

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF SOMERVILLE

and

SOMERVILLE POLICE
EMPLOYEES ASSOCIATION

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Case No. MUP-13-2977

Date issued:
July 1, 2015

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Matthew Buckley, Esq. - Representing the City of Somerville

Jason Powalisz, Esq. - Representing Somerville Police Employees
Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the City of Somerville (City or Employer) violated Section
2 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) when it required
3 bargaining unit members to assume the duties of the non-unit position of Console
4 Operator on July 3, 2013 without first giving the Somerville Police Employees
5 Association (Union) prior notice and an opportunity to bargain to resolution or impasse
6 over the decision and impacts of the decision on employees' terms and conditions of
7 employment.

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STIPULATION OF FACTS

The parties stipulated to the following facts:

- 1. The City is a public employer with the meaning of Section 1 of the Law.
- 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 3. The Union is the exclusive bargaining representative for uniformed patrol officers employed by the City in its Police Department.
- 3. On July 3, 2013, Chief of Police Thomas Pasquerello [(Pasquerello)] issued Special Order 2013-15.
- 4. Special Order 2013-15 requires bargaining unit members to provide coverage for the Console Operator from 2:00 a.m. to 6:00 a.m., Tuesday through Saturday, and from 4:00 pm. on Sunday to 6:00 a.m., Monday morning.
- 5. The parties did not bargain over the Special Order.

FINDINGS OF FACT

The Collective Bargaining Agreement

The Union and the City were parties to a collective bargaining agreement (Agreement) effective from July 1, 2004 – June 30, 2008. They were also parties to three memoranda of agreement (MOA) effective from: July 1, 2008 through June 30, 2009; July 1, 2009 through June 30, 2011; and July 1, 2011 through June 30, 2012.

Article II, Management Rights states, in pertinent part:

Except as provided by the specific provisions of this Agreement and in accordance with applicable law, the City will continue to have, whether exercised or not, all of the right[s], powers and authority heretofore existing, including but not limited to, the following: determine the standards of services to be offered by the Police Department; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve it[s] employees from duty because of lack of work or for other legitimate reasons; issue rules and regulations not inconsistent with this Agreement; maintain the efficiency of governmental operations; determine the methods, means and personnel by which the City's operations are to be conducted; determine the content of job

1 classifications; exercise complete control and discretion over its
2 organization and the technology of performing its work; and fulfill all of its
3 legal responsibilities....
4

5 **The 311 Call Centers**

6
7 The City has three call-centers that are dedicated to answering telephone calls
8 from the public which pertain to non-emergency (311) services (e.g., requests for
9 certain City services like repairing potholes and removing downed trees). The City's
10 three 311 call-centers are located at City Hall, in the Police Department and in Beverly,
11 Massachusetts by a third-party answering service. Each call-center is open seven days
12 weekly, 24 hours daily and, since August of 2000, has been headed by Steven Craig
13 (Craig), Director of Constituent Services for the City. Craig is also responsible for the
14 non-unit, civilian 311 console operators, who answer (and sometimes transfer) the
15 incoming 311 calls.

16 At the police station, the 311 call area is located at the front desk inside the
17 "bubble,"¹ which is near the station officers' designated work area and separated by an
18 eight-foot hallway and two doors (that are typically closed, or only partially opened).
19 The Police Department assigned civilian 311 console operators to work in the station at
20 the bubble. When one of the civilian 311 console operators needed to take a meal or
21 restroom break, a station officer would occasionally cover the bubble that brief period,
22 due to the close proximity between the bubble and the station officer's designated area.
23 On those occasions, prior to July 3, 2013, the station officer would either sit inside the
24 bubble or monitor the lobby and the front desk areas via the department's video
25 surveillance system.

¹ The Police Department colloquially refers to the front desk area as the "bubble" because it is enclosed by glass.

1 In preparation for the fiscal year (FY) 2014 budget, Craig conducted a study and
2 concluded that during the winter of FY 2013, the lowest call-volume of all incoming, 311
3 calls that the Police Department's console operators received occurred between the
4 hours of 2:00 a.m. and 6:00 a.m.² As a result of his study, the City decided that,
5 through attrition, it would no longer fill any more civilian 311 console operator vacancies.

