

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF SOMERVILLE

and

SOMERVILLE FIREFIGHTERS, LOCAL
76, IAFF

Case No.: MUP-20-8189

Issued: November 18, 2022

Hearing Officer: Sara Skibski Hiller, Esq.

Appearances:

Hannah Pappenheim, Esq. - Representing the City of Somerville

Paul Hynes, Esq. - Representing the Somerville Firefighters, Local
76, IAFF

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Somerville (City) violated Section
2 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Law Chapter 150E
3 (the Law) by failing to provide the Somerville Firefighters, Local 76, IAFF (Union)
4 psychological test data for a firefighter who underwent a fitness for duty evaluation that
5 was relevant and reasonably necessary for the Union to exercise its duties as collective
6 bargaining agent. As stated below, I find that the City did not violate the Law in the manner
7 alleged because it did not have the test data in its possession or control at the time of the
8 Union's request, and I dismiss the Complaint.

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STATEMENT OF THE CASE

On September 10, 2020, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the City had engaged in a prohibited practice within the meaning of Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law. A DLR investigator conducted an in-person investigation into the charge on December 2, 2020. On December 18, 2020, the Investigator issued a Complaint of Prohibited Practice (Complaint). The City filed its answer to the Complaint on December 24, 2020. On August 25, 2021, I conducted a hearing by videoconference.¹ During the hearing, the parties received a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On October 29, 2021, the parties filed post-hearing briefs. Based on my review of the record, I make the following findings of fact and render the following opinion.

STIPULATIONS OF FACT

1. The City of Somerville (City) is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive collective bargaining representative for all uniformed members of the Fire Department except the Chief and the Assistant Chief.
4. On or about October 21, 2019, Charles Breen, Jr, Chief of the Somerville Fire Department (Chief Breen) placed Firefighter X on paid administrative leave while the City conducted an investigation into allegations against him.²

¹ I conducted the hearing remotely pursuant to Governor Baker’s teleworking directive to executive branch employees.

² In the Complaint, the Investigator used a pseudonym to identify the bargaining unit member described therein. At the request of the parties and to further protect the anonymity of the bargaining unit member, the member is referred to herein as “Firefighter X.”

- 1 5. On or about November 4, 2019, Chief Breen ordered Firefighter X to attend a
2 fitness for duty evaluation on November 8, 2019 with Dr. Jill Durand.
3
- 4 6. Before the evaluation, Firefighter X signed an evaluation agreement
5 acknowledging, in relevant part, that the City “has specifically asked that I [Dr.
6 Durand] not include extensive clinical data in my report to them, and it is my
7 intention to comply with that request.”
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- 9 7. On or about November 18, 2019, Dr. Durand released her fitness for duty
10 evaluation to the City, based in part upon three psychological tests which she
11 had administered.
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- 13 8. On or about December 7, 2019, Union President Tom Ross informed Chief
14 Breen that X disagreed with Dr. Durand's findings and would seek a second
15 opinion.
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- 17 9. On April 6, 2020, Dr. Durand conducted a second fitness for duty evaluation for
18 Firefighter X, including two additional psychiatric tests.
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- 20 10. Before this evaluation, Firefighter X signed the same evaluation agreement as
21 referenced in Stipulation #6.
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- 23 11. On April 29, 2020, Paul Hynes, Union Counsel, emailed Ellen Collins, Deputy
24 Director of Personnel, requesting that she make arrangements for Dr. Durand to
25 send him copies of all the tests which Dr. Durand performed as Hynes believed
26 they were both relevant and necessary to the Union's ability to represent
27 Firefighter X in this matter. The tests which were performed on November 8, 2019
28 (Items 1-3) and April 6, 2020 (Items 4-5) are:
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 - 30 A. Personality Assessment Inventory (PAI)
 - 31 B. Minnesota Multiphasic Personality Inventory -2RF (MMPI-2RF)
 - 32 C. Montreal Cognitive Assessment (MOCA)
 - 33 D. Personality Assessment Inventory (PAI)
 - 34 E. California Personality Inventory (CPI)
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- 36 12. On May 1, 2020, Collins emailed Hynes asserting, in part, “We are basing any
37 decision on all information provided to us, including Dr. Durand’s reports as a
38 whole, not on the technical test data. For these reasons, I am not going to ask
39 Dr. Durand to provide this detailed data, as it is neither part of the City’s
40 assessment, nor part of our documentation of Firefighter X’s evaluation results.
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- 42 13. In this email, Collins also explained that the City does not possess the clinical
43 test data.
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- 1 14. On a least two more occasions, on May 8, 2020, and July 23, 2020, Hynes
2 informed Collins that the Union was expecting to receive the information
3 requested in Stipulation #11.
4
- 5 15. On August 28, 2020, Collins emailed certain documents to Hynes in response to
6 the Union's information request but did not include the information requested in
7 Stipulation #11.
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- 9 16. The City failed and refused to provide the Union with the information referred to
10 in Stipulation #11.

