

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of \*  
\*  
CITY of LAWRENCE \*  
\*  
and \*  
\*  
LAWRENCE FIREFIGHTERS UNION \*  
LOCAL 146 \*  
\*

Case No. MUP-19-7325

Date Issued: June 11, 2021

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Hearing Officer:

Gail Sorokoff, Esq.

Appearances:

Paul Hynes, Esq.

Representing the Lawrence  
Firefighters Union Local 146

Nicholas Dominello, Esq.

Representing the City of Lawrence

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Lawrence (City) violated Section  
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws (M.G.L.)  
3 Chapter 150E (the Law) by: 1) failing to bargain in good faith by allowing a bargaining unit  
4 employee to hold a bargaining unit position, Captain of Building Safety, and a non-unit  
5 position, Director of the Inspectional Services Department, at the same time without  
6 providing the Lawrence Firefighters Union, Local 146 (Union) with prior notice and an  
7 opportunity to bargain over the decision and the impacts of that decision; (2) failing to

1 bargain in good faith with the Union by creating a new bargaining unit position, Captain  
2 of Building Safety, without providing the Union with prior notice and an opportunity to  
3 bargain over the terms and conditions of employment of the new position, and (3) failing  
4 to bargain in good faith by dealing directly with an employee about him simultaneously  
5 holding a unit and non-unit position. I find that the City violated the Law by failing to  
6 bargain over the impacts of the creation of a new Captain position and failing to bargain  
7 over the impacts of allowing a bargaining unit employee to simultaneously hold a unit and  
8 non-unit position. However, I find that the City did not violate the Law by failing to bargain  
9 over the decision to assign a bargaining unit employee to a unit position and a non-unit  
10 position simultaneously. Additionally, because I find that the allegation about direct  
11 dealing was untimely filed, I do not find that the City violated the Law with respect to that  
12 allegation.

### 13 STATEMENT OF THE CASE

14 On May 9, 2019, the Union filed a charge of prohibited practice (Charge) with the  
15 Department of Labor Relations (DLR) alleging that the City had violated Sections 10(a)(1),  
16 (3) and (4) of Massachusetts General Laws, Chapter 150E (the Law). During the  
17 investigation on September 18, 2019, the Union withdrew the 10(a)(3) and 10(a)(4)  
18 allegations and amended the charge to allege a violation of Sections 10(a)(1) and (5). On  
19 October 22, 2019, a DLR investigator issued a three count Complaint of Prohibited  
20 Practice (Complaint). On July 29, 2020, and September 3, 2020, I conducted a hearing  
21 by video conference during which the parties received a full opportunity to be heard, to

1 examine and cross-examine witnesses, and to introduce evidence. On January 11, 2021,  
2 the parties filed post-hearing briefs.<sup>1</sup> Based on my review of the record, including my  
3 observation of the demeanor of the witnesses, I make the following findings of fact and  
4 render the following opinion.

STIPULATIONS OF FACT

- 5 1. The City is a public employer within the meaning of Section 1 of Massachusetts  
6 General Laws chapter 150E (“the Law”).  
7
- 8 2. The Union is an employee organization within the meaning of Section 1 of the  
9 Law.  
10
- 11 3. The Union is the exclusive bargaining representative for a unit of firefighters  
12 employed by the City and as recognized via the Parties’ Agreement Article I.  
13
- 14 4. Brian F. Moriarty (Moriarty) is the Fire Chief for the City.  
15
- 16 5. On November 8, 2018, Moriarty issued General Order-2018-38 Amended.  
17
- 18 6. On November 11, 2018, Moriarty issued General Order-2018-40.  
19
- 20 7. General Order 2018-40 stated that Lieutenant Michael Armano (Armano) had  
21 been appointed to the position of Permanent Captain of Building Safety and to  
22 the position of temporary Director of the Inspectional Services Department.  
23
- 24 8. The Director of the Inspectional Services Department is a non-Unit position.  
25
- 26 9. The City appointed Armano to the position of Captain and he subsequently held  
27 the position of Director of the Inspectional Services Department.  
28
- 29 10. Daniel Rivera (Rivera) is the Mayor of the City.  
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<sup>1</sup> I have not considered the exhibits that were attached to the Union’s brief as these documents were not submitted into evidence during the hearing.

1 FINDINGS OF FACT

2 **Background**

3 The City's Fire Department consists of approximately 125 firefighters, lieutenants,  
4 captains, and a deputy chief. Brian Moriarty (Moriarty or Chief) has served as the Chief  
5 of the Fire Department since March 2015.

6 Eric Zahn (Zahn or President) is the Union President, Pat Driscoll (Driscoll) is the  
7 Vice President, and Michael Delaney (Delaney) serves as the Union's Secretary. Michael  
8 Armano (Armano) held an elective position with Union, as a delegate to the Professional  
9 Firefighters of Massachusetts, and served on the Union's bargaining team in 2007.

10 The City operates an Inspectional Services Department (ISD) which is responsible  
11 for issuing buildings permits and licenses, as well as enforcing the City's building and  
12 health codes. The position of Director of the ISD is a non-unit position.<sup>2</sup> Shortly after  
13 Moriarty became the Chief of the Fire Department in March, 2015, he spoke with Mayor  
14 Daniel Rivera (Rivera or Mayor) about putting ISD under the Fire Department, by creating  
15 a deputy chief position in charge of fire prevention. The Mayor did not support this idea.

16 Pat Ruiz (Ruiz) served as the ISD Director from 2015 until early 2018. Ruiz, a fire  
17 fighter, took a leave of absence from his civil service position within the Fire Department  
18 while he served as the ISD Director. As the ISD Director, Ruiz worked in City Hall and  
19 reported to the Mayor. When Ruiz stepped down from his position as ISD Director, he

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<sup>2</sup> Per Lawrence Code of Ordinances, 2.72.020, the Director of ISD is appointed by the Mayor and earns a salary at a non-union grade 6 level.

1 returned to the Fire Department. Thereafter, Ana Camargo served as the ISD Director  
2 briefly, stepping down from this position sometime prior to September 2018. In September  
3 2018, serious gas explosions rocked the City, requiring a four-day response, and then  
4 months of recovery. The ISD position was vacant at the time of the explosions.

### 5 **The Mayor's efforts to fill the Director of ISD position**

6 After the explosions, the Mayor was anxious to fill the vacant ISD Director position.  
7 He needed to fill this position with someone with both strong leadership skills and  
8 expertise of the building codes. The Mayor had worked with Armano on a Problem  
9 Property Task Force and had observed him on the job at fire scenes. Based on his  
10 interactions with Armano, the Mayor believed that he would be the ideal candidate for the  
11 position.<sup>3</sup>

12 The Mayor spoke with Moriarty about wanting to put a fire fighter in charge of the  
13 ISD.<sup>4</sup> Moriarty again advocated for creating a deputy chief position. The Mayor rejected  
14 that suggestion but reiterated that he wanted a fire fighter in the position, and he

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<sup>3</sup> The Mayor testified that Armano had the necessary level of intelligence and experience and that people trusted him and would follow him. Armano is also a licensed attorney, has a master's degree in public administration, has a construction supervisor's license, holds various fire-related certifications, and is a certified building official with the International Code Council.

<sup>4</sup> Certain duties of the ISD and the Fire Department are interrelated. For instance, when there is a fire, the Fire Department may need to call the plumbing inspector or building inspectors to the scene. ISD conducts sprinkler and fire alarm system reviews, involving consultations with the Fire Department.

1 specifically mentioned that he believed Armano would be a good fit. The Mayor asked the  
2 Chief if he thought Armano would accept the position. The Chief said that he did not  
3 believe that Armano would accept the position, but that the Mayor should ask him.<sup>5</sup>

4 On a Friday in late September 2018,<sup>6</sup> the Mayor asked Armano to come to his  
5 office and offered him the position of ISD Director. The Mayor suggested that, like Ruiz,  
6 Armano should take a leave of absence from the Fire Department in order to assume the  
7 ISD position. Armano declined the offer.<sup>7</sup> The Mayor asked him to think about it some  
8 more, and Armano agreed to do that.

9 After leaving the meeting with the Mayor, Armano called the Union President and  
10 told him about the Mayor's offer. Armano was aware that in parts of New Hampshire,  
11 some building and fire departments were combined. He explained to Zahn that he  
12 believed that such a combination of departments could work well in the City. During this

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<sup>5</sup> Although Rivera did not recall discussing this matter with the Chief, I credit the Chief's testimony in this instance because of the specificity of his memory of the conversation and because of Rivera's general lack of recall of many of the specifics about the general topic.

