COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:	*	
	*	Case Number: MUP-16-5532
CITY OF NEWTON	*	
	*	
and	*	Date Issued: January 30, 2019
	*	
NEWTON POLICE SUPERIOR OFFICERS ASSOCIATION, MASSCOP LOCAL 401	*	

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Jeffrey A. Honig, Esq.	Representing City of Newton
Alan H. Shapiro, Esq.	Representing Newton Police Superior Officers Association, MASSCOP Local 401

HEARING OFFICER'S DECISION

SUMMARY

The issue in this matter is whether the City of Newton (City or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: repudiating Article 32.04 of the parties' collective bargaining agreement (CBA) (Count I); failing to timely provide information (Count II); failing to bargain upon demand about fitness for duty examination issues (Count III); and imposing a fitness for duty policy as a condition of continued employment without providing notice and an opportunity to bargain about the decision and impacts of the decision (Count IV). Based on the record, and for the reasons explained below, I

dismiss Counts I and II, and I find that the City violated the Law as alleged in Counts III and IV.

STATEMENT OF THE CASE

On October 3, 2016, the Newton Police Superior Officers Association, MASSCOP Local 401 (Union or Association) filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On January 26, 2017, a DLR Investigator conducted an in-person investigation of these allegations. On February 24, 2017, the Investigator issued a four-count Complaint of Prohibited Practice alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On March 21, 2017, the City filed an Answer to the Complaint of Prohibited Practice.

On February 20, 2018, and April 30, 2018, I conducted a hearing during which the parties received a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the conclusion of the hearing on April 30, 2018, I closed the evidentiary record in this matter.[1] On or before July 10, 2018, the parties filed post-hearing briefs.

On October 15, 2018, the City filed "Respondent City of Newton's Request to Supplement Its Post-Hearing Brief and for Deferral to an Arbitration Award" (Motion). Attached to this Motion, and labelled as Addendum A, was an October 9, 2018

[1] At that time, I noted on the record that the parties had agreed to submit certain exhibits in redacted form along with an amended, redacted City Exhibit 11. On May 8, 2018, after receiving the outstanding materials, I again noted, this time via email to counsel, that the evidentiary record was closed.

Arbitration Award (Award) between the parties. On October 24, 2018, the Union responded to the City's Motion, opposing deferral.[2]

STIPULATIONS OF FACT

1. The City of Newton is a public employer within the meaning of Section 1 of the Law.

2. The Newton Police Superior Officers Association, Masscop, Local 401, AFL-CIO is an employee organization within the meaning of Section 1 of the Law.

3. The Union represents the superior officers of the City's police department, including all sergeants, lieutenants, and captains.

4. The City and the Union are parties to a collective bargaining agreement for the period July 1, 2006, through June 30, 2009, as modified and extended in the September 2009 and July 2011 memoranda of agreement and that continues in effect at all relevant times to the present.

5. X, a member of the NPSOA bargaining unit, was twice sent for psychological fitness evaluations. On the first occasion in the early 2000's, X was out sick and on FMLA leave for a number of months. X asked the City to return him/her to duty. The City sent him/her to a psychologist who examined X and verified his/her fitness for duty. On the second occasion, about ten years later, X had been out sick for several months and was asserting that the illness should be compensable under Chapter 41, Section 111F. X requested to return to work when his/her paid leave was exhausted. The City sent X to a psychiatrist to determine whether he/she was fit to return to the [sic] duty and whether her/his absence was due to occupational illness. The Union was not copied on any of the transmittal documents in either of the above situations.[3]

FINDINGS OF FACT

Relevant Collective Bargaining Agreement Provisions

[2] I address the City's Motion in Section 1 of the Opinion.

[3] The parties employed a pseudonym, "X," to protect the officer's privacy. At the hearing on February 20, 2018, the parties orally agreed to Stipulation 5 to resolve an evidentiary objection to proposed City Exhibits 5 and 6. After agreeing to this stipulation, the City withdrew proposed City Exhibits 5 and 6. Because they are not part of the evidentiary record, I have not considered the references to these withdrawn exhibits in the City's post-hearing brief.

Article VI Medical Examination

6.01

a. The following provisions (b and c) are applicable to employees hired on or after November 1, 1985:

b. The CITY and the ASSOCIATION agree that the maintenance of good health and physical fitness is important to the successful performance of all duties of a Superior Officer.

c. Superior Officers may be required to complete an annual medical examination conducted by the City Physician's Office. If the initial examination indicates the need for further testing or consultation with other physicians, the employee may have his own physician provide the CITY with information to rebut or rescind the need for further testing. The City Physician may consult with the other physician and, if the City Physician continues to require that additional testing be carried out, then the Superior Officer will cooperate in any recommended program to manage responsibly his/her medical condition which may be determined by the annual physical examination or testing.

Article XV Management Rights

15:01

Except where such rights, powers, and authority are specifically relinquished, abridged, or limited by the provisions of this Contract, the CITY has and will continue to retain, whether exercised or not, all of the rights, powers and authority heretofore had by it, and except where such rights, powers and authority are specifically relinquished, abridged or limited by the provisions of this Contract, it shall have the sole and unquestioned right, responsibility and prerogative of management of the affairs of the CITY and direction of the working forces including, but not limited to the following:

....

B. To establish or continue policies, practices and procedures for the conduct of the CITY business and, from time to time, to change or abolish such policies, practices or procedures.

....

E. To employ, transfer, promote or demote employees, or to lay-off, terminate or otherwise relieve Superior Officers from duty for lack of work or other legitimate reasons when it shall be in the best interest of the CITY or the Department.

Article XXXII Drug and Alcohol Abuse Policy

32.04 A. Testing Procedure

A.1. The Chief of Police, or his designee in the Chief's absence, may require that a Superior Officer submit to a drug and/or alcohol screening test forthwith to detect the presence of non-prescribed drugs, illegally-used drugs, alcohol or non-prescribed controlled substances for the reasons listed in paragraphs 32.04, B.1 to B.5. The Superior Officer being tested may, at his/her option, be accompanied by an ASSOCIATION representative while the screening test is being administered, provided that the taking of the test is not delayed thereby.

A.2. The Superior Officer may initiate a review of the Chief's directive in the case of a drug screening test. Failure of the Superior Officer to initiate the review immediately shall be deemed a waiver of this right. When the review procedure has been initiated, the Chief's directive shall be reviewed by a committee of three, comprised of either the Chief's Administrative Assistant or the Internal Affairs Officer appointed by the Chief; one Superior Officer appointed by the ASSOCIATION; and the CITY'S Director of Personnel. The review shall be conducted and concluded within twenty-four (24) hours of the time the Chief required the test sample, or as soon thereafter as possible.

