

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

CITY OF BOSTON

and

BOSTON POLICE SUPERIOR OFFICERS
FEDERATION

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Case Number: MUP-16-5618

Date Issued: March 15, 2019

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Barbara V.G. Parker, Esq.

Representing City of Boston

Patrick N. Bryant, Esq.

Representing Boston Police Superior Officers
Federation

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this matter is whether the City of Boston (City or Employer) violated
2 Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws,
3 Chapter 150E (the Law) by establishing Food and Drink Guidelines (Guidelines) for
4 employees in the Operations Unit (Operations) of the Boston Police Department
5 (Department) without giving the Boston Police Superior Officers Federation (Federation
6 or Union) prior notice and an opportunity to bargain to resolution or impasse over the
7 decision to establish the Guidelines and the impacts of that decision on the bargaining
8 unit members' terms and conditions of employment. Based upon the record, and for the

1 reasons explained below, I find that the City did not violate the Law, and I dismiss the
2 Complaint.

3 STATEMENT OF THE CASE

4 On November 18, 2016, the Union filed a charge of prohibited practice with the
5 Department of Labor Relations (DLR) alleging that the City had violated Section
6 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On March 7, 2017, a DLR
7 Investigator conducted an in-person investigation of these allegations. On March 21,
8 2017, the Investigator issued a Complaint of Prohibited Practice alleging that the City
9 had violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law. On April 13,
10 2017, the City filed an Answer to the Complaint of Prohibited Practice.

11 On June 19, 2018, I conducted a hearing during which the parties received a full
12 opportunity to be heard, to examine and cross-examine witnesses, and to introduce
13 evidence. On August 6, 2018, the parties filed post-hearing briefs.

14 STIPULATIONS OF FACT

- 15 1. The City of Boston is a public employer within the meaning of Massachusetts
16 General Laws, Chapter 150E, Section 1.
- 17 2. The Boston Police Superior Officers Federation is an employee organization
18 within the meaning of Massachusetts General Laws, Chapter 150E, Section 1.
- 19 3. The Union is the exclusive bargaining representative for certain uniformed
20 personnel in the City's Police Department, including those who hold the rank of
21 sergeant and lieutenant in the Operations Communication Center.
- 22 4. On July 21, 2016, the Massachusetts Department of Labor Standards conducted
23 a workplace safety and health inspection of the Operations Unit as a result of a
24 complaint filed by SEIU, Local 888, which represents certain civilian employees
25 in the Operations Unit, alleging such things as a lack of maintenance and
26 housekeeping, a potential vermin infestation, and broken workstations.
- 27 5. On August 12, 2016, the DLS issued a Written Warning and Order to Correct
28 certain conditions that placed employees at risk of work-related injury or illness.
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6. On or about September 7, 2016, the City notified the DLS that it had taken corrective action, including contracting with an exterminator, cleaning cabinets and locker rooms, purchasing closed-top trash containers, repairing broken workstations, and mounting fire extinguishers.
 7. On September 19, 2016, the City provided an update to the DLS that it had deep cleaned the carpet in the Operations Unit on September 13, 2016, and that "our office now considers all items listed in your report addressed."
 8. On or around October 17, 2016, the City issued food and drink guidelines for employees in the Operations Unit that stated, in part, the following:
 1. No eating at work stations or Operations floor.
 2. Drinks are allowed in work areas as long as they are in securely covered, spill resistant containers.
 3. Food is allowed in the following designated areas:
 - a. BPD "Quality Eats" cafeteria located on the 1st floor.
 - b. BPD Operations Break Room located on the 4th floor.
 4. If you bring food to the Break Room:
 - c. Food can be stored for the day in the Break Room or refrigerator. You are responsible for removing remaining food, plates, crumbs, etc... no later than end of the employee's shift.
 - d. Food must be stored in sealed plastic or airtight canisters if left in the Break Room refrigerator.
 - e. Employees using the Break Room must clean up any dirty dishes, utensils or eating surfaces immediately after finishing lunch/break.
 - f. Dispose of food, plates, etc... in Break Room barrels with the covered lids. No food is to be thrown out in the trash barrels on the Operations floor.
 - g. Unattended or improperly stored food will be discarded.
 5. The Deputy Superintendent and the Captain of the Operations Division may make exception to this policy.

