

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of:

CITY OF BOSTON

and

BOSTON POLICE SUPERIOR OFFICERS
FEDERATION

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Case Number: MUP-16-5618

Date Issued: September 27, 2019

CERB Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerman, CERB Member

Appearances:

Patrick N. Bryant, Esq. Representing the Boston Police Superior
Officers Federation

Barbara V.G. Parker, Esq. Representing the City of Boston

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

1 SUMMARY

2 The issue before us on appeal is whether the City of Boston (Boston) was required
3 to give the Boston Police Superior Officers Federation (Union) prior notice and an
4 opportunity to bargain before implementing food and drink guidelines that prohibit
5 bargaining unit members from eating at their workstations. The Hearing Officer dismissed
6 the Complaint on grounds that this topic was not a mandatory subject of bargaining. To
7 reach this conclusion, the Hearing Officer balanced the parties' respective interests in this
8 topic and held that the City's interest in protecting critical and expensive equipment and
9 ensuring a rodent and pest-free work environment outweighed any "inconvenience" that

1 might result from the eating restrictions. He thus held that the Union had not carried its
2 burden of proving that the Guidelines impacted a mandatory subject of bargaining and
3 dismissed the Complaint.

4 On appeal, the Union claims that the Hearing Officer misapplied the balancing test
5 by omitting certain facts, overstating the City's interests, trivializing bargaining unit
6 members' interests and misunderstanding some of its arguments and testimony. The
7 Union also claims that the decision is irreconcilable with existing precedent.

8 After reviewing the record on appeal, including both parties' supplementary
9 statements, we reverse the Hearing Officer's decision. Contrary to the Hearing Officer,
10 we find that prohibiting bargaining unit members from eating at their desks did more than
11 merely inconvenience bargaining unit members. Rather, the decision to implement this
12 work rule impacted several mandatory subjects of bargaining, including the availability of
13 food in the workplace, and the conditions under which it could be consumed. It also
14 affected break time and potential discipline by requiring employees to leave their
15 workstations in order to eat and by imposing a reporting obligation on employees and the
16 supervisors of employees observed violating the rule. Thus, although the City may have
17 a core managerial prerogative to avoid attracting rodents and pests and to safeguard
18 expensive equipment from spillage and debris, where there is no evidence showing that
19 this work rule was either compelled by a third party or the exclusive means of achieving
20 these objectives, or that the City imposed the rule uniformly on employees who worked
21 in the same vicinity or who used expensive equipment, we conclude the City's managerial
22 interests in imposing the rule did not outweigh the Union's interests in bargaining over it.

23

Facts

The facts of this case, as set forth in the parties' stipulations and as found by the Hearing Officer, are unchallenged on appeal. We accept the findings and summarize them below.

Operations Unit

The Operations unit (Operations) is a specialty unit within the City's Police Department (Department), whose functions include Department communications. Deputy Superintendent Michael Cox (Cox) commands Operations. Operations is located on the fourth floor of the Police Department's main headquarters (Headquarters) and the Operations Communications Center is housed on the Operations floor (Floor). The Floor contains approximately twenty 911 call-taking workstations and eight or nine police dispatch workstations. Overall, Operations is staffed by approximately 160 civilian employees who work as call-takers, dispatchers, support staff and clerks. Local 888, SEIU represents a number of these civilians.

Approximately twenty-two sworn officers also work in Operations. The Union is the exclusive representative for approximately twelve sergeants and lieutenants (Supervisors) who work in the Operations Communications Center supervising the call-takers and dispatchers.

Operations Workspace

The Supervisors work on an elevated platform (Platform) that overlooks the Floor. A hallway running perpendicular to one side of the Platform contains several offices, including Cox's office and Captain Phillip Terenzi's (Terenzi) office. The Bureau of Field Services (BFS), which is not part of Operations, has an office next to Terenzi's office. There is also a conference room (Conference Room) next to Cox's office. The Conference

1 Room is about ten to fifteen feet away from the Platform. EMS, an entity separate from
2 the Department but based in Headquarters, is located on the other side of the wall that
3 runs behind the Platform. About forty feet across the Floor opposite the Platform is a
4 hallway with additional office space and a break room (Break Room).