....

A.5. The screening test of the Superior Officer shall be administered by the City Physician, the Nurse Practitioner, or the City Physician's designee in accordance with this policy for drug and alcohol testing and provided that the person administering the test has been properly certified, trained or is otherwise qualified to administer that particular test.

A.5.(b) An original non-tested sample will be given to the Superior Officer upon request made at the time the sample is provided.

A.6. The results of the drug screening test shall be given to the Chief of Police and to the Superior Officer.

B. Reasons for Testing

Superior Officers will be required to take a drug/alcohol test as a condition of continued employment in order to ascertain prohibited drug/alcohol use, only as provided below:

B.1. If there is a reasonable suspicion of a supervisor that a Superior Officer is or has been using drugs or alcohol in violation of this policy. "Reasonable Suspicion" is something more than a hunch but less than probable cause....

B.2. When a Superior Officer is offered any promotional position, i.e., Lieutenant, and/or Captain, as a pre-promotional condition.

B.3. When a Superior Officer is offered certain specialist assignments, as a pre-assignment condition....

B.4. Subsequent to any significant vehicular accident involving a vehicle which is being operated by a Superior Officer while on duty.

B5. Subsequent to any serious, unsafe practice or incident (such an incident includes the unplanned, unexpected and unintended discharge of a firearm) which occurs while the Superior Officer is on duty.

Newton Ordinances- Administration

Section 2-46. Approval and review of sick leave; hazards.

(c) Upon determination by a department head, the director of human resources or the mayor that an employee, while engaged in the performance of their duty, appears to be suffering from sickness or injury so as to constitute a hazard to their health or the health of other persons, the director of human resources may order such employee to discontinue their duties for such time as the director deems desirable and may require such employee to undergo an examination by a qualified health care provider(s) without charge to the employee.

Newton Police Department Code of Conduct and Appearance[4]

V. PROFESSIONAL CONDUCT AND RESPONSIBILITIES

In addition to the specific duties of each individual rank and assignment, the following provisions are applicable to all officers and civilian employees of the department insofar as they are pertinent to their particular functions and responsibilities.

....

4. Attention to Duty – All officers shall at all times be alert and diligent in the performance of their duties and respond prudently but decisively when police action is required.

[4] The CBA does not incorporate the Code of Conduct and Appearance (Code of Conduct). Additionally, the record contains no evidence regarding when the City promulgated the Code of Conduct, under what authority it promulgated the Code of Conduct, and if or when it notified the Union about the Code of Conduct.

5. Devotion to Duty – All employees, while on duty, shall devote their full time and attention to the service of the Newton Police Department and to the citizens of the community. They shall remain awake and alert at all times while on duty.

....

29. Physical or Psychological Exam – An employee shall submit to a physical, mental or psychological examination, at the expense of the Newton Police Department, when so ordered for just cause as determined by the Chief of Police.

30. Physical Fitness – All officers shall maintain good physical condition and mental alertness in accordance with acceptable standards determined by the Chief of Police. All officers are expected to keep themselves physically fit as their age permits.

General Background

The sworn personnel comprising the Newton Police Department (Department) include approximately 100 patrol officers, 21 sergeants, 11 lieutenants, 6 captains, and Chief of Police David MacDonald (MacDonald). The Department contains eight bureaus, or divisions, and Captains command six of these bureaus, including Dispatch and Communications (Dispatch) and Patrol (Patrol). Patrol is the largest division within the Department, and the captain in charge of Patrol oversees approximately 100 officers, including 7 to 8 lieutenants and 14 sergeants.

MacDonald has been a City police officer since 1993, and he became Chief of Police in November 2015. Lieutenant Daly (Daly) is MacDonald's executive officer (XO), a non-Union position. Captain Doe (Doe) has been a City police officer since 1987, and he has been a Captain since 2009.[5] Upon becoming a captain, Doe was assigned to Dispatch, where he oversaw approximately twenty-five civilian personnel.

[5] The parties have employed a pseudonym to protect Doe's privacy. Doe is not Officer X.

Summer of 2015

On July 9, 2015, Doe was injured in an off-duty motor vehicle accident. Several days later he developed a concussion. As a result of this accident, Doe was out of work until late-October 2015, when Dr. Cantu (Cantu), a neurologist specializing in concussions, cleared Doe to return to work.

Upon returning to work, Doe continued to experience issues related to his concussion, including sensitivity to lights and the glare of computer screens, and severe headaches. By January 2016, these issues had abated, and in late-January or early-February Doe saw Cantu for the final time. Doe has not seen any doctor for issues related to his head injury since his final appointment with Cantu.

Also, during the summer of 2015, two of Doe's close family members passed away.

Summer of 2016

In August 2016, the City reorganized the Department. As part of the reorganization, MacDonald transferred four Captains, including Doe, to new assignments. MacDonald transferred Doe from Dispatch to Patrol. Doe's reassignment took effect on or about August 8, 2016.

On unidentified dates prior to MacDonald assigning Doe to Patrol, MacDonald spoke to Doe a few times about the prospect of Doe commanding Patrol, and Doe informed MacDonald that he did not want to command Patrol. After MacDonald told Doe that Doe would be assigned to Patrol, Doe utilized various forms of accrued

personal leave to take an extended vacation beginning on August 3, 2016.[6] Doe returned to work on the Monday after Labor Day, September 12, 2016.

To initiate his vacation, Doe contacted Lisa Pearson (Pearson), MacDonald's secretary, about using all his available personal leave. MacDonald expected Doe to check in with him about taking off this much time from work, but Doe did not violate any rule or regulation by taking the amount of vacation in the manner that he did. MacDonald did, however, consider the amount of time that Doe took off to be unusual.

During Doe's absence from work, MacDonald expressed concern to both Sergeant John Babcock (Babcock), President of the Union, and Captain Dennis Geary (Geary), Vice President of the Union, about Doe, stating words to the effect that Doe seemed to be a different person than he had been.[7] MacDonald also expressed concern about Doe to Therese Struth (Struth), the City's Employment Manager, and they decided that upon Doe's return to work they would tell him to let Human Resources (HR) know if he needed any help.[8]

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[6] Doe testified that he commenced his vacation in mid-July. Doe took off July 12, 14, and 22, and he left work early numerous times in mid-to-late July, but his extended absence from work commenced on August 3, 2016.

[7] MacDonald testified that he became concerned about Doe's well-being because of the length of Doe's vacation; however, MacDonald also testified that he was concerned about Doe's well-being prior to Doe taking his vacation.