6 Prior to July 3, 2013, and between the hours of 2:00 a.m. and 6:00 a.m. (i.e.,
7 after hours), the Police Department did not assign civilian 311 console operators to
8 answer calls from inside the station's bubble. Instead, the Police Department directed
9 that those incoming 311 calls be automatically transferred to either the third-party
10 answering service in the city of Beverly or to the 911 operators.

11 **The Civilian 311 Console Operators**

12 The civilian 311 console operators' duties include: surveillance of the lobby area,
13 including ensuring the safe transfer of children during parent custody exchanges;
14 monitoring public facilities such as the lavatories; reviewing claim checks for towed
15 motor vehicles and processing vehicle releases from the tow lot; handing out and
16 receiving certain forms for: vehicle crash reports, stolen motor vehicles, incident reports,
17 missing persons, credit card fraud, identity fraud, etc.; answering 311 calls, calls from
18 the "1600" line³ and other types of non-emergency calls; assisting the general public
19 with various directions (e.g., about information related to holiday parking bans; etc.).

² Craig testified that during this time, the call-centers received between 1 and 1.5 calls per hour, on average. The Union did not dispute this testimony. Neither party offered Craig's complete FY 2014 study. Further, neither party offered evidence of the average number of total 311 calls that occurred after-hours during the spring, summer and autumn months of FY 2014.

³ The parties did not elaborate about the nature of these calls.

1 The Station Officer Position

2
3 Since at least 1994, the Police Department has assigned two police officers per
4 shift to work at a specific desk area inside the station, which is located near the lobby
5 and 911 areas but is separate from the front desk/bubble area. Specifically, prior to July
6 3, 2013, and between the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
7 Saturdays, and 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning,
8 the Police Department regularly assigned two station officers to work in the station area.
9 During that time, the Police Department never assigned those station officers to
10 specifically cover the “bubble” and perform civilian 311 console operator duties. On
11 occasion, however, the third-party answering service might transfer a 311 call to the
12 police station if that call concerned to a police-related matter (e.g., a noise complaint).
13 In those instances, one of the assigned station officers would usually respond to the
14 call.

15 The Station Officers

16 In July of 2011, the Police Department hired Mark Nevin⁴ as a patrol officer.
17 Beginning in or about September of 2012 through February of 2014, the Police
18 Department assigned Nevin to work as a station officer. After July 3, 2013, the

⁴ In its post-hearing brief, the Union contends that station officer “Dan Nevin” testified at the hearing, however the record only reflects the testimony of the following five witnesses: Oscar Joseph Rivera, Mark Nevin, Steven Craig, David Fallon and Michael McGrath. The record also shows that the only station officers employed by the City were Joseph Rivera, Michael McGrath and Mark Nevin. Further, on or about November 12, 2014, the Association requested, and I authorized, a subpoena for a person identified as Mark Nevin. Thus, for purposes of my decision, I am treating all references to Dan Nevin as a reference to Mark Nevin.

1 Department assigned Nevin to work in the bubble and perform the duties of the civilian
2 311 console operator, in addition to his duties as a station officer.⁵

3 In November of 2012, the Police Department hired Oscar Joseph Rivera
4 (Rivera), assigning him to the station officer position from February of 2013 to present.
5 Between February of 2013 and February of 2014, the Police Department scheduled
6 Rivera to work the "last-half" shift (11:45 p.m. to 7:45 a.m.) on a four-two schedule (i.e.,
7 working four consecutive shift days with two consecutive days off). At some point
8 between July of 2013 and February of 2014, the Police Department assigned Rivera to
9 work in the bubble and perform the duties of the civilian 311 console operator, in
10 addition to his duties as a station officer during his last-half shift schedule. At some
11 point after February 2014, the Police Department scheduled Rivera to work a four-two
12 "switch" or "split" shift (i.e., working two consecutive days on the first shift (3:45 p.m. to
13 11:45 p.m.) and two consecutive days on the last shift (7:45 a.m. to 3:45 p.m.), with two
14 consecutive days off.

