COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:		
TOWN OF HULL		
-and-		ARB-15-4725
FRATERNAL ORDER OF POLICE LODGE 66		

Arbitrator:

Timothy Hatfield, Esq.

Appearances:

James B. Lampke, Esq.	- Representing Town of Hull
Edward J. McNelley, Esq.	- Representing Fraternal Order of Police Lodge 66

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The grievance is procedurally non-arbitrable and the grievance is denied.

Timothy Hatfield, Esq.
November 4, 2016

INTRODUCTION

On July 27, 2016, the Fraternal Order of Police, Lodge 66 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L. Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Department's Boston office on April 6, 2016.

The parties filed briefs on June 29, 2016.

THE ISSUES

1. Is the grievance arbitrable?
2. Did the Town violate the collective bargaining agreement by reducing the complement of the bargaining unit command staff (lieutenant/sergeant) to less than six (6) positions in violation of the collective bargaining agreement?
3. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement (Agreement) contains the following pertinent provisions:

Section 5 – Management Rights

A. The International Brotherhood of Police Officers and the Local recognizes that the Town of Hull through its Police Department has the paramount duty to preserve the peace, protect life and property, prevent crime, apprehend criminals, and enforce the laws within the Town of Hull. The International Brotherhood of Police Officers and the Local also recognize that the control and administration of the Police Department is vested by law in the Board of Selectmen and the Police Chief. This

responsibility imposed on the Town, by law, and enforced under the control and management of the Board of Selectmen and the Police Chief, prohibits the Town from delegating to others or otherwise dividing its obligations, authority, and duties to make management decisions.

B. The International Brotherhood of Police Officers and the Local, therefore, recognize that the management of the Town and the direction of the police force, including the right to hire, discipline, suspend, discharge for proper cause, promote, demote or transfer, to make work assignments, to determine time and length of work shifts, to determine the nature, scope and manner of performance of job duties, the right to relieve employees from duty because of lack of work or for other proper legitimate reasons, and the right to issue and enforce rules and regulations, is vested and reserved to the Town and to the Police Chief, subject however that if any portion of this AGREEMENT is found to be in conflict with any laws or ordinances it shall be null and void but all remaining portions of this AGREEMENT shall remain in effect.

Section 16 – Provisionals

The Police Chief or person acting in his stead shall endeavor to assign permanent police officers to fill in or substitute for other permanent police officers when the Police Chief or person acting in his stead determines that, by reason of absence, leave, days off, vacations, or other similar circumstances, such a permanent police officer's regular duties require replacement. When permanent police officers are unavailable for such substitution or replacement, provisional, permanent-intermittent, seasonal, or auxiliary police officers may be assigned to fill such needs. In addition permanent-intermittent officers may fill-in for or substitute for permanent officers who are on injured on duty leave; extended sick leave; maternity leave; or other authorized leaves of absences when they have been on said leave of absence for a period of thirty-day (30) days (Sic). Auxiliary Officers may only be used in accordance with statute and if a state of emergency is declared by lawful authority. In addition auxiliary officers shall wear a different style uniform than that of a Hull Police Officer and there shall be no rank structure for auxiliary officers. (effective 7/11/02)

Section 21 – Temporary Service at Higher Classification

Whenever any employee is by proper authority temporarily appointed to an authorized position, acting or provisional, or is required by direction of the Police Chief or person acting in his stead to work in an authorized position the classification of which is higher than the employee's regular classification, said employee shall receive the salary rate provided for the higher classified position which is next higher than the employee's own salary rate.

Section 25 – Grievance Procedure (In Part)

B. Procedure

Step 4 – If the grievance has not been adjusted to the satisfaction of the aggrieved employee, he/she may then appeal to the State Board of Conciliation and Arbitration provided he/she enters the appeal within five (5) days of the notice from the Board of Selectmen.

The function of the arbitrator is to determine the interpretation and application of express and specific provisions of the Agreement. There shall be no right of arbitration to obtain, and no arbitrator shall have any authority or power to award or determine any change in, modification or alteration or addition to, or detraction from, any provisions of this Agreement.