5 Shifts and Breaks

6 Operations is staffed twenty-four hours a day on three shifts. Three Supervisors
7 are assigned to each shift, and two are required to be on the Floor at any given time.
8 Supervisors are entitled to a break and can schedule their own breaks.¹ Although there
9 was testimony suggesting that Supervisors might not always take the breaks to which
10 they are entitled,² the Union does not dispute that the Supervisors can take breaks, and
11 Cox testified that he has never received any complaints that the Supervisors were not
12 getting enough breaks. To the contrary, Cox testified that "other parts of the Department"
13 had complained that the Supervisors "break too often."

14 Workstations

15 The call-takers' workstations include a desk, computer and telephone equipment.
16 The dispatchers' workstations are similar but include additional monitors and radios. The
17 Supervisors have the same set up at their desks. Before the City issued the Guidelines,
18 each workstation also had a small, open-top trash container next to it.

19 The equipment is expensive - twelve workstation desks alone cost over \$200,000.
20 About two or three years prior to the hearing in this matter, a third-party consultant

¹ The Hearing Officer made no findings as to the length or the number of breaks that Supervisors could take per shift, and neither party points to any record testimony or documents containing this information.

² Sergeant Jeanne Carroll (Carroll) testified on behalf of the Union that Supervisors do not "really" take scheduled breaks.

1 informed Cox during repairs to dispatch radios that food crumbs were damaging the
2 equipment, but Cox took no action at the time.

3 Sanitation Issues

4 Operations has had issues with mice and insects for some time, and the
5 Department has periodically employed an exterminator to address the problem.
6 Headquarters suffers from similar pest-related sanitation issues, including rats and bugs.

7 In 2006, the SEIU complained about unsanitary work conditions. The record
8 contains no information about what, if anything, the Department did in response to this
9 complaint.

10 In June 2016, however, the Department learned that the SEIU had filed a new
11 complaint with the Commonwealth's Department of Labor Standards (DLS) alleging a
12 number of different problems within Operations.³ According to the DLS' response, the
13 SEIU's complaint included allegations of "a lack of maintenance and housekeeping, a
14 potential vermin infestation, and broken workstations."

15 On July 21, 2016, the DLS conducted a workplace safety and health inspection of
16 Operations in response to the SEIU's complaint. On August 12, 2016, it issued a "Written

³ As set forth in the DLS' Written Warning and Order to Correct, described infra:

Pursuant to M.G.L. c. 149, §§ 6, 6 ½, it is the responsibility of the [DLS] to investigate occupational hazards in the workplace, to recommend controls to reduce such hazards, and to assist counties, municipalities and state agencies to comply with applicable workplace safety and health laws, regulations, and recognized industry standards.

The CERB also takes administrative notice that, pursuant to the DLS enabling statute, M.G.L. c. 23, §11A, the DLS is required to employ persons "having special knowledge of the causes, and prevention of occupational diseases" to fulfill the duties set forth above.

1 Warning and Order to Correct" (Written Warning/Order) describing the complaint and
2 listing four items requiring corrective action. Each of the action items included a deadline
3 for compliance and the proof it would require.

4 The first order related to complaints that employees were getting bitten by insects
5 and had seen mice in the dispatch area. Noting that the Department had contracted with
6 an Integrated Pest Management (IPM) vendor to address these issues, the DLS directed
7 the Department to "follow any action plan developed by the IPM vendor." The DLS stated
8 that "an action plan typically involves . . . removing food sources which attract rodents."
9 The proof of corrective action required was to "Provide DLS with the schedule and action
10 plan implemented by the IPM vendor."

11 The third action item concerned food at workstations and trash containers. The
12 condition was described as "In occasions [sic] employees eat food at their workstations.
13 The majority of trash containers have no lids. If food remains and liquids are tossed in
14 the trash the lining bag should be changed, and the container should have a lid." The DLS
15 directed the Department to use open-top trash containers for paper or dry refuse waste
16 only, and to provide and designate closed-top trash containers for food waste and other
17 things that could leak. It requested that the Department to provide it with pictures of the
18 trash containers designated for food waste. The proof of corrective action included "follow
19 recommendation by the IPM vendor with regard to eating and drinking at desks."

20 The other two action items relate to the cleanliness of the Operations area,
21 including the Floor, the Break Room and the locker room, and broken workstations
22 (ergonomic chairs and tables) in the Dispatch Center.

