

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of

MALDEN POLICE PATROLMEN'S
ASSOCIATION

and

CITY OF MALDEN

Case No. MUPL-19-7698

In the Matter of

MALDEN POLICE SUPERIOR
OFFICER'S ASSOCIATION

and

CITY OF MALDEN

Case No. MUPL-19-7699

Date issued: August 15, 2023

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Amy Davidson, Esq.
Ian Collins, Esq.

Representing the Malden Police Superior
Officers Association

Joseph Padolsky, Esq.

Representing the Malden Police Patrolmen's
Association

John Clifford, Esq.
David Kouroyen, Esq.

Representing the City of Malden

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISIONSUMMARY

1 The collective bargaining agreements (CBAs) between the City of Malden (City)
2 and its two police unions, the Malden Police Patrolmen's Association (MPPA) and the
3 Malden Police Superior Officers Association (MPSOA) (collectively, the Unions), each
4 provide for a seven-member Detail Board that has "control over all matters having to do
5 with details." Pursuant to the CBAs, the Detail Board is comprised of the presidents of the
6 MPPA and the MPSOA or their designees, one patrolman elected by the MPPA, one
7 superior officer elected by the MPSOA, and three police officers of any rank elected on
8 an annual basis at large by the members of both Unions. Both CBAs also state that the
9 base rate for paid details "shall be one and a half times the maximum patrolman's rate of
10 pay including night differential."

11 These prohibited practice charges arose in late September 2019, when several
12 City police officers filed a federal lawsuit, and the MPSOA filed a grievance alleging that
13 the City had violated state and federal wage laws and the MPSOA's collective bargaining
14 agreement by deducting a 10% administrative detail fee directly from the officers' detail
15 pay instead of collecting that fee from the person requesting the detail. Shortly after
16 receiving the federal complaint and the grievance, the City sent an information request to
17 the Unions' respective attorneys. Asserting that the Unions' "shared membership in the
18 Detail Board provides you sole access to information relating to setting the rate paid to
19 officers working details," the City sought, among other things, "all records relating to [the]
20 establishment or modification to detail rates by the Detail Board from January 2009
21 through the present." Counsel for the MPPA, who also represented the plaintiffs in the

1 federal lawsuit, responded in October 2017, contending that the records sought by the
2 City were City records and asserting that the Detail Board has no control over the detail
3 rate – rather the rate was set by the collective bargaining agreements. The Unions
4 provided no information to the City in response to the request.

5 On November 14, 2019, the City filed these charges of prohibited practice with the
6 Department of Labor Relations (DLR). After investigation, a DLR Investigator issued a
7 consolidated complaint alleging that the Unions had violated Sections 10(b)(2) and
8 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing and refusing
9 to provide the City with the requested information about detail rates. A DLR hearing officer
10 subsequently conducted a one-day hearing in which MPSOA President Evan Tuxbury
11 (Tuxbury) and three former and current Detail Board members all testified that the CBAs,
12 not the Detail Board, established and modified the detail rate. The City submitted exhibits
13 reflecting that the Detail Board periodically notified bargaining unit members and third-
14 parties that the detail rate would be increasing, what that rate would be, and that the rate
15 would include a “10% City of Malden administrative fee,” a fee that is neither referenced
16 nor calculated in any of the CBAs.

17 The Hearing Officer dismissed the charges. Although she determined that the
18 requested information was relevant to the City’s collective bargaining obligations, she
19 found that because the CBAs, not the Detail Board, established and modified the detail
20 rate, the information that the City requested did not exist. As such, she concluded that the
21 Unions did not violate the Law by not providing information in response to the City’s
22 requests. She further determined that even if the information request had been limited to
23 records notifying the Detail Clerk of rate changes or other records relating to setting detail

1 rates, there was no evidence that those records were anything other than City records,
2 which the Union was not obliged to provide.

3 The City appealed this decision to the Commonwealth Employment Relations
4 Board (CERB). The Unions did not cross-appeal from any of the Hearing Officer's
5 subsidiary findings.

6 We partly reverse. We agree with the Hearing Officer that the Unions were not
7 obliged to provide the City with records that were already within the City's possession or
8 control. We further agree that the CBAs, not the Detail Board, define the *base* detail rate.
9 The CBAs do not however, provide a mechanism by which the contractual increases are
10 automatically implemented, i.e., passed on to contractors without Detail Board
11 involvement, nor do they set forth the amounts needed to calculate the detail rates set
12 forth in the memos that the Detail Board has sent to bargaining unit members and
13 contractors, i.e., the maximum patrolmen's rate of pay including the night differential, the
14 calculation that results by multiplying that rate by one and a half, or the 10% administrative
15 fee. As such, the Unions' argument, which was adopted by the Hearing Officer, that the
16 information the City requested "relating to [the] establishment or modification to detail
17 rates by the Detail Board" does not exist, is incompatible with the record, which shows
18 that the Detail Board, not the CBAs, either made or approved the above-referenced
19 calculations and notified bargaining unit members and contractors when the new rate
20 would go into effect. Because the record reflects that Detail Board members
21 communicate with each other via private email and text regarding Detail Board business,
22 we conclude that the Unions violated the Law when they failed to search their texts or

1 private emails for information about these aspects of setting or changing the detail rate.