Section 29 Miscellaneous (In Part)

M. Lieutenant's Position

The Town may establish lieutenant(s) position(s). The Lieutenant(s) position(s) will be Union positions and part of the International Brotherhood of Police Officers Local 344. The Town will be allowed to reduce the present complement of six sergeants for (Sic) appointing a lieutenant(s); however the Town agrees not to reduce the complement of the bargaining unit command staff (lieutenant(s) / sergeants) to less than six (6) positions except through reduction in force or in accordance with law. Further, the Chief of Police or person acting in his stead shall endeavor to assign sergeants to fill in or substitute for other sergeants when the Chief of Police or persons acting in his stead determines that, by reason of absence, leave, days off, vacation, or other similar circumstances, such a sergeant's regular duties require replacement. When sergeants are unavailable for such substitution or replacement, a lieutenant may substitute for said sergeant.

FACTS

The Town of Hull (Town) and the Union are parties to a collective bargaining agreement that was in effect at all relevant times to this arbitration.

On April 1, 2014, Sergeant Gregory Shea (Shea) retired from active duty, reducing the number of bargaining unit command staff from six to five. At the

time of his retirement, a valid Civil Service list for promotion to the rank of sergeant existed with two names, patrolman Craig Lepro (Lepro) and patrolman Scott Saunders (Saunders). Lepro was listed first and Saunders was second on the list. The Civil Service Commission certified the list on September 15, 2014, and both men signed that they would accept the position.

Between the time of Shea's retirement and Lepro's promotion to sergeant, the Town, at various times, appointed both Lepro and Saunders as acting sergeants to fulfill operating needs of the department and to provide each employee with experience and the opportunity to be observed serving in the rank of acting sergeant.

To fill Shea's former position, the Town formed an interview panel comprised of other police chiefs, who interviewed both candidates. Ultimately, the interview panel and Hull Police Chief Richard Billings (Billings) recommended both candidates.

On October 11, 2014, during the process to fill Shea's former position, a second opening on the command staff occurred when Sergeant Detective Bart Forzese (Forzese) transferred to the Milton Police Department. In addition, during the interview process for Shea's former position, the Human Resources Division (HRD) of the Commonwealth administered another promotional exam for sergeant. Ten employees of the Hull Police Department registered and took the exam.

On November 18, 2014, the Board of Selectmen appointed Lepro as a permanent sergeant, filling Shea's former position. Saunders remained an acting

sergeant filling Forzese's former position, as the Town declined to fill the position from a one-person civil service list. Instead, the Town planned to wait for the results of the sergeant promotional exam administered in October.

On November 19, 2014, the Union filed a grievance, alleging that the Town had reduced the complement of bargaining unit command staff below the agreed upon number of six. The Town denied the grievance at all steps of the grievance procedure. On January 20, 2015, the Board of Selectmen notified the Union of the final internal denial of the grievance. On January 23, 2015, a demand for arbitration was filed by the Union with the American Arbitration Association (AAA). In July 2015, the Union withdrew its petition for arbitration from the AAA and filed a petition for arbitration with the Commonwealth of Massachusetts Department of Labor Relations (DLR), the successor to the Commonwealth of Massachusetts Board of Conciliation and Arbitration (BCA).

POSITIONS OF THE PARTIES

THE UNION

Procedural Arbitrability

The grievance in this case was filed on November 19, 2014 for an ongoing violation of the collective bargaining agreement, specifically, a failure to maintain the complement of bargaining unit command staff at six (6) positions. The grievance proceeded through Steps 1, 2, 3, and 4 of the grievance procedure as required in the collective bargaining agreement. On January 20, 2015, Christopher Olivieri (Olivieri), Chairperson of the Board of Selectmen, notified the Union in writing that the grievance was denied. On January 23, 2015, John

Parlon (Parlon), labor representative for the Union, filed for arbitration at the AAA. The parties were notified of the filing on February 3, 2015 with a written notice from the AAA.

