

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of: *

CITY OF EVERETT *

and *

EVERETT FIREFIGHTERS, IAFF, LOCAL 143 *

Case Number: MUP-19-7133

Date Issued: September 21, 2020

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Albert Mason, Esq. - Representing City of Everett

Patrick N. Bryant, Esq. - Representing Everett Firefighters, IAFF, Local 143

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Everett (City) violated Section 10(a)(5)
2 and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the
3 Law) by deciding to use an assessment center as the sole basis for scoring and ranking
4 candidates on an eligible list for promotion to Fire Chief without bargaining to impasse or
5 resolution with the Everett Firefighters, IAFF, Local 143 (Union) over the impacts of that
6 decision on bargaining unit members' terms and conditions of employment. Based upon
7 the record, and for the reasons explained below, I find that the City did not violate the
8 Law.

9 STATEMENT OF CASE

1 On February 1, 2019, the Union filed a charge of prohibited practice (Charge) with
2 the Department of Labor Relations (DLR) alleging that the City had violated Section
3 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On April 17, 2019, a DLR
4 Investigator investigated the Charge and allowed the Union to amend the Charge to
5 include allegations that the City had violated Sections 10(a)(3) and 10(a)(4) of the Law.
6 On May 23, 2019, the Investigator issued a Complaint of Prohibited Practice and Partial
7 Dismissal (Complaint) alleging that the City had violated Section 10(a)(5) and,
8 derivatively, Section 10(a)(1) of the Law by failing to bargain over the impacts of its
9 decision to use an assessment center as the sole basis for scoring and ranking
10 candidates on an eligible list for promotion to Fire Chief. The Investigator dismissed the
11 Union's allegation that the City violated the Law by failing to bargain over the decision to
12 use an assessment center and also dismissed the Union's allegations that the City
13 violated Sections 10(a)(3) and 10(a)(4) of the Law. The Union did not appeal the
14 dismissed allegations. On May 30, 2019, the City filed Respondent City of Everett's
15 Response to Issued Complaint and Renewal of Motion to Dismiss or in the Alternative for
16 Judgment on the Pleadings of Summary Judgment.¹ On November 20, 2019, I conducted
17 a hearing during which the parties received a full opportunity to be heard, to examine and
18 cross-examine witnesses, and to introduce evidence. On January 24, 2020, the parties
19 filed post-hearing briefs.

20

STIPULATIONS OF FACT

- 21 1. The City is a public employer within the meaning of Section 1 of the Law.
22
23 2. The Union is an employee organization within the meaning of Section 1 of the Law.
24

¹ I deferred ruling on the City's motion. I have considered the City's arguments in issuing this decision.

- 1 3. The Union is the exclusive bargaining representative of all firefighters employed
2 by the City, except for the Chief.
3
- 4 4. Prior to 2019, the promotional process for the position of Chief did not include an
5 assessment center.
6
- 7 5. On February 21, 2018, the City chose the Sole Assessment Center/In-Title
8 Experience Only as the process to select [a] Fire Chief, subject to inclusion within
9 the delegation agreement.
10
- 11 6. On May 14, 2018, the City sent a letter notifying the Union that it was contemplating
12 using an assessment center to hire a non-union Fire Chief.
13
- 14 7. In the May 14, 2018 letter to the Union, the City stated that it was willing to meet
15 and discuss any thoughts, concerns, or proposals from the Union and for the Union
16 to provide those comments, questions or proposals to the City by May 31, 2018.
17
- 18 8. On or about May 21, 2018, the City entered into a Delegation Agreement with HRD
19 to use an assessment center in the selection of a Fire Chief.
20
- 21 9. On May 31, 2018, the Union sent the City a letter explaining that it believed that
22 the Commonwealth's Human Resources Division (HRD) would be offering both
23 written examinations and an assessment center as options for the upcoming Fire
24 Chief examination. The Union requested that the City contact HRD to confirm this
25 option for either a written examination or an assessment center.
26
- 27 10. The Union's letter further requested that after contacting HRD, if the City still
28 wanted to administer an assessment center that it contact the Union so it could
29 arrange a meeting.
30
- 31 11. After the Union's May 31, 2018 letter, there were no further communications
32 between the Union and the City about the assessment center for the Fire Chief
33 position.
34
- 35 12. The Fire Chief position is a managerial position within the meaning of Section 1 of
36 the Law.
37
- 38 13. The Delegation Agreement states that the Everett Fire Department has chosen to
39 utilize a delegated Assessment Center for the selection process of Fire Chief. With
40 the exception of additional points as required by statute or rule, this delegated
41 selection process for Fire Chief will be used as the sole basis for scoring and
42 ranking candidates on an eligible list.
43