[8] Struth testified that MacDonald told her that prior to Doe's vacation Doe had not "seemed like himself," had been "dozing off at work and not as responsive or proactive as he had been in the past," and that "there was a definite change in his work performance and personality." MacDonald testified that Doe would "come into a lot of meetings just lethargic and, you know, kind of disengaged, sit on the side." On cross-examination, MacDonald could not identify when this occurred, other than that it occurred after October 2015.

MacDonald asked Babcock to tell Doe to contact MacDonald upon Doe's return to work. The night before Doe returned to work, Babcock contacted Doe and told him that MacDonald wanted to see him in the morning.

Doe Returns to Work from Vacation

On the morning of September 12, 2016, Doe returned to work as the captain in command of Patrol, and he met with MacDonald and Struth. At this time, MacDonald was thinking about ordering Doe to undergo a fitness for duty examination. MacDonald asked Doe if Doe needed any help, and Doe responded that he was clear and felt well, had been enjoying his vacation with his children, and was "ready to go." Struth asked Doe if he wanted to avail himself of the employee assistance program, and Doe again stated that he was well. During this meeting, Struth observed that Doe seemed to be himself.

After returning to work on September 12, 2016, Doe used sick time to take off September 22 and 23, 2016. MacDonald did not talk to Doe about these two sick days. MacDonald did, however, talk to Struth about Doe's use of the two sick days, and MacDonald ultimately decided to place Doe on administrative leave.[9]

On the morning of September 26, 2016, MacDonald entered Doe's office and told Doe that Doe did not look well, and Doe was not the same person he had been. At this time, MacDonald raised with Doe the prospect of a fitness for duty examination, and

[9] MacDonald testified that Doe's use of sick leave on these two days "may have been the final piece in my mind that said we really should visit this fit for duty." MacDonald was concerned that "maybe there's really something going on that I don't know about either medically or psychologically or otherwise." Struth testified that she was "worried" that Doe was "not really ready to be employed."

Doe told MacDonald that such an examination was not necessary. MacDonald told Doe they would talk the next day.

After MacDonald spoke to Doe, HR notified MacDonald that, due to a cancellation, Doe's fitness for duty examination could be scheduled for the next day, September 27, 2016. At that time, MacDonald decided that he would order Doe to undergo a fitness for duty examination.

Fitness for Duty Examination

On the morning of September 27, 2016, Doe was summoned to MacDonald's office, where he met with MacDonald and Daly in MacDonald's conference room. MacDonald presented Doe with a letter placing Doe on administrative leave pending a fitness for duty examination. This letter states:

> You are hereby notified that you are being placed on paid administrative leave, beginning today, Tuesday September 27, 2016 pending a fitness for duty examination.
>
> The examination is scheduled for you at Mt. Auburn Occupational Health for today, Tuesday September 27, 2016 at 1:00 PM with Dr. Reid Boswell. His office is located at Mt. Auburn Occupational Health at 725 Concord Ave. Suite 1500, Cambridge, MA 02138....
>
> You will be notified by the Human Resources Department of an appointment with Dr. John Madonna. His office is located at Chandler Psychological Services at 469 Chandler Street, Worcester, MA 01602.

Doe requested Union representation, and both Babcock and Geary subsequently joined the meeting. MacDonald explained his decision to order Doe to undergo a fitness for duty examination by stating words to the effect that Doe did not look well and was not the same person he had previously been. MacDonald asserted that he had just cause under the Code of Conduct to order the fitness for duty examination, and also claimed authority to order the examination under the City ordinances. MacDonald did

not invoke Article XXXII of the parties' CBA, and they did not discuss Doe receiving a drug or alcohol test.[10] At the end of the discussion, all agreed that Doe would obey MacDonald's order.[11]

By email on September 27, 2016, at 12:26 PM, Struth, after having already scheduled the examination with Dr. Reid Boswell's (Boswell) office over the telephone, wrote to Boswell:

> [Doe] is coming to see you today for a fitness for duty exam. We are requesting this exam out of concern for him. [Doe] had some medical issues last year and has not seemed to get back to 100% capacity. I have attached his essential job functions. Please let me know if you need any additional information.

After changing out of his uniform and turning over his departmental vehicle and firearm, Doe went to the appointment with Boswell. Upon Doe's arrival and before Boswell examined Doe, a medical assistant directed Doe to a room and requested from Doe a urine sample. The medical assistant did not explain the reason for requesting the urine sample, and Doe provided the urine sample. The medical assistant next took a sample of Doe's chest hair, again without explanation. Doe was then taken into a different room and administered a breathalyzer test, again without explanation. After Doe provided the samples and underwent the breathalyzer test, Boswell examined Doe. The examination lasted a few minutes, and Boswell asked Doe a few questions. Doe then went home.

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[10] MacDonald testified on cross-examination that he did not have reasonable suspicion to believe that Doe was using drugs or alcohol in violation of the contractual policy.

[11] Babcock testified regarding this conversation: "I asked him the question what type of physical was it and he said basically a physical. And I want to say under the code of conduct he had just cause and by the city ordinance was allowed to send him to the doctor. I disagreed, but I asked him if this was an order and he said yes. I told him the captain would follow the order."

Still on September 27, 2016, after conducting the fitness for duty examination, Boswell cleared Doe to return to work without restrictions "pending drug tests." Boswell forwarded the form containing this information to the City, and Struth received it. Struth informed MacDonald that Boswell found Doe fit for duty.

On September 28, 2016, Struth forwarded a referral letter (Referral Letter) for Doe to Dr. John Madonna (Madonna). This Referral Letter states:

> [Doe] has been with the Newton Police Department since 1987 and has been promoted through the ranks becoming a Captain in 2009. Captain [Doe] has been an exemplary employee and has always gone above and beyond expectations. [Doe] had a difficult year last year. He suffered some family loss and also had a medical event. [Doe] has displayed behavior such as struggling to stay awake during meetings, taking excessive time off and seeming generally disengaged all of which are totally out of character for him. Upon [Doe's] return after four weeks off in August Chief MacDonald and I met with [Doe] just to check in and see if things were alright. It was unusual for him to be out for that long without having called the chief. He had put in for the time through the timekeeper. He assured us that he was just enjoying the summer with his children. Since then he has taken additional sick time. We are asking for this fitness for duty exam out of concern for [Doe].
>
> Please let me know if you need any additional information at this time. Upon receipt of a signed release I will send [Doe's] personnel file and any available test results.