FINDINGS OF FACTOperations Unit

Operations is a specialty unit located on the fourth floor of the Department's Headquarters (Headquarters) that has responsibility for, among other things, Department communications, including 911 call-taking and police officer dispatch. The unit's primary physical area consists of the Operations floor (Floor), which contains approximately twenty 911 call-taking workstations and eight or nine police dispatch workstations. An elevated platform (Platform), from where Federation bargaining unit members assigned to Operations supervise the civilian 911 call-takers and police dispatchers, runs along a wall at one end of the Floor.¹ The area opposite the Platform at the other end of the Floor contains offices. Hallways containing offices bound the remaining two sides of the Floor.

Deputy Superintendent Michael Cox (Cox) commands Operations. His office is across one hallway that bounds the Floor, approximately ten to fifteen feet from the Platform. A conference room (Conference Room), also approximately ten to fifteen feet from the Platform, is next to Cox's office. A staff office is next to the Conference Room, and Captain Phillip Terenzi's (Terenzi) office is next to the staff office.² The Bureau of Field Services (BFS), which is not part of Operations, has an office next to Terenzi's office.

¹ EMS, an entity separate from the Department but based in Headquarters, is located on the other side of this wall.

² Terenzi is a member of the Federation bargaining unit.

1 Across the other hallway that bounds the Floor is a back room that contains the
2 missing persons unit and the tow unit. Two training rooms are next to the back room.
3 The break room (Break Room) is next to the training rooms, approximately forty feet
4 from the Platform.³ Locker rooms are farther down this hallway in the direction moving
5 away from the Floor.

6 Workstations and Equipment

7 The 911 call-takers' workstations include a desk, computer, and telephone
8 equipment. The computers' hard drives are secured in a cabinet underneath the
9 desktop. The dispatchers' workstations include similar equipment with additional
10 monitors and also radios. The Platform contains the same workstation set-up for the
11 superior officers. The equipment is expensive.⁴ Additionally, prior to October 2016,
12 every workstation on the Floor had a small, open-top trash container next it.

13 Staffing of Operations

14 Approximately twenty-two sworn officers are assigned to Operations. Of these,
15 approximately twelve are supervisors.⁵ Approximately 160 civilian employees work in
16 Operations as call-takers, dispatchers, support staff, and clerks.

17 Operations is continuously staffed twenty-four hours a day over three shifts. The
18 day shift is 7:30 am to 4:00 pm; the first half shift is 4:00 pm to 11:45 pm; and the

³ The Break Room contains a vending machine. Additionally, the first floor of Headquarters contains a cafeteria. The cafeteria is accessible twenty-four hours a day, also has vending machines, and serves food from approximately 7 am to 6 pm.

⁴ Cox testified that twelve workstation desks alone cost over \$200,000.

⁵ During the hearing, the parties used the terms "superior officers" and "supervisors" interchangeably.

1 midnight shift is 11:45 pm to 7:30 am. The day shift is the busiest shift in Operations,
2 with approximately sixty-five to eighty civilian employees working.

3 Although Cox has overall supervisory responsibility for employees who work in
4 Operations, Terenzi, and below him the other superior officers, are responsible for day
5 to day supervision within the unit. On any given shift, three supervisors are working. Of
6 these three supervisors, two are required to be on the Floor at all times.⁶ Approximately
7 eight to twelve call-takers work each shift.⁷

8 Operations is a busy work environment, and once the civilian employees log onto
9 their computers and don their headsets they are mostly tethered to their workspace
10 except to use the restroom and to take breaks. Supervisors schedule breaks for the
11 call-takers and dispatchers. Supervisors are entitled to a break, and are responsible for
12 scheduling their own breaks.⁸

13 Food and Drink in Operations Prior to October 2016

14 Prior to October 2016, the Department did not restrict the consumption of food
15 and drink in Operations, and employees regularly ate and drank in their work areas.

⁶ Cox testified that there are three supervisors on each shift, and that two supervisors are required to be on the Floor at all times so that the third can take a break.