2 I

3 Facts

4 The parties entered into thirty-two stipulations of fact and the Hearing Officer made
5 additional detailed findings of fact. We highlight the relevant portions, below,
6 supplementing with relevant, undisputed findings from the hearing record. We address
7 the City's challenges to the Hearing Officer's findings both in this section and our opinion.

8 Contractual Provisions

9 The 2018-2021 collective bargaining agreement between the City and the MPPA
10 provides in pertinent part as follows:

11 Article 23 Paid Details

12 Section 3: The base rate for paid details shall be one and one half times the
13 maximum patrolman's rate of pay including night differential.

14
15 Section 5: A detail board shall be established consisting of the President of
16 the Patrolmen's Association and the Superior Officers Association or their
17 designees and one patrolman elected by the Patrolmen's Association and
18 one superior officer elected [by] the Superior Officers Association. The term
19 of the above four (4) members will be for a period of two (2) years to run as
20 more specifically set forth herein. Their terms shall run from January 1st
21 after their appointment or election consecutively with the term of the
22 President of each Association so far as that is reasonable and possible in
23 light of the timing of the election and the term of the President of each
24 Association, most particularly the Patrolmen's Association whose election
25 of the officers/officials of the Association is in September of every other
26 year, and further except that the designee of the President of the
27 Patrolmen's Association shall serve solely and exclusively at the pleasure
28 of the President of the Patrolmen's Association and may be changed or
29 replaced at any time by the President of the Patrolmen's Association. In
30 addition to the four (4) members cited above, there shall be three (3) police
31 officers of any rank elected on an annual basis at large by the body of the
32 fully paid...membership of both the Patrolmen's Association and the
33 Superior Officers Association in a general election. The members of the
34 detail board shall take office on January 1st after their appointment or
35 election, as the case may be, and their term shall run for two years or one

1 year thereafter, as the case may be, except that the designee of the
2 President of the Patrolmen's Association shall serve solely and exclusively
3 at the pleasure of the President of the Patrolmen's Association. The detail
4 board shall establish rules and procedures pertaining to details. They shall
5 hear complaints pertaining to details and rectify them in accordance with
6 the rules they establish.

7 ***

8 Section 8: The detail board shall have control over all matters having to do
9 with details such as, but not limited to, the rotation of detail opportunities
10 and setting punishment "and/or suspension" from the detail list for
11 infractions(s) of the detail rules and regulations.

12
13 Section 9: The detail board shall interview and nominate for hiring the detail
14 clerk subject to the City Affirmative Action Plan and subject to the approval
15 of the Commissioner or his designee. No person shall be hired as detail
16 clerk without the nomination of the detail board....

17 ***

18 Section 12: The Detail Rate will be increased as of the date the pay
19 increases hereunder are funded by the City. No new categories for which
20 now pay in excess of 1.5 times the maximum patrolmen's rate of pay will be
21 approved or voted by members of this unit without approval of the Mayor.

22
23 The Memorandum of Agreement between the City and the MPSOA,¹ effective July
24 1, 2017 through June 30, 2020 contains similar provisions regarding the Detail Board's
25 composition and purpose, including, in particular,

26 Article V Paid Details and Poll Duty

27
28 Paragraph 2: The base rate for paid details shall be one and one-half times
29 the maximum patrolman's rate of pay including night differential.

30
31 Paragraph 7: The detail board shall have control over all matters having to
32 do with details such as, but not limited to, the rotation of detail opportunities
33 and setting "punishment" and/or suspension from the detail list for
34 infraction(s) of the detail rules and regulations.

35
36 As of September 2019, the following individuals comprised the Detail Board:
37 Officer George MacKay (MacKay), Sergeant Jason Froio (Froio), Tyler Calhoun, Steve

¹ The NEPBA represented the Superior Officers in 2019. On May 7, 2020, MassCOP succeeded NEPBA.

1 Bellavia Jr., Scott Carroll, Gustavo Kruschewsky, and Officer Brian Tilley (Tilley). As of
2 the date of the hearing, Froio was MPSOA President Tuxbury's designee on the Detail
3 Board and Tilley had been a member of the Detail Board "off and on" for six years. John
4 Amirault (Amirault) served on the Detail Board in 2015. As of 2019, no Detail Board
5 members served on the MPPA's Executive Board or the MPSOA's Executive Board.

6 Contractual Compensation

7 Article 30 of Joint Exhibit 1, the 2018-2021 MPPA CBA, Compensation, contains
8 nine sections, including "Base Salary," "Shift Differential," "Increments," "Hazardous
9 Duty," "and "Longevity and Education." The "Base Salary" provision provides for a 2%
10 cost of living adjustment to base pay for each of the contract's three years, but neither
11 this provision nor any other CBA provision, including the Night Differential provision, set
12 forth hourly, weekly, monthly or annual base rates of pay for a patrolman. The "Shift
13 Differential" provision similarly provides for a night differential of 6% of base pay. In
14 contrast, the 2017-2020 MPSOA Memorandum of Agreement contains a chart setting
15 forth annual and weekly rates of pay for the superior officers at both Step 1 and Step 2.

