

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

SUFFOLK COUNTY SHERIFF'S
DEPARTMENT

and

JAIL OFFICERS AND EMPLOYEES
ASSOCIATION OF SUFFOLK COUNTY

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Case No. SUP-19-7686

Date Issued: March 9, 2021

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Allen Forbes, Esq. - Representing the Suffolk County
Sheriff's Department

Kristen A. Barnes, Esq. - Representing the Jail Officers
and Employees Association of
Suffolk County

HEARING OFFICER'S DECISION

1 SUMMARY

2 The issues in this case are whether the Suffolk County Sheriff's Department
3 (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts
4 General Laws, Chapter 150E (the Law) by: a) repudiating a provision of the collective
5 bargaining agreement between the Employer and the Jail Officers and Employees
6 Association of Suffolk County (JOEASC) when it made promotions to lieutenant at the
7 Suffolk County Jail (Jail) in October 2019; and b) changing the promotional procedure for

1 lieutenant when it did not post the promotional list with the applicants' rankings and total
2 scores before it notified the successful applicants of their promotions. For the reasons
3 explained below, I find that the Employer violated the Law in the manner alleged.

4 Statement of the Case

5 On November 8, 2019, JOEASC filed a charge of prohibited practice with the
6 Department of Labor Relations (DLR), alleging that the Employer violated Sections
7 10(a)(5) and (1) of the Law. A DLR investigator investigated the charge on February 7,
8 2020. On February 27, 2020, the investigator issued a two-count complaint alleging that
9 the Sheriff's Department violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
10 the Law. Count I alleged that the Employer repudiated Article XX, Section 8 of the parties'
11 collective bargaining agreement that, by its terms, was in effect from July 1, 2017 through
12 June 30, 2020 (2017-2020 CBA) when in October 2019, it made certain promotions to
13 lieutenant at the Jail. Count II alleged that the Employer unilaterally changed the
14 promotional procedure for lieutenant by not posting the promotional list with the
15 applicants' rankings and total scores in the promotional process before it notified the
16 successful applicants of their promotions. The Employer filed an answer to the complaint
17 on July 14, 2020.

18 I conducted a hearing on September 2, 2020.¹ Both parties had an opportunity to
19 be heard, to call witnesses and to introduce evidence. The parties submitted their post-
20 hearing briefs on November 20, 2020. Upon review of the entire record, including my

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

1 observation of the demeanor of the witnesses, I make the following findings of fact and
2 render the following opinion.

3 Stipulated Facts

- 4 1. The Suffolk County Sheriff's Department ("Employer" or "Department") is a public
5 employer within the meaning of Section 1 of M.G.L. c.150E ("the Law").
6
7 2. The Jail Officers and Employees Association of Suffolk County ("JOEASC" or
8 "Association") is an employee organization within the meaning of Section 1 of the
9 Law.
10
11 3. The Association is the exclusive representative of certain employees employed by
12 the Department at the Suffolk County Jail ("the Jail") including Jail Officers,
13 Corporals, and Sergeants.
14
15 4. The Department and Association are parties to a July 1, 2017 to June 30, 2020
16 collective bargaining agreement ("CBA") (Joint Exhibit 1).
17

18 2019 Lieutenant Promotional Process

- 19
20 5. On June 26, 2019, the Department announced via a memorandum (Joint Exhibit
21 2) that it intended to fill vacant lieutenant positions at the Jail.
22
23 6. On July 17, 2019, the Department announced via a memorandum (Joint Exhibit 3)
24 that the written component for the position of lieutenant would be held on August
25 17, 2019.
26
27 7. The Department administered the written component for applicants for the position
28 of lieutenant on August 17, 2019. For those applicants who passed the 2019
29 examination, the Department conducted interviews and evaluated applicants' job
30 performance.
31
32 8. As a part of the 2019 lieutenant promotional process, the Department ranked
33 applicants on a promotional list (Joint Exhibit 4) utilizing their overall scores based
34 on the written examination, interview, and job performance evaluation. In
35 tabulating an applicant's overall score, the Department counted the written
36 component score as 50% of the overall score, the interview score as 25% of the
37 overall score, and the job performance evaluation as 25% of the overall score.
38
39 9. On or about October 30, 2019, the Department promoted 14 applicants to the
40 position of lieutenant.
41
42 10. The Department promoted the applicants ranked 1st, 4th, 5th, 9th, 10th, 14th, 22nd,
43 24th, 26th, 27th, 28th, 29th, 40th, and 43rd on the promotional list.

2014-2015 Lieutenant Promotional List

- 1
2
3 11. On September 19, 2014, the Department announced via a memorandum (Joint
4 Exhibit 5) that it intended to fill vacant lieutenant positions at the Jail.
5
6 12. On November 3, 2014, the Department announced via a memorandum (Joint
7 Exhibit 6) that the promotional examination for the position of lieutenant would be
8 held on December 13, 2014.
9
10 13. The Department held a written examination for applicants for the position of
11 lieutenant on December 13, 2014. Following the examination, the Department
12 created a list (Joint Exhibit 7) of the applicants' examination scores.
13
14 14. On January 16, 2015, (Joint Exhibit 8), the Department announced the
15 examination scores for the lieutenant promotional examination and indicated that
16 candidates who passed the examination would move forward in the interview
17 process.
18
19 15. For those applicants who passed the 2014 examination, the Department
20 conducted interviews and evaluated applicants' job performance based on a
21 scoring matrix (Joint Exhibit 9).
22
23 16. As a part of the 2014 to 2015 lieutenant promotional process, the Department
24 ranked applicants on a promotional list (Joint Exhibit 10) utilizing their overall
25 scores based on the written examination, interview, and job performance
26 evaluation. In tabulating an applicant's overall score, the Department counted the
27 written examination score as 50% of the overall score, the interview score as 25%
28 of the overall score, and the job performance evaluation as 25% of the overall
29 score.
30
31 17. On or about April 10, 2015, the Department promoted 12 applicants to the position
32 of lieutenant and announced the promotions via a memorandum (Joint Exhibit 11).
33
34 18. The Department promoted the applicants ranked 1st, 2nd, 3rd, 5th, 6th, 7th, 12th, 14th,
35 15th, 18th, 20th, and 24th on the promotional list.
36

2007 Lieutenant Promotional Process

- 37
38
39 19. In or about 2006, the Department conducted a promotional process for the position
40 of lieutenant.
41
42 20. As a part of that promotional process, the Department held a written examination
43 for applicants, conducted interviews, and evaluated applicants' job performance.
44
45 21. As a part of that promotional process, the Department ranked applicants on a
46 promotional list (Joint Exhibit 22) utilizing their overall scores based on the written

1 examination, interview, and job performance evaluation. In tabulating an
2 applicant's overall score, the Department counted the written examination score
3 as 50% of the overall score, the interview score as 25% of the overall score, and
4 the job performance evaluation as 25% of the overall score.

5
6 22. On January 3, 2007, the Department promoted 14 applicants to the position of
7 lieutenant.

8
9 23. The Department promoted the applicants ranked 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th,
10 11th, 15th, 16th, 17th, 18th, and 19th on the promotional list.

11 Findings of Fact²

12 Background

13 Jail Officers (JOs) are responsible for the care and custody of pre-trial detainees
14 at the Jail. JO-1s, JO-2s,³ who hold the rank of corporal, and JO-3s, who hold the rank
15 of sergeant, are included in a bargaining unit that JOEASC represents. JO-4s, who hold
16 the rank of lieutenant, and JO-5s, who hold the rank of captain, are included in a
17 bargaining unit that AFSCME, Local 3643 (Local 3643) represents. Also, prior to 2001 or
18 2002, AFSCME Local 1134 (Local 1134) was the predecessor representative for the
19 JOEASC unit.