15 In 1994, the Police Department hired Michael McGrath (McGrath) and, since that
16 time he has served in the following positions: dispatcher, station officer, clerk, officer in
17 the narcotics unit, officer in the domestic violence unit, officer in the general detective
18 unit, and patrol officer (his most current position). Since in or about 2011, McGrath has
19 also served as Union President.⁶

⁵ The record is unclear about the specific time period during which Nevin performed the station officer duties.

⁶ The record is unclear about the specific time period during which McGrath performed the station officer duties. Also, there is no record evidence showing that the Police Department ever assigned McGrath to work in the bubble and perform the duties of the civilian 311 console operator position on or after July 3, 2013.

1 **The Station Officers' Duties**

2 The station officers' duties include: monitoring arrestees; booking arrestees;
3 transporting arrestees from the arrest site, from the hospital and/or to a "wet shelter" for
4 intoxicated arrestees; administering breathalyzer tests; managing the detail list and
5 contacting/assigning patrol officers to available detail assignments; inputting various
6 document information, including stolen vehicle information, stolen license plates,
7 missing persons, other stolen or missing "high-value" property; processing license plate
8 information requests from fellow officers; inputting certain data for Homeland Security
9 and reporting if the input system has crashed; responding to law enforcement-related
10 issues in the lobby area; answering certain questions by telephone; sitting with juveniles
11 in a designated area and waiting to either release them to a parent or guardian or
12 transport them to a separate juvenile holding facility; and monitoring SIGIS, a national
13 database communications software application system that allows computerized
14 communication between different law enforcement agencies.

15 **1. The Booking Process**

16 The Police Department usually assigns two officers per shift to the station. Prior
17 to July 3, 2013, when a patrol officer would make an arrest, one of the station officers
18 would drive the police transport vehicle to the arrest location, arrest the suspect, pat
19 them down for contraband, remove any personal property from their person, and
20 transport them to the station. Once arriving at the station, the second station officer
21 would assist the first one by placing the arrestee in the holding area until the
22 commanding officer (or commander) was ready to "book" the arrestee (i.e., process
23 certain documentation and authorize certain procedures to finalize the arrestee's

1 confinement). On the commander's instruction, both station officers would bring the
2 arrestee to the front desk area where they would: log all of the arrestee's personal
3 property; remove any personal clothing articles that may harm the arrestee; fingerprint
4 the arrestee; grant him or her a telephone call if requested; and place them in a jail cell.
5 During this time, the entire booking process could take anywhere between 20 to 30
6 minutes depending on whether the arrestee was cooperative.

7 Prior to July 3, 2013, the arresting patrol officer did not enter the station with the
8 station officer to conduct the arrestee's booking during the after-hours period of 2:00
9 a.m. to 6:00 a.m. on Tuesday through Saturday, and 4:00 p.m. to 6:00 a.m. on Sunday
10 afternoon through Monday morning. However, after July 3, 2013, the Police
11 Department instructed the arresting patrol officer to accompany the first station officer
12 into the station to book the arrestee, while the second station officer remained in the
13 bubble. After this change, the booking process could average about one-hour
14 depending on the arresting officer's experience with the process.

15 Additionally, after July 3, 2013, there were occasions when the station officer
16 assigned to the bubble would have to leave the front-desk area to either assist in the
17 booking process or attend to members of the public who entered the lobby.

18 **2. The Detail Assignments**

19 On the last-half shift between the hours of 7:45 a.m. and 3:45 p.m. on Sunday,
20 station officers assigned to that shift would be responsible for coordinating the detail
21 assignments for the upcoming day shift on Monday. Coordination of those detail
22 assignments include contacting approximately 30 patrol officers by telephone to fill
23 between 15 to 25 detail job assignments. Specifically, the assigned station officer

1 would telephone each patrol officer, inquire about whether they had an assignment
2 preference from the detail list, and mark that preference, if any. If a patrol officer did not
3 answer his or her telephone on the first call, the station officer would leave a voice
4 message and give them 10 minutes to call back. Failure to return the station officer's
5 call would result in the station officer bypassing that patrol officer and contacting the
6 next person on the list.

7 After July 3, 2013, the Police Department expected station officers to carry out
8 the detail assignment responsibility, in addition to any other tasks required of them while
9 assigned to the bubble throughout the last-half shift.

