

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *
* Case No. MUPL-19-7698
MALDEN POLICE PATROLMEN'S *
ASSOCIATION *
*
and *
*
CITY OF MALDEN *
*

In the Matter of *
* Case No. MUPL-19-7699
MALDEN POLICE SUPERIOR *
OFFICERS ASSOCIATION *
* Date Issued: August 19, 2022
*
and *
*
*
CITY OF MALDEN *
*

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Amy Davidson, Esq. Representing the Malden Police Superior
Ian Collins, Esq. Officers Association

Joseph Padolsky, Esq. Representing the Malden Police Patrolmen's
Association

John Clifford, Esq. Representing the City of Malden
David Kouroyen, Esq.

HEARING OFFICER'S DECISION

SUMMARY

1 evidence. The parties filed timely post-hearing briefs on or before November 15, 2021.¹
 2 Based on the record, which includes witness testimony, my observation of the
 3 witnesses' demeanor, stipulations of fact, and documentary exhibits, and in
 4 consideration of the parties' arguments, I make the following findings of fact and render
 5 the following opinion.

6 STIPULATIONS OF FACT

- 7 1. The City of Malden (hereafter "City") is a public employer within the
 8 meaning of Section 1 of the Law.
- 9
- 10 2. The MPPA is an employee organization within the meaning of Section 1 of
 11 the Law.
- 12
- 13 3. The Superiors Association is an employee organization within the
 14 meaning of Section 1 of the Law.
- 15
- 16 4. The MPPA is the exclusive bargaining representative for a unit of police
 17 patrol officers employed by the City.
- 18
- 19 5. The Superiors Association is the exclusive bargaining representative for a
 20 unit of superior officers employed by the City.
- 21
- 22 6. The City and the MPPA are parties to a collective bargaining agreement
 23 (MPPA CBA) which is effective from July 1, 2018, through June 30, 2021.
- 24
- 25 7. The City and the Superiors Association are parties to a collective
 26 bargaining agreement (Superiors CBA) which was effective from July 1,
 27 2017 through June 30, 2020. The City and the Superiors Association have
 28 subsequently signed a memorandum of Agreement extending the CBA
 29 through June 2023 and modifying several of the provisions contained
 30 therein.
- 31
- 32 8. Article 5, Section 7 of the Superior CBA states that:

¹ The MPPA submitted a document with its brief entitled "Corrective Memorandum of Decision" that was not included in the evidentiary record and invited me to take administrative notice of it. I decline to do so because the MPPA submitted its brief and the document following multiple time extensions, after the City submitted its brief, and with no prior notice or opportunity for the City to respond. I excluded the document and have not read or considered it in this decision.

- 1 “The Detail Board shall have control over all matters having to do with
2 details such as, but not limited to, the rotation of detail opportunities and
3 setting punishment and/or suspension from the detail list for infraction(s)
4 of the detail rules and regulations.”
5
- 6 9. The Detail Board establishes rules and procedures pertaining to the
7 distribution of details. It has control over the rotation of detail
8 opportunities, setting punishment/or suspension from the detail list for
9 infractions of the detail rules.
10
- 11 10. The City employs a Detail Clerk. She is responsible for calculating the
12 amount of detail pay owed to each officer based upon the details they
13 perform. She is not a member of the MPPA or the Superior Officers Union.
14
- 15 11. The records of detail pay are contained in the City’s computer system.
16
- 17 12. The Detail Board interviews and nominates the Detail Clerk, but the Police
18 Commissioner ultimately determines who to hire for that position.
19
- 20 13. Article 23, Section 5 of the MPPA CBA calls for the creation of a Detail
21 Board which consists of seven members from the MPPA and the Superior
22 Association who are elected to their positions on the Detail Board.
23
- 24 14. On September 16, 2019, Attorney Joseph A. Padolsky served the City
25 with a Complaint captioned *Jack Owens, et. al. v. City of Malden*, 1:19-
26 CV-11835-WGY, asserting the City was violating the Massachusetts
27 Wage Act and federal Fair Labor Standards Act by unlawfully taking the
28 G.L.c.44, s.53C administrative fee out of its officers’ detail wages and for
29 failure to pay correct paid detail and overtime wages.
30
- 31 15. On September 27, 2019, City attorney John Clifford (Clifford) wrote a letter
32 to counsel for the MPPA [and] Superior Association requesting:
33
34 “all records relating to establishment or modification to detail rates by the
35 Detail Board from January 2009 through the present. That includes
36 emails or memoranda notifying the Detail Clerk of changes to the detail
37 rate, notifications to Malden Police Department personnel of changes to
38 the detail rate, minutes of meetings of the Detail Board, or any other
39 records relating to setting detail rates during the relevant period.”
40
- 41 16. On October 16, 2019, Attorney Clifford sent an email to counsel for the
42 MPPA [and] Superior Association, repeating his request for the
43 information sought in his September 27, 2019, request.
44
- 45 17. On October 17, 2019, Attorney Padolsky sent another letter to Attorney
46 Clifford further indicating that the records sought by the City were City