11 ADDITIONAL FINDINGS OF FACT

12 At all relevant times, Firefighter X was employed by the City in its Fire Department
13 and was in a bargaining unit that the Union represented. On or about October 21, 2019,
14 Chief of the Fire Department Charles Breen (Chief Breen) placed Firefighter X on paid
15 administrative leave pending investigation into his involvement with local police during an
16 incident that took place in a neighboring town. On or about November 4, 2019, Chief
17 Breen ordered Firefighter X attend a fitness for duty evaluation to be conducted by Dr. Jill
18 Durand (Durand). Durand is licensed clinical psychologist and a partner with
19 Psychological Consulting Services in Salem, Massachusetts. In her practice, Durand
20 regularly conducts public safety evaluations, including employment and fitness for duty
21 evaluations for public employers, and has conducted approximately four fitness for duty
22 evaluations of City employees.

23 First Fitness for Duty Evaluation

24 Firefighter X attended the fitness for duty evaluation with Durand on November 8,
25 2019. Prior to beginning the evaluation, Firefighter X signed an Evaluation Agreement
26 that Durand provided which explained the nature and procedures followed during the
27 assessment (Evaluation Agreement). In addition to the terms stated in Stipulation # 6, the
28 Evaluation Agreement stated that a copy of the report would be released to the employer,

1 who would then determine whether to release the report to Firefighter X.³ Durand also
2 asked Firefighter X to sign releases that would allow Durand to speak with Firefighter X's
3 other treatment providers and collateral contacts; however, Firefighter X declined to sign
4 them.⁴

5 As part of the evaluation, Durand reviewed documents provided by the City,
6 including limited mental health records from treatment in 2018, and a police report
7 describing the October 2019 incident. Durand also conducted a clinical interview with
8 Firefighter X that lasted approximately two hours. During the interview, Durand
9 administered a mental health status examination referred to as the Montreal Cognitive
10 Assessment (MOCA) and two standardized tests, the Personality Assessment Inventory
11 (PAI) and the Minnesota Multiphasic Personality Inventory-2RF (MMPI-2RF).

12 When administering psychological tests measures, Durand gives the test taker a
13 prescribed set of statements and asks them to determine whether or not those statements
14 are true or false or fall somewhere on a scale. Durand then compares the test taker's
15 answers to a group of individuals of the same age, gender or profession as determined
16 by the test developer and calculates scores (test data). Durand interprets the test data to
17 determine if someone has an area of emotional, behavioral, or personality dysfunction or

³ In response to the Evaluation Agreement language cited in Stipulation #6 that the City asked Durand not to include clinical data in her report, Durand testified that the language was not added at the request of the City but was boilerplate language that she added to the Evaluation Agreement. The Union provided no evidence in rebuttal.

⁴ Subsequent to the incident, Firefighter X attended an inpatient counseling program and regularly saw a psychologist, a psychiatrist and a licensed counselor. Although Firefighter X declined to sign the medical releases to allow the City to communicate with his treatment providers, he provided the City with proof of counseling and the results of a neuro-path examination conducted by his psychologist.

