

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *
*
TOWN OF NORTHBOROUGH *
*
and *
*
MASSACHUSETTS COALITION OF *
POLICE, LOCAL 165 *
*
*

Case No.: MUP-20-7911

Date Issued: November 18, 2021

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Brian M. Maser, Esq. - Representing the Town of Northborough

Daniel Fogarty, Esq. - Representing the Massachusetts
Coalition of Police, Local 165

HEARING OFFICER'S DECISION

SUMMARY

1 The three issues in this case are whether the Town of Northborough (Town or
2 Respondent) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. c. 150E
3 (the Law) when it: 1) ordered a bargaining unit member to participate in a fitness for duty
4 evaluation on September 6, 2019, without providing the Massachusetts Coalition of
5 Police, Local 165 (Union or Charging Party) with prior notice and an opportunity to bargain
6 to resolution or impasse over that decision and its impacts; 2) refused to bargain with the
7 Union on September 10, 2019, over the criteria and procedures for fitness for duty

1 evaluations; and 3) failed to timely provide the Union with relevant information that was
2 requested on September 11, 2019, and was reasonably necessary for the Union to
3 execute its duty as the collective bargaining representative. For the reasons explained
4 below, I find that the Town violated the Law when it: 1) ordered a bargaining unit member
5 to participate in a fitness for duty evaluation on September 6, 2019, without providing the
6 Union with prior notice and an opportunity to bargain to resolution or impasse over that
7 decision and its impacts; 2) refused to bargain with the Union on September 10, 2019,
8 over the criteria and procedures for fitness for duty evaluations; and, 3) failed to timely
9 provide the Union with relevant information that was requested on September 11, 2019,
10 and was reasonably necessary for the Union to execute its duty as the collective
11 bargaining representative.

12 STATEMENT OF THE CASE

13
14 On March 5, 2020, the Union filed a Charge of Prohibited Practice with the
15 Department of Labor Relations (DLR), alleging that the Town had engaged in prohibited
16 practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the
17 Law by ordering a bargaining unit member to attend a mandatory fitness for duty
18 evaluation on September 6, 2019; refusing to bargain with the Union on September 10,
19 2019 over the criteria and procedures for mandatory fitness duty evaluations; and failing
20 to provide the Union with information requested on September 11, 2019 that was relevant
21 and necessary to investigate a potential unfair labor practice. On June 23, 2020, a DLR
22 Investigator issued a Complaint of Prohibited Practice, alleging that the Town had violated
23 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it: 1) ordered a

1 bargaining unit member to participate in a fitness for duty evaluation on September 6,
2 2019, without providing the Union with prior notice and an opportunity to bargain to
3 resolution or impasse over that decision and its impacts; 2) refused to bargain with the
4 Union on September 10, 2019 over the criteria and procedures for fitness for duty
5 evaluations; and 3) failed to provide the Union with relevant information requested on
6 September 11, 2019, that was reasonably necessary for the Union to execute its duty as
7 the collective bargaining representative. On June 26, 2020, the Town filed its Answer to
8 the Complaint. On February 19, 2021, the parties filed a Statement of Stipulated Facts
9 and Exhibits and Waiver of Hearing (Stipulated Record). The Town and the Union filed
10 their post-hearing briefs on March 31, 2021 and April 1, 2021, respectively.

11

STIPULATED RECORD

12 The parties stipulated to the following facts:

13

14 1. The Town of Northborough ("Town") is a public employer within the meaning of
15 Section 1 of G.L. c. 150E (the "Law").

16

17 2. Massachusetts Coalition of Police, Local 165 ("Union") is an employee
18 organization within the meaning of Section 1 of the Law.

19

20 3. The Union is the exclusive collective bargaining representative for all patrol officers
21 of the Town's Police Department [(Department)].

22

23 4. The Town and the Union are parties to a collective bargaining agreement [(CBA)]
24 currently in effect from July 1, 2019 through June 30, 2022.

25

26 5. The Parties' CBA does not contain any relevant provisions regarding mandatory
27 fitness for duty evaluations.

28

29 6. John Coderre is the Town Administrator of the Town of Northborough.

30

31 7. Chief William ("Bill") Lyver is the Town of Northborough Chief of Police.