- 1 records. Attorney Padolsky requested that the City review [its] records
2 and produce them as soon as practicable.
3
- 4 18. The City did not produce any such records to the MPPA.
5
- 6 19. MassCOP succeeded the NEPBA as the collective bargaining
7 representative of the Superior Officers bargaining unit on May 7, 2020.
8
- 9 20. The trial in *Jack Owens et al. vs. City of Malden*, CA No. 1:19-CV-11835-
10 WGY concluded on May 12, 2021.
11
- 12 21. As of September 2019, the following individuals were the members of the
13 Detail Board: George MacKay, Jason Froio, Tyler Calhoun, Steve Bellavia
14 Jr., Scott Carroll, Gustavo Kruschewsky, and Brian Tilley. None of these
15 individuals were members of the MPPA's Executive board or the Superior
16 Officers Executive Board.
17
- 18 22. The documents marked as City Exhibits 2 – 10 were maintained in the
19 records of the City of Malden Police Department.
20
- 21 23. Attorney Padolsky's October 17, 2019 letter, marked as Joint Exhibit 3,
22 contained the Unions' response to the City's September 27 and October
23 16, 2019 information requests.
24
- 25 24. The MPPA and the Superior Officers Association did not provide the City
26 with documents in response to the City's September 27 and October 16,
27 2019 information requests.
28
- 29 25. The City received the affidavit of Evan Tuxbury dated December 3, 2019,
30 on or about December 3, 2019.
31
- 32 26. The Superior Officers Association filed a grievance dated September 17,
33 2019 that concerned the City's deduction of a 10% fee from the Superior
34 Officers' detail pay.
35
- 36 27. The Superior Officers Association withdrew the grievance concerning the
37 10% administrative fee on or about October 28, 2019.
38
- 39 28. The MPPA did not file a grievance concerning the City's deduction of a
40 10% fee from the patrol officers' detail pay. The MPPA had no grievances
41 pending in September of 2019 regarding details or the Detail Board.
42
- 43 29. The City was not engaged in bargaining for a successor contract with
44 either the MPPA or the Superior Officers Association in or around
45 September of 2019.
46

- 1 30. Neither the MPPA nor the Superior Officers Association, nor the City had
- 2 any pending cases at the DLR or in arbitration regarding detail pay on or
- 3 around September of 2019.
- 4
- 5 31. Neither union was a party to *Owens v. The City of Malden*.
- 6
- 7 32. The City did not send a Federal Rule of Civil Procedure Rule 45 subpoena
- 8 to any entity during the civil litigation of *Owens v. Malden* including the
- 9 MPPA, the Superior Officers Association or the Detail Board.

FINDINGS OF FACT

Contractual Provisions Regarding the Detail Board

The collective bargaining agreement between the City and the MPPA, effective July 1, 2018 through June 30, 2021, provides in pertinent part as follows:

Article 23 Paid Details

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

Section 5: A detail board shall be established consisting of the President of the Patrolmen's Association and the Superior Officers Association or their designees and one patrolman elected by the Patrolmen's Association and one superior officer elected [by] the Superior Officers Association. The term of the above four (4) members will be for a period of two (2) years to run as more specifically set forth herein. Their terms shall run from January 1st after their appointment or election consecutively with the term of the President of each Association so far as that is reasonable and possible in light of the timing of the election and the term of the President of each Association, most particularly the Patrolmen's Association whose election of the officers/officials of the Association is in September of every other year, and further except that the designee of the President of the Patrolmen's Association shall serve solely and exclusively at the pleasure of the President of the Patrolmen's Association and may be changed or replaced at any time by the President of the Patrolmen's Association. In addition to the four (4) members cited above, there shall be three (3) police officers of any rank elected on an annual basis at large by the body of the fully paid....membership of both the Patrolmen's Association and the Superior Officers Association in a general election. The members of the detail board shall take office on January 1st after their appointment or election, as the case may be, and their term shall run for two years or one year thereafter, as the case may be, except that the designee of the President of the Patrolmen's Association shall serve solely and exclusively at the pleasure of the President of the Patrolmen's Association. The detail board shall establish rules and procedures pertaining to details. They shall hear complaints pertaining to details and rectify them in accordance with the rules they establish.

1
2 ***

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

7
8 Section 9: The detail board shall interview and nominate for hiring the detail clerk
9 subject to the City Affirmative Action Plan and subject to the approval of the
10 Commissioner or his designee. No person shall be hired as detail clerk without the
11 nomination of the detail board....

12
13 ***

14
15 Section 12: The Detail Rate will be increased as of the date the pay increases
16 hereunder are funded by the City. No new categories for which now pay in excess of
17 1.5 times the maximum patrolmen’s rate of pay will be approved or voted by members
18 of this unit without approval of the Mayor.