By letter to Doe dated September 29, 2016, Struth notified Doe that he was scheduled to see Madonna on Tuesday, October 4, 2016. On October 4, 2016, Doe met with Madonna for approximately thirty to forty-five minutes. At the conclusion of the meeting, Madonna told Doe he was fit for duty. That same day, Struth spoke with Madonna, who verbally communicated to Struth that he found Doe fit for duty; Madonna also sent a letter to this effect. Struth then told MacDonald that Madonna had found Doe fit for duty.

<u>Union Information Request and Demand to Bargain</u>

By letter to MacDonald, sent via email and regular mail, dated September 28, 2016 (September 28 Letter), the Union, through counsel, requested the following information in response to Doe's placement on paid administrative leave pending a fitness for duty examination:

1. Under what authority have you ordered [Doe] to be examined by Mt. Auburn?

2. If you are relying upon #29 of Professional Conduct and Responsibilities of the Newton Police Department Code of Conduct ... what is the "just cause" for this order? If you are relying on any other authority, please supply the reason(s) for this order.

3. What tests or other diagnostics were requested by the Newton Police Department/City of Newton to be performed by Mt. Auburn on [Doe]?

4. What information was communicated to Mt. Auburn regarding [Doe]?

5. Please supply a copy of all communications between the Newton Police Department/City of Newton and Mt. Auburn concerning [Doe].

In this September 28 Letter, the Union also requested the following information regarding Doe's appointment with Madonna at Chandler Psychological Services:

1. Under what authority have you ordered [Doe] to be examined by Dr. Madonna?

2. If you are relying upon #29 of Professional Conduct and Responsibilities of the Newton Police Department Code of [Conduct], what is the "just cause" for this order? If you are relying on any other authority, please supply the reason(s) for this order.

3. What tests or other diagnostics were requested by the Newton Police Department/City of Newton to be performed by Dr. Madonna on [Doe]?

4. What information was or is being communicated to Dr. Madonna regarding [Doe]?

5. Please supply a copy of all communications between the Newton Police Department/City of Newton and Dr. Madonna concerning [Doe].

The September 28 Letter concludes, in relevant part:

In addition, presuming that Dr. Madonna is being requested to perform a fitness for duty examination, the Union requests that the Newton Police Department/City of Newton negotiate over certain aspects of this mandated examination ***before*** (emphasis in original) it is undertaken. Specifically, the Union requests negotiations over the following:

1. The selection of the evaluator;

2. The information which is transmitted to the evaluator;

3. The testing protocol to be used by the evaluator;

4. What results are to be generated by the evaluator and to whom they are to be communicated.

The Department of Labor Relations has specifically found all of these matters to be mandatory subjects of bargaining. See *In the matter of Massachusetts Port Authority*, UP-04-2669 (6/30/09), *aff'd sub nom. Massachusetts Port Authority v. Commonwealth Employment Relations Board*, 78 Mass. App. Ct. 1122 (2011).

City Responds to Union's September 28 Letter

The City did not bargain with the Union as requested in the September 28 Letter. By letter dated October 5, 2016 (October 5 Letter), the City, through counsel, responded to the Union's September 28 Letter. The City responded to the first five items contained in the September 28 Letter as follows:

1. Newton Police Department Code of Conduct and Appearance, No. 29... Section 2-46(c) of the Newton Revised Ordinances... Article XV of the CBA between the City and NPSOA, at 15.01(B) and (E). Furthermore, the determination of whether a police officer is fit for duty is a "core managerial right" under Massachusetts law that the City cannot relinquish or otherwise make subject to collective bargaining.

2. Observation of physical and mental condition in addition to work performance, in essence, the totality of the circumstances.[12] The City is also generally

[12] MacDonald did not subsequently identify any issues with Doe's work performance when MacDonald completed Doe's 2016 Performance Evaluation, dated January 11, 2017.

aware of the employee's past medical condition(s). See also Attachment 2 (emphasis in original) to this letter.[13]

3. The City requested that the City Physician perform a fitness-for-duty physical evaluation.

4. See Attachment 1 (emphasis in original) to this letter.[14]

5. See response to No. 4, above.

The City responded to the Union's request for information relating to Doe's appointment with Madonna as follows:

1. Newton Police Department Code of Conduct and Appearance, No. 29... Section 2-46(c) of the Newton Revised Ordinances... Article XV of the CBA between the City and NPSOA, at 15.01(B), (E). Furthermore, the determination of whether a police officer is fit for duty is a "core managerial right" under Massachusetts law that the City cannot relinquish or otherwise make subject to collective bargaining.

2. Observation of physical and mental condition in addition to work performance, in essence, the totality of the circumstances. The City is also generally aware of the employee's past medical condition(s). See also Attachment 2 to this letter.

3. The City requested that Chandler Psychological Services ("CPS") perform a fitness-for[-]duty cognitive evaluation.

4. See Attachment 2 to this letter.

5. See response to No. 4, above.

Doe Returns to Work from Administrative Leave

By letter dated October 6, 2016, Struth notified Doe that HR had received written confirmation of his fitness for duty from "the City Physician and CPS."[15] The letter

[13] Attachment 2 contained the Referral Letter that Struth forwarded to Madonna on September 28, 2016.

[14] Attachment 1 contained Struth's September 27, 2016 email to Boswell, and the referenced essential job functions.

instructed Doe to report to work on the morning of October 7, 2016. Babcock also called Doe and told him to return to work on October 7. On October 7, 2016, Doe returned to work and resumed command of Patrol.

Struth's Role in Scheduling Fitness for Duty Examinations

Struth has worked for the City since 2005. In 2006 she began working in HR as a Benefits Specialist. In or around 2007, she became Employment Manager. At some point in late 2016, Struth became Deputy Director of HR. At the time of the hearing in this matter, she served as interim Director of HR.

The City has sent employees from every City department for a fitness for duty examination.[16] Struth has been scheduling City employees for fitness for duty examinations for approximately five to six years and she schedules between seven and ten employees annually for a fitness for duty examination.[17] When scheduling a fitness for duty examination, Struth schedules the employee to undergo both a physical examination and a psychological examination. The City has used Boswell to perform physical examinations on City employees since before Struth began working for the City; the City has used psychologist Bruce Cedar (Cedar), of CMG Associates in Newton, to perform psychological examinations on City employees since before Struth began working for the City; and the City has used Madonna, of Chandler Associates in

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[15] Doe passed the drug and alcohol test.

[16] Struth testified that the City sends "[a]ll prospective employees...prior to employment for a pre[-]employment physical. And then for fitness for duty, we send anybody for reasonable suspicion."

