

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

In the Matter of:

CITY OF EVERETT

and

EVERETT FIREFIGHTERS, IAFF,
LOCAL 143

Case No. MUP-19-7133

Date issued: June 10, 2022

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Albert Mason, Esq.	-	For the City of Everett
Patrick Bryant, Esq.	-	For the Everett Firefighters, IAFF, Local 143

CERB RULING ON AMENDED PETITION FOR ENFORCEMENT

Summary

1 On August 27, 2021, the Commonwealth Employment Relations Board (CERB)
2 issued a final decision and order in the above-captioned case (CERB Order). The CERB
3 held that the City of Everett (City) violated Section 10(a)(5) and, derivatively, Section
4 10(a)(1) of M.G.L. c. 150E (the Law) by using an Assessment Center as the sole basis
5 for scoring and ranking candidates on an eligible list for promotion to Fire Chief without
6 bargaining to impasse or resolution with the Everett Firefighters, IAFF, Local 143 (Union)
7 over the impacts of that decision and the means and methods of implementing that
8 decision. The Union filed a petition for enforcement of the CERB Order on September 14,

1 2021, which it amended and re-filed on March 21, 2022. The CERB grants the Union's
2 Amended Petition, in part, and denies other portions, for the reasons set forth below.

3 Background

4
5 On September 21, 2020, a Department of Labor Relations (DLR) Hearing Officer
6 dismissed the Complaint in the above-captioned case, finding that the City did not violate
7 the Law as alleged. On August 27, 2021, the CERB issued the CERB Order, which
8 reversed the Hearing Officer's decision. In addition to a cease and desist order, the CERB
9 required the City to take the following action:

- 10 a. Rescind reliance on the eligibility list that resulted from the March
11 14, 2019 assessment center;
- 12 b. If, as a result of the [CERB's] Decision and Order, the City holds
13 a second assessment center for Fire Chief that awards additional
14 credit for in-title experience, applicants should be awarded
15 whatever additional credit they claimed, or that they would have
16 been entitled to claim, in their application for the March 14, 2019
17 assessment center.
- 18 c. Upon request, bargain in good faith with the Union to resolution
19 or impasse about the impacts and means and methods of
20 implementing the City's decision to use an assessment center as
21 the sole basis for scoring and ranking candidates on an eligible
22 list for promotion to Fire Chief.
- 23 d. Post immediately in all conspicuous places where members of
24 the Union's bargaining unit usually congregate, or where notices
25 are usually posted, including electronically, if the City customarily
26 communicates with these unit members via intranet or email, and
27 display for a period of thirty days thereafter signed copies of the...
28 Notice to Employees[.]

29
30 The City filed a timely notice of appeal of the CERB Order on September 1, 2021.¹

31 The City has not filed a motion to stay the CERB Order with either the CERB or the
32 Appeals Court.

¹ The City's appeal is currently pending before the Massachusetts Appeals Court.

1 On September 2, 2021, the City e-mailed the Union and the DLR stating that the
2 posting required in the CERB Order “is being and will be accomplished.” The City also
3 stated that it would bargain the impact issues set forth in the order. The City further
4 indicated, however, that Fire Chief Anthony Carli’s (Carli) permanent status would not be
5 returned to “acting status,” because the decision to make Carli the permanent Fire Chief
6 was made after the Hearing Officer’s decision and prior to the CERB Order.

7 On September 14, 2021, the Union filed a Petition for Enforcement (Petition) of the
8 CERB Order pursuant to 456 CMR 16.08 alleging that the City failed to comply with that
9 order. The Union asserted, among other things, that the City’s refusal to rescind Carli’s
10 promotion to permanent Fire Chief violated the CERB Order. The City failed to file a
11 response with the DLR within ten days of being served with the Union’s Petition as
12 required under 456 CMR 16.08(2).

13 On October 6, 2021, the DLR sent the City a Show Cause Order (October 6, 2021
14 Show Cause Order), asking the City to show cause, within seven days, why the DLR
15 should not initiate proceedings to enforce the CERB’s order. Among other things, the
16 DLR’s October 6, 2021 Show Cause Order stated that the CERB had ordered the City to
17 “[r]escind reliance on the eligibility list that resulted from the March 14, 2019 assessment
18 center, including rescinding Anthony Carli’s permanent promotion to Fire Chief and
19 restoring him to Acting Chief.”