- 1 8. Attorney Brian Maser is Labor Counsel for the Town of Northborough.
- 2 9. Officer Thomas McDonald is the [P]resident of the Union.
- 3
- 4 10. Anthony Papandrea is an Area Vice President [(AVP)] of the Massachusetts
- 5 Coalition of Police, who works with the Union.
- 6
- 7 11. Attorney Daniel Fogarty represents the Union.
- 8
- 9 12. By letter dated March 24, 2010, the Northborough Chief of Police requested that a
- 10 bargaining unit member, Officer "TK" attend an Independent Medical Exam ("IME")
- 11 prior to returning to active duty following a period of sick leave. Officer TK was
- 12 placed on paid administrative leave pending the outcome of the IME. This letter is
- 13 in evidence as Joint Exhibit 10. No Union representatives were copied on the letter
- 14 to Officer TK, and Officer TK was not, at any relevant time, a Union representative.
- 15
- 16 13. The Northborough Chief of Police previously requested that a bargaining unit
- 17 member, Officer "KA" attend a fitness for duty assessment on or about April 14,
- 18 2017, following an off-duty incident. A letter concerning this assessment is in
- 19 evidence as Joint Exhibit 11. No Union representatives were copied on the letter
- 20 to Officer KA, and Officer KA was not, at any relevant time, a Union representative.
- 21
- 22 14. By letter dated August 29, 2019, the Town placed Officer KA on administrative
- 23 leave. That letter is in evidence as Joint Exhibit 4.
- 24
- 25 15. By letter dated August 29, 2019, the Northborough Chief of Police suspended
- 26 Officer KA's License to Carry. That letter is in evidence at Joint Exhibit 3.
- 27
- 28 16. The Town opened an Internal Affairs investigation into Officer KA's actions on
- 29 August 29, 2019.
- 30
- 31 17. The Department completed the Internal Affairs Investigation referenced in
- 32 Paragraph 1[6] on September 18, 2019.
- 33
- 34 18. In a letter dated September 6, 2019, the Town ordered a bargaining unit member,
- 35 Officer KA, to attend a mandatory fitness for duty evaluation.
- 36
- 37 19. Before issuing the September 6, 2019 notice, the Town did not provide the Union
- 38 with prior notice and the opportunity to bargain to impasse or resolution over the
- 39 decision to require a fitness for duty evaluation and the impacts of that decision on
- 40 employees' terms and conditions of employment.

- 1 20. On September 10, 2019, the Union demanded to bargain over the criteria and
2 procedure for fitness for duty evaluations, specifically:
3 a. The selection of the evaluator,
4 b. The information provided to the evaluator,
5 c. The testing protocol,
6 d. What results will be generated by the evaluator and to whom they will
7 be communicated,
8 e. How that information will be used, and
9 f. The procedure by which the Town will determine that an employee will
10 need a fitness for duty examination.
11
12 21. On September 10, 2019, the Town refused to bargain with the Union over the
13 criteria and procedures for fitness for duty examinations.
14
15 22. On September 11, 2019, the Union submitted a written request by e-mail to the
16 Town's Labor Counsel for any and all documents in support of the Town's
17 assertion that it had previously ordered bargaining unit members to submit to
18 fitness for duty evaluations. The Union cc'd Chief Lyver, Town Administrator
19 Coderre, Union President McDonald and MCOP AVP Papandrea. This email is in
20 evidence as Joint Exhibit 8.
21
22 23. On September 11, 2019, the Town's Labor Counsel stated that he and Chief Lyver
23 would obtain the requested information, described in Paragraph 22, and provide it
24 to the Union. Chief Lyver and Town Administrator Coderre were cc'd on this email.
25 This email is in evidence as Joint Exhibit 9.
26
27 24. In October [of 2019], the Town, Union, and Officer KA signed a settlement
28 agreement¹ resulting from the off-duty incident that led to Officer KA being placed
29 on paid administrative leave by letter dated August 29, 2019.
30
31 25. After the parties executed the settlement agreement the Union did not renew its
32 request for the requested information sought by the Union in the e-mail to Labor
33 Counsel on September 11, 2019.
34
35 26. The Town did not provide the information in response to the Union's September
36 11, 2019 request for information, described in Paragraph 22, prior to the Union
37 filing the instant charge of prohibited practice.
38

39 **The CBAs and the MOA**

¹ The parties did not offer into evidence a copy of the October 2019 settlement agreement.

1 The parties entered into a CBA which was effective from July 1, 2016 to June 30,
2 2019 (2016-2019 CBA). Article IV of the 2016-2019 CBA pertained to “Rights of
3 Management” and stated in full:

4 (A) It is agreed that management officials of the [T]own shall at all times
5 retain the right to direct employees, to hire, promote, transfer and to
6 suspend, demote, discharge or take other disciplinary action against
7 employees for any violation of the rules and regulations of the
8 Northborough Police Department, to relieve employees from duty
9 because of lack of work or for other legitimate reasons, to maintain
10 the efficiency of the operations entrusted to them, to determine the
11 methods, means and personnel by which such operations are to be
12 made, to take whatever action may be necessary to carry out the
13 mission of the police department. Nothing in this agreement shall in
14 any way diminish or derogate from the powers, duties and
15 responsibilities entrusted to the police chief as set forth in MGL
16 Chapter 41, Section 97A.

17
18 (B) Nothing in this agreement shall limit the [T]own in the exercise of its
19 function of management and in the direction and supervision of the
20 town business. This includes but is not limited to the right to add or
21 eliminate departments; require and assign overtime; increase or
22 decrease the number of jobs; change process; assign work and work
23 to be performed; scheduled shifts and hours of work and lunch or
24 break periods; hire; suspend; demote, discipline or discharge;
25 transfer or promote; layoff because of lack of work or other legitimate
26 reasons; establish rules, regulations, job descriptions, policies and
27 procedures; conduct orderly operations; establish new jobs; abolish
28 and change existing jobs; determine where, when, how and by whom
29 work will be done; determine standards of proficiency in law
30 enforcement skills and physical fitness standards; except where any
31 such rights are specifically modified or abridged by the terms of this
32 agreement.