1 14. In January 2019, the City signed an updated delegation agreement with HRD.
2

3 15. On January 31, 2019, the City posted a notice inviting applications for the “Everett
4 Fire Chief Assessment Center.”
5

6 16. The City took the actions described in paragraphs 14 and 15 without bargaining to
7 impasse or resolution over the impacts of the decision to use an assessment
8 center as the sole basis for scoring and ranking of candidates on an eligible list for
9 promotion to Fire Chief on bargaining unit members’ terms and conditions of
10 employment.
11

12 17. Human Resources Division provides six months’ notice prior to examinations for
13 fire career ladder positions of the reading list.

14 FINDINGS OF FACT

15 General Background

16 Promotions in the Everett Fire Department (Department) occur in accordance with
17 the Civil Service law, Chapter 31 of Massachusetts General Laws.² Approximately 95
18 firefighters currently work for the Department. The Union represents firefighters in the
19 ranks of Private, Lieutenant, Captain, and Deputy Chief. There are seven Deputy Chiefs,
20 including Anthony Carli (Carli), who has been the Provisional Chief since he was
21 promoted to that position in 2016 upon the resignation of the prior Chief.³ At a City Council
22 meeting in June 2016, the Mayor expressed his desire to select Carli to become the
23 permanent Chief once an eligible list was established.

24 Carli began working for the Department as a Private in or around May 2000. He
25 ascended the ranks, becoming a Deputy Chief in or around February 2015. Some of the

² Article 5.1 of the parties’ collective bargaining agreement provides that, “The City agrees to appoint and promote in accordance with Civil Service law and rules.”

³ At that time, no Civil Service eligible list existed from which to appoint a permanent Fire Chief.

1 Deputy Chiefs have more seniority than Carli. For example, Michael Ragucci (Ragucci)
2 has thirty-one years with the Department, was promoted through the ranks, and has been
3 a Deputy Chief for fifteen years. Additionally, the Deputy Chiefs possess varying levels
4 of education. Carli has some college education, Ragucci holds numerous certifications
5 but no college education, and at least two Deputy Chiefs have a college education.

6 Prior to the events at issue in this matter, the City utilized the “80/20” scoring
7 method to establish eligible lists for promotions in the Department, with a written
8 examination comprising eighty percent of a candidate’s score and education and
9 experience comprising the remaining twenty percent.⁴ Written Civil Service examinations
10 require extensive preparation. Reading lists for these written examinations are posted
11 six months prior to the written examination, with private preparation courses also
12 available.⁵

13 Requisition and Delegation Agreement

14 In or around January 2018, the City, with Carli involved, began the process to use
15 an assessment center to establish an eligible list for promotion to Fire Chief as an
16 alternative to the written examination. An assessment center evaluates a candidate for
17 promotion based upon the candidate’s performance on various exercises. No reading
18 lists are announced prior to the assessment center. This process required the City to
19 select a third-party vendor to conduct the assessment center, and to enter into a

⁴ Although the three witnesses at the hearing agreed on this point, the record does not contain any specific information – for example, dates – regarding any prior examinations within the Department, let alone any prior examinations for Fire Chief.

⁵ As of the date of the hearing, HRD had not offered a written examination for Fire Chief since Carli was promoted to Provisional Chief.

1 Delegation Agreement with HRD, whereby HRD would delegate to the City's Human
2 Resources Department certain authority pertaining to the selection process for Fire
3 Chief.⁶

4 On or around January 24, 2018, Carli notified Michael Vetrano (Vetrano), the City's
5 Human Resources Director, that Carli would "start the delegation agreement now through
6 civil service." By email on January 25, 2018, Carli forwarded a Delegation Agreement to
7 Vetrano for Vetrano to sign on behalf of the City. Vetrano forwarded the Delegation
8 Agreement to Colleen Mejia (Mejia), the City Solicitor, with a Cc: to the Mayor, to confirm
9 that "it is ok for me to sign." On February 7, 2018, Mejia authorized Vetrano to sign the
10 Delegation Agreement on behalf of the City.