<sup>6</sup> None of the witnesses provided a specific date for this conversation.

<sup>7</sup> Armano originally declined the offer because he had worked hard to become a fire fighter and he was proud of his position in the Fire Department and proud to be part of the Union. The Mayor's offer also caught him by surprise. Although the Chief testified that he had told Armano that the Mayor would be asking him if he wanted to run ISD, Armano credibly testified that he had no advance knowledge of the offer.

1 call, Armano understood that Zahn supported the idea.<sup>8</sup> Armano also discussed the idea  
2 with Driscoll, who also seemed supportive.<sup>9</sup>

3 On the following Monday, Armano met with the Mayor for a second time. Armano  
4 informed the Mayor that he would be inclined to accept the ISD position if it was an “acting  
5 type” of position and if he could remain in the Fire Department while occupying the  
6 position. Although the Mayor was not willing to officially merge the two departments, he  
7 expressed interest in the idea of Armano accepting the ISD Director position while  
8 remaining in the Fire Department. Armano, who was a Lieutenant at the time, then  
9 mentioned that he was about to assigned as an Acting Captain. The Mayor indicated that  
10 the ISD position could be a Captain position.<sup>10</sup>

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<sup>8</sup> Zahn did not specifically testify about this conversation.

<sup>9</sup> Driscoll did not specifically testify about this conversation.

<sup>10</sup> The Mayor’s testimony is somewhat contradictory on this point. At one point, Rivera testified that he did not bring up the idea of making the position a Captain while speaking with Armano, but at another point in his testimony, Rivera stated that he was aware that Armano would serve as the ISD Director as a Captain. The Mayor also testified that he and Armano discussed that Armano would simultaneously hold the ISD Director position and be a Captain in the Fire Department. I credit Armano’s testimony that the Mayor broached the subject of creating a new Captain position. Armano’s subsequent conversations and actions support his understanding that the Mayor offered to create a new Captain position for him to hold while simultaneously serving as the ISD Director. Additionally, Armano’s testimony is bolstered by the Chief’s testimony. The Chief testified that prior to the end of October 2018, the Mayor told him that he was creating two new Captain positions, including a Captain position that would go to Armano.

1           Armano was aware that he was second on the promotion list.<sup>11</sup> During the  
2 discussion about creating a Captain's position, Armano had concerns about bypassing  
3 anybody on the list. The Mayor contemplated creating two new Captain positions.<sup>12</sup>

4           During this discussion, the Mayor made it clear that he wanted only Armano for the  
5 ISD Director position. He was willing to have Armano stay in the Fire Department while  
6 running ISD, but the Mayor emphasized that he did not want the ISD Director to wear a  
7 fire fighter uniform. Therefore, Armano would wear civilian clothes while serving as the  
8 ISD Director. The Mayor also made it clear that Armano would work in City Hall while  
9 serving as the ISD Director. Armano informed the Mayor that, based on all that they had  
10 discussed, he was now inclined to accept the position. He explained, however, that he  
11 wished to gain the support of the Union membership before he proceeded. The Mayor  
12 did not understand why Armano wished to speak with the Union about this matter and let

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<sup>11</sup> The Commonwealth of Massachusetts Human Resources Division held a fire captain promotional exam in November 2017. Matthew Nadeau (Nadeau) was ranked first, and Armano ranked second.

<sup>12</sup> Although Armano did not specifically testify that the Mayor ever stated that he was creating two Captain positions during their discussions, the evidence supports the conclusion that he did so. Although the Mayor had the right to select anyone on the list, Armano, knowing he was second on the promotional list, explained that "I did not want to bypass anybody if he did that (creating a Captain position for Armano). So I wasn't completely comfortable with that and that was the discussion about the captain's position." Armano later explained to the Union membership that, based on his conversations with the Mayor, Armano was aware that the City might create two new Captain positions. Based on all of this testimony as well as Armano's, the Mayor's, and the Chief's subsequent actions, it is most plausible that the Mayor implied to Armano during their second conversation that he was willing to create two new Captain positions.



1 Armano know that he felt that was a mistake. The Mayor, though, ultimately accepted  
2 Armano's condition.<sup>13</sup>

3 After his second meeting with the Mayor, Armano spoke with Zahn and Driscoll  
4 together after a fire.<sup>14</sup> He informed them about his conversations with the Mayor.<sup>15</sup>  
5 Armano discussed his vision of some connection between ISD and the Fire Department.  
6 While they talked, it became clear that Zahn and Driscoll did not support his plan; Armano  
7 understood that they believed that he should follow Ruiz's path and take a leave of  
8 absence in order to take the ISD position. Zahn informed Armano that Armano should not  
9 be involved in these discussions with the Mayor.<sup>16</sup> Nevertheless, Zahn and Driscoll told

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<sup>13</sup> The Mayor testified that he was willing to give Armano the necessary time because he "really wanted Mike...he's a leader and he's a subject matter expert. So I didn't want to give him an ultimatum."

<sup>14</sup> None of the participants in this meeting were able to provide the date of this discussion.

<sup>15</sup> Armano testified that he explained that "there's going to be a Captain of Building Safety, he's going to work in City Hall with the Inspectional Services Department." Driscoll did not testify about this conversation. Zahn's testimony on this discussion was inconsistent. At one point Zahn stated that he was not aware that the Mayor had offered Armano the ISD Director position, but at another point in his testimony, he stated that Armano told him that he had meetings with the Mayor and that the Mayor was going to create a position for him. Zahn testified that Armano "explained what was going on with the Mayor." Zahn told Armano that Armano should not be dealing directly with the Mayor on this matter. I credit Armano's consistent testimony that he explain to Zahn and Driscoll what transpired with his conversations with the Mayor, and that the Mayor agreed to create a new Captain position for Armano to occupy while also serving as ISD Director.

<sup>16</sup> Zahn testified that he told Armano to "[g]et out of the way. Take yourself out of the process. That way you're not direct dealing with the Mayor." He also advised Armano that, "Mike, you're doing it wrong. This isn't the way it should be done. There is a process that we use that works and it would be fair." Zahn also testified that "I wanted the City to

1 Armano that he could bring up the matter at a special Union meeting and suggested that  
2 Armano consult with Delaney about the specifics of calling a special meeting. Armano  
3 consulted with Delaney, reviewed the Union's bylaws, and obtained the necessary  
4 signatures to hold a special meeting.

5 At some point after the Mayor had his second meeting with Armano, the Mayor  
6 informed the Chief that he was going to make two new captain positions<sup>17</sup> and Armano  
7 would be a Captain and was going to run ISD.<sup>18</sup> The Mayor's primary reason for these  
8 actions was to secure Armano, who he considered to be the best candidate, for the ISD  
9 position. The Mayor added that he was not going to do this right away because Armano  
10 first wanted to speak with the Union.

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go make the position of Captain of the Inspectional Services. Let the Chief put it out for bid, whoever got that bid through seniority, then that would've been the exact way it should've went down."

<sup>17</sup> In addition to the new position of Captain of Building Safety, the Mayor was converting the Lieutenant of Fire Alarm to a Captain of Fire Alarm.

<sup>18</sup> The Chief testified that this conversation took place in early October, explaining that the Mayor was anxious to fill the positions. The Mayor did not testify about this specific conversation but did testify that it was the Chief who suggested creating a second position, that of Fire Alarm Captain, and although the Mayor was hesitant, he agreed. I credit the Chief's testimony that it was the Mayor's idea to create the two Captain positions and that he informed the Chief prior to the Union's vote. This testimony is most consistent with the subsequent actions of all those involved. Although, as noted previously, Armano did not specifically testify about the Mayor addressing a second Captain position, that comports with his memory of expressing his discomfort with receiving a Captain position while he was second on the promotion list. It also seems implausible that Armano would have the Union vote on creating two new Captain positions if the Mayor had not indicated that this would be acceptable.

1           The Mayor was anxious to move forward and fill the ISD position and asked the  
2 Chief a few times whether Armano had met with the Union yet. The Mayor's Chief of Staff  
3 followed up with Armano. Armano explained that he had spoken with the Union President  
4 and Vice President and, although they were not willing to support this effort, they had told  
5 Armano that he had the right to go before the membership. Armano explained to the  
6 Mayor's Chief of Staff that this would take some time.

#### 7 **Special Union Meeting**

8           Union meetings are usually held on the first Wednesday of the month. The  
9 President runs the regularly scheduled meetings and Delany takes the minutes. A special  
10 meeting can take place on any day. Armano's special meeting was originally scheduled  
11 for Monday, October 22, 2018. Delaney prepared a notice to be posted to inform the  
12 membership of the meeting. The notice indicated that Armano had called for a special  
13 meeting and that "[t]he purpose of this meeting is to discuss possible new positions for  
14 the good of the local." During the lead up to the meeting, Armano had discussions with a  
15 number of the fire fighters and explained more about what he planned to discuss at the  
16 meeting.

