

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of	*	
	*	
CITY OF SOMERVILLE	*	Case No.: MUP-16-5023
	*	
and	*	Date Issued: August 21, 2017
	*	
SOMERVILLE POLICE EMPLOYEES	*	
ASSOCIATION	*	
	*	

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Hearing Officer:

Kathleen Goodberlet, Esq.

Appearances:

Shannon T. Phillips, Esq.	-	Representing the City of Somerville
Kristen A. Barnes, Esq.	-	Representing the Somerville Police Employees Association

HEARING OFFICER'S DECISION

SUMMARY

1  
2 The issue in this case is whether the City of Somerville (City) violated Section  
3 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter  
4 150E (the Law) by failing to bargain in good faith with the Somerville Police Employees  
5 Association (Association or Union) by unilaterally changing the parties' practice of  
6 bypassing Step 1 of the grievance procedure for Association grievances filed in writing  
7 with the Police Chief. For the following reasons, I find that by processing and deciding

1 the Association's December 29, 2015 grievance at Step 1, rather than at Step 2, the  
2 City violated the Law as alleged.

3 STATEMENT OF THE CASE

4 On December 31, 2015, the Association filed a Charge of Prohibited Practice  
5 (Charge) with the Department of Labor Relations (DLR), alleging that the City had  
6 engaged in prohibited practices within the meaning of Sections 10(a)(3) and Section  
7 10(a)(1) of the Law. Following an investigation,<sup>1</sup> the DLR issued a three-count  
8 Complaint of Prohibited Practice (Complaint) and Partial Order of Dismissal on March  
9 16, 2016. On March 25, 2016, the Association filed a request for review of the partial  
10 dismissal with the Commonwealth Employment Relations Board (CERB). On April 15,  
11 2016, the City filed its response. On June 1, 2016, the CERB issued a ruling concluding  
12 that there was probable cause to believe that an additional violation had occurred, and  
13 the DLR issued an Amended Complaint of Prohibited Practice alleging that the City: 1)  
14 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally  
15 changing the practice of allowing Traffic Bureau officers to stay in their bids for at least  
16 two years regardless of seniority; 2) violated Section 10(a)(3) and, derivatively, Section  
17 10(a)(1) and of the Law by discriminating against Michael McGrath (McGrath) for  
18 engaging in concerted, protected activity; 3) violated Section 10(a)(4) of the Law by  
19 discriminating against McGrath for participating in DLR proceedings; and 4) violated  
20 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in  
21 good faith with the Association by unilaterally changing the practice of omitting Step 1 of

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<sup>1</sup> During the investigation, the Association amended the charge to allege additional violations of Sections 10(a)(4) and 10(a)(5).

1 the grievance procedure set forth in Article VII of the Agreement and instead proceeding  
2 directly to Step 2.

3 The City filed an Answer to the Complaint on June 3, 2016. I conducted a  
4 hearing on July 7, August 25, and September 8, 2016, at which both parties had the  
5 opportunity to be heard, to examine witnesses and to introduce evidence. On November  
6 15, 2016, the Association withdrew the first three counts of the Complaint. The parties  
7 subsequently filed post-hearing briefs on November 18, 2016 on the issue of whether  
8 the City unilaterally changed a past practice of omitting Step 1 of the grievance  
9 procedure. Based on the record, which includes witness testimony, my observation of  
10 the witnesses' demeanor, stipulations of fact, and documentary exhibits, and in  
11 consideration of the parties' arguments, I make the following findings of fact and render  
12 the following opinion.

### 13 STIPULATED FACTS

14  
15 The parties agreed to the following stipulations of fact:<sup>2</sup>

#### 16 Background

- 17  
18 1. The City is a public employer within the meaning of Section 1 of the  
19 Law.
- 20  
21 2. The Association is an employee organization within the meaning of  
22 Section 1 of the Law.
- 23  
24 3. The Association is the exclusive bargaining representative for police  
25 officers employed by the City in its Police Department (Department) as  
26 patrol officers.  
27

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<sup>2</sup> I have included the parties' stipulations pertaining to the issue to be decided, but omitted the stipulations relative to the withdrawn counts. Stipulations 11-59 listed various DLR cases that the Association had filed against the City, and they are immaterial to this decision. I also have made minor technical edits to the parties' stipulations for consistency and clarity.

- 1       4. The Association and the City are parties to a collective bargaining  
2       agreement for the period July 1, 2011 to June 30, 2012 (Agreement).
- 3
- 4       5. By its terms, the 2011-2012 Agreement was extended through June 30,  
5       2014 while the parties negotiated over a successor agreement.
- 6
- 7       6. From in or about November 2014 through July 7, 2016, the parties have  
8       been engaged in proceedings before the Joint Labor Management  
9       Committee.
- 10
- 11       7. Article VII of the Agreement referenced in paragraphs 4 and 5,  
12       sets forth the grievance and arbitration procedure, stating in pertinent  
13       part:
- 14

15               **Section 2.** Grievances shall be processed as follows:

16

17               Step 1. Grievances may be first presented by the employee(s)  
18               and/or the Association to a senior Captain designated by the Chief  
19               within thirty (30) days of the date of the grievance or of the date  
20               the employee first acquired knowledge of its occurrence, and an  
21               earnest effort shall be made within the next forty-eight (48) hours  
22               to adjust the grievance in an informal matter.

23

24               This step may be omitted by mutual agreement.

25

26               Step 2. If the grievance is not resolved in Step 1, the grievance  
27               shall be then reduced to writing by the Association and  
28               presented to the Chief of Police. The Chief shall meet with the  
29               Association's Grievance Committee and/or the employee(s)  
30               involved with [sic] five (5) days from the time the grievance is  
31               presented to him to discuss and attempt to adjust the grievance,  
32               and he shall answer the grievance within ten (10) days after  
33               meeting in writing.

34

35                               \* \* \*

36

37               **Section 4.** An employee may present a grievance directly to the  
38               City, commencing at Step 2, provided that in such event the City,  
39               by its Chief of Police, shall immediately notify the President or  
40               Vice President of the Association of the initiation of and of the  
41               proposed disposition of such individual grievance. Association  
42               representatives shall be afforded the opportunity to be present  
43               at any conference between the aggrieved employee and the City  
44               relative to such grievance and shall also be given the opportunity  
45               to confer with the City relative to such grievance....