⁷ The record does not disclose the number of dispatchers scheduled on each shift.

⁸ Sergeant Jeanne Carroll (Carroll) has been assigned to Operations for nearly ten years, and she became Vice President of the Federation in April 2017. She testified that in Operations, "Nobody really takes scheduled breaks." Cox testified that the supervisors get a break, are responsible for scheduling their own breaks, and that he is confident that they get their breaks because he has never received a complaint about them not getting their breaks, and "other parts of the Department" complain to him that the supervisors "break too often." Thus, supervisors are entitled to take breaks even if they do not do so. Additionally, in its post-hearing brief, the Union twice asserts that, prior to the Guidelines, the supervisors used their breaks for personal errands or activities other than eating.

1 The supervisors in Operations have their own refrigerator next to the Platform. In
2 October 2016, the parties were in negotiations for a successor contract, and the City did
3 not propose implementing food and drink guidelines during these negotiations.

4 Additionally, prior to October 2016, the Department did not discipline any
5 Operations employees for being distracted due to eating or drinking. The Department
6 also had not received any reports of Federation supervisors being distracted due to
7 consuming food and drink in Operations.

8 SEIU Complaint and Department of Labor Standards Investigation

9 Operations has had longstanding sanitary issues.⁹ Mice are an enduring
10 problem, and the Department has periodically engaged an exterminator over the years.
11 At some point in 2006, SEIU, the union that represents certain civilian employees
12 working in Operations, complained about unsanitary working conditions in Operations.
13 At some point two or three years ago, a third-party consultant informed Cox during
14 repairs to dispatch radios that food crumbs were damaging the equipment, but Cox took
15 no action.

16 In or around June 2016, Stephen B. Sutliff, Esq. (Sutliff), the Deputy Director of
17 the Department's Office of Labor Relations, learned that SEIU had filed a new complaint
18 about unsanitary conditions in Operations. By letter to Sutliff dated August 12, 2016,
19 the Department of Labor Standards (DLS) issued a Written Warning and Order to
20 Correct (Warning and Order). It states, in relevant part:

21 On July 21, 2016, the Massachusetts Department of Labor Standards conducted
22 a workplace safety and health inspection at the Boston Police Department
23 Headquarters (BPDHQ) ("Respondent") located at One Schroeder Plaza in

⁹ Headquarters generally has sanitary issues as well. Rats are an ongoing issue on the property, and Cox testified that spraying for bugs has been routine for some time.

1 Boston. The inspection was initiated due to a complaint filed by the Employee
2 Representative SEIU Union Local 888. The inspection was completed by DLS
3 Supervisor Mary Dozois and Health and Safety Inspector Maria Colon.
4

5 Among the allegations brought to DLS attention were the lack of maintenance
6 and housekeeping, a potential vermin infestation, and broken workstations. The
7 area of complaint was the 911 Call Center and the Dispatch Unit. There are a
8 total of 120 employees in this area, working in shifts to provide 24 hour coverage
9 seven days a week. Employees work an eight hour shift. Employees are
10 provided with headsets, and the workstations are designed to be adjusted for
11 employee ergonomics. Employees have access to break and locker rooms.
12

13 As part of the inspection, DLS conducted a walkthrough of the 911 Call Center,
14 break room, and locker rooms. DLS identified conditions which place employees
15 at risk of work-related injury or illness. DLS issues this Written Warning and
16 Order to Correct to the Respondent to correct those conditions in accordance
17 with Massachusetts General Laws and Federal Regulations. The Respondent is
18 advised to apply DLS corrective actions and recommendations as appropriate to
19 all work locations and all departments.
20

21 Relevant to this proceeding, the Warning and Order identified four (4) items that
22 required the Department to take corrective action. Item Number 1 related to employee
23 complaints that employees were experiencing insect bites and had observed mice in the
24 dispatch area. DLS noted that the Department indicated to DLS that the Department
25 had contracted with a vendor to implement an Integrated Pest Management Program
26 (IPM), and directed the Department to continue efforts with the IPM vendor to "monitor
27 and control pests in the building." Regarding mice, DLS directed the Department to
28 "follow any action plan developed by the IPM vendor. An action plan typically involves
29 sealing access points to the building, and removing food sources which attract rodents."
30 DLS directed the Department to provide, by September 10, 2016, "the schedule and
31 action plan implemented by the IPM vendor."