19
20 The Memorandum of Agreement between the City and the Superior Officers
21 Association, effective July 1, 2017 through June 30, 2020, provides in pertinent part as
22 follows:

23 Article V Paid Details and Poll Duty

24
25 Paragraph 2: The base rate for paid details shall be one and one-half times the
26 maximum patrolman’s rate of pay including night differential.

27
28 Paragraph 4: A detail board shall be established consisting of the Presidents of the
29 Superior Officers Local #78 and the Malden Police Patrolmen’s Association or their
30 designees and one patrolman elected by the Police Patrolmen’s Association and one
31 Superior Officer elected by the Superior Officers Local #78. The term of the above four
32 members will be for a period of two (2) years to run consecutively with the Presidents of
33 both unions. In addition, there will be three at-large seats to be elected by the (sic) both
34 the Superior Officers Local #78 and the Malden Police Patrolmen’s Association in a
35 general election. The term of office for the three at-large seats will be for one (1) year.

36
37 Paragraph 7: The detail board shall have control over all matters having to do with
38 details such as, but not limited to, the rotation of detail opportunities and setting
39 “punishment” and/or suspension from the detail list for infraction(s) of the detail rules
40 and regulations.

41

1 Paragraph 8: The detail board shall, subject to the City's Affirmative Action Plan,
2 interview and nominate for hiring the detail clerk subject to approval of the
3 Commissioner or his/her designee. No person shall be hired as detail clerk without the
4 nominations of the detail board. Further, the detail board may terminate said detail clerk
5 subject to the approval of the Commissioner or his/her designee.
6

7 **The Detail Board**

8 ***Structure and Purpose***

9 As described in the applicable provisions of the MPPA and Superior Officers
10 contracts, there is a Detail Board comprised of the presidents of both unions (or the
11 president's designee), a patrol officer (who is elected by the patrol officers), a superior
12 officer (who is elected by the superior officers) and three elected officers of either unit.
13 As noted in Stipulation 21, as of September 2019, the following individuals comprised
14 the Detail Board: George MacKay (MacKay), Jason Froio (Froio), Tyler Calhoun, Steve
15 Bellavia Jr., Scott Carroll, Gustavo Kruschewsky, and Brian Tilley (Tilley). As of the date
16 of the hearing, Tilley had been a member of the Detail Board "off and on" for six years.
17 MacKay was on the Detail Board in approximately 2002, 2003, 2009, 2010, 2018 and
18 2019. John Amirault (Amirault) was on the Detail Board in 2015.

19 The contractual provisions give the Detail Board the express authority to:
20 establish rules and procedures pertaining to details; hear complaints pertaining to
21 details; rectify complaints based on the established rules and procedures, including
22 setting punishments and/or suspension from the detail list; interview and nominate a
23 Detail Clerk for hire; and terminate the Detail Clerk.² The contractual provisions also
24 state that the Detail Board "shall have control over all matters having to do with details."

² The Detail Board's authority to hire and terminate the Detail Clerk are subject to certain limitations that are not relevant here.

1 ***Authority to Establish or Modify the Detail Rate***

2 Article 23, Section 3 of the MPPA contract, and Article 5, Paragraph 2 of the
3 Superior Officers' contract state that "the base rate for paid details shall be one and one
4 half times the maximum patrolman's rate of pay including night differential." There is no
5 provision in either contract that gives the Detail Board the authority to establish or
6 modify the detail rate.

7 Periodically, there are increases in the detail rate. On certain occasions, the
8 Detail Clerk has forwarded a notice of the rate increase to police officers.³ On May 15,
9 2012, Sullivan sent the members of the Detail Board an email stating: "please review
10 the Detail Rate Increase letter. Advise of any changes by Thursday, May 17 2012, I
11 would like to get this mailed by Friday." On May 15, 2012, a memo signed by the Detail
12 Board and addressed "To Whom it May Concern" was sent to police officers that stated:
13 "in accordance with labor contracts between the City of Malden and Police Department
14 Unions, the following increases for paid details will become effective June 18, 2012."
15 The Detail Board also signed Detail Rate Increase letters dated October 28, 2015, April
16 27, 2017, and July 31, 2019. Each Detail Rate Increase letter contained the same
17 prefatory language: "In accordance with labor contracts between the City of Malden and
18 Police Department Unions, the following increases for paid details will become
19 effective...."

20 On October 21, 2015, Amirault sent an email to the members of the Malden
21 Police Department that stated as follows:

³ The record does not establish whether rate increase letters are distributed every time the detail rate increases.

1 To All Members,

2

3 The Detail Board met on October 6, 2015 and voted on the following issues:

4

5 1) Effective November 15, 2015, the detail rate will be raised to \$55.91 per hour
6 and from that the City will deduct its 10% which leaves the detail officer with a
7 net rate of \$50.32 before taxes. This rate increase occurred as a result of
8 members bringing to the boards (sic) attention that our rate was not in line
9 with both the Patrolman's or Superior Officer's contracts.