- 1 8. Article XVIII of the Agreement referenced in paragraphs 4 and 5, sets  
2 forth the job bidding procedure, stating in pertinent part:  
3

4 Section 3(a). .... Notwithstanding the foregoing provisions relating  
5 to the right and option of employees to pick the job assignments  
6 listed therein, employees who bid for CPO and Traffic Bureau job(s)  
7 on the occasion of the January pick, and who are assigned such  
8 job(s) because of their seniority, shall not be permitted to bid out of  
9 the CPO [Community Police Officer] or Traffic Bureau Job (or their  
10 shift selection) for the two (2) year period of their CPO or Traffic  
11 Bureau pick. Employees so bidding for and assigned to the CPO/or  
12 Traffic Bureau job because of the promotion, retirement, resignation  
13 or an employee in such job or who is assigned to the Detective  
14 Bureau from such job, as example, shall similarly not be permitted to  
15 bid out of the CPO or Traffic Bureau job (or their shift/district  
16 selection) for the remainder of their then two (2) year bid/pick.  
17

18 All employees assigned as CPO's [sic] or to the Traffic Bureau  
19 immediately prior to the January job pick/bid shall be entitled to rebid  
20 or repick their CPO or Traffic Bureau position and may not be outbid  
21 for the CPO or Traffic Bureau ward assignment (or their shift  
22 selection) on the occasion of the January, 2008 bid/pick, whether  
23 they are senior employees or not at the time so bidding or picking,  
24 and similarly shall not be permitted to bid out of the CPO or Traffic  
25 Bureau job (or their shift selection) for the two (2) year period of their  
26 CPO or Traffic Bureau pick. This shall also be the case with respect  
27 to future bid/picks for the CPO or Traffic Bureau job. Effective upon  
28 implementation of the new shift rotation, delete the word "ward" as  
29 found herein and insert the word "district" in its place.  
30

31 It is the intent and purpose of these provisions that employees who  
32 bid/pick for the CPO or Traffic Bureau job and who are assigned to  
33 such job (and shift/district selection) by their seniority, may not be  
34 outbid, on the occasion of the next job/district pick/bid, for such job  
35 (inclusive of ward and shift selection), whatever his/her then  
36 seniority, and this in order to assure that an employee's continuity in  
37 a job bid/pick for the CPO or Traffic Bureau job shall continue for at  
38 least two (2) job bids/pick cycles. It is also understood that once an  
39 employee assigned to the CPO or Traffic Bureau job has served four  
40 (4) years in that job (or more than two (2) years but less than four  
41 (4) years if so assigned to fill a vacancy), he/she may be outbid by  
42 seniority for the CPO or Traffic Bureau job on the occasion of the  
43 next job bid/pick.  
44

- 45 9. Shift bid procedures are mandatory subjects of bargaining.

1 10. Grievance and arbitration procedures are mandatory subjects of  
2 bargaining.

3  
4 \* \* \*

5  
6 Pre-2014

7  
8 60. On or about November 2009, McGrath became Association President.

9  
10 61. On or about October 2014, David Fallon (Fallon) became Police Chief.

11  
12 62. On or about October 2014, Stephen Carrabino (Carrabino) became  
13 one of the Department's two Deputy Chiefs.

14  
15 2014

16  
17 63. In or about October 2014, Michael Kiely (Kiely) vacated his position in  
18 the Traffic Bureau due to his promotion to sergeant.

19  
20 64. On November 3, 2014, the Department posted for Department-wide bid,  
21 the position vacated by Kiely in the Traffic Bureau.

22  
23 65. On November 3, 2014, McGrath bid on the Traffic Bureau position.

24  
25 66. In or about November 2014, Fallon appointed McGrath to the Traffic  
26 Bureau position.

27  
28 2015

29  
30 67. McGrath remained in the Traffic Bureau position during the January  
31 2015 annual bid.

32  
33 68. On December 28, 2015, Patrol Officer Steve Johnson (Johnson)  
34 requested that the Association file a grievance on his behalf disputing  
35 that McGrath's Traffic Bureau position was not available for bid during  
36 the annual January 2016 bids.

37  
38 69. On December 29, 2015, McGrath filed Johnson's grievance with Chief  
39 Fallon.

40  
41 70. By e-mail on December 29, 2015, McGrath requested that Chief Fallon  
42 notify the Association's Executive Board prior to any meeting between  
43 the Department and Johnson concerning the grievance referenced in  
44 paragraph 22, so the Association could be represented as set forth in

Article VII, Section 4 of the Agreement.<sup>3</sup>

By e-mail on December 30, 2015, Deputy Chief Carrabino stated to McGrath that, because the grievance could be resolved at Step 1, outlined under Article VII of the CBA, a meeting was not necessary.

#### 2016

71. By letter dated January 2, 2016, McGrath objected to Deputy Chief Carrabino's December 30, 2015 ruling, requested to meet with the City to discuss Johnson's grievance, and asserted that the Association filed the grievance at Step 2, not at Step 1.

72. In January of 2016, McGrath's Traffic Bureau position was available for bid during the annual bidding process.

### FACTUAL FINDINGS

#### Background

The City and the Association are parties to a collective bargaining agreement for the period July 1, 2011 through June 30, 2012 (Agreement), as extended by agreement through June 30, 2014.<sup>4</sup> Article VII, described in relevant part in stipulation 7, contains the Grievance and Arbitration Procedure. Section 1 of Article VII defines a grievance "as a complaint between the Employer and the Association and/or any employee(s) involving an alleged violation of a specific provision of this Agreement."

Section 2 of Article VII, unchanged since the 2000-2004 Agreement, sets forth the steps of the grievance process, including Steps 1 and 2. Section 2 provides that either the Association or individual bargaining unit members "may" file a Step 1

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<sup>3</sup> There is no grievance referenced in paragraph 22 of the parties' stipulations, or in the June 1, 2016 Amended Complaint.

<sup>4</sup> The City and the Association are also parties to the following agreements:

- July 1, 2000 through June 30, 2004 (2000-2014 Agreement);
- July 1, 2004 through June 30, 2008 (2004-2008 Agreement);
- July 1, 2008 through June 30, 2009 (2008-2009 Agreement); and
- July 1, 2009 through June 30, 2011 (2009-2011 Agreement).

1 grievance with “a senior Captain designated by the Chief.”<sup>5</sup> It also states that the parties  
2 may omit Step 1 by “mutual agreement.” Section 2 does not require grievants to file  
3 Step 1 grievances in writing, or the City to respond in writing. Nor does it require the  
4 City to notify the Association about Step 1 grievances. In contrast, Step 2 provides that  
5 the Association “shall” reduce a grievance to writing and present it to the Chief of Police  
6 if it is not resolved at Step 1. The Chief of Police is then required to meet with the  
7 Association’s Grievance Committee “and/or the employee(s) involved” within 5 days.  
8 Within 10 days of the meeting, the City must provide a written answer to the grievance.  
9 The language in Article VII, Section 2 that describes Steps 1 and 2 does not refer to the  
10 Deputy Chiefs.<sup>6</sup>

11 Section 4 of Article VII is more expansive than Section 2, and provides that  
12 individual bargaining unit members “may present a grievance directly to the City,  
13 commencing at Step 2” (Section 4 grievances).<sup>7</sup> Section 4 grievances need not be in  
14 writing. Because Section 4 broadly allows employees to file grievances with “the City,”  
15 bargaining unit members may present grievances to the Deputy Chiefs at Step 2.  
16 However, Section 4 requires the Chief to immediately notify the Association President or  
17 Vice President of such grievances. Additionally, Section 4 requires the City to give

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<sup>5</sup> The City’s post-hearing brief claim that Step 1 allows officers to file grievances directly with the administration, including the Deputy Chiefs, is factually and legally incorrect. The language of Step 1 explicitly states that individual officers may file with a Captain designated by the Chief. It does not refer to either the administration, or to the Deputy Chiefs.