10 **The 2003 Grievance**

11 From 1994 until 2003, the Police Department had employed civilians to staff the
12 bubble as operators. At some point in 2003, the Police Department decided to lay-off
13 the civilian operators who worked in the bubble during the after-hours period on the last-
14 half shift. Specifically, by Memo 2003-30, issued on July 11, 2003, the Department
15 stated, in full:⁷

16 At 2400 hours on July 13, 2003 the lay-offs of the Console Operators will
17 take effect.
18

⁷ The Memo 2003-30 is silent about 311 calls, and the parties did not clarify whether these "console operators" were the same civilian 311 console operators at issue here. David Fallon (Fallon), whom the department promoted to Chief in October of 2014, testified that since at least 2005, the City has employed civilians as "operators" inside the bubble. On rebuttal, Union President McGrath testified that while he was unsure about when the City first began using the term "311 console operators," he was sure that it had employed civilians in those positions to perform their duties inside of the bubble since, at least, 1994. Because the City did not dispute this point, I credit McGrath's testimony.

1 Effective at 0001 hours on July 14, 2003, shift #1, one of the two Station
2 Officers will assume the work station in the Glassed-In Lobby area to
3 assist walk-in citizens.

4
5 The Lobby Station Officer will have access to the CAD⁸ and Telephone
6 systems.

7
8 The duties of the Lobby Station Officer's position will continue to be the
9 same as the inside station officer as outlined in all previous orders,
10 memos and job descriptions.

11
12 **Lobby Station Officer Duties:**

13 Tow Card Release

14 Assisting with Lobby Customers

15 Answering Emergency Phone Lines

16 Answering General Business Phone Lines

17 Adding in CAD Items (incidents) for Dispatch

18 And any other duties or responsibilities given to them by the Division
19 Commander, Commander of Field Operations, or the Chief of Police.

20
21 (Emphasis in original.)

22
23 The Union filed a grievance protesting the changes outlined in Memo 2003-30,
24 and the City ultimately settled the matter in or about May of 2004 by restoring the
25 console operators to their positions.

26 **Special Order 2013-15**

27
28 By Special Order 2013-15 dated July 3, 2013, former Chief Pasquarello notified
29 all personnel that the Police Department was changing the way it handled temporary
30 coverage when the console operator's position was vacant. That Order stated, in full:

31 On July 1, 2013, the Console Operators' hours have been changed
32 leading to no coverage from 2:00 a.m. to 6:00 a.m. each morning Tuesday
33 through Saturday and Sunday from 4:00 p.m. through 6:00 a.m. Monday
34 morning. This affects business line calls to the Police Department,
35 Customer Service to citizens at the lobby window and the overall security
36 of the Public Safety building.
37

⁸ The parties did not identify this term.

1 As we work toward a permanent solution to these issues, the following
2 steps will be taken in the interim:

- 3
- 4 1. When the console operator's position is vacant, the operator will
5 forward all police related calls to station personnel and/or 911 call
6 takers;
 - 7
 - 8 2. One of the station officers will perform their duties while stationed at
9 the front desk-lobby area, to assist the public with police related
10 issues, monitor all civilian activity and maintain the security of the
11 public safety building. The other station officer will remain in the
12 station officer's area to continue with current duties as described in the
13 Station Officer's job description (Prisoner Transport, Monitoring
14 prisoners, BOP, etc...);
 - 15
 - 16 3. When an officer places a person in custody (arrest, 111B, etc.) the
17 arresting officer will follow the prisoner transport vehicle to the station;
18 and will remain with the person in custody, assuming all booking duties
19 and responsibilities, until the prisoner is placed in the cell. The
20 arresting officer will then utilize the station officer's computer to file
21 reports, while also being in a position to monitor prisoners. This will be
22 necessary, especially if the station officer needs to leave the station to
23 pick up an arrestee with the wagon.
 - 24

25 Since issuing Special Order 2013-15, the Police Department has required one of
26 the two station officers to sit inside the bubble and perform the console operator's duties
27 in addition to his or her station officer duties during the 2:00 a.m. – 6:00 a.m. time slot
28 on Tuesdays through Saturdays, and during the 4:00 p.m. to 6:00 a.m. time slot
29 beginning Sunday afternoon into Monday morning.