20 By e-mail on October 16, 2021, the City responded to the October 6, 2021 Show
21 Cause Order. The City asserted that the DLR’s October 6, 2021 Show Cause Order
22 contained a different version of the CERB Order. The City contended that the CERB Order
23 did not require the City to rescind Carli’s permanent promotion to Fire Chief and restore

1 him to Acting Chief, as the October 6, 2021 Show Cause Order stated. Without specificity,
2 the City stated that it otherwise complied with the CERB Order.

3 By e-mail on October 26, 2021 to the DLR, the City raised again that the CERB
4 Order did not require it to rescind Carli's permanent promotion to Fire Chief and restore
5 him to Acting Chief. Further, the City stated that Carli had resigned from employment with
6 the City.² The City also stated that it had rescinded the eligibility list and would impact
7 bargain. On October 27, 2021, the City e-mailed the DLR to state that the City is in
8 compliance with the posting because it posted the notice in City Hall on a bulletin board
9 outside the City Clerk's office where the City usually posts its notices.

10 By e-mail to the DLR on February 23, 2022, the Union provided additional
11 information and continued to seek enforcement action. Based on the Petition and the
12 February 23, 2022 e-mail, on March 11, 2022, the DLR sent a letter to the Union (DLR
13 March 11, 2022 letter) requesting that it file an amended Petition for Enforcement to clarify
14 the Union's current position. The Union filed its Amended Petition for Enforcement on
15 March 21, 2022 (Amended Petition) with the DLR and copied the City on the filing.

16 The Union's Amended Petition asserted that the City failed to comply with the
17 CERB Order in four ways. First, the City refused to rescind its reliance on the eligibility
18 list generated from the March 2019 assessment center, including refusing to rescind
19 Carli's permanent promotion to Fire Chief. The Union stated that the City only
20 accomplished rescission of reliance on the eligibility list because Carli had resigned.
21 Second, the City has insisted that eligibility for the Assessment Center promotional

² Neither party stated exactly when Carli resigned. However, the statement of facts in the Amended Petition indicates that another provisional Fire Chief was appointed, presumably following Carli's resignation, prior to a meeting on September 30, 2021.

1 procedure not be limited to individuals eligible for the March 2019 Assessment Center.
2 The Union asserted that any expansion of eligibility beyond those eligible for the March
3 2019 Assessment Center violates the status quo ante order by the CERB, because it
4 allows candidates not eligible for the March 2019 process to benefit from the City's
5 violation. Third, the City delayed in determining whether it would hold a second
6 Assessment Center as the method to fill the Fire Chief vacancy, thereby failing to bargain
7 in good faith in violation of paragraphs 2(b) and (c) of the CERB Order. Lastly, the City
8 violated the aspect of the CERB Order requiring it to post the Notice to Employees where
9 bargaining unit members usually congregate, or where notices are usually posted,
10 including by e-mail. The Union stated that the City posted only in City Hall, which is
11 insufficient because bargaining unit employees, comprised of firefighters, do not normally
12 congregate at City Hall or work there. Bargaining unit members work at one of the three
13 assigned stations.

14 In its March 11, 2022 letter, the DLR informed the City that it would have ten days
15 from receipt of the Union's Amended Petition to respond to the Amended Petition. The
16 City failed to file a response pursuant to 456 CMR 16.08(2), as it was advised to do in the
17 DLR's March 11, 2022 letter.³ The DLR sent the City another Show Cause Order on April
18 4, 2022 (April 4, 2022 Show Cause Order).

³ The DLR's Regulations, 456 CMR 16.08(2), require the City to stipulate that the information in the Amended Petition is accurate, or if it is contended that the information is not accurate, to provide an explanation of the nature of any alleged inaccuracy and the reasons therefor. Such reasons must be supported by affidavits made by individuals with personal knowledge, signed under the pains and penalties of perjury, specifying the steps taken to fully comply with CERB's order or portions thereof.

1 In response to the April 4, 2022 Show Cause Order, the City filed a response on
2 April 7, 2022.⁴ The City again alleged that the October 6, 2021 Show Cause Order, which
3 referenced rescinding Carli's permanent promotion to Fire Chief and restoring him to
4 Acting Chief, altered the language of the CERB Order. In its response, the City included
5 a copy of its September 2, 2021 and October 26, 2021 e-mails described above. On April
6 8, 2022, the City e-mailed additional documents to the DLR. One document was a copy
7 of an e-mail from the Civil Service Commission dated September 24, 2021, confirming
8 that the 2019 Everett Fire Chief eligibility list had been revoked. The second document
9 was a copy of e-mail correspondence between the City and the Union scheduling impact
10 bargaining sessions pursuant to the City's decision to use an Assessment Center again
11 to fill the Fire Chief vacancy, including a March 9, 2022 e-mailed confirmation that a
12 meeting was scheduled to discuss the topic on April 13, 2022.