1           The special meeting was delayed until October 28, 2018.<sup>19</sup> It took place at the  
2 Union hall at 7:30 p.m. Between 50 to 75 bargaining unit members attended.<sup>20</sup> No  
3 minutes were taken.<sup>21</sup>

4           Zahn opened the meeting and introduced Armano. Armano addressed the  
5 membership and shared with them exactly what took place during his two conversations  
6 with the Mayor.<sup>22</sup> He explained that the Mayor had offered him the position of Director of  
7 ISD, but he had declined it. He shared that the Mayor was willing to create two new  
8 captain positions including a new Captain of Building Safety.<sup>23</sup> Armano was explicit that  
9 this position would be created exclusively for him.<sup>24</sup> He explained the details that the

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<sup>19</sup> None of the witnesses could recall any other special meeting called by a member.

<sup>20</sup> Zahn originally testified that he believed that about 40 of the approximately 125 to 130 members of the bargaining unit were present for the meeting. After recalling that this was during the gas crisis when there was more staffing, he guessed there were up to 50. Armano testified that about 75 people attended the meeting.

<sup>21</sup> Although Delaney, as secretary, usually takes minutes of union meetings, he did not take notes or prepare minutes of this special meeting. Delaney explained that he thought there was just going to be a discussion that did not need to be memorialized; he was not aware there would be a vote.

<sup>22</sup> Armano explained "I shared every bit of every conversation and I was very honest with them."

<sup>23</sup> Armano did not know what the name of the position would be, but he used the title "Captain of Building Safety" during the meeting.

<sup>24</sup> Armano testified that he explained that "I told them specifically, humbly that the Mayor didn't want anybody else to take the position and he's asking me to take it." Armano further testified "so I wanted to make perfectly clear that if this happened, the Mayor was

1 Mayor had set forth; the Mayor had specifically stated that in this position, Armano would  
2 work in City Hall and wear business attire rather than a uniform. Armano explained that  
3 he would be the sole bid for the position in its initial vacancy.<sup>25</sup> Armano spoke for about  
4 an hour.<sup>26</sup> Armano explained his vision about how it would be beneficial for the Fire  
5 Department and ISD to work together. He then answered questions.

6 At some point during the meeting, Armano distributed a prepared doubled-sided  
7 document that he had drafted.<sup>27</sup> Armano had not shared this document with the Union  
8 officials prior to the special meeting. On one side of the document, Armano listed three  
9 options. He included a “yes or no” choice below each option in case there was going to  
10 be a written vote.<sup>28</sup> Armano explained to the membership that he wanted to gauge their  
11 support on the difference scenarios so he could see what his options were.

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looking for me to go over there and no one else, and I would be the person going over there.”

<sup>25</sup> Armano explains that although he and the Mayor did not specifically address these details, Armano was aware that the CBA required vacancies to be posted and bid so he assumed that would be the process used here.

<sup>26</sup> Although there was varied testimony about the length of the meeting, I credit Armano’s testimony that he spoke for at least an hour due to the specificity of his recollection.

<sup>27</sup> Armano believes he distributed the document at the start of the meeting. Others believed he distributed it later in the meeting. I need not resolve these differences as the matter is not pertinent to my findings.

<sup>28</sup> Armano did not know how the process worked and who had to approve the plan. He drafted the document the way that he did in case the President wanted to use it for a written vote.

1 Option 1 was for two Captain positions. Armano wrote under Option 1:

2

3 City creates Captain of Fire Alarm, replacing Lieutenant of Fire Alarm.

4 City creates a Captain of Building Safety.

5

6 The effect: City promotes two Captains.<sup>29</sup>

7 City promotes one Lieutenant.

8 City hires one Firefighter.

9

10 Do you approve creating two Captain positions?

11 [YES] [NO]

12

13 Option 2 was labeled "One Lieutenant Position." Armano wrote:

14

15 City creates a Lieutenant of Building Safety.

16

17 The effect: City promotes one Lieutenant.

18 City hires one Firefighter.

19

20 If the Captain positions are rejected, do you approve creating one Lieutenant  
21 position?

22 [YES] [NO]

23

24

25 Option 3 was entitled "Leave of Absence." Under this option, Armano wrote:

26

27 With Mass Human Resources Division approval, City grants a leave of  
28 absence for Mike Armano from his civil service position as a Lieutenant for  
29 up to 5 years. Mike Armano negotiates terms with the City for a position  
30 outside of civil service.

31

32 The effect: City holds Mike Armano's Lieutenant position.

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<sup>29</sup> Armano testified that he wrote this document himself, presenting options that he believed the Mayor was inclined to accept based on his statements during their second meeting. However, he explained to the members that he could not be 100% sure what would ultimately take place, explaining "I told them that I didn't know if this would happen for sure. I wanted to gauge their support on these different scenarios so that we could have a conversation and see what my options were. I didn't know if I was going to have another conversation with the Mayor. I didn't know what that looked like. I didn't know if the Union was going to want to reach out."

1 City likely has authority to make a provisional or temporary Lieutenant at  
2 Fire Alarm.

3  
4 If the Lieutenant position is rejected, do you approve a Leave of Absence?  
5 [YES] [NO]

6  
7 On the back side of the paper, Armano wrote a more detailed summary of each  
8 option. He wrote each of these summaries as if the vote was accepted for that option.  
9 For instance, for the first option of creating two Captain positions, he wrote:

10 Re: Captain of Building Safety  
11 Captain of Fire Alarm

12  
13 On October 29, 2018, members of the Lawrence Firefighter's Local 146 met during  
14 a special meeting to review and accept the creation of a Captain of Building Safety  
15 and a Captain of Fire Alarm.

16  
17 Members voted to accept the following conditions:

- 18  
19 1) The City will create a Captain of Fire Alarm position and eliminate the Lieutenant  
20 of Fire Alarm position.  
21 2) The City will create a Captain of Building Safety position.  
22 3) The Captain of Building Safety will work in City Hall with the Inspectional  
23 Services Department and will be uniformed in the same or similar business attire  
24 of that division.  
25 4) In the City's discretion, the Captain of Building Safety may be appointed as  
26 Commissioner of Inspectional Services, Chief Building Official, and/or other  
27 managerial role. There will be no additional compensation for any appointment(s).  
28 5) Local 146 will not object to Mike Armano submitting the sole bid for the  
29 position of Captain of Building Safety during its initial vacancy.<sup>30</sup>

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<sup>30</sup> Armano wrote the following for option 2:

Re: Lieutenant of Building Safety  
On October 29, 2018, members of the Lawrence Firefighter's Local 146 met  
during a special meeting to review and accept the creation of a Lieutenant  
of Building Safety.

Members voted to accept the following conditions:

- 1 After the question period, Deputy Chief John McGinnish motioned for a vote. The  
2 President called for a vote.<sup>31</sup> The majority voted, by hand, for option one. There was no

- 
- 1) The City will create a Lieutenant of Building Safety.
  - 2) The Lieutenant of Building Safety will work in City Hall with the Inspectional Services Department and will be uniformed in the same or similar business attire of that division.
  - 3) In the City's discretion, the Lieutenant of Building Safety may be appointed as Commissioner of Inspectional Services, Chief Building Official, and/or other managerial role. There will be no additional compensation for any appointment(s).
  - 4) Local 146 will not object to Mike Armano submitting the sole bid for the position of Lieutenant of Building Safety for its initial vacancy.

For Option 3, he wrote:

Re: Leave of Absence from Civil Service

On October 29, 2018, members of the Lawrence Firefighter's Local 146 met during a special meeting to review and accept the provisions of Mike Armano taking a leave of absence from Civil Service.

Members voted to accept the following conditions:

- 1) Mike Armano is currently in the position of Lieutenant of Fire Alarm.
- 2) Local 146 will not object to Mike Armano taking a leave of absence from his position of Lieutenant of Fire Alarm, a civil service position.
- 3) Mike Armano will leave his position for a period of no longer than 5 years or as allowed by law.
- 4) Mike Armano may return to his position before the 5 year term.
- 5) Mike Armano will negotiate the terms of a new position outside of civil service and in his sole discretion accept or deny an offer of employment for the new position.

<sup>31</sup> Zahn testified that he had not expected a vote and he only called for the vote because of the motion.