<sup>6</sup> Since creating the Deputy Chief position in 2008, the City has not proposed amending the language of Article VII during successor negotiations to include explicit references to the Deputy Chief position.

<sup>7</sup> It is unclear whether the parties added Section 4 to Article VII in the 2004-2008 Agreement or the 2000-2004 Agreement because the parties only submitted Article VII, Sections 1 and 2 of the 2000-2004 Agreement. However, this is not a material fact.



1 Association Representatives "the opportunity to confer with the City relative to such  
2 grievance," and to allow the Association to be present at any conference between the  
3 aggrieved employee and the City.

4 The Police Department employs, in part, one Chief, two Deputy Chiefs, and four  
5 Captains. In recent years, the City has employed the following Police Chiefs: Anthony  
6 Holloway (Holloway) (2008-2010); Thomas Pasquarello (Pasquarello) (2010-2013);  
7 Charles Femino (Femino) (2013-2014); and David Fallon (Fallon) (October 2014-  
8 present). Michael Cabral (Cabral) served as Acting Chief for a period in 2010 and  
9 presently holds the rank of Captain.<sup>8</sup> The City also has employed the following Deputy  
10 Chiefs: Cabral (2008-2010; 2011-2014); Paul Trant (Trant) (September 2014-present);  
11 and Carrabino<sup>9</sup> (October 2015-present). Chief Fallon meets daily with Deputy Chiefs  
12 Carrabino and Trant. Trant's responsibilities include supervising the Detectives and  
13 covering budgetary issues. Carrabino's responsibilities include supervising the Traffic  
14 Bureau, Community Policing, and the Patrol Division. In the Traffic Bureau, there is no  
15 Captain between Deputy Chief Carrabino and the Lieutenants.<sup>10</sup>

16 The Department generally assigns Patrol Officers to positions based on seniority  
17 through an annual bidding process held each January or February. If a vacancy arises  
18 after the January bid, the Department posts a bid notice for that position and then fills it  
19 by seniority. Article XVIII, Section 2 provides that seniority picks through the bid process  
20 are for one year. However, Article XVIII, Section 3(a), described in stipulation 8,

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<sup>8</sup> Cabral is the President of the Somerville Police Superior Officers Association.

<sup>9</sup> Carrabino has worked for the Department since 1995. He has held the ranks of Police Officer, Sergeant, Lieutenant, Captain, and Deputy Chief.

<sup>10</sup> For consistency throughout this decision, I use the term Traffic Bureau, which the parties also refer to interchangeably as the Traffic Bureau, Division, and Unit.

1 provides that patrol officers assigned as Traffic Bureau or Community Police Officers  
2 may not bid out of those positions for two years. Subsequently, an officer may continue  
3 in those positions for an additional two years regardless of seniority, but after four years  
4 may be outbid by seniority. In addition, the Chief makes some appointments that are not  
5 by seniority, referred to as a "Chief's Picks."

6 Grievances Filed Before December of 2015

7 The parties' practice prior to December of 2015 was for the Association President  
8 to file Association grievances directly at Step 2 and for the Police Chief to process and  
9 decide those grievances at Step 2, after discussing them with the Association President.  
10 The evidence does not establish that the parties had any of the following practices prior  
11 to December of 2015: allowing only grievances not resolved at Step 1 to progress to  
12 Step 2; allowing Deputy Chiefs to process and decide Step 1 grievances and Step 2  
13 grievances filed by the Association; classifying Association grievances filed in writing  
14 with the Police Chief as Step 1 grievances; allowing the Police Chief or Deputy Chiefs to  
15 choose whether Association grievances filed in writing with the Chief should be resolved  
16 at Step 1 or Step 2; or allowing the City to resolve Step 2 grievances at Step 1 when the  
17 City believed that an informal resolution was appropriate.<sup>11</sup>

18 Step 2 Grievances

19 Although the parties have no written agreement allowing the Association to  
20 routinely bypass Step 1 of the grievance procedure described in Article VII, Section 2 of  
21 the Agreement, McGrath has filed all Association grievances directly at Step 2, in writing

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<sup>11</sup> The City's arguments to the contrary have no factual support.

1 with the Police Chief, since becoming Association President in 2009.<sup>12</sup> In at least seven  
2 instances where McGrath filed Association grievances at Step 2, neither the Association  
3 nor the individuals involved previously had filed at Step 1.<sup>13</sup> Each time McGrath filed  
4 directly with the Police Chief at Step 2, he did so without discussing bypassing Step 1.  
5 Regardless, a series of Police Chiefs between 2012 and 2015 never objected to  
6 McGrath's filing Association grievances directly at Step 2. Rather, with one exception,  
7 each time after McGrath filed a written grievance directly with the Police Chief, the  
8 Police Chief discussed the matter with McGrath before deciding the grievance. In the  
9 one instance where a Police Chief initially ignored an Association grievance, the City  
10 ultimately acknowledged its' obligations to meet with the Association and to answer  
11 grievances pursuant to Article VII of the Agreement. At no time prior to December of  
12 2015 did Deputy Chief process and decide grievances filed at Step 2 by the  
13 Association. Below are instances where McGrath filed Association grievances directly at  
14 Step 2:<sup>14</sup>

- On February 28, 2012, McGrath filed with Pasquarello a written grievance at Step 2 on behalf of 90 bargaining unit bargaining members regarding the posting of vacation schedules. Pasquarello and McGrath met and resolved the grievance.

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<sup>12</sup> The Department has employed McGrath since 1994 as a patrol officer. He has held positions in the Patrol Division, Traffic Bureau, and as a Detective. Over the years, he has served as Association President, Vice President, and Secretary.

<sup>13</sup> In its post-hearing brief, the City argues that McGrath did not know whether officers initially filed any of the Step 2 grievances at Step 1. However, the Agreement does not require the City to tell the Association about Step 1 grievances, and the City presented no evidence that any of the employees involved in the grievances actually filed at Step 1. Therefore, I dismiss this portion of the City's argument.

<sup>14</sup> There is no evidence in the record of any other grievances that arose before December 27, 2015.

