

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF EVERETT

and

NEW ENGLAND POLICE  
BENEVOLENT ASSOCIATION

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Case No. MUP-13-3006

Date issued: June 16, 2015

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Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Albert Mason, Esq. - Representing the City of Everett

Gary G. Nolan, Esq. - Representing NEPBA

**HEARING OFFICER'S DECISION**

**SUMMARY**

1 The issues are whether the City of Everett (City or Employer) violated Section  
2 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by: (1) reducing  
3 the number of police captains employed by the City through attrition without first giving  
4 the New England Police Benevolent Association (Union or NEPBA) prior notice and an  
5 opportunity to bargain to resolution or impasse about the method to achieve a reduction  
6 in force, and the impacts of that decision; and (2) by assigning police lieutenants to  
7 perform the duties of the unfilled captain position without giving NEPBA prior notice and

1 an opportunity to bargain to resolution or impasse over that decision and its impacts on  
2 employees' terms and conditions of employment.

3 For the reasons explained below, I find that the City did not violate the Law when  
4 it reduced the number of police captains employed by the City through attrition, but did  
5 violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it assigned  
6 a police lieutenant to perform the duties of an unfilled captain position without first giving  
7 NEPBA prior notice and an opportunity to bargain to resolution or impasse over that  
8 decision and its impacts on employees' terms and conditions of employment.

9 STATEMENT OF THE CASE

10 On July 26, 2013, the Union filed a Charge of Prohibited Practice (Charge) with  
11 the Department of Labor Relations (DLR), alleging that the City had engaged in  
12 prohibited practices within the meaning of Section 10(a)(5) of the Law. On October 21,  
13 2013, a duly-designated DLR Investigator issued a two-count Complaint of Prohibited  
14 Practice (Complaint) alleging that the City: (1) unlawfully reduced the number of police  
15 captains through attrition when, since April 19, 2013, it left unfilled a captain's position,  
16 and (2) assigned a police lieutenant to perform the duties from the unfilled captain's  
17 position without first giving the Union prior notice and an opportunity to bargain to  
18 resolution or impasse over the decision to reduce the number of captains and assign  
19 lieutenants to perform the captains' work. On October 29, 2013, the City filed its  
20 Answer.

21 On September 17, 2014, I conducted a hearing at which both parties had a full  
22 opportunity to be heard, to examine and cross-examine witnesses and to introduce

1 evidence. The City and the Union filed their post-hearing briefs on October 20 and 21,  
2 2014, respectively.

3 STIPULATION OF FACTS

4 The parties stipulated to the following facts:

- 5 1. The Union is an employee organization within the meaning of Section 1 of the  
6 Law.
- 7
- 8 2. The Union is the exclusive bargaining representative for uniformed personnel in  
9 the City's police department who hold the rank of sergeant, lieutenant and  
10 captain.
- 11
- 12 3. On April 19, 2013, Captain Robert Bontempo [(Bontempo)] retired from the City's  
13 police department (Department).
- 14
- 15 4. The City has assigned a lieutenant to the duty assignment that Captain  
16 Bontempo had been assigned to prior to April 19, 2013.
- 17
- 18 5. The City took the action involved herein, without giving the Union prior notice and  
19 an opportunity to bargain to resolution or impasse over the assignment of a  
20 lieutenant to the duty assignment that Captain Bontempo had previously been  
21 assigned to prior to April 19, 2013.
- 22
- 23 6. The City is a public employer with the meaning of Section 1 of the Law.
- 24
- 25 7. There are currently fewer captains on the Everett police department than there  
26 were before the retirement of Captain Bontempo.
- 27

28 FINDINGS OF FACT

29 **The Collective Bargaining Agreement**

30  
31 The Union and the City were parties to a collective bargaining agreement  
32 (Agreement) effective from July 1, 2013 – June 30, 2014. Article 5, Section 5.3 of the  
33 Agreement pertains to Appointment and Promotion, and states in full:

34 Upon request the City will give the Union an opportunity to state its views  
35 with respect to the existence of an alleged vacancy and how it should be  
36 filled. Irrespective of whether a vacancy exists above the rank of  
37 patrolman, the City will call for a Civil Service promotional examination at

1 least once every two years. The City reserves the sole discretion to  
2 determine if a vacancy will be filled.