1 vote on options two or three. The President did not vote, as he only votes when there is  
2 a tie. The vote was not unanimous.<sup>32</sup>

3 After the vote, the President explained that he believed the vote was improper and  
4 did not follow the rules.<sup>33</sup> He indicated that he was going to speak with the union attorney  
5 to check if this was a legal vote. He further explained that if he learned that the  
6 membership should not have taken this vote, he would deem it an illegal vote.<sup>34</sup>

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<sup>32</sup> No one testified about the exact vote tally. Driscoll testified that he voted against option one because he did not believe that a subsection of the Union membership should make a decision that would do away with the bidding rules in the contract.

<sup>33</sup> Zahn testified that when the Union holds elections or votes on contract issues or bylaw changes, all members of the Union are given the opportunity to vote, but that was not the case here. Article 5 of the Union's bylaws provides as follows:

Section 1: A majority vote shall be construed as meaning more than one-half of the total votes cast at the regular or special or two-shift meeting. Such vote to be tabulated by the Secretary at each session.

Section 2: All voting in the elections shall be under the Australian Ballot System. The Local may not make rules inconsistent therewith.

Section 3: If, as a result of a vote taken at a Union meeting ends in a tie, the presiding officer shall cast the tie breaking vote.

<sup>34</sup> It is undisputed that Zahn made these comments after the vote. Zahn testified that he also made similar comments before the vote. Zahn testified that "I explained that I thought the vote was illegal, against the rules, because when we are voting on something, especially a document that affects the whole membership, that it should have been different rules apply with bylaws that have to be posted for a number of weeks, the opportunity would have to be given to the membership to read up on what they were exactly voting on. I believed that the vote was going to be out of order, and that I would seek counsel opinion to see if that was, indeed, an illegal vote taken there." Zahn, however, is the only one to testify that he also made these objections prior to the vote. Delaney testified that Zahn said that he felt that the vote was out of order, but he did not clarify whether Zahn made these comments before or after the vote. Armano testified that after the vote, Zahn indicated he was unsure of the votes' legality and he would speak to

1           The day after the vote, on October 30, 2018, Armano informed the Mayor's Chief  
2 of Staff that the Union had voted to support the idea of Armano working at ISD and the  
3 creation of two new Captain positions.<sup>35</sup> Armano was not sure at that point what the next  
4 steps would be.<sup>36</sup>

5           After the meeting, Zahn sought a legal opinion from counsel, who confirmed that  
6 the vote was out of order.<sup>37</sup> During the next union meeting, in early November,<sup>38</sup> Zahn

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an attorney about it. Given the weight of the testimony, I find that Zahn only made his objections clear immediately after the vote.

<sup>35</sup> The Mayor testified that he learned about the vote from the Chief and other fire fighters. He also testified that Armano had told him that there was a vote but the eboard spoke against it. This conflicts with Armano's testimony that Armano never spoke with the Mayor after the special meeting, but rather informed the Mayor's Chief of Staff of the results of the Union's vote. The evidence is clear that the Mayor learned of the vote; the question of who provided the Mayor with this information is not material to my decision.

<sup>36</sup> Armano testified there was a lot of uncertainty at that time, and he did not know if the Union and the City would talk about how to proceed. When asked by other fire fighters what was going to happen next, he could not answer. Armano testified that "I left it in the hands at that point of the Chief, the City, the Union, whatever discussions had to happen. So until I actually saw paperwork and was called -- I mean assigned to that promotion, I had no idea what was even going to happen."

<sup>37</sup> There is no testimony regarding exactly why the counsel made this determination.

<sup>38</sup> Assuming that the meeting took place as usual on the first Wednesday of the month, the meeting took place nine days after the special meeting, on November 7, 2018. The minutes from this meeting were not submitted into evidence.

1 started the meeting by saying the vote that was taken at the special meeting was out of  
2 order and that the vote is not in effect.<sup>39</sup>

3 At some point thereafter, Zahn informed the Chief that the vote had not been a  
4 legal vote.<sup>40</sup>

### 5 **Creation of Two Captain Positions**

6 The Mayor created two new Captain positions and told the Chief to promote two  
7 people to those positions.<sup>41</sup> Moriarty prepared the paperwork and had the eligible  
8 candidates, including Armano, sign that they were willing to accept an appointment for a  
9 permanent full-time Fire Captain position. On November 5, 2018, a Departmental  
10 Promotional Certification was issued for two permanent full-time fire Captain positions.

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<sup>39</sup> Driscoll testified that during the DLR's investigation into the Charge in this case, City representatives mentioned that the Union had not voted to formally rescind the special meeting vote. He felt procedurally that they should have a vote on the record rescinding the vote so, during the October 2019 Union meeting, Driscoll motioned to formally rescind the special meeting vote. The minutes of the meeting provide that "[o]n October 29, 2019 M Armano brought forward a pole (sic) to this local that was voted on. Vote was deemed out of order by the President at the next meeting after speaking to our attorney. Motion made and seconded to rescind that vote from the body. Motion passed." Zahn testified that this vote was held because someone motioned for it, but he testified "I don't even know why we were doing that because I had deemed the vote out of order in the previous November of 2018."

<sup>40</sup> The record does not reflect the date the Chief learned that the Union considered the vote to be null and void.

<sup>41</sup> No one provided a specific date for this discussion. The Chief could not specifically recall the details other than that the Mayor decided to change the fire alarm position from a Lieutenant to a Captain and gave the "green light" to proceed filling that Captain position and the Captain for Building Safety position. Based on a totality of the evidence, the conversation must have taken place very shortly after the October 29 special meeting.

1 Nadeau, Armano and David Amero all circled that they were willing to accept the  
2 appointment and signed the required paperwork. The Mayor then signed the certification  
3 as the appointing authority.

4 The Mayor did not speak to the Union leadership about his decision to create the  
5 two Captain positions at any time. The Chief also saw no reason to inform the Union about  
6 the creation of the two new Captain positions.<sup>42</sup>

7 On November 8, 2018, the Chief issued General Order 2018-38 (Amended) which  
8 put out certain positions for bid, including a Captain of Fire Alarm and a Captain Building  
9 Safety.<sup>43</sup> The bids were due by Friday November 16, 2018. Armano submitted a bid for  
10 the Captain of Building Safety position.

11 On November 11, 2018, the Chief issued General Order 2018-40 listing certain  
12 transfers and promotions, which were in effect as of that day. He wrote, in part, that “[d]ue  
13 to recent developments the Mayor has added a Permanent Captain position to the fire  
14 department as well as raise (sic) the Lt position in fire alarm to a permanent Captain.”  
15 Nadeau was promoted to permanent Captain Fire Alarms. Armano was promoted to  
16 permanent Captain of Building Safety and temporary Director of ISD.

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<sup>42</sup> Zahn testified he was never provided with a job description for this new position. None of the witnesses presented any evidence that the City provided the Union with advance notice and the opportunity to negotiate regarding the terms and conditions of the new Captain of Building Safety position.

<sup>43</sup> At one point, the Chief informed Armano that he did not like the name of the position. Armano explained that was the name of the position he used when the Union voted for it, so the Chief kept the name Captain of Building Safety.

1           The position of Captain Building Safety was a new position that did not exist  
2 previously.<sup>44</sup>

3           Thereafter, Moriarty spoke with a city attorney about the procedures he had  
4 initiated.<sup>45</sup> Moriarty learned that the Director of ISD was a specialist assignment that did  
5 not need to be bid. Accordingly, on November 15, 2018, Moriarty issued General Order-  
6 2018-42 to amend the previous General Order regarding bids. He wrote,

7           Please be advised that the assignment of Director of Inspectional Services  
8 is a specialist assignment in the Department.

9  
10           Assignment to the Director of Inspectional Services is at the discretion of  
11 the Fire Chief and not subject to bidding. The City reserves all rights to add  
12 or remove this assignment from the Department.

13  
14           Please know that individuals have submitted notice of their interest in this  
15 assignment and individuals may continue to submit notice of their interest  
16 until Friday, November 23, 2018.

17  
18           At some point thereafter, Zahn informed Moriarty that all positions should be  
19 subject to the bidding process, including the ISD Director position. Moriarty responded  
20 that the Mayor wanted Armano for the position, and that Armano would occupy the  
21 position or no one would.

22           On November 21, 2018, Moriarty emailed Zahn about the temporary position,  
23 writing,

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<sup>44</sup> It is undisputed that this is a new position. The Chief testified that the position did not exist until he promoted someone into the position on November 11, 2018.

<sup>45</sup> The record does not contain the specific date of this conversation or the identity of the attorney.

