# COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF NEWTON

And

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, LOCAL 863

Case No.: MUP-20-8053 & MUP-20-8059

Date Issued: November 8, 2022

Hearing Officer: Meghan Ventrella, Esq.

Appearances:

Jeffrey Honig, Esq. Representing the City of Newton

Joseph Donnellan, Esq. Representing the International

Association of Fire Fighters, AFL-CIO,

Local 863

## **HEARING OFFICER'S DECISION**

### SUMMARY

The issue in this case is whether the City of Newton (City) violated Section 10 (a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Law Chapter 150E (the Law) by prohibiting the display of the "thin red line" flag and changing its policy regarding the posting of flags and banners without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the City's decisions and the impacts of the decisions on bargaining unit members' terms and conditions of employment. I find that the City did not violate the Law as alleged.

#### STATEMENT OF CASE

On June 15, 2020, the International Association of Fire Fighters, AFL-CIO, Local 863 (Union) filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR) alleging that the City of Newton (City) had engaged in prohibited practices within the meaning of Sections 10(a)(5), 10(a)(2), 10(a)(3), 10(a)(4), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). On June 16, 2020, the Union filed a second Charge with the DLR alleging that the City violated Sections 10(a)(5), 10(a)(2), 10(a)(3), 10(a)(4), and, derivatively, Section 10(a)(1) of the Law. On September 14, 2020, a DLR Investigator investigated the Charges docketed as MUP-20-8053 and MUP-20-8059 together. On October 16, 2020, the Investigator issued a Consolidated Two-Count Complaint of Prohibited Practice (Complaint) alleging that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On May 28, 2021, the City filed its Answer. On June 10, 2021, the City filed an amended Answer.

On July 21, 2021, I conducted a hearing by video conference during which the parties received a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the day of the hearing, the parties settled the underlying matter in the second count in the consolidated Complaint, and the Union withdrew MUP-

<sup>&</sup>lt;sup>1</sup> The Union's charge was docketed as MUP-20-8053.

<sup>&</sup>lt;sup>2</sup> The Union's second charge was docketed as MUP-20-8059 and alleged that the City violated the Law when it issued a policy stating that City employees should only wear face coverings that are solid, floral, or striped.

<sup>&</sup>lt;sup>3</sup> At the investigation, the Union withdrew its allegations that the City violated Sections 10(a)(2), 10(a)(3), and 10(a)(4) of the Law for both charges.

- 20-8059. Based on my review of the record, including my observation of the demeanor of
- the witnesses, I make the following findings of fact and render the following opinion.

# 3 <u>STIPULATIONS OF FACT</u>

1.) The property of the Newton schools is controlled by the School Principal, the School Superintendent, and the School Committee on which the Mayor serves as one of nine members.

2.) The motor vehicles depicted in Union Exhibit 3, which are two photos, are owned by the City of Newton.

3.) The flag depicted in Union Exhibit 4 is the Pride Flag which is flying on the flagpole outside Newton City Hall during the month of June in 2020.

## FINDINGS OF FACT

## **Background**

Within the Fire Department, Station 4 is the designated building for the training division of the Department. The City instructs all fire fighters to report to Station 4 when they need their uniforms or equipment fitted. Additionally, all fire fighters report to Station 4 at least a few times a year for EMT and other fire training. Station 4 has several large bay doors that face the street. In or about 2017, Gregory Gentile (Gentile), a fire fighter in the Department, hung the thin red line flag on a bay door at Station 4.4 The thin red line flag is the United States flag but with a thin red line displayed in the stripes. The thin red line flag is a memorial flag in remembrance of fire fighters who were injured or died while

<sup>&</sup>lt;sup>4</sup> Gentile did not consider the thin red line flag as a union flag.

on duty.<sup>5</sup> The flag does not display the Union emblem, nor does it have any other marks that represent the Union.

By email dated June 4, 2020, Ellen Farwell (Farwell), a resident of Newton complained to Ruthanne Fuller (Fuller), the mayor of Newton, that the thin red line flag hanging at Station 4 may be viewed by the public as a political message or an anti-Black Lives Matter message. Farwell requested that the City remove the flag from the Fire Station. On or about June 12, 2020, Fuller instructed Fire Chief Gino Lucchetti (Lucchetti) to remove the flag from Station 4. Lucchetti then instructed the fire fighters assigned to Station 4 to remove the thin red line flag, and they complied.<sup>6</sup>

By letter dated June 14, 2020, Marc Rizza (Rizza), a Newton fire fighter and the President of the Union, explained the historical context of the thin red line flag to Fuller. Rizza stated that the thin red line flag was a remembrance flag for fallen fire fighters. Also, Rizza informed Fuller that several professions utilize a similar flag, such as EMTs who use a "thin white line" flag. Later that day, Fuller emailed Rizza stating that the City supported the ideas embedded in the fire fighter remembrance flag. However, Fuller explained that the decision to remove the flag is "about not putting the City in the position



<sup>&</sup>lt;sup>6</sup> Prior to issuing an order to remove the flag from Station 4, the City did not inform the Union of its decision to remove the flag or bargain with the Union over the decision.