11 By email on February 8, 2018, Carli received notification from HRD's Civil Service
12 Unit that the Delegation Agreement could not move forward until the City submitted "an
13 official requisition to the Civil Service department for the rank of Fire Chief."⁷ Carli
14 forwarded this email to Vetrano and asked Vetrano to handle it. On or around February
15 14, 2018, Vetrano indicated that the requisition was "done."

16 Upon receipt of the requisition, HRD asked Vetrano by email on February 21, 2018,
17 to specify the "format of open competitive examination you are requesting" and presented
18 Vetrano with the City's four options: 1) HRD's written examination and Education and
19 Experience; 2) HRD's written exam, vendor created Assessment Center, and Education
20 and Experience; 3) Vendor created Assessment Center (sole Assessment Center) and

⁶ Carli did not select the vendor.

⁷ Section 1 of M.G.L. c. 31 defines "requisition" as: "a request by an appointing authority to the administrator to certify names of persons for appointment to civil service positions."

1 Education and Experience; and 4) Vendor created Assessment Center (sole Assessment
2 Center) and In-Title Experience. Vetrano then consulted with Carli, who told him to
3 choose option 4, which Vetrano did.⁸

4 On February 22, 2018, HRD sent a Delegation Agreement (Second Delegation
5 Agreement) to Vetrano to sign and return to HRD. After some confusion, Vetrano
6 executed the Second Delegation Agreement on March 5, 2018.⁹

7 Notice of Contemplated Use of Assessment Center for Hiring Chief

8 On May 14, 2018, the Union issued a notice to its membership stating that,
9 “President Hardy was notified today by the PFFM President...who received notification
10 from Civil Service that there will be a written Chief’s Exam to be held in March 2019.” The
11 Union also made these representations to Carli and Mejia. Later that day, Mejia wrote an
12 email to Carli, Vetrano, the Mayor’s Chief of Staff, and the Mayor, stating, in relevant part,
13 that: “I’m not sure how reliable the information is, but I wanted to let this group know in
14 light of the City’s contemplation of using an assessment center to hire a new chief.”
15 Shortly thereafter, Carli responded, in relevant part:

16 I feel strongly we should still move forward with the assessment center as I have
17 been temporary for 2 years, and this is the current accepted process for the Chief’s
18 position. That’s fine that civil service is bringing the written exam back in the future
19 but we have the vacancy now.¹⁰ Civil service regularly changes policy and testing

⁸ Carli testified that the City had already made this decision based upon a discussion in which he participated, and that he did not make the decision on his own. The Union disputes this testimony, but the initial Delegation Agreement, which the City authorized Vetrano to execute, includes “credit for employment or experience in the Fire Chief title.” Accordingly, I find no reason to discredit Carli’s testimony.

⁹ This Second Delegation Agreement is not in the record.

¹⁰ Carli believed that Civil Service would not soon be offering a written examination and that this was a “stall tactic” on the part of the Union to prevent the assessment center from moving forward.

1 procedures, I don't see why we should have to wait because the union feels it's
2 the best for the city. Have they contacted you about the impact of the assessment
3 center?
4

5 Mejia responded seeking approval from the Mayor's Office to "send the letter to
6 the Union." Carli responded that, "We should definitely send the letter soon," and the
7 Mayor's Chief of Staff then responded that, "The letter looks good, let's just get it out
8 there." Subsequently, by letter dated May 14, 2018, the City, through Mejia, issued a
9 letter to the Union that states:

10 Please be advised that the City is contemplating following the lead of civil service
11 of using an assessment center to hire a non-union chief.
12

13 The City is willing to meet to discuss any thoughts, concerns, or proposals that the
14 union may have. As such, please provide me with your questions, comments,
15 thoughts, concerns and/or proposals by May 31, 2018 and we will set up a time to
16 meet.
17

18 Third Delegation Agreement

19 On May 21, 2018, HRD notified Vetrano that, "In light of the changes to the
20 Assessment Center process we need to send out a new delegation agreement for your
21 Fire Chief Assessment Center." On May 22, 2018, Vetrano returned this Delegation
22 Agreement (Third Delegation Agreement) to HRD, and HRD returned the executed Third
23 Delegation Agreement to Vetrano on May 30, 2018.¹¹ Vetrano promptly forwarded the
24 Third Delegation Agreement to Carli.

