties negotiate and agree to a fitness for duty policy, there would be little if any need to

bargain each time the City orders a fitness for duty examination, provided that the examination was covered by and conducted in accord with the negotiated policy.

The cases that the City cites do not persuade us otherwise. The Appeals Court decisions relating to public safety are inapposite for the reasons stated above. Town of Hull, 38 MLC 312, ARB-097-2010 (May 31, 2012) is inapposite because it is an arbitration award and not a prohibited practice decision arising under Chapter 150E. Just as the arbitrator who issued the Hull award noted that she was not bound by the CERB decisions cited by the union, see id. at 315, n. 8, the CERB is not bound by arbitration awards.[12] This remains true even when parties have selected the DLR to serve as the arbitration tribunal.[13] The City cites no authority to the contrary. Cf. MassPort, 78 Mass. App. Ct. 1122 (declining to rely on arbitrator's contrary interpretation of a contract provision where union provided no support for its claim that an agency is bound by an arbitrator's interpretation of a contract).

The City also contends that the Hearing Officer's decision was inconsistent with state agency case law from other jurisdictions. Again, however, such decisions are in no way binding, and where there is CERB precedent directly on point with which we agree, we need not seek guidance from decisions arising under different collective bargaining statutes.[14]

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[12] The limited exception to this rule, when the DLR or CERB expressly defers to an arbitration award under Section 11 of the Law, is not applicable here.

[13] Pursuant to 456 CMR 23.00 et. seq., the DLR offers grievance arbitration services to public sector and private sector parties.

[14] To the extent that the City relies upon these decisions to argue that it also has the managerial right to determine the *criteria* by which an employee is judged fit for duty, that issue is not implicated here because the Union did not seek to bargain over either the

Impact Bargaining

In this section of its appeal, the City acknowledges that it had a duty to bargain over the means of implementing its managerial decision but argues that it was justified in not doing so here because the Union waived its right to do so by contract and inaction. The City also claims that its authority to act under the City Ordinance, Department Code of Conduct and other state and federal statutes relieved it of any impact bargaining obligation. We are not persuaded by any of these arguments.

Waiver by Contract

Where an employer raises the affirmative defense of waiver by contract, it bears the burden of demonstrating that the parties consciously considered the situation that has arisen, and that the union knowingly and unmistakably waived its bargaining rights. City of Lynn, 42 MLC 336, 338, MUP-11-1318 (June 27, 2016) (citing Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988) (additional citations omitted)). It is well-established that waiver cannot be found on the basis of a broad, but general, management rights clause. School Committee of Newton v. LRC, 388 Mass at 569; MassPort, 36 MLC at 12.

The Hearing Officer rejected the City's argument that the Union waived by contract its right to bargain over the means of implementing the City's decision to require a fitness for duty examination by agreeing to two CBA provisions, Article VI, "Medical

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criteria for imposing Doe's fitness for duty examinations or the criteria for determining Doe's fitness for duty. We therefore need not and do not consider whether there are circumstances when bargaining over such criteria would impermissibly intrude on an employer's managerial prerogative regarding public safety.

Examination," and Article XV, the management rights clause.[15] The Hearing Officer disagreed because Article VI nowhere referenced the imposition of a fitness for duty examination as a condition of continued employment or authorized psychological examinations as part of the annual medical examination. Also, the City never referenced Article VI when ordering the examination or in its correspondence with the Union. The Hearing Officer also rejected the City's assertion of rights under the management rights clause on grounds that it was a broad management rights clause that was too vague to provide a basis for inferring a clear and unmistakable waiver.

We agree for all the reasons stated in the Hearing Officer's decision. The arbitration award that the City provided to the CERB on appeal, which analyzed an identically-worded management rights clause,[16] does not persuade us otherwise because it is not binding under the CERB and because we agree with the Hearing Officer that the Union did not waive its right to bargain over mandatory subjects of bargaining not covered by the CBA by agreeing to this broad and general management rights clause.