10

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

13

14 Notwithstanding Amirault's October 21, 2015 email message, I find that the Detail

15 Board does not have the authority to establish or modify the detail rates. First, there is

16 no evidence that the Detail Board has the authority to establish or modify detail rates,

17 and no evidence that it has ever independently established, set, changed, or modified

18 the detail rate. Although the Detail Board voted on the rate on October 6, 2015, the rate

19 increase occurred because the rate was inconsistent with the contracts, not because

20 the Detail Board voted to increase the rate. Further, the Detail Rate Increase letters

21 consistently state that detail rates were increasing "in accordance with the labor

22 contracts" between the City and the Unions. Finally, Detail Board member Tilley

23 credibly testified that the Detail Board did not establish or change detail rates.⁴

24 ***Relationship between the Detail Board and the Unions***

25 The contracts provide that the presidents of the Unions, or their designees, are

26 members of the Detail Board. Detail Board members who serve as the MPPA

⁴I credit Tilley's testimony generally, because he admitted, contrary to the Unions' litigation position, that he has taken minutes of Detail Board meetings, and that Detail Board members sent email messages to each other's private email accounts. I also note that Amirault and Superiors Association President Evan Tuxbury (Tuxbury) corroborated Tilley's testimony regarding the Detail Board's lack of authority to establish or change detail rates.

1 president's designee, serve "at the pleasure" of the president. Some of the Detail Board
2 members' (the presidents and their designees) terms are tied to the terms of the
3 president of each union. As previously noted, the Union contracts also establish the
4 Detail Board's authority to take various actions.

5 Nevertheless, I find that the Detail Board is not part of the MPPA or the Superiors
6 Association⁵ and the Unions do not control the Board on an ongoing basis. There is no
7 evidence in the record that expressly connects the Unions and the Detail Board other
8 than the contractual provisions establishing the Board and the Board's general
9 authority, and governing Board membership. The fact that the Unions' presidents or
10 their designees are ex-officio members of the Detail Board does not give either Union
11 control over the board itself, particularly where there is no evidence that the Unions
12 have any role or responsibility for setting the Detail Board's rules, procedures, penalties,
13 or control any other aspect of the Detail Board or its administration.

14 Also, there is no evidence that the Unions keep Detail Board records, and there
15 are no Union records relating to the establishment or modification of detail rates from
16 January 2009 through the date of the hearing.

17 ***Administrative Procedures***

18 Detail Board members typically send communications to each other by sending
19 email messages to their City of Malden email address. Email messages that are sent to

⁵ Tilley, McKay, and Tuxbury testified that the Detail Board is not part of either the Superior Officers Association or the MPPA. There was no contrary evidence introduced, and I credit this testimony.

1 the entire board are sent to DetailBoard@maldenpd.com.⁶ The Detail Board does not
2 use its members' private email addresses for official Detail Board business, but the
3 members can use a private email sometimes for "unofficial" Detail Board business.⁷ An
4 example of "unofficial" Detail Board business would be a discussion of issues that
5 needed a quick answer and didn't effect or involve the entire Department. Official Detail
6 Board records are disseminated through the Police Department's email server.

7 The clerk of the Detail Board attends all the Detail Board meetings and takes
8 notes. The Detail Clerk takes notes on the kinds of rules that may have been changed
9 or discussed, or on any kind of punishments or hours assessed to officers for minor rule
10 infractions.⁸

11 The Detail Board does not take formal minutes of its meetings that its members
12 vote on at subsequent meetings. However, Tilley has taken what he characterized as
13 "minutes" from Detail Board meetings and sent them to the Detail Board members after
14 the meeting. Tilley's minutes summarized what occurred at a Detail Board meeting, and

⁶ In April of 2020, Tilley advised the NEPBA that the "board attempted to come to a decision on something last week via text message..." Because this communication was sent over six months after the information request at issue in this case, I do not take it as evidence that Detail Board members communicated with each other by text message prior to the information request, or that there were text messages that were responsive to the September 27, 2019 information request. There was no testimony that described the use of text messaging as a general method of communication between Detail Board members.

⁷ Conversely, Tuxbury uses his City email address and his private email address for Union business.

⁸ The record contains no examples of the Detail Clerk's notes, and there is no evidence in the record regarding what she does with her notes. The Detail Clerk did not testify in the hearing in this case.

1 he took them at some, but not all meetings.⁹ For example, Tilley took minutes from a
2 meeting on December 30, 2019 and a meeting on Monday, April 13, 2020.¹⁰ The
3 minutes that Tilley took exist on the Police Department's email server. The Detail Board
4 members never voted on Tilley's minutes at another meeting.

5 **The Federal Court Litigation**

6 ***Detail Rate Disputes***

7 M.G.L. c.44, Section 53(c) governs payment for private detail work and provides
8 in pertinent part that: "[a] city, town or district may establish a fee not to exceed ten per
9 cent of the cost of services authorized under this section, which shall, except in the case
10 of a city, town, district or the commonwealth, be paid by the persons requesting such
11 private detail." On September 17, 2019, the Superiors Association filed a grievance
12 over the 10% administrative fee that the City had been charging to its officers rather
13 than to detail contractors. The Police Chief did not respond to the grievance at Step 1 of
14 the grievance procedure. The Superiors Association withdrew the grievance on or about
15 October 28, 2019, because the membership decided to pursue the issue of detail
16 compensation through a lawsuit rather than the grievance procedure. The MPPA did not
17 file a grievance at any time over the 10% administrative fee issue.