30 By e-mail dated July 3, 2013, Deputy Chief of Police Michael S. Cabral (Cabral)
31 informed all personnel that Special Order 2013-15 pertained to "temporary changes"
32 affecting the 311 console position vacancies. By that e-mail Cabral also stated that:

33 The Executive Staff realizes that these changes have put additional
34 responsibilities on you. In advance we apologize for the inconvenience,
35 but feel that this order is necessary to continue to provide services to the
36 community we serve. Please know that Chief Pasquarello has been in
37 contact with personnel and the Mayor's officer regarding these concerns.

1 In the meantime, we ask for your understanding and thank you for [your]
2 cooperation.

3
4 After filing its Charge, the Union made a written demand to bargain with the City
5 on July 30, 2013.⁹

6 DECISION

7 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
8 when it unilaterally changes an existing condition of employment or implements a new
9 condition of employment involving a mandatory subject of bargaining without first giving
10 its employees' exclusive bargaining representative notice and an opportunity to bargain
11 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
12 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
13 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,
14 SUP-4784 (Oct. 9, 2003). To establish a violation, a union must show that: (1) the
15 employer changed an existing practice or instituted a new one; (2) the change had an
16 impact on a mandatory subject of bargaining; and, (3) the change was implemented
17 without prior notice to the union and an opportunity to bargain to resolution or impasse.
18 Commonwealth of Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45,
19 MUP-1704 (June 29, 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-
20 4378 (Aug. 24, 2000). Issues concerning workload and job duties are mandatory
21 subjects of bargaining. Peabody School Committee, 13 MLC 1313 (1986) (workload);
22 Town of Lakeville, 38 MLC 219, MUP-09-5590 (H.O. Mar. 22, 2012), aff'd 38 MLC 290
23 (May 23, 2012) and Town of Danvers, 3 MLC 1559, 1576, MUP-2292 and MUP-2299
24 (April 6, 1977) (job duties).

⁹ There is no evidence in the record that the parties ever met to bargain over this issue.

1 Here, the Union argues that the City changed the established practice of
2 assigning two station officers to the station area, when on July 3, 2013, it began
3 assigning one of the two officers to work in the bubble and perform the duties of the
4 civilian 311 console officer, in addition to his or her own duties as a station officer,
5 between the hours of 2:00 a.m. to 6:00 a.m. during the last-half shift on Tuesdays
6 through Saturdays, and the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon
7 through Monday morning. The Union contends that the change affected a mandatory
8 subject of bargaining because it: increased the station officer's workload and duties by
9 requiring that s/he respond to the incoming 311 calls (along with performing other
10 civilian 311 console operator duties, such as responding to lobby events); increased the
11 amount of time it takes to conduct the booking process during the after-hours shift by
12 requiring the station officer to stay in the bubble while the arresting officer enters the
13 station to assist with booking; increased interference with the station officers' duties;
14 and an increased safety risk for patrol officers who remained on patrol while the
15 arresting officer left his or her post to come inside the station and assist with the
16 booking process.

17 I agree. The Union presented evidence showing that the City changed an
18 established practice that affected a mandatory subject of bargaining when, on July 3,
19 2013, it assigned a station officer to work in the bubble and perform the duties of the
20 civilian 311 console officer, in addition to his or her own duties as a station officer,
21 during the 2:00 a.m. to 6:00 a.m. shift on Tuesdays through Saturdays, and the 4:00
22 p.m. to 6:00 a.m. shift on Sunday afternoon through Monday morning. See
23 Commonwealth of Massachusetts, 30 MLC at 64. The evidence also shows that the

1 assignment effectively increased the station officers' workload because, prior to the
2 change, the City did not require them to perform the civilian 311 console officer's duties
3 in addition to their own station officer duties. See Peabody School Committee, 13 MLC
4 at 1319; Town of Lakeville, 38 MLC at 225, aff'd 38 MLC at 290; see also, Chief Justice
5 of Administration and Management of the Trial Court (CJAM), 35 MLC 230, 235, SUP-
6 04-5126 (April 14, 2009) (employer unilaterally changed unit members' workload when it
7 temporarily assigned them to staff the front desk for one half day per week, in addition
8 to performing their regular job duties). There is no dispute that the City failed to provide
9 the Union with notice and an opportunity to bargain to resolution or impasse over the
10 decision or its impacts.