Waiver by Inaction

We further affirm the Hearing Officer's holding that the Union did not waive by inaction its right to bargain over the means of implementing the City's decision to ascertain Doe's fitness for duty. The affirmative defense of waiver by inaction must be supported

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[15] The portion of the Management Rights Clause that the City relies upon states that the City has the right:

> To establish or continue policies, practices and procedures for the conduct of the City's business and from time to time, to change or abolish such policies, practices or procedures.

[16] IAFF, Local 863 and City of Newton, AAA 1139-1803-06 (October 1, 2007).

by evidence that the union had actual knowledge and a reasonable opportunity to negotiate over the proposed change, but unreasonably or inexplicably failed to bargain or request to bargain. Town of Westborough, 25 MLC 81, 89, MUP-9779, MUP-9892 (June 30, 1997).

The City bases its waiver by inaction defense on several factors. Pointing to the Hearing Officer's finding that the Department had previously sent superior officers for fitness for duty examinations, it essentially claims that the Union had reasonable notice and an opportunity to bargain over these issues but unreasonably failed to do so. For the reasons set forth in the decision and in footnote 10, above, however, we agree with the Hearing Officer that the City had no mutually known and agreed to past practice of sending its employees for fitness for duty examinations or for unilaterally imposing any of the procedures related to those exams. Accordingly, the Union did not waive by inaction its right to bargain over these issues merely because the City has, without the Union's knowledge, previously sent superior officers, or members of other bargaining unit to fitness for duty exams.

City Ordinance and Department Code of Conduct

The City also claims that the City Ordinance and the Code of Conduct establish waiver by inaction to the extent that they both should have put the Union on constructive notice that the City had the right to require fitness for duty examinations. However, the affirmative defense of waiver by inaction requires the union to have "actual knowledge"

of the change. Id. It is not analyzed under a "knew or should have known standard."[17] Thus, the mere existence of the Code of Conduct and City Ordinance was insufficient to trigger a bargaining obligation if the Union did not know that the City was exercising its rights thereunder. See generally, City of Boston, 25 MLC 92, MUP-1087 (December 29, 1998) (If an employer attempts to reserve an area of discretion, but in practice, does not exercise that discretion, the employer may not then unilaterally begin to exercise discretion without giving the union notice and an opportunity to bargain). Cf. Boston Water and Sewer Commission, 12 MLC 1250, MUP-5860, MUP-5861 (September 20, 1985) (finding that employer not obliged to bargain over residency ordinance that had "lain dormant and unenforced" until it "suddenly emerges with vigor to cause consternation between management and labor.")

Effect

We also affirm the Hearing Officer's conclusion that neither the City Ordinance nor the Code of Conduct superseded the City's bargaining obligation. The Hearing Officer correctly cited Town of Lee for the proposition that when a subject is within the scope of negotiations pursuant to Section 6 of the Law, but not contained in the CBA, the employer

[17] The City suggests that it could not have notified and cannot be forced to notify the Union before directing superior officers to attend fitness for duty exams due to privacy concerns over disclosing an employee's medical information. There is a difference, however, between directing an employee to take a fitness for duty examination based on reasonable concerns and disclosing the results of the exam. Only the former is implicated here, and the City's claim that merely informing the Union about an upcoming fitness for duty examination would compel an employee to waive their privacy and confidentiality rights under federal or state law is without merit. In any event, one of the topics that the Union sought to bargain over was what information the medical provider would disclose and to whom. As the City implicitly concedes, such matters impact an employee's terms and conditions of employment and are therefore subject to bargaining.

is still required to give a union notice and an opportunity to bargain before changing, or making a new policy or requirement over that topic upon request regardless of any bylaw or ordinance on point. Town of Lee, 11 MLC 1274, 1277, MUP-5211 (November 21, 1984) *aff'd sub nom* Town of Lee v. Labor Relations Commission, 21 Mass. App. Ct. 166, 167 (1985). "Section 7 of the Law demonstrates the [Legislature's] intent that the collective bargaining process is not to be frustrated by the presence of conflicting by-laws." Id. at 1277.

The City does not contest this general principle but attempts to distinguish Town of Lee on grounds that it did not alter a practice or institute a new one when it sent Doe for testing. Once again, however, having affirmed the Hearing Officer's finding that the City had no known and mutually-agreed to practice of sending superior officers to fitness for duty exams, we reject the City's efforts to distinguish Town of Lee on its facts.[18] In sum, neither the City Ordinance nor the Code of Conduct precluded the City from bargaining here.