[17] The record does not establish how these approximate numbers break down across the ten unions that represent City employees.

Worcester, to perform psychological examinations on public safety officers since 2007 or 2008.

Struth knows that Boswell frequently conducts a drug and alcohol test on employees that the City sends to him for the physical component of the fitness for duty examination. When scheduling Doe's fitness for duty examination, Struth did not request that Boswell perform a drug and alcohol test on Doe. Additionally, MacDonald was not involved in scheduling Doe's examination, he did not request a drug or alcohol test, did not invoke any provisions of the CBA, did not direct HR to request such testing, and he was not aware that Doe would receive a drug and alcohol test.

Union Knowledge of Fitness for Duty Examinations

The record contains no evidence that the City notified the Union on any occasion when it sent a superior officer for a fitness for duty examination.[18]

Babcock became a sergeant in 2009. He has been the Union's President since 2015, and prior to becoming President he was Vice President for two years. Since becoming a sergeant, Babcock has no knowledge of the Department sending any superior officer, except Doe, for a fitness for duty examination. Doe also has no knowledge of the Department sending any superior officer, except himself, for a fitness for duty examination.

At an unidentified point in 2014, the Department sent Superior Officer Roe (Roe) to Cedar for a psychological fitness for duty examination after receiving an anonymous

[18] Even the September 27, 2016 letter placing Doe on administrative leave pending a fitness for duty examination did not copy the Union. After Doe requested Union representation, the City copied the Union on the September 29, 2016 letter to Doe.

allegation that Roe was involved in domestic abuse.[19] At that time, MacDonald was XO to then Chief of Police Howard Mintz (Mintz), and Captain Dennis Berube (Berube) was the Union's President. Sergeant Brian Henderson (Henderson), a Department stress officer, accompanied Roe to the fitness for duty examination, but the record contains no evidence that Henderson had any role in the Union. Struth, who was by this time scheduling fitness for duty examinations, had no knowledge of Roe's fitness for duty examination. Additionally, the record contains no credible evidence that Mintz notified the Union that he ordered Roe to undergo a fitness for duty examination.[20]

OPINION

I. Repudiation of Article XXXII

City's Motion

Generally, *Spielberg*, or post-arbitration deferral, is appropriate if: 1) the arbitration proceedings have been fair and regular; 2) all parties agreed to be bound by the proceedings; 3) the decision of the arbitrator is not repugnant to the purposes and

[19] "Roe" is a pseudonym, and Roe is not Doe or X.

[20] Berube is still employed with the City but did not testify at the hearing. MacDonald, who fielded the anonymous allegation, testified that he "believe[s]" this incident got on Berube's "radar," but MacDonald could not recollect how and MacDonald acknowledged that, "I never talked to the Captain directly at this time about it." On cross-examination, MacDonald testified that MacDonald "sat in on the initial meeting with Officer Roe and the chief. So after that it was no longer part of my duties and responsibilities." Roe did not have Union representation at this initial meeting. MacDonald further testified that the Union was concerned about the source of the allegation against Roe and that the allegation would lead to "unilateral" fitness for duty examinations being "undertaken pell-mell," but he could not provide specific facts to substantiate this assertion. Additionally, no documentary evidence establishes that the Department communicated with the Union about this incident. Accordingly, the preponderance of the evidence in this record does not establish that the Union received notice that the Department sent Roe for a psychological fitness for duty examination in 2014.

policies of the Law; and 4) the arbitration award disposes of the substantially identical issue presented to the Commonwealth Employment Relations Board (CERB). City of Cambridge, 7 MLC 2111, 2112, MUP-3386 (May 6, 1981). Additionally, so long as the arbitration award disposes of substantially identical issues to those presented in an unfair labor practice proceeding, the CERB will generally defer even after a hearing has taken place. Town of Brookline, 20 MLC 1570, 1593, MUP-8426, 8478 and 8479 (May 20, 1994) (citing City of Boston, 5 MLC 1155, MUP-2089 (July 24, 1978)).

The CERB has declined to defer, however, where the arbitration award at issue is not part of the evidentiary record. City of Leominster, 23 MLC 62, 65 n. 13, MUP-8528 et al. (August 7, 1996) (CERB unable to determine if deferral would be appropriate because the arbitrator's decision was not part of the record); Town of Ludlow, 17 MLC 1191, 1202, MUP-7040 (August 3, 1990) (declining to defer to arbitral process where no arbitration decision was presented for consideration); cf. City of Boston, 5 MLC at 1156-1157 (CERB deferred to arbitration award after hearing when the city moved to re-open the record for the purpose of placing the arbitration award before the CERB, and the union did not object to re-opening of the record). Ultimately, deferral is a matter of discretion. Town of Wilmington, 9 MLC 1694, 1695 n.1, MUP-4688 (March 18, 1983).

Here, I closed the evidentiary record in this matter on April 30, 2018, subject to the parties submitting certain agreed-upon materials that required additional redacting or amending. On May 8, 2018, after receiving those agreed-upon materials, I again indicated to the parties that the evidentiary record was closed. The parties then submitted briefs on or before July 10, 2018, after, according to the Motion, the arbitration hearing had occurred. At no time did the City request that I leave the record

open so that the Award, or any of the grievance materials, could be included in the record after the Award issued; and the City did not raise the issue of deferral in its post-hearing brief. Instead, the City waited until it had received the Award before raising the issue of deferral via the October 15, 2018 Motion. The City's Motion comes more than three months after the parties submitted post-hearing briefs and more than five months after I closed the evidentiary record in this matter.

The City has not moved to re-open the evidentiary record to include the Award. Rather, it seeks to supplement its post-hearing brief with the Award. Yet, even if the City supplements its post-hearing brief with the Award, the Award does not thereby become part of the evidentiary record, which is closed.[21]

I decline to treat the Motion as a motion to re-open the record. As a preliminary matter, I cannot conclude that the Union has acquiesced to the re-opening of the record where the City has not, in fact, moved to re-open the record. Moreover, even if I treated the Motion as a motion to re-open the record, the City cannot satisfy the applicable standard because evidence that a party seeks to include in the record after the close of the hearing generally must be newly discovered evidence which was in existence at the time of the hearing but of which the moving party was reasonably ignorant, despite the exercise of reasonable diligence. City of Boston, 35 MLC 95, MUP-04-4050 (December 19, 2008) (citing Boston City Hospital, 11 MLC 1065, 1075, MUP-4893 (July 25, 1984)). The Award unquestionably does not meet these criteria.

[21] The City has not requested that I take notice of the Award pursuant to M.G.L. c. 30A, s. 11(5).