32 Item Number 2 related to the cleanliness of Operations. DLS noted that the
33 carpet in the 911 center and dispatch unit was worn out, and that portions of the carpet

1 “were stained with unknown substances.” Additionally, the cabinets and refrigerator in
2 the break room were cluttered, as were areas of the locker rooms. DLS directed that
3 the Department “should” keep the carpet in dispatch dry, vacuum “at least weekly,” and
4 steam clean annually. DLS noted that the carpets in dispatch are in use twenty-four
5 hours per day and have a “higher use than a typical office area.” Regarding the break
6 room, DLS directed that the Department, “Encourage periodic clean-up of the break
7 room cabinets, floors and refrigerator.” DLS directed the Department to provide, by
8 September 10, 2016, documentation that scheduled cleaning and maintenance has
9 been established.

10 Item Number 3 related to trash containers. DLS noted the condition as follows:
11 “In [sic] occasions employees eat their food at their workstations. The majority of trash
12 containers in these areas have no lids. If food remains and liquids are tossed in the
13 trash the lining bag should be changed, and the container should have a lid.” DLS
14 ordered the following corrective action:

15 Designate open-top trash containers that do not have a lid for paper, or dry
16 refuse waste. Provide and designate a closed-top trash container for food waste
17 and anything that could leak. These containers should be large enough for a full
18 shift, and be foot operated with a closeable lid. Follow recommendation by the
19 IPM vendor with regard to eating and drinking at desks.

20
21 DLS directed the Department to provide, by September 10, 2016, “pictures of the trash
22 containers destined for food waste.”

23 Item Number 4 related to workstations. DLS noted that at least two of the
24 workstations were broken. DLS directed the Department to repair the broken
25 workstations and to implement a preventive maintenance schedule for workstations,
26 furniture, and chairs. DLS directed the Department to provide, by September 10, 2016,

1 documentation that a preventive maintenance schedule has been developed, and/or
2 documentation that a work order has been submitted.

3 Department Response to DLS Warning and Order

4 By letter dated September 7, 2016, Sutliff responded to DLS. Regarding Item
5 Number 1, Sutliff notified DLS that the Department has a contract with an extermination
6 company that requires the company to come to Headquarters twice per month and
7 respond to any additional calls for service. Regarding Item Number 2, Sutliff informed
8 DLS that the Department had cleaned the break room and locker rooms. Also, in
9 addition to vacuuming the carpets on a regular basis, the Department "is taking the
10 additional step of having the carpets cleaned according to the recommendation of the
11 manufacturer." Sutliff informed DLS that this cleaning would occur the week of
12 September 12, 2016, and that the Department would supplement its report after that
13 cleaning occurred. Regarding Item Number 3, Sutliff wrote: "Enclosed please find
14 photographs documenting that the Department has purchased closed-top trash
15 containers." Regarding Item Number 4, Sutliff notified DLS that the Department had
16 executed a contract with a vendor to repair broken workstations, and that the
17 Department had secured a contract for three intensive cleanings of the 911 Dispatch
18 console.

19 By letter dated September 19, 2016, Sutliff supplemented the Department's
20 response to DLS. This letter states:

21 Please accept this letter as a supplemental report to the original response mailed
22 to you on September 7, 2016. The deep carpet cleaning... in the Operations Unit
23 took place on September 13, 2016. Enclosed please find a copy of invoice from
24 the vendor and photographs of the new furniture purchased for the lunchroom.
25 Our office now considers all the items listed in your report addressed.
26

1 Guidelines

2 Effective October 17, 2016, the Department implemented the Guidelines for
3 Operations. Although Cox mentioned the possibility of implementing food and drink
4 guidelines during a staff meeting in September 2016, the Department did not provide
5 notice to the Federation about the Guidelines before it implemented them. The
6 Guidelines' Objective states:

7 Operations Division is a shared workspace with a considerable amount of critical
8 equipment that must remain clean and free from debris. In addition, spilled food
9 or beverages in the workspace can attract rodents and other pests. Effective
10 October 17, 2016, consumption of food in the Operations Communication Center
11 will be restricted to the break [r]oom area.¹⁰
12