16 Changes to Detail Rates:

17 As exemplified by five letters and emails that the City maintained in its records and
18 submitted as exhibits at hearing,² the Detail Board periodically sends letters or emails to
19 its membership or outside contractors notifying them when detail rate increases will
20 become effective and what those rates will be. For example, on May 15, 2012, Detail

² The stipulations reflect that the City maintained these notices, in its records. The record does not reflect whether r similar letters exist other than those submitted at hearing. The Union did not provide any of these documents to the City or introduce any similar documents during the hearing.

1 Clerk Mardie Sullivan (Sullivan) sent an email to seven individuals including then-Detail
 2 Board Member John Amirault (Amirault) asking them to, "Please review the Detail Rate
 3 Increase letter" and "Advise of any changes by Thursday, May 17, 2012."³ The record
 4 does not reflect that the Detail Board replied, but on May 15, 2012, the Detail Board sent
 5 a letter that stated in pertinent part:

6 *To Whom it May Concern:*⁴

7
 8 *In accordance with labor contracts between the City of Malden and Police*
 9 *Department Union, the following increases for paid details will become*
 10 *effective June 18, 2012.*

11 **PAID DETAIL RATES**

DAY OF WEEK	TIME PERIOD	HOURLY RATE
Monday-Sunday	7 AM - Midnight	\$47.00*
Monday-Sunday	Midnight-7Am	\$70.50*
Holidays	** See page 2**	**See page 2**

12
 13 * Includes a 10% City of Malden Administrative Fee

14 **NOTES**

15 *After eight consecutive hours, the overtime rate will apply,*
 16 *which is one and one half the regular hourly rate.*

17
 18 *Road jobs will have an eight hour minimum payment after four*
 19 *hours. All other paid details will continue to require a four hour*
 20 *minimum payment.*

21
 22 *All strike details will be paid the rate of double time the regular*
 23 *detail rate.*

24
 25 **IMPORTANT:** *When calling for a detail, we must have the*
 26 *following information:*

- 27 *1. Name and telephone number of person requesting*
 28 *detail*
 29 *2. Billing information*
 30 *3. Number of officers needed for detail*

³ This email did not include the referenced Detail Rate Increase letter.

⁴ Based on the content of this notice, in particular its reference to what is required when calling for a detail and to whom to the check is payable, we find that the Detail Board addressed the letter to existing or potential detail contractors.

1 *members bringing to the boards (sic) attention that our rate was not in line with*
2 *both the Patrolman's or Superior Officer's contracts.*

3
4 2) *Just a reminder to have all officers turn in their detail slips with (sic) 48 hours*
5 *of a detail, there has been a number of people that aren't following it. ...⁵*

6 Amirault signed it, "Captain John Amirault, Malden Police Department." Beneath
7 his signature block was a disclaimer that indicated in part that the email was being sent
8 by the Malden Police Department and that those responding should "please be advised
9 that the City of Malden and the Office of the Secretary of State has determined that email
10 could be considered a public record." When asked at hearing what prompted Amirault to
11 send the message, he testified that "A number of officers . . . came to various members of
12 the Detail Board indicating that the Patrolmen had received a raise, and as such, they
13 should've – we should've raised the rate in accordance with the contract, as it states. And
14 we hadn't done that for some time, like three or four weeks, and they were getting a little
15 anxious, so we had a meeting." When asked, however, if the Detail Board changed the
16 rate, Amirault answered, "No, it was – it was raised in accordance with the contract."

⁵ The Hearing Officer found that, "notwithstanding this email," the Detail Board did not have the authority to establish or modify detail rates. The Hearing Officer reasoned that the rate increase occurred because the rate was inconsistent with the contracts, not because the Detail Board voted to increase the rate. The City challenges this finding. As explained further below, while we agree that the CBAs set forth the base Detail Rate, the evidence shows that unless the Detail Board voted to implement the increase, third-parties would continue to pay whatever rate was being charged at the time, even if the contractual rate would have been higher. In this sense, therefore, the Detail Board does have the authority to modify the rates charged to contractors because the contractual increases are not self-effectuating. Moreover, as explained in the summary of this case and below, the rate charged to contractors included a 10% administrative fee that was neither referenced nor calculated in the CBA. We therefore find that the CBAs, standing alone, neither established nor modified the Detail Rates. Rather, any detail rate changes that resulted from contractual wage increases had to be calculated and then implemented by the Detail Board.

1 Tilley, who served on the Detail Board when Amirault sent this email similarly testified
2 that the Detail Board never voted on changing the rate – when questioned further on cross
3 examination, he stated that he did not remember whether the Detail Board had taken the
4 vote.

