COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S ASSOCIATION

Case No.: MUP-15-4374

Date Issued: July 15, 2016

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Amy Laura Davidson, Esq. - Representing the Boston Police Patrolmen's Association

Natacha Thomas, Esq. - Representing the City of Boston

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the City of Boston (City) failed to bargain in good faith with the Boston Police Patrolmen’s Association (Union) by not providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision to deny bargaining unit members the right to have a union representative accompany them at fitness-for-duty physical examinations and the impacts of that decision on employees’ terms and conditions of employment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law).

2 For the reasons explained below, I find that the City did not violate the Law by failing to bargain with the Union when it denied bargaining unit members the right to
have a union representative accompany them at fitness-for-duty physical examinations and the impacts of that decision on employees’ terms and conditions of employment.

STATEMENT OF THE CASE

On March 11, 2015, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the City had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On June 29, 2015, a DLR Investigator issued a Complaint of Prohibited Practice (Complaint) and Partial Dismissal, alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith with the Union after it denied bargaining unit members the right to have a union representative present during fitness for duty examinations in September of 2014, and the impacts of that decision on employees’ terms and conditions of employment. On January 28, 2016, the City filed its Answer to the Complaint.

On February 24, 2016, I conducted a hearing at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On April 11 and 14, 2016, respectively, the Union and the City filed their post-hearing briefs.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. The City is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive collective bargaining representative of patrol officers employed by the City in its Police Department (Department).
4. The Department has a Medically Incapacitated Section known as MIS. The City designates doctors assigned to MIS to perform fitness for duty examinations.

5. Fitness for duty exams include evaluations to determine whether the officer is capable of returning to work on light duty or full duty.

6. A fitness for duty exam may include either a physical medical exam or a psychiatric evaluation.

7. On September 15, 2014, the Department’s Occupational Health Services Unit [(OHSU)] denied Officer Michael Duggan’s [(Duggan)] request to have a union representative accompany him to a fitness for duty examination.

8. Officer Duggan’s fitness for duty exam was a physical medical exam.

ADMISSION OF FACTS

In its Answer, the City admitted to the following facts:

1. On September 15, 2014, OHSU Director Ian Mackenzie (Mackenzie) denied Officer Duggan’s request to have a union representative accompany him during his fitness for duty examination.

2. The MIS scheduled a second fitness for duty examination for Officer Duggan on September 23, 2014, and, again, Director Mackenzie denied Officer Duggan’s request to have union representation present at that examination.

FINDINGS OF FACT

The Collective Bargaining Agreements

The City and the Union were parties to a collective bargaining agreement (Agreement) that was effective from July 1, 2007 through June 30, 2010. The parties negotiated a successor Agreement that was effective from July 1, 2013 through June 30, 2016. Article XIII, Section 1 pertained to “Fitness to Return to Work After Service-Connected Sickness Injury or Disability.” The Agreement was silent about whether unit members may have a third-party representative (such as a union representative or private attorney) accompany them during their fitness-for-duty physical examinations at the MIS.
Department Rule 110

Effective December 31, 2012, the Department issued Rules and Procedures, Rule 110. Section 11 of Rule 110 concerns the MIS, and states in relevant part:

After 30 calendar days of absence because of sickness, injury or disability, an employee shall be reassigned to the [MIS]. An officer so assigned must obtain a certificate to return to duty from their attending physician and shall not be returned to duty until a physician designated by the Police Commissioner has examined the officer and certified that he is capable of performing assigned duties in whole or in part.

Section 27 of Rule 110 states in full, “Police officers who have been certified by the department physician as fit to return to duty shall return to duty on the date specified by the department physician.”

Rule 110 is silent about whether the City permits unit member requests to have third-party representatives accompany them during physical examinations at the MIS.

MIS Personnel

Prior to October of 2013, and for approximately 40 years, Roberta Mullan (Mullan) was employed by the City as the Director of the Department’s MIS. At some point in or about January of 2014, Mullan retired and the City appointed Ian Mackenzie to assume her position. Since his appointment, Mackenzie has assigned doctors and nurse practitioners employed by the MIS to perform fitness for duty physical examinations on injured officers to determine whether those officers are incapacitated due their injuries or capable of returning to work on light duty or full duty.