1 Pursuant to GENERAL ORDER 2018-41 Bids,<sup>46</sup> the City has clarified that  
2 this assignment is a specialist assignment, assigned at the discretion of the  
3 Fire Chief.  
4

5 While the City believes that it has the right to create this specialist  
6 assignment and permit the Fire Chief to assign an individual to this  
7 assignment the City also believes that it has the right to remove the  
8 specialist assignment from the Department in the future.  
9

10 Please let me know if you would like to discuss the Director of Inspectional  
11 Services specialist assignment and its role in the Department.  
12

13 Armano serves as the Captain of Building Safety and the temporary Director of  
14 ISD.<sup>47</sup> At some point, the Chief and the Mayor discussed how Armano's positions would  
15 be funded.<sup>48</sup> Armano is paid the same salary as other Captains in the Fire Department,  
16 rather than the rate specified for the ISD Director. ISD reimburses the Fire Department

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<sup>46</sup> It appears that Moriarty was actually referring to General Order 2018-42; General Order 2018-41 merely extended the due date for bids set forth in General Order 2018-38.

<sup>47</sup> No evidence was presented that the City provided the Union with notice and the opportunity to negotiate regarding Armano simultaneously holding both positions.

<sup>48</sup> No one testified about the date of this conversation.

1 for Armano's salary.<sup>49</sup> Armano performs overtime work on ISD matters; he does not  
2 perform fire suppression work on overtime.<sup>50</sup>

3 Armano works in City Hall and wears civilian clothing. Armano holds a dual role,  
4 as both Captain in the Fire Department and ISD Director.<sup>51</sup> Armano does not respond to  
5 active fires but has been called to investigate fires after the fact. He has also represented  
6 the Fire Department on certain matters such as zoning calls when the Chief is not  
7 available. At the time of the hearing, Armano was still a member of the Union. In his role  
8 of ISD Director, Armano reports on ISD matters to the Mayor and meets with the other

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<sup>49</sup> The Mayor explained the funding as follows, "Listen, I think that no one will ever say that we are spendthrifts when it comes to the City's money. And so there was an opportunity to move the payment of the ISD director to pay for the position that Mike has now, so we did that, and some partial money that we had inside the Inspectional Services Department. And this is the way I told city councilors about it. It wasn't creating both an ISD director and a captain. That would be adding a position, which they didn't look -- you know, I was a city councilor, too. We don't really look fondly on two added positions. So the idea was you take the money from ISD director's position to fund for this job."

<sup>50</sup> There was conflicting testimony about which department pays for Armano's overtime. Zahn indicated that Armano's overtime comes out of the Fire Department budget. The Chief testified that Armano's overtime is paid by ISD as a "journal transfer." It is not necessary to resolve this non-material discrepancy.

<sup>51</sup> The Mayor explained the positions as follows: "...if Mike's at a fire, I think that he'd have to respond to the Chief. I think that if Mike's in a conference room and there is a fire, the Chief would probably have to go and Mike would probably stay, because he's not an active -- he's not fighting fires. But you know, he is a member of the Fire Department." The Chief concurs that Armano holds a permanent Captain position in the Fire Department simultaneously with a temporary ISD Director position. He also says that Armano reports to him. "He does not need my approval to make decisions over at ISD, but when we do interrelated tasks and items, he quite often calls me or emails me, put me in on the loop of it, asks my opinion."

1 directors for weekly Monday meetings. Another fire fighter now works under Armano at  
2 City Hall on ISD matters.

3 OPINION

4 Section 6 of the Law requires public employers and employee organizations to  
5 negotiate in good faith with respect to wages, hours, standards of productivity and  
6 performance, and any other terms and conditions of employment. A public employer  
7 violates Sections 10(a)(5) and (1) of the Law when it unilaterally alters a condition of  
8 employment involving a mandatory subject of bargaining without first bargaining with a  
9 union to resolution or impasse. School Committee of Newton v. Labor Relations  
10 Commission, 388 Mass 557 (1983). An employer's obligation to bargain before changing  
11 conditions of employment extends to working conditions established through past  
12 practice, as well as those specified in a collective bargaining agreement. Town of  
13 Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983). To establish a violation, a  
14 union must demonstrate by a preponderance of the evidence that there was a pre-existing  
15 practice, that the employer unilaterally changed that practice, and that the change  
16 impacted a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603,  
17 1605, MUP-2503, 2528, 2541 (April 15, 1977).

18 **Count 1 Appointing a bargaining unit employee to a unit position and a non-unit**  
19 **position simultaneously.**

20  
21 The facts demonstrate, and the parties' stipulation confirms, that commencing in  
22 November 2018, Armano simultaneously held a unit position as Captain of Building Safety



1 and a non-unit position as ISD Director. Neither party cited any Commonwealth  
2 Employment Relations Board (CERB) decisions, and I have found none, considering  
3 whether it is a mandatory subject of bargaining to have an employee simultaneously  
4 holding both a unit and non-unit position.<sup>52</sup>

5 To determine whether a matter is a mandatory subject of bargaining, the CERB  
6 balances a public employer's interests in maintaining its managerial prerogative to  
7 effectively govern against the impact on employees' terms and conditions of employment.  
8 Town of Danvers, 3 MLC 1559, 1571, MUP-2292, 2299 (April 6, 1977). The CERB applies  
9 this balancing test on a case-by-case basis, considering such factors as the degree to  
10 which the subject has a direct impact on terms and conditions of employment, and  
11 whether the subject involves a core governmental decision or is far removed from  
12 employees' terms and conditions of employment. Id. at 1577. One consideration is  
13 whether the "ingredient of public policy inherent" in a particular action "is so comparatively

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<sup>52</sup> The National Labor Relations Board (NLRB) has addressed the issue in the context of a discrimination case, in Legacy Health System, 354 NLRB No. 45 (2009), aff'd 355 NLRB No. 76 (2010). In that case, both parties agreed that the terms and conditions of employment of an employee who is both a unit and a non-unit employee, are mandatory subjects of bargaining. Any legal uncertainties that arise, such as whether the daily overtime provisions of the collective bargaining agreement (CBA) would apply if the employee worked more than eight total hours per day in the two positions; whether time spent working in a non-unit position would count as hours worked for benefits eligibility provisions under the CBA; whether the discipline in the non-unit position would count toward progressive discipline in the unit position; whether the grievance procedure would apply to issues arising in the non-unit position; and whether the employee would have the right to union representation in disciplinary meetings, could be resolved through collective bargaining.

1 heavy that collective bargaining . . . is, as a matter of law, to be denied effect.” Town of  
2 Burlington v. Labor Relations Commission, 390 Mass. 157, 164 (1983) (citing School  
3 Committee of Boston v. Boston Teachers Local 66, 378 Mass. 65, 71 (1979)).

4 Public employers may exercise core managerial prerogatives to set public safety  
5 priorities. City of Boston, 32 MLC 4, MUP-2749, MUP-01-2892 (June 24, 2005) (applying  
6 the Danvers balancing test, the CERB decided that a public employer's decision to  
7 prioritize law enforcement details directly implicates the employer's ability to set its law  
8 enforcement priorities and, therefore, it does not constitute a mandatory subject of  
9 bargaining); City of Newton, 46 MLC 21, MUP-16-5532 (August 20, 2019)(a public  
10 employer has a nonbargainable prerogative to decide that, for public safety reasons, it  
11 will employ only physically and psychologically healthy people).

12 The City argues that M.G.L. c. 48, § 42 imbues the Fire Chief with nondelegable  
13 managerial rights over a Fire Department and its operations, and where there are such  
14 broad grants of authority, the authority must only yield to its collective bargaining  
15 obligations where the public policy at issue is “not so weighty.” See Dracut v. Dracut  
16 Firefighters Union, IAFF Local 2586, 97 Mass. App. Ct. 374, 380 (2020). The City asserts  
17 that assigning public safety employees to particular duties such as those of the Director  
18 of ISD “is a matter that concerns the public safety.” Taunton v. Taunton Branch of  
19 Massachusetts Police Assn, 10 Mass. App. Ct. 237, 243 (1980) citing Chief of Police of  
20 Dracut v. Dracut, 357 Mass. 492, 502 (1970). Likewise, the Mayor’s decision to have a  
21 Fire Department Captain simultaneously serve as the Director of ISD is also a matter of

1 public safety that need not be bargained. The City is responsible for safeguarding  
2 residents' health and safety in their homes, and the Fire Department and ISD are  
3 interrelated in ensuring public health and safety via fire prevention practices and building  
4 code enforcement. The duty assignments at issue here fall within the lens of a public  
5 safety policy. For these reasons, the City argues that there was no mandatory subject of  
6 bargaining here and thus Count I must be dismissed.