5 Other Detail Board Communications

6 The Detail Board has, on occasions before and after the information request, taken
7 minutes summarizing what has occurred at a Detail Board Meeting.⁶ For example, on
8 January 1, 2020, Tilley sent an email to the Detail Board at their Malden Police
9 Department email address, DetailBoard@maldenpd.com, asking:

10 *Does this email sound good? I think [I] covered everything. I will be sending*
11 *from the meeting most likely tomorrow. I spoke to [J]ack Owens⁷ about a*
12 *few things that [I] will send out in text messages.*

13
14 *Let me know if I missed anything or you think anything should be changed.*

15
16 Beneath Tilley's introduction was the text of the draft minutes. The first paragraph
17 stated:

18 *All,*

19
20 *A meeting was held by the detail board on 12/30/19. One of the topics of*
21 *discussion was violations that happened from 1/1/2019 to 12/31/2019. As*
22 *most are aware no assessment of any penalties has taken place in the past*
23 *year. The board decided that it would not be fair to penalize anyone for past*
24 *violations that were assessed in the agreed to time frame.*
25

⁶ Although Tuxbury testified that the Detail Board kept no minutes, Tilley contradicted that testimony by testifying that he kept minutes sporadically during his tenure on the Detail Board. The Hearing Officer credited Tilley's testimony as to this point and, based on Tilley's admission, generally credited all of Tilley's testimony.

⁷ As reflected in the case caption of the complaint, Jack Owens (Owens) was the lead plaintiff in the lawsuit against the City.

1 Tilley's draft discussed other detail procedures, such as how officers should
2 indicate they are available to work a detail. The final sentence stated, "Any questions
3 please contact a board member" followed by Tilley's signature line, "Brian Tilley, City of
4 Malden Police Sent from my iPhone."

5 In January 2019, Detective Steven Mulcahy Jr. (Mulcahy) sent an email from his
6 Malden PD account to the *MPPA@maldenpd.com* and the Detail Board regarding
7 "National Grid Gas Lockout – Payment of details to Malden PD." Mulcahy, stating that he
8 was speaking for the "majority of patrolman [sic] including members of the 'detail board'
9 and union," asked why they had to find out from the "Chief's secretary" that the lockout
10 details were not being paid. Mackay's response led to several more emails between
11 Mackay and Mulcahy and one other bargaining unit member who joined in. At one point,
12 Mulcahy quoted from the Malden PD's email disclaimer that email could be considered a
13 public record, to which Mackay responded, "I'm well aware of that so why would you open
14 this subject on this email. You have everyone's telephone number and could just have
15 called any one of us."

16 To that point, the hearing record reflects that Board members communicated using
17 their private email addresses and, as Tilley's January 1, 2020 email reflects, via text
18 message. Tilley testified that private emails were used for unofficial Board business,
19 which he characterized as "just discussion," regarding matters that did not affect the entire
20 Department, and which did not result in any decisions being made. When pressed,
21 however, Tilley could not come up with any concrete examples of such discussions. As
22 to text messages, during the hearing, the City submitted an email dated April 13, 2020
23 from Tilley's City email account to Owens, Sullivan and the Detail Board, which stated:

1 *All,*

2 *The detail board attempted to come to a decision on something last week*
3 *via text message and we lost something in translation. We request that you*
4 *go back to filling details the same way you were prior to the email that was*
5 *sent out last week. The board is meeting this week to rectify the issue [sic]*
6 *we apologize for any confusion and appreciate the cooperation.⁸*

7

8 Litigation and Grievance Over Administrative Fee

9 M.G.L. c. 44, Section 53(c) governs payment for private detail work and provides
10 in pertinent part that: “[a] city, town or district may establish a fee not to exceed ten per
11 cent of the cost of services authorized under this section, which shall, except in the case
12 of a city, town, district or the commonwealth, be paid by the persons requesting such
13 private detail.”

14 On August 28, 2019, Owens, Jeffrey Drees, Katelyn Murphy, Patrick Manolian,
15 Scott Mann, and Sean Hussey, (collectively, the plaintiffs) filed a civil complaint (Federal
16 Complaint) against the City in the United States District Court for the District of

⁸ Because this email was sent more than six months after the City sent the information request at issue here, the Hearing Officer did not view the April 2020 email as evidence that Detail Board members communicated with each other by text message before September 2019, when the City made the information request, or that the Union had any text messages that were responsive to the information request. However, as detailed above, Tilley sent two emails from his City email that reflected that the Detail Board used texts to communicate regarding Detail Board business – the April 2020 email and the December 30, 2019 email that Tilley sent to Detail Board members attaching draft minutes from the December 30, 2019 Detail Board meeting. The 2019 email notably stated that Tilley had a discussion with Owen “about a few things that I will send out in text messages.” It is reasonable to infer from this that Tilley did not wish his conversation with Jack Owens, the lead plaintiff in Owens v. Malden, the detail wage complaint that bargaining unit members filed against the City, to be publicly discoverable. Given the closeness in time between the August 2019 Federal Court complaint and Tilley’s January 2020 email, it is reasonable to believe that, in addition to communicating via email, Detail Board members communicated via text messages even before the City made the September 2019 information request.