For the past 30 years, and at all relevant times, the City has employed Zelma Greenstein (Greenstein) as the MIS nurse practitioner (N.P.). As part of her duties, Greenstein conducts pre-examination interviews with the injured officers to discuss their medical histories, the nature of their injuries, current symptoms and trauma (if any).
During her tenure, N. P. Greenstein has performed thousands of physical examinations on unit members. At no point during her tenure has N.P. Greenstein ever allowed a union representative, union attorney, private attorney or other third party to be present with an officer during her physical examination.

For many years, and at all relevant times, the City employed Kristian Arnold, M.D. (Arnold) as its primary MIS doctor. As part of his duties, Dr. Arnold presided over the medical appointments and physical examinations of officers at the MIS. At the end of each officer’s examination, Dr. Arnold would memorialize his findings and make suggestions via official “Progress Notes” that he filed with the Department. When third-parties accompanied officers to their MIS appointments, Dr. Arnold indicated their presence in his Progress Notes. Between 2006 and 2014, Dr. Arnold noted at least ten occasions when third parties (e.g., union representatives or attorneys) had accompanied officers to their MIS appointments. Wherever Dr. Arnold identified a third-party representative in his Progress Notes, most often the person identified was Union counsel Kenneth Grace, Esq. (Grace).

In his Progress Notes, Dr. Arnold failed to distinguish whether the third-party representatives were present during the officers’ pre-examination interviews, the physical exams or any follow-up conferences. Instead, his notes reflected only the medical issues that he discussed with the third party and the officer.

On or about September 22, 2009, Dr. Arnold documented that he had prohibited Officer Mark Bordley’s (Bordley) private attorney from attending a scheduled physical

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1 Dr. Arnold did not testify at the hearing because after his retirement in November of 2015, he relocated to France.
examination with Officer Bordley at the MIS. On or about September 23, 2009, Officer
Bordley's attorney contacted Attorney Grace and communicated what had happened at
the MIS concerning Dr. Arnold's prohibition. Attorney Grace memorialized his
conversation with Officer Bordley's private attorney via handwritten notes. The Union
did not file a grievance or a charge against the City for Dr. Arnold's decision on
September 22, 2009.

MIS Examinations

At the MIS, both doctors and nurse practitioners may perform physical
examinations on officers. When the Department assigns either an MIS doctor or nurse
practitioner to perform a physical examination, he or she will usually conduct a pre-
examination interview with the officer to discuss that officer's medical history. If the
doctor or nurse practitioner determines that a physical examination is needed, then he
or she may proceed to examine the officer on that day or at a later time. After
conducting the pre-examination interview and/or the physical examination, the doctor or
nurse practitioner will memorialize his or her professional thoughts about the officer's
medical exam by completing the Department's "Progress Report" form.

On occasion, an officer might request to have a union representative or attorney
accompany him or her to the MIS and into the physical examination room. Since at
least 2002, the assigned MIS doctor and nurse practitioner has always allowed third
parties (e.g., union representatives and/or attorneys) to accompany officers during their
pre-examination interviews. While N.P. Greenstein has never allowed union
representatives and/or other third parties to be present in the examination room during
an injured officer's actual physical exam, in July of 2014, Dr. Arnold permitted Officer
Brenda James (James) to have her father and Attorney Grace accompany her into the examining room while Dr. Arnold performed a physical examination. Besides this July 2014 exception, Dr. Arnold never performed physical examinations on officers while a third-party (union representative, attorney or other) was present in the examining room.

**Officer Duggan’s MIS Examinations**

1. **July 2014**

On or about July 1, 2014, Officer Duggan was injured-on-duty (IOD) while attempting to place an individual into custody. On or about July 17, 2014, Officer Duggan scheduled an appointment at the MIS with Dr. Arnold but for unforeseen reasons, Officer Duggan was unable to attend that appointment.

2. **August 2014**

On or about August 7, 2014, Dr. Arnold met with Officer Duggan and instructed him about the City’s restrictions of light-duty status for returning to work. At some point during or after that meeting, Officer Duggan signed a light-duty agreement, acknowledging the light-duty instructions communicated by Dr. Arnold earlier that day. On August 26, 2014, Dr. Arnold met with Officer Duggan and performed a physical, fitness-for-duty examination. Prior to that examination, Officer Duggan complained to Dr. Arnold that he was experiencing discomfort in the areas of his right forearm, hip and right knee. Based on those complaints, Dr. Arnold examined Officer Duggan and torqued his right knee, causing him additional pain.