3  
4 Article 6 of the parties' Agreement pertains to salaries and states, in relevant  
5 part, "The differential of at least 15% between pay grades will be maintained  
6 between...sergeant and lieutenant and captain."

7 **The Department's Organizational Structure**

8

9 **1. The Divisions**

10 Since at least 1998, the department has had a hierarchical command structure  
11 that consists of the Chief of Police at the top with four captains underneath who  
12 command four divisions (one captain per division): Operations, Investigations,  
13 Community Services and Administrative. Beginning in or about 2006, the department  
14 subsumed the Community Services division into the newly created Special Services  
15 division.

16 The Operations Division comprises functions that are directly concerned with  
17 legal violations; enforcement of all laws and ordinances, preservation of peace and  
18 public order, prevention and repression of crime, apprehension of all violators of the  
19 law, etc.

20 The Investigations Division comprises three subunits (criminal investigations,  
21 special investigations and evidence) while providing oversight for all investigative  
22 actions undertaken by the department, including management and monitoring of all  
23 evidence, and any other related functions assigned by the Chief.

24 The Special Services Division comprises homeland security, intelligence and  
25 crime analysis, community services, elder affairs, school resource officer program,  
26 marine unit, grants and any other related functions assigned by the Chief.

1           The Administrative Division provides services to the other divisions to assist with  
2 execution of their primary missions. It is also responsible for department property, the  
3 records section, building/fleet maintenance, holding facility, weapons and firearms  
4 section, capital equipment, licensing, scheduling personnel, keeper of the records,  
5 armorer, training and development of court officers, and any other related functions  
6 assigned by the Chief.

## 7           **2. The Chief and the Captains**

8           Beginning in early 2003, and at all relevant times, Steven A. Mazzie (Mazzie) has  
9 been Chief of the department. Two months prior to Mazzie's promotion, the department  
10 returned then-chief Rogers<sup>1</sup> to his former position as captain. In April of 2003, Captain  
11 Rogers retired from the department via an early retirement incentive.

12           The department employed Henry as a captain who, in 2009 and 2010,  
13 commanded the department's Operations Division. Henry retired from the department  
14 in 2011 via an early retirement incentive that prevented the department from filling his  
15 position until three years after his departure.

16           Since in or about 1976 through 2013, Bontempo was employed by the  
17 department which eventually promoted him to captain.<sup>2</sup> During his tenure as captain,  
18 Bontempo commanded the department's Investigations Division until his retirement in  
19 April of 2013.<sup>3</sup>

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<sup>1</sup> The parties did not identify Captain Rogers' first name.

<sup>2</sup> The record is unclear about when the Department promoted Bontempo to the position of captain.

<sup>3</sup> Captain Bontempo's retirement was regular and unrestricted, unlike Captains Rogers and Henry.

1 Captain Basteri has been employed with the department for 33 years, 20 of  
2 which have been as a captain. In 2009 and 2010, Basteri commanded the Special  
3 Services Division. In 2011, Chief Mazzie assigned Captain Basteri to perform the duties  
4 of commander of the Operations Division. Initially, Basteri shared these duties with  
5 Captains Bontempo and McAdam until the City permanently assigned him to perform  
6 those duties exclusively.

7 The department promoted Patrick McAdam (McAdam) to captain in 2006 after  
8 Rogers took early retirement.<sup>4</sup> At all relevant times, the department has assigned  
9 Captain McAdam as commander of the Administrative Services Division.

#### 10 **The Captains' Retirements**

11 As previously noted, when Captain Henry took early retirement in 2011, the City  
12 was prohibited from filling his vacant position for a period of three years. To  
13 compensate for his absence during this period, the department reassigned Captain  
14 Henry's duties and responsibilities as commander of the Operations Division among the  
15 three remaining captains—Bontempo, McAdam and Basteri—until, later appointing  
16 Captain Basteri to that position, permanently.