20 The Bargaining Units' Relevant Contractual History Regarding Promotions

21 Local 3643

22 As part of the collective bargaining agreement that, by its terms, was in effect from
23 July 1, 1995 through June 30, 1998, the Employer and Local 3643 negotiated the
24 following language regarding promotions:

25 Article XX-Probation and Promotion

26 Section 2. Notice of a promotional vacancy in a position covered by this agreement shall
27 be posted for a period of ten (10) consecutive days. Any employee who is eligible,

² The DLR's jurisdiction is uncontested in this matter.

³ The record before me indicated that the Employer is phasing out the JO-2 title.

1 pursuant to Section 3 of this Article, and interested in filling the vacancy shall apply
2 therefor to the Sheriff through the Director of Personnel.

3
4 Section 3. Only eligible persons may apply for promotional opportunities. No employees
5 with less than three- and one-half years of continuous service (42 months) with the
6 Sheriff's Department may be eligible for promotion to the position of JO-4. No employee
7 with less than four- and one-half years of continuous service (54 months) with the Sheriff's
8 Department may be eligible for promotion to the position of JO-5.

9
10 Section 4. Every applicant shall receive an interview for the position applied for before a
11 panel selected by the Sheriff. Whenever possible, the interview panel shall consist of the
12 same persons for all interviews of persons applying for the same promotional opportunity.
13 Applicants will be questioned about topics, including but not limited to, the duties and
14 responsibilities of the position applied for, policies and procedures, the applicant's past
15 job performance, and any other questions related to the operation of the Suffolk County
16 Sheriff's Department. The interview panel shall make recommendations to the Sheriff
17 based on considerations including, but not limited to the following: the interview, the
18 applicant's past record of attendance, prior work performance, training, attitude and
19 demeanor.

20
21 Where qualifications and ability are equal, seniority shall be the determining factor. The
22 Sheriff shall be the sole judge of qualifications and ability, provided that such judgment
23 shall not be exercised arbitrarily, capriciously, or unreasonably. The determination of
24 qualifications and ability shall include but shall not be limited to the applicant's knowledge
25 and understanding of departmental policies and procedures.

26
27 Any dispute regarding any promotion pursuant to this Article shall be subject to the
28 grievance and arbitration procedure by only the two (2) most senior applicants.

29
30 Section 5. Any promotional vacancy posted pursuant to this Article shall be filled no later
31 than thirty (30) days after the conclusion of the interview process. Upon request of an
32 applicant not selected for promotion, he/she will be provided with his/her interview
33 summary. The Department will endeavor to provide said summary within 45 days of the
34 promotion subject to good cause shown. ...

35
36 The Employer and Local 3643 continued to include the above-referenced language in
37 their successor collective bargaining agreements, including in Article XXI of their most
38 recent collective bargaining agreement that, by its terms, was in effect from July 1, 2017
39 through June 30, 2020.

1 Local 1134

2 On September 9, 1999, the Employer and Local 1134 executed a collective
3 bargaining agreement that, by its terms, was in effect from July 1, 1998 through June 30,
4 2000: Article XX, Probation and Promotion, of that agreement states in pertinent part:

5 Section 2. Posting. Notice of a promotional vacancy in a position covered by this
6 agreement shall be posted for a period of ten (10) consecutive days. Any employee who
7 is eligible, pursuant to Section 3-7 of this Article, but not interested in filling the vacancy,
8 shall inform the Sheriff through Director of Personnel.

9
10 Section 3. Process. The ... Employer will incorporate examinations into a new
11 promotional process as discussed below. Until such time, the current process, as stated
12 in the 1995-1998 collective bargaining agreement, shall remain in full force and effect.

13
14 Section 4. Examination. Applicants for a promotional opportunity by this Agreement must
15 successfully pass an examination administered by the ... Employer in order to be eligible
16 for an interview and any further consideration. What constitutes a passing score shall be
17 decided by a joint committee after the creation off the examination.

18
19 An applicant's test score shall count for fifty percent (50%) of his/her overall score.

20
21 Section 5. Eligibility. Employees must have the following minimum years of service with
22 the ... Employer in order to be eligible to take a promotional examination: ...

23
24 Section 6. Interviews. All applicants for a promotional opportunity covered by this
25 Agreement who receive a passing score on the examination shall receive an interview
26 before a panel selected at the sole discretion of the ... Employer. Wherever possible, the
27 interview panel shall consist of the same persons for all interviews of applicants for the
28 same promotional opportunity.

29
30 Applicants shall be questioned about topics including but not limited to the following: the
31 duties and responsibilities of the position applied for; policies and procedures of the
32 Suffolk County Sheriff's Department; his/her past job performance; and any other
33 questions related to the operation of the Suffolk County Sheriff's Department. Each
34 panelist shall score the interviewee based on his/her substantive responses to questions
35 posed during the interview, as well as the person's appearance, attitude and demeanor.

36
37 An applicant's interview score shall count for twenty-five percent (25%) of his/her overall
38 score.

39
40 Section 7. Job Performance. All applicants for a promotional opportunity covered by this
41 Agreement who receive a passing score on the examination shall also be judged and
42 scored on their past job performance. This assessment shall include but not be limited

1 to the following factors: disciplinary history, attendance history, supervisors'
2 recommendations, education and training.

3
4 An applicant's job performance score shall count for twenty-five percent (25%) of his/her
5 overall score.

6
7 Section 8. Order on list. An applicant's scores for the examination, interview, job
8 performance and attendance record shall be added together to reach his/her overall
9 score, and each applicant shall be ranked accordingly. Where two or more persons have
10 identical scores, the more senior person, pursuant to Article XII of the Agreement, shall
11 be ranked ahead of the less senior person. Once established, the list shall remain in
12 effect for a period of two years. Upon request, applicants will be provided with a numerical
13 breakdown of their overall score.

14
15 Section 9. Selection. In making promotional decisions, the Sheriff shall select an
16 individual based on the formula of "2n+1," with "n" being the number of positions to be
17 filled. However, if an individual on the promotion list, during the period the list is in effect,
18 engages in misconduct (including excessive absenteeism) which would have affected
19 his/her score had it occurred (or become known) prior to the publication of the list, the
20 Sheriff reserves the right to remove said person from the list.

21
22 Section 10. Grievability. Promotional decisions shall not be subject to challenge under
23 the grievance and arbitration procedure of the Agreement, except in those instances
24 where the Sheriff has exercised his right to remove a person from the promotion list.

25
26 Section 11. Post-promotion probation. Any person who receives an increase in grade or
27 rank pursuant to this Article shall be on probation in that grade or rank for one (1) year.
28 Up to and including one (1) year after the increase in grade or rank, the Sheriff shall retain
29 all prerogatives and discretion with respect to maintaining such person at the new grade
30 or rank, or returning such person to their previous grade or rank.

31 JOEASC

32 JOEASC and the Employer executed a collective bargaining agreement⁴ that, by
33 its terms, was effective on July 1, 2005, revised on March 21, 2006, and expired on June
34 30, 2008 (2005-2008 CBA). Article XX of the 2005-2008 CBA included language
35 pertaining to probation and promotion. The parties included the same language in

⁴ Article 1 of the 2017-2020 CBA, Employees Covered by this Agreement, stated in pertinent part:

The ... Employer recognizes the Union as the exclusive representative, for the purpose of collective bargaining relative to wages, hours, and other conditions of employment, of all current employees in the compensation grades JO-1, JO-1n, JO-2, JO-2N, JP-3, JP-3N, LN-8, LN-8N, ME-1, ME-2, ME-3, and ME-4.