1 to better define their personality style. Durand also uses the test data to indicate whether
2 a test taker responded to the questions honestly and fully or whether they exaggerated
3 or failed to disclose all of their experiences.

4 Based on the information provided, the clinical interview, mental health status
5 examination, and the psychological tests, Durand opined that Firefighter X was not fit to
6 return to duty. While Durand's report described her clinical opinion which was based on
7 her interpretation of the test data, her report did not include any of the actual test data.
8 After Firefighter X provided a copy of the report to Union President Thomas Ross (Ross),
9 Ross informed Chief Breen that he and Firefighter X disagreed with Durand's findings
10 and intended to seek a second opinion.

11 Second Fitness for Duty Evaluation

12 On or about November 15, 2019, Firefighter X was involved in another incident in
13 which he was arrested by the Somerville Police Department and charged with various
14 criminal offenses.⁵ Subsequently, Chief Breen informed Firefighter X that the City
15 intended to conduct another investigation into this conduct and consider disciplinary
16 action. On April 6, 2020, the City ordered Firefighter X to undergo a second fitness for
17 duty evaluation with Durand. Prior to beginning the evaluation, Firefighter X once again
18 signed an Evaluation Agreement containing the same language as the agreement signed
19 on November 8, 2019. During this evaluation, Durand conducted another clinical interview
20 that lasted approximately 2.5 hours, which included two psychological tests, the

⁵ Subsequent to the evaluations by Durand, the criminal charges against Firefighter X were dismissed.

1 Personality Assessment Inventory (PAI) and the California Personality Inventory (CPI).⁶
2 Subsequently, Durand issued a report in which she determined, based on documentation
3 provided by the City, the clinical interview, the mental health status examination and the
4 psychological tests, that there was not a substantial change in Firefighter X's overall
5 psychological functioning and he was not fit to return to duty. Again, while the report
6 included Durand's opinion on her interpretation of the test data, the second fitness for
7 duty report did not include the actual test data.

8 Request for Information

9 On April 29, 2020, Union Counsel Paul Hynes (Hynes) emailed Deputy Director of
10 Personnel Ellen Collins (Collins) requesting copies of the tests results for the five
11 psychological tests that Durand administered to Firefighter X, identified as the PAI, MMPI-
12 2RF and MOCA conducted on November 8, 2019, and the PAI and CPI conducted on
13 April 6, 2020. On April 30, 2020, Collins emailed Durand explaining that the City received
14 a request from the Union's attorney representing Firefighter X and that the Union was
15 seeking the test data. In response, Durand indicated that "all ethical guidelines speak
16 against releasing test data to non-psychologists. They are not trained to interpret the data.
17 If the Union has their own evaluator, I will consider releasing the data to that
18 professional."⁷ The Union did not secure another evaluator to receive the test data as
19 Durand suggested.

⁶ For the second evaluation, Durand used different test measures than the tests conducted in November of 2019, out of concern that Firefighter X was familiar with the tests from the previous examination and could recall the questions.

⁷ Durand testified that it is not standard practice to include test data in a report. Durand stated that she believed test data should only be given to those who are able to interpret the data. Specifically, Durand explained that psychologists are trained to interpret test data, while social workers or individuals with a counseling degree are not. Durand further

1 On May 1, 2020, Collins emailed Hynes responding to his request for information.
2 In addition to the language referenced in Stipulation #12, Collins indicated “[y]ou asked
3 me to make arrangements for you to receive the results of the five tests performed as part
4 of the initial and updated Fitness for Duty evaluations. [Firefighter X] signed a Fitness for
5 Duty Evaluation Agreement with Psychological Testing Services at each of his
6 evaluations with Dr. Durand. The agreement states that the evaluation components,
7 including but not limited to testing, and that extensive clinical data is not part of the end
8 product supplied to the City. The City has provided [Firefighter X] and yourself with the
9 two reports provided to us by Dr. Durand, which per the consent form were at our
10 discretion to provide.”