11 While the City does not dispute that job duties are a mandatory subject of
12 bargaining, it City argues that there has been no substantial change in the station
13 officers' job duties; or, alternatively, if there was a change, it was de minimis because
14 the total number of 311 calls received by station officers during the winter of FY 2014
15 averaged between one and two calls between the hours of 2:00 a.m. and 6:00 a.m. on
16 Tuesdays through Saturdays, and between 4:00 p.m. and 6:00 a.m. on Sunday
17 afternoon through Monday morning.

18 **Complained of Action was not De Minimis**

19 Generally, the Commonwealth Employment Relations Board (CERB) will not find
20 an unlawful change to employees' terms and conditions of employment where the
21 action complained of is only a slight departure from what is normally required. See
22 Town of Danvers, 3 MLC 1559, 1576-77, MUP-2292 and MUP-2299 (Apr. 6, 1977)
23 (where employer required firefighters to include more specified data on their time slips,

1 that the change was “too insignificant” to be subjected to mandatory collective
2 bargaining). However, where the change is more than a slight departure and, where it
3 amounts to a material increase in workload and job duties, the CERB will not find the
4 complained of action to be de minimis. See CJAM, 35 MLC at 235 (employer’s
5 assignment of probation officers and assistant chief probation officers to staff the front
6 desk for one half day per week for an eight-week period, in addition to their regular
7 duties, constituted a significant workload increase and, therefore, was not de minimis).

8 Here, the City’s action of assigning station officers to the bubble in July of 2013
9 was a significant material change because, in addition to answering 311 calls, the
10 Police Department also required them to perform all of the other duties of the civilian
11 311 console operator during the hours of 2:00 a.m. and 6:00 a.m. on Tuesdays through
12 Saturdays, and between 4:00 p.m. and 6:00 a.m. on Sunday afternoon through Monday
13 morning, including: monitoring the lobby area and the public lavatories; assisting with
14 various forms and directions; and managing towed vehicle incidents. CJAM, 35 MLC at
15 235. Because the assigned station officers performed those bubble duties on top of
16 their regular station officer duties, I find that the change was more than a slight
17 departure from their regular duties; and, thus not de minimis. Id.

18 **Affirmative Defenses**

19 As affirmative defenses, the City argues that it has the core managerial
20 prerogative and contractual management right under Article II of the parties’ Agreement
21 to assign station officers to the bubble to perform civilian 311 console operator duties, in
22 addition to their own station officer duties.

23 **1. Core Managerial Prerogative**

1 Section 6 of the Law requires public employers to negotiate before changing the
2 wages, hours, working conditions or standards of productivity and performance of their
3 employees. School Committee of Newton, 388 Mass. at 562; see also Commonwealth
4 of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009); Town of Andover, 28
5 MLC 264, 269-70, MUP-1012 and MUP-1186 (Feb. 7, 2002). The City's decision to set
6 priorities for the deployment of law enforcement resources is a matter of policy over
7 which it has no duty to negotiate. See City of Worcester v. Labor Relations
8 Commission, 438 Mass. 177, 182 (2002). However, notwithstanding a public
9 employer's prerogative to make certain types of core managerial decisions without prior
10 bargaining, the CERB holds that "if a managerial decision has impact upon or affects a
11 mandatory topic of bargaining, [then] negotiation over the impact is required." Id. at 185
12 (citing Boston v. Boston Police Patrolmen's Association, 403 Mass. 680, 685 (1989));
13 see also Newton School Committee, 388 Mass. at 564.

14 To decide whether a subject properly falls within the scope of bargaining, the
15 CERB balances a public employer's interest in maintaining its managerial prerogative to
16 effectively govern against the impact on employees' terms and conditions of
17 employment. City of Boston, 32 MLC 4, 11-12, MUP-01-2892 (June 24, 2005) (citing
18 Town of Danvers, 3 MLC at 1577). Applying this balancing test, the CERB considers
19 factors such as the degree to which the subject has a direct impact on terms and
20 conditions of employment, and whether the subject involves a core governmental
21 decision or is far removed from employees' terms and conditions of employment. City
22 of Boston, 32 MLC at 11 (citing Town of Danvers, 3 MLC at 1577).