33
34 It is understood and agreed by the parties hereto that the [T]own does not
35 have to rely on any collective bargaining contract with its employees as the
36 source of its rights and management prerogatives, that this contract does
37 not purport to spell out the job responsibilities and obligations of the
38 employees covered by this contract, that said responsibilities and
39 obligations are specifically described or that they are not required to perform
40 obligations not outlined [in] this contract and that the failure or omission of

1 the parties to outline or delineate in this contract responsibilities and
2 obligations of employees is not to be relied upon by the latter as evidence
3 of the fact that such obligations or responsibilities do not exist.
4

5 On or about September 9, 2019, the parties entered into a Memorandum of
6 Agreement (MOA) for a successor CBA which was effective from July 1, 2019 until June
7 30, 2021. The MOA did not change the terms of the 2016-2019 CBA as they pertained to
8 Article IV "Rights of Management." At some point after September 9, 2019, the parties
9 reached a successor CBA that is currently effective from July 1, 2019 through June 30,
10 2022.

11 **Officer KA**

12
13 By letter dated August 28, 2019, Department Chief Lyver notified Town
14 Administrator Coderre that a Department investigation established probable cause to
15 believe that Officer "KA" had committed domestic assault and battery on August 27, 2019.
16 By that same letter, Lyver informed Coderre that a Department lieutenant served Officer
17 KA with a restraining order, that Lyver arrested Officer KA and placed him on immediate
18 administrative paid leave, and that Officer KA had surrendered both his Department and
19 personal weapons pursuant to the order.

20 By letter dated August 29, 2019, Chief Lyver notified Officer KA that the
21 Department was suspending his license to carry firearms pursuant to M.G.L. c. 140,
22 Section 131, and ordered him to surrender his firearms to the Department. By that same
23 letter, Lyver notified Officer KA of his right to appeal the suspension within 90 days to the
24 appropriate district court. By another letter dated August 29, 2019, Lyver provided Officer
25 KA with "Notice of Administrative Leave," stating in full:

1 Please accept this letter as written confirmation that, effective August 28,
2 2019, you were placed on a paid administrative leave status due to your
3 arrest for domestic assault and battery.
4

5 During the period of your administrative leave, you are prohibited from
6 performing any duties of your position and you are to have no active or
7 passive role in Department operations. You are ineligible for shift coverage,
8 details, overtime, and/or special assignments during the period of your
9 leave. You are prohibited from entering upon any Town-owned property,
10 except to conduct Town business, without first obtaining my expressed
11 written authorization. You are further prohibited from speaking to members
12 of the Department as to your duty status except that you may confer with a
13 Union representative. The terms of this administrative leave will remain in
14 effect until further notification from my office. Failure to abide by the terms
15 of your leave as set forth will result in the termination of your employment
16 with the Town.
17

18 Be advised that the Department intends to initiate an Internal Affairs
19 Investigation relative to your alleged off-duty conduct. Per Chapter 52,
20 Section 1.6., enclosed please find Department Form IAN – 2009 placing
21 you on notice of that pending investigation.
22

23 A copy of this letter will be placed in your personnel file.
24

25 By letter dated September 6, 2019, Department Lieutenant Joseph Galvin (Galvin)
26 informed Officer KA about a “Psychological Fitness for Duty Examination,” stating in
27 pertinent part:

28 An appointment has been made for you with Dr. John Madonna
29 [(Madonna)], Chandler Psychological Services, for Wednesday September
30 11, 2019 to determine your psychological fitness for duty as a patrol officer
31 with the Northborough Police Department. The appointment is scheduled
32 for 9[00] am at his office located at 469 Chandler Street Worcester[,]
33 Massachusetts 01602. You are required to attend this initial examination
34 and all additional appointments as determined by Dr. Madonna. Failure to
35 appear and participate in the examination or future examinations will serve
36 as cause to discipline you, up to and including the termination of your
37 employment with the Town.
38

39 A copy of this letter will be placed in your personnel file.
40

....

1 **The Union's Demand to Bargain**

2 By email on September 10, 2019, the Union notified the Town of its demand to
3 bargain over Lieutenant Galvin's September 6, 2019 order that Officer KA appear at a
4 psychological fitness for duty evaluation on September 11, 2019. By that same email,
5 the Union also "insist[ed]" that the Town postpone Officer KA's evaluation order, and
6 attached a letter dated September 10, 2019, which specified the Union's demands. The
7 Union's September 10, 2019 letter stated in pertinent part:

8 I am writing on behalf of my client, the Massachusetts Coalition of Police
9 Local 165 (Patrolmen), in response to Lt. Galvin's September 6, 2019 letter
10 to Officer [redacted] ordering him to appear at a psychological fitness for
11 duty examination scheduled for September 11, 2019 at 9:00 a.m. under the
12 threat of discipline up to and including the termination of his employment as
13 a Police Officer with the Town of Northborough.
14

15 Specifically, the Union requests that the Northborough Police Department
16 and/or the Town of Northborough bargain over the criteria and procedure
17 for this mandatory fitness for duty evaluation before it is undertaken,
18 [emphasis in original] including but not limited to:
19

- 20 1. The selection of the evaluator,
- 21 2. The information provided to the evaluator,
- 22 3. The testing protocol,
- 23 4. What results will be generated by the evaluator and to whom they
24 will be communicated,
- 25 5. How that information will be used [sic] procedure by which the
26 Employer determines that an employee is for fitness for duty
27 examination [sic.]
28

29 The Commonwealth Employment Relations Board recently issued a
30 decision in City of Newton and Newton Police Superior Officers Association,
31 MassCOP Local 401[.] reaffirming that the criteria and procedure for fitness
32 for duty evaluations are mandatory subjects of bargaining, and that
33 bargaining over these subjects must occur prior to an evaluation taking
34 place....