13 Ruling

14 Failure to Rescind Eligibility List

15 Paragraph 2(b) of the CERB Order required the City to "[r]escind reliance on the
16 eligibility list that resulted from the March 14, 2019 assessment center." The City
17 repeatedly challenged the meaning of this order, asserting that the CERB Order did not
18 require it to rescind Carli's permanent promotion to Fire Chief. However, the City's
19 interpretation ignores the CERB's discussion of the appropriate remedy in the body of its
20 August 27, 2021 Decision and Order. There, the CERB explained that "restoring the
21 status quo ante here means that if Carli has since been promoted to Fire Chief, the

⁴ The City's response did not contain affidavits or other statements signed under the pains and penalties of perjury pursuant to 456 CMR 16.08(2), to dispute the information the Union alleged in its Amended Petition.

1 promotion should be rescinded, and Carli should resume serving as Acting Chief.”
2 Accordingly, the City’s insistence that the CERB Order did not require it to rescind the
3 promotion is erroneous and violates the Order. Although the City’s April 8, 2022
4 submission demonstrates that it requested, and accomplished, rescission of the March
5 2019 Eligibility List with the Civil Service Commission, and Carli subsequently resigned,
6 thereby obviating the need for the City to rescind his promotion, we do not regard the
7 matter as moot because there is the possibility that the City’s conduct could recur. See
8 Town of Dennis, 30 MLC 119, MUP-01-2976 (February 12, 2004) (where town’s conduct
9 strongly suggested that it “failed to fully understand its obligation to comply with both the
10 letter and the spirit of the CERB’s order,” but later was found to be in full compliance,
11 CERB issued a supplemental order requiring town to cease and desist from not complying
12 with CERB orders). Thus, we find that the City failed to comply with the CERB’s order to
13 rescind Carli’s promotion and return him to acting status. We will not now, however,
14 require the City to do so based on the specific facts and circumstances surrounding Carli’s
15 resignation after the August 27, 2021 CERB Order issued.

16 Refusal to Limit Applicants

17 The Union asserted that the CERB Order to restore the status quo ante included
18 restricting eligibility for a new Assessment Center to only those eligible for the March 2019
19 Assessment Center. The City did not admit or deny the Union’s allegation that the City
20 insisted on expanding those employees who were eligible to participate in a new
21 Assessment Center beyond those who were eligible to participate in the March 2019
22 Assessment Center. We therefore cannot assess the accuracy of the Union’s assertion.
23 We nevertheless clarify this aspect of the CERB Order to assist the parties going forward.

1 In its decision, the CERB agreed with the Union that “an order to restore the status
2 quo ante includes rescinding any reliance on the promotional process that resulted in the
3 current list is appropriate here.” We explained that this would include rescinding Carli’s
4 permanent promotion to Fire Chief. We further specified that “should the City decide, and
5 obtain the appropriate approvals...to conduct a second assessment center to establish
6 an eligibility list, all applicants, including Carli, should be awarded whatever additional
7 credit for in-title experience they claimed or would have been entitled to claim in their
8 application for the March 14, 2019 assessment center.” The purpose of this aspect of the
9 CERB Order was to place all bargaining unit members who choose to participate in the
10 second Assessment Center in the position they would have been in had the first
11 Assessment Center never occurred. Contrary to the Union’s argument, this did not mean
12 limiting participation in a second Assessment Center only to those bargaining unit
13 members who participated in the first Assessment Center. Rather, we specified only that
14 *if a second Assessment Center awarded credit for in-title experience*, then, consistent
15 with the order to rescind reliance on the eligibility list that resulted from the *first*
16 assessment center, any applicant who served as Acting Chief or Chief in the period
17 between the first and second Assessment Centers would not receive credit for that in-title
18 experience. See Town of Norwell, 16 MLC 1575, MUP-6962 (H.O. February 21, 1990)
19 aff’d 18 MLC 1263 (January 22, 1992) (as part of remedy for employer’s violation of past
20 practice of considering all officers who were on the civil service list in selection process
21 for acting sergeant, CERB ordered town to refrain from rewarding officer for his service
22 as acting sergeant made pursuant to the violation). With this clarification, we dismiss this
23 aspect of the Amended Petition.