13 The Department intended Guideline 5, which allows Cox and or Terenzi to make
14 exceptions to the policy, to accommodate any employee who may need to eat or drink
15 due to a medical condition. Additionally, shortly after the Department issued the
16 Guidelines, it authorized the supervisors to eat in the Conference Room next to Cox's
17 office.¹¹

18 After implementing the Guidelines, the Department issued spill-proof cups to all
19 Operations employees so that they could drink liquids in their work areas. These spill-
20 proof containers did not effectively prevent spills and were replaced. For reasons that
21 are not clear from the record, Carroll did not receive a replacement.

¹⁰ Stipulation of Fact 8 contains the five Guidelines.

¹¹ The Department's November 14, 2016 letter in response to the Union's bargaining demand memorializes that Federation bargaining unit members are authorized to eat in the Conference Room. Both Cox and Sutliff also testified that the supervisors are authorized to eat in the Conference Room.

1 As a result of the Guidelines, Federation bargaining unit members assigned to
2 Operations no longer enjoy a convenience that other Federation bargaining unit
3 members, and Department employees generally, continue to enjoy.¹² The Department
4 does, however, ban food and drink in the forensic unit.

5 Union Demands to Bargain and City's Response

6 By letter dated November 8, 2016, the Union, through counsel, demanded that
7 the Department rescind the Guidelines and bargain. By letter dated November 14,
8 2016, Deputy Superintendent and Commander of the Department's Office of Labor
9 Relations, Steven Whitman, responded, in relevant part:

10 The Food and Drink Guidelines were written in response to numerous grievances
11 and a complaint by the Department of Labor Standards regarding
12 recommendations of an environment not conducive to insects or pests. In
13 response, the Department took several steps to remedy any conditions that might
14 promote insects or rodents, including the purchase of trash receptacles with lids
15 and spill proof cups for consumption of liquids on the floor. The Food and Drink
16 Guidelines limit the work areas where food may be consumed. Members of the
17 Federation are also authorized to eat in the Conference Room outside the
18 Operations Floor, in addition to the main break room for all Operations
19 employees, and the cafeteria located on the first floor of HQ when available.

20
21 The Department is not of the opinion that there is a bargaining obligation where
22 there are two equally accessible places in Operations to consume food and the
23 Management Rights clause of the collective bargaining agreement reserves to
24 the Department the exclusive right to issue reasonable work rules and

¹² Carroll testified, "Now I have to make sure there's ... enough supervisors around, grab my granola bar and walk down to the breakroom, eat my granola bar and come back. It's just inconvenient. As for going down to the first floor, that just takes ... too much time. Nobody really takes scheduled breaks." Carroll also testified that EMS and BFS employees continue to eat on the Fourth Floor of Headquarters and that even other employees within Operations continue to eat in their work areas. "I've seen office staff walking into Operations with take-out containers, heading to their office." Additionally, Terenzi has a refrigerator and coffee maker in his office and Carroll has seen food in his office.

1 regulations governing the conduct of the Police Department provided such rules
2 and regulations are not inconsistent with express provisions.¹³

3
4 While the Department is not willing to rescind the policy, we are willing to meet
5 with the Federation to discuss any concerns. If the Union wishes to discuss
6 these Guidelines, please contact this office prior to November 28, 2016.

7
8 Captain Terenzi's Email

9
10 By email dated April 28, 2018, to sixteen Department employees, including
11 Carroll, Terenzi wrote:¹⁴

12
13 Having expended substantial funding on the deep cleaning of the Operations
14 Center, please ensure everyone is complying with the food and drink policy in
15 Operations.

16
17 If I should happen to see someone in violation of the food and drink policy, I will
18 ask for reports from those who are violating the policy and the supervisors who
19 are working.