7         The Union does not address whether Armano's holding both a unit position and a  
8 non-unit position simultaneously is a mandatory subject of bargaining or if it impacts on  
9 public safety. Instead, the Union proffers that holding the two positions simultaneously  
10 likely violates M.G. L. c. 268A, and/or the ordinance of the City, state ethics laws and the  
11 public employee retirement law.<sup>53</sup>

12         I agree with the City that it did not have to bargain over its decision to appoint  
13 Armano to the non-unit position as Director of the ISD while he was also holding a

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<sup>53</sup> The Union, correctly asserting that a transfer of bargaining unit work to a non-unit employee is a mandatory subject of bargaining, suggests there was such a transfer of bargaining work here. I disagree, and further note that the Complaint did not so allege. Moreover, the Union contradicts its own argument by claiming that Armano remained in the Fire Department on paper only and did not perform any fire-related duties. If he did not perform any bargaining unit duties, there could not be any transfer of bargaining unit work here. The evidence demonstrates, and the parties stipulated, that Armano holds two positions at once, a unit position and a non-unit position. Testimony supports a finding that Armano does perform fire investigation and other prevention duties. However, there is no indication that he performs these bargaining unit duties in his non-unit role as ISD Director; rather he performs this work in his role as a Captain in the Fire Department. Therefore, I do not find evidence to support a finding that the City transferred any bargaining unit work to a non-unit position.

1 bargaining unit position. The evidence demonstrates that the City took this action to  
2 further public safety. In the wake of the gas explosions in the City, it was imperative that  
3 the ISD Director position be filled promptly. The Mayor believed Armano was uniquely  
4 qualified to handle the ISD Director position due to his leadership abilities, experience,  
5 and his expertise of the building codes. Armano originally turned down the position but  
6 was willing to accept it if he could remain in the Fire Department. Based on Armano's  
7 refusal to accept the ISD Director position unless he could remain in the Fire Department  
8 and the Mayor's determination that Armano was the appropriate person for the position,  
9 the Mayor opted to create a new Captain position for Armano to hold while also serving  
10 as ISD Director.

11 The Mayor testified that creating a new Captain position and assigning Armano to  
12 that position while also serving as the ISD Director was economically feasible because  
13 the City was only paying Armano one salary. Nevertheless, the evidence supports a  
14 finding that the Mayor's primary reason for the decision was not financial in nature but  
15 rather to secure the best candidate for the position.<sup>54</sup> The Mayor wanted Armano to be

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<sup>54</sup> If the decision had been made primarily for economic reasons, it may not have been a mandatory subject to bargain. See City of Everett, 42 MLC 253, 256, MUP-13-3006, (April 29, 2016) (decision to assign a lieutenant to perform captain's work was primarily for economic reasons; the decision did not "implicate the City's ability to select particular individuals to fill this position" where there was no evidence that the person was selected "due to any special skills or qualifications that he possessed"); City of Boston, 26 MLC 144, 146, MUP-1085 (March 10, 2000) aff'd sub nom. City of Boston, v. Labor Relations Commission, 58 Mass App. Ct. 1102, fur. rev. den. 440 Mass. 1106 (2003) (CERB properly imposed a bargaining requirement where City's decision to transfer some work

1 the Director of ISD and took the necessary actions to achieve that end. The fact that it  
2 was economically feasible to create a new position because there would be no additional  
3 financial outlays does not require a finding, under these circumstances, that the decision  
4 was made for economic reasons.

5       Because I find that the Mayor's decision was not primarily motivated by financial  
6 concerns but in order to select a specific person for the position, due to his perceived  
7 necessary qualifications to ensure public safety, the City's assignment of Armano to both  
8 positions simultaneously is not a mandatory subject of bargaining, and therefore the City  
9 was not required to bargain over its decision to appoint Armano to both positions.  
10 However, that is not the end of the inquiry. Notwithstanding a public employer's  
11 prerogative to make certain types of core managerial decisions without prior bargaining,  
12 if a managerial decision impacts a mandatory subject of bargaining, then bargaining over  
13 the impacts is required. City of Somerville, 42 MLC 170, 171, MUP-13-2977 (December  
14 30, 2015) (impact bargaining required where decision to assign non-unit duties impacted  
15 workload and job duties); Commonwealth of Massachusetts, 26 MLC 116, SUP-4158  
16 (February 15, 2000) (impact bargaining required where new risk assessment policy  
17 impacted job duties and workload).

18       The City's decision to have Armano simultaneously hold both a unit and non-unit  
19 position presents a number of issues directly impacting his terms and conditions of

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policing housing developments was not a level of services decision, but a decision about which law enforcement personnel would perform the work for less money).

1 employment, such as workload and duties. Peabody Municipal Light Department, 28 MLC  
2 88, 89, MUP-2351 (Aug. 9, 2001); Commonwealth of Massachusetts, 28 MLC 36, 40,  
3 SUP-4345 (June 29, 2001). Wages, hours, standards of productivity and performance  
4 and other terms and conditions of employees are all mandatory subject to bargaining.  
5 Boston School Committee 10 MLC 1420, MUP-5192 (February 21, 1984). There were  
6 many issues to decide, such as how many hours Armano would serve in each position,  
7 how he would be evaluated, whether he would wear a uniform or civilian attire, etc. See  
8 City of Lawrence, 43 MLC 170, MUP-14-3753 (January 20, 2017) aff'd 43 MLC 238 (May  
9 26, 2017) (dress codes are a mandatory subject of bargaining). Accordingly, the impacts  
10 of the City's decision implicate mandatory subjects of bargaining, and the City was  
11 required to provide the Union with notice and the opportunity to bargain to resolution or  
12 impasse over the impacts of its decision.

13       The City argues that even if there was a bargaining obligation, the City did not  
14 violate the Law as alleged because the Union had inherent notice and opportunity to  
15 bargain by voting to create the Captain of Building Safety position and conditions  
16 associated with the position. I disagree with the City's contention that the Union's vote  
17 absolves the City of its obligation to negotiate with the Union on this matter. Armano  
18 informed a portion of the Union membership, those who attended the special meeting,  
19 that the Mayor was considering creating a Captain of Building Safety position and  
20 assigning Armano to that position and that "in the City's discretion, the Captain of Building  
21 Safety may be appointed as Commissioner of Inspectional Services, Chief Building

1 Official, and/or other managerial role.” The membership voted to accept a new Captain  
2 position and allow Armano to potentially hold two positions. However, they did not discuss  
3 or vote on the impacts of Armano holding the two positions simultaneously.<sup>55</sup> Moreover,  
4 immediately after the vote, the President indicated that he was unsure that the vote was  
5 legal. At the very next meeting, about 9 days later, the President announced that the vote  
6 was determined to be illegal and therefore not binding.

7 The City itself never gave the Union prior notice. Neither the Chief nor the Mayor  
8 took any steps to discuss the situation with the Union, let alone negotiate with the Union  
9 prior to implementation. On November 8, 2018, the Union first learned, along with  
10 everyone else, that certain positions were out for bid, including a new position of Captain  
11 for Building Safety. Three days later, on November 11, 2018, the Chief announced that  
12 Armano was promoted to Captain of Building Safety and temporary Director of ISD.<sup>56</sup>  
13 After this implementation, on November 21, 2018, the Chief wrote to Zahn explaining that  
14 the assignment to ISD Director need not be bid and offered to discuss the Director of ISD  
15 assignment and its role. This vague offer to discuss the specialist assignment does not  
16 constitute the required advance notice and opportunity to bargain. Absent exigent  
17 circumstances, an employer's duty to notify the exclusive representative about a potential

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<sup>55</sup> Armano did discuss that the Captain of Building Safety would work in City Hall and wear the business attire of the ISD. The record contains no evidence that any other impacts were discussed or agreed upon.

<sup>56</sup> As of the hearing, Armano was still considered the temporary Director of ISD.

1 change before it is implemented is not satisfied by presenting the change as a fait  
2 accompli and then offering to bargain. City of Newton, 35 MLC 296, 298, MUP-04-4265  
3 (May 27, 2009); Town of Hudson, 25 MLC 143, 148, MUP-1715 (April 1, 1999). A fait  
4 accompli exists where, “under all the attendant circumstances, it can be said that the  
5 employer’s conduct has progressed to a point that a demand to bargain would be  
6 fruitless.” Id. at 148; Holliston School Committee, 23 MLC 211, 212-213, MUP-1300  
7 (March 27, 1997) (citing Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May  
8 27, 1982)). Even if the offer to discuss the specialist assignment could be considered an  
9 offer to bargain, it only came after the City had already created the new Captain position  
10 and assigned Armano to that position and the non-unit position.