17 When Captain Bontempo took unrestricted retirement in 2013, the City was not  
18 prohibited from filling his vacant position. However, instead of hiring a new captain to  
19 replace Bontempo, or reassigning his duties as commander of Investigations to the

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<sup>4</sup> There is no direct evidence that Captain Rogers' early retirement contained a hiring restriction similar to Captain Henry's three-year early retirement restriction. However, Captain Basteri testified that the City waited until 2006 to promote McAdam and replace Rogers as captain. Because the City did not dispute Basteri's testimony on this point, I find that Captain Rogers' early retirement also contained an early retirement, hiring restriction of three years.

1 remaining captains, the City assigned Lieutenant Gamby to perform those duties  
2 without promoting him to captain or providing him with a 15% salary increase pursuant  
3 to Article 6 of the parties' Agreement.

#### 4 **The Prior Practices**

5 Prior to 2013, when a captain retired from the department, the City would either  
6 hire a new captain or redistribute the retiring captain's duties to other captains. When  
7 the City promotes a lieutenant to the position of captain, that promotion is accompanied  
8 by a 15% contractual pay increase pursuant to Article 6 of the Agreement. Based on  
9 these practices, the Union believed that after the three years had lapsed on Captain  
10 Henry's early retirement and after Captain Bontempo had taken his retirement, the City  
11 would either hire new captains to fill their vacancies or redistribute the work to the other  
12 captains.

13 Since the retirements of Captains Henry and Bontempo, the department has  
14 increased its number of employees by hiring 43% more lieutenants (from 7 to 10) and  
15 15% more patrol officers (from 65 to 75). Since April 19, 2013, the City has employed  
16 only two captains: McAdam and Basteri.

#### 17 **The October 2012 E-mails**

18 In or about 2012, the Union became aware that the City neither intended to fill  
19 Captain Henry's vacancy nor intended to hire a new captain to replace Captain  
20 Bontempo when he retired in 2013. Rather, the City wanted to keep those positions  
21 vacant—since Bontempo would not be retiring for another year—and use salaried funds  
22 from those positions to implement a new Deputy Chief structure. Specifically, by e-mail  
23 dated October 11, 2012, the Commonwealth's Civil Service Director of Operations

1 Bruce T. Howard, Jr. (Howard) contacted the City's Human Resource Director Robert  
2 Joy (Joy) about whether the City intended to hire a captain "in the near future."<sup>5</sup> Later  
3 that day, Joy replied to Howard's e-mail, stating that after speaking with Chief Mazzie,  
4 the department had no plans to hire a new captain. Joy also stated that the Chief was  
5 "moving towards a [D]eputy [Ch]ief structure"<sup>6</sup> and intended to use the salaries from the  
6 vacant captains' positions to fund the new Deputy Chief position.<sup>7</sup>

7 The City stated that its "biggest reason" for not filling the vacancies of Captains  
8 Henry and Bontempo "is economics" especially due to the forthcoming casino.<sup>8</sup> As of  
9 April 19, 2013, the City has yet to make a final decision about whether to fill the  
10 vacancies left by the retirements of Captains Henry and Bontempo.

#### 11 DECISION

12 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law  
13 when it unilaterally changes an existing condition of employment or implements a new  
14 condition of employment involving a mandatory subject of bargaining without first giving

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<sup>5</sup> The genesis of this e-mail exchange occurred when Union President Lieutenant O'Malley asked Howard in 2012, on behalf of Lieutenant Paul Landry (Landry), whether there would be an upcoming Civil Service exam for Captain Henry's vacant position. Pursuant to Article 5, Section 5.3 of the parties' Agreement, the City is obligated to "call for a Civil Service promotional examination at least once every two years."

<sup>6</sup> At some point after this e-mail, the parties agreed during negotiations for a successor agreement that they would first bargain over the new Deputy Chief structure before the City would implement it.

<sup>7</sup> Chief Mazzie later forwarded the entire e-mail exchange to both Lieutenants O'Malley and Landry.

<sup>8</sup> Chief Mazzie testified to this fact and the Union did not rebut it. At the time of the hearing, the November 2014 ballot question on whether to allow casinos in the Commonwealth had not yet passed. On November 4, 2014, the Commonwealth voted to pass the ballot measure.