20
21 OPINION

22
23 A public employer violates the Law when it unilaterally alters a condition of
24 employment involving a mandatory subject of bargaining without first bargaining with the
25 exclusive collective bargaining representative to resolution or impasse. School

¹³ Article IV, Management Rights, of the parties' collective bargaining agreement provides:

The Municipal Employer shall not be deemed to be limited in any way by this Agreement in the performance of the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including, without limitation, the exclusive right of the Police Commissioner to issue reasonable rules and regulations governing the conduct of the Police Department, provided that such rules and regulations are not inconsistent with the express provisions of this Agreement.

The remainder of the collective bargaining agreement, which contains the "express provisions of this Agreement," was not submitted into evidence at the hearing.

¹⁴ In addition to Carroll, the record identifies three of these employees as lieutenants assigned to Operations. The record contains no information beyond the names of the remaining twelve employees, and the record does not disclose why sixteen employees received the email if there are twelve supervisors assigned to Operations.

1 Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). An
2 employer's duty to bargain before changing conditions of employment extends not only
3 to actual contract terms, but also to working conditions that have been established
4 through custom and past practice. City of Boston, 16 MLC 1429, 1434, MUP-6697
5 (December 19, 1989) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March
6 18, 1983)). To establish a violation, a union must show that: 1) the employer changed
7 an existing practice or instituted a new one; 2) the change impacted a mandatory
8 subject of bargaining; and 3) the employer implemented the change without prior notice
9 or an opportunity to bargain. Commonwealth of Massachusetts v. Labor Relations
10 Commission, 404 Mass. 124, 127 (1989).

11 Here, the City implemented a change without giving the Union prior notice and an
12 opportunity to bargain to resolution or impasse. Effective October 17, 2016, the
13 Department implemented the Guidelines, which placed restrictions on consuming food
14 and drink in Operations that did not previously exist. The City implemented the
15 Guidelines without providing notice to the Union, and the City refused the Union's
16 November 8, 2016 bargaining demand. Accordingly, the outcome turns on whether the
17 Guidelines impacted a mandatory subject of bargaining.

18 Mandatory Subject of Bargaining

19 The Commonwealth Employment Relations Board (CERB) has consistently held
20 that certain amenities provided by an employer at the workplace amount to benefits on
21 which employees may rely as conditions of employment and which constitute
22 mandatory subjects of bargaining. Town of Shrewsbury 28 MLC 44, 45, MUP-1704
23 (June 29, 2001). In Town of Shrewsbury, the town implemented, as part of a renovation

1 project, a new locker policy that, among other things, prohibited its police officers from
2 storing food in their lockers. Overturning a hearing officer's decision that no change had
3 occurred, the CERB held that the new locker policy constituted a change, and
4 concluded that the manner in which lockers may be used is a benefit amounting to a
5 condition of employment that constitutes a mandatory subject of bargaining. Id.

6 In City of Boston, 16 MLC 1086, MUP-6431 (July 12, 1989), the CERB affirmed a
7 hearing officer's decision holding that the City violated the Law when the Deer Island
8 House of Correction unilaterally changed the conditions under which it served
9 institutional meals to employees, who could not leave the premises during their meal
10 breaks, by closing their dining area and unilaterally discontinuing the practice of
11 allowing them to receive alternative menu items and additional servings of meals.
12 Relying on Ford Motor Co. v. National Labor Relations Board, 441 U.S. 488 (1979), the
13 hearing officer reasoned that the employees' inability to leave the premises during their
14 lunch break increased the significance of the location and availability of food as a
15 bargainable condition of employment.¹⁵ City of Boston, 15 MLC 1209, 1214, 1216,
16 MUP-6431 (October 19, 1988).

17 In City of Peabody, 9 MLC 1447, MUP-4750 (November 17, 1982), the city
18 violated the Law when it unilaterally changed the police officers' lunch period from 12:00
19 pm through 1:30 pm to 11:00 am through 2:00 pm, and ordered when the officers could
20 eat their lunch. Id. at 1452. By changing the beginning of the lunch hour and requiring

¹⁵ In affirming the Seventh Circuit's upholding of a decision of the National Labor Relations Board that in-plant food services and prices are mandatory subjects of bargaining, the Supreme Court noted that the Seventh Circuit was "particularly influenced by the lack of reasonable eating alternatives for employees." Ford Motor Co., 441 US at 494.