Accordingly, I deny the City's Motion. The Award is not part of the evidentiary record, and is therefore not properly before me to consider for deferral. Consequently, I must address Count I on the merits.

Merits

Count I of the Complaint alleges that the City repudiated Article 32.04 of the CBA when Boswell drug and alcohol tested Doe during the fitness for duty examination without MacDonald invoking Article 32.04 of the CBA, and without the City following the procedures contained in Article 32.04. A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of the Law. Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (October 23, 2009). There is no repudiation of an agreement if the language of the agreement is ambiguous and there is no evidence of bargaining history to resolve the ambiguity. Id.

The Union did not meet its burden to establish that the City repudiated Article 32.04 because Article 32.04 either does not apply to fitness for duty examinations or is ambiguous. The Union did not present any evidence to establish that the parties' bargaining history over Article 32.04 reached fitness for duty issues. I therefore find that the City did not repudiate the parties' CBA and I dismiss Count I.

Article 32.04, A.1., provides that the Chief of Police or his designee may require that a superior officer submit to a drug and/or alcohol test for the reasons listed in paragraphs 32.04, B.1. to B.5. This article nowhere references fitness for duty examinations, and thus does not expressly contemplate a situation where, as here, the officer is ordered to undergo a fitness for duty examination, and the attending physician

orders a drug and alcohol test as part of that fitness for duty examination. Regardless of whether the City's physician is functioning as an agent of the City, or Struth knew that Boswell sometimes administered a drug and alcohol test as part of a fitness for duty examination, Doe's drug and alcohol test occurred pursuant to a fitness for duty examination rather than pursuant to MacDonald or his designee requiring the testing. In other words, Doe received an order to submit to a fitness for duty examination, not an order to undergo a drug and alcohol test. Accordingly, Article 32.04 either does not apply to this factual scenario or is ambiguous.

Additionally, the Union argues that the parties have not bargained about fitness for duty examinations. It would therefore follow that the parties did not agree that Article 32.04, a bargained drug and alcohol policy, would apply to fitness for duty examinations. Accordingly, the City cannot have repudiated Article 32.04, and I dismiss Count I.

II. Failure to Timely Provide Information

Count II alleges that the City violated the Law by delaying providing relevant information that was reasonably necessary for the Union to execute its duty as the collective bargaining representative. Specifically, the Complaint alleges that the City violated the Law by not responding to the Union's September 28, 2016 information request until October 6, 2016.[22]

An employer may not unreasonably delay furnishing requested information that is relevant and reasonably necessary to the union's function as the exclusive bargaining representative. Boston Public School Committee, 24 MLC 9, 11, MUP-1410, 1412

[22] The City responded on October 5, 2016.

(August 26, 1997). The CERB considers the following factors when deciding whether an employer has unreasonably delayed providing relevant information: 1) whether the delay diminishes the union's ability to fulfill its role as exclusive bargaining representative, Id.; 2) the extensive nature of the request, Trustees of the University of Massachusetts Medical Center, 26 MLC 149, 158, SUP-4392, 4400 (March 10, 2000); 3) the difficulty of gathering the information, Id.; 4) the period of time between the request and the receipt of the information, Higher Education Coordinating Council, 23 MLC 266, 269, SUP-4142, (June 6, 1997); and 5) whether the employee organization was forced to file a prohibited practice charge to retrieve the information, Board of Higher Education, 26 MLC 91, 93, SUP-4509 (January 11, 2000).

The Union argues that the City's production of the requested information after Madonna examined Doe violated the Law because, "No evidence was offered by the City why it could not have produced the information before, rather than after, Doe was sent to Dr. Madonna." The City argues that responding to the September 28, 2016 information request on October 5, 2016, "in no way hindered" the Union's ability to challenge the City's basis for sending Doe for fitness for duty examinations because the information would not have changed the fact that the City ordered Doe to undergo the examinations and would not have altered the outcome of those examinations.

I agree with the City. On September 27, 2016, MacDonald ordered Doe to undergo the fitness for duty examinations. On September 28, the Union made the information request. On October 3, three business days after requesting the information, the Union filed the instant charge. On October 4, Doe saw Madonna, and the City responded to the request on October 5.

Even if the Union is correct that the City could have provided the information before Doe saw Madonna, the Union did not prove that receiving the information on October 5, 2016, diminished its ability to represent Doe prior to Doe attending the examination with Madonna. As Babcock acknowledged in his testimony, once Doe received MacDonald's order, it was incumbent on Doe to obey that order. Having the requested information a day or two earlier would not have changed that fact. Additionally, the Union does not argue that receiving the information on October 5 diminished the Union's ability to represent Doe after October 5. Accordingly, I conclude that the Union did not prove that the City unreasonably delayed providing the relevant information in violation of Section 10(a)(5) of the Law and I dismiss Count II.

III. Failure to Bargain on Demand and Unilateral Change

Count III of the Complaint alleges that the City violated the Law by failing to respond to the Union's September 28, 2016 demand to bargain over certain aspects of the psychological examination with Madonna before Madonna examined Doe. Specifically, the Union requested to bargain over: the selection of the evaluator; the information which is transmitted to the evaluator; the testing protocol to be used by the evaluator; and what results are to be generated by the evaluator and to whom those results are to be communicated. Count IV of the Complaint alleges that the City violated the Law by requiring Doe to undergo a fitness for duty examination, both physical and psychological, as a condition of continued employment without giving the Union prior notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision. Because both counts allege a failure to

bargain over the City's requirement that Doe undergo a fitness for duty examination I address them together.

Unilateral Change

A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing its employees' exclusive collective bargaining representative with notice and an opportunity to bargain. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983). The duty to bargain extends to both conditions of employment established through past practice and to conditions of employment established through a collective bargaining agreement. Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To establish a unilateral change violation, the charging party must show that: 1) the employer altered an existing practice or implemented a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was implemented without prior notice and an opportunity to bargain. Town of Lexington, 37 MLC 115, 119, MUP-08-5313 (December 9, 2010); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

The Union argues that MacDonald's order that Doe undergo a fitness for duty examination was the first instance where a bargaining unit member, with knowledge of the Union, was compelled to undergo a fitness for duty examination as a condition of continued employment. Fitness for duty examinations are mandatory subjects of bargaining, and the City ordered Doe to undergo the fitness for duty examination without bargaining with the Union. The Union further argues that City Ordinance Section 2-46(c) does not excuse the City from its bargaining obligation. Finally, the

Union argues that although the Department has maintained a rule that authorizes the Chief of Police to order fitness for duty examinations for just cause, that rule was previously unenforced, and unilateral implementation of previously unenforced rules constitutes a unilateral change to employees' terms and conditions of employment.