At some point after his August 26, 2014 physical examination with Dr. Arnold, Officer Duggan met with his personal physician Dr. Kai Mithoefer, M.D., (Dr. Mithoefer)
who injected cortisone into Officer Duggan’s knee. After his appointment with Dr. Mithoefer, Officer Duggan spoke with the MIS front desk administrators Maria and Linda, who instructed him to file a Form 26 regarding his IOD status. At some point after his conversation with Maria and Linda, Officer Duggan spoke with Lieutenant Wilbanks (Lt. Wilbanks) who also recommended that he file a Form 26. Pursuant to Lt. Wilbanks’ request, on or about August 29, 2014, Officer Duggan filed a Form 26 with the Department, which included a written account of his August 26, 2014 examination with Dr. Arnold.

3. September 2014

On September 15, 2014, Officer Duggan attended another fitness-for-duty examination at the MIS. Prior to Officer Duggan’s arrival, MIS Director Mackenzie directed Linda and Maria to prohibit anyone one other than Officer Duggan from entering the examination room. When Officer Duggan and his Union representative arrived at the MIS, they requested to enter the examination room but Linda and Maria denied the request. Officer Duggan then terminated his appointment. He scheduled another appointment for September 23, 2014, arriving on that day with Attorney Grace. Again, Linda and Maria prohibited Attorney Grace from accompanying Officer Duggan into the examination room pursuant to Director Mackenzie’s express directive.

4. October 2014

On or about October 7, 2014, Officer Duggan attended his rescheduled fitness-for-duty examination at the MIS. Attorney Grace traveled with Officer Duggan to the MIS but did not accompany him into the examination room. On that day, N. P. Greenstein performed Officer Duggan’s examination, instead of Dr. Arnold. At some
point on October 21, 2014, the City permitted Officer Duggan to return to work, which he
did on or about October 22, 2014.

3 Attorney Grace’s Record-Keeping

   In 1982, Sandulli Law Offices hired Attorney Grace and three years later, offered
him a partnership. Grace accepted the partnership and, in 1985, Sandulli Law Offices
became Sandulli Grace. Prior to 2002, Attorney Grace documented his client meetings
with unit members by summarizing the scope of those meetings in his personal
appointment books.\(^2\) In or about 2002, Attorney Grace began documenting his client
meetings with unit members by inputting that data into Sandulli Grace’s electronic,
record-keeping database. These electronic documentations were very brief (a few short
sentences) and contained only generalized information about the meetings. For
example, between 2002 and 2014, Attorney Grace made the following data entries
concerning client meetings with various unit members:

2002:
   
   - April 22 – Conference on medical hearing; Second conference on
     same.
   - May 6 – Meeting with Officer prior to medical exam; Meeting with
   City doctor to review accidental disability retirement options;
   Conference with Officer after medical appointment.

2003:
   
   - Jan. 7 – Meeting with Officer at MIS to resolve light duty status;
     Follow up conference on same.
   - May 7 – Review of cases for meeting with Officer; Meeting with
     Officer prior to medical exam; Medical exam at MIS; Follow up on
     same.

2007:

\(^2\) The Union did not offer into evidence any of Attorney Grace’s personal appointment
books.
• Jan. 8 – Preparation of position to meet with Dr. Arnold; Conference with Officer on same; Meeting with Dr. Arnold at MIS; Conference after meeting.

• Feb. 26 – Review of medicals; Attendance at medical appointment at MIS; conference after appointment with Officer.

• June 27 – Conference on medical exam; Meeting with Officer; Meeting at MIS; Conference after meeting with Officer.

• Oct. 10 – Meeting with Officer prior to appointment at MIS; Meeting with Department doctor; Follow up conference on same.

2009:

• March 30 – Preparation for medical appointment with Officer at MIS; Meeting at MIS to secure return to full duty; Follow up conference on same.

• April 13 – Conference on strategy to challenge department’s refusal to return Officer to full duty; Discussion of legal options; Meeting with Officer prior to MIS; Conference after appointment.