18

⁹ Tilley testified that taking minutes at Detail Board meetings was "kind of a random thing."

¹⁰ Although the City only introduced evidence of Tilley's minutes for meetings that occurred after the September 27, 2019 information request, I find that Tilley also took minutes for meetings that occurred prior to the information request. Tilley served on the Detail Board "off and on" for six or seven years. He testified that he created minutes for meetings other than a meeting in December of 2020, and he did not testify that he only began taking minutes after September 27, 2019.

1 ***The Federal Court Complaint***

2 On August 28, 2019, Jack Owens, Jeffrey Drees, Katelyn Murphy, Patrick
3 Manolian, Scott Mann and Sean Hussey, (collectively, the plaintiffs) filed a civil
4 complaint (Federal Complaint) against the City in the United States District Court for the
5 District of Massachusetts. The court docketed the case as *Jack Owens et. al. v. City of*
6 *Malden*, 1:19-CV-11835-WGY (*Owens v. Malden*). The plaintiffs, who were City patrol
7 or superior officers, alleged that the City had violated the Massachusetts Wage Act,
8 M.G.L. c.149, s.148, and the Fair Labor Standards Act (FLSA), 29 U.S.C. s.201, by
9 deducting the 10% administrative fee from their detail pay, rather than charging the 10%
10 fee to the private persons requesting the detail.¹¹ Neither union was a party to *Owens*
11 *v. Malden*.

12 MPPA Attorney Joseph Padolsky (Padolsky) represented the plaintiffs. By letter
13 dated September 16, 2019, Padolsky advised City attorney John Clifford (Clifford) that
14 he represented the plaintiffs and attached a copy of the Federal Complaint, Civil Action
15 Cover Sheet and other documents related to the lawsuit. Clifford responded to
16 Padolsky by letter dated September 26, 2019, denying that the City's third-party detail
17 practice violated the FLSA and the Massachusetts Wage Act. Clifford's letter further
18 stated that the Detail Board "...has the sole authority to set detail rates, bill third parties
19 hiring details, collect funds, and process payments for officers," and "[p]ursuant to the
20 collective bargaining agreement between the City of Malden and your client, the Malden
21 Police Patrolmen's Association...the City has no authority to change the detail rate."¹²

¹¹ Other Malden police officers subsequently joined the litigation as plaintiffs.

¹² Other attorneys also represented the City in the litigation.

1 ***The City's Request for Information***

2 On September 27, 2019, Clifford forwarded a letter to Padolsky and then to
3 Superior Officers Association Attorney Thomas Horgan (Horgan) which provided in
4 pertinent part as follows:

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

18
19 By email to the Unions dated October 16, 2019, Clifford repeated his September 27,
20 2019 information request.

21 ***The Unions' Responses to the Information Request***

22 Following receipt of the City's September 27 information request, Association
23 President Tuxbury reviewed it and asked Froio, who was Tuxbury's designee on the
24 Detail Board, whether any of the requested information existed in the Superior Officers
25 Association's records.¹³ Tuxbury believed that there were no documents in the

¹³ Tuxbury did not show Froio the information request and did not know whether Froio checked his City or private emails for responsive information. Tuxbury filed an affidavit in response to the Charge of Prohibited Practice in this case and the affidavit states that he "conducted an inquiry into whether I, or any other current detail board members were in possession of any responsive documents to the September 27th information request." However, during his testimony, Tuxbury did not recall talking to any of the officers who were on the Detail Board at that time other than Froio. Tilley did not recall Tuxbury asking him about the information request, and although Amirault was asked to look for information in response to the information request, the request came from a union

1 Association's records that were responsive to the information request, and Froio
2 confirmed Tuxbury's belief. Tuxbury did not search his City emails or private emails to
3 look for information that would be responsive to the information request.

4 Padolsky responded to Clifford's September 27 information request on behalf of
5 the Unions by letter to Clifford dated October 17, 2019. Padolsky's letter provided in
6 pertinent part that: "**...the Detail Board has no control over the Detail Rate...** Neither
7 the City nor the Detail Board, the MPPA or the Malden Superior Officers'
8 Association...may unilaterally change the Detail rate...The records of the detail clerk or
9 the Detail Board are the City's records. I request that you review them and request that
10 you produce the same to me as soon as practicable." (emphasis in original.) The MPPA
11 and the Superior Officers Association did not give the City any documents in response
12 to the City's September 27 and October 16, 2019 information requests.

13 The City filed the charge of prohibited practice in this case on November 14,
14 2019. On December 3, 2019, the City received an affidavit from Tuxbury which
15 contained information on Tuxbury's actions in response to the information request.