1 its employees' exclusive bargaining representative notice and an opportunity to bargain  
2 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations  
3 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations  
4 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,  
5 SUP-4784 (Oct. 9, 2003). To establish a violation, a union must show that: (1) the  
6 employer changed an existing practice or instituted a new one; (2) the change had an  
7 impact on a mandatory subject of bargaining; and, (3) the change was implemented  
8 without prior notice to the union and an opportunity to bargain to resolution or impasse.  
9 Commonwealth of Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45,  
10 MUP-1704 (June 29, 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-  
11 4378 (Aug. 24, 2000).

12 Section 6 of the Law requires public employers to negotiate before changing the  
13 wages, hours, working conditions or standards of productivity and performance of their  
14 employees. School Committee of Newton, 388 Mass. at 562; see also Commonwealth  
15 of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009); Town of Andover, 28  
16 MLC 264, 269-70, MUP-1012 and MUP-1186 (Feb. 7, 2002). The City's decision to  
17 reduce the overall size of its police force is a level-of-services decision over which it has  
18 no duty to negotiate. School Committee of Newton, 388 Mass. at 562-63; Melrose  
19 School Committee, 9 MLC 1713, 1721, MUP-4507 (Mar. 24, 1983). However, its  
20 decision to do so by means of reduction in force through attrition is a mandatory subject  
21 of bargaining. School Committee of Newton, 388 Mass. at 563; Sec. of Admin. and  
22 Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91, 96  
23 (2009); City of New Bedford, 38 MLC 239, MUP-09-5581 and MUP-09-5599 (Apr. 3,

1 2012) (appeal pending). Workload and job duties are also mandatory subjects of  
2 bargaining. Town of Lakeville, 38 MLC 219, MUP-09-5590 (H.O. Mar. 22, 2012), aff'd  
3 38 MLC 290 (May 23, 2012) (citing Medford School Committee, 1 MLC 1250, 1252-53,  
4 MUP-690 (Jan. 20, 1975)).

#### 5 **Reduction in Force by Attrition**

6 There is no evidence that the City changed or instituted a new practice of  
7 reducing the number captains through attrition. Prior to April 19, 2013, the record  
8 shows that when Captain Rogers took early retirement in 2003, the City was prevented  
9 from appointing Captain McAdam as his replacement for a period of three years.  
10 Similarly, when Captain Henry took early retirement in 2011, the City was prohibited  
11 from hiring a new captain until 2014, pursuant to the terms of the early retirement  
12 arrangement. In 2012, one year after Henry's retirement, the Union learned that the  
13 City did not intend to fill his vacancy and wanted to implement a new Deputy Chief  
14 structure using the funds from his vacant position. The Union demanded to bargain in  
15 October of 2012 and, since that time, the City has agreed not to implement that  
16 structure until it first bargains with the Union over the impacts of the decision. Although  
17 the three-year period on Captain Henry's early retirement restrictions had not yet  
18 expired and the City had not yet made a final decision about his vacancy, the City did  
19 decide on April 19, 2013 that it would not appoint a new captain to replace Captain  
20 Bontempo on his retirement.

21 The Union argues that the decisions to leave Captain Henry's and Captain  
22 Bontempo's positions unfilled were unlawful because there were no level of services

1 impacted—just a change in the persons responsible for doing the captains' work. I  
2 disagree.

3 It is well-settled that a public employer's decision to determine its level of  
4 services is a core managerial decision that is not subject to collective bargaining.  
5 Commonwealth of Massachusetts, 33 MLC 39, 40-41 (2006). I find that the City's  
6 decision to reduce the number of captains by leaving those positions vacant was a  
7 matter within its exclusive prerogative over which it was not obligated to with the Union.  
8 Commonwealth of Massachusetts, 18 MLC 1220, 1225 (1991).