The City argues that fitness for duty examinations are not mandatory subjects of bargaining because they fall within a core managerial prerogative of the Department. Alternatively, the City argues that even if a bargaining obligation did exist, the Union waived any bargaining rights by contract and inaction. Additionally, the City argues that it has a legal right under applicable Civil Service law to conduct fitness for duty examinations.

Employer Altered an Existing Practice or Instituted a New One

MacDonald's order that Doe undergo a fitness for duty examination as a condition of continued employment was the first time that the Department, with notice to the Union, ordered a bargaining unit member to undergo a fitness for duty examination as a condition of continued employment. The City argues that it regularly orders employees of every City department to undergo fitness for duty examinations, and that these examinations have included bargaining unit members. Under well-established law, however, notice will be imputed to a union when a union executive officer with authority to bargain is first made aware of the employer's proposed plan. Commonwealth of Massachusetts, 28 MLC 239, 242, SUP-4485 (January 23, 2002) (citing Town of Hudson, 25 MLC 143, 148, (1999)). The City did not produce any evidence that imputes notice of prior fitness for duty examinations to the Union.

The City produced evidence that it ordered a bargaining unit member to undergo a fitness for duty examination on three separate occasions. Two occasions involved Officer X, who both times sought to return to active duty from a period of leave. The City did not copy the Union on any of the transmittal documents, and the City did not produce any evidence that would otherwise establish Union notice or knowledge of these examinations. On the third occasion, involving Officer Roe, the City again did not copy the Union on any transmittal documents, and the City produced no credible evidence that would impute notice or knowledge to the Union.

Although the City maintains a Code of Conduct that purports to authorize fitness for duty examinations under limited circumstances, the record contains no evidence that the City ever exercised that authority over bargaining unit members with notice to the Union.[23] Accordingly, MacDonald ordering Doe to undergo a fitness for duty examination as a condition of continued employment implemented a change to the bargaining unit members' terms and conditions of employment. See generally, City of Boston, 25 MLC 92, MUP-1087 (December 29, 1998) (If an employer attempts to reserve an area of discretion, but in practice, does not exercise that discretion, the employer may not then unilaterally begin to exercise discretion without giving the union notice and an opportunity to bargain).

Mandatory Subject of Bargaining

Although the City disputes that fitness for duty examinations are mandatory subjects of bargaining, the CERB has held that, "[T]he criteria and procedure by which an employer determines whether individuals are fit for employment have a direct and

[23] I more fully address the Code of Conduct during the discussion of the City's waiver by inaction argument, infra.

profound effect on employees' job security and are, therefore, quintessential conditions of employment, subject to collective bargaining." Massachusetts Port Authority, 36 MLC 5, 11-12, UP-04-2669, (June 30, 2009), aff'd sub nom. Massachusetts Port Authority v. Commonwealth Employment Relations Board, 78 Mass. App. Ct. 1122 (2011).

Additionally, in City of Haverhill, 17 MLC 1215, 1217, MUP-7194 (August 21, 1990), the CERB affirmed a hearing officer's decision holding that, "[T]he imposition of a psychological test as a condition of continued employment is a mandatory subject of bargaining." In the affirmed decision, the hearing officer expressly considered and rejected the argument that a core managerial prerogative overwhelmed any bargaining obligation related to psychological testing as a condition of continued employment. She wrote: "While the [c]ity may have a nonbargainable managerial prerogative to decide that it will employ only physically and psychologically healthy persons, the standards and methods by which it will determine whether individuals are thus fit for employment... are... subject to collective bargaining." City of Haverhill, 16 MLC 1077, 1081, 1082 n.2 (H.O. July 6, 1989). Accordingly, under the CERB's existing precedent, the order that Doe undergo a fitness for duty examination as a condition of continued employment was a change that affected a mandatory subject of bargaining.

Notice and Opportunity to Bargain

The Union requested to bargain over certain aspects of the psychological examination, and the City refused the bargaining demand. The Union did not request bargaining over the physical component of the examination, but that examination had already occurred, and was thus a fait accompli that did not require the Union to demand bargaining. Town of Hudson, at 148. Accordingly, the Union has established that the

City refused a bargaining demand (Count III) and that the City implemented a unilateral change to a mandatory subject of bargaining without notice and an opportunity to bargain (Count IV). I now consider the City's affirmative defenses.

Waiver by Contract

The City argues that the Union waived by contract any bargaining rights related to fitness for duty examinations under Articles VI and XV of the CBA. The CERB has consistently held that an employer asserting the affirmative defense of contract waiver must show that the subject was consciously considered and that the union knowingly and unmistakably waived its rights to bargain. Commonwealth of Massachusetts, 28 MLC 308, 311, SUP-4740 (April 11, 2002) (citing Board of Trustees of the University of Massachusetts/University Medical Center, 21 MLC 1795, 1802, SUP-3375 (May 12, 1995)). The City has not met this standard.

Article VI

The City argues that by the "explicit and unambiguous terms" of Article VI, the City could have "sent every single member of the NPSOA for a fitness-for-duty examination in 2016." I disagree. Article 6.01(c) provides that the City may require superior officers to complete an annual medical examination conducted by the City Physician. This provision provides the employee with the opportunity to involve his or her own physician in "the need for further testing or consultation with other physicians," and it requires the employee to "cooperate in any recommended program to manage responsibly his/her medical condition which may be determined by the annual physical examination or testing."

This article contemplates a program to identify and manage medical conditions. Article VI nowhere references the imposition of a fitness for duty examination as a condition of continued employment, and it does not authorize psychological examinations as part of the annual medical examination. Additionally, neither MacDonald, at the time that he ordered the fitness for duty examination, nor the City, when responding to the Union's information request, referenced Article VI of the CBA. This failure to invoke Article VI during the occurrence of the events at issue further undermines the City's position that Article VI unambiguously applies to this situation. Moreover, the City presented no evidence that the parties consciously considered Article VI to cover fitness for duty examinations as a condition of continued employment, or that they have previously interpreted it to cover such examinations. Accordingly, Article VI does not waive the Union's bargaining rights.