16 ***The Litigation of Owens v. Malden***

17 In the litigation, the City took the position that "[d]etermining the rate of Officer
18 detail pay and management of the Officers detail pay has at all times material herein
19 been controlled by the detail board..."¹⁴ The City did not send a Federal Rule of Civil

lawyer whose identity is not in evidence. Consequently, I find that Tuxbury's inquiry was limited to his conversation with Froio.

¹⁴ The City made this argument in its Memorandum of Law supporting its Motion for leave to file and serve Third Party Complaint against the Unions and its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

1 Procedure Rule 45 subpoena to any entity during the litigation of *Owens v. Malden*,
2 including the MPPA, the Superior Officers Association, or the Detail Board. At some
3 unidentified point in the litigation, the City found certain Detail Board communications in
4 the records of the City's Police Department.¹⁵

5 The trial in *Owens v. Malden* concluded on May 12, 2021. On June 2, 2021,
6 Judge William G. Young held a virtual hearing with the City and the plaintiffs to
7 announce the Court's findings and rulings. During the hearing, Judge Young stated
8 that:

9 Now the purpose of this hearing is - - for the Court to announce its findings and
10 rulings in this jury-waived case. I'm prepared to do so and I'm going to go
11 forward.

12
13 I will say that these rulings are not in place of the written opinions required by
14 Federal Rule of Civil Procedure 52 and I will amplify them with a full written
15 opinion, however, because these findings require further...dates to be
16 established in the future, it's well to set out the key...findings and rulings so that
17 the parties may be advised and may take such action as they think proper. No
18 judgment on either of these claims, given their current procedural posture, may
19 enter today, but the Court... is in a position to make essential findings and rulings
20 for all parties for their guidance...

21
22 The Wage Act claim...has a serious bar to the entry of any judgment and that bar
23 is the requirement not satisfied in this case, that notification, application be made
24 to the Attorney General of the Commonwealth, and that has not been done here,
25 and that is a requirement of law that is not satisfied. ...

¹⁵ Padolsky told the City in his October 17 letter that the records of the Detail Clerk or the Detail Board are the City's records, and asked that the City review them. The parties stipulated that "the documents marked as City Exhibits 2 – 10 were maintained in the records of the City of Malden Police Department," and the City offered them into evidence as City exhibits. Thus, I infer that the City discovered certain Detail Board communications in the City's records. See generally, *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299 (1981). The City's brief supports this inference as it states that "the City was able to access records kept by the clerk that worked for the detail board..." Further, the City argued in its opening statement that "through the discovery process in the federal lawsuit, the City has recovered a limited amount of documents or information that should have been produced in response to the original 2019 request..."

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But as I'm going to order that a form of judgment be prepared no later than 45 days from the date of this decision, we'll see at that time whether application to the Attorney General - - notification to the Attorney General in the statutory form has been made. If it has, I'll have to consider, if it has not, the Wage Act claim will be dismissed with prejudice....

But you are entitled to know what the Court's rulings are.

The first issue...is whether remuneration for work for private details as well as the work – the detail work for the City constitutes wages under the Wage Act? The court rules that it does. The second issue, whether officers performing private detail work are employees under the Wage Act? The Court rules that they are....

This Court rules that the City violated Chapter 44, Section 53(c), when it deducted the 10 percent administrative fee from the officers' wages for private detail work instead of charging the third-party that had requested the private detail the full 10 percent administrative fee.

The key issue here is to construe what is the appropriate wage rate for such detail? The matter is governed by Article 23.3 of the...collective bargaining agreement....”

Now let me turn to the Fair Labor Standards Act...

Now let me sum up. I believe the Court has made sufficient findings and rulings that we know where we're going. Here's ... let me spin out the various possibilities. ...we'll talk about the Wage Act claim first. Let's assume no application is made to the Attorney General sometime between today's date and 45 days from today's date. Should that be the case, judgment will enter for the City on the Wage Act claim.

Let's say to the contrary....If this Court decides that recovery is appropriate, I will enter judgment and I will enter judgment under the appropriate subsection of the rule even though we have not resolved the Fair Labor Standards Act case, and that will move the case on to appeal one way or the other...

If no claims are made under the Fair Labor Standards Act, judgment will enter for the City on the Fair Labor Standards Act. If a claim is made, ... The Court will, at the end of 7 months, no later, enter judgement - - .well after I've considered the brief, enter judgment resolving the case. ...

OPINION

1 The issue in this case is whether the Unions violated Sections 10(b)(2) and
2 10(b)(1) of the Law by failing to provide any information to the City in response to the
3 City's September 27, 2019 information request. The City argues generally that the
4 Detail Board sets detail rates and creates records regarding rate changes, and the
5 Unions possessed documents that they failed to produce that were responsive to the
6 information request and relevant to collective bargaining. It argues specifically that the
7 Unions were required to produce records even if the City had them in its possession or
8 could have requested them by federal subpoena, and that the Unions made no good
9 faith effort to ascertain whether they had any records that were responsive to the
10 information request. Conversely, the Unions argue broadly that the requested
11 information does not exist because the Detail Board does not set detail rates or
12 maintain records, the Unions do not control the Detail Board, and the City's request was
13 unrelated to collective bargaining. I am not persuaded by the City's arguments and find
14 that the Unions did not violate the Law as alleged.