• Sept. 3 – Meeting with Officer prior to examination at MIS; Attend examination at MIS; conference with Officer after exam.

2010:

• Jan. 21 – Review of medicals and injury reports; Meeting with Officer; Meeting at MIS with Dr. Arnold; conference after meeting on strategy.

• July 12 – Preparation for MIS meeting with Officer; Meet with Department doctor and Officer; Follow up conference on same.

2014:

• July 14 – Medical exam for Officer at MIS; Conference with MIS on next steps for clearance.

Attorney Grace and the MIS

Whenever Union leaders would contact Attorney Grace about accompanying officers to the MIS for physical examinations, Grace would first contact the officers to confirm whether they wanted him to be present during their exams. If an officer wanted Attorney Grace to accompany him or her to the MIS, Attorney Grace would meet with the officer prior to the exam (usually on the day of the exam) and review their case.
Attorney Grace would then walk the officer into the MIS office and wait to be called into the examination room by Dr. Arnold or N. P. Greenstein. Once called into the examination room, the doctor or nurse practitioner would commence a medical history interview with the officer. When Attorney Grace attended these medical history interviews, he did not actively participate in the interview, except as a silent observer.

The majority of pre-examination interviews observed by Attorney Grace ended without the doctor or nurse practitioner conducting an actual physical exam on the officer. When no physical examination occurred, Attorney Grace would leave the examination room with the officer at the end of the interview.

**The City's 2016 Information Request**

By letter dated January 19, 2016, the City requested certain information from the Union, including:

1. Any and all names and dates Kenneth Grace accompanied BPPA members to the Office of the Occupational Health Services at the Boston Police Department from 1992 to present;
2. Any instance...where Mr. Grace was allowed to be present while a BPD doctor conducted a medical examination...[including] the name of the doctor;
3. All instances Mr. Grace waited outside the medical room while a medical examination took place.

Pursuant to the City's January 19, 2016 request for information, Attorney Grace instructed his legal secretary to conduct an electronic data search in Sandulli Grace's record-keeping system, using the search terms MIS, medical exam or medical hearing. After concluding the search on or about February 1 and 18, 2016, the results showed that there were 15 instances where Attorney Grace had either met with an officer prior to attending a scheduled appointment at the MIS, or had accompanied that officer to the MIS to "meet with Dr. Arnold" and conduct a "follow-up conference." Nothing in the
search results stated clearly whether Attorney Grace actually accompanied the officers into their physical examinations at the MIS, or if he was just present during their pre-examination interviews.\(^3\) By letter dated February 19, 2016, the Union replied to the City’s information request, stating in pertinent part:

\[\text{[T]he information below covers as many as these situations as Mr. Grace could find from 2001 to the date the BPPA alleges a change in practice occurred in September/October, 2014. Specific information going back from 1992 to 2001 is not available without doing an exhaustive hand search of multiple filing boxes which may or may not contain the relevant files. My point to you is that there are other instances over the 22 year period besides those listed below where Mr. Grace accompanied BPPA officers to the Office of Occupational Health Services and was present during their medical examinations. In each of the instances of Mr. Grace’s representation of an officer where an examination was conducted for a physical injury, the examination was conducted by either the Department’s Physician Dr. Kris Arnold or the Department’s Nurse Practitioner, Zelma Greenstein. If it is necessary for you to know which person was at each examination, please let me know and I will see if Mr. Grace can answer that question. Except where noted for 2 psychological exams...Mr. Grace was present during all the other exams...}\

