

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of  
CITY OF NEWTON

and

NEWTON FIREFIGHTERS ASSOCIATION,  
I.A.F.F., LOCAL 863

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Case No.: MUP-12-2102

Date Issued: March 16, 2015

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Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

- Jeffrey A. Honig, Esq. - Representing the City of Newton
- Paul T. Hynes, Esq. - Representing the Newton Firefighters Association, I.A.F.F., Local 863

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Newton (City) violated Section  
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter  
3 150E (the Law) by failing to provide the Newton Firefighters Association, I.A.F.F., Local  
4 863 (Union) with prior notice and an opportunity to bargain to resolution or impasse over  
5 the City's decision to order firefighters on probation (FFOPs) to attain Firefighter I and II  
6 (FF I/II) certification as a condition of continued employment and the impacts of that  
7 decision on employees' terms and conditions of employment. For the following  
8 reasons, I find that the City violated the Law as alleged.



1 motion to defer to the arbitrator's award. The City filed its opposition to both motions on  
2 February 3, 2015. The DLR will generally allow a motion to re-open the record to take  
3 additional evidence when the proffered evidence is "newly discovered evidence, which  
4 was in existence at the time of the hearing but of which the moving party was excusably  
5 negligent, despite the exercise of due diligence." Massachusetts Port Authority, 36 MLC  
6 5, 6, UP-04-2669 (June 30, 2009) (citing Town of Lexington, 22 MLC 1676, 1677 n.1,  
7 MUP-7757 (April 17, 1996)). Absent extraordinary reasons, the DLR will not re-open a  
8 record. American Federation of State, County and Municipal Employees, Council 93,  
9 AFL-CIO, 31 MLC 180, 181, MUPL-4257 (June 3, 2005); City of Haverhill, 17 MLC  
10 1215, 1218, MUP-7194 (August 21, 1990). I decline to allow the Union's motion to re-  
11 open, because it is undisputed that Arbitrator Siegel's decision did not issue until more  
12 than six months after the hearing took place in the present case. Further, as the City  
13 points out, Arbitrator Siegel specifically notes on page 9 of his decision that:

14 In the absence of any ruling from the State Labor Relations Board as to  
15 whether or not the Department had the unilateral right to legally require  
16 new recruits to the Dept. to obtain certification ... as Firefighter 1-2 as a  
17 condition of continued employment, I was instructed to ignore such issue  
18 in deciding this case.

19 Based upon that declaration, Arbitrator Siegel's award would not be relevant or  
20 probative of the issues in the present case. See generally Town of Lexington, 22 MLC  
21 at 1677 n.1 (study about second-hand smoke conducted three years later not relevant  
22 to unilateral change in smoking policy).

FINDINGS OF FACT<sup>2</sup>

1 Background

2           The City's Fire Department (Department) has approximately 187 employees,<sup>3</sup> six  
3 fire stations, and a headquarters building that serves approximately 85,000 residents.<sup>4</sup>

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<sup>2</sup> The DLR's jurisdiction in this matter is uncontested.

<sup>3</sup> 160 of those employees are involved in fire suppression.

<sup>4</sup> Section 4 of the Revised February 29, 2012 Rules and Regulations states:

4.01 The Chief of the Department shall be the commanding officer of the Department and shall have control and command of the officers and men constituting the Department and of all Fire Stations and apparatus and equipment and all other property belonging to the Department. He shall prescribe and direct such measures as he shall deem proper for the extinguishment and control of fires and the efficient operation of the Department.

4.02 He may from time to time issue such orders and establish such rules and regulations as he may deem necessary for the government of the members of the Department.

4.03 He shall require and shall receive from each officer and member of the Department strict compliance with all rules and regulations of the Department, and prompt, intelligent, faithful service....

4.05 The Chief of the Department may, at his discretion transfer any firefighter, officer or group of firefighters or group of officers.

Section 4 has been present in the Department's Rules and Regulations for approximately fifty years.