The Town's argument that the grievance is not arbitrable is misplaced. The Town's contention is based on the fact that the Union filed the grievance (albeit within the time limits required in the collective bargaining agreement) with the AAA and not with the BCA as called for in the collective bargaining agreement. The Town, however, is equally responsible for the Union's filing at the wrong venue and cannot now rely on it to defeat the present grievance. The DLR was established in 2007. All of the BCA's duties, functions and responsibilities were consolidated into the DLR, and the BCA ceased to be in existence. The Town, represented by counsel, negotiated successor collective bargaining agreements and allowed the outdated language concerning the BCA to remain unchanged in two successor collective bargaining agreements.

Furthermore, Parlon, who filed the grievance on behalf of the Union, testified that because the BCA no longer existed, the AAA was interchangeable and a proper forum in which to file because both forums are used in Massachusetts to settle grievances. In a similar case, where the Union mistakenly filed for arbitration at the wrong agency, AAA arbitrator Robert O'Brien held that a waiver of the grievance would be an inequitable application of the collective bargaining agreement. He found that the Union's innocent mistake in filing was understandable as both entities (AAA / Labor Relations Connection) perform comparable functions and their labor arbitration rules are similar. Town

of North Providence v. North Providence Fraternal Order of Police, Lodge 13 (AAA Case Number 11390 00359 13).

Here, as in the cited case, both the AAA and the DLR service the labor management community in Massachusetts, both entities perform comparable functions and their labor arbitration rules are similar. Therefore, the Union complied with the spirit of the grievance and arbitration procedure as set forth in the collective bargaining agreement. Additionally, the Town provided no testimony or argument that it was harmed, inconvenienced or suffered a financial burden because of the filing of the arbitration at the AAA. To allow the Town to benefit from the procedural due process argument would be an inequitable application of the collective bargaining agreement.

Substantive Arbitrability

Although counsel for the Town asserted that the Town has a non-delegable right to determine the number of police command staff, and any contractual infringement upon that right cannot be enforced and is substantively non-arbitrable, he failed to produce any evidence either through testimony or documentation to support his position. He referenced a Boston Police Department case that he failed to produce at the hearing or upon request thereafter. Thus, the Town's argument is moot.

However, Arbitrator Hatfield requested that the issue be addressed in the parties' briefs. In the cited Boston Police Department case, the Supreme Judicial Court relied upon the statute creating the authority and powers of the Boston Police Commissioner when it determined that the City of Boston had the right to

transfer a union representative. The Boston Police Department case is distinguishable from the present case, because here, the Town has not enacted a Police Commissioner's statute upon which it can rely upon in support of its position. The present grievance does not challenge the Town's authority to organize the department or to make any transfer, additions, subtractions or assignments that it deems necessary to efficiently run the department. The grievance also does not challenge the Town's authority or ability to run its police department as it sees fit. However, the grievance seeks to enforce the provisions in the collective bargaining agreement agreed to by the Town and the Union concerning the proper number of supervisors to subordinates. At the current staffing levels, the collective bargaining agreement calls for six (6) command staff members to be maintained. The Town can decrease the number of command staff members by reducing the number of personnel on the force. The provision calling for six (6) command staff members to be maintained is arbitrable because it concerns a condition of employment, public policy and public safety rather than the Town's authority to effectively run its police department.

Merits

The language in Section 29 of the collective bargaining agreement is clear and can only have one meaning, that is, the Town agreed not to reduce the complement of bargaining unit command staff (lieutenants / sergeants) to less than six (6) positions. The retirement of Shea and the transfer of Forzese left the number of supervisors at four (4) thereby creating two vacancies. The

appointment of Lepro as a sergeant left one vacancy, or five supervisors instead of six, which is a violation of the collective bargaining agreement. The Town and the Union agreed, based upon public policy, public safety concerns and the effective management of the department to maintain a ration of six supervisors to patrolman.

In cases when a permanent police officer requires replacement, Section 16 of the collective bargaining agreement requires that the Town:

> shall endeavor to assign permanent police officers to fill in or substitute for other permanent officers when the Police Chief or person acting in his stead determines that by reason of absence, leave, days off, vacation, or other similar circumstances, such a permanent police officer's regular duties require replacement.