- 1 • On March 13, 2012, McGrath filed with Pasquarello a written grievance at Step 2  
2 regarding identification officer duties. Pasquarello and McGrath met and resolved  
3 the grievance.  
4
- 5 • On June 30, 2013, McGrath filed with Pasquarello written grievances on behalf of  
6 Officers James Slattery, Timothy Van Nostrand, and Marc Difava regarding  
7 overtime pay. Pasquarello and McGrath met regarding the grievances.  
8
- 9 • On October 15, 2013, McGrath filed with Pasquarello a written grievance on  
10 behalf of the bargaining unit regarding arson overtime. Pasquarello and McGrath  
11 met, and, subsequently, Femino and McGrath met in an attempt to resolve the  
12 grievance.  
13
- 14 • On May 22, 2014, McGrath filed with Femino a written grievance on behalf of  
15 certain bargaining unit members regarding overtime pay. Femino and McGrath  
16 met and resolved the grievance by providing overtime pay to the involved  
17 officers.  
18
- 19 • By email dated June 3, 2015, McGrath filed with Fallon a written grievance dated  
20 June 2, 2015 regarding the drug testing of an officer. After Fallon failed to meet  
21 with the Association or respond to the grievance, the Association filed a  
22 prohibited practice charge with the DLR. On September 1, 2015, the parties  
23 settled the matter and the City agreed to meet with the Association and to  
24 answer grievances pursuant to the time limits set forth in Article VII of the  
25 Agreement. The June 2, 2015 grievance is currently being held in abeyance at  
26 Step 3.  
27
- 28 • By email dated June 26, 2015, McGrath filed with Fallon a written grievance  
29 dated June 25, 2015 regarding the length of a Chief's Pick position assigned to  
30 the Alpha Unit. Fallon discussed the grievance by phone with McGrath, and by  
31 email to McGrath, granted the grievance.  
32

33 In addition to the grievances that the Association filed directly at Step 2, the  
34 record contains evidence of one instance prior to 2015 where an individual bargaining  
35 unit member filed a grievance directly with the Chief of Police. On May 30, 2012, James  
36 Hyde (Hyde) filed a Section 4 grievance at Step 2, and Pasquarello processed the  
37 grievance in accordance with Section 4 of the Agreement. After Hyde filed a written  
38 grievance regarding an overtime hours pilot program, Pasquarello provided McGrath

1 with a copy of Hyde's grievance, and met with McGrath.<sup>15</sup> By letter dated June 7, 2012,  
2 Pasquarello responded to Hyde's grievance.

3 Step 1 Grievances

4 The parties had no practice prior to December of 2015 of allowing Deputy Chiefs  
5 to process grievances filed at Step 1. Although Deputy Chief Carrabino testified that he  
6 processes Step 1 grievances, I do not credit him on this point. Carrabino testified that  
7 while he takes part in "pretty much every phase" of the grievance process, he prefers to  
8 deal with grievances "at Step 1, where [he] can resolve a problem without having to  
9 document it." Carrabino's first example of a Step 1 grievance that he processed  
10 involved facts that occurred in 2016. Officer Robert Hickey (Hickey) called Carrabino in  
11 August of 2016 to say that he wanted to file a grievance. Carrabino invited Hickey to his  
12 office, where Hickey complained that it was unfair that certain officers had held Traffic  
13 Bureau positions for a while, but had not completed the educational requirements  
14 necessary to maintain their positions. Carrabino told Hickey that he agreed completely,  
15 and assured him that he would take action. Carrabino did not notify the Association of  
16 Hickey's "grievance" or the resolution.

17 The second example that Carrabino offered involved a conversation that  
18 occurred at an unidentified point in time with a non-unit member about an issue that  
19 impacted two bargaining unit members, but which is not addressed in the Agreement.  
20 Lieutenant Lavey, who is not a bargaining unit member, approached Carrabino on  
21 behalf of himself and two patrol officers regarding the number of days off given to  
22 officers transitioning to a new schedule following a bid (transition days). After Carrabino

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<sup>15</sup> The record does not indicate whether Pasquarello also met with Hyde. However, this fact is immaterial.

1 consulted with the IT person, Officer Robert Ankenbauer (Ankenbauer), and confirmed  
2 that the practice was to grant two transition days, not one transition day, Carrabino  
3 granted Lavey and the two patrol officers two transition days. On cross-examination,  
4 Carrabino acknowledged that there is no provision of the collective bargaining  
5 agreement that pertains to transition days. Although he thought that a side letter or a  
6 past practice existed on the issue, there is no evidence in the record on this point.

7 Neither one of Carrabino's examples establish that he processed Step 1  
8 grievances prior to December of 2015. His first example is not relevant because those  
9 facts occurred in August of 2016, well after the December of 2015 events at issue. His  
10 second example is off point because it involves an issue that cannot be the subject of a  
11 grievance pursuant to Article VII, Section 1, which requires grievances to involve an  
12 alleged violation of a "specific provision" of the Agreement. When asked on direct  
13 examination whether he could provide any other examples of Step 1 grievances,  
14 Carrabino testified that those were the only two examples that he could recall. Thus,  
15 prior to December of 2015, Deputy Chief Carrabino handled routine problems that  
16 employees discussed with him on a daily basis, but he did not process or decide Step 1  
17 grievances filed by either the Association or individual bargaining unit members.<sup>16</sup>

18 There is also no evidence that after creating the Deputy Chief positions in 2008,  
19 the City ever told the Association that the Deputy Chiefs would process Step 1

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<sup>16</sup> When asked on direct examination how many times he had decided a Step 1 grievance as Deputy Chief, Carrabino first explained that he "deal[s] with problems every day." When subsequently asked about incidents where he had resolved grievances, Carrabino reiterated that "[i]t is hard to think of them like that because my job is pretty much to deal with problems and people come to me with problems, and I want to solve the problems, because I want the Department to run efficiently." Additionally, Carrabino acknowledged on cross-examination that not all discussions between employees and supervisors constitute grievances.

1 grievances, or that any Deputy Chief actually processed and decided a Step 1  
2 grievance before December of 2015. For instance, Cabral did not testify that he  
3 processed Step 1 grievances in his role as Deputy Chief between 2008-2010 and 2011-  
4 2014. Nor did Trant, the other current Deputy Chief, testify that he processes Step 1  
5 grievances. Moreover, after Carrabino became Deputy Chief in October of 2014, Chief  
6 Fallon did not tell the Association or bargaining unit members that Carrabino would  
7 handle Step 1 grievances, and not a Captain as referenced in Article VII, Section 2.  
8 Finally, there is no evidence that Carrabino himself explained to the Association before  
9 the events of 2015 that he was responsible for deciding Step 1 grievances.

#### 10 The 2014 Traffic Bureau Vacancy

11 In October of 2014, around the time Fallon became Chief and Carrabino became  
12 Deputy Chief, a position in the Traffic Bureau became vacant after the Department  
13 promoted Officer Michael Kiely (Kiely) to Sergeant, a non-unit position. Carrabino  
14 posted the vacant position on October 27, 2014, without any language regarding the  
15 length of time that the position was available in relation to the bid cycle. Carrabino  
16 previously had not been involved in Traffic or Community Police postings. After McGrath  
17 emailed Carrabino that "those going in are guaranteed 2 yrs with an option of staying an  
18 additional 2 yrs," Carrabino issued a new posting on October 28, 2014, with added  
19 language indicating that the Traffic Bureau position was for 2 years with a 2 year option.  
20 Effective November 10, 2014, Chief Fallon appointed McGrath to the day-shift traffic  
21 position based on his seniority.

22 Shortly after McGrath's appointment to the Traffic Bureau, the Deputy Chiefs  
23 began preparing for the January of 2015 bids and directed Lieutenant Polito and

1 Sergeant John Gobile (Gobile) to collect information from Traffic Bureau officers about  
2 when they bid into the Traffic Bureau, and when they would rebid. Polito has been the  
3 highest ranking officer in the Traffic Bureau since entering in 2009, and Gobile is a  
4 former Association President. On December 10, 2014, Polito emailed Fallon, Trant, and  
5 Carrabino a chart of the Traffic Bureau Annual Review Cycle. Polito wrote in the chart  
6 that McGrath bid into the Traffic Bureau in 2014, was finishing the third year of Kiely's  
7 bid cycle, and would rebid with everyone else in the Traffic Bureau in 2016.