9 Nothing in the record shows that the City changed its past practice or established  
10 a new one in terms of the method used to reduce the number of captains' positions by  
11 attrition or otherwise. First, the evidence shows that of the three captains who retired  
12 between 2003 and 2013, two had left service under early retirement. Specifically, the  
13 City was precluded from filling the vacancy left by Captain Rogers' early retirement in  
14 2003 until 2006. Similarly, when the Union filed its Charge in 2013, the City had not yet  
15 exhausted the mandatory three-year waiting period preventing any new appointments to  
16 the vacancy left by Captain Henry's early retirement. The record is clear that these  
17 reductions in force were not due to attrition but by non-negotiable early retirement  
18 restrictions. Second, while the City was not restricted by any hiring freeze related to  
19 Captain Bontempo's retirement in April of 2013, it still possessed the core managerial  
20 prerogative to determine its level of services by appointing (or not appointing) a new  
21 captain to replace him.

22 Consequently, because the Union is unable to show that the City violated the law  
23 by failing to appoint new captains to replace Henry and Bontempo, it has failed to satisfy

1 its burden of proving that a change occurred. Therefore, I dismiss this portion of the  
2 Complaint. Commonwealth of Massachusetts, 30 MLC at 64.

### 3 **Increase in Lieutenant Gamby's Workload**

4 Here, the Union has successfully shown that the City changed an established  
5 practice that affected a mandatory subject of bargaining when it increased Lieutenant  
6 Gamby's workload in April of 2013. Commonwealth of Massachusetts, 30 MLC at 64.  
7 On April 19, 2013, the City assigned Lieutenant Gamby to perform the duties of  
8 Investigations commander left vacant by Captain Bontempo's retirement. This  
9 assignment effectively increased Lieutenant Gamby's workload because prior to the  
10 change the City did not require him to perform the following duties in addition to his  
11 lieutenant's duties: provide oversight for all investigative actions undertaken by the  
12 department; manage and monitor all evidence; perform other related functions assigned  
13 by Chief Mazzie. Town of Shrewsbury, 28 MLC at 45; see also Town of Lakeville, 38  
14 MLC at 225 (citing Medford School Committee, 1 MLC at 1252-53. Further, the City  
15 made this change without promoting Gamby to captain or granting him the 15% salary  
16 increase that differentiates lieutenants from captains under Article 6 of the Agreement.

17 The City does not dispute that it made this change without first providing the  
18 Union with notice and an opportunity to bargain to resolution or impasse over the  
19 decision to assign Lieutenant Gamby to perform the duties of Investigations commander  
20 and the impacts of that decision. However, it argues that the decision to leave Captain  
21 Bontempo's position unfilled and assign lieutenant Gamby to perform the duties of that  
22 unfilled position neither changed an existing practice nor impacted a mandatory subject  
23 of bargaining. In the alternative, the City contends that matters of deployment,

1 assignment, promotions, minimum manning and transfers are non-delegable  
2 managerial rights that are not subject to collective bargaining law. It also contends that  
3 even if it was required to bargain with the Union over the decisions to keep unfilled the  
4 captains' positions and assign a lieutenant to perform the duties of that unfilled position,  
5 the City cannot bargain until it makes a final decision about whether to fill the position.  
6 Last, the City maintains that pursuant to Article 5 of the Agreement, the Union waived its  
7 right to bargain over those changes because that provision gives the City exclusive  
8 discretion over whether to fill a vacancy.

### 9 **Affirmative Defenses**

#### 10 1. Core Managerial Prerogative

11 The Law allows public employers to exercise core managerial prerogatives  
12 concerning the nature and level of its services without first bargaining over that decision  
13 with unions representing its employees. City of Boston, 38 MLC 85, MUP-08-5253  
14 (H.O. Sept. 28, 2011), aff'd 38 MLC 201 (Mar. 9, 2012). The Law also does not require  
15 public employers to bargain over law enforcement priorities and public safety decisions.  
16 Id. (citing City of Boston, 32 MLC 4, MUP-2749 and MUP-01-2892 (June 24, 2005);  
17 City of Worcester v. Labor Relations Commission, 438 Mass. 177 (2000)). Generally, to  
18 decide whether a subject properly falls within the scope of bargaining, the  
19 Commonwealth Employment Relations Board (Board) balances a public employer's  
20 interest in maintaining its managerial prerogative to effectively govern against the  
21 impact on employees' terms and conditions of employment. Id. (citing Town of  
22 Danvers, 3 MLC 1559, 1577, MUP-2292 and MUP-2299 (Apr. 6, 1977)).