Other Laws

The City finally contends that the Hearing Officer's decision conflicts with both the Massachusetts Civil Service Law, specifically M.G.L. c. 31, §61A, and the federal Family and Medical Leave Act. Neither argument has merit.

[18] The City additionally argues that finding that the Ordinance relieved it of its duty to bargain over the criteria and procedures for fitness for duty examinations would lead to a "sensible and practical" result because it would eliminate the "convoluted bureaucracy" that would be created if the City had to bargain with the nine unions who represent City employees over this topic. Because we conclude that the Ordinance does not prevent bargaining here, we do not address this argument except to note that a similar argument could be made regarding virtually any mandatory subject of bargaining in municipalities that bargain with more than one union Standing alone therefore, it is not a persuasive defense.

Regarding the Civil Service Law, we summarily affirm the Hearing Officer's conclusion that M.G.L c. 31, §61A does not preclude an employer from bargaining over aspects of the fitness for duty examinations at issue here. The Civil Service decision that the City relies upon, Puza v. Westfield Police Commission, D1-12-318 (2014), states only that a police department *may* require an employee to undergo a fitness for duty evaluation . . . *under appropriate circumstances."* Id. (Emphasis added). Where, as the Hearing Officer noted, this decision does not discuss fitness for duty evaluations in the context of collective bargaining, this equivocal statement is not reasonably construed as precluding collective bargaining on all aspects of this topic.

We also reject the City's argument that the Civil Service statute justified its refusal to bargain because it is not listed in Section 7(d) of the Law as being superseded by the terms of a CBA. As the CERB explained in response to a similar argument that the City made in City of Newton, 42 MLC 181, MUP-12-2102 (January 29, 2016), the fact that the Civil Service Law is not listed in Section 7(d) does not end the inquiry under Chapter 150E. Rather, bargaining over a topic addressed in the Civil Service statute is precluded only where such bargaining would materially conflict with that statute. Id. For all the reasons stated in the Hearing Officer's decision, although Section 61A may address fitness for duty examinations, we agree that this provision does not conflict with the City's obligation to bargain over such examinations under the circumstances of this case.

The City's reliance on provisions of the Family and Medical Leave Act (FMLA) is both misplaced and raised improperly for the first time on review. See Anderson v. CERB, 73 Mass. App. Ct. 908, 909, n. 7 (2009). The fact that the FMLA may authorize certain medical examinations for employees on FMLA leave has nothing to do with this case

because Doe was not out on a medical leave of absence when the fitness for duty examinations were required. Rather, the City placed him on paid administrative leave and then required the fitness for duty examinations as a condition of his returning to work. The City points to no FMLA provision that precludes collective bargaining over the procedures and protocol for these examinations.

Union's Appeal - Make-Whole Remedy

In fashioning appropriate remedies, the CERB attempts to restore the situation as nearly as possible to that which existed but for the unfair labor practice. City of Gardner, 10 MLC 1218, 1222, MUP-4917 (September 14, 1983). In this case, the Hearing Officer attempted to do this by ordering the City to rescind its unilateral implementation of a fitness for duty policy until the City satisfied its bargaining obligation. On appeal, the Union seeks to amend the order to include a make-whole remedy to compensate Doe for the lost overtime and paid details that he would otherwise have worked from September 27 through October 6, 2016, the period of his paid administrative leave. The Union notes that the MassPort and Haverhill decisions discussed above both included make-whole remedies and it seeks the same for Doe. For the first time on review, the Union also seeks removal of all references to the fitness for duty examinations from the City's records, including Doe's personnel file.