1 successor collective bargaining agreements, including the 2017-2020 CBA.⁵ Article XX,
2 Probation and Promotion, states in pertinent part:

3 Section 2. Posting. Notice of a promotional vacancy in a position covered by this
4 agreement shall be posted for a period of ten (10) consecutive days. Any employee
5 who is eligible pursuant to Sections 3-7 of this Article, but not interested in filing the
6 vacancy, shall inform the Sheriff through the Recruitment Manager.
7

8 Section 3. Examination.
9

10 A. Applicants for a promotional opportunity covered by this Agreement must
11 successfully pass an examination administered by the ... Employer in order to be
12 eligible for an interview and further consideration. What constitutes a passing
13 score shall be decided by a joint committee after the creation of the examination.
14

15 B. An applicant's test score shall count for fifty percent (50%) of his/her overall score.
16

17 Section 4. Eligibility. Employees must have the following minimum years of service with
18 the ... Employer in order to be eligible to take a promotional examination:
19

20 A. two (2) years for the position of Corporal;
21

22 B. three (3) years for the position of Sergeant; and
23

24 C. three and one-half (3 ½) for the position of Lieutenant.
25

26 Section 5. Interviews. All applicants for a promotional opportunity covered by this
27 Agreement who receive a passing score on the examination shall receive an interview
28 before a panel selected at the sole discretion of the ... Employer. Wherever possible, the
29 interview panel shall consist of the same persons for all interviews of applicants for the
30 same promotional opportunity.
31

32 Applicants shall be questioned about topics including but not limited to the following: the
33 duties and responsibilities of the position applied for; policies and procedures of the
34 Department; his/her past job performance, and other questions related to the operation
35 of the Department. Each panelist shall score the interviewee based on his/her
36 substantive responses to questions posed during the interview, as well as the person's
37 appearance, attitude and demeanor.
38

39 An applicant's interview score shall count for twenty-five percent (25%) of his/her overall
40 score.

⁵ The 2017-2020 CBA contains a duration clause extending the terms and conditions of the contract for an additional 180 days beyond its expiration date provided that the parties are engaged in good faith negotiations.

1 Section 6. Job Performance. All applicants for a promotional opportunity covered by this
2 Agreement who receive a passing score on the examination shall also be judged and
3 scored on their past job performance. This assessment shall include but not be limited
4 to the following factors: disciplinary history, attendance history, supervisors'
5 recommendations, education, and training.

6
7 An applicant's job performance score shall count for twenty-five percent (25%) of his/her
8 overall score.

9
10 Section 7. Order on List. An applicant's scores for the examination, interview, job
11 performance and attendance record shall be added together to reach his/her overall
12 score, and each applicant shall be ranked accordingly.

13
14 Where two or more persons have identical scores, the more senior person, pursuant to
15 Article XII of the Agreement, shall be ranked ahead of the less senior person.

16
17 Once established, the list shall remain in effect for a period of two (2) years.

18
19 Upon request, applicants will be provided with a numerical breakdown of their overall
20 score.

21
22 Section 8. Selection. In making promotional decisions, the Sheriff shall select an
23 individual based on the formula of "2n+1," with "n" being the number of positions to be
24 filled.

25
26 However, if an individual on the promotion list, during the period the list is in effect,
27 engages in misconduct (including excessive absenteeism) which would have affected
28 his/her score had it occurred (or become known) prior to the publication of the list, the
29 Sheriff reserves the right to remove said person from the list.

30
31 Section 9. Grievability. Promotional decisions shall not be subject to challenge under the
32 grievance and arbitration procedure of the Agreement, except in those instances where
33 the Sheriff has exercised his right to remove a person from the promotion list. ...

34 Promotional Examinations for Lieutenant⁶

35 2006-2007

⁶ Currently, there are 21 lieutenants. Lieutenants, who are not assigned to support services, circulate between one or more floors at the Jail supervising housing units. Lieutenants have more discretion than corporals or sergeants and typically deal with more significant and substantial issues than sergeants, who are the first line supervisors.

1 In 2006, the Employer conducted a promotional process for the position of
2 lieutenant. As part of that promotional process, the Employer held a written examination,
3 conducted interviews, and evaluated the applicants' job performance. As part of that
4 promotional process, the Employer compiled a list (promotional list),⁷ which ranked the
5 applicants utilizing their overall scores based on the written examination, interview and
6 job performance evaluation. In calculating an applicant's overall score, the Employer
7 credited the written examination score as worth 50%, the interview score as worth 25%
8 and the job performance score was worth 25%. On January 3, 2007, the Employer
9 promoted fourteen applicants to the position of lieutenant. The Employer promoted the
10 applicants ranked 1st, 2nd, 3rd, 4th, 6th, 7th, 9th, 10th, 11th, 15th, 16th, 17th, 18th, and 19th on
11 the promotional list.⁸

12 2014-2015

13 On September 19, 2014, then Superintendent in Chief Michael Harris (Harris), then
14 Jail Superintendent Eugene Sumpter (Sumpter), and House of Correction Superintendent

⁷ Although the parties introduced the promotional list into evidence as Joint Exhibit #2, the promotional list is undated, and the record does not indicate whether Employer posted it, and if so, whether it was posted before or after the Employer made the applicable promotions. I also note that the 2006 promotional list for lieutenant contains the applicants' names rather than using ID numbers as subsequent promotional lists did.

⁸ Neither of JOESAC's witnesses, president Michael Caprigno (Caprigno), who was hired in 2004, or vice-president Brian Etro (Etro), who was hired in 2005, were eligible to participate in the 2006 promotional process for lieutenant. In 2007, Caprigno and Etro both applied for promotion to sergeant and took the written exam. The Employer posted the test scores, and both Caprigno and Etro earned passing scores. The Employer subsequently interviewed and evaluated those applicants who passed the exam, including Caprigno and Etro. The Employer posted the promotional list with the applicants' rankings and overall scores before announcing the successful applicants. The Employer did not select Caprigno or Etro for promotion. All the successful applicants held rankings on the promotional list that fell within the 2n+1 formula.

1 and Special Sheriff Yolanda Smith (Smith) sent the following memo to all eligible
2 employees:

3 Please be advised of the Department's intention to fill vacant Lieutenant
4 positions at both the House of Correction and the Nashua Street Jail.

5
6 All interest, eligible employees are hereby instructed to submit written
7 notification no later than 2:00PM on Friday, October 10, 2014.

8
9 Written submission should be addressed to Sheriff Tompkins and directed
10 to the attention of Anne Fairbank, Senior HR Administrator at the House of
11 Correction. Please provide active contact information so that receipt of your
12 notification can be properly confirmed.

13
14 You may, but are not required to, include a current resume with your
15 notification. Please note however that copies of training records, employee
16 files and additional personal information are not necessary and will not be
17 accepted at this time.

18
19 We encourage and look forward to your participation in this process.

20 Thereafter, Caprigno and Etro submitted what they referred to as "letters of intent" seeking
21 to apply for promotion. On November 3, 2014, Harris, Sumpter and Smith sent the
22 following memo to all promotional candidates:

23 The 2014 Lieutenant Promotional Test will be conducted on Saturday,
24 December 13, 2014 @ 10:00 AM.

25
26 Three separate testing locations will be utilized to conduct the exam. The
27 House of Correction, The Nashua Street Jail and The Chelsea Training
28 Facility[.] Candidates will be assigned to a specific location and will only
29 be allowed to test at the assigned location. No exceptions will be
30 entertained. If you live north of Boston, you will likely be assigned to the
31 Chelsea location. All other candidates are likely to be assigned to the facility
32 at which you presently work.

33
34 Study packets have been available in the Shift Commander's office at both
35 the HOC and NSJ. If you have not yet picked up your study packet, please
36 do so immediately.

37
38 A private vendor will be available to offer testing preparation services on
39 dates to be announced. These services will be offered to you at your own
40 expense and on your own time. The vendor ... has a proven success record

1 with promotional testing candidates in other Law Enforcement Agencies,
2 including Boston Police and Fire.

3
4 Additional information regarding the testing process will continue to be
5 made available in the days and weeks ahead. Please plan and prepare
6 accordingly.

7 On or about early December 2014, Charles Abate (Abate), then legal counsel for
8 the Employer, contacted JOEASC to inquire if JOEASC would be willing to lower the
9 passing score for the promotional exam for lieutenant from 80 to 75. JOEASC's executive
10 board, which included Caprigno and Etro, discussed the request and agreed to it.
11 JOEASC also informed Abate that JOEASC was willing to lower the passing score to 70
12 to make as many members as possible eligible for promotion. On December 11, 2014,
13 Abate sent an email to Sumpter and Sweeney that stated in pertinent part:

14 Just spoke with Brian Etro, who said he talked with Caprigno and Grant,
15 and JOEASC is OK with 75 as the passing grade on the LT exam. He
16 added they would be willing to lower it to 70, but I told him we were looking
17 to make it consistent with the HOC passing score. ...