8 The next morning, December 11, 2014, Trant, who had been Deputy Chief for  
9 less than three months, emailed Polito's chart to McGrath stating, in relevant part:

10 Mike will you look below at traffic bid info. I think everyone is correct except  
11 for you. Do you fall into [the] prior bidding cycle or do you start fresh with 2  
12 year bid with 2 year option. If the latter, it appears to me your two year bid  
13 is 2014-2016 and your first two year option bid will be in Jan. 2017. Is Lt.  
14 Polito's chart correct or am I?  
15

16 A few hours later, McGrath emailed Trant that he would "dig those bid sheets and call  
17 you." That afternoon, Trant emailed McGrath an Annual Bid Cycle chart for Detectives,  
18 Traffic and Neighborhood Police Officers. Trant wrote in his chart that McGrath bid into  
19 the Traffic Bureau in November of 2014, was entitled to the two year option in January  
20 of 2017, and was not up for rebid until January of 2019.

21 Around the same time after McGrath's appointment to the Traffic Bureau, Officer  
22 Johnson, who held the second day-shift traffic position, became personally concerned  
23 about whether McGrath's position would be up for bid in January of 2016 after he  
24 learned from unidentified sources that McGrath believed that everyone bidding into the  
25 Traffic Bureau was entitled to two years with a two year option. If McGrath's position



1 was not up for bid in January of 2016, Johnson would be subject to bumping from a  
2 senior bidder.

3 2015 Events Regarding McGrath's Traffic Bureau Position

4 During the summer of 2015, Johnson asked Polito, Gobile, Sylvester, Hickey,  
5 and Gilbertie whether they thought the Department should post McGrath's position in  
6 the 2016 bid cycle. They all agreed that McGrath's position should be up for bid in  
7 January of 2016. Johnson also told Carrabino around the same time that he could be  
8 bumped if McGrath's position was not up for bid in January of 2016.<sup>17</sup> Carrabino  
9 subsequently talked to "just about everyone in the Traffic Bureau" about the situation,  
10 including Robert Hickey (Hickey), Timothy Sullivan (Sullivan), Sean Sylvester  
11 (Sylvester), Ross O'Meara (O'Meara), Polito and Gobile.

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<sup>17</sup> On direct examination Carrabino testified that he first learned of Johnson's grievance in December of 2015. On cross-examination, Carrabino testified that he had at least one conversation with Johnson during the summer about Johnson's concern that more senior bidders could outbid him. Carrabino could not remember exactly when Johnson raised the issue, how many conversations they had, and he did not take notes of the conversations. On cross-examination, Johnson initially denied speaking with Carrabino prior to December of 2015 about the 2016 traffic bids. He then clarified that while he had no memory of the conversation, it could have happened. I credit Carrabino's testimony because Johnson did not deny talking to Carrabino in the summer of 2015, and it is plausible that Carrabino had a conversation with Johnson in the course of discussing the issue with the other Traffic Bureau officers.

1 Hickey and Sullivan had both bid into the Traffic Bureau in September of 2011,  
2 but the Department put their positions up for bid in January of 2012.<sup>18</sup> Hickey explained  
3 to Carrabino that he was bumped in January of 2012, and would have been out of the  
4 Traffic Bureau if Cabral had not recommended Hickey as a Chief's Pick. Carrabino had  
5 a similar conversation with Sullivan, who had also been bumped from the Traffic Bureau  
6 in January of 2012 after his September of 2011 appointment.

7 Likewise, Sylvester and Gobile told Carrabino that in the past, officers would bid  
8 into the Traffic Bureau, complete a cycle, and then rebid. In 2015, Sylvester was a  
9 Chief's Pick in the Traffic Bureau, but in October of 2011, Sylvester had bid into  
10 Neighborhood Police.<sup>19</sup> Although Sylvester had wanted to stay in Neighborhood Police  
11 after completing the cycle that he bid into, he was bumped out in the January 2012  
12 annual bid cycle. Sylvester and Gobile also told Carrabino that if senior officers bid into  
13 the Traffic Bureau in the January of 2016 bids, it would displace officers who had been  
14 there for a long time.

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<sup>18</sup> Both the September 9, 2011 posting for the Traffic Bureau positions and the October 7, 2011 General Order appointing Hickey and Sullivan to the Traffic Bureau stated explicitly that the positions were temporary until the January 2012 Annual Bid. McGrath told Chief Pasquarello in September of 2011 that the appointments were guaranteed for two years, with a two year option. According to McGrath, Pasquarello said that he did not want to fill the positions at all because of staffing issues, but that he would fill the positions on a temporary basis and re-evaluate the staffing situation in January of 2012. McGrath maintains that Pasquarello told him that this was a one-time event, and that he only agreed because the alternative was to leave the positions vacant.

<sup>19</sup> Both the October 24, 2011 posting and the November 10, 2011 General Order appointing Sylvester indicated that the position was temporary until the January of 2012 Annual Bid. As he had with the Traffic Bureau positions posted the previous month, McGrath told Pasquarello that the Community Policing was a two year commitment with the two year option and should not be posted as a temporary position. According to McGrath, Pasquarello asked to extend their earlier one-time agreement, and that he agreed that Pasquarello could post the positions as temporary because the only alternative was to leave the positions vacant.

1 Carrabino also contacted Cabral before the January of 2012 bids for his opinion  
2 on the job bids with respect to when the two year bid with the two year option went into  
3 effect. Cabral told Carrabino that for continuity, the Department kept everyone on the  
4 same cycle. If a vacancy arose, the Department posted the position and assigned an  
5 officer to temporarily fill the remainder of the assignment. The two year window did not  
6 start when an officer filled a vacancy in the Traffic Bureau. That way, the Department  
7 knew that they had officers for four years in the Traffic Bureau and Community Policing  
8 where training and building relationships are important elements. Later, Carrabino had a  
9 second, similar conversation with Cabral.

10 As Carrabino began preparing for the 2016 bids, he also had a conversation with  
11 Trant. Carrabino told Trant that the cycle was up, and that he would post all Traffic  
12 Bureau positions in January of 2016. Trant told Carrabino about his earlier  
13 conversations with McGrath to the contrary. Carrabino explained to Trant that in the  
14 past, officers such as Sullivan and Sylvester had only finished bid cycles, which Trant  
15 had not known.

16 Around early December, Carrabino met with Polito and Gobile in Polito's office,  
17 to discuss their interpretation of the Agreement with respect to the issue of whether the  
18 Department should post McGrath's position in the 2016 bid cycle.<sup>20</sup> Polito told Carrabino

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<sup>20</sup> There is conflicting testimony about whether Carrabino met with Polito and Gobile in early December and whether Carrabino met with Fallon, Trant Polito and Gobile in mid-December. Carrabino testified that he met with Polito and Gobile in early December and with Fallon, Trant Polito and Gobile in mid-December. Gobile initially testified on direct that he attended only one meeting with Fallon, Carrabino, Trant and Polito in December of 2015, but on cross-examination testified that he met with Fallon, Carrabino, and Polito a second time in December as well. Polito did not testify on the matter. I credit Carrabino's testimony regarding the December meetings because he was coordinating the meetings.