25 Union Letter

26 By letter dated May 31, 2018, the Union, through Counsel, responded to the City's
27 May 14, 2018 letter, in relevant part, that:

¹¹ The Third Delegation Agreement is not in the record, but the email records establish that this was the first one that both the City and HRD executed.

1 While your letter seems to suggest that the Civil Service Commission is moving
2 towards using assessment centers as the sole examination mechanism for the Fire
3 Chief position, it is our understanding based on certain information that the Human
4 Resources Division is currently in the process of establishing both a written exam
5 and an assessment center as options for the upcoming Fire Chief exam. We are
6 of the belief that both a written exam and an assessment center will be offered by
7 HRD for the Fire Chief position during the early part of next year. We would
8 encourage you to reach out to HRD to confirm this information.

9
10 There has been a longstanding practice in Everett of administering a written exam
11 for the Fire Chief position and because HRD is planning to establish a written exam
12 for early next year, we see no reason for the City to offer an assessment center
13 this year. Because there is a long and historic practice favoring the use of written
14 exams for the Fire Chief position, we strongly suggest that you contact HRD before
15 contemplating a decision to use assessment centers. If after contacting HRD and
16 receiving the same information regarding the plan to administer a written exam
17 early next year you still want to administer an assessment center this year you can
18 contact Local 143 and at that time we can evaluate your request to meet.

19 20 Final Delegation Agreement

21 For unclear reasons, between January 9, 2019 and January 14, 2019, the City and
22 HRD executed a final, updated Delegation Agreement (Final Delegation Agreement). The
23 Final Delegation Agreement provides, in relevant part, that:

24 The Everett Fire Department has chosen to utilize a delegated Assessment Center
25 for the selection process for Fire Chief. With the exception of additional points as
26 required by statute or rule, this delegated selection process for Fire Chief will be
27 used as the sole basis for scoring and ranking candidates on an eligible list.¹²

28
29 By email on January 15, 2019, HRD returned the Final Delegation Agreement to
30 the City. This email stated:

31 The next steps and time frames are listed below:

- 32
33 1. Let us know the planned date of the assessment center.

¹² At paragraph I.10, the Final Delegation Agreement provides that, "In-Title Experience will be added to the Assessment Center score to determine the final score. HRD will score the In-Title Experience credit."

- 1 2. Attach the **Public Safety Eligibility Form** to your requisition 6 weeks in
- 2 advance of the planned assessment center date. Towns will be invoiced at this
- 3 point in time.
- 4 3. The vendor will be required to e-mail us a completed **Vendor Assessment**
- 5 **Center Details Form** at least 6 weeks before the assessment center date.
- 6 4. Posters will be posted on our website 4 weeks before the assessment center
- 7 date. The poster will be up for 3 weeks.
- 8 5. Once the poster has been established, attach a copy of the **Examination**
- 9 **Announcement Posting Certificate** to the requisition confirming that all
- 10 eligible candidates have been notified of the examination.
- 11 6. Once the poster is closed, we will send a list of applicants to the town.
- 12 7. Assessment Center is administered and Scores are sent to HRD.
- 13 8. Following the statutory 7 day appeal period, scores will be e-mailed to
- 14 candidates.
- 15 9. Following the second statutory 17 day appeal period, and the resolution of all
- 16 (if any) appeals, the eligible list will be established.

18 Everett Fire Chief Sole Assessment Center

19 On January 31, 2019, the application period for the Everett Fire Chief Sole
 20 Assessment Center was announced.¹³ The examination was scheduled for March 14,
 21 2019 and was open to Deputy Chiefs in the Department. The posting provides that, "The
 22 Sole Assessment Center will be 100% of the final score," with individuals able to apply to
 23 receive credit, pursuant to M.G.L. c. 31, Section 22, for "employment or experience in the
 24 position title Fire Chief."