- of picking and choosing which banners, flags and ideas put forward by our employees
- that we as a City will support."
- On June 17, 2020, the City issued the following Flagpole Policy:<sup>7</sup>

"The City may fly the flag of the United States of America, the Commonwealth of Massachusetts, the City of Newton, as well as flags representing individual City Departments or Schools as approved by the Mayor, or any official United States military flag, including the POW-MIA flag, on any City flagpole. The Flagpole on the south side of City Hall will continue to be used for secular ceremonial flags. In accordance with a proclamation of the Governor of the Commonwealth or the President of the United States, the City may fly a ceremonial flag for the purpose of honoring a particular holiday or event in relation to the proclamation. Additionally, the Mayor may exercise discretion in flying other appropriate secular ceremonial flags, for example, the purpose of honoring a particular holiday or event. In all other respects, and to the extent feasible, the flying of flags on flagpoles located on City property shall be done in accordance with the U.S. Flag Code at 4 U.S.C. § 1 et seq."

Also, the policy stated that "this policy reserves the use of flagpoles and selection of flags to the City acting through the Mayor or designee. The decision to which flags to fly shall not be open to the public. By this policy, the City has determined that the flagpoles on City property are a nonpublic form."

24 Opinion

A public employer violates Section 10(a)(5) of the Law when it changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or

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<sup>&</sup>lt;sup>7</sup> From approximately 2017 to 2021, the Department hosted "Red Shirt Fridays", when the fire fighters wear red t-shirts that had the thin red line flag affixed on the sleeve in remembrance of the armed services. Lucchetti ordered the t-shirts and issued the shirts to the fire fighters. After the City issued its flagpole policy in 2020, Lucchetti decided to issue new red t-shirts without the thin red line flag on the sleeve.

impasse. School Committee of Newton v. Labor Relations Commission, 338 Mass. 557

2 (1983). The duty to bargain extends to both conditions of employment that are established

through past practice as well as by a collective bargaining agreement. Commonwealth of

Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000); City of Boston, 16 MLC 1429,

1434, MUP-6697 (December 19, 1989); Town of Wilmington, 9 MLC 1694, MUP-4688

(March 18,1983).

The Union asserted that the City changed an existing condition of employment involving a mandatory subject of bargaining when it adopted the policy which only allowed the American flag, the Commonwealth of Massachusetts flag, City banners, and any other secular ceremonial flags chosen by the Mayor to hang on the sides of City buildings and instructed the Newton Fire Department to take down the thin red line flag that hung in the bay door of Station 4. First, the Union established that in 2017, a unit member had hung the thin red line flag from the bay door of Station 4. Additionally, the Union demonstrated that the City's 2020 flagpole policy and directive to take down the thin red line flag was a departure from the City's decision to allow the unit members to hang the thin red line flag from the bay door of Station 4 for approximately three years. However, the Union failed to establish that the change regarding the thin red line flag involved a mandatory subject of bargaining.

The Union first asserted that hanging the thin red line flag was a display of union material, thus the Employer's decision to prohibit the unit members from hanging the flag in Fire Station 4 involved a mandatory subject of bargaining. I agree with the Union that displays of union materials on an employer's property is a mandatory subject of bargaining. However, in this case, the Union failed to demonstrate how the thin red line

flag was union material. It is undisputed that the thin red line flag did not contain or display any symbols or reference to the Union. Additionally, it is undisputed that the unit members considered the thin red line flag as a memorial flag for fallen fire fighters. The Union did not provide any evidence to suggest that the flag was associated or connected with the Union or the labor movement in general.<sup>8</sup>

The Union also asserted because a Union official hung the flag in the Fire Station, that the flag was union material. However, the fact that a fire fighter hung the flag, whether they held a Union officer position or not, does not necessarily mean the flag is union material. The Union did not demonstrate that the thin red line flag provided the unit members or the public with information about the unit members' terms and conditions of employment. In fact, the Union provided evidence to suggest that for several years, Lucchetti had instituted a red shirt Friday, where the City ordered red t-shirts with the thin red flag displayed on the sleeve of the shirt for the unit members to wear as their uniform on Fridays. The Union did not provide any explanation for why City management would choose to display Union material as part of a City-issued uniform. It is clear from the record that the thin red line flag is a memorial flag for fire fighters, and not a display of union material.

Next, the Union argued that flying the thin red line flag was a benefit and a term and condition of employment for the unit members because it had hung publicly and continuously for almost three years. Despite the Union's assertions, it failed to explain or establish how the display of the thin red line flag was a benefit or term and condition of

<sup>8</sup> Additionally, the Union failed to establish that the City's decision regarding which flags it displays, absent the connection to union material, is a mandatory subject of bargaining.