2. May 7, 2003 – Officer Flores
3. November 2, 2006 – Officer Lynch

\(^3\) At the hearing, Attorney Grace testified that he did not distinguish between pre-examination interviews and actual physical exams conducted at the MIS. Instead, he testified that he conflated the term “examination” to include both the pre-exam interview and the physical examination. Attorney Grace conceded that when he accompanied officers to medical appointments at the MIS, a majority of those appointments consisted only of the interview and not the physical exam. He also conceded that between 2002 and 2014, his entries into Sandulli Grace’s electronic database did not specify whether he actually attended a pre-examination interview, a physical exam or both. Similarly, Dr. Arnold failed to clarify in his Progress Notes whether the third-party representatives who had accompanied officers to the MIS actually observed the pre-examination interviews, the physical exams or both. Consequently, because N. P. Greenstein gave unequivocal and unrepudiated testimony that she never permitted third-parties into the physical examination room, and because Attorney Grace could not testify conclusively to being present in the physical examination room every time that an officer made such a request (except in July of 2014), I do not credit his testimony that Dr. Arnold always permitted Attorney Grace to accompany officers into the physical examination room while Dr. Arnold conducted physical examinations.
4. January 8, 2007 – Officer Lynch
5. February 26, 2007 – Officer Lynch
6. June 27, 2006 – Officer Bynoe Simpson
7. October 10, 2007 – Officer Garcia
8. March 30, 2009 – Officer Hart
9. April 13, 2009 – Officer Hart
10. September 3, 2009 – Officer Trull
11. December 10, 2009 – Officer Guilford
12. January 13, 2010 – Officer Antonino
13. January 21, 2010 – Officer Antonino
14. July 12, 2010 – Officer Guilford
15. March 2, 2011 – Officer Lamb (psychological with Dr. Scott)
17. July 14, 2014 – Officer James

The Union’s 2016 Information Request

By letter dated February 1, 2016, the Union submitted a request for information from the City, seeking:

1. Any and all names and dates when the City denied a request by a Boston patrol officer to have a Union representative or attorney accompany him or her to a medical examination for the period at the Office of Occupational Health Services at the Boston Police Department from 1992 until September 15, 2014.
2. The names and dates when such requests were denied, the name of the officer and the name of the representative who was excluded from the examination.

By letter dated February 17, 2016, the City replied to the Union’s request for information, stating in pertinent part:

1. Patrolman Mark Bordley was denied union/legal representation during a medical exam on September 22, 2009.
2. Patrolman Mark Bordley was denied union representation during a medical exam on September 22, 2009. We do not have the name of the legal representative who was not allowed in.

OPINION

Timeliness
DLR Rule 15.03, 456 CMR 15.03, states that, "except for good cause shown, no charge shall be entertained based upon any prohibited practice occurring more than six months prior to the filing of a charge with the [DLR]." The Commonwealth Employment Relations Board (Board) has established that pursuant to Rule 15.03, a charging party must file a charge of prohibited practice with the DLR within six months of the alleged violation or within six months of the date the violation became known or should have become known to the charging party, except for good cause shown. Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992); Town of Lenox, 29 MLC 51, 52, MUP-01-3214 and MUP-01-3215 (Sept. 5, 2002) (citing Town of Dennis, 26 MLC 203, 205, MUP-1868 (April 21, 2000)).

The City argues that the Union's charge is untimely because Attorney Grace knew about the change in 2009 when Dr. Arnold refused to meet with Officer Bordley's private attorney and prohibited him from accompanying Officer Bordley into his physical examination at the MIS on or about September 22, 2009. Because the Union was aware of this change in 2009 but waited until 2015 to file its charge, the City argues that I should dismiss the charge based on timeliness. In contrast, the Union argues that its charge is timely because Officer Bordley's case involved a non-union, third-party representative (i.e., his private attorney) and, therefore, it never had notice of any change until Dr. Arnold denied Attorney Grace from accompanying Officer Duggan into his physical examination in September of 2014.

Because an allegation that a charge is untimely is an affirmative defense, the City has the burden of showing that the Union failed to file its charge within six months of Dr. Arnold changing the alleged practice of permitting third-party representatives to
accompany officers into their physical examinations at the MIS. See Diane McCormick
v. Labor Relations Commission, 412 Mass. 164, 171, n. 13 (1992); see also
Commonwealth of Massachusetts, 29 MLC 43, 46, SUP-4546 (Aug. 7, 2002); City of
Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000).