23 On September 7, 2016, the Department responded to the DLS indicating that it
24 had contracted with an extermination service that required the company to come to

1 Headquarters twice a month and to respond to any additional calls for service. As proof
2 of its corrective action, the Department provided pictures of the closed-trash lids that it
3 had designated for food waste. It did not, however provide the DLS with a copy of an IPM
4 vendor action plan as had been requested.⁴ The Department nevertheless stated in a
5 September 19, 2016 follow-up letter to the DLS that it “now consider[ed] all the items
6 listed in your report addressed.”

7 Food and Drink Guidelines

8 Before October 2016, the City did not restrict the consumption of food and drink in
9 Operations, and employees regularly ate and drank in their work areas.

10 On October 17, 2016, the City issued the Guidelines without giving the Union prior
11 notice and an opportunity to bargain over them. Under the heading “Objective,” the
12 Guidelines stated:

13 Operations Division is a shared workspace with a considerable amount of
14 critical equipment that must remain clean and free from debris. In addition,
15 spilled food or beverages in the workspace can attract rodents and other
16 pests. Effective October 17, 2016, consumption of food in the Operations
17 Communications Center will be restricted to the break room area.”
18

19 The Guidelines then listed five Guidelines (some with subparts) under the heading
20 “Food and Drink.” The first Guideline prohibited “eating at workstations or Operations
21 floor.” The second permitted drinks in the work areas as long as they were in covered,
22 spill-resistant containers. The third indicated that food was allowed in the cafeteria on the
23 first floor of Headquarters and in the Break Room. The fourth Guideline addressed how
24 food would be stored and disposed of in the Break Room, and the fifth stated that the

⁴ The City did not provide an IPM Action Plan at hearing either.

1 Deputy Superintendent and the Captain of the Operations Division may make exceptions
2 to the policy.

3 A few weeks later, the Department indicated that it would also permit Supervisors
4 to eat in the Conference Room.

5 Demand to Bargain

6 On November 8, 2016, the Union sent a letter to Deputy Superintendent Steven
7 Whitman (Whitman) in the Department's Office of Labor Relations demanding that he
8 "immediately rescind" the Guidelines until the Department "adheres to its collective
9 bargaining obligations prior to implementation." Whitman replied on November 14, 2016,
10 stating:

11 The Food and Drink Guidelines were written in response to numerous
12 grievances and a complaint by the [DLS] regarding recommendation of an
13 environment not conducive to insects or pests. In response, the
14 Department took several steps to remedy any conditions that might promote
15 insects or rodents, including . . .limit[ing] the work areas where food may be
16 consumed.

17 * * *

18 The Department is of the opinion that there is no bargaining obligation
19 where there are two equally accessible places in Operations to consume
20 food and the Management Rights clause of the collective bargaining
21 agreement reserves to the Department the exclusive right to issue
22 reasonable work rules and regulations governing the conduct of the Police
23 Department provided such rules and regulations are not inconsistent with
24 express provisions.⁵

25
26 While the Department is not willing to rescind the policy, we are willing to
27 meet with the Federation to discuss any concerns.

28 The Union filed the instant charge two days later.

⁵ Although the City argued to the Hearing Officer that the Management Rights clause allowed it to unilaterally promulgate the Guidelines, the Hearing Officer did not address this argument in his decision. The City did not re-raise this argument to the CERB in its response to the Union's appeal, and we therefore do not consider it.

1 On April 28, 2018, about a year and a half after the Guidelines went into effect,
2 Terenzi sent an email to sixteen Department employees, including Carroll and three
3 lieutenants assigned to Operations. The email stated:

4 Having expended substantial funds on the deep cleaning of the Operations
5 Center, please ensure everyone is complying with the food and drink
6 policies in operations.
7

8 If I should happen to see someone in violation of the food and drink policy,
9 I will ask for reports from those who are violating the policy and the
10 supervisors who are working.
11

12 There is no evidence that the Guidelines applied to any Department or
13 Headquarters employees other than those who worked in the Operations Unit. After the
14 Guidelines were issued, Terenzi continued to have a refrigerator and coffee maker in his
15 office. Carroll also testified that EMS and BFS employees continue to eat on the fourth
16 floor of Headquarters, and that she had seen office staff walking into Operations with
17 take-out containers heading to their offices.