18 On December 13, 2014, the Employer held the written examination for applicants
19 for the position of lieutenant, including Caprigno and Etro. Thereafter, the Employer
20 compiled a list of the applicants' written exam scores. On January 16, 2015, William
21 Sweeney (Sweeney),⁹ then Director of Human Resources, sent the following memo to all
22 candidates for promotion to lieutenant:

⁹ Sweeney has worked for the Employer for thirty years. His job titles have included: a) assistant director of personnel from 2001 to 2005, where he was responsible for payroll, personnel files, attendance and discipline, b) director of personnel administration from 2005 to 2014, where he was responsible for all areas of human resources except recruitment and collective bargaining negotiations, and c) director of human resources beginning in 2014, when he also became responsible for worker's compensation issues and collective bargaining negotiations. Sweeney currently holds the title of superintendent and is a member of the Sheriff's Executive Team. He now is also responsible for oversight of financial services and drug testing.

1 Attached are the exam scores for all candidates who sat for the lieutenant's
2 promotional exam on December 13, 2014. The minimum passing score on
3 the exam is 75.¹⁰

4
5 Any candidate who successfully passed the exam will move forward in the
6 promotional process and will be contacted for an interview.

7
8 Please contact me if you have any questions about the exam.

9 Etro received a passing score and moved forward in the promotional process, but
10 Caprigno did not.

11 For those applicants who passed the promotional examination, the Employer
12 conducted interviews and evaluated the applicants' job performance based on a scoring
13 matrix (job performance scoring matrix). In an attachment to a January 30, 2015 email
14 to Sumpter and Smith, Sweeney, in part, described the job performance scoring matrix
15 as:

16 **50% Test** Simple Score

17
18 **25 % Interview**

19
20 **Answers (50)**

21 10 questions: each answer gets one of the following grades.

22 Below 1 point

23 Meets 3 points

24 Above 5 points

25

26 **Appearance (25)**

27 Below 5 points

28 Meets 10 points

29 Above 25 points

30

31 **Attitude & Demeanor (25)**

32 Below 5 points

33 Meets 15 points'

34 Above 25 points

35 **25% Performance**

36

37 **Supervisor evaluation from 2014 (20)**

| | | |
|---|---|-----------|
| 1 | (Max of 80 pts-60 scoring, 5 evaluator, 5 Shift Comm., 10 | |
| 2 | Supt.) | |
| 3 | 75+ | 20 points |
| 4 | 70+ | 18 points |
| 5 | 65+ | 15 points |
| 6 | 60+ | 12 points |
| 7 | 55+ | 7 points |
| 8 | 45+ | 5 points |
| 9 | <40 | 0 points |

10
11 **Attendance** (20) sick usage over past 3 years (excludes

| | | |
|----|-----------------------|--------|
| 12 | FMLA days) | |
| 13 | Not more than 3 days | 20 pts |
| 14 | Not more than 6 days | 18 pts |
| 15 | Not more than 9 days | 16 pts |
| 16 | Not more than 12 days | 14pts |
| 17 | Not more than 15 days | 12pts |
| 18 | Not more than 18 days | 10pts |
| 19 | Not more than 21 days | 8 pts |
| 20 | Not more than 24 days | 6pts |
| 21 | Not more than 27 days | 4pts |
| 22 | Not more than 30 days | 2pts |
| 23 | More than 30 days | 0pts |

24
25 **Discipline** (20) (Excludes MAP, but not UA)

| | | |
|----|---------------------------|-----------|
| 26 | No discipline | 20 points |
| 27 | No discipline higher than | 16 points |
| 28 | oral warning | |
| 29 | No discipline higher than | 12 points |
| 30 | written warning | |
| 31 | No discipline higher than | 10 points |
| 32 | one day suspension | |
| 33 | No discipline higher than | 6 points |
| 34 | three day suspension | |
| 35 | No discipline higher than | 3 points |
| 36 | ten day suspension | |
| 37 | Discipline greater than | 0 points |
| 38 | a ten day suspension | |

39
40 **Supervisory experience** (20)

| | | |
|----|--|-----------|
| 41 | Only eligible for one of the following four: | |
| 42 | Greater than 5 years | 20 points |
| 43 | experience as a Sergeant | |
| 44 | Less than 5 years | 15 points |
| 45 | experience as a sergeant | |
| 46 | Greater than 5 years | 10 points |

| | | |
|----|--|-----------|
| 1 | experience as a Corporal | |
| 2 | Greater than 10 years | 5 points |
| 3 | of experience as an Officer | |
| 4 | | |
| 5 | Education (10) | |
| 6 | Master's degree | 10 points |
| 7 | Bachelor's degree | 7 points |
| 8 | Associate's degree | 5 points |
| 9 | | |
| 10 | Department involvement (10) | |
| 11 | Employee will receive an additional 10 points for any of the | |
| 12 | following (10 points maximum from this section): | |
| 13 | Honor Guard, Choice Program, Community events, CO of | |
| 14 | year | |

15 On April 2, 2015, Sweeney posted a memorandum to all lieutenant promotional
 16 applicants that stated in pertinent part:

17 Attached is the list with the final ranking of all candidates¹¹ who passed the
 18 lieutenant's promotional exam and completed the promotional process.
 19 These rankings are based on each candidate's overall score, which
 20 includes scores for the examination, the interview, and job performance.

21 Please contact me if you have any questions about your individual ranking.

23 On April 6, 2015, Sweeney sent an email to Jenny Prokopovich (Prokopovich)¹² that
 24 stated in pertinent part:

25 JOEASC requested that we include the final overall score on the posting
 26 so employees know what they received.¹³

27 I spoke with Harris, and he thinks we probably included the score on other
 28 promotional testing. I'm fine with doing so.
 29

¹¹ The Employer used ID numbers consisting of several digits of the applicants' social security numbers rather than the applicants' names, which it also had done for the 2007 promotional list for sergeant.

¹² Prokopovich's title at the Jail was not identified in the record.

¹³ At hearing, Caprigno indicated that the JOEASC was seeking the applicants' overall scores to ensure that the process was fair and equitable as well as to let unit members' have the opportunity to challenge the score informally or to speak with the Employer about areas in which they might improve for future promotions.

1
2 If Gene and Cliff are fine with this, please replace the original list with the
3 attached. If anyone has an issue with it, please give me a call.

4 The Employer then displayed the revised posting at the Jail. On April 12, 2015, the
5 Employer announced the promotion of twelve new lieutenants at the Jail.¹⁴ The promoted
6 candidates were ranked as 1st, 2nd, 3rd, 5th, 6th, 7th, 12th, 14th, 15th, 18th, 20th, and 24th on
7 the promotional list.¹⁵

8 2019

9 On June 26, 2019, Sweeney posted a memorandum regarding promotional
10 opportunities for the position of lieutenant that stated in pertinent part:

11 Please be advised of the Department's intention to fill a vacant Lieutenant
12 position(s) at the Jail.

13
14 All interested, eligible employees are hereby instructed to submit written
15 notification no later than 2:00PM on Friday July 12, 2019.

16
17 Written submissions should be directed to the attention of Bill Sweeney,
18 AS/Human Resources, at the House of Correction. Please provide active
19 contact information, including an e-mail address, so that receipt of your
20 notification can be properly confirmed.

21 You may, but are not required to, include a current resume with your
22 notification. Please note, however, that copies of training records,

¹⁴ When announcing the promotional processes for sergeant or lieutenant, the Employer did not announce how many vacancies that it was seeking to fill. Unit members only became aware of the number of promotional opportunities that existed when the Employer announced the number of successful applicants.