11 I find that the City did not provide the Union with the opportunity to bargain over  
12 the impacts of its decision to simultaneously assign Armano to the two positions. The fact  
13 that a bargaining unit employee informed the Union that the City was contemplating  
14 making a change, and some members of the bargaining unit supported the idea, does not  
15 excuse the City from fulfilling its bargaining obligations.<sup>57</sup> Because the City did not do so,

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<sup>57</sup> The City did not specifically assert an affirmative defense of waiver by inaction, but even if it had, I would not find that the Union waived its right to bargain by inaction. To find a waiver by inaction, the Union must have actual knowledge and a reasonable opportunity to negotiate over the proposed change, but unreasonably or inexplicably fail to bargain or request to bargain. Town of Watertown, 32 MLC 54, 56, MUP-01-3275 (June 29, 2005). The Union did not have actual knowledge that the City was assigning Armano to a unit and non-unit position simultaneously until the day of implementation, November 11, 2018. Where a union is presented with a fait accompli, it is not required to make a demand to bargain in order to preserve its rights. Ashburnham-Westminster Regional



1 I find it violated the Law by failing to bargain over the impact of its decision to assign  
2 Armano to both a unit and non-unit position.

3 **Count II New Position of Captain for Building Safety.**

4 It is uncontroverted that the City was not obligated to bargain with the Union over  
5 its decision to create a new Captain position. Management has the prerogative to abolish  
6 or create positions; these decisions are not subject to mandatory bargaining. School  
7 Committee of Braintree v. Raymond, 369 Mass. 686 (1976); Cambridge School  
8 Committee, 7 MLC 1026, MUP-3319 (May 17, 1980). However, impacts resulting from  
9 the exercise of the City's managerial powers upon mandatory subjects of bargaining such  
10 as wages, hours, standards of productivity and performance, and other terms and

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School District, 29 MLC 191, MUP-01-3144 (April 9, 2003). Prior to November 11, 2018, Armano had informed the Union that the City was contemplating making such a change however a union is not required to demand bargaining when the only available information consists of rumors or speculation. City of Gardner, 10 MLC 1218, 1222, MUP-4917 (September 14, 1983).

1 conditions of employment, are negotiable. Lawrence School Committee 3 MLC 1304  
2 MUP-2287, 2329 (December 7, 1976).

3 It is also uncontroverted that position of Captain of Building Safety was a new  
4 position. The Mayor and the Chief both admit that they did not inform the Union about the  
5 decision to create this position in advance. Given this, I find that the City did not provide  
6 the Union with advance notice and the opportunity to bargain over the impact of its  
7 decision to create a new Captain of Public Safety.

8 The City asserts that it did not violate the Law as alleged, arguing that it was the  
9 Union, not the City, that was responsible for the creation of the Captain position. Because  
10 the Union voted for Armano's option 1, the City maintains that the Union cannot rationally  
11 argue that it did not have knowledge of the position or the opportunity to bargain over the  
12 terms or conditions.<sup>58</sup> The City further maintains that the Union cannot assert that the  
13 vote did not actually pass or that the vote should be disregarded. The City believes any  
14 Union attempt to dispute the vote's validity is undercut by the fact that no notes were  
15 taken about the vote. The Union's executive board could have expressed their concerns  
16 at the time of the special meeting. Although the Union leadership may be unhappy with

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<sup>58</sup> Here, as in the previous count, the City did not specifically assert an affirmative defense of waiver by inaction, but even if it had, I would not find that the Union waived its right to bargain by inaction for the same reasons as discussed above. The Union did not have actual knowledge about the new position until it was posted and Armano's prior assertions that the City contemplated creating a new position were merely speculative.

1 the results of the vote, the City asserts that the Union cannot credibly litigate the validity  
2 of the vote.

3 The Union does not dispute that the vote took place or that the majority of  
4 bargaining unit employees present at the October 29, 2018 meeting voted for option 1.  
5 The Union can, and does, dispute that the vote was valid or binding. Zahn expressed his  
6 concerns about the legality of the vote immediately after the vote. Armano was aware of  
7 this. At the very next Union meeting, Zahn informed the membership that, after consulting  
8 with counsel, he determined that the vote was not valid.

9 Moreover, at no point did the Union vote to determine all of the terms and  
10 conditions of the position. The City argues that “the Union membership had full reign at a  
11 meeting among its membership to decide, on its own accord absent City involvement, the  
12 terms and conditions of the position. The October 29<sup>th</sup> meeting imbued the Union with the  
13 sole authority to determine the creation and conditions of this position...” I do not find this  
14 argument persuasive. The Union simply does not have the power, on its own, to do so.  
15 Even though the Union membership voted in favor of option 1, that vote did not determine  
16 the terms and conditions of the position, nor did it compel the City to create the position.  
17 It is not conceivable that had the Union membership voted, for instance, for a Deputy  
18 Chief position, that the City would then be compelled to create a new Deputy Chief  
19 position based solely on the Union’s vote.

20 The facts demonstrate that the Mayor decided to create the Captain position so  
21 that his chosen candidate would accept the ISD Director position. The City asserts that it

1 is unreasonable to hold it responsible “on a technicality” that it is the entity responsible  
2 for filling the position. I do not find this to be a technicality. It is the City, not the Union,  
3 that can create a position. The City asserts that “in deference to the Union’s wishes, the  
4 City indeed went through the process of filling two new positions when it could have easily  
5 responded to the Union that its vote to create the two positions does not obligate any  
6 action on part of the City.” This accurate statement undercuts the City’s argument. It is  
7 true that the City was not obligated to create a position just because the Union voted to  
8 make it happen. Therefore, whether there was a vote or not, it was the City that created  
9 and filled the position. Along with the privilege to create positions, the City also has a  
10 corresponding obligation to bargain with the Union over the terms and conditions of  
11 employment of such a position. It did not do so. It never presented the Union with a job  
12 description or opportunity to bargain over any negotiable items. Even Armano testified  
13 that he was not sure what the next steps would be after the vote and whether there would  
14 then be discussions between the City and the Union. The evidence, though, makes clear  
15 that there were no such discussions or opportunities to bargain.<sup>59</sup> I find that the City was

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<sup>59</sup> The Union’s brief claims that in late September, Zahn spoke to the Chief and demanded to bargain over the new position. The record does not support this contention. The record only supports a finding that Zahn spoke with the Chief at some unspecified date after the October special meeting and explained that he believed that the City would be violating the contract by opening a spot just for Armano. However, it is not necessary for the Union to have requested to bargain because, as noted above, where, as here, a union is presented with a fait accompli, the union is not required to make a demand to bargain in order to preserve its rights to an adjudication of unlawful conduct or remedial relief. Town of Dennis, 12 MLC 1027, 1032, MUP-5247 (June 21, 1985).

1 required to provide the Union with notice and the opportunity to bargain to resolution or  
2 impasse over the terms and conditions of the newly created unit position but the City  
3 failed to do so, thereby violating the Law as alleged.

#### 4 **Count 3- Direct Dealing**

5         The duty to bargain collectively prohibits an employer from negotiating directly with  
6 employees in the bargaining unit on matters that are properly the subject of negotiations  
7 with the employees' exclusive representative. Trustees of the University of  
8 Massachusetts Medical Center, 26 MLC 149, 160, SUP-4392, SUP-4400 (March 14,  
9 2000). Direct dealing occurs where an employer deals directly with employees, not the  
10 exclusive representative, regarding topics such as the employees' wages, hours and  
11 working conditions. See Town of Harwich, 32 MLC 27, 32, MUP-01-2960 (June 27, 2005)  
12 (finding direct dealing where the employer discussed with an employee, not the union, a  
13 light duty assignment); City of Lowell, 28 MLC 157, 159, MUP-2478 (October 15, 2001)  
14 (finding direct dealing where the employer contacted an employee, not the union, about  
15 the employee's willingness to return to work on a modified schedule). Direct dealing is  
16 impermissible for at least two reasons. First, direct dealing violates the union's statutory  
17 right to speak exclusively for the employees who have elected it to serve as their sole  
18 representative. Service Employees International Union, AFL-CIO, Local 509 v. Labor  
19 Relations Commission, 431 Mass. 710, 715 (2000). Second, direct dealing undermines  
20 the employees' belief that the union actually possesses the power of exclusive  
21 representation to which the statute entitles it. Id.