1 Therefore, the Union respectfully insists that the Department rescind Lt.
2 Galvin's order and postpone any psychological fitness for duty examination
3 until such time as the parties meet and bargain over these issues to
4 resolution or impasse.

5

6
7 By reply email on September 10, 2019, the Town informed the Union of the

8 following:

9

10
11 The Town expects Officer [KA] to comply with Galvin's written directive to
12 appear before Dr. Madonna for a psychological fitness for [duty evaluation]
13 as previously scheduled. The Town has previously ordered other members
14 of the Union, including Officer [KA] on one prior occasion, to attend fitness
15 exams, without objection from the Union or a demand to bargain. The
16 [sic]²...in this case is untimely and the Union has waived its rights to
17 demand bargaining given its prior inaction when other officers have been
18 ordered to attend to [sic] an examination.

19
20 **The Union's Request for Information**

21 By email on September 11, 2019, the Union informed the Town of the following:

22 The Union disagrees with the Town's contention that a mutually known and
23 accepted past practice exists between the parties. It is worth noting that,
24 here, the Department made no effort to notify the Union of Lt. Galvin's order.
25 The Town's refusal to bargain as the Union requested is a violation of G.L.
26 c. 150E, and the Union is prepared to enforce its rights in the appropriate
27 forum. Moreover, the Union will continue to investigate whether any other
28 action is appropriate.

29
30 If the Town believes that it has ordered bargaining unit members to submit
31 to fitness for duty evaluations under similar circumstances in the past,
32 please provide any and all documents related to those orders.

33
34 Finally, as we discussed on the phone yesterday, since Officer [KA] has
35 been ordered to submit to questions by the Town under the threat of

² Email text not legible.

1 termination, he [sic]³...rights against self-incrimination including but not
2 limited to his rights under the 5th Amendment of the [United States]
3 Constitution and is invoking his rights under Article 12 of the Massachusetts
4 Constitution where appropriate.

5 By reply email on September 11, 2019, the Town informed the Union that it had
6 “asked Chief Lyver to prepare the responsive documents and we will send them to you
7 pursuant to our obligations under G.L. c. 150E.” By that email, the Town also stated that:

8 I am aware of at least one prior instance where the Department ordered the
9 same officer to attend a fitness for duty exam following an incident at his
10 residence with his wife where his wife called the station during or shortly
11 after a verbal argument where the officer punched his hand through a wall
12 and broke his hand. I believe that incident happened in 2017.

13
14 I will be in touch with the documents.

15 **The 2010 and 2017 Evaluations**

16
17 At some point on or after March 5, 2020, the Town provided the Union with two
18 letters. The first letter was dated March 24, 2010, from then-Department Chief Mark K.
19 Leahy (Leahy) who notified⁴ Officer “TK” of the following:

20 I am writing in regards to your sick leave, which you have been on since
21 February 19, 2010. On March 19, 2010 we received a note form your
22 physician indicating that you were cleared to return to full duty effective
23 March 21, 2010.

24
25 Prior to your return to active duty, I am requesting that you undergo an
26 Independent Medical Evaluation (IME). Please be advised that we have
27 scheduled you for an IME with Dr. [redacted] at 8:00 am [emphasis in
28 original,] on Thursday, March 25, 2010 at Chandler Psychological Services,
29 which is located at [redacted], Worcester, MA 01602. Please note that the
30 Town will pay for the IME.
31

³ Email text not legible.

⁴ Leahy copied “Town Administrator” and “Town Counsel” on that letter.

1 Effective March 24, 2010, you are being placed on [a]dministrative leave
2 pending the outcome of your IME.
3

4 The second letter was dated April 14, 2017, from Chief Lyver who notified Dr.
5 Madonna about the reasons for his request of a fitness for duty evaluation for Officer KA:

6 As requested, I am providing you with a summary of the circumstances that
7 lead to my requesting a fitness-for-duty assessment of...[redacted].
8

9 On Sunday, April 9, 2017 at 2:00 a.m., we received a call from [redacted]
10 wife of [redacted] requesting to speak with someone here regarding her
11 husband[']s behavior. The on-duty patrol supervisor responded to the
12 [redacted] home. He interviewed both [redacted] and [redacted] separately.
13 [Redacted] stated that she was sick of her husband's behavior and didn't
14 know what else to do. During the interview with [redacted] she told the
15 supervisor that she believed he ([redacted]) may suffer from depression.
16 She also stated that [redacted] told her that he was sad and felt like hurting
17 himself, although she did not think he would hurt himself.
18

19 During his interview with [redacted], the supervisor asked how he had felt
20 yesterday (Saturday, April 8th). [Redacted] stated he felt strange when he
21 woke up, that he felt very anxious and that he had come to the conclusion
22 that he hated himself. When asked by the supervisor if he felt like hurting or
23 killing himself[,] he said that he did not want to hurt himself and denied telling
24 his wife he was sad and felt like hurting himself.
25