1 that two officers eat lunch an hour earlier than officers had previously eaten lunch, the
2 city made a change that affected working hours within the work day. Thus, the CERB
3 held that the scheduling of the lunch period was a mandatory subject of bargaining. Id.

4 On the other hand, a distinction must be drawn between those amenities which
5 are of deep concern to employees and those amenities which are simply a
6 convenience. Commonwealth of Massachusetts, 22 MLC 1441, 1442-1443, SUP-3893
7 (January 11, 1996) (decision to cease providing refrigerated, bottled water for
8 employees did not violate the Law). In City of Boston, 9 MLC 1021, MUP-4316 (May
9 28, 1982), the CERB overruled a hearing officer's decision that because eating in the
10 cafeteria at Boston City Hospital was "safer, cheaper, more convenient and less time
11 consuming" than eating elsewhere, a reduction in those cafeteria hours violated the
12 Law. According to the CERB, the unilateral reduction in cafeteria hours did not violate
13 the Law where food services remained reasonably available at all hours of the day and
14 night. Id. at 1024.

15 None of these cases, or any other cases that the parties cite, address the issue
16 here, which is whether the Department must bargain prior to restricting the on-duty
17 consumption of food by superiors officers in Operations. To determine whether a topic
18 is a mandatory subject of bargaining, the CERB balances the interest of employees in
19 bargaining over a particular subject with the interest of the public employer in
20 maintaining its managerial prerogatives; and the CERB will consider such factors as the
21 degree to which the topic has a direct impact on terms and conditions of employment,
22 whether the issue involves a core governmental decision, or whether it is far removed
23 from terms and conditions of employment. Town of Danvers, 3 MLC 1559, 1577, MUP-

1 2292, 2299 (April 6, 1977). Phrased differently, the CERB must balance the competing
2 interests by determining whether the predominant effect of a decision is directly upon
3 the employment relationship, with only a limited or speculative impact on core
4 managerial policy, or whether the predominant effect is upon the level or types of
5 governmental services, with only a side effect upon employees. Boston School
6 Committee, 3 MLC 1602, 1607, MUP-2541 (April 15, 1977); City of Boston, 15 MLC at
7 1212.

8 The Union argues that the Guidelines impact a mandatory subject of bargaining
9 because the ability to eat and drink on-duty in Operations without limitation is an
10 unrestricted benefit that was particularly convenient for the superiors, who are not
11 guaranteed a break during their shift. Additionally, the Union argues that the Guidelines
12 impact supervision on the Operations floor; and also impact when, where and if the
13 superiors have the opportunity to eat during their shift. The Union also argues that the
14 Guidelines affect a mandatory subject of bargaining because policies that provide for the
15 discipline of employees who violate them are mandatory subjects of bargaining.

16 The City argues that no legal precedent exists for finding restrictions on
17 consuming food and drink at one's desk or in the workplace to be mandatory subjects of
18 bargaining. According to the City, the impact of the Guidelines on the superior officers
19 is *de minimis*. In the alternative, the City argues that its interest in maintaining its
20 managerial prerogative under this factual scenario outweighs any impact on the
21 superior officers' terms and conditions of employment.

22 The evidence does not persuade me that the Union's interest in bargaining over
23 the Guidelines outweighs the Department's interest in managing Operations. The

1 Union's only witness acknowledged in her testimony that the impact was one of
2 convenience: "Now I have to make sure there's... enough supervisors around, grab my
3 granola bar and walk down to the breakroom, eat my granola bar and come back. It's
4 just inconvenient." The evidence establishes that this testimony exaggerates the impact
5 of the Guidelines, as the Department has made the Conference Room available to the
6 superior officers and it is within fifteen feet of the Platform. Additionally, the Guidelines
7 do not even prohibit the consumption of food on duty, but only restrict where the
8 superior officers may eat while on duty.

9 The Union argues that the superior officers must eat on duty because they are
10 not guaranteed a break during their shift, but the evidence again does not support the
11 Union's position. Although Carroll testified that the supervisors do not "really" take
12 scheduled breaks, they are nevertheless entitled to one, and in its post-hearing brief the
13 Union twice contradicts Carroll's testimony on this point: "Previously, Operations
14 employees could freely eat, snack or drink freely while they worked and then use their
15 breaks for personal errands or activities other than eating," and "Employees also could
16 be free to use their break for personal errands, instead of eating."¹⁶ Accordingly, the
17 Union directly contradicts its own position.