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employment. The mere fact that the flag was displayed in Fire Station 4's bay window for three years does not make it a term and condition of employment or a work benefit.

The Union further argued that the unit members who hung the thin red line flag engaged in concerted activity because it was an activity undertaken not solely on behalf of one employee. Additionally, the Union argued that the unit members' flying of the thin red line flag is protected activity under the Law as the flag is a memorial flag highlighting the sacrifices of firefighters, and unit members have a right to discuss with the public information about their terms and conditions of employment for the purpose of mutual aid and protection. However, the issue in this case is not whether the unit members' hanging of the thin red line flag in Station 4 was concerted, protected activity, but rather, whether it involved a mandatory subject of bargaining. Despite the Union's arguments, the issue of whether unit members were engaged in concerted, protected activity is not the same as whether an employer's conduct involved a mandatory subject of bargaining. For example, a unit member may engage in concerted, protected activity by speaking with their employer on behalf of fellow unit members about a level of services decision. Even though the unit member's actions may constitute concerted, protected activity, an employer's decision on the level of services it provides to the public is a permissive subject of bargaining. Commonwealth of Massachusetts, 25 MLC 201, SUP-4075 (June 4, 1999). In this case, the Union failed to establish that the City's decision regarding flags involved a mandatory subject of bargaining.9

<sup>&</sup>lt;sup>9</sup> The Union did not provide any case law, nor did I find any, that demonstrated an Employer's decision on which flags it displays is a mandatory subject of bargaining. Nor did the Union provide any caselaw that would establish that the thin red line flag is generally regarded as union material.

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Finally, the Union argued that the City's flag policy and resulting decision to instruct the Fire Department to remove the thin red line flag was not neutral or uniformly enforced. The Union argued that the City allowed other flags such as the "Pride" flag to be displayed on City property, but refused to allow the thin red line flag to hang in Fire Station 4's bay window.

It is well established that under Section 2 of the Law employees have the right to distribute union literature and the right to observe and read that material. Quincy Hospital, 23 MLC 201, 202, MUP-9867 (March 13, 1997)( citing Massachusetts Board of Regents of Higher Education, 13 MLC 1697, 1701, SUP-2863, SUP-2865 (May 22, 1987)); Clinton Services Corporation d/b/a Greater Expectations, Inc., 9 MLC 1494, 1498. UP-2473 (December 8, 1982). The Commonwealth Employment Relations Board (CERB) has consistently held that an employer's discriminatory restriction on the use of its facilities is unlawful. City of Quincy, 23 MLC at 201, MUP-9867 (March 3, 1997) (discriminatory denial of use of table outside cafeteria held unlawful); Quincy School Committee 19 MLC 1476, MUP-5951 (October 21, 1992)(blanket policy prohibiting union solicitation held unlawful). Thus, although an employer may promulgate rules regulating the distribution of union literature, the employer's rules must be neutral and nondiscriminatory so that employee access to union information is not unduly restricted. Quincy Hospital, 23 MLC at 202. A rule that is enforced only against union literature or access demonstrates the lack of any legitimate purpose for the rule. Id. Moreover, an employer's enforcement of a rule or policy that prevents or discourages employees from discussing statutorily protected subjects during their nonworking time violates Section 10(a)(1) of the Law. Quincy School Committee, 19 MLC

1 1476, 1481, MUP-5951 (October 21, 1992). <u>See also Republic Aviation Corp v. NLRB,</u>
2 324 U.S. 793, 803 n.10 (1945) (upholding NLRB's presumption that a rule prohibiting
3 union solicitation by employees outside working time is unlawful in the absence of
4 evidence that special circumstances make the rule necessary for maintaining production

and discipline).

In this case, the Union has not established that the City's flag policy impacted union material. As explained above, the Union did not demonstrate that the thin red line flag was union material. Therefore, the Union did not establish that the City's flag policy restricted the Union from distributing, reading, or observing union literature. Moreover, the Union failed to prove that the City's flag policy and resulting decision to instruct the Fire Department to remove the thin red line flag prevented the distribution of union material or was not neutral or uniformly enforced. For all the reasons explained above, the Union failed to establish that the City unilaterally changed an existing condition of employment or implemented a new condition of employment involving a mandatory subject of bargaining without providing the Union with prior notice and an opportunity to bargain to resolution or impasse.

17 <u>CONCLUSION</u>

The City did not violate the Law by unilaterally prohibiting the display of the thin red line flag and changing its policy regarding the posting of flags and banners. I therefore dismiss the Complaint in MUP-20-8053.

21 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS

MEGHAN VENTRELLA, ESQ.

**HEARING OFFICER** 

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## **APPEAL RIGHTS**

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.