26 At some point in the ongoing argument [redacted] punched a wall in the
27 house. As a result[,] he sustained a fracture to his right hand and is out of
28 work for six to eight weeks. I am also aware that [redacted] has also been
29 under a great deal of stress this past year due to substantial financial issues.
30 The supervisor did note that both [redacted] and [redacted] had been
31 drinking. He stated that [redacted] appeared moderately intoxicated and
32 that [redacted] had also been drinking but did not appear intoxicated.
33

34 When I met with [redacted] after this incident, I made it clear that he was
35 not in danger of disciplinary action, that my concern was for his wellbeing
36 and health but his comments to the supervisor and those of his wife,
37 coupled with the additional stressors of his financial issues warranted this
38 assessment....

DECISION

1 Section 6 of the Law requires public employers to negotiate in good faith with
2 respect to wages, hours, standards of productivity and performance, and any other terms
3 and conditions of employment. The statutory obligation to bargain includes the duty to
4 give the exclusive collective bargaining representative notice and an opportunity to
5 bargain to resolution or impasse before changing an existing condition of employment or
6 implementing a new condition of employment involving a mandatory subject of
7 bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404
8 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission,
9 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment
10 that are established through a past practice as well as conditions of employment that are
11 established through a collective bargaining agreement. Spencer-East Brookfield Regional
12 School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017) (citing Town of Wilmington,
13 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)).

Unilateral Change

15 To establish a unilateral change violation, the charging party must show that: (1)
16 the employer altered an existing practice or instituted a new one; (2) the change affected
17 a mandatory subject of bargaining; and (3) the employer established the change without
18 prior notice and an opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460
19 (May 13, 1994).

20 Here, there is no dispute that the Town's decision ordering Officer KA to attend to
21 a fitness for duty evaluation on September 6, 2019 was a mandatory subject of

1 bargaining. The parties also stipulated that the Town did not provide the Union with prior
2 notice and an opportunity to bargain to resolution or impasse when it made that decision.
3 However, the Town disputes whether it altered an existing practice or instituted a new
4 one by requiring Officer KA to attend the evaluation on September 6, 2019. It argues that
5 it has utilized such evaluations for over ten years when officers take certain leaves of
6 absence or are involved in certain off-duty incidents. Specifically, the Town points to the
7 2010 independent medical evaluation for Officer TK and the 2017 fitness for duty
8 evaluation for Officer KA, contending that the September 6, 2019 requirement for Officer
9 KA to attend a fitness for duty evaluation was consistent with its established practice.
10 While the Town concedes that fitness for duty evaluations are “uncommon” and occur
11 “infrequently,” it asserts that it has consistently applied this practice in response to
12 incidents that raise concerns about an officer’s fitness for duty.

13 Conversely, the Union argues that the Town implemented a new practice when it
14 required Officer KA to undergo a fitness for duty examination in September of 2019
15 because the two prior examinations for Officer TK and Officer KA were not mandatory
16 and did not involve disciplinary action. Specifically, the Union points to the Town’s letters
17 on March 24, 2010 and April 14, 2017, in which Chief Leahy and Chief Lyver both stated,
18 respectively, that they were “requesting” officer participation to undergo an evaluation. It
19 also points to the March 24, 2010 letter, which concerned Officer TK’s sick leave, and the
20 April 14, 2017 letter, which stated that Officer KA “was not in danger of disciplinary action.”
21 Based on these facts, the Union asserts that Officer KA’s 2019 evaluation was a new or,
22 in the alternative, an altered practice because it was mandatory and involved the threat

1 of discipline.

2 To determine whether a binding past practice exists, the Commonwealth
3 Employment Relations Board (CERB) analyzes a combination of factors to determine
4 whether an alleged practice has occurred with regularity over a sufficient period of time
5 so that it is reasonable to expect that the practice will continue. City of Boston, MUP-13-
6 3371, MUP-14-3466, MUP-14-3504 (Nov. 7, 2014) (citing Swansea Water District, 28
7 MLC 244, 245, MUP-2436 and MUP-2456 (Jan. 23, 2002); Commonwealth of
8 Massachusetts, 23 MLC 171, 172, SUP-3586 (Jan. 30, 1997)). The record shows that the
9 Town has utilized fitness for duty evaluations and/or independent medical evaluations
10 since 2010 to respond to incidents that raise concerns about an officer's fitness for duty.
11 Although, such examinations have not occurred on a regular basis, each time the Town
12 was concerned about an officer's well-being (e.g., in 2010 and 2017), it requested an
13 evaluation for that officer as a prerequisite to their return to work.