In the present case, the Police Chief determined that two permanent police officers, who also happened to be members of the command staff, needed to be replaced because of a retirement and a transfer. The only two permanent police officers in the Hull Police Department, who were qualified to fill those positions at that time, were Lepro and Sanders. Both were on an active, certified Civil Service list for promotion to sergeant, had been vetted by the Town, interviewed by the Board of Selectmen, held the position of provisional sergeant, and had been recommended by the Police Chief. The plain and legal meaning of the word "shall", as used in Section 7 of the collective bargaining agreement, required the Town to appoint both Lepro and Saunders to the permanent position of sergeant as replacements for Shea and Forzese. Even though there was no impediment against doing so, the Town violated the collective bargaining

agreement by not appointing Saunders to fill one of the vacancies as a permanent sergeant.

Conclusion

For all the reasons stated above, the arbitrator should find that the grievance is arbitrable, and that the plain language of the collective bargaining agreement, and the intent of the parties demonstrates that the Town violated the collective bargaining agreement. The grievant should be made whole by being promoted retroactively to the rank of permanent sergeant with all of the back pay, benefits and privileges to which he would have been entitled, if the Town had not violated the collective bargaining agreement.

THE CITY

Procedural Arbitrability

The collective bargaining agreement clearly sets forth the grievance procedure. If the Union is not satisfied with the Town's response, after the Union has exhausted the initial internal steps of the grievance procedure, it may file for arbitration. The Union's demand for arbitration must be filed with the BCA within five days of the Town denial of the grievance at Step 3. The collective bargaining agreement does not provide for grievances of this nature being filed with the AAA.

The Union contends that because the Legislature transferred the duties and responsibilities of the BCA to the DLR, there was no place to file the demand for arbitration except the AAA. This argument completely ignores the fact that the BCA's duties and responsibilities were transferred to the DLR, an agency

within the family of state labor agencies. It is nothing more than a name change from BCA to DLR. Under the Acts of 2007, c. 145, the Legislature reconstituted the various labor and employment-related agencies of the Commonwealth as the DLR. The DLR has all the legal powers, authority, responsibilities, duties, rights and obligations previously conferred on the LRC, JLMC and BCA, and is clearly the successor to the BCA.

It does not matter why the Union chose to file with the AAA because the collective bargaining agreement clearly vests jurisdiction with a state agency not the AAA. Testimony at the hearing revealed that the Union knew that the DLR had assumed the duties and responsibilities of the BCA. Additionally, if there was any lingering doubt on the part of the Union about where to file, it could have contacted the Town to discuss where to file for arbitration. On July 27, 2015, the Union withdrew its errant filing with the AAA and then filed the demand for arbitration with the DLR, which was some six months late. The Union's withdrawal and subsequent filing with the DLR shows that it was aware that its filing with the AAA was incorrect, and that the DLR was the proper agency for its filing.

In addition to the incorrect filing, the matter also is procedurally non-arbitrable because the Union did not file the initial grievance as far back as April 2014, when the Town first appointed Lepro and Saunders as acting sergeants. If the Town's appointment of the grievant as an acting sergeant in November 2014, was, as claimed by the Union, a reduction in the complement of command staff, then applying the Union's logic, the appointment of Saunders as an acting

sergeant in April 2014 and May 2014 would have also caused a reduction in the number of command staff. Therefore, the Union was obligated to file its grievance back in April and its filing in November is untimely.

It is well settled in arbitral law that an arbitrator derives his or her authority from the collective bargaining agreement. An arbitrator who does not observe the procedural steps of a collective bargaining agreement exceeds his or her authority to adjudicate a matter. The language of the parties' collective bargaining agreement specifically states that the arbitrator cannot change or modify the agreement. The initial grievance was untimely filed, the demand for arbitration was incorrectly filed with the AAA, and then untimely filed at the DLR. The arbitrator is without jurisdiction and has no authority to hear this case and rule on the merits. Therefore, the grievance is procedurally non-arbitrable and should be denied on that basis.

Substantive Arbitrability

The grievance asserts that the Town violated the collective bargaining agreement by reducing the command staff. This allegation can also be viewed as a complaint about the Town's appointment of an acting sergeant. As stated at the arbitration hearing, it is the Union's position that the Town could only permanently appoint sergeants and could not appoint acting sergeants. Either way, under any reasonable view of the subject matter of the grievance, it is not arbitrable, as the actions taken by the Town are well within its inherent non-delegable management rights.