18 Opinion⁶

19 The issue before the CERB on appeal is whether a work rule that prohibits
20 employees from eating at their workspace is a mandatory subject of bargaining. To decide
21 this issue, the Hearing Officer applied the traditional balancing test that the CERB uses
22 to determine whether a topic is a mandatory subject of bargaining, which balances the
23 interests of employees in bargaining over a particular subject with the interest of the public
24 employer in maintaining its managerial prerogatives. Town of Danvers, 3 MLC 1559,
25 1577 MUP-2292, 2299 (April 6, 1977). After considering such factors as the degree to
26 which the topic has a direct impact on terms and conditions of employment and whether

⁶ The CERB's jurisdiction is not disputed.

1 the issue involves a core governmental decision, see id., the Hearing Officer concluded
2 that the City's stated interest in maintaining its managerial objectives of ensuring that
3 critical equipment remain free from debris and avoiding attracting rodents and other pests
4 outweighed the "inconvenience" that resulted from the Supervisors having to drink out of
5 spill-proof containers while they handle expensive electronic equipment or walk across
6 the hall to eat while on duty. For the reasons stated below, we agree with the Hearing
7 Officer that the guidelines requiring employees to drink out of spill-proof containers did
8 not trigger a bargaining obligation. With respect to eating at workstations however, we
9 weigh the parties' respective interests differently and conclude that the City was obliged
10 to give the Union notice and an opportunity to bargain before imposing its blanket
11 prohibition on eating at workstations.

12 We first consider the Union's interests in bargaining over this topic. Contrary to
13 the Hearing Officer, we find that the eating restriction was more than a mere
14 inconvenience to bargaining unit members; rather, it was a material change to terms and
15 conditions of employment that impacted several mandatory subjects of bargaining,
16 including, most clearly, the availability of food and the conditions under which food is
17 consumed in the workplace. See Ford Motor Co. v. National Labor Relations Board, 441
18 U.S. 488 (1979). On several occasions, the CERB has held that changes in such
19 conditions, which the Supreme Court has deemed "matters of deep concern to workers,"
20 id. at 498, trigger a statutory bargaining obligation. City of Boston, 15 MLC 1209, 1214,
21 1216, MUP-6431 (H.O., October 19, 1988) (citing Ford Motor Co. v. NLRB, supra) *aff'd*
22 16 MLC 1086 (July 12, 1989) (City violated the Law by closing dining area and changing
23 meal options, where employees could not leave premises during meal breaks); City of

1 Peabody, 9 MLC 1447, 4767, MUP-4750 (November 17, 1982) (scheduling of lunch
2 period is a mandatory subject of bargaining).

3 Not all changes in food-related conditions will trigger a bargaining obligation,
4 however. In analyzing this issue, the CERB considers whether there has been a material
5 change in employees' working conditions, including whether reasonable alternatives exist
6 to the eliminated food or drink benefit. Thus, in Commonwealth of Massachusetts, 22
7 MLC 1441, 1442-3, SUP-3893 (January 11, 1996), the CERB held that the employer's
8 decision to cease providing refrigerated, bottled water to employees was not subject to
9 mandatory bargaining where it found that the tap water available to employees from a
10 drinking fountain was not materially different from the bottled water. Similarly, in City of
11 Boston, 9 MLC 1021, MUP-4316 (May 28, 1982), the CERB found that the City's
12 reduction in on-site cafeteria hours did not trigger a bargaining obligation because
13 alternative food services remained reasonably available at all hours.

14 In this case, the Hearing Officer found that the impact of the new food and drink
15 restriction on the Supervisors' terms and conditions of employment was merely one of
16 convenience because instead of being able to eat at their desks, the Supervisors had to
17 walk ten to fifteen feet to eat at the Conference room. He also rejected the Union's claims
18 that the Guidelines impacted discipline or the Supervisors' duties. In essence, the
19 Hearing Officer held that there had been no material change to the Supervisors' working
20 conditions.

21 We agree with respect to the spill resistant drinking container guidelines restriction
22 only. The requirement that employees drink out of a spill-proof container did not prevent
23 them from drinking a beverage anywhere or anytime they wanted; much like the

1 Commonwealth bottled water decision described above, it just changed the type of
2 container they could drink from.

3 The restriction on eating at workstations had more far-reaching implications on the
4 Supervisors' terms and conditions of employment, however. Although the Supervisors
5 may have had alternative eating locations, including one as close as fifteen feet away,
6 their proximity does not alter the fact that the Supervisors went from a situation where
7 they could consume food at *any* time and place in Operations while on-duty, including at
8 their workstations, to a situation where, before they could eat, they had to check that there
9 were at least two Supervisors on duty, and either interrupt whatever they were doing and
10 walk away from their workstations, or wait until they had either completed their tasks or
11 there was adequate coverage. For employees used to eating without restrictions at their
12 workstations while on duty, the blanket prohibition from doing so constituted a material
13 change in working conditions that affected both the availability of food to them during the
14 workday, i.e., if there was not adequate coverage, they could not eat at all, and the
15 conditions under it could be consumed, i.e., away from the workstation where they were
16 performing their job. As the Supreme Court stated in Ford Motor Company, "one need
17 not strain to consider these to be among those conditions of employment that should be
18 subject to the mutual duty to bargain." 441 U.S. at 498.