14 Based on this evidence, I find that the Town consistently requested officer
15 evaluations, even though this practice occurred sporadically and infrequently. See, e.g.,
16 City of Boston 2014 (citing Commonwealth of Massachusetts, 23 MLC at 172; City of
17 Everett, 8 MLC 1036, 1038 MUP-3807 (June 4, 1981), aff'd 8 MLC 1393 (Oct. 21, 1981)
18 (a condition of employment may exist despite sporadic or infrequent activity where a
19 consistent practice that applies to rare circumstances is followed each time that the
20 circumstances preceding the practice recurs). However, I also find that the Union never
21 knew about these requests prior to September 6, 2019. First, the parties' CBAs and MOA
22 are silent on the issues of fitness for duty and independent medical evaluations. Second,

1 the Town never copied the Union on its March 24, 2010 and April 14, 2017 letters, and
2 never notified the Union that it had requested evaluations for Officers TK and KA. Third,
3 the parties stipulated that neither Officer TK nor Officer KA served in a Union
4 representative capacity at any relevant time between 2010 and 2017. See, City of Boston,
5 at (Nov. 7, 2014); Commonwealth of Massachusetts, 30 MLC at 64 (CERB will not find a
6 binding past practice where it is neither known nor accepted by both parties). Based on
7 this evidence, I find that there was no binding practice of requesting officer evaluations
8 because the Union neither knew about it nor accepted it.

9 **Waiver by Inaction**

10 In the alternative, the Town raises the affirmative defense of waiver by inaction,
11 arguing that the Union had actual notice and knew about the existence of fitness for duty
12 evaluations for over 11 years based on the Town's consistent application of those
13 evaluations "in circumstances such as those involved here," where the Town was
14 concerned about an officer's fitness for duty. It also argues that Officer KA acquiesced to
15 his evaluation in April of 2017, and the Union neither objected to that evaluation nor
16 demanded to bargain over it. Therefore, it contends that a finding of waiver by inaction is
17 appropriate in this instance. Conversely, the Union argues that it never waived its rights
18 to bargain because it never had actual notice or knowledge about the fitness for duty
19 evaluations prior to September 6, 2019.

20 The affirmative defense of waiver by inaction must be supported by evidence that
21 the Union had actual knowledge and a reasonable opportunity to negotiate over the
22 proposed change, but unreasonably or inexplicably failed to bargain or request to bargain.

1 City of Newton, 46 MLC 20, 23, MUP-16-5532 (Aug. 20, 2019) (citing Town of
2 Westborough, 25 MLC 81, 89, MUP-9779 and MUP-9892 (June 30, 1997)). As
3 demonstrated above, the Town has failed to show that the Union had actual knowledge
4 about the existence of fitness for duty evaluations prior to September of 2019. Although
5 the Town had requested evaluations for Officer TK and Officer KA in March of 2010 and
6 April of 2017, respectively, it never provided the Union with notice of those evaluations,
7 nor did it copy the Union on the March 24, 2010 and April 14, 2017 letters. Further, there's
8 no evidence that either Officer TK or Officer KA served in a Union representative capacity
9 in 2010 or 2017, and the parties stipulated to this fact.

10 While the Town contends that the Union "clearly knew" about the fitness for duty
11 evaluations given "the Town's long-standing and consistent practice" of utilizing them
12 beginning in 2010, nothing in the record supports this contention. Instead, the record
13 shows that the practice was known only to the Town, until the Union first became aware
14 of it on September 6, 2019 and demanded to bargain four days later on September 10,
15 2019. Despite that demand, the Town notified the Union of its refusal to bargain by reply
16 email on September 10, 2019. Consequently, the Town's affirmative defense that the
17 Union waived by inaction its right to bargain over Officer KA's fitness for duty evaluation
18 in September of 2019 must fail because the Union did not have actual knowledge or a
19 reasonable opportunity to bargain over the practice of requiring such evaluations. See,
20 e.g., City of Newton, 46 MLC at 23 (citing Town of Westborough, 25 MLC at 89) (no waiver
21 by inaction where union neither had notice nor knowledge of city's practice or procedure
22 to require fitness for duty evaluations)).

1 Good Faith Bargaining

2 Under the good faith bargaining standard imposed by Section 6 of the Law, a
3 public employer contemplating managerial actions that would affect a mandatory subject
4 of bargaining has an affirmative duty to give timely notice of those actions to
5 the union. City of Worcester v. Labor Relations Commission, 438 Mass. 177, 180 (2002);
6 Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 685 (1989). The CERB holds
7 that the criteria and procedure for fitness for duty evaluations are mandatory subjects of
8 bargaining. City of Newton, 46 MLC 20, 22, MUP-16-5532 (Aug. 20, 2019) (citing
9 Massachusetts Port Authority, 36 MLC 5, UP-04-2669 (June 30, 2009), aff'd sub nom.
10 Massachusetts Port Authority v. Commonwealth Employment Relations Board, 78 Mass.
11 App. Ct. 1122 (2011) (unpublished ruling issued pursuant to Massachusetts Appeals
12 Court Rule 1:28).