¹⁵ Later, in 2015, the Employer announced promotional opportunities for the position of sergeant. Both Caprigno and Etro applied for promotion to sergeant and took the written exam. The Employer posted the test scores, and both Caprigno and Etro earned passing scores. The Employer subsequently interviewed and evaluated those candidates who passed the exam, including Caprigno and Etro. The Employer posted the promotional list that ranked the applicants' and contained their overall scores before announcing the successful applicants. All the successful applicants held rankings on the promotional list that fell within the 2n+1 formula, including Etro who was promoted to sergeant in December of 2015.

1 employee files, letters of commendation, and additional personal
2 information are not necessary and will not be accepted at this time.

3

4 I encourage and look forward to your participation in this process.

5 For the first time, the Employer permitted applicants, including Caprigno and Etro, to
6 submit their letters of intent via email. On July 17, 2019, Sweeney posted a memorandum
7 regarding the lieutenants' promotional exam that stated in pertinent part:

8 The promotional exam for the position of Lieutenant will be held on
9 Saturday, August 17, 2019, at 10:00 am, in the gymnasium.

10

11

Attached is the study guide, in two separate parts.

12

13

14

15

16

17

18

19

The only thing you will need to bring with you on the day of the exam is your
license or Department ID. Even though we know most employees,
everyone is required to provide a photo ID in order to sit for the exam. The
Department will provide you with the pencils and with the questions and
booklets for recording your answers. Dictionaries, cell phones, and smart
watches are not allowed during the exam.

20

21

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27

The exam will begin promptly at 10:00 am. You will have three (3) hours to
complete the exam once it starts. In an effort to minimize distractions to the
employees taking the exam, no one will be allowed to check in and take the
exam after 10:15 am.

28

29

30

31

32

33

If you have any concerns about the test or the testing conditions that you
would like to discuss, please do not hesitate to contact me.

34

On July 18, 2019, Caprigno sent an email to Sweeney inquiring:

35

36

37

What will the passing score be for the exam? I know last time we did 75%
on the lieutenants exam and 80% on the sergeants exam. Any information
on how the test will be formatted?

38

On August 7, 2019, Etro sent an email to Sweeney stating in relevant part:

1 On behalf of JOEASC I was wondering if we could get a breakdown of the
2 grading and what the dept is accepting as a passing grade. I know in the
3 past the grade has been altered with approval from the union, we are just
4 looking for clarification on both. Thank you for your time.

5 In an August 8, 2019 email to Etro, Sweeney replied:

6 I just texted with Caprigno to confirm we're using 75% as the passing grade.
7 This is the same score we used for the 2014 Lieutenant exam. He agreed
8 with my recommendation to keep the passing grade consistent with the last
9 test.

10
11 Let me know if you have any questions.

12
13 Thanks.

14 On August 17, 2019, the Employer conducted the exam for promotion to lieutenant,
15 and both Caprigno and Etro took the test. After the exam, JOEASC asked for clarification
16 how the job performance breakdown would work. At the August 22, 2019
17 labor/management meeting,¹⁶ Sweeney¹⁷ gave an outline of the job performance matrix
18 that the Employer had used for the 2015 promotional process for sergeant and indicated
19 that the Employer would use something similar for the lieutenant promotional process.¹⁸
20 When JOEASC indicated that it disagreed with how certain points were awarded in the
21 job performance matrix, Sweeney and Assistant Superintendent Thomas Cloherty

¹⁶ Labor/management meetings, which are referenced in the parties' contract, provide JOEASC and the Employer, which sends representatives to the meeting from both labor relations and operations, consistent and regular opportunities to address issues of concern.

¹⁷ Sweeney typically did not attend labor/management meetings.

¹⁸ While the job performance matrix used for the 2015 promotional process for sergeant had the same categories as the job performance matrix used for the 2014 promotional process for lieutenants, there were differences in the criteria for points and the point values.

1 informed JOEASC that it could submit its own proposal as to how the job performance
2 breakdown would work. JOEASC subsequently submitted its own proposal. The
3 Employer declined to accept JOEASC's proposal and instead used the job performance
4 matrix that Sweeney had described at the labor/management meeting.

5 At the September 12, 2019 labor/management meeting, the Employer informed,
6 JOEASC that it had posted the scores for the lieutenant's exam. The Employer also
7 indicated that it was in the process of scheduling interviews. Both Caprigno and Etro
8 received interviews. On or about October 30, 2019, the Employer promoted 14 applicants
9 to the position.¹⁹ On October 31, 2019 at 8:14 AM, Caprigno sent an email to Sweeney
10 stating:

11 Can you please let me know when the final lieutenant scores will be posted
12 and if the department has a timeline for promotions. Also can you please
13 tell me when we will be ready to begin shift picks.²⁰

14 Thank you.
15

16 On or about November 1, 2019, JOEASC became aware through "word of mouth"
17 that the Employer had made promotions to lieutenant at the Jail. Caprigno then contacted
18 Sweeney via telephone to inquire why the Employer had not posted the promotion list

¹⁹ The record before me does not show that on October 30 or 31, 2019, the Employer made any official announcement of the fourteen promotions and/or notified JOEASC about the promotions.

²⁰ JOEASC and the Employer had agreed to delay the annual shift pick process, which was usually completed by October 31st, until the promotional process for lieutenant was completed. During the shift pick process, unit members, with more than three years of service who were not assigned to special services, selected their shifts and days off for the next year based on seniority.

1 before it notified the successful applicants of their promotions.²¹ Sweeney informed
2 Caprigno that he was out of the office, but that he was unaware that the Employer needed
3 to post the promotional list before notifying applicants of their promotions. Sweeney also
4 informed Caprigno that the Employer had not used the 2n+1 formula, and that two of the
5 fourteen successful applicants held rankings that put them outside of the 2n+1 selection
6 pool, i.e. they were not included in the twenty-nine highest ranked candidates. Caprigno
7 asked Sweeney why the 2n+1 formula was not used. Sweeney responded that while the
8 Employer may have used the 2n+1 formula previously, it was not obligated to do so. He
9 explained that it was Sumpter's desire²² to use the 2n+1 formula because Sumpter
10 thought it was the fairest way to do promotions and that Sumpter wanted to limit the
11 Sheriff's discretion as much as JOEASC did.²³ Caprigno then rhetorically asked didn't
12 the Employer want to be fair, and Sweeney responded that is not what he meant.
13 Sweeney stated that he anticipated that JOEASC would have an issue with the Employer
14 not using the 2n+1 formula, and that JOEASC would fight the Employer's action. The
15 Employer promoted the applicants ranked 1st, 4th, 5th, 9th, 10th, 14th, 22nd, 24th, 26th, 27th,

²¹ The Employer had not apprised JOEASC that it intended to notify the successful applicants of their promotions before posting the promotional list with the applicants' rankings and overall scores.

²² Sumpter, who had been superintendent for twenty years, retired in late 2018 or early 2019.

²³ Sweeney opined at hearing that Sumpter and Sheriff Steven Tompkins had different philosophies regarding promotions. Sumpter wanted to promote only "the very best employees" as defined by the criteria in the promotional process. However, the Sheriff wanted to consider other factors in the 2019 promotional process to achieve a more diverse group of supervisors, and Sweeney referenced gender as one of the factors. On cross-examination, Sweeney confirmed that neither of the successful applicants who were ranked 40th and 43rd on the promotional list were female.

1 28th, 29th, 40th and 43rd on the promotional list.²⁴ A day or two later²⁵ the Employer posted
2 a promotional list that ranked the applicants and contained their overall scores. The
3 Employer counted the test result as 50% of the overall score, the interview grade as 25%
4 of the overall score, and the job performance evaluation as 25% of the overall score.²⁶

5 Opinion

6 The issues before me are whether the Employer repudiated a provision of the
7 parties' 2017-2020 CBA, and whether the Employer implemented a unilateral change in
8 the promotional procedure.