19 Further, this change not only affected the Supervisor's food-related conditions of
20 employment, it also affected various aspects of their break time, including how they spent
21 their breaks and the number and frequency of breaks taken. Previously, employees could
22 use their breaks for purposes other than eating. Now, due to the prohibition on eating at
23 workstations, if employees wanted to eat during their shift, at least a part of the time that

1 they spent away from their workstations had to be used for this purpose.⁷ The manner in
2 which employees can spend their non-working time is a mandatory subject of bargaining.
3 Town of Amesbury, 10 MLC 1295, MUP-5250 (November 18, 1983) *aff'd*, 10 MLC 1602
4 (May 16, 1984) (the existence and location of the television set in fire station is
5 mandatorily bargainable); City of Everett, 2 MLC 1471, MUP-2126 (May 5, 1976)
6 (employee use of nonactive working time is a mandatory subject of bargaining).

7 Eliminating the ability to eat at workstations also increased the likelihood that
8 employees who had previously eaten at their workstations would need to take more
9 breaks than they had in the past. Where Cox testified that he had received complaints
10 that the Supervisors "break too often," the Union, at minimum, also had an interest in
11 bargaining over the number and/or frequency of food-related breaks that the Supervisors
12 would be allowed to take under the new Guidelines.

13 Finally, unlike in the Commonwealth of Massachusetts and City of Boston
14 decisions described earlier, the change at issue here was promulgated in the form of a
15 work rule, which imposed a reporting obligation upon the employees seen violating the
16 rule and upon the Supervisors on duty when the violation occurred. Although, as the
17 Hearing Officer found, the Guidelines did not expressly include a disciplinary penalty for
18 violators, the Union nevertheless had an interest in bargaining over whether or how those

⁷ Although the Hearing Officer found that Guidelines permitted the employees to eat while on duty, just in a different location, there is no evidence, nor does the City claim, that it did not consider the time that the Supervisors spent eating in places other than their desks to be a break from their regular work duties. Indeed, in its post-hearing brief, the City, in an effort to distinguish the CERB's holding in City of Boston (Deer Island), *supra*, described the Guidelines as creating a "respite for the superior officers from their stressful work environment by requiring them to eat somewhere other than on the Operations floor where they would be surrounded by their stressful work environment."

1 reports would be taken into consideration in matters such as progressive discipline,
2 evaluations, promotions, etc.

3 In sum, we find that prohibiting the Supervisors from eating at their desks
4 constituted a material change in working conditions affecting a number of different
5 mandatory subjects of bargaining that the Union had good reason to bargain over. The
6 fact that Carroll characterized the change as only "inconvenient" does not change this
7 result, because, as the Union points out, the convenience of a term and condition of
8 employment is not dispositive of whether it is a mandatory subject of bargaining. See,
9 e.g., Town of Dedham, 16 MLC 1235, 1242, MUP-6561 (September 8, 1989) ("The
10 convenience and commuting cost savings which an employee may derive from free use
11 of the employer's vehicle constitutes a mandatory subject of bargaining."); City of Boston,
12 9 MLC at 1024 (elimination of on-premises medical library).

13 The question then becomes whether the City's asserted managerial interests in
14 imposing the rule outweigh the Union's interests in bargaining over it. As found by the
15 Hearing Officer, the stated objective of the Guidelines, which were issued in response to
16 complaints about the unsanitary nature of Operations, including employees experiencing
17 insect bites, was to ensure that "critical equipment" remains "clean and free from debris,"
18 and to avoid attracting rodents and pests. Although, as the Hearing Officer found, these
19 are legitimate interests, we conclude that they do not outweigh the Union's interests in
20 bargaining for the following reasons.