13 Here, there is no dispute that the Town did not provide the Union with prior notice
14 and an opportunity to bargain to resolution or impasse over the decision to require a
15 fitness for duty evaluation for Officer KA on September 6, 2019, and the impacts of that
16 decision on employees' terms and conditions of employment. Nor is there any dispute
17 that the Town refused to bargain with the Union over the criteria and procedure for fitness
18 for duty evaluations on September 10, 2019. While the Town does not raise a specific
19 waiver by contract defense, it argues that Article IV of the CBA gave it the authority to
20 implement its decision on September 6, 2019. Even if the Town did raise such a defense,
21 I am not persuaded that the language of Article IV, Section B of the CBA confers on the
22 Town the contractual right to unilaterally implement criteria and procedures for fitness for

1 duty evaluations. This is because the record is void of any evidence of the parties'
2 bargaining history to support such a defense. See, e.g., City of Newton, 29 MLC 186,
3 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents, 15 MLC 1265,
4 1269, SUP-2959 (November 18, 1988)) (where an employer raises the affirmative
5 defense of waiver by contract, it bears the burden of demonstrating that the parties
6 consciously considered the situation that has arisen and that the union knowingly waived
7 its bargaining rights). This is also because the language of Article IV, Section B is too
8 broad for me to find any contractual managerial authority that allows the Town to impose
9 fitness for duty evaluations on bargaining unit members. Id. Moreover, the parties
10 stipulated that the CBA "does not contain any relevant provisions regarding mandatory
11 fitness for duty evaluations." Further, the Town failed to show how its freedom to perform
12 public functions, including requiring fitness for duty evaluations, would have been unduly
13 impinged by providing the Union with prior notice and an opportunity to bargain over those
14 requirements. Contrast City of Worcester, 438 Mass. at 180 (quoting Local 346,
15 International Brotherhood of Police Officers v. Labor Relations Commission, 391 Mass.
16 429, 437 (1984) (where a negotiation requirement would "unduly impinge on a public
17 employer's freedom to perform its public functions," Section 6 of the Law does not
18 mandate bargaining over a decision directly affecting the employment relationship).

19 For all these reasons, I find that the Town failed to bargain in good faith with the
20 Union over the criteria and procedures for imposing fitness for duty evaluations in
21 September of 2019. Compare City of Newton, 46 MLC at 22 (while town had managerial
22 right to decide to employ only physically and psychologically healthy persons, town still

1 obligated to bargain over the means and impacts of implementing such a decision).

2 **Duty to Provide Information**

3 If a public employer possesses information that is relevant and reasonably
4 necessary to an employee organization in the performance of its duties as the exclusive
5 collective bargaining representative, the employer is generally obligated to provide the
6 information upon request of the employee organization. City of Boston, 35 MLC 95, 100,
7 MUP-04-4050 (Dec. 10, 2008) (citing Board of Higher Education, 29 MLC 169, 170, SUP-
8 4612 (March 6, 2003); Higher Education Coordinating Council (HECC), 23 MLC 266, 268,
9 SUP-4142 (June 6, 1997)). An employee organization's right to receive relevant and
10 reasonably necessary information is derived from the statutory obligation of parties to
11 engage in good faith collective bargaining. City of Boston, 35 MLC at 100 (citing Sheriff's
12 Office of Middlesex County, 30 MLC 91, 96 (2003); Boston School Committee, 24 MLC
13 8, 11, MUP-1410 and MUP-1412 (Aug. 26, 1997)).

14 Here, there is no dispute that the information requested by the Union on
15 September 11, 2019, was relevant and reasonably necessary for the Union to perform its
16 exclusive bargaining duties relative to Officer KA's potential discipline. Nor is there any
17 dispute that the Union also needed that information to evaluate the merits of potential
18 grievances, and to determine whether a practice existed for requiring fitness for duty
19 evaluations. The Town acknowledged the Union's request for information by reply email
20 on September 11, 2019, stating that it had "asked Chief Lyver to prepare the responsive
21 documents" and that it would "send them to [the Union] pursuant to [the Town's]
22 obligations under G.L. c. 150E."

1 Nonetheless, the Town argues that it was ultimately not obligated to provide the
2 Union with the requested information because it “reasonably believed” that the Union had
3 withdrawn its request for that information pursuant to the October 2019 settlement
4 agreement for Officer KA. Specifically, the Town asserts that it believed that the
5 agreement represented a “final settlement of the issues raised in these proceedings,”
6 and, based on this belief, understood that the Union had withdrawn its request. It also
7 asserts that the Union never renewed its request after finalizing the settlement, and that
8 the Town had “since provided all documents responsive to the request.” Based on these
9 facts, the Town contends that it did not violate the Law because it did not “knowingly”
10 refuse to provide the Union with documents that were “subject to an ongoing records
11 request.”

12 Conversely, the Union argues that the Town failed to provide the requested
13 information in a reasonable period because the Town acknowledged its request by reply
14 email on September 11, 2019, but waited until after the Union filed its Charge on March
15 5, 2020 to produce the requested information. The Union also argues that its failure to
16 renew the request after reaching the October 2019 agreement is inapposite because the
17 Law does not require “a union to show bad faith to prevail on a claim that the employer
18 failed to provide information.” Last, it argues that there is no evidence that the October
19 2019 settlement agreement addressed the parties’ disputes over criteria and procedure
20 for fitness for duty evaluations or the Union’s intent to withdraw the September 11, 2019
21 information request per that agreement.

22 The record shows that the Union requested the disputed information on September

1 11, 2019, and the Town acknowledged that request on September 11, 2019, agreeing to
2 “prepare the responsive documents” and send them to the Union pursuant to its statutory
3 obligation. The record also shows that the Town did not provide the requested information
4 until after the Union filed the instant Charge on March 5, 2020, which was almost six
5 months after the Union’s initial request. Although the parties had reached a settlement
6 agreement concerning Officer KA in October of 2019, there is no evidence that the
7 agreement addressed either the Union’s request for information or whether the Union
8 intended to withdraw that request pursuant to the terms of that settlement. Nor is there
9 any other evidence showing that the Union ever communicated to the Town that it was
10 withdrawing its request for information.