1           The City asserts that its assignment of Lieutenant Gamby to perform the duties  
2 from Captain Bontempo's unfilled position is a core managerial prerogative that is not  
3 subject to bargaining. First, it relies on Section 4A of Chapter 1078 of the Acts of 1973  
4 and cites to City of Boston v. Boston Police Superior Officers Federation, 466 Mass.  
5 210 (2013), arguing that these two authorities, when read together, support the City's  
6 power to make core managerial decisions about the department's level of services and  
7 public safety needs assigning lieutenants to perform captains' duties.

8           Concerning the City's reliance on Section 4A of Chapter 1078 of the Acts of 1973  
9 and City of Boston v. Boston Police Superior Officers Federation, 466 Mass. 210  
10 (2013), I find those authorities inapposite. Section 4A of Chapter 1078 of the Acts of  
11 1973 pertains to dispute resolution procedures for municipal police officers (and fire  
12 fighters) who petition the Joint Labor Management Committee (JLMC) for assistance  
13 with collective bargaining negotiations. Here, there is no evidence that the City or the  
14 Union filed a petition with the JLMC's to invoke its jurisdiction. Further, City of Boston  
15 pertains specifically to the Boston Police Commissioner (BPC) (and the corresponding  
16 BPC statute St. 1906, c. 291, § 10, as appearing in St. 1962, c. 322, § 1), not to the City  
17 of Everett or the Everett Police Department.

18           Next, the City relies on G.L., c. 31 (Chapter 31 or Civil Service), Section 7(d) of  
19 G.L. c. 150E and City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172  
20 (1997), to argue that its decision to assign Lieutenant Gamby as commander of  
21 Investigations was based on core managerial policies that exempted it from bargaining  
22 with the Union. First, Chapter 31 does not apply here because there is no evidence that  
23 any aspect of the Civil Service law impacted the City's decision to assign Lieutenant

1 Gamby captain's duties, or to bargain with the Union over that decision. Similarly, I do  
2 not find evidence of an authorizing statute listed in Section 7(d) that impacted the  
3 decision.

4 City of Lynn is distinguished because in that case the fire chief unilaterally filed a  
5 superannuation retirement application for an employee pursuant to his non-delegable  
6 authority under G.L. c. 32, s. 16(1)(a) (Chapter 32) without first having to bargain with  
7 the Union over the decision or its impacts. Despite the Court's enumeration of non-  
8 bargainable categories that exempted the city from bargaining with the union in that  
9 case, it still held that a public sector employer must "bargain with the employee  
10 representative on questions relating to "wages, hours, standards of productivity and  
11 performance, and any other terms and conditions of employment". Id., 43 Mass. App.  
12 Ct. at 178-79. Here, there are no authorizing statutes that specifically exempt the City  
13 from bargaining with the Union over the decision to increase the lieutenants' workload  
14 or duties.

15 Applying the Board's balancing test to decide whether an employer's decision  
16 falls properly within the scope of bargaining, the Board considers factors such as the  
17 degree to which the subject has a direct impact on terms and conditions of employment,  
18 and whether the subject involves a core governmental decision or is far removed from  
19 employees' terms and conditions of employment. City of Boston, 32 MLC at 11 (citing  
20 Town of Danvers, 3 MLC at 1577).

21 Here, assigning Lieutenant Gamby to perform the duties of Captain Bontempo's  
22 unfilled position via commanding the Investigations Division had a direct impact on  
23 Gamby's terms and conditions of employment because the assignment changed his

1 duties and increased his workload while simultaneously freezing his salary by failing to  
2 provide him with the 15% contractual pay increase under Article 6 of the Agreement.  
3 Because the City assigned Lieutenant Gamby to perform the traditional captain's duties  
4 of commanding the Investigations division, it had essentially instructed him to work as a  
5 captain in all aspects but job title and pay grade. See Town of Lakeville, 38 MLC at 225  
6 (citing Medford School Committee, 1 MLC at 1252-53; Town of Danvers, 3 MLC at  
7 1576).