1 Massachusetts. The court docketed the case as Jack Owens et. al. v. City of Malden,
2 1:19-CV-11835-WGY (Owens v. Malden). MPPA Attorney Joseph Padolsky (Padolsky)
3 represented the plaintiffs. The plaintiffs, who were City patrol or superior officers, alleged
4 that the City had violated the Massachusetts Wage Act, M.G.L. c.149, s.148, and the Fair
5 Labor Standards Act (FLSA), 29 U.S.C. s.201, by deducting the 10% administrative fee
6 from their detail pay, rather than charging the 10% fee to the entity requesting the detail.⁹
7 Neither the MPPA nor the MPSOA was a party to Owens v. Malden.

8 On September 17, 2019, the MPSOA also filed a grievance over the 10%
9 administrative fee that the City had been charging to its officers rather than to detail
10 contractors. The Police Chief did not respond to the grievance at Step 1 of the grievance
11 procedure. The MPSOA withdrew the grievance on or about October 28, 2019, because
12 the membership decided to pursue the issue of detail compensation through a lawsuit
13 rather than the grievance procedure. The MPPA did not join or file its own grievance over
14 the 10% administrative fee.

15 By letter dated September 16, 2019, Padolsky advised City attorney John Clifford
16 (Clifford) that he represented the plaintiffs and attached a copy of the Federal Complaint
17 and other documents related to the lawsuit. Clifford responded to Padolsky with a letter
18 on September 26 that set forth the City's position that the Detail Board had the "sole
19 authority" to, among other things, set detail rates, and that the City had no authority to
20 change the detail rate.

⁹ Other Malden police officers, including Tuxbury, subsequently joined the litigation as plaintiffs.

1 On September 27, 2019, Clifford sent the information request at issue here to
2 Padolsky and MPSOA attorney Thomas Horgan (Horgan). The request stated:

3 In your roles as counsel for the Malden Police Patrolmen's Association (MPPA)
4 and the Malden Police Superior Officers' Association... I am requesting information
5 relating to the joint oversight of your clients of the City of Malden's detail operation.
6 As you are both aware, pursuant to collective bargaining agreements between your
7 clients and the City, your shared membership in the Detail Board provides you sole
8 access to information relating to setting the rate paid to officers working details. I
9 am requesting all records relating to establishment or modification to detail rates
10 by the Detail Board from January 1, 2009 through the present. That includes
11 emails or memoranda notifying the detail clerk of changes to the detail rate,
12 notifications to Malden Police Department personnel of changes to the detail rate,
13 minutes of meetings of the Detail Board, or any other records relating to setting
14 detail rates during the relevant period.

15
16 On October 17, 2019, Padolsky responded to Clifford's September 27 information
17 request on behalf of the Unions. Padolsky's letter quoted from Article 23, Section 3 and
18 12 of the CBA and stated that "...**the Detail Board has no control over the Detail**
19 **Rate**... Neither the City nor the Detail Board, the MPPA or the Malden Superior Officers'
20 Association...may unilaterally change the detail rate." (emphasis in original.) Padolsky
21 further contended that, "[t]he records of the detail clerk or the Detail Board are the City's
22 records. I request that you review them and request that you produce the same to me as
23 soon as practicable." By email to the Unions dated October 16, 2019, Clifford repeated
24 his September 27, 2019 information request. The MPPA and MPSOA never gave the City
25 any documents in response to the City's September 27 and October 16, 2019 information
26 requests.

27 The City filed the charge of prohibited practice in this case on November 14, 2019.
28 On December 3, 2019, the City received an affidavit from Tuxbury that addressed his
29 response to the information requests. The affidavit stated in part that Tuxbury had
30 "reviewed the information request . . .from the City," and "personally conducted an inquiry

1 into whether I, or any other current detail board members were in possession of any
2 responsive documents . . . Having conducted such an inquiry I have determined that
3 neither I, nor any other current detail board member, is in possession of any responsive
4 documents . . .”

5 When questioned about the affidavit at hearing, however, Tuxbury could not recall
6 asking any current Detail Board members other than Froio about the request. The Hearing
7 Officer thus found that, contrary to his affidavit, Tuxbury’s inquiry was limited to his
8 conversation with Froio. Regarding his conversation with Froio, Tuxbury testified that he
9 never showed the information request to Froio, but that Froio nonetheless confirmed what
10 Tuxbury “already knew – that there are no minutes, that nothing about wages, none of
11 that information that you’re seeking exists in our *union* records.”¹⁰ (Emphasis added.)¹¹
12 As to the extent of the search, Tuxbury testified that he did not check his personal emails
13 or texts in response to the request, nor did he know whether Froio searched his personal
14 emails or texts for documents.¹² Tuxbury further testified that he did not check his City or
15 personal emails for responsive documents because he “knew they didn’t have documents
16 relating to establishing or modifying the rate.” In response to a question if there were *any*
17 files or formal records that are kept of Detail Board meetings or records, Tuxbury
18 responded:

¹⁰ Based on this testimony and another part of his testimony where Tuxbury states to Clifford, “but your request was for union records; was it not”, it would appear that Tuxbury erroneously interpreted the information request as requesting only union records pertaining to detail rates.