25 By letter dated February 8, 2019, Union counsel, on behalf of Deputy Chiefs
 26 Joseph Hickey, Lawrence Cardinale, and Ragucci, requested that the Civil Service
 27 Commission "investigate the newly-announced promotional procedures for Everett Fire
 28 Chief." The letter states, in relevant part:

29 The named petitioners are Deputy Chiefs eligible to participate for the Fire Chief
 30 Promotional process. They lack experience in the Chief title, unlike another

¹³ Human Resources informed Carli that the assessment center was moving forward approximately one week prior to the announcement.

1 Deputy Chief eligible to participate. The concern is that the City and/or HRD are
2 improperly setting criteria to favor or disfavor known or suspected promotional
3 applicants. We ask that the Commission commence an investigation.
4

5 At some point after the assessment center was announced, the vendor contacted
6 Carli about scheduling the orientation session for the candidates.¹⁴ The vendor held the
7 orientation session a few weeks prior to the assessment center to generally explain the
8 types of exercises that might comprise the assessment center. Carli was ultimately the
9 highest scoring candidate on the assessment center. Ragucci had a previously
10 scheduled family vacation during the week of March 14 and did not participate in the
11 assessment center. The Union's President attempted to observe the assessment center,
12 but the vendor did not allow him to stay.

13 By letter dated June 20, 2019, the Civil Service Commission denied the Union's
14 request to open an investigation. In relevant part, this letter states:

15 Four EFD Deputy Fire Chiefs completed and passed the Assessment Center. The
16 Acting Fire Chief received an over-all score of 86 (which included 2 points for
17 veteran's preference and 0.66 credit for his "in-title" service as a provisionally
18 appointed Acting Fire Chief). The scores of the other three Deputy Fire Chiefs
19 were 79, 75 and 70. At my request, HDR made several hypothetical calculations
20 which suggest that, whether an "In-Title only" or a more traditional E&E component
21 were used, the spread in the score of the Acting Fire Chief and the other
22 candidates is large enough that the Acting Fire Chief would still be ranked at the
23 top of any eligible list. Also, at my request, I have received and reviewed the
24 names and credentials of the four Assessment Center panelists.... Most have
25 served as panelists on dozens of Assessment Centers.
26

27 OPINION

28 The issue is whether the City violated the Law by using an assessment center to
29 establish an eligible list for promotion to the Department's Fire Chief, a managerial

¹⁴ Carli previously gave the vendor organizational and budgetary information, and at that time, the vendor told Carli that the vendor would deal directly with the City on any questions about the makeup of the assessment center because Carli was a candidate.

1 department-head position that the Law excludes from collective bargaining, without
2 bargaining to resolution or impasse with the Union about the impacts of this decision on
3 the bargaining unit members' terms and conditions of employment. Assuming, without
4 deciding, that impact bargaining is applicable to a public safety employer's decision
5 regarding a promotion to fire chief, I nevertheless conclude that the Union has failed to
6 prove by a preponderance of the evidence that the City's decision directly impacted a
7 mandatory subject of bargaining. Accordingly, I find no violation of the Law.

8 Promotional Procedures

9 A public employer violates Sections 10(a)(5) and (1) of the Law when it unilaterally
10 alters a condition of employment involving a mandatory subject of bargaining without first
11 bargaining with a union to resolution or impasse. School Committee of Newton v. Labor
12 Relations Commission, 388 Mass 557 (1983). An employer's obligation to bargain before
13 changing conditions of employment extends to working conditions established through
14 past practice, as well as those specified in a collective bargaining agreement.¹⁵ Town of
15 Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983). To establish a violation, a
16 union must demonstrate by a preponderance of the evidence that there was a pre-existing
17 practice, that the employer unilaterally changed that practice, and that the change

¹⁵ I note that the Union has not addressed such preliminary considerations as whether the procedures for promotion to a position that the Law excludes from collective bargaining can properly be considered a condition of employment, or whether an employer can bind itself to a past practice related to such procedures. On the other hand, the City argues that the Union cites no authority holding that a promotion to a public safety, confidential and managerial department-head position "is or has ever been declared" a working condition. Because I resolve the case on other grounds, I do not reach this issue.

1 impacted a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603,
2 1605, MUP-2503, 2528, 2541 (April 15, 1977).