1 Here, the decision to assign one station officer to the bubble during the hours of
2 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and 4:00 p.m. to 6:00 a.m. on
3 Sunday afternoon through Monday morning was a core managerial law enforcement
4 priority because it impacted the City's ability to effectively deliver 311 services to the
5 public. See City of Worcester, 438 Mass. at 182-84 (where to deploy public services fall
6 within the penumbra of managerial rights and, thus, are not subject to mandatory
7 bargaining); see also Boston School Committee, 13 MLC 1444, aff'd 14 MLC 1365
8 (1987) (the number of employees assigned to each building is a managerial decision).
9 However, because the decision also had a direct impact on the station officers' terms
10 and conditions of employment (i.e., changing the station officers' duties and increasing
11 their workload), I find that the City was required to first bargain with the Union over the
12 impacts of that decision but failed to do so. Town of Lakeville, 38 MLC at 22; see also
13 See Burlington v. Labor Relations Comm'n, 390 Mass. 157, 164-67 (1983) (although
14 town had prerogative to reassign duties, it was still required to bargain over the impacts
15 of that reassignment).

16 **2. Contractual Waiver**

17 The City also argues that the Union waived its right to bargain over the decision
18 and impacts of assigning station officers to perform the civilian 311 console operator
19 duties during the last-half shift in July of 2013, pursuant to Article II of the Agreement.
20 Because I have found that the City was not obligated to bargain over the decision to
21 require station officers to perform the console operators' duties, I only consider whether
22 the Union waived its rights to impact bargain.

1 Where an employer raises the affirmative defense of waiver by contract, it bears
2 the burden of demonstrating that the parties consciously considered the situation that
3 has arisen, and that the union knowingly and unmistakably waived its bargaining rights.
4 City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City
5 of New Bedford, 38 MLC 239, 248, MUP-09-5581 and MUP-09-5599 (April 3, 2012);
6 Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988);
7 Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar. 28, 1986). A waiver by
8 contract will not be lightly inferred. There must be clear and unmistakable showing that
9 such waiver occurred through the bargaining process or the specific language of the
10 agreement. City of New Bedford 38 MLC at 248 (citing City of Taunton, 11 MLC 1334,
11 1336, MUP-5198 (Jan. 17, 1985)).

12 Although the language of Article II states clearly that the City reserves the sole
13 discretion “to determine the standards of services to be offered by the Police
14 Department;...issue rules and regulations not inconsistent with this Agreement;...[and]
15 determine the methods, means and personnel by which the City’s operations are to be
16 conducted” the contract is silent about whether that same exclusive discretion extends
17 to the City’s managerial decision to permanently increase the workload of station
18 officers by assigning them to perform the duties of the civilian 311 console operator in
19 addition to performing their own duties as station officers. Accordingly, I find no
20 contractual waiver in this instance because the City failed to present evidence showing
21 that the Union consciously considered the situation and knowingly and unmistakably
22 waived its rights to bargaining over the impacts of the new station officer assignment to

1 the bubble during the after-hours portion of the last-half shift. City of Boston, 48 Mass.
2 App. Ct. at 174; City of New Bedford, 38 MLC at 248.

3 REMEDY

4 Section 11 of the Law grants the CERB broad authority to fashion appropriate
5 orders to remedy a public employer's unlawful conduct. Labor Relations Commission
6 v. Everett, 7 Mass. App. Ct. 826 (1979). When an employer refuses to bargain, the
7 usual remedy includes an order to bargain, and to return the parties to the positions
8 they would have been in if the violation had not occurred. Town of Dennis, 12 MLC
9 1027, 1033, MUP-5247 (June 21, 1985). However, if the bargaining obligation involves
10 only the impacts of a decision to alter a mandatory subject of bargaining, but not the
11 decision itself, the appropriate remedy must strike a balance between the right of
12 management to carry out its lawful decision and the right of an employee organization to
13 have meaningful input on impact issues while some aspects of the status quo are
14 maintained. Town of Burlington, 10 MLC 1387, 1388-89, MUP-3519 (Feb. 1, 1984).