¹¹ Tuxbury also testified that he was unaware that the request went back to 2009.

¹² Froio did not testify.

1 As the union president, I have all the files in my possession and there's
2 nothing from the Detail Board. No minutes, no nothing. I know the clerk
3 would take notes on what kinds of rules may have been changed or
4 discussed or notes of any kind of punishments or hours assessed to officers
5 for minor rule infractions, but there was never – I've never seen minutes
6 taken at subsequent meetings voted and approved, filed. None of that ever
7 existed. I would have those in my records if they did. And I'd be happy to
8 share them if we had them.¹³

9
10 In response to the question of whether he would have access to the Detail Clerk's notes,
11 Tuxbury stated that he would not.

12 Of the three remaining former or current Detail Board witnesses who testified, only
13 Amirault testified that he was asked to do anything with respect the information request.
14 Amirault testified that he never saw the information request, but that a "union lawyer,"
15 whom he did not name, asked him to make a "generalized search." When asked whether
16 he did so, Amirault could not recall whether he "did or didn't" search for the information
17 requested in the letter. Tilley, who served on the Detail Board when the information
18 request was made and became Union Vice President in October 2020, could not recall
19 whether Tuxbury or anyone else had ever spoken to him about the information request.
20 At hearing, no one asked Officer MacKay, a current Detail Board Member, whether
21 anyone ever showed him the information request, or asked him to search any records.
22 He did, however, testify, consistent with the other witnesses, that he could not recall ever
23 discussing the detail rate at Detail Board meetings.

24 Opinion¹⁴

¹³ As noted above, Tilley directly contradicted Tuxbury's testimony when Tilley testified that the Detail Board kept minutes, that he had taken such minutes and that such minutes existed in the City's server.

¹⁴ The CERB's jurisdiction is not contested.

1 Chair Wittner and Member Caldwell

2 The duty to bargain in good faith set forth in Section 6 of the Law requires both
3 public employers and unions to provide information that is relevant and reasonably
4 necessary to the other parties' collective bargaining obligations. Wood's Hole, Martha's
5 Vineyard and Nantucket Steamship Authority, et. al., 12 MLC 1531, 1542-1543, UPL-100
6 (January 21, 1986). Here, rejecting the Unions' arguments, the Hearing Officer found
7 that because the City's information request pertained to its duty to correctly pay
8 contractual wages to bargaining unit members, the requested information was relevant to
9 the City's collective bargaining obligations. The Unions do not dispute this point on
10 appeal.

11 Once relevancy is established, the burden shifts to the responding party to
12 establish that it has legitimate and substantial concerns about disclosure and that it has
13 made reasonable efforts to provide as much of the information as possible, consistent
14 with its expressed concerns. Adrian Advertising a/k/a Advanced Advertising, 13 MLC
15 1233, 1263, UP-2497 (November 6, 1986).

16 Before the Hearing Officer, the Unions made three arguments defending their
17 failure to provide any information to the City: 1) the requested information did not exist
18 because the Detail Board does not establish or modify the detail rate; 2) the Unions do
19 not possess any Detail Board records; and 3) the Unions do not control the Detail Board
20 and thus could not compel the Details Board to produce any information that it may have
21 had.

22 As to the first argument, the Hearing Officer agreed with the Unions that the Detail
23 Board had no authority to change the detail rate and that the CBA controlled all rate

1 changes. Although we agree that the base detail rate is set forth in the CBA, the MPPA
2 contract contains no salary charts indicating what the maximum patrolmen's rate of pay
3 is including night differential and what that rate is when multiplied by one and a half. Nor
4 does the CBA mention or calculate the "10% City of Malden Administrative Fee" included
5 in the detail rate set forth in the Detail Board's 2012, 2015, 2017, and 2019 detail rate
6 increase announcements. In other words, the CBAs only set forth the formula for
7 calculating the base detail rate, not the rate itself. Given the broad powers granted to the
8 Detail Board in the CBAs and given the Detail Clerk's and Detail Board's rate increase
9 memos, we find that either the Detail Board, or the Detail Clerk subject to the Detail
10 Board's approval, calculates the detail rate.