Article XV[24]

The City argues that the Union has waived any bargaining rights under Article 15.01.B. Although Article 15.01.B gives the City the right to establish or continue policies for the conduct of the City business, a broadly-framed management rights clause is too vague to provide a basis for inferring a clear and unmistakable waiver. Massachusetts Port Authority, 36 MLC at 12 (no waiver where the management rights clause unambiguously gives Massport the right to issue rules and regulations but does not refer to fitness for duty evaluations or psychological examinations). Accordingly, I

[24] The City attached to its post-hearing brief an arbitration award between the City and IAFF, Local 863, which the City argues supports its position that the Union waived by contract any bargaining rights under the management rights clause of the parties' CBA. For the same reasons explained supra, this arbitration award is not part of the evidentiary record, and I have not considered it.

conclude that Article XV does not waive the Union's bargaining rights regarding fitness for duty examinations.

Waiver by Inaction

The City also argues that the Union waived by inaction any bargaining rights. To support its position, the City points to the longstanding existence of City Ordinance, Section 2-46; the long-standing existence of Professional Conduct and Responsibilities #29 of the Code of Conduct; and the City's alleged practice of sending employees from every department for fitness for duty examinations. I address each in turn.

A public employer that asserts the affirmative defense of waiver by inaction must demonstrate by a preponderance of the evidence that an employee organization had: 1) actual knowledge or notice of the proposed action; 2) a reasonable opportunity to negotiate about the subject; and 3) unreasonably or inexcusably failed to bargain or request bargaining. Town of Watertown, 32 MLC 54, 56, MUP-01-3275 (June 29, 2005).

Ordinance

Regarding City Ordinance, Section 2-46, where a subject is within the scope of negotiations pursuant to Section 6 of the Law, but not contained in the collective bargaining agreement, the employer is still required to bargain over the subject despite the existence of a town by-law or ordinance, rule or regulation. Town of Lee, 11 MLC 1274, 1277, MUP-5211 (November 21, 1984), aff'd sub nom. Town of Lee v. Labor Relations Commission, 21 Mass. App. Ct. 166, 167 (1985); Boston Water and Sewer Commission, 12 MLC 1250, 1253-54, MUP-5861 (September 20, 1985). Accordingly,

the longstanding existence of City Ordinance, Section 2-46 does not establish that the Union waived any bargaining rights.

Code of Conduct

Regarding Professional Conduct and Responsibilities #29 of the Code of Conduct, the record evidence does not establish when the City promulgated the Code of Conduct; under what authority it promulgated the Code of Conduct; and if or when the City notified the Union about the Code of Conduct. Consequently, the mere existence of the Code of Conduct does not prove that the Union waived its right to bargain.

The record does establish, however, that this was the first time, with notice to the Union, that the City exercised this claimed authority over the Union. Because the City never exercised, with notice, this authority over this Union until MacDonald ordered Doe to undergo the fitness for duty examination, the Union could not have had actual knowledge of any proposed action until this incident arose. Upon receiving actual knowledge of the proposed action, the Union sought to bargain. Accordingly, the Code of Conduct does not establish that the Union waived its right to bargain by inaction.

City's Alleged Practice

The City argues that its longstanding practice has been to send employees from every City department for fitness for duty examinations. Regardless of any practice that may exist in other bargaining units, the City only produced evidence of three prior instances where it ordered a superior officer to undergo a fitness for duty examination as a condition of continued employment, and the City did not produce evidence that the

City notified the Union of those occurrences, or that the Union knew of them. Accordingly, no waiver here exists.

Civil Service Law

Finally, the City argues that it has the authority under applicable Civil Service law to order police officers to undergo fitness for duty examinations. To support this position, the City cites M.G.L. c. 31, s. 61A.[25] This statute provides that an administrator, defined in Section 1 of Chapter 31 as an administrator "of the human resources division within the executive office for administration and finance," shall establish in-service health and physical fitness standards which shall be applicable to all police officers and firefighters in cities and towns. These standards shall be rationally related to the duties of such positions and shall have the purpose of minimizing health and safety risks to the public. Additionally, all police officers shall undergo in-service medical and physical fitness examinations at such time intervals as the administrator shall determine.

The record contains no evidence that the City was acting pursuant to such standards. The record does establish that Doe underwent a fitness for duty examination because MacDonald ordered it and not because the "administrator" required the examination pursuant to M.G.L. c. 31, s. 61A. Moreover, this section of the Civil Service law expressly provides that any municipality may adopt stricter in-service health and physical fitness standards "subject to collective bargaining." Accordingly, the City's argument fails.

[25] This City also cites a Civil Service Commission case, Puza v. Westfield Police Commission, D1-12-318, p. 23 (2004). This decision does not discuss fitness for duty examinations in the context of collective bargaining.

CONCLUSION

The City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it failed to bargain upon demand about the criteria and procedure for fitness for duty examinations. The City also violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it imposed a fitness for duty policy as a condition of continued employment without providing notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision on employees' terms and conditions of employment. The City did not violate Section 10(a)(5) of the Law by repudiating the parties' CBA, and the City did not violate Section 10(a)(5) of the Law by unreasonably delaying providing information to the Union.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City shall:

1. Cease and desist from:

   a. Refusing to bargain collectively with the Union by failing to negotiate with the Union about the criteria and procedure for imposing fitness for duty examinations; and

   b. Imposing a fitness for duty policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision.

2. Take the following affirmative action that will effectuate the purposes of the Law:

   a. Upon request, bargain collectively with the Union about the criteria and procedure for imposing fitness for duty examinations;

   b. Rescind the unilateral imposition of a fitness for duty examination as a condition of employment until the City has bargained to resolution or impasse regarding the criteria and procedure for imposing fitness for duty examinations;

c. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically if the City customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees; and

d. Notify the DLR in writing of steps taken to comply with this Order within ten (10) days of receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the 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 ten days, this decision shall become final and binding on the parties.

NOTICE TO EMPLOYEES

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

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held that the City of Newton (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by 1) failing to negotiate with the Newton Police Superior Officers Association (Union) about the criteria and procedure for imposing fitness for duty examinations and 2) imposing a fitness for duty policy without giving the Union prior notice and opportunity to bargain to resolution or impasse.

The City posts this Notice to Employees in compliance with the Hearing Officer's Order.

WE WILL NOT refuse to bargain collectively with the Union by failing to negotiate with the Union about the criteria and procedure for imposing fitness for duty examinations.

WE WILL NOT refuse to bargain collectively with the Union by imposing a fitness for duty policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

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

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

- Upon request, bargain collectively with the Union about the criteria and procedure for imposing fitness for duty examination issues; and

- Rescind the unilateral implementation of a fitness for duty examination as a condition of employment until the City has bargained to resolution or impasse regarding the criteria and procedure for imposing fitness for duty examinations.

_____ _____

City of Newton Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).