Here, the record shows that the City denied Officer Bordley's request to have his
private attorney accompany him to his physical examination at the MIS in September of
2009. However, there is no evidence that this decision changed a prior practice or
created a new one in 2009. Rather, Dr. Arnold's September 2014 denials of Officer
Duggan's requests triggered the statutory limitations period because that was when his
decision became inconsistent with his earlier practice of granting Officer James' request
in July of 2014. The Union knew about this inconsistency in September of 2014, and
filed its charge in March of 2015, which fell within the six month limitations period. See
Commonwealth of Massachusetts, 39 MLC 169, 171, SUP-08-5447 (Dec. 27, 2012)
(citing Town of Lenox, 29 MLC at 52)) (in unilateral change cases, the timeliness of a
charge turns on when the union knew or should have known that the employer would
implement a change affecting a mandatory subject of bargaining without satisfying its
Section 6 bargaining obligation).

10(a)(5)

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
when it unilaterally changes an existing condition of employment or implements a new
condition of employment involving a mandatory subject of bargaining without first giving
its employees' exclusive bargaining representative notice and an opportunity to bargain
to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, SUP-4784 (Oct. 9, 2003), aff'd Secretary of Administration and Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). The Board holds that the eligibility criteria for paid injury-on-duty leave is a mandatory subject of bargaining. Town of Harwich, 32 MLC 27, 30-31, MUP-01-2960 (June 27, 2005) (citing City of Medford, 28 MLC 136, 137-38, MUP-2389 (Oct. 10, 2001); City of Springfield, 12 MLC 1051, 1054, MUP-5365 (June 28, 1985)). Likewise, an employer's requirement that an employee claiming disability leave submit to an examination by a physician designated by the employer rather than an employee is also a mandatory subject of bargaining. City of Medford, 28 MLC at 137-38 (citing Town of Avon, 6 MLC 1290, 1291-92, MUP-3191 (July 12, 1979)).

To establish a violation, a union must demonstrate by a preponderance of evidence that there was a pre-existing practice, that the employer unilaterally changed that practice, and that the change impacted a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528 and MUP-2541 (April 15, 1977). To determine whether a binding past practice exists, the Board "analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue." City of Boston, 41 MLC 119, 125, MUP-13-3371, MUP-14-3466 and MUP-14-3504 (Nov. 7, 2014) (citing Swansea Water District, 28 MLC 244, 245, MUP-2436 and MUP-2456 (Jan. 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (Jan. 30, 1997)).
Here, the Union has failed to demonstrate that the City altered an existing practice or instituted a new one by denying Officer Duggan’s requests to have Attorney Grace accompany him into his physical exams at the MIS in September of 2014. There is no evidence to support the Union’s contentions that prior to September of 2014, the City consistently allowed Union representatives to attend the physical examinations of officers at the MIS, or that the City consistently failed to recognize a substantive difference between the pre-exam interview and the actual physical exam. Instead, the evidence shows that except on one occasion in July of 2014, the City has never permitted third-parties to accompany officers into the actual physical examination room. Although the Union points to Attorney Grace’s multiple instances of attending MIS medical appointments with officers decades prior to 2014, nothing in the record reveals that he ever accompanied officers into their actual physical examinations. Further, the Union cannot demonstrate that Dr. Arnold permitted exceptions like the one he allowed for Officer James in July of 2014 on a consistently sporadic or infrequent basis to establish a bargainable condition of employment. Contrast City of Newton 29 MLC 186, 188-89, MUP-2209 (April 2, 2003) (a condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time the circumstances precipitating the practice recur); contrast also, City of Boston, 21 MLC 1487, 1491-93, MUP-7470 (Dec. 1, 1994) (citing Town of Arlington, 16 MLC 1350, 1351, MUP-7128 (Nov. 9, 1989) (a consistent practice that applies to rare circumstances may become a condition of employment if it is followed each time the circumstances precipitating the practice recur)).
Consequently, because there is no evidence that the City changed a past practice or created a new one when it denied Officer Duggan's requests in September of 2014, I find that the Union has failed to meet the first element of its prima facie case. Therefore, I must dismiss the Complaint. See City of Boston, 41 MLC at 126 (union failed to satisfy first prong of unilateral change analysis); see also Town of Seekonk, 14 MLC 1725, 1732-33, MUP-6131 and MUP-6132 (May 10, 1988) (Board dismissed complaint after union failed to establish.

CONCLUSION

For the reasons stated above, I conclude that the City did not violate Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law when it denied Officer Duggan's request to have Union counsel accompany him at his fitness for duty physical examination in September of 2014.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

[Signature]

KENDRAH DAVIS, ESQ. HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Division of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.