11 As importantly, the CBAs contain no mechanism by which the base detail rate is
12 automatically implemented. Rather, as demonstrated by Amirault's memo and testimony,
13 the actual rate increases require Detail Board notifications of the sort set forth in City
14 Exhibits 5, 7, 8, 9, and 10. All of these documents are either Detail Board's documents or
15 Detail Clerk documents and contain the phrase, "Detail Rate Increases," or words to that
16 effect. We thus disagree that no records existed in response to a request for "all records
17 relating to establishment or modification to detail rates by the Detail Board from January
18 1, 2009 through the present." The Detail Rates neither calculate nor set themselves and
19 the five Detail Board memoranda demonstrate that it is the Detail Board that ultimately
20 approves new rates and effectuates the rate increases.¹⁵

¹⁵ Although as the Hearing Officer found, there may be no concrete evidence that the Detail Board's October 6, 2015 vote described in Amirault's October 21, 2015 memo to the entire Malden Police Department effectuated the rate increase described therein, we note that the rates and effective date of Amirault's memo are consistent with the rates

1 As to the Unions' second and third arguments, that they neither possess nor
2 control Detail Board records, it is well-established that the Law does not impose an
3 obligation upon unions or employers to provide information that is not in their possession
4 or control. Bristol County Sheriff's Department, 32 MLC 76, 81, MUP-01-3086 (August 3,
5 2005) (citations omitted); Woods Hole, 12 MLC at 1545-1547. In Woods Hole, the CERB
6 concluded that the fact that the union's vice president and executive vice president were
7 trustees of a pension fund did not mean that the union was in de facto control of the
8 pension plan. Finding no other information that the Pension Plan was under the control
9 of the union, the CERB found that the union would have had to obtain it from the Plan's
10 salaried administrator in order to provide it to the employer. The CERB thus held that
11 where the union did not thwart or delay the administrator's attempts to provide the
12 information, the union had satisfied its obligation to respond to the Employer's information
13 request by referring the employer to the administrator for the information. Id. at 1547. In
14 so holding, the CERB adopted principles set forth in UFCW, Local 1439, 268 NLRB 780
15 (1983), which also involved an employer's request to a union for pension plan information.
16 In UFCW, the NLRB found that where the union would have had to obtain the information
17 from the plan administrator, and where the union had no more expeditious or effective
18 access to the information than the employer, the union was not obliged to provide the

and date contained in the Detail Board's October 28, 2015 rate increase memo to detail contractors. Further, because Amirault sent the 2015 memo to respond to patrol officers' concerns that the detail rate had not increased for a while, and because the detail rates specified in the 2017 and 2019 memos were higher than those set forth in the 2015 memo, it is extremely unlikely that the 2015 rates or the rates set forth in any other similar memos were not effectuated.

1 information to the employer who could just as easily have asked the administrator. Woods
2 Hole, 12 MLC at 1546-1547 (citing UFCW at 781).

3 In this case, the Hearing Officer similarly found that, “the City provided no case law
4 holding that the duty to bargain entitles one party to require the other party to search its
5 records and provide information that they both possess simply to save the requesting
6 party the time and effort of reviewing its own records.” Woods Hole, however, is
7 distinguishable. In that decision, the pension board was governed by a board of trustees
8 composed equally of management and union representatives. 12 MLC at 1547. Here,
9 however, the City has no direct or indirect representation on the Detail Board, the CBA
10 makes clear that the Detail Board has control over all matters having to do with details,
11 and all the members of the Detail Board are either MPPA or MPSOA presidents or their
12 designees, or union members elected by other union members. Thus, regardless of
13 whether these factors give the Unions de facto control over the Detail Board’s operations,
14 the Unions clearly have access to Detail Board documents due to their presidents’
15 designees’ presence on the Detail Board. Tuxbury admitted as much when he testified
16 that if the Detail Board kept records, he, as Union President, would have had them. He
17 likewise stated in his affidavit that, in response to the information request, he “conducted
18 an inquiry into whether I, *or any other current detail board members*, were in possession
19 of any responsive documents.” Tuxbury’s affidavit and testimony thus belie the Unions’
20 contention that Detail Board and union records are entirely separate or that Tuxbury had
21 no control over or access to Detail Board communications by virtue of his status as Union
22 president. See Service Employees International Union, Local 715, 355 NLRB 353, 355,
23 356 (2010) (union violated the law by not providing employer with information to which it

1 had access about a third-party union with whom the union had a “close relationship” and
2 whom the employer had reason to believe was now representing bargaining unit);
3 International Brotherhood of Firemen and Oilers, Local No. 288, 302 NLRB 1008, 1009
4 (1991) (in context of grievance processing, union obliged to “at least attempt” to obtain
5 grievant’s medical records from grievant in response to employer’s request for information
6 pertaining to grievance processing).

7 We nevertheless agree with the Hearing Officer that a union should not be
8 compelled to provide documents to an employer that are contained in the employer’s own
9 records. Both Woods Hole and UFCW state as much. However, in this case, there was
10 compelling and unrefuted evidence that the Detail Board communicated and even
11 conducted business by text and personal emails, i.e., in a manner that the City cannot
12 access by searching its own records. The record, however, is devoid of any evidence
13 that the Unions sought to search for any responsive records that were in their possession
14 or that they could obtain from other Detail Board members. Padolsky’s response to the
15 City’s request stated, in essence, that there were no Detail Board records that were
16 responsive to the request. We disagree with that statement for all the reasons set forth
17 above. Tuxbury testified that he did not search his personal emails for any responsive
18 documents because he knew he would not find any, and Amirault, who wrote the memo
19 memorializing a Detail Board vote on a rate increase, had only the vaguest recollection
20 of being asked to find responsive information, and could not even recall whether he had
21 conducted such search. Given that we have found that there were Detail Board
22 documents in the *City’s* records that were responsive to the City’s request, the Unions,
23 through their officers and designees, also had a duty to make a reasonable effort to

1 search for records in their own possession or control, i.e., their texts and personal emails,
2 before insisting that they had no responsive documents at all. Their failure to do so forms
3 the basis of the violation we find here.