3 Generally, the procedures for promotion are a mandatory subject of bargaining.
4 Town of Danvers, 3 MLC 1559, 1574-1576, MUP-2292, 2299 (April 6, 1977). In Town of
5 Danvers, the Commonwealth Employment Relations Board (CERB) expressed its view
6 that the possibilities of advancement in one's job and the manner in which such
7 advancement is obtained are inexorably intertwined with the nature of an employee's
8 career. Id. at 1575. Yet, it noted that not all issues relating to promotions are necessarily
9 mandatory subjects of bargaining. Citing Kono-TV-Mission Telecasting Corp., 163 NLRB
10 1005 (1967), the CERB noted that the NLRB distinguishes between promotions within the
11 bargaining unit and non-discriminatory promotions of unit personnel to supervisory
12 positions outside of the unit, which are not mandatory subjects of bargaining. Town of
13 Danvers, 3 MLC at 1575.¹⁶ The CERB concluded that absent these considerations, "the
14 generic topic of promotions is so strongly tied to an employee's terms and conditions of
15 employment as to be a mandatory subject of bargaining under the Law." Id. at 1575.

16 In Boston School Committee, the CERB held that residency requirements as a
17 condition of continued employment are mandatory subjects of bargaining. 3 MLC at 1608.
18 In dicta, the CERB stated that residency as a condition of promotion within the bargaining
19 unit was a mandatory subject of bargaining. Id. at 1610. The CERB further concluded
20 that residency as a pre-condition of promotion to a job in a different bargaining unit is a
21 mandatory subject of bargaining, where the promotional position constitutes a step in an

¹⁶ The CERB noted that under the Law, non-managerial, supervisory positions may be within the bargaining unit.

1 established career ladder or is a position which is typically filled from within the bargaining
2 unit. Id. The CERB continued:

3 If the promotional position is “managerial or “confidential” within the meaning of the
4 Law, however, the employer is not bound to bargain regarding the standards of
5 promotion. An employer need not consider the views of a union in determining
6 what criteria to consider in selecting individuals to fill such positions. Any other
7 rule would unduly hinder the employer in the conduct of its labor relations affairs.
8 The employer must be able to select individuals who the employer views as loyal
9 to it, unfettered by the views of the employees’ collective bargaining agents. Id. at
10 1611.

11 In Town of Arlington, 42 MLC 97, MUP-14-3750 (September 30, 2015), the CERB
12 affirmed a hearing officer’s decision finding a duty to bargain over the proposed use of an
13 assessment center as a criteria for a bargaining unit to bargaining unit promotion from
14 patrol officer to sergeant. During its review of the hearing officer’s analysis of Town of
15 Danvers, the CERB stated that:

16 Just as supervisors are “non-union positions under the NLRA,” confidential and
17 managerial employees are excluded from collective bargaining under Chapter
18 150E. The Hearing Officer therefore reasonably construed *Danvers* indicating that
19 an employer had no duty to bargain over promotions to excluded positions outside
20 the bargaining unit. In any case, regardless of how this aspect of *Danvers* is
21 construed, the Hearing Officer correctly concluded that *Danvers* did not address
22 the issue squarely presented by this case: whether an employer is required to
23 bargain over promotional procedures to supervisory positions outside of the
24 bargaining unit that are not otherwise excluded from collective bargaining. 42 MLC
25 at 99-100.

26 Additionally, the CERB embraced the dicta in Boston School Committee. It stated:

27 As expressed in *Boston School Committee*, the duty to bargain over procedures
28 for promotions to positions outside of a bargaining unit is limited to the procedures
29 for promotions to positions that fall within the bargaining unit members’ career
30 ladder and extends only to positions that are entitled to collective bargaining rights.
31 Id. at 100.

32 Accordingly, the standards or procedures for promotion to fire chief are not a mandatory
33 subject of bargaining.

1 Impacts

2 Notwithstanding a public employer's prerogative to make certain types of core
3 managerial decisions without prior bargaining, if a managerial decision impacts a
4 mandatory subject of bargaining, then bargaining over the impacts is required.¹⁷ City of
5 Somerville, 42 MLC 170, 171, MUP-13-2977 (December 30, 2015) (impact bargaining
6 required where decision to assign non-unit duties impacted workload and job duties);
7 Commonwealth of Massachusetts, 26 MLC 116, SUP-4158 (February 15, 2000) (impact
8 bargaining required where new risk assessment policy impacted job duties and workload);
9 Groton School Committee, 1 MLC 1221, MUP-702 (December 17, 1974) (employers must
10 bargain over curriculum decisions that can be shown to impact mandatory subjects of
11 bargaining). Additionally, in some instances, the means of implementing a decision can
12 be a mandatory subject of bargaining. School Committee of Newton, 388 Mass at 563-
13 564 (the means of achieving a reduction in force can be the subject of collective
14 bargaining).