We decline to order a make-whole remedy. The Union's claim that Doe is entitled to overtime and detail pay is based on its assumption that the City would have allowed Doe to continue working until it satisfied its bargaining obligation. The Union provides no evidence to support this assumption, nor, as previously noted, did the Union challenge the City's decision to place Doe on paid administrative leave in the first instance. The

cases that the Union cites are therefore distinguishable because the make-whole remedies there attempt to compensate the affected employees for the economic losses that they suffered as a direct result of the employer's unlawful conduct. In MassPort, the make-whole remedy was directed at the potential loss of overtime pay that the officer suffered when MassPort unilaterally changed his shift and location when he returned to work from leave. MassPort, 36 MLC at 14-15.[19] In Town of Haverhill, the CERB ordered the employer to reinstate and make whole the employees it had terminated for failing an unlawful psychological examination. Town of Haverhill, 17 MLC at 1223. In this case, the Union has failed to provide any evidence showing that Doe suffered any loss of compensation or benefits due to the City's failure to satisfy its bargaining obligation over the fitness for duty examinations. That is, where the Union has not challenged the City's decision to place Doe on paid administrative leave in the first instance, restoration of the status quo ante in this case does not require Doe to be placed in the same economic position that he would have been in had he never been placed on paid leave.

The Union also requests for the first time on review that the City remove all references to Doe's fitness for duty examinations from Doe's personnel file and all other records maintained by the City. This request is improperly made for the first time on review. Anderson v. CERB, 73 Mass. App. Ct. at n. 7. In any event, we believe that the Union's request is subsumed by Section 2(b) of the Order, requiring the City to rescind the unilateral implementation of a fitness for duty examination. At the bare minimum, this

[19] Although Part 2(a) of that Order included a make-whole remedy for both the unlawful fitness-for duty examination and decision to change the affected employee's work shift and location, the discussion in the Remedy portion of the decision and the posting pertained only to the MassPort's unlawful decision to change the employee's work shift and location. MassPort, 36 MLC at 14-15.

requires the City to update its records, including, in particular, Doe's personnel record, to reflect that the City's order that Doe undergo fitness for duty testing was rescinded. See generally, M.G.L c. 149, §52C.

CONCLUSION

For the reasons stated above and in the Hearing Officer's decision, we conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it failed to bargain upon demand with the Union over the procedures for fitness for duty evaluations, including the selection of the evaluator, the information to be transmitted to the evaluator, the testing protocol to be used by the evaluator, what results are to be generated by the evaluator, and to whom they are to be communicated. The City also violated Section 10(a)(5) and, derivatively, Section 10(a)(5) of the Law when it imposed a fitness for duty policy as a condition of employment without providing notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision on employees' terms and conditions of employment.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City shall:

1. Cease and desist from:

   a. Refusing to bargain collectively with the Union by failing to negotiate with the Union about the procedures for imposing fitness for duty examinations including, but not limited to, the selection of the evaluator, the information to be transmitted to the evaluator, the testing protocol to be used by the evaluator; and what results are to be generated by the evaluator and to whom they are to be communicated;

   b. Imposing a fitness for duty policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision; and

   c. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

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

a. Upon request, bargain collectively with the Union about the criteria and procedure for imposing fitness for duty examinations;

b. Rescind the unilateral imposition of a fitness for duty examination as a condition of employment until the City has bargained to resolution or impasse regarding the criteria and procedure for imposing fitness for duty examinations;

c. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically if the City customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees; and

d. Notify the DLR in writing of steps taken to comply with this Order within ten (10) days of receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

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

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that the City of Newton (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by 1) failing to negotiate with the Newton Police Superior Officers Association (Union) about the procedure for imposing fitness for duty examinations; and 2) imposing a fitness for duty policy without giving the Union prior notice and opportunity to bargain to resolution or impasse over the criteria and procedure for imposing fitness for duty examinations.

The City posts this Notice to Employees in compliance with the CERB's Order and assures its employees that:

WE WILL NOT refuse to bargain collectively with the Union by failing to negotiate with the Union about the procedure for imposing fitness for duty examinations;

WE WILL NOT refuse to bargain collectively with the Union by imposing a fitness for duty policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse; and

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

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

Upon request, bargain collectively with the Union about the criteria and procedure for imposing fitness for duty examinations; and

Rescind the unilateral implementation of a fitness for duty examination as a condition of employment until the City has bargained to resolution or impasse regarding the criteria and procedure for imposing fitness for duty examinations.

_____ _____

City of Newton 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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).