21 First, the record reflects that the City did not impose or enforce the rule uniformly
22 on all employees who worked in or near the Operations Unit or expensive equipment,
23 including EMS and BFS employees who worked in areas directly adjacent to the Floor
24 and Platform. There was also testimony that Terenzi and other staff continued to have

1 food in their offices. The City does not dispute this, but defends its disparate treatment
2 on grounds that, by narrowly tailoring the food restrictions to the areas about which the
3 SEIU had complained, it was trying to “limit the impact of the Guidelines on employees.”
4 In so doing, however, the City not only acknowledges that the Guidelines did, in fact, have
5 an impact on those employees, but undermines its stated goals of removing all food
6 sources that could attract pests or damage equipment.⁸

7 Second, it is well established that where a decision is committed to a public
8 employer’s prerogative, the Law imposes a duty to bargain over the means of
9 implementing it where, as here, those means affect mandatory subjects of bargaining.
10 Local 346, International Brotherhood of Police Officers v. Labor Relations Commission,
11 391 Mass. 429, 442 n. 16 (1984) (citing Burlington v. Labor Relations Commission, 390
12 Mass. 157, 165 (1983); School Committee of Newton v. Labor Relations Commission,
13 388 Mass. 557, 564 (1983). Moreover, if a third-party mandates changes in employees’
14 working conditions that are outside the control of the public employer, the public employer
15 is nevertheless required to negotiate over the non-mandated areas of the changes and
16 the impact of the changes on mandatory subjects of bargaining prior to implementation.
17 City of Boston, 33 MLC 1, 8, MUP-02-3491 (June 22, 2006) *aff’d sub nom.* City of Boston
18 v. CERB, 453 Mass. 389 (March 16, 2009); Commonwealth of Massachusetts, 24 MLC
19 113, 114, SUP-3869 (June 10, 1998) and cases cited therein.

⁸ Our analysis here is limited to the fact that that City continued to allow EMS and BFS employees to continue to eat on the Fourth floor of Headquarters. We do not consider the exception that the City carved out to accommodate employees who need to eat or drink due to medical conditions.

1 Here, the City has offered no evidence, nor does it claim, that its blanket prohibition
2 was mandated by a third party, or was the only means of achieving its managerial
3 objectives.⁹ Rather, after investigation, the DLS, the state agency with expertise in the
4 field of public sector occupational safety, ordered the City to take certain measures short
5 of a blanket prohibition on eating at workstations to address the sanitation issues it found,
6 but directed the City to comply with the IPM vendor's action plan regarding eating at
7 desks. Where there is no evidence, and the City does not contend, that either the DLS
8 or the IPM vendor¹⁰ required the City to promulgate the blanket prohibition at issue here,
9 the City's interests in unilaterally implementing the work rule as the sole means of
10 accomplishing its managerial objectives are significantly diminished. Indeed, under the
11 decisions cited in the preceding paragraph, bargaining was required over the matters that
12 remained within its control.

13 Finally, although the CERB has never considered whether an employer is required
14 to give prior notice and an opportunity to bargain before issuing a work rule that prohibits
15 eating in work areas, the NLRB has. In National Association of Government Employees,
16 327 NLRB 676 (1999), *enfd* NAGE v. NLRB, 205 F. 3d 1324 (Table), 1999 WL 1253998
17 (2d Cir. 1999), the NLRB affirmed an Administrative Law Judge's (ALJ) decision holding
18 that the employer violated its statutory bargaining duty by revoking employees' privileges

⁹ In footnote 3 of its supplementary statement, the City, in response to one of the Union's arguments on appeal, states that it "never claimed that the DLS mandated the Guidelines; it only claimed that the Guidelines were consistent with the DLS's recommendation to reduce food waste in Operations that attracts rodents."

¹⁰ Indeed, the City's failure to present the IPM action plan to either the DLS, as the DLS requested, or to introduce it at hearing, strongly suggests either that the City never requested or received an action plan from its IPM vendor, or that if it did, the action plan did not go as far as the City did in imposing its blanket food prohibition.

1 of eating and drinking at their desks. Relying on Ford Motor Co., *supra*, for the principles
2 articulated above, and a number of NLRB decisions,¹¹ the ALJ rejected the employer's
3 claim that it had not made a significant change because the same employees still ate
4 primarily in the lunchroom, and opined that the "privilege of consuming food and drinks,
5 such as coffee, yogurt, juice, popcorn, as well as lunch if the employee so chooses, is a
6 matter of significant concern to employees, and is not an inconsequential change to their
7 working environment." 327 NLRB at 687-688 (citations omitted).