15 If a public employer possesses information that is relevant and reasonably
16 necessary to an employee organization in the performance of its duties as the exclusive
17 collective bargaining representative, the employer is generally obligated to provide the
18 information upon the employee organization's request. City of Boston, 32 MLC 1, MUP-
19 1687 (June 23, 2005). In Wood's Hole, Martha's Vineyard and Nantucket Steamship
20 Authority, et. al., 12 MLC 1531, 1542-1543, UPL-100 (January 21, 1986), the
21 Commonwealth Employment Relations Board (CERB) held that a union has a
22 corresponding duty to provide information to an employer upon request, based on the
23 parties' reciprocal obligations to bargain in good faith. See also Iron Workers Local 207

1 (Steel Erecting Contractors), 319 NLRB 87, 90 (1995) (union's duty to furnish
2 information pursuant to Section 8(b)(3) of the National Labor Relations Act is
3 "commensurate with and parallel to an employer's obligation to furnish it to a union"
4 pursuant to Section 8(a)(1) and (5) of the Act.) Thus, as a threshold matter, I find that
5 the Unions had a general duty to provide relevant and requested collective bargaining
6 information to the City.¹⁶

7 I next consider whether the information that the City requested from the Unions
8 on September 27, 2019, and reiterated on October 16, 2019, was relevant to the
9 collective bargaining process. At the time the City requested the information in dispute,
10 the Superiors Association had filed a grievance concerning the correct amount of detail
11 pay, and whether the City should have charged the 10% administrative fee to the
12 private party requesting the detail or deducted it from an officer's pay. Although the
13 MPPA did not have a grievance pending regarding the 10% fee at the time of the
14 request, and the parties were not engaged in collective bargaining over this or any other
15 issue, the detail pay rate is addressed in and controlled by both of the collective
16 bargaining agreements. Thus, the City's duty to correctly pay contractual wages to
17 bargaining unit members makes the subject of the City's information request relevant to
18 its collective bargaining obligations.¹⁷

¹⁶ The MPPA argues that there are no cases which indicate that a union has a duty to provide information to the employer as the employer does to the union. As noted, the CERB and the NLRB have held otherwise. See generally, Wood's Hole, supra, California Nurses Association, 326 NLRB 1362 (1998).

¹⁷ Clifford forwarded his information request to Padolsky in Padolsky's capacity as the MPPA's lawyer. In his response to Clifford's information request, Padolsky demanded that the City review the records of the Detail Board that it maintained in its records and produce them to Padolsky. The MPPA cannot be heard to argue that the documents at

1 I am not persuaded by the Unions' contrary argument that the information sought
2 pertained solely to the federal litigation and was unrelated to collective bargaining, even
3 though I recognize that the City was clearly requesting information that would support its
4 defense in *Owens v. Malden*. Although the NLRB has held that an information request
5 may not be a substitute for discovery, see Unbelievable, Inc., 318 NLRB 857 (1995), an
6 information request that is relevant to the collective bargaining relationship or process
7 doesn't lose its relevance simply because the information is sought for other reasons or
8 may be put to other uses. Associated General Contractors of California, 242 NLRB 891
9 (1979), enf'd in relevant part and modified on other grounds, 633 F.2d. 766 (9th Cir.
10 1980). As noted above, the City's information request was relevant to the administration
11 of the contract and the issue of whether it was properly paying a contractual benefit.
12 Thus, the information request was relevant to the City's collective bargaining
13 obligations, notwithstanding its connection to the *Owens v. Malden* litigation.

14 I turn next to the issue of whether the Unions complied with their responsibility to
15 respond to the City's information request. Higher Education Coordinating Council, 22
16 MLC 1662, 1673, SUP-4078 (April 11, 1996). As noted above, on October 17, 2019,
17 Padolsky provided a written "response to information request pursuant to G.L.c.150E,"

issue would be relevant for purposes of a union information request but not for purposes of a City information request, nor can it dispute the City's right to information that the Union simultaneously seeks from the City.

Additionally, because I have found that the City's request is relevant to the administration of the collective bargaining agreements it maintains with the Unions, I need not consider the Unions' argument that the City was obligated to request the information pursuant to a federal subpoena.

1 which refuted the basis of the City's information request.¹⁸ Additionally, Tuxbury asked
2 Froio whether he knew of any information that was responsive to the information
3 request, and the Association gave the City an affidavit on December 3, 2019,
4 addressing Tuxbury's efforts to respond to the City's request.¹⁹ While neither response
5 was exemplary or as comprehensive as what the Unions may have sought if they had
6 made the request, the Unions did not ignore the request, and both eventually provided a
7 written response.