11 On August 28, 2020, the City provided information in response to the Union’s
12 request, including written communications between the City and Durand regarding the
13 evaluations, the documents the City provided to Durand to be used as part of the
14 evaluations, and a pre-employment psychological test report from 2008. The City did not
15 provide the Union with the test data for the psychological tests that Durand conducted.

testified that she could be found in violation of the Ethical Principles of Psychologists and Code of Conduct (Ethics Code) if she were to release the test data to someone who is not trained to interpret it. Section 9.04 of the Ethics Code states “Pursuant to a client / patient release, psychologists provide test data to the client / patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client / patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law” and “in absence of a client / patient release, psychologists provide test data only as required by law or court order.” Durand further testified that in the seventy fitness for duty evaluations she has conducted, she has never released the test data to the employer. Durand was required to release test data to someone other than the client in two circumstances, one in which a court ordered her to release data to another psychologist retained by the employer to conduct another fitness for duty assessment, and the second, to a psychiatrist who had been hired by opposing counsel to conduct a secondary evaluation.

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OPINION

The Complaint alleges that the City failed to bargain in good faith in violation of Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by not providing the Union with the psychological test data for psychological tests conducted on Firefighter X on November 8, 2019, and April 6, 2020, that is relevant and reasonably necessary for the Union to exercise its duties as collective bargaining representative. If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union’s request. City of Boston, 35 MLC 95, 100, MUP-04-4050 (Dec. 10, 2008) (citing Board or Higher Education, 29 MLC 169, 170, SUP-4612 (March 6, 2003); Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997)). An employee organization’s right to receive relevant and reasonably necessary information is derived from the statutory obligation of parties to engage in good faith collective bargaining. City of Boston, 35 MLC at 100 (citing Sheriff’s Office of Middlesex County, 30 MLC 91, 96, MUP-2754 (December 31, 2003); Boston School Committee, 24 MLC 8, 11, MUP-1410, MUP-1412 (Aug. 26, 1997)).

The Commonwealth Employment Relations Board’s (CERB) standard in determining whether the information requested by a Union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. Board of Higher Education, 26 MLC 91, 92, SUP-4509 (January 11, 2000). A union’s entitlement to information extends to information that will assist the union to monitor compliance with the contract, permit the union to determine whether a grievance should

1 be arbitrated, or otherwise will promote the union's performance of its duties. Boston
2 School Committee, 22 MLC 1365, MUP-8125 (January 9, 1996) (citing Worcester School
3 Committee, 14 MLC 1682, 1685, MUP-6169 (April 20, 1988)).

4 Here, the Union argues that the test data was relevant and reasonably necessary
5 to contest the City's decision not to return Firefighter X to work. The Union argues that
6 the test data was a component of the fitness for duty evaluations, which the City relied on
7 in reaching its decision that Firefighter X was not fit to return to duty. The Union required
8 the information to determine if the evaluation was fair and to evaluate whether to file any
9 grievances or unfair labor practices. Conversely, the City argues that it neither viewed nor
10 saw the test data and did not rely on it in making a decision regarding Firefighter X's
11 employment status.

12 It is well established that records with information that may form the basis of a
13 grievance or could enable a union to determine the merits of a grievance are relevant and
14 reasonably necessary for a union to perform its representational responsibilities. City of
15 Boston v. Labor Relations Commission, 61 Mass. App. Ct. 397, (June 28, 2004); see also,
16 Commonwealth of Massachusetts, 21 MLC 1499, 1504, SUP-3459 (December 14, 1994)
17 (citing Worcester School Committee, 14 MLC at 1684-1685; Boston School Committee,
18 8 MLC 1380, 1382, MUP-3909 (October 20, 1981)). It is undisputed that the City relied
19 on Durand's reports in reaching a decision, and that Durand's conclusion that Firefighter
20 X was not fit to return to duty was based, in part, on the psychological testing. Therefore,
21 the test data that Durand used to formulate the result of the psychological testing is
22 relevant in contesting the accuracy of the fitness for duty evaluations.