4 Conclusion

5 On the basis of the foregoing, we partially reverse the Hearing Officer's dismissal
6 of the complaint.

7 Member Strong, concurring

8 I concur in the result herein, but in applying the Woods Hole analysis to the facts
9 of this case, I would go further than the majority and find that the Unions had de facto
10 control of the Detail Board. There is a distinction between a union member elected to be
11 a pension trustee and a union member elected to a detail board. Pursuant to Section 1 of
12 Chapter 32 of the Massachusetts General Laws, a trustee of a public sector pension plan
13 is, by definition, a fiduciary. As such, the trustee must adhere to state regulations that
14 require the trustee to act in the best interest of the pension plan, which encompasses
15 acting with skill, prudence, and diligence, and managing plan assets in a manner that will
16 minimize loss and continue to provide benefits to members and their beneficiaries. See
17 840 CMR 1.00 et seq. The trustee's fiduciary obligations may at times require the trustee
18 to make decisions that are contrary to what plan participants would like to see happen,
19 and such participants may include union officers or fellow union members. For example,
20 a union trustee may vote against a benefit increase because the long-term cost of such
21 benefit may adversely affect future unfunded liability although it may provide an
22 immediate or near future benefit to the union trustee's union president or fellow bargaining
23 unit members who are about to retire.

1 In the present matter, I view the MPSOA and MPPA CBA provisions concerning
2 the Detail Board as the means by which the Unions can exercise control over the
3 administration of the CBA detail provisions; and thus, the Detail Board's allegiance is to
4 the Unions to ensure that they receive the benefit for which they have bargained. The
5 CBAs and the testimony reflect that the union members' purpose in serving on the Detail
6 Board is to properly administer the Union's collectively-bargained-for detail benefit. The
7 plain language of both contracts clearly demonstrates MPPA and MPSOA control over
8 the Detail Board where each of the Union Presidents or their designees serve on the
9 Board, the respective union memberships each elect one board representative from their
10 bargaining unit, three additional at-large board seats are filled by a combined vote of both
11 unions, and the non-union Detail Clerk, must be nominated by the Detail Board, before
12 the Commissioner can approve the appointment. These Detail Board members placed
13 on the board by their Union presidents or their union brothers and sisters, have "control
14 over all matters having to do with details..." This contract language coupled with Union
15 testimony, including but not limited to the MPSOA President's own testimony concerning
16 his knowledge of the Detail Board's record keeping and operations, even though he did
17 not actually sit on the Board, and the lack of any management control over the Detail
18 Board other than the approval of a Detail Clerk nominated by the Unions, leads to the
19 reasonable conclusion that the Unions wield considerable influence on the Detail Board's
20 composition and resulting operation. As a result, I believe the Unions do have de facto
21 control over the Detail Board's operations, lending further force to the conclusion that the
22 Unions violated the Law by not searching for email and text records within their exclusive
23 possession and control for the requested Detail Board records.

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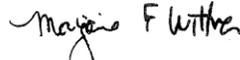
Order

WHEREFORE, IT IS HEREBY ORDERED that the Unions shall:

- 1. Cease and desist from:
 - a. Refusing to bargain in good faith with the City by failing to make reasonable efforts to provide information that is relevant and reasonably necessary to the City’s collective bargaining responsibilities.
 - b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.
- 2. Take the following action that will effectuate the purposes of the Law:
 - a. Make a reasonable effort to search all records within their possession and control, including, without limitation, personal emails and texts, that are responsive to the City’s September 27, 2019 information request and, if that search uncovers responsive information, immediately produce the information to the City.
 - b. Post immediately in all conspicuous places where members of the Unions’ bargaining units usually congregate, or where notices are usually posted, including electronically if the Unions customarily communicate with these members via email or intranet, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CERB CHAIR



KELLY STRONG, CERB MEMBER



VICTORIA B. CALDWELL, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employer Relations Board (CERB) issued a decision holding that the Malden Police Patrolmen's Association (MPPA) and the Malden Police Superior Officer's Association (MPSOA) violated Section 10(b)(2) and 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by not making reasonable efforts to respond to an information request from the City of Malden (City).

Section 2 of the Law gives public employees the right to engage in self-organization, to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection, and to refrain from all of the above.

WE WILL NOT refuse to bargain in good faith with the City by failing to make reasonable efforts to provide information that is relevant and reasonably necessary to the City's collective bargaining responsibilities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL make a reasonable effort to search all records within our possession and control, including, without limitation, personal emails and texts, that are responsive to the City's information request and if that search uncovers responsive information, to immediately produce the information to the City.

Malden Police Patrolmen's Association

Date

Malden Police Superior Officers
Association

Date

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

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