8 The City's decision to assign Gamby to Investigations commander was not a  
9 level of services decision because it does not impact the number of persons required to  
10 perform the work, nor does it affect a public safety decision. Board of Higher Education,  
11 SUP-08-5396 (Feb. 6, 2015). Rather, as discussed above, Gamby's assignment  
12 impacted the mandatory subjects of workload and job duties, over which the City is  
13 required to bargain. Town of Lakeville, 38 MLC at 225. Therefore, this affirmative  
14 defense must fail.

## 15 2. Economic Exigency

16 Next, the City asserts that it assigned Lieutenant Gamby as commander of  
17 Investigations without promoting him to captain based on economic and operational  
18 needs of the department.

19 An employer relying on an economic exigency defense has the burden of  
20 establishing that: 1) circumstances beyond its control require the imposition of a  
21 deadline for negotiations; 2) the bargaining representative was notified of those  
22 circumstances and the deadline; and 3) the deadline imposed was reasonable and  
23 necessary. Cambridge Public Health Commission, d/b/a/ Cambridge Health Alliance,



1 37 MLC 39, 46, MUP-10-5888 (Aug. 18, 2010). Here, I find no evidence of exigent  
2 circumstances existing beyond the City's control in this case. Further, the City failed to  
3 provide the Union with prior notice and an opportunity to bargain over the change; thus,  
4 it could not have imposed a "reasonable and necessary" deadline for negotiations as  
5 required under Cambridge Health Alliance. Consequently, the City's economic  
6 exigency assertion must fail.

### 7 3. Contractual Waiver

8 Last, the City argues that the Union waived its right to bargain over the decision  
9 assign lieutenants to perform captains' duties pursuant to Article 5, Section 5.3 of the  
10 Agreement.

11 Where an employer raises the affirmative defense of waiver by contract, it bears  
12 the burden of demonstrating that the parties consciously considered the situation that  
13 has arisen, and that the union knowingly and unmistakably waived its bargaining rights.  
14 City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City  
15 of New Bedford, 38 MLC at 248; Massachusetts Board of Regents, 15 MLC 1265, 1269,  
16 SUP-2959 (Nov. 18, 1988); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar.  
17 28, 1986). A waiver by contract will not be lightly inferred. There must be clear and  
18 unmistakable showing that such waiver occurred through the bargaining process or the  
19 specific language of the agreement. City of New Bedford 38 MLC at 248 (citing City of  
20 Taunton, 11 MLC 1334, 1336, MUP-5198 (Jan. 17, 1985)).

21 The City argues that because Article 5, Section 5.3 of the Agreement gives it the  
22 exclusive right to make decisions about whether to fill a captain's vacancy, it is excused  
23 from bargaining with the Union over the issue of assigning Lieutenant Gamby to perform

1 duties from an unfilled captain's position. The Union argues that it did not waive its  
2 rights to bargain because the Agreement is silent about that issues. I agree.

3 Although the language of Article 5.3 states clearly that the "City reserves the sole  
4 discretion to determine if a vacancy will be filled," it is silent about whether that same  
5 exclusive discretion extends to the City's managerial decision to permanently increase  
6 the workload of lieutenants without bargaining. Accordingly, I find no contractual waiver  
7 in this instance because the City failed to present evidence showing that the Union  
8 consciously considered the situation and knowingly and unmistakably waived its rights  
9 to bargaining over Lieutenant Gamby's assignment as commander of the Investigation  
10 division. City of Boston, 48 Mass. App. Ct. at 174; City of New Bedford, 38 MLC at 248.