1           During the Mayor's first discussion with Armano, he offered Armano the position  
2 of ISD Director, suggesting he take a leave of absence. In the second meeting, Armano  
3 made it clear that he would not accept the ISD Director position unless he could remain  
4 in the Fire Department. He also made clear that he would be an acting Captain soon. The  
5 Mayor then indicated that he might create a Captain position in the Fire Department and  
6 Armano could hold both the Captain position and the ISD Director position. Armano  
7 responded that he was now inclined to accept the position. The City argues that the Mayor  
8 at no point raised any terms of conditions related to either the Director of ISD position or  
9 Captain Armano's position in the Fire Department. I disagree. Although the evidence does  
10 not demonstrate that Armano and the Mayor agreed to all the terms of conditions of his  
11 employment while serving in the dual positions, the evidence does demonstrate that they  
12 discussed, and apparently, agreed about some of the terms of conditions of his  
13 employment in the dual positions including where Armano would work, in City Hall, and  
14 what he would wear to work, civilian attire rather than the Fire Department uniform.

15           Armano made the Union aware of these discussions both before and during the  
16 October 29, 2018 special meeting. Section 15.04 of the DLR's regulations, 456 CMR  
17 15.04, states: "Except for good cause shown, no charge shall be entertained ... based  
18 upon any prohibited practice occurring more than six months prior to the filing of a  
19 charge..." Therefore, a charge of prohibited practice must be filed with the DLR within six  
20 months of the alleged violation or within six months from the date that the violation  
21 became known or should have become known to the charging party, unless good cause

1 is shown. Town of Lenox, 29 MLC 51, MUP-01-3214, and MUP-01-3215 (September 5,  
2 2002) (citing Town of Dennis, 26 MLC 203, MUP-1868 (April 21, 2000)). It is well-  
3 established that the six-month limitations period begins to run when the party adversely  
4 affected receives actual or constructive notice of the conduct alleged to be an unfair labor  
5 practice. Id. (citing Wakefield School Committee, 27 MLC 9, 10, MUP-2441 (August 16,  
6 2000)).

7           Although the record does not reveal the exact date that Armano first informed Zahn  
8 and Driscoll about his discussions with the Mayor, it was unmistakably weeks before the  
9 October 29, 2018 special meeting. Armano explained that the Mayor offered him the ISD  
10 position and that the Mayor was willing to create a new captain position for him to hold at  
11 the same time. Although the record does not establish that Armano explained all the  
12 details of his conversations with the Mayor at this time, for instance whether he and the  
13 Mayor had agreed that Armano would wear civilian attire if he assumed the two positions,  
14 Armano certainly expressed enough of their conversation that Zahn told Armano to take  
15 himself out of the process, saying “[t]hat way you're not direct dealing with the Mayor.”

16           Subsequently, during the October 29, 2018 special meeting, Armano discussed  
17 his meetings with the Mayor in full. He spoke for close to an hour during which he detailed  
18 his conversations with the Mayor. He explained that the Mayor offered him the ISD  
19 position and after Armano originally declined the position, the Mayor indicated that he  
20 was willing to create a new Captain position specifically for Armano to occupy while also  
21 working as the ISD Director. Armano also made it clear that although he and the Mayor

1 had not worked out all the details involved if Armano were to occupy two positions, they  
2 had addressed some of details. Armano shared with the attendees at the meeting that if  
3 he accepted both the Captain of Building Safety position and the ISD Director position,  
4 he would work at City Hall and wear civilian attire instead of his fire uniform.

5 I find that Armano's conversation with Zahn and Driscoll about his dealings with  
6 the Mayor, and Armano's further recounting of his discussion with the Mayor during the  
7 special meeting were sufficient to put the Union on notice that the Mayor was directly  
8 dealing with Armano regarding negotiable matters. Even though the Union was not yet  
9 aware that Armano would actually hold both positions, the Union had sufficient notice that  
10 the Mayor was directly dealing with a bargaining unit employee. The President even used  
11 those specific words when addressing the issue with Armano. When considering if the  
12 Union had sufficient notice of a violation of Law, the Employer need not show that the  
13 Union was aware of every fact necessary to prevail on the claim. See Secretary of  
14 Administration and Finance v. Commonwealth Employment Relations Board, 81 Mass.  
15 App. Ct. 81, 89 (2012) (although a union may receive a clearer understanding of the  
16 alleged violation later, the first event reasonably likely to have put the union on notice of  
17 a violation triggers the running of the limitations period). It was not until later that the Union  
18 learned that the City was establishing a new Caption position and having Armano serve  
19 in that capacity as well as Director of the ISD. However, Armano first made the Union  
20 aware of the direct dealings during the October 29, 2019 special meeting and in their  
21 discussion that predated that meeting. Although the Union may have received a clearer



1 understanding of the direct dealings after learning of the unilateral implementation, the  
2 earlier date triggered the running of the limitations period. Id. In fact, the record is silent  
3 on any other evidence that the Union learned regarding the direct dealing allegation  
4 between the date of the special meeting and when it filed the Charge. Accordingly, I find  
5 that the Union had notice of the City's direct dealings with Armano more than six months  
6 before it filed the Charge on May 9, 2019. No evidence was presented to establish that  
7 good cause existed to excuse the delay in filing. 456 Code Mass. Regs. § 15.03. Because  
8 the Charge was filed beyond the six-month period of limitations, I dismiss the allegations  
9 in Count 3 as untimely.<sup>60</sup>

#### 10 CONCLUSION

11 Based on the record and for the reasons stated above, I conclude that the City  
12 violated Section 10(a)(5) and, derivatively, Section 10(a)(1), of the Law when it failed to  
13 bargain over the impact of its decision to 1) create the new Captain of Building Safety  
14 position, and 2) assign a bargaining unit employee simultaneously to a unit-position and  
15 a non-unit position. I conclude that the City did not violate the Law by failing to bargain  
16 over its decision to assign a bargaining unit employee to both a unit and non-unit position,  
17 and I find that the City did not violate the Law by dealing directly with Armano because  
18 that allegation was untimely filed.

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<sup>60</sup> Given my determination that the allegation regarding direct dealing was untimely filed, I need not consider the City's further argument that a finding of a violation here would chill the employer's first amendment rights to converse with its employees.



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

2        1. Cease and desist from:

3            a. Failing to bargain over the impacts of its decision to create a Captain of  
4            Building Safety, without first giving the Union notice and an opportunity to  
5            bargain to resolution or impasse;

6            b. Failing to bargain over the impacts of its decision to assign a bargaining unit  
7            employee to a unit position and a non-unit position simultaneously, without first  
8            giving the Union notice and an opportunity to bargain to resolution or impasse;

9            c. Otherwise, interfering with, restraining, or coercing employees in the exercise  
10           of their rights guaranteed under the Law.

11        2. Take the following affirmative action that is necessary to effectuate the purposes  
12        of the Law:

13            a. Upon request, bargain in good faith with the Union to resolution or impasse  
14            over the impacts of the decision to create the Captain of Building Safety  
15            position.

16            b. Upon request, bargain in good faith with the Union to resolution or impasse  
17            over the impacts of the decision to simultaneously assign a bargaining unit  
18            employee to both a unit-position, Captain of Building Safety, and a non-unit  
19            position, Director of ISD.

20            c. Immediately post signed copies of the attached Notice to Employees in all  
21            conspicuous places where members of Union's bargaining unit usually  
22            congregate, or where notice are usually posted, including electronically, if  
23            the Employer customarily communicates with these unit members via  
24            intranet or email and display for a period of thirty (30) days thereafter,  
25            signed copies of the attached Notice to Employees.

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

Handwritten signature of Gail Sorokoff in cursive script.

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GAIL SOROKOFF, 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 be final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

# NOTICE TO EMPLOYEES

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

The City of Lawrence violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: 1) unilaterally creating a new position, and 2) assigning a bargaining unit employee to a unit position and a non-unit position simultaneously without providing the Lawrence Firefighters Union Local 146 (Union) with prior notice and an opportunity to bargain to resolution or impasse over the impacts of these decisions on employees' terms and conditions of employment.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the City of Lawrence assures its employees that:

**WE WILL NOT** create a new bargaining unit position without first providing the Union with notice and the opportunity to bargain to resolution or impasse over the impacts of that decision;

**WE WILL NOT** assign a bargaining unit employee to a unit position and a non-unit position simultaneously, without first providing the Union with notice and the opportunity to bargain to resolution or impasse over the impacts of that decision on unit members;

**WE WILL**, upon request, bargain with the Union in good faith to resolution or impasse over the terms and conditions of employment for the Captain of Public Safety position;

**WE WILL**, upon request, bargain with the Union in good faith to resolution or impasse over the impacts of the decision to simultaneously assign a bargaining unit employee to both the unit position of Captain of Public Safety and a non-unit position of Inspectional Services Division Director;

**WE WILL NOT** otherwise interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Law.

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City of Lawrence

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Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston MA 02111 (Telephone: (617) 626-7132).