A fire chief heads the Department.<sup>5</sup> The Union is the exclusive bargaining representative for all uniformed members of the Fire Department, excluding the Fire Chief and the Administrative Assistant to the Chief (the operations officer). The Union's bargaining unit members are subject to the provisions of M.G.L. c.31 (Civil Service Law).<sup>6</sup> On July 8, 2011, the City and the Union executed memoranda of understanding for the periods July 1, 2009 through July 30, 2011 (the 2009-2011 MOU) and July 1, 2011 through June 30, 2014 (the 2011-2014 MOU). Except where specifically noted, the 2009-2011 MOU and the 2011-2014 MOU incorporated the terms of the parties' July 1, 2006 through June 30, 2009 collective bargaining agreement (2006-2009 CBA).<sup>7</sup>

Article VI, Management Rights states in relevant part:

1           6.01-Except where such rights, powers, and authority are specifically  
 2           relinquished, abridged, or limited by the provisions of this contract, the  
 3           CITY [emphasis in the original] has and will continue to retain, whether  
 4           exercised or not, all of the rights, powers and authority heretofore had by  
 5           it, and except where such rights, powers and authority are specifically

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<sup>5</sup> Chapter 10, Section 10-32 of the City's 2012 Revised Ordinances contains the following description of the Fire Chief's duties:

The chief of the fire department shall be responsible for the discipline, good order and proper conduct of the officers and firefighters constituting the department and for such purpose he may, subject to the approval of the mayor, make and issue regulations therefor. He may suspend or discharge any officer or member in accordance with chapter 31 of the General Laws in reference to civil service and the rules and regulations of the civil service commission and shall forthwith report such action to the mayor. He shall have the superintendence and the control of the several fire stations, the apparatus, the furniture therein and all other property appertaining to the department. He shall, subject to the approval of the mayor, prescribe the uniform to be worn by all officers and other members of the fire department.

<sup>6</sup> The City uses the Civil Service Firefighter Task Survey Analysis Sheet (Task Survey Analysis) as the job description for the position of firefighter.

<sup>7</sup> The 2006-2009 CBA was the parties' last fully integrated collective bargaining agreement.

1 relinquished, abridged or limited by the provisions of this contract, it shall  
2 have the sole rights, responsibility and prerogative of management of the  
3 affairs of the CITY and directions of the working forces, including but not  
4 limited to the following: ....

5  
6 B. To establish or continue the policies, practices and procedures for the  
7 conduct of the CITY business and, from time to time, to change or abolish  
8 such policies, practices or procedures.

9  
10 C. To select and to determine the number and types of employees  
11 required to perform the City's operations.

12  
13 D. To prescribe and enforce reasonable rules and regulations for the  
14 maintenance of discipline and for the performance of work in accordance  
15 with the requirements of the CITY, provided such rules and regulations are  
16 made known in a reasonable manner to the employees affected by them.

17  
18 E. To insure that related duties connected with departmental operations,  
19 whether enumerated in job descriptions or not, shall be performed by  
20 employees.

21  
22 F. To establish, continue and/or change polices and/or regulations  
23 pertaining to standards for hiring and enforcement thereof.

24  
25 The foregoing is not to be regarded as a waiver by the ASSOCIATION  
26 [Union] of its rights under M.G.L. c.150E.

27  
28 The members covered by this AGREEMENT shall retain their Civil Service  
29 rights now in effect and regulated by Chapter 31 of the General Laws of  
30 Massachusetts.<sup>8</sup>

31 Firefighter Hiring Process

32 The Department takes certain steps whenever a firefighter vacancy occurs. First,  
33 the Department seeks City Hall's approval to fill the vacancy. If City Hall approves filling  
34 the vacancy, the Department makes a requisition to fill the vacancy. The Department

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<sup>8</sup> The record does not contain evidence of bargaining history concerning Article VI.

1 then compiles a list of individuals who are civil service eligible to fill the vacancy.<sup>9</sup> Using  
2 the 2n +1 formula, the Department determines how many candidates it must consider in  
3 order to fill a vacancy, i.e. for two vacancies it must consider five candidates. After  
4 determining the number of candidates that it must consider, the Department conducts  
5 CORI checks on the candidates. The Department then interviews the candidates, and  
6 the candidates fill out information packets. The Department conducts background  
7 checks and credit checks on the candidates. After the Department decides which  
8 candidates it wants to appoint to fill the vacancies, it makes conditional offers of  
9 employment to them, subject to them passing a physical exam, a physical agility test  
10 and a psychological exam, and the continued availability of the vacancies. Upon  
11 successful completion of the physical exam, the physical agility test and the  
12 psychological exam, the new firefighters attend orientation. At orientation, they  
13 complete paperwork for human resources, go on facility tours, and undergo  
14 measurements for uniforms. Orientation sessions can occur before the new firefighters  
15 are actually employees of the City or on their first day of work.