1 Refusal to Bargain in Good Faith

2 The Union argued that the City violated the Order by a “dilatatory and unexcused
3 delay” both in filling the Fire Chief vacancy and in announcing that it planned to fill the
4 vacancy by using an Assessment Center. As stated above, the CERB Order required the
5 City to “[u]pon request bargain in good faith with the Union. . . about the impacts and
6 means and methods of implementing the City’s decision to use an assessment center.”
7 The order, however, contained no timeline for the City’s decision or subsequent
8 bargaining. Further, although there appears to be a dispute over whether the City made
9 the decision in November 2021 or late February/ early March 2022,⁵ on March 9, 2022,
10 the parties agreed to meet in mid-April regarding the proposed Assessment Center.
11 Based on this agreement, and in the absence of any deadline to commence bargaining,
12 there is insufficient evidence to conclude that City violated the CERB Order by refusing
13 to bargain in good faith with the Union.⁶

14 Failure to Comply with Posting

15 The CERB Order required the City to post a notice “immediately in all conspicuous
16 places where members of the Union’s bargaining unit usually congregate, or where
17 notices are usually posted.” The City posted the Notice to Employees only at City Hall.

⁵ The Union contends that the Mayor announced in November 2021 that the City would use an Assessment Center; according to e-mails that the City sent to the DLR on April 8, 2022, the City made its decision to use an Assessment Center again in late February/early March 2022.

⁶ Our dismissal of this aspect of the enforcement petition is without prejudice to the Union filing a new petition should the City subsequently fail to bargain in good faith regarding the mandatory topics identified in the CERB Order. See City of Boston, 44 MLC 56, MUP-10-5895 (Aug 30, 2017) (addressing through compliance proceeding whether employer had met its obligation to bargain in good faith).

1 The Union alleged, and the City did not dispute, that bargaining unit employees do not
2 typically congregate at City Hall. Rather, bargaining unit employees, firefighters, typically
3 congregate at the three fire stations. We agree with the Union that posting only at City
4 Hall does not comply with the CERB Order. See Commonwealth of Massachusetts, 29
5 MLC 49, SUP-4514 (Aug. 29, 2002) (finding that the employer's posting at one
6 correctional facility where some unit employees usually congregate was insufficient and
7 requiring the employer to post at all facilities where employees usually congregate);
8 Massachusetts Department of Transportation, 45 MLC 5, SUP-14-3576, SUP-14-3640
9 (Aug. 21, 2018) (requiring the employer to post in additional places where unit employees
10 usually congregate and where notices to those employees are usually posted).

11 Conclusion

12 For the reasons set forth above, we find that the City has not fully complied with
13 the CERB Order but dismiss other aspects of the petition for enforcement. We therefore
14 issue the following Supplemental Order.

15 Supplemental Order

16 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City of Everett
17 shall:

18 1. Cease and desist from:

19 a. Failing to comply with CERB Orders in good faith.
20

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

22 a. Post immediately in all conspicuous places where members of the
23 Union's bargaining unit usually congregate, including, but not limited to
24 the City's three fire stations, and electronically if the Employer
25 customarily communicates to its employees via intranet or email, and
26 maintain for a period of thirty (30) consecutive days thereafter, signed

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copies of the Notice to Employees that the CERB ordered it to post on August 27, 2021.

- b. Post immediately in all conspicuous places where members of the Union’s bargaining unit usually congregate, including, but not limited to the City’s three fire stations and electronically if the Employer customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Supplemental Notice to Employees
- c. Notify the CERB in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

MARJORIE F. WITTNER, CERB CHAIR

Joan Ackerman

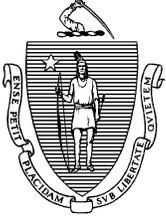
JOAN ACKERSTEIN, CERB MEMBER

Kelly Strong

KELLY STRONG, 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



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

SUPPLEMENTAL 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 determined that the City of Everett has failed to comply with certain aspects of the Order that the CERB issued on August 27, 2021, in Case No. MUP-19-7133. The City of Everett posts this Supplemental Notice to Employees to comply with the CERB's compliance order.

WE WILL NOT fail to comply with CERB Orders in good faith.

WE WILL COMPLY with the CERB's decision in Case No. MUP-19-7133 by posting and displaying for thirty days in all conspicuous places where members of the Union's bargaining unit usually congregate, including, but not limited to the City of Everett's three fire stations, and including electronically, if the City customarily communicates with the unit members via intranet or email, signed copies of the Notice to Employees that the CERB ordered it to post on August 27, 2021

City of Everett

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 dirtied to the Department of Labor Relations, Lafayette City Center, 2 Ave. de Lafayette, Boston, MA 02111. (Telephone: (617)626-7132).