The Management Rights Clause reiterates that the control and administration of the police department is vested by law to the Board of Selectmen and the Police Chief. The provision states that the right to hire, discipline, suspend, discharge for proper cause, promote, demote, or transfer, and to make work assignments is vested and reserved to the Town and the Police Chief.

Courts have recognized that staffing requirements purportedly set forth in a contract represent an "intrusion into that type of governmental decision which should be reserved for the sole discretion of the elected representatives of all the citizens of the Town." Billerica v. International Association of Firefighters, 415 Mass. 692, 695 (1993). In the instant case, there was at most a temporary assignment of the grievant to the position of acting sergeant, until the Town was ready to make a permanent assignment in accordance with Civil Service Law. The fact that the Town chose to make a temporary assignment is a non-delegable, discretionary prerogative of management and therefore, beyond the arbitrator's authority. See City of Boston v. Boston Police Superior officers Federation, 52 Mass App. Ct. 296, 298 (2001).

The premise of the Union's grievance, no matter how it is couched, is that the Town had to make a permanent promotion of a patrolman to sergeant and could not make a patrolman an acting sergeant. This premise conflicts with the inherent non-delegable rights of management and thus, cannot be made the subject of a grievance. Consequently, the grievance is substantively non-arbitrable.

Merits

Section 29 M (Lieutenant's Position) of the collective bargaining agreement does not create a command staff. It refers to the command staff, which includes those positions covered by the collective bargaining agreement who exercise supervisory authority, including sergeants and lieutenants. The collective bargaining agreement refers to a command staff of six, and the Town has maintained that number at all times. The collective bargaining agreement clearly recognizes that there may be employees working out of grade in an acting position. Specifically, Section 21 (Temporary Service at Higher Classification) outlines the procedure for such assignments. Noteworthy by its absence is any language which restricts how long someone can be working in an acting or provisional position.

Additionally, G.L. c. 31, Section 15 (Civil Service/Provisional Promotions), provides for acting or provisional appointments and promotions. Section 15 states that:

> An appointing authority may ... make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment. ...

Simply stated, nowhere does the collective bargaining agreement or Chapter 31 suggest that acting promotions cannot be made. In fact, the collective bargaining agreement and Chapter 31 clearly provide the authority for the Town to make provisional or acting promotions, especially when, as here, there is a list with only one name.

In this instance, the grievant, as an acting sergeant, has all the duties, responsibilities, rights and authority of a permanently promoted sergeant. An acting sergeant is as much a member of the command staff as a permanent sergeant. The Town is not required to fill vacancies in the rank of sergeant with permanent appointments. The Union's position that the Town must make a permanent promotion to the position of sergeant is a misreading of the collective bargaining agreement and is clearly not supported by the law.

Recognizing that it had a short list (only two names on the list), the Town only intended to fill the one vacancy that existed at the beginning of the selection process, Shea's former position. The second vacancy did not come up until October when Forzese's transfer to Milton became effective. Were the Town to fill the vacancy created by that transfer from the same list, it would have no choice to make because there was only one name remaining after Lepro's promotion. The Town had a practice of never appointing from a list of one and was well aware that ten patrolmen had registered to take the upcoming promotional exam. The law does not require an appointment to be made from any list and certainly not from a list of less than three names. Furthermore, the Union even acknowledged at the hearing that the Town is not required to make an appointment from a short list.

Finally, Section 16 (Provisionals) of the collective bargaining agreement does not require a permanent appointment to be made, and the Union's reliance on this section is misplaced. As seen in the plain language of Section 16, the section limits the use of provisional police officers for various functions. It is a

complete stretch to interpret the language to mean that the Town must only make permanent promotions and cannot make acting promotions. It is even questionable whether this section applies where the filling or substitution is for a vacancy in a position such as sergeant, as opposed to when a permanent police officer is absent due to "absence, leave, days off, vacations, or other similar circumstances." The language refers to a temporary absence, not a permanent vacancy. A vacancy is not the type of absence covered by this section. To the extent that the language is even applicable, the Town is acting in accordance with the language because it assigned a permanent police officer (Saunders) to fill in or substitute for another permanent police officer, in this case, Forzese.