18 The Union also argues that the Guidelines impact supervision on the floor, and
19 impact when, where and if the supervisors get to eat during their shift. The evidence
20 does not support this position. The Union offered no evidence that the Guidelines have
21 caused any employee to go hungry at work, and there is no evidence that they impact
22 supervision in Operations, where three supervisors are regularly assigned and two must

¹⁶ These cited passages appear on pages 10 and 13, respectively.

1 be on the floor at all times. Moreover, as already observed, the supervisors remain
2 entitled to a break, and may still consume food while on duty as long as they do so in a
3 designated location. Thus, the evidence on this point further establishes that the impact
4 of the Guidelines is one of simple convenience.

5 The Union further argues that the Guidelines affect a mandatory subject of
6 bargaining because policies that provide for discipline are mandatory subjects of
7 bargaining. To support its position the Union cites City of Lowell, 28 MLC 126, MUP-
8 2299 (October 10, 2011), and City of Peabody, *supra*. City of Lowell involved a
9 unilaterally promulgated domestic violence policy that expressly mandated a reporting
10 requirement, detailed a disciplinary penalty, and specified that the policy could be
11 considered in making determinations of promotions. City of Lowell, 28 MLC at 128.
12 City of Peabody is completely inapposite because it involved the elimination of lunch
13 overtime and a change to the lunch period during the work day, not discipline related to
14 any promulgated policy. City of Peabody, 9 MLC at 1449-1452. The Guidelines restrict
15 the location where on-duty employees can eat, and do not provide for discipline.
16 Accordingly, the Union's reliance on this principle is misplaced.¹⁷

17 The stated objective of the Guidelines, which were issued in response to a
18 complaint about the unsanitary nature of Operations that included employees being
19 bitten by insects while working, is to ensure that "critical equipment" remains "clean and

¹⁷ I note that the Union's theory would transform any and all enforceable rules into mandatory subjects of bargaining.

1 free from debris,” and to avoid attracting rodents and pests.¹⁸ Regardless of whether it
2 could have or should have addressed this issue sooner, the Department has a
3 legitimate interest in achieving both objectives, and that interest outweighs any mere
4 inconvenience that may result to the supervisors by having to drink out of a spill-proof
5 container while they handle expensive electronic equipment, or walk across the hall to
6 eat while on duty.

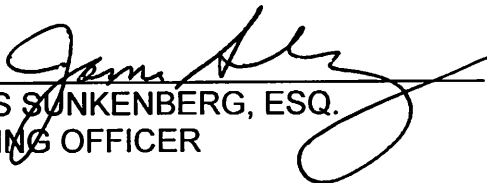
7 Finally, although the City does not expressly argue that Section 11 of Chapter
8 291 of the Acts of 1906, as amended (Commissioner’s Statute), vests it with the
9 managerial authority to promulgate the Guidelines, the Union argues, citing City of
10 Boston v. Boston Police Patrolmen’s Association, 41 Mass. App. Ct. 269 (1996), that,
11 “There can be no legitimate contention that the City’s action related to a non-delegable
12 authority regarding a core managerial function of the City or the Commissioner.” I
13 therefore note that in the cited case, the Appeals Court unambiguously stated that the
14 scope of Section 11 of the Commissioner’s Statute is sufficiently broad to include
15 decisions made solely to manage the “administration and disposition... of the
16 department.” Id. at 273. The Guidelines achieve precisely this result.

17 CONCLUSION

18
19 The Union did not prove that the Guidelines do more than inconvenience the
20 superior officers. Accordingly, the Union has not carried its burden of proving that the
21 Guidelines impacted a mandatory subject of bargaining, and I dismiss the Complaint.
22 SO ORDERED.

¹⁸ The Union repeatedly argues that the Guidelines only apply to Operations and not the whole Department. This is correct but irrelevant, as the complaint that precipitated the Guidelines pertained to Operations and not the whole Department or Headquarters.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 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 ten days, this decision shall become final and binding on the parties.