9 Repudiation

10 Section 6 of the Law requires public employers and unions that represent their
11 employees to meet at reasonable times to negotiate in good faith regarding wages, hours,
12 standards of productivity and performance, and any other terms and conditions of
13 employment. The statutory obligation to bargain in good faith includes the duty to comply
14 with the terms of a collectively bargained agreement. Commonwealth of Massachusetts,
15 26 MLC 165, 168, SUP-3972 (March 13, 2000) (citing City of Quincy, 17 MLC 1603, MUP-
16 6710 (March 20, 1991); Massachusetts Board of Regents of Higher Education, 10 MLC

²⁴ Of the top twenty-nine applicants on the promotional list for lieutenant, the Employer bypassed seventeen applicants, who were ranked 2nd, 3rd, 6th, 7th, 8th, 11th, 12th, 13th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 23rd and 25th.

²⁵ The Employer in its post-hearing brief contended that it posted the promotional list a day later. However, the only evidence in the record regarding the timing of the posting is when Caprigno credibly testified that the Employer put up the posting a day or two later.

²⁶ After the Employer conducted the promotional process for lieutenant, it conducted a promotional process for sergeant in 2019-2020. I make no findings about the 2019-2020 promotional process for sergeant as it occurred after the controversy that is the subject of the matter before me. However, I note that Caprigno became an acting sergeant in 2019 and a permanent sergeant in 2020 prior to the hearing.

1 1196, SUP-2673 (September 8, 1983)). A public employer's deliberate refusal to abide
2 by an unambiguous collectively bargained agreement constitutes a repudiation of that
3 agreement in violation of the Law. Town of Falmouth, 20 MLC 1555, 1559, MUP-8114
4 (May 16, 1994), aff'd sub nom., Town of Falmouth v. Labor Relations Commission, 42
5 Mass. App. Ct. 1113 (1997). If the evidence is insufficient to find an agreement or if the
6 parties hold differing good faith interpretations of the language at issue, the
7 Commonwealth Employment Relations Board (CERB)n will conclude that no repudiation
8 has occurred. Commonwealth of Massachusetts, 18 MLC 1161, 1163, SUP-3439, SUP-
9 3556 (October 16, 1991). If the language is ambiguous, the CERB examines applicable
10 bargaining history to determine whether the parties reached an agreement.
11 Commonwealth of Massachusetts, 16 MLC 1143, 1159, SUP-3127 (August 8, 1989).
12 There is no repudiation of an agreement if the language of the agreement is ambiguous,
13 and there is no evidence of bargaining history to resolve the ambiguity. Commonwealth
14 of Massachusetts, 28 MLC 8, 11, SUP-4345 (June 29, 2001) (citing Town of Belchertown,
15 27 MLC 73, MUP-2397 (January 3, 2000)).

16 Here, JOEASC alleges that the Employer's selection of candidates for promotion,
17 who were ranked 40th and 43rd on the promotional list, repudiated Article XX, Section 8 of
18 the 2017-2020 CBA. I turn first to consider the plain language of Article XX, Section 8,
19 which JOEASC contends is clear and unambiguous. The CERB gives effect to the clear
20 meaning of the bargained-for language and does not inquire into the parties' intent where
21 the words of the agreement are unambiguous. Boston School Committee, 22 MLC 1365,
22 1376, MUP-8125 (January 9, 1996) (citing City of Worcester, 2 MLC 1281, 1285, MUP-
23 2260 (January 8, 1976)). Article XX, Section 8 states:

1 In making promotional decisions, the Sheriff shall select an individual based
2 on the formula of "2n+1," with "n" being the number of positions to be filled.

3 In October 2019, the Employer filled fourteen lieutenant positions. JOEASC asserts that
4 if the Employer properly adhered to the 2n+1 formula it would only have considered the
5 top twenty-nine applicants on the promotional list when making its selections for
6 promotion. The Employer admittedly promoted two applicants that were ranked lower
7 than seventeen of the top twenty-nine applicants, whom it bypassed for promotion.

8 However, the Employer contends that Article XX, Section 8 is not applicable to
9 promotions for lieutenant. In support of its claim, the Employer cites to another provision
10 of Article XX, specifically Section 2. Article XX, Section 2 states in pertinent part:

11 Notice of a promotional vacancy in a position covered by this agreement
12 shall be posted for a period of ten (10) consecutive days.

13 The Employer argues when Article XX, Section 2 is read in conjunction with Article I of
14 the 2017-2020 CBA, which does not reference the position of lieutenant (JO-4), the
15 position of a lieutenant is not covered by the parties' collective bargaining agreement.
16 Reading the language in Article XX, Section 2 carefully, giving its words their plain and
17 normal meaning, "notice of a promotional vacancy covered by this Agreement" is
18 ambiguous. The phrase could refer to the position of lieutenant because as JOEASC
19 points out, Article XX, Section 4, states, in part, that employees must have a minimum of
20 three and one-half years of service with the Employer to take a promotional examination
21 for lieutenant. On the other hand, the phrase could refer only to positions covered by the
22 recognition clause in Article I of the 2017-2020 CBA, which the position of lieutenant is
23 not.

1 Given the ambiguity of Article XX, Section 2 and its interplay with Article XX,
2 Section 8, I next examine the parties' bargaining history to determine whether the parties
3 previously agreed that the Article XX, Section 2 covers promotions for lieutenant. On or
4 about December 2014, the Employer inquired whether JOEASC would be willing to agree
5 to lower the passing score on the promotional exam for lieutenant. The Employer's
6 solicitation of JOEASC's agreement as to the passing score for the promotional exam for
7 lieutenant is consistent with Article XX, Section 3, which states that what constitutes a
8 passing score shall be decided by a joint committee after the creation of the examination.
9 Nearly five years later, JOEASC and the Employer conferred in July and August 2019,
10 shortly before the 2019 promotional exam, and agreed that the passing score for the 2019
11 exam would remain the same as the 2014 exam. The Employer never informed JOEASC
12 that the provisions in Article XX of the 2017-2020 CBA did not apply to the promotional
13 process for lieutenant. Also, in April 2015, JOEASC requested and the Employer agreed
14 to include the applicants' overall scores, as well as the applicants' rankings, on the
15 promotional list for lieutenant that it displayed at the jail. The Employer's assent to
16 JOEASC's request is consistent with recognizing JOEASC as having a role in the
17 promotional process for lieutenant beyond merely having its unit members apply for the
18 positions.

19 Similarly, at the August 22, 2019 labor/management meeting, the Employer gave
20 JOEASC an outline of the job performance matrix that it intended to use in the
21 performance evaluation portion of the promotional process for lieutenant. Article XX,
22 Section 6 of the parties' 2017-2020 CBA references the job performance portion of the
23 promotional process. When JOEASC disagreed with how the Employer intended to

1 award certain points as part of the job performance matrix, the Employer informed
2 JOEASC that JOEASC could submit its own proposal as to how the job performance
3 breakdown would work. Although this exchange did not occur in the context of successor
4 contract negotiations, it does demonstrate that the Employer acted in a manner consistent
5 with the provisions of Article XX of the 2017-2020 CBA applying to the promotional
6 process for lieutenant. Therefore, I have resolved the ambiguity in Article XX, Section 2
7 in favor of JOEASC.

8 However, the Employer also argues that it never actually used the $2n+1$ formula to
9 select promotional applicants for lieutenant and thus, had a differing good faith
10 interpretation of its applicability. First, a review of the facts before me clearly shows that
11 in the 2007 and 2014-2015 promotional processes for lieutenant the Employer selected
12 the successful applicants from a pool of applicants whose rankings fell within the $2n+1$
13 formula. Nevertheless, the Employer argues that just because it promoted applicants
14 from a group that fell within the $2n+1$ formula does not constitute evidence that it relied
15 on the formula. Instead, the Employer contends that Carigno's and Etro's testimonies
16 that the Employer used the $2n+1$ formula was merely based upon their subjective
17 impressions.