Conclusion

Based on the evidence presented, the grievance should be denied.

OPINION

The issues before me are:

1. Is the grievance arbitrable?
2. Did the Town violate the collective bargaining agreement by reducing the complement of the bargaining unit command staff (lieutenant/sergeant) to less than six (6) positions in violation of the collective bargaining agreement?
3. If so, what shall be the remedy?

For the reasons stated below, I find the grievance to be procedurally non-arbitrable and the grievance is denied.

The parties' collective bargaining agreement states that if a grievance has not been resolved to the satisfaction of the aggrieved employee, he/she may then appeal to the BCA, a state agency. In this case, the Union unilaterally filed for arbitration with the AAA. The AAA is a private company that provides labor relations services, including arbitration, to parties who have authorized its use through their collective bargaining agreements. It is not a state agency, as authorized by the parties' collective bargaining agreement. The rights, obligations, and functions of the former BCA now reside by statute with the DLR. While the Union is correct that the BCA no longer exists in name, and the Union may have been unsure as to where to file for arbitration, it could have taken steps to ascertain the appropriate location to file for arbitration, or even asked the Town for its position on the appropriate location to file, instead of unilaterally selecting a private, non-state agency without the authority to hear the case. By the time the Union fixed its mistake and filed for arbitration at the DLR, it was some six months later, well beyond the five-day limit set forth in the collective bargaining agreement.

As is the case in all arbitrations, the authority for an arbitrator to hear and rule on a grievance originates in the parties' collective bargaining agreement. Included in that grant of authority from the parties are some specific limits and restrictions. In this case, the collective bargaining agreement states that: "the arbitrator shall have no authority or power to award or determine any change in, modification or alteration or, addition to, or detraction from, any of the provisions of this Agreement." Working within the grant of authority provided to me, I do not

have the power to authorize the filing of a grievance for arbitration nearly six months beyond the stated timeline, as it would be a modification or alteration of the parties' collective bargaining agreement.

Even if I had the authority to excuse the Union's late filing of this grievance with the DLR, which, as stated above, I do not, the grievance is procedurally non-arbitrable for an additional reason. The Union filed this grievance on November 19, 2014, the day after the Board of Selectmen permanently appointed Lepro as a sergeant to fill Shea's former position and declined to permanently appoint Saunders to fill Forzese's former position. Instead, Saunders remained an acting sergeant. The Union claims that the Town's actions reduced the number of bargaining unit command staff below the agreed-upon level of six. In effect, the Union is arguing that the Town's use of an acting sergeant in the command staff does not count towards the requirement of six bargaining unit command staff as outlined in the collective bargaining agreement. Under this theory, when Shea retired and the Town appointed both Lepro and Saunders as rotating acting sergeants, the Union was aware that the Town had allegedly reduced the bargaining unit command staff below the required six members. The grievance procedure outlined in Section 25 of the parties' collective bargaining agreement states that: "if the grievance is not resolved informally, by the employee and the immediate supervisor, the grievance committee must present the grievance in writing to the Police Chief within thirty (30) days of the date that the facts giving rise to the grievance occurred." Shea's retirement took effect on April 1, 2014, the appointment of Lepro as acting sergeant became effective on April 10, 2014,

and Saunders' appointment took effect on May 25, 2014. To be timely filed, the grievance should have been filed by May 10, 2014, or arguably at the latest by June 25, 2014, thirty days after Saunders' appointment. Instead, the Union waited to file the grievance until November 19, 2014, when the Town declined to appoint Saunders to permanently fill the Forzese's former position, thus, the filing of the grievance was untimely and comprises a second reason for my finding that the grievance is procedurally non-arbitrable.

Having found the grievance to be procedurally non-arbitrable for two distinct reasons, I decline to rule on the Town's substantive arbitrability arguments, or the merits of the grievance.

AWARD

The grievance is procedurally non-arbitrable and the grievance is denied.

Timothy Hatfield, Esq.
November 4, 2016