1 However, if an employer does not possess or control information requested by a
2 union, the employer cannot be found to violate the Law by failing to provide the requested
3 information. See Higher Education Coordinating Council, 22 MLC 1662, 1673, SUP-4078
4 (April 11, 1996) (citing, Board of Regents of Higher Education, 19 MLC 1248, 1271, SUP-
5 3267, 3268, 3269, 3270, 3271, 3272 (August 24, 1992)). Here, the City has substantiated
6 that it did not have the test data in its possession or control. At the beginning of each
7 evaluation, Firefighter X signed the Evaluation Agreement which informed him that
8 Durand was not releasing the test data to the City. Further, the City was direct and upfront
9 with the Union, indicating in its first response to the Union's request for information that it
10 did not have the test data in its possession and declining to request the information from
11 Durand. The Union offered no evidence that the City was dishonest in this respect or that
12 it had possession of the test data. Further, apart from the test data, the Union does not
13 allege that the City's response was incomplete or that the City withheld responsive
14 documents. Moreover, the record shows that the City did ask Durand about obtaining the
15 test data on the Union's behalf. Durand communicated an alternative solution, which
16 required the Union select a psychologist so she could provide the data directly to that
17 individual. The Union declined to secure a psychologist to receive the test data from
18 Durand.

19 Although the Union argues that the City requested Durand withhold the test data,
20 Durand testified that the City did not make this request, and that Durand specifically
21 requested the language be added to the Evaluation Agreement. The Union did not
22 present any evidence to indicate otherwise. Furthermore, even if the City had asked
23 Durand not to provide the data, the City still did not have the data in its possession or

1 control at the time of the Union's request. See Woods Hole, 12 MLC 1531, 1547, UPL-
2 100 (January 21, 1986) (Union did not violate Law when it refused to provide pension
3 plan documents that the plan administrator possessed, and the Union did not); See also
4 Board of Regents, 19 MLC 1248, 1271, SUP-3267-3272 (August 24, 1992) (Employer did
5 not violate the Law by failing to produce a new insurance policy where it did not have a
6 copy within its possession or control until a later date).

7 The Union argues that Durand is an agent for the City, and thus, the City's duty to
8 provide information to the Union extended to those documents in Durand's possession.
9 However, there is no evidence in the record to support this contention. The CERB has
10 long held that a public employer is responsible for the unlawful actions of its supervisory
11 employees and agents who act within the scope of their apparent authority, whether or
12 not those acts were specifically authorized. Commonwealth of Massachusetts, 38 MLC
13 324, 325, SUP-07-5341 (April 12, 2013) (citing Higher Education Coordinating Council,
14 25 MLC 69, 71, SUP-4087 (September 17, 1998)). Durand worked for a private company
15 that the City contracted with to perform fitness for duty evaluation services. Durand had
16 no role in collective bargaining and no input in employment decisions. She issued her
17 fitness for duty report for Firefighter X to the City as a recommendation to assist the City
18 in making decisions about Firefighter X's employment. The Union offered no evidence
19 that Durand made any statement or took any action with regard to Firefighter X's
20 employment that would imply that she acted as an agent for the City. Compare Town of
21 Chelmsford, 8 MLC 1913, 1917, MUP-4620 (March 12, 1982).

22 Moreover, the City has demonstrated that it did not have control over Durand or
23 the test data and could not produce the test data to the Union until and unless Durand

1 decided to release it, which she declined to do based on industry standards and past
2 practice recommending against it. Thus, I find that the City did not violate the Law by
3 failing to provide the Union with information that it did not have within its possession or
4 control.

5 CONCLUSION

6 For the reasons stated above, the City did not violate Section 10(a)(5), and
7 derivatively, Section 10(a)(1) of the Law by failing to provide the Union with information
8 that is relevant and reasonably necessary for the Union to perform its duties as collective
9 bargaining representative. Accordingly, I dismiss the Complaint.

10 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


SARA SKIBSKI HILLER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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