11 Consequently, the Town’s delay in providing the requested information diminished
12 the Union’s ability to fulfill its role as the exclusive bargaining representative because the
13 Union was unable to evaluate the merits of potential grievances and was unable to
14 determine whether a practice existed regarding the criteria and procedures for fitness for
15 duty evaluations. See City of Boston, 35 MLC at 101-102 (city’s near two-year delay in
16 providing requested information was unreasonable); see also Bristol County Sheriff’s
17 Office, 28 MLC 113, MUP-1820 (Oct. 10, 2001), aff’d sub nom., Sheriff of Bristol County
18 v. Labor Relations Commission, 62 Mass. App. Ct. 665 (2004) (information sought by
19 union was relevant and reasonably necessary to the union’s assessment about whether
20 to file a grievance); City of Boston, 22 MLC 1698, 1707, MUP-9605 (April 26, 1996) (a
21 union must have access to the information surrounding the disciplinary proceedings to
22 properly fulfill its role to bargaining unit members).

1 when it refused to bargain with the Union over the criteria and procedures for fitness for
2 duty evaluations on September 10, 2019, and failed to timely provide the Union with
3 relevant information that was reasonably necessary for the Union to execute its duty as
4 the collective bargaining representative.

ORDER

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

- 5 1. Cease and desist from:
 - 6
 - 7 a) Ordering bargaining unit members to participate in fitness for duty
 - 8 evaluations without providing the Union with prior notice and an
 - 9 opportunity to bargain to resolution or impasse over that decision and
 - 10 its impacts;
 - 11
 - 12 b) Failing and refusing to bargain collectively in good faith with the
 - 13 Union about the criteria and procedure for imposing fitness for duty
 - 14 evaluations;
 - 15
 - 16 c) Failing and refusing to bargain collectively in good faith with the
 - 17 Union by refusing to provide in a timely manner information that is
 - 18 relevant and reasonably necessary to the Union's role as exclusive
 - 19 bargaining representative; and
 - 20
 - 21 d) In any like or related manner interfering with, restraining or coercing
 - 22 employees in the exercise of their rights guaranteed under the Law.
 - 23
- 24 2. Take the following affirmative action:
 - 25
 - 26 a) Rescind the September 6, 2019 order imposing a fitness for duty
 - 27 evaluation for Officer KA as a condition of employment until the Town
 - 28 has bargained to resolution or impasse regarding the criteria and
 - 29 procedure for imposing fitness for duty evaluations;

- 1 b) Remove from Officer KA's personnel file any references to the
- 2 September 6, 2019 order which imposed a fitness for duty evaluation
- 3 as a condition of employment;
- 4
- 5 c) Upon request, bargain collectively in good faith with the Union about
- 6 the criteria and procedure for imposing fitness for duty evaluations;
- 7
- 8 d) Provide, in a timely manner, requested information that is relevant
- 9 and reasonably necessary to the Union's role as exclusive bargaining
- 10 representative;
- 11
- 12 e) Refrain from interfering with, restraining, or coercing employees in the
- 13 exercise of their rights under Section 2 of the Law;
- 14
- 15 f) Post immediately, signed copies of the attached Notice to Employees
- 16 in all conspicuous places where members of the Union's bargaining
- 17 unit usually congregate or where notices are usually posted, including
- 18 electronically if the Town customarily communicates with these unit
- 19 members via intranet or email, and display for a period of thirty (30)
- 20 days thereafter; and
- 21 g) Notify the DLR in writing of the steps taken to comply with this Order
- 22 within ten (10) days of its receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations

within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS

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 Town of Northborough (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by ordering a bargaining unit member to participate in a fitness for duty evaluation without providing the Massachusetts Coalition of Police, Local 165 (Union) with prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts. The Town also violated the Law by refusing to bargain with the Union over the criteria and procedures for fitness for duty evaluations, and failed to timely provide the Union with relevant information that was reasonably necessary for the Union to execute its duty as the collective bargaining representative.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; 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 Town assures its employees that:

WE WILL NOT order bargaining unit members to participate in fitness for duty evaluations without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts;

WE WILL NOT fail and refuse to bargain collectively in good faith with the Union about the criteria and procedure for imposing fitness for duty evaluations;

WE WILL NOT fail and refuse to bargain collectively in good faith with the Union by refusing to provide in a timely manner information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative; and

WE WILL rescind the September 6, 2019 order imposing a fitness for duty evaluation for Officer KA as a condition of employment until the Town has bargained with the Union to resolution or impasse regarding the criteria and procedure for imposing fitness for duty evaluations;

WE WILL remove from Officer KA's personnel file any references to the September 6, 2019 order which imposed a fitness for duty evaluation as a condition of employment;

WE WILL provide in a timely manner, requested information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative;

WE WILL refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

Town of Northborough

Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, 2 Avenue de Lafayette, Boston, MA 02111-1750 Telephone: (617) 626-7132.