1 that the Traffic Bureau was on a cycle and the past practice was that "if someone bid in,  
2 they finished out that cycle and then the position was put up for rebid." Gobile agreed.  
3 They talked about the bid cycle, the January date in the contract, and the past practice  
4 with respect to Hickey, Sullivan, and Sylvester. They looked at the Agreement, but they  
5 did not review documents regarding Sullivan and Sylvester's past bids.

6 In about mid-December, Fallon met with Carrabino, Trant, Polito, and Gobile.  
7 They discussed the contract. Gobile explained his interpretation of Article XVIII. Polito  
8 explained that when he first joined the Traffic Bureau in 2009, Sergeant James Rooney  
9 (Rooney) told him that everyone in the Traffic Bureau was on the same cycle, and that  
10 was the way that it had been since then. They also discussed Hickey's and Sullivan's  
11 temporary appointments in the past. According to Carrabino, the consensus at the  
12 meeting was that "based on past practice, history, and albeit less than precise  
13 contractual language," the Department would post McGrath's position for bid in January  
14 of 2016.

15 Johnson's December 28, 2015 Grievance

16 Johnson called Carrabino on December 27, 2015 to express his "concerns" that  
17 all Traffic Bureau positions should be up for bid in 2016.<sup>21</sup> Johnson explained to  
18 Carrabino that based on past practice and the Agreement, officers bidding into the  
19 Traffic Bureau vacancies finished the departing officers' bid, and that McGrath's position

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<sup>21</sup> There is conflicting testimony about whether Johnson contacted Carrabino about his grievance on December 27 or 28. Johnson testified that he spoke with Carrabino on December 27, 2015, and that he sent the grievance to Carrabino the next day. Carrabino testified that Johnson called him on December 28, 2015. I credit Johnson's testimony on this point because he explained that he had the telephone conversation the day before he sent his grievance.

1 should be up for bid in January of 2016.<sup>22</sup> Carrabino was well aware of the situation,  
2 and told Johnson that he agreed, but to file a written grievance.<sup>23</sup>

3 On December 28, 2015, Johnson filed a Step 2 grievance with Chief Fallon and  
4 Deputy Chief Carrabino pursuant to Article VII, Section 4 of the Agreement. Johnson  
5 emailed Carrabino a memorandum addressed to both Fallon and Carrabino that stated  
6 in relevant part:

7 I am filing a grievance regarding the fact that the second day traffic position  
8 is not available for bid during the upcoming 2016 department wide job bids.  
9 It is my contention that because Officer McGrath bid into the Traffic Unit in  
10 the fall of 2014, he is fulfilling the remainder of the Sgt. Keily's [sic] bid that  
11 was vacated upon Sgt. Keily's [sic] promotion. Section 3(a) of the  
12 agreement between the SPEA and the City of Somerville states: . . .

13  
14 Because Officer McGrath bid into the Traffic Unit in the fall of 2014, and not  
15 during the annual January bids, he is not entitled to a two year job bid.  
16 Therefore his job should be posted for bid next month.

17  
18 There is also past practice to support my contention. 1) Sean Sylvester  
19 was in [the] Community Police Unit from August of 2011 and was then  
20 bumped out during the January 2012 job bids. 2) Tim Sullivan was in the  
21 Traffic Unit from October 2011 and was bumped out, also, during the  
22 January 2012 bids. In both of these cases, Officers Sylvester and Sullivan  
23 were fulfilling vacancies that were created during the course of two year

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<sup>22</sup> I do not credit the City's post-hearing brief assertion that Johnson filed a Step 1 grievance by calling Carrabino on December 27, 2015. Although Carrabino testified that he first learned of Johnson's grievance when Johnson called him, Johnson did not identify his call to Carrabino as a grievance during his testimony. Rather, Johnson testified that on December 27, 2015, he had a "conversation" with Carrabino during which he "expressed [his] concerns." Moreover, Johnson's December 28, 2015 grievance letter does not include any reference to his earlier phone call.

<sup>23</sup> Carrabino testified that Johnson "might as well have sat right in front of me [when] we spoke by telephone. The decision was made." Carrabino did not testify about his reasons for telling Johnson to file a grievance on a matter he asserts the Department had already decided and that was not adverse to Johnson. Nevertheless, even if the Department had decided to post McGrath's position for bid in January of 2016, it technically could not have decided Johnson's grievance on December 27, 2015, before the grievance existed.

1 bids, and they finished the reminder of those bids. Then those positions  
2 were posted and available for bid in the annual job bid.

3  
4 By email dated December 28, 2015, at 1:10 p.m., Johnson emailed McGrath,  
5 stating, in relevant part, "[p]lease file this grievance as soon as possible. I'm sorry. This  
6 is nothing personal but I feel strongly that [I] need to do it." Attached to Johnson's email  
7 to McGrath was his memorandum to Fallon and Carrabino. Johnson specifically  
8 understood that he could file the grievance both as an individual and through the  
9 Association, and he chose to do it both ways.

10 The Association's December 29, 2015 Grievance

11 On December 29, 2015, the Association filed a Step 2 grievance on behalf of  
12 Johnson with Chief Fallon pursuant to Article VII, Section 2.<sup>24</sup> By email to Chief Fallon  
13 dated December 29, 2015, McGrath stated, in relevant part: "[p]lease see the attached  
14 grievance filed by Officer S Johnson, as well as the Association's position letter." The  
15 letter from McGrath on behalf of the Association, also dated December 29, 2015, stated  
16 in relevant part:

17 Please see the attached grievance which has been filed by Officer  
18 Steven Johnson. You should be aware that although the Association is  
19 presenting this grievance to you, it does not support it. The Association  
20 maintains the position that despite bidding into Traffic as a result of a  
21 vacancy, I bid into the position during the January, 2015 bids and have the  
22 contractual right to remain in the position for at least the two year term as

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<sup>24</sup> The City's post-hearing brief argument that McGrath's decision to send Johnson's grievance to the Chief on December 29, 2015 did not "make" the Association's grievance on behalf of Johnson a Step 2 grievance has no factual support. The City's argument ignores the fact that the Association did not present the grievance on behalf of Johnson to "a senior Captain designated by the Chief" pursuant to Article VII, Section 2, Step 1. Rather, McGrath wrote a formal letter to Chief Fallon regarding Johnson's grievance, stating "the Association is presenting this grievance to you." The Association's written grievance to the Police Chief is consistent with Article VII, Section 2, Step 2. Therefore, by its actions in filing a written grievance with Chief Fallon, I find that the Association filed a grievance at Step 2 on December 29, 2015.

1 per Article XVIII, Section 3a (ninth paragraph) of the Agreement between  
2 the City of Somerville and the Somerville Police employees Association  
3 (Agreement). The examples that Officer Johnson provided had never bid in  
4 a January bid and therefore are plainly distinguishable for that reason  
5 alone.