18 Even if I were to discount the empirical data regarding the Employer's past
19 promotions for lieutenant, Sweeney acknowledged in his November 1, 2019 conversation
20 with Caprigno that Sumpter, who was Jail Superintendent for twenty years and the
21 Employer's agent, used the $2n+1$ formula when Sumpter promoted lieutenants. The
22 authority to act for and to speak on behalf of an employee is governed by the principles
23 of agency and may be actual, implied, or apparent. Town of Bolton, 32 MLC 20, 25, MUP-

1 01-3254 (June 27, 3005). The issue of agency may be gauged from the point of view of
2 the employees. Id. As the CERB recognized in Town of Chelmsford, “supervisors are
3 presumed to be acting and speaking for the employer, even when the employer has
4 instructed the supervisor to refrain from such action, so long as the employer’s
5 instructions have not been communicated to employees.” 8 MLC 1913, 1916, MUP-4620
6 (March 12, 1982), aff’d 15 Mass. App. Ct. 1107 (1983). Accordingly, in Town of
7 Chelmsford, the CERB found that the Superintendent of the Highway Department was
8 “unquestionably an agent of the employer’ as he was in charge of the overall running of
9 the department on a day-to-day basis. Id.; see also Amherst Police League, 35 MLC 239,
10 252, MUPL-05-4521 (April 23, 2009) (citing Town of Ipswich, 11 MLC 1403, 1420 n.7,
11 MUP-5248 (February 7, 1985) (unless communication of a limitation in one’s authority is
12 presented to the other party, an individual in charge of a transaction is held to have broad
13 apparent authority)); Higher Education Coordinating Council, 25 MLC 69, 71, SUP-4807
14 (September 17, 1998) (citing Commonwealth of Massachusetts, 11 MLC 1206, SUP-2747
15 (October 3, 1984) (public employer is responsible for the actions of its supervisory
16 employees as agents who act within the scope of their apparent authority whether or not
17 those acts were specifically authorized)). Here, the record is devoid of any information
18 showing that prior to November 1, 2019, the Employer had informed JOEASC that
19 Sumpter had exceeded his authority by using the 2n+1 formula to make promotions to
20 lieutenant as a means to limit the Sheriff’s discretion. Thus, the Employer’s assertion that
21 it did not actually rely on the 2n+1 formula when promoting lieutenants cannot be credited
22 as a differing good faith interpretation of Article XX, Section 8 because it was plainly
23 inconsistent with the contractual language that the parties had negotiated and how

1 Sumpter actually had made prior promotions to lieutenant. See Town of Lexington, 37
2 MLC 115, 122, MUP-08-5313 (December 9, 2010) (rejecting claim that town's perspective
3 on an agreement regarding paid religious holidays was a differing good faith interpretation
4 because it was inconsistent with the actual agreement and library director's
5 implementation of that agreement).

6 Finally, the Employer contends that the 2n+1 formula cannot apply to the
7 promotional process for lieutenant because the Employer also negotiated a provision
8 Article XX, concerning promotions to the positions of lieutenant and captain, in successive
9 collective bargaining agreements between the Employer and Local 3643, which
10 represents lieutenants and captains at the Jail. The inclusion of Article XX commenced
11 with the contract between the Employer and Local 3643 that was in effect from 1995 to
12 1998 and the provision remains in the current contract. As JOEASC correctly points out,
13 the record before me shows no evidence that the Employer adhered to Article XX of the
14 contract between the Employer and Local 3643 when making promotions to lieutenant.
15 Specifically, Article XX, Section 4 of the current contract between the Employer and Local
16 3643 states in pertinent part:

17 Every applicant shall receive an interview for the position applied for before
18 a panel selected by the Sheriff.

19 However, during the 2014-2015 and the 2019 promotional processes for lieutenant, only
20 applicants who passed the written exam were eligible to receive an interview. Further,
21 the Employer presented no affirmative evidence showing that all applicants for the 2007
22 promotional process received interviews. Rather, the record is silent on the issue.
23 Moreover, the mere fact that the Employer negotiated a contract with Local 3643
24 containing promotional language for lieutenant does not permit it to repudiate the 2n+1

1 formula that it negotiated with JOEASC. See generally Town of Burlington, 35 MLC 18,
2 27, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of Burlington v. Commonwealth
3 Employment Relations Board, 85 Mass. App. Ct. 1120 (2014) (finding violation where
4 town negotiated a change in the priority for paid details in one bargaining unit's contract
5 but failed to take any action to reconcile its conflicting obligations with other bargaining
6 units). Conflicts cannot be resolved by restricting the ability of JOEASC or Local 3643 to
7 protect their interests, or by subjugating the rights of JOEASC's unit members to the rights
8 of Local 3643's unit members, but through negotiations. See Sheriff's Office of Plymouth
9 County, 39 MLC 41, 59, MUP-05-4775 (September 10, 2012). Accordingly, the Employer
10 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating
11 Article XX, Section 8 when it failed to apply the 2n+1 formula during the 2019 promotional
12 process for lieutenant.

13 Unilateral Change

14 A public employer violates Section 10(a)(5) of the Law when it implements a
15 change in a mandatory subject of bargaining without first providing the employees'
16 exclusive bargaining representative with prior notice and an opportunity to bargain to
17 resolution or impasse. School Committee of Newton v. Labor Relations Commission, 338
18 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that
19 are established through a past practice as well as conditions of employment that are
20 established through a collective bargaining agreement. Town of Burlington, 35 MLC at
21 25; Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To
22 establish a unilateral change violation, the charging party must show that: 1) the employer
23 altered an existing practice or instituted a new one; 2) the change affected a mandatory

1 subject of bargaining; and 3) the change was established without prior notice and an
2 opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).
3 Here, JOEASC alleges that the Employer implemented a change in the parties' past
4 practice regarding procedures for promotion to lieutenant. Specifically, JOEASC claims
5 that the Employer had a past practice of posting the promotional list for lieutenant, which
6 included applicants' rankings and overall scores in the promotional process, before
7 notifying the successful applicants for promotion.

8 The Employer in its post-hearing brief does not dispute that a practice existed
9 whereby it posted the promotional list with applicants' rankings and overall scores before
10 the Employer contacted the successful applicants. Also, the Employer acknowledges that
11 in November 2019, it posted the promotional list after the Employer informed applicants
12 of their promotions. Additionally, promotional procedures, see City of Boston, 41 MLC
13 119. 126, MUP-13-3371, MUP-14-3666, MUP-14-3504 (November 7, 2014) (citing Town
14 of Danvers, 3 MLC 1559, MUP-2292, MUP-2299 (April 6, 1977)), including intra-unit
15 promotional procedures, see Town of Arlington, 42 MLC 97, 98-99, MUP-14-3750
16 (September 30, 2015), are mandatory subjects of bargaining. Thus, the Employer
17 implemented a change in a mandatory subject of bargaining.

18 The Employer argues that it had no obligation to bargain because the change was
19 de minimis. The CERB will not find an unlawful change to employees' terms and
20 conditions of employment where the action complained of is only a slight departure from
21 what is normally required. See Town of Danvers, 3 MLC at 1576-77. However, where the
22 change is more than a slight departure, the CERB will not find the complained of action
23 to be de minimis. See Chief Justice and Administration and Management of the Trial

1 Court, 35 MLC 230, 235, SUP-04-5126 (April 14, 2009). Here, the Employer argues that
2 the one-day delay, which I earlier in this decision found to be a one- or two-day delay,
3 caused no prejudice to JOEASC and that unit members could not even grieve their non-
4 selections for promotion. The flaw in the Employer's argument is that the length of the
5 delay is not the salient point in the case. Rather, unit members lost the opportunity to
6 review the list and to approach the Employer informally to correct any perceived errors in
7 how the Employer calculated the applicants' overall scores or ranked them, before the
8 Employer announced the final selections. The fact that unit members cannot grieve the
9 Employer's promotional selections makes it more vital that those unit members are able
10 to review and ensure that the Employer is making selections based on accurate data.
11 The change is more than de minimis, especially when coupled with the Employer's
12 repudiation of the 2n+1 formula.