8 There is no dispute that neither union provided any notes, memoranda, records,
9 meeting minutes, email messages or other documents in response to the City's request.
10 Thus, I consider the Unions' defenses that: 1) the requested information does not exist
11 because the Detail Board does not establish or modify the detail rate; 2) the Unions do
12 not possess any Detail Board records; and 3) the Unions do not control the Detail Board
13 and thus could not compel the Detail Board to produce any information that it may have
14 had.²⁰

¹⁸ Although Padolsky's letter did not specifically say that the Union had no responsive records, it indirectly made that point by stating that "[t]he records of the detail clerk or the Detail Board are the City's records" and further noting that the Detail Board did not control the detail rate.

¹⁹ As previously noted, the City received Tuxbury's affidavit after it filed the prohibited practice charge.

²⁰ The Unions further argued that they had no obligation to give the City any documents that the City possessed in its email servers. Conversely, the City argued that it is not required to "dig through tens of thousands or even hundreds of thousands of documents, emails or other files to access information that is readily available and accessible by the other party." I need not address this argument because I find that the requested records do not exist. However, the City provided no case law holding that the duty to bargain entitles one party to require the other party to search its records and provide information that they both possess simply to save the requesting party the time and effort of reviewing its own records. I also note that Padolsky told the City that the

1 The City asked for “all records relating to [the] establishment or modification to
2 detail rates by the Detail Board from January 2009 through the present,” including
3 “emails or memoranda notifying the detail clerk of changes to the detail rate,
4 notifications to Malden Police Department personnel of changes to the detail rate,
5 minutes of meetings of the Detail Board or any other records relating to setting detail
6 rates during the relevant period.” The information request tracked the City’s litigation
7 position that the Detail Board “...has the sole authority to set detail rates, bill third
8 parties hiring details, collect funds, and process payments for officers..” Notably, the
9 City did not seek general information regarding detail rate increases by any entity,
10 process or agreement, but rather, sought records specifically relating to the
11 “establishment or modification to detail rates by the Detail Board...”

12 The record contains evidence that the Detail Board voted on detail rates and
13 authored notices advising bargaining unit members of increases in the rates.
14 Nevertheless, for the following reasons, I find that the Detail Board had no authority to
15 change the detail rate, and thus there could be no records relating to the establishment
16 or modification to detail rates *by the Detail Board*.²¹

records of the Detail Clerk and the Detail Board are the City’s records. Consequently, if I reached this argument, I would not find that the Unions violated the Law by failing to provide any information that the City maintained in its own email records.

²¹ The MPPA argues that the principles of collateral estoppel prohibit the City from claiming that the Detail Board sets the detail rates. I need not consider this argument because the record evidence compels the conclusion that the contract – rather than the Detail Board – sets the detail rates. However, if I were to consider the argument, I would find that the principles of collateral estoppel do not bar the City’s arguments because Judge Young’s June 2, 2021 decision was not a “final judgement on the merits,” the record does not contain evidence of the Court’s subsequent and final decision, and I decline to take administrative notice of the decision that the MPPA submitted with its post-hearing brief.

1 First, both contracts say that “[t]he base rate for paid details shall be one and
2 one-half times the maximum patrolman’s rate of pay including night differential.” This
3 language plainly shows that the contract sets the detail rate. Second, the Detail Board
4 members consistently testified that the Detail Board never set or changed the rates.
5 Third, there was no other evidence that the Detail Board ever established or modified
6 detail rates²² separate from a contractual increase in wage rates.²³ The detail rates
7 changed in 2012, 2015, 2017, and 2019, but the notices that addressed those rate
8 increases stated plainly that the rate increases would be effective “in accordance with
9 labor contracts” between the City and the Unions. There was no testimony that the
10 Detail Board’s October 6, 2015 vote effectuated the change in detail rates or that the
11 rates would not have increased without the vote. Consequently, I find that there could
12 not have been any records relating to the establishment or modification to detail rates
13 by the Detail Board²⁴ from January 2009 through the date of the request since the Detail
14 Board has no ability or authority to establish or modify the rates.

²² If the Detail Board had the authority to change detail rates, there would likely be evidence that the Detail Board changed the rates for reasons unrelated to changes in contractual wage rates.

²³ The City argues in its brief that the Detail Board members “did the calculations” and “explained to their members how they calculated adjustments in the detail rate.” However, it is not clear what evidence the City is relying on, and I find no evidence in the record to support that contention.

²⁴ I would not find that the Unions violated their duty to bargain with the City even if the City had only requested “emails or memoranda notifying the detail clerk of changes the detail rate, notifications to Malden Police Department personnel of changes to the detail rate, minutes of meetings of the Detail Board, and any other records relating to setting detail rates.” The emails or memoranda notifying the Detail Clerk of changes to the detail rate and notifications to Malden Police Department personnel of changes to the detail rate are kept in the City’s email records. For the reasons explained in footnote

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, 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 the ten days, this decision shall become final and binding on the parties.