11 REMEDY

12 Once the Board determines that a prohibited practice under c. 150E, Section 10,  
13 has been committed, it is authorized to issue a cease and desist order to the offending  
14 party "and shall take such further affirmative action as will comply with the provisions of  
15 this section . . . ." G. L. c. 150E, Section 11; Labor Relations Commission v. Everett, 7  
16 Mass. App. Ct. 826 (1979). Section 11 of the Law grants the Board broad authority to  
17 fashion appropriate orders to remedy unlawful conduct, including the authority to  
18 fashion "make whole" remedies to compensate employees who suffer an economic loss  
19 due to the respondent's unlawful action. City of Gardner, 26 MLC 72, 78 (2000); School  
20 Committee of Newton, 388 Mass. at. When fashioning appropriate remedies, the Board  
21 attempts to place employees in the position they would have been in but for the unlawful  
22 conduct. City of Gardner, 26 MLC at 78 (citing Amesbury School Committee, 11 MLC  
23 1049, 1058 (1984)). Moreover, the Board attempts to fashion remedies that will prevent

1 a respondent from benefitting from its unlawful practice. Amesbury School Committee  
2 (Amesbury II), 13 MLC 1196, 1197 (1986).

3 To remedy this unilateral change violation, I issue the standard order requiring  
4 the City to cease and desist its unlawful activity, restore the status quo ante and  
5 negotiate with the Union before changing that status quo. However, I do not order a  
6 monetary make-whole remedy. Although the Board has the authority to monetarily  
7 compensate employees for performing more work than they would have performed but  
8 for the unlawful conduct (see Amesbury II), I refrain from doing so here because the  
9 parties' collective bargaining agreement is silent on the matter of whether unit members  
10 should be compensated for working out of their pay grade.

11 CONCLUSION

12 For the reasons stated above, I conclude that the City did not violate the Law by  
13 reducing the number of police captains by attrition and leaving their positions unfilled,  
14 but did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it  
15 assigned Lieutenant Gamby to perform the duties of an unfilled captain's position  
16 without first giving the Union prior notice and an opportunity to bargain to resolution or  
17 impasse over that decision and its impacts on employees' terms and conditions of  
18 employment.

19 ORDER

20 WHEREFORE, based on the foregoing, it is hereby ordered that the City of  
21 Everett shall:

22 Cease and desist from:

- 1 a. Unilaterally changing lieutenants' workload and duties without first giving the
- 2 Union notice and an opportunity to bargain to resolution or impasse over that
- 3 decision and its impacts;
- 4
- 5 b. In any like manner, interfering with, restraining and coercing its employees in
- 6 any right guaranteed under the Law.
- 7
- 8 2. Take the following affirmative action that will effectuate the purpose of the Law:
- 9
- 10 a. Restore the status quo ante by returning the duties of commanding the
- 11 Investigations division to the captains until the City satisfies its obligation to
- 12 bargain with the Union over the decision to assign lieutenants to perform the
- 13 duties of unfilled captains' positions and the impacts of that decision;
- 14
- 15 b. Upon request, bargain in good faith with the Union to resolution or impasse
- 16 over the decision to assign lieutenants to perform the duties of unfilled
- 17 captains' positions and the impacts of that decision;
- 18
- 19 c. Sign and post immediately in all conspicuous places where members of the
- 20 Union's bargaining unit usually congregate and where notices to these
- 21 employees are usually posted, including electronically, if the City customarily
- 22 communicates to its employees via intranet or e-mail, and maintain for a
- 23 period of thirty (30) consecutive days thereafter, signed copies of the attached
- 24 Notice to Employees; and
- 25
- 26 d. Notify the DLR in writing within thirty (30) days of receiving this Decision of
- 27 the steps taken to comply with the Order.

28 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS




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KENDRAH DAVIS, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



**THE COMMONWEALTH OF MASSACHUSETTS  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF A HEARING OFFICER OF THE  
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the City of Everett (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by assigning police lieutenants to perform the duties of unfilled captains' positions without giving Union prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on employees' terms and conditions of employment.

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

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

**WE WILL NOT** unilaterally change lieutenants' workload and duties without first giving the Union notice and an opportunity to bargain to resolution or impasse over that decision and its impacts.

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

**WE WILL** restore the status quo ante by returning the duties of commanding the Investigations division to the captains until the City satisfies its obligations to bargain with the Union.

**WE WILL** upon request, bargain in good faith with the Union to resolution or impasse over the decision to assign lieutenants to perform the duties of unfilled captains' positions and the impacts of that decision.

\_\_\_\_\_  
City of Everett

\_\_\_\_\_  
Date

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

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