8 Similarly, in Blue Circle Cement Company, Inc., 319 NLRB 954 (1995), the
9 employer unilaterally ordered maintenance employees and electricians who had
10 previously taken breaks and eaten lunch in the electrical shop to take their breaks and
11 lunch in the designated maintenance lunchroom. While acknowledging the managerial
12 control and safety concerns that impelled the new restriction, the ALJ nevertheless held
13 that, to the extent that federal regulations required the employer to prohibit the employees
14 from eating in the shop, the employer still had an obligation to bargain over the impacts
15 of the decision, and over alternative break and lunch locations. The ALJ further held that
16 to the extent the order extended beyond prohibiting eating in the electrical shop, the
17 employer was required to bargain over the decision itself. *Id.* at 958-959. *See also*,
18 Indiana Hospital, 315 NLRB 647, 655 (1994) (affirming ALJ decision that employer had
19 duty to give union notice and an opportunity to bargain before prohibiting employees from
20 taking breaks and having lunch in powerhouse); U-Haul Company of Nevada, 2006 WL

¹¹ The decisions included Advertiser's Mfg. Co., 280 NLRB 1185, 1190-1191 (1986) (change in area where employees were permitted to take breaks and lunch without notifying union found violative); Alberts, Inc. 213 NLRB 687, 692 (1974) (prohibition of employees having coffee behind the wrapping desk when not busy).

1 2990327 (NLRB Div. of Judges, October 17, 2006) (prohibiting employees from eating in
2 non-toxic areas of shop floor violated Section 8(a)(5)).

3 The same result should obtain here. Although the City may have a core
4 managerial prerogative to protect employee safety by avoiding food waste that attracts
5 insects and rodents, and to safeguard expensive and essential equipment from food
6 debris, where there is no evidence demonstrating that its decision to ban eating in work
7 areas was compelled by a third party or the only means of achieving its objectives, or that
8 the City imposed the prohibition uniformly on employees who worked in the same vicinity
9 or used expensive equipment, the City's interests in imposing the new work rule did not
10 outweigh the Union's interests in bargaining over the myriad of ways that the decision
11 and the impacts of the decision affected mandatory subjects of bargaining.¹²

12 Conclusion

13 For the above reasons, we reverse the Hearing Officer's decision and issue the
14 following Order.

15 **ORDER**

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

1. Cease and desist from:
 - a. Refusing to bargain in good faith with the Union over a work rule prohibiting Supervisors from eating at their workstations;
 - b. Imposing a work rule prohibiting the Supervisors from eating at their workstations without giving the Union prior notice and an opportunity to

¹² Although the Hearing Officer referenced Section 11 of Chapter 291 of the Acts of 1906, as amended (Commissioner's Statute) in the final paragraph of his decision, he noted that the City had not expressly argued to him that this statute, which grants the City's Police Commissioner the broad authority to manage the "administration and disposition...of the department" vested it with the managerial authority to promulgate the Guidelines. Nor does the City rely on this statute in urging affirmance of the Hearing Officer's decision. We therefore do not reach this issue.

bargain to resolution or impasse over the decision and the impacts of the decision; and

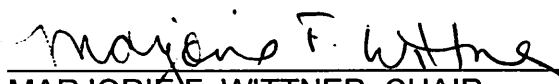
- c. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

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

- a. Upon request, bargain collectively with the Union regarding eating at workstations;
- b. Rescind the work rule prohibiting the Supervisors from eating at their workstations until the City has bargained to resolution or impasse over this issue;
- 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
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


KATHERINE G. LEV, CERB MEMBER


JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE DEPARTMENT OF LABOR RELATIONS COMMONWEALTH EMPLOYMENT RELATIONS BOARD AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has issued a decision holding that the City of Boston (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to negotiate over a work rule prohibiting bargaining unit members from eating at their workstations.

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

Section 2 of M.G.L. c 150E gives public employees the following rights: to engage in self-organization, to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT refuse to bargain collectively with the Union by implementing a work rule that prohibits employees from eating at their workstations.

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 regarding eating at workstations.

Rescind the work rule prohibiting bargaining unit members from eating at their workstations until we have bargained with the Union to resolution or impasse over the decision and the impacts of the decision to implement the work rule on bargaining unit members' terms and conditions of employment.

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