15 The usual remedy for a failure to bargain over the impacts of a decision involving
16 a managerial prerogative is a prospective order to bargain to resolution or impasse over
17 the impacts of the decision on mandatory subjects of bargaining. Town of Burlington,
18 10 MLC at 1389 (ordering the employer to offer to bargain over the impact of its
19 decision to reassign prosecutorial duties). In cases where an employer's refusal to
20 negotiate is limited to the impact of a managerial decision, the CERB traditionally orders
21 restoration of the status quo ante applicable to those affected mandatory subjects rather
22 than to the decision itself. Commonwealth of Massachusetts, 26 MLC 116, 121-22,
23 SUP-4158 (Feb. 15, 2000). In this respect, the CERB seeks to restore the parties to

1 their bargaining and economic positions that existed prior to the unlawful conduct. City
2 of Malden, 20 MLC 1400, 1406-07, MUP-7998 (Feb. 23, 1994).

3 Here, the City failed to bargain to resolution or impasse over the impacts of the
4 changes in station officers' workload and job duties between the hours of 2:00 a.m. and
5 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. and
6 6:00 a.m. on Sunday afternoon through Monday morning. Thus, to effectively restore
7 the status quo ante in this case, I order the City to bargain with the Union over the
8 impacts of the July 3, 2013 decision to assign station officers to perform the duties of
9 the civilian 311 console operator, in addition to their own station officer duties.
10 Commonwealth of Massachusetts, 26 MLC at 121-22; Town of Burlington, 10 MLC at
11 1389.

12 CONCLUSION

13 For the reasons stated above, I conclude that the City did not violate the Law
14 when it failed to provide the Union with notice and an opportunity to bargain to
15 resolution or impasse over the July 3, 2013 decision to assign station officers to perform
16 the duties of the civilian 311 console operator between the hours of 2:00 a.m. and 6:00
17 a.m. during the last-half shift on Tuesdays through Saturdays, or between the hours of
18 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning. However, I
19 conclude that the City did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of
20 the Law by failing to bargain with the Union over the impacts of that July 3, 2013
21 decision on employees' terms and conditions of employment.

22 ORDER

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

3 Cease and desist from:

4 a. Unilaterally changing station officers' workload and duties by assigning them
5 to perform the duties of the civilian 311 console operator, in addition to their
6 own duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
7 Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday
8 afternoon through Monday morning, without first giving the Union notice and
9 an opportunity to bargain to resolution or impasse over the impacts of that
10 decision;

11
12 b. In any like manner, interfering with, restraining and coercing its employees in
13 any right guaranteed under the Law.

14
15 2. Take the following affirmative action that will effectuate the purpose of the Law:

16
17 a. Upon request, bargain in good faith with the Union to resolution or impasse
18 over the impacts of the July 3, 2013 decision to assign station officers to
19 perform the duties of the civilian 311 console operator, in addition to their own
20 duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through
21 Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday
22 afternoon through Monday morning;

23
24 b. Sign and post immediately in all conspicuous places where members of the
25 Union's bargaining unit usually congregate and where notices to these
26 employees are usually posted, including electronically, if the City customarily
27 communicates to its employees via intranet or e-mail, and maintain for a
28 period of thirty (30) consecutive days thereafter, signed copies of the attached
29 Notice to Employees; and

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

33 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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 Somerville (City) violated Sections 10(a)(5) and, derivatively, 10(a)(1) of General Laws Chapter 150E (the Law) by assigning police officers to perform the duties of the civilian 311 console operator without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over the impacts of that decision on employees' terms and conditions of employment. The City posts this Notice to Employees in compliance with the Hearing Officer's order.

Section 2 of the Law gives 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 station officers' workload and duties by assigning them to perform the duties of the civilian 311 console operator, in addition to their own duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning, without first giving the Union notice and an opportunity to bargain to resolution or impasse over the impacts of that decision.

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 upon request, bargain in good faith with the Union to resolution or impasse over the impacts of the July 3, 2013 decision to assign station officers to perform the duties of the civilian 311 console operator, in addition to their own duties, during the hours of 2:00 a.m. to 6:00 a.m. on Tuesdays through Saturdays, and between the hours of 4:00 p.m. to 6:00 a.m. on Sunday afternoon through Monday morning;

City of Somerville

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