6  
7 Please notify the Association's Executive Board prior to any meeting  
8 between the Department and Officer Johnson so the Association can be  
9 represented as per Article VII, Section 4 of the Agreement.<sup>25</sup>

10  
11 The City's Response to the Grievances

12 Chief Fallon forwarded McGrath's December 29, 2015 email and attachments to  
13 Carrabino on December 29, 2015, and Fallon, Carrabino and Trant decided to grant  
14 Johnson's grievance.<sup>26</sup> According to Carrabino, "it was plain to us that Officer Johnson's  
15 grievance had validity and all positons would be put up for bid in 2016." Carrabino  
16 decided that a meeting with Johnson was unnecessary because "[Johnson] came to

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<sup>25</sup> In light of McGrath's statement that "the Association is presenting this grievance to you" and his demand that the Chief notify the Association's Executive Board prior to any meeting between the Department and Johnson, his reference to Article VII, Section 4 is technically in error, and should be to Article VII, Section 2. Regardless, Article VII, Section 2 of the Agreement obliged Fallon to meet with the Association's Grievance Committee and/or Johnson within 5 days of the Association's December 29, 2015 grievance, and Section 4 required Fallon to confer with the Association about Johnson's December 28, 2015 grievance and to allow the Association to be present at any conference between the City and Johnson.

<sup>26</sup> The hearing record does not include any details of when Fallon, Carrabino and Trant met after the Association filed the grievance on December 29, 2015, but there is other evidence that Fallon generally meets daily with Carrabino and Trant.

me. It could be resolved at Step 1, right there.” Thus, in a December 30, 2015 email to McGrath and others, including Chief Fallon and Trant, Carrabino stated:<sup>27</sup>

The SPEA’s grievance can be resolved at step 1, outlined under Article VII of the SPEA’s CBA, and therefore a meeting with Officer Johnson will not be necessary.

Based on the SPEA’s grievance filed on behalf of Officer Johnson, and after careful review, this grievance was found to have merit. Therefore, all seniority positions in both the Traffic Unit and the Community Services Unit are due to be bid in this current bid cycle in January 2016.

A revised personnel order will be posted soon on Policy Tech. Because there have been issues recently with Policy Tech, a department-wide email will be disseminated.

There is no evidence that the City processed or responded to the grievance that Johnson filed as an individual on December 28, 2015.

#### 2016 Events

By email dated January 5, 2016, McGrath attached a letter dated January 2, 2016 to Carrabino. McGrath objected to Carrabino’s ruling, requested to meet with the City to discuss Johnson’s grievance, and explained that the Association had filed the grievance with Chief Fallon at Step 2, not at Step 1. The City did not respond, and the Department put McGrath’s position up for bid in January of 2016. Neil Collins (Collins) and Johnson bid on and were appointed to the two day Traffic Bureau positions. Collins is senior to Johnson, and Johnson is 8 years senior to McGrath. McGrath bid on and was appointed to a night shift Traffic Bureau position.

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<sup>27</sup> Carrabino testified that his December 30, 2015 email “reflects my response to McGrath’s December 29, 2015 email to Chief Fallon saying that we needed to meet and discuss this.” On cross-examination, Carrabino claimed that he thought that the Association filed a grievance because the Department refused to meet about a Step 1 grievance. I do not credit Carrabino on this point because when the Association filed the grievance on December 29, 2015, it did not know yet that the Department would refuse to meet on December 30, 2015.



## OPINION

For the following reasons, I find that by processing and deciding the Association's December 29, 2015 grievance at Step 1, rather than at Step 2, the City unilaterally changed the parties' grievance processing practice and violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first providing 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). To establish a violation, the Association must demonstrate that: 1) the City altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 39 MLC 169, 171, SUP-08-5447 (December 27, 2012).

A past practice is a practice which is unequivocal, has existed substantially unvaried for a reasonable period of time, and is known and accepted by both parties. City of Newton, 32 MLC 37, 49, MUP-2849 (June 29, 2005). To determine whether a practice exists, the Commonwealth Employment Relations Board (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,

1 MUP-13-3371, MUP-14-3466, MUP-14-3504, (November 7, 2014). The Board's inquiry  
2 turn on whether employees in the unit have a reasonable expectation that the practice  
3 "is unequivocal, has existed substantially unvaried for a reasonable period of time and is  
4 known and accepted by both parties." Commonwealth of Massachusetts, 23 MLC 171,  
5 172, SUP-3586 (January 30, 1997) (citing Town of Chatham, 21 MLC 1526, 1531,  
6 MUP-9186 (January 5, 1995)).

7 The City does not dispute that provisions for a grievance procedure are terms  
8 and conditions of employment and mandatory subjects of bargaining. Rather, it argues  
9 that it acted in accordance with the Agreement, and that it did not unilaterally change  
10 any term and condition of employment. The City contends that no change in practice  
11 occurred because the parties were "entitled to resolve the grievance at Step 1 in an  
12 informal manner if it was capable of being resolved." The City maintains that it was able  
13 to resolve the grievance at Step 1 because it previously had months of extensive  
14 discussion and deliberation relative to whether the Traffic Bureau jobs would be  
15 available for Department-wide bid in January of 2016. The City emphasizes that Step 1  
16 remains in force and effect, that the Association never sought to modify the Agreement  
17 to omit Step 1, and that the inclusion of Step 1 in the Agreement is evidence that the  
18 parties intended "to resolve grievances informally at the earliest stage possible." The  
19 City also argues that pursuant to the Agreement, bypassing Step 1 of the grievance  
20 process is only available in the event of a mutual agreement between the parties.

21 Notwithstanding the language of the Agreement, Association President McGrath  
22 began filing Association grievances directly at Step 2 after becoming Association  
23 President in 2009. Between 2012 and 2015, McGrath filed at least seven Association

1 grievances at Step 2 where neither the Association nor the individuals involved  
2 previously filed at Step 1. In each of those instances, the parties had no explicit  
3 agreement to bypass Step 1, and the Association President had no discussion about  
4 bypassing Step 1 with the Police Chief. Nevertheless, a series of different Police Chiefs  
5 between February of 2012 and June of 2015 consistently assented to the Association's  
6 filing directly at Step 2, regularly consulted with the Association President about the  
7 grievances, and decided the grievances at Step 2. Therefore, despite the language of  
8 the grievance procedure in the Agreement, by December of 2015, the parties had a  
9 well-established pattern whereby the Association President filed grievances directly at  
10 Step 2, in writing with the Police Chief, and the Police Chief routinely processed and  
11 decided those grievances at Step 2. Accordingly, I find that the parties had a practice of  
12 bypassing Step 1 of the grievance procedure for Association grievances that was  
13 unequivocal, existed substantially unvaried for a reasonable period of time, and was  
14 known and accepted by both parties.