15 The Union argues that the impacts of promotional procedures to a managerial
16 position should be declared a mandatory subject of bargaining, especially where, as here,
17 the incumbent was involved in the promotional process. The Union further argues that
18 because the City did not bargain, "the CERB need not at this juncture decide precisely
19 which topics are properly the subject of impact bargaining." Essentially, the Union seeks

¹⁷ I note that in City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172, 183 (1997), the court stated that it was "in doubt as to the relevance of the impact decisions in the range of cases where the employer's authority derives from a specific, narrow statute vesting discretion as to a particular decision in specified public officers." The Supreme Judicial Court has characterized City of Lynn as cogent. City of Somerville v. Commonwealth Employment Relations Board, 470 Mass 563, 571 fn. 13 (2015). Here, it is Chapter 150E itself that removes the decision from collective bargaining.

1 an order that although the procedures for promotion to a managerial position are not a
2 mandatory subject of bargaining, the impacts of those procedures on mandatory subjects
3 of bargaining, which impacts on mandatory subjects the Union need not identify, are
4 nevertheless mandatory subjects of bargaining that should negate the decision. The
5 Union's position collapses the distinction between decisional and impact bargaining and
6 does not persuade me.

7 The Union cites numerous cases where the CERB has found impact bargaining
8 obligations. These cases involved identifiable impacts on mandatory subjects of
9 bargaining. For example, in City of Boston, 30 MLC 23, 29-30, MUP-2670 (September
10 3, 2003), the CERB found an impact bargaining obligation regarding the City's decision
11 to implement a less-lethal force rule where that decision impacted the mandatory subjects
12 of job duties, compulsory training, and workload. In situations where a decision does not,
13 however, impact a mandatory subject of bargaining, the CERB has found no impact
14 bargaining obligation. City of Boston, 24 MLC 89, 91-92, MUP-9234 (April 1, 1998) (no
15 impact bargaining obligation where decision to create and implement a Community
16 Appeals Board did not affect a mandatory subject of bargaining).

17 Here, the Union does not identify any impacts on a mandatory subject of
18 bargaining that result from the City's decision. Rather, the Union argues that it could have
19 bargained with the City about the following topics: the scheduling and/or timing of the
20 assessment center; the types of information to be addressed in orientation; preparation
21 materials to be provided ahead of time; leave or paid work time to prepare for the
22 examination; the security of the assessment process; union observation; the weight
23 considered for education and experience; the training of the assessors; the cost to

1 participate in the assessment center; and the right of unsuccessful participants to receive
2 feedback. These topics are part and parcel of the standards and or procedures for
3 promotion to the Fire Chief position, and, as such, are not mandatory subjects of
4 bargaining.¹⁸

5 Finally, I briefly address the Union's concerns about Carli's involvement in the
6 promotional process. The Union argues that the process was unfair because Carli was
7 involved in it, and the Mayor predetermined that he wanted Carli to become the
8 permanent chief. Under Boston School Committee, an employer filling a managerial
9 position "must be able to select individuals who the employer views as loyal to it,
10 unfettered by the views of the employees' collective bargaining agents." 3 MLC at 1611.
11 Where, as here, the Complaint does not allege unlawful retaliation, the Law does not
12 constrain the City from favoring Carli. Consequently, the Union's concerns are irrelevant
13 to determining the scope of bargaining.

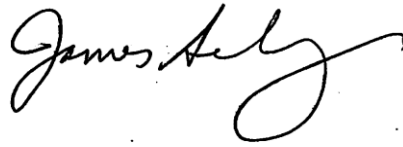
14 CONCLUSION

15 The Union has not established that the City's decision impacted a mandatory
16 subject of bargaining. Accordingly, it has not established that the City violated the Law.
17 I therefore dismiss the Complaint.

18 SO ORDERED.

¹⁸ The Union has not demonstrated, and I do not discern, a meaningful distinction between the procedures to be used and the means of implementing the decision to use an assessment center. The procedures are the means of implementing the decision.

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 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.