13 Remedy

14 Pursuant to Section 11 of the Law, once the CERB determines that a prohibited
15 practice under Section 10 has been committed, it is authorized to issue a cease and desist
16 order to the offending party "and shall take such further affirmative actions as will comply
17 with provisions of this section" The phrase "further affirmative action" has been
18 construed as granting the CERB authority to fashion appropriate orders to remedy
19 unlawful conduct, including remedial measures not specified in Section 11. Labor
20 Relations Commission v. City of Everett, 7 Mass. App. Ct. 826, 829 (1979). Moreover,
21 Section 11 of the Law broadly commits the design of appropriate remedies to the CERB's
22 discretion and expertise.

1 When an employer violates the Law, the CERB typically orders the employer to
2 cease and desist from, in any like or related manner interfering with, restraining or
3 coercing employees in the exercise of their rights, guaranteed under the Law as well as
4 to take certain affirmative action. Here, JOEASC requests that the further affirmative
5 action for the repudiation violation include an order that the Employer promote seven
6 additional unit members to lieutenant for a total of 21 promotions resulting in the 2n+1
7 formula encompassing the top 43 candidates on the promotional list. Alternatively,
8 JOEASC seeks an order that upon JOEASC's request, the Employer rescind the
9 promotions of the applicants ranked 40th and 43rd on the promotional list. However, the
10 Employer looks for an order that requires it to rescind all fourteen promotions that were
11 made in October 2019. Alternatively, the Employer seeks an order that obliges it to
12 rescind the promotions of the applicants ranked 40th and 43rd on the promotional list
13 without giving JOEASC the discretion to decide whether to seek the rescission.

14 First, I decline to issue an order requiring the Employer to promote seven additional
15 unit members to lieutenant. The goal of fashioning appropriate remedies is to place a
16 charging party in the position that it would have been but for the unfair labor practice. See
17 Commonwealth of Massachusetts, 36 MLC 65, 69, SUP-05-5191 (October 23, 2009).
18 Because Article XX, Section 8 makes no reference to the number of applicants that the
19 Employer must promote, an order requiring an additional seven promotions would present
20 a boon to JOEASC.

21 Additionally, I decline to order all fourteen promotions to be rescinded as the
22 Employer requests. The Employer's selection of the applicants ranked 1st, 4th, 5th, 9th,
23 10th, 14th, 22nd, 24th, 26th, 27th, 28th and 29th on the promotional list properly adhered to

1 the 2n+1 formula, and thus, there was no need for remedial action regarding those
2 promotions.²⁷ Turning to JOEASC's request that the order grant it the discretion to decide
3 whether to request the rescission of the promotions of the applicants ranked 40th and 43rd
4 on the promotional list, I find that requested remedy to be consistent with prior CERB
5 precedent where the concern is that unit members will be alienated from the union that
6 represents them. see Suffolk County Sheriff's Department, 30 MLC 1, 8, MUP-2630, 2747
7 (August 19, 2003) (upon request from the union, rescinding permanent appointments to
8 lieutenant where oral agreement was repudiated); Commonwealth of Massachusetts, 14
9 MLC 1322, 1327-1328, SUP-2826 (November 20, 1987) (allowing the charging party the
10 opportunity to request that a unilateral salary increase for data processing clerks not be
11 rescinded); Natick School Committee, 11 MLC 1387, 1400-1401, MUP-5157 (February
12 1, 1985) (declining to order rescission and repayment of a monetary recognition award that
13 certain unit members already had received.)

14 However, there is merit to the Employer's point that in the unique circumstances
15 here, specifically the paramilitary employment structure at the Jail, JOEASC should not
16 have endless discretion to seek the rescission of the promotions to lieutenant of the
17 applicants who were ranked 40th and 43rd on the promotional list, because such endless
18 discretion could place those lieutenants in an untenable position in their interactions with
19 JOEASC unit members whom they supervise. Therefore, consistent with the

²⁷. I also decline to order a rescission of the promotions as a remedy to the unilateral change violation. The usual remedy for a unilateral change violation is an order restoring the status quo until an employer has satisfied its bargaining obligation. Commonwealth of Massachusetts, 29 MLC 132, 133, SUP-4485 (January 22, 2003). A return to the status quo here would require the Employer to post the promotional list before notifying successful applicants of their promotions not rescind the promotions. However, because the Employer subsequently posted the list, albeit late, I do not order it to be posted again.

1 Commonwealth of Massachusetts case, 14 MLC at 1327-1328, I order JOEASC to submit
2 within ten days any request to the Employer to rescind the promotions of the applicants
3 who were ranked 40th and 43rd on the 2019 promotional list or those promotions will stand.

4 Conclusion

5 Based on the record and for the reasons stated above, I conclude that the
6 Employer violated Section 10(a)(5) of the Law when it repudiated Article XX, Section 8 of
7 the 2017-2020 CBA and when it unilaterally changed the promotional procedure for
8 lieutenant by not posting the promotional list with the applicants' rankings and total scores
9 before notifying the successful applicants of their promotions.

10 Order

11 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the
12 Employer shall:

13 1. Cease and desist from:

14
15 a) Failing to bargain in good faith by repudiating Article XX, Section 8 of the
16 parties' 2017-2020 CBA.

17
18 b) Unilaterally changing the promotional procedure for lieutenant by not
19 posting the promotional list with the applicants' rankings and total scores in
20 the promotional process before notifying the successful applicants of their
21 promotions.

22
23 c) In any like or related manner interfering with, restraining or coercing
24 employees in the exercise of their rights guaranteed under the Law.

25
26 2. Take the following affirmative action:

27
28 a) Immediately abide by Article XX, Section 8 of the parties' 2017-2020 CBA.

29
30 b) Upon a request from JOEASC that must be made within ten days of the
31 date of this decision, rescind the promotions to lieutenant that were made
32 to the applicants ranked 40th and 43rd on the 2019 promotional list.

- 1 c) Restore the prior practice of posting the promotional list for lieutenant with
- 2 the applicants' rankings and total scores in the promotional process before
- 3 notifying the successful applicants of their promotions.
- 4
- 5 d) Bargain in good faith to resolution or impasse with JOEASC about
- 6 discontinuing the practice of posting the promotional list for lieutenant with
- 7 the applicants' rankings and total scores in the promotional process before
- 8 notifying the successful applicants of their promotions.
- 9
- 10 e) Immediately post signed copies of the attached Notice to Employees in all
- 11 conspicuous places where members of JOEASC's bargaining unit usually
- 12 congregate, or where notice are usually posted, including electronically, if
- 13 the Employer customarily communicates with these unit members via
- 14 intranet or email and display for a period of thirty (30) days thereafter,
- 15 signed copies of the attached Notice to Employees.
- 16
- 17 f) Notify the DLR in writing of the steps taken to comply with this decision
- 18 within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

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



NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. SUP-19-7686 that the Suffolk County Sheriff's Department (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it repudiated Article XX, Section 8 of the 2017-2020 collective bargaining agreement (2017-2020 CBA) between the Employer and the Jail Officer and Employees Association of Suffolk County (JOEASC) and when it unilaterally changed a past practice of posting a promotional list for lieutenant with applicants' rankings and total scores in the promotional process before notifying the successful applicants of their promotions.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

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 fail to bargain in good faith by repudiating Article XX, Section 8 of the 2017-2020 CBA with JOEASC.

WE WILL NOT unilaterally change the promotional procedure for lieutenant by not posting the promotional list with the applicants' rankings and their total scores in the promotional process before notifying the successful applicants of their promotions.

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

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

Immediately abide by Article XX, Section 8 of the 2017-2020 CBA.

- Upon a request from JOEASC that must be made within ten days of the date of the decision in Case No. SUP-19-7686, rescind the October 2019 promotions to lieutenant of two applicants whose promotions did not adhere to the 2n+1 formula in Article XX, Section 8.
- Restore the prior practice of posting the promotional list for lieutenant with the applicants' rankings and total scores before notifying the applicants of their promotions.
- Bargain in good faith to resolution or impasse with JOEASC about discontinuing the practice of posting the promotional list for lieutenants with the applicants' rankings and total scores in the promotional process before notifying the successful applicants of their promotions.

Suffolk County Sheriff's Department

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, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).