15 On December 29, 2015, the Association filed a Step 2 grievance on behalf of  
16 Johnson with Chief Fallon pursuant to Article VII, Section 2.<sup>28</sup> Pursuant to the parties'  
17 past practice, Chief Fallon had an obligation to process and decide the Association's

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<sup>28</sup> Johnson's December 28, 2015 grievance and the Association's December 29, 2015 grievance on his behalf are distinct Step 2 grievances. On December 28, 2015, Johnson filed a Step 2 grievance with Chief Fallon and Deputy Chief Carrabino pursuant to Article VII, Section 4 of the Agreement. Pursuant to Article VII, Section 4 of the Agreement, Chief Fallon then had an obligation to "immediately notify the President or Vice-President of the Association of the initiation of and proposed disposition" of Johnson's grievance, and "Association representatives" had not only the right to be present at any conference between the City and Johnson, but the right "to confer with the City" relative to Johnson's grievance. The City ultimately did not respond to, process, or decide the December 28, 2015 grievance that Johnson filed as an individual employee.

1 December 29, 2015 grievance at Step 2. He did not. Rather, by email dated December  
2 30, 2015, Deputy Chief Carrabino informed the Association that the "grievance can be  
3 resolved at [S]tep 1 . . . and therefore a meeting with Officer Johnson will not be  
4 necessary," and that the grievance "was found to have merit." The parties had no  
5 practice of allowing Deputy Chiefs to process and decide Step 1 grievances or Step 2  
6 grievances filed by the Association, no practice of classifying Association grievances  
7 filed in writing with the Police Chief as Step 1 grievances, and no practice of allowing  
8 the Police Chief or Deputy Chiefs to choose whether Association grievances filed in  
9 writing with the Chief should be resolved at Step 1 or Step 2. Rather, the parties had a  
10 well-established practice whereby the Association President filed Association  
11 grievances directly at Step 2, in writing with the Police Chief, and the Police Chief  
12 processed and decided those grievances at Step 2. Therefore, I conclude that the City  
13 unilaterally changed the parties' practice of bypassing Step 1 of the grievance  
14 procedure for Association grievances filed in writing with the Police Chief.

15 The City's claim that it is entitled to resolve Association Step 2 grievances at  
16 Step 1 if the grievance is "capable of being resolved" has no factual support. The fact  
17 that the Department held months of discussions regarding the Traffic Bureau bid cycle  
18 before the Association filed the December 29, 2015 grievance does not justify the  
19 Department's decision to abandon the parties' past practice with respect to processing  
20 and deciding Association grievances because the City denied the Association the  
21 opportunity to meet with the Police Chief and argue the merits of the grievance that it  
22 filed on behalf of Johnson. Finally, there is no support for the City's assertion that the  
23 existence of Step 1 in the Agreement establishes the parties' intent to resolve all

1 grievances informally at the earliest stage possible, such that the Association would be  
2 subject to the City's whims about whether to process grievances at Step 1 or Step 2.  
3 Accordingly, I dismiss the City's arguments.

#### 4 CONCLUSION

5 Based on the record, and for the reasons stated above, I conclude that the City  
6 has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law by changing  
7 the parties' practice of bypassing Step 1 of the grievance procedure for Association  
8 grievances filed in writing with the Police Chief, without giving the Association prior  
9 notice and an opportunity to bargain to resolution or impasse over that decision and the  
10 impacts of that decision on employees' terms and conditions of employment.

#### 11 REMEDY

12 The Association requests that the DLR issue a cease and desist order, a  
13 bargaining notice, a make whole order, and the posting of a notice of violation and any  
14 and all appropriate relief. Section 11 of the Law grants the Board broad authority to  
15 fashion appropriate orders to remedy a public employer's unlawful conduct. Labor  
16 Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979). The Board fashions  
17 remedies for violations of the Law by attempting to place charging parties in the  
18 positions they would have been in but for the unfair labor practice. Natick School  
19 Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). The traditional remedy  
20 where a public employer has unlawfully refused to bargain is an order to restore the  
21 status quo ante until the employer has fulfilled its bargaining obligation, and to make all  
22 affected employees whole for any economic losses they may have suffered.  
23 Commonwealth of Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10,

1 2008). Nevertheless, while Section 11 of the Law grants the DLR broad authority to  
2 fashion appropriate orders to remedy unlawful conduct, that authority does not extend  
3 to speculative financial harm. Town of Marion, 30 MLC 11, 15, MUP-02-3329 (August  
4 20, 2003).

5 I order the City to restore the practice of bypassing Step 1 for grievances filed by  
6 the Association in writing with the Police Chief, until it satisfies the obligation to bargain  
7 with the Association to resolution or impasse over the decision and the impacts of the  
8 decision to change the existing practice. Because the Association withdrew the  
9 allegation that the City unilaterally altered the Traffic Bureau shift bid procedures by  
10 posting McGrath's position in the January of 2016 bid cycle, there can be no existing  
11 controversy on the matter that formed the basis of the Association's opposition to the  
12 December 29, 2015 grievance that it filed on behalf of Johnson. Therefore, I decline to  
13 order the City to resume processing the Association's December 29, 2015 grievance at  
14 Step 2. Finally, I dismiss the Association's request for a make whole remedy because  
15 there is no evidence of economic loss in this case and the Association advanced no  
16 substantive argument on this point.

17 ORDER

18 WHEREFORE, based on the foregoing, it is hereby ordered that the City of  
19 Somerville shall:

20 1. Cease and desist from:

- 21 a. Failing to bargain about the decision and the impacts of its decision to change  
22 the parties' practice of bypassing Step 1 of the grievance procedure for  
23 grievances filed by the Association in writing with the Police Chief, without  
24 first bargaining with the Association to resolution or impasse;

1           b. In any like manner, interfering with, restraining and coercing its employees in  
2           any right guaranteed under the Law.

3  
4       2. Take the following affirmative action that will effectuate the purpose of the Law:

5  
6           a. Immediately restore the practice of bypassing Step 1 of the grievance  
7           procedure for grievances filed by the Association in writing with the Police  
8           Chief, until the City satisfies the obligation to bargain with the Association to  
9           resolution or impasse over the decision and the impacts of the decision to  
10          change the existing practice;

11  
12          b. Sign and post immediately in all conspicuous places where members of the  
13          Association's bargaining unit usually congregate and where notices to these  
14          employees are usually posted, including electronically, if the City customarily  
15          communicates to its employees via intranet or e-mail, and maintain for a  
16          period of thirty (30) consecutive days thereafter, signed copies of the attached  
17          Notice to Employees; and

18  
19          c. Notify the DLR in writing within thirty (30) days of receiving this Decision of  
20          the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



KATHLEEN GOODBERLET, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 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 Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

# 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 that the City of Somerville (City) has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by changing the parties' practice of bypassing Step 1 of the grievance procedure for Association grievances filed in writing with the Police Chief, without giving the Association prior notice and an opportunity to bargain to resolution or impasse over that decision and the impacts of that decision on employees' terms and conditions of employment.

The City posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of the Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

WE WILL not fail and refuse to bargain in good faith by unilaterally changing the parties' practice of bypassing Step 1 for grievances filed by the Association.

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 immediately restore the practice of bypassing Step 1 for grievances filed by the Association until the City satisfies the obligation to bargain with the Association to resolution or impasse over the decision and the impacts of the decision to change the existing practice.

---

City of Somerville

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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 Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).