#### 16 FFOPs

17 The Fire Department refers to newly hired firefighters as FFOPs, because they  
18 are subject to a one-year Civil Service probationary period. Notwithstanding the one-  
19 year Civil Service probationary period, FFOPs become members of the Union's  
20 bargaining unit on their hire dates. At the beginning of their probationary periods,

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<sup>9</sup> Effective September 1, 2009, the Commonwealth of Massachusetts Human Resources Division delegated the Civil Service appointment and promotional approval process to municipalities. Municipalities became responsible for contacting the candidates, making appointments and promotions from the eligible list and providing bypass and selection reasons to the applicants in accordance with Civil Service Law and rules. Bypassed applicants appeal directly to the Civil Service Commission.

1 FFOPs attend either an in-house training program, or a training program offered at the  
2 Massachusetts Firefighting Academy (MFA). FFOPs become City employees on the  
3 first day that they attend training whether it is in-house or at the MFA. The Task Survey  
4 Analysis for the firefighter position does not require academy training or FF I/II  
5 certification.

#### General Information Regarding Firefighter Recruit Training and FF I/II Certification

6 The MFA, a division of the Massachusetts Department of Fire Services (DFS),  
7 offers multi-week recruit training programs (recruit training) for entry-level career  
8 firefighters at its facilities in Stow.<sup>10</sup> Also, large municipalities, including Boston and the  
9 City at issue in this case, provide recruit training programs either in-house or in  
10 conjunction with a neighboring community. Entry-level firefighters who attend the MFA  
11 recruit training program automatically take the FF I/II exam after graduation.<sup>11</sup>  
12 Firefighters who undergo recruit training programs elsewhere must arrange to take the  
13 FF I/II exam through the MFA. The MFA administers the FF I/II certification exam on a  
14 monthly basis. To be eligible to take the exam, individuals must: 1) be at least 18 years  
15 of age at the time of the examination; 2) possess a high school diploma or GED at the  
16 time of the examination; and 3) be employed by a Massachusetts Fire Department.<sup>12</sup>

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<sup>10</sup> In March 2013, the MFA changed the recruit training program from twelve weeks to seven weeks.

<sup>11</sup> At the time of the events underlying this case, firefighters could successfully complete the MFA academy training and return to their respective fire departments without passing the FF I/II certification exam. Currently, firefighters cannot graduate the MFA academy training without passing the FF I/II certification exam.

<sup>12</sup> The Council's Certification Exam Application, Section 3, Fire Service Affiliation, specifically requires applicants to identify the fire department where they currently work and their appointment dates.

1 The FF I/II certification exam, which tests basic firefighter competence, consists of a  
2 written exam and two practical exams testing fire skills and non-fire skills.<sup>13</sup> A passing  
3 grade on each exam affords the student a FF I/II certification from the Massachusetts  
4 Fire Training Council (Council or MFTC), an accredited agency of the National Board on  
5 Fire Service Professional Qualifications.

6 Pre-2011 City Firefighter Training and FF I/II Certification

7 Between 1975 and 2009, twenty-six City firefighters graduated from the MFA  
8 recruit training program. Other City firefighters have attended City-run recruit training  
9 programs. For example, when the City hired Fire Chief Bruce Proia (Chief Proia) as a  
10 firefighter in July of 1978, he participated in a three-week in-house recruit training  
11 program run by the deputy fire chief. Also, Union president Lieutenant Thomas Lopez  
12 (Lopez) and Union Grievance Committee Chairman Lieutenant Richard Toli (Toli)  
13 attended the City's in-house recruit training programs after the City appointed them to  
14 the Fire Department in July 1997<sup>14</sup> and November 1999<sup>15</sup> respectively. In certain years,  
15 including the time period relevant to this case, the City did not send its recruits to the  
16 MFA because the MFA had a one and one-half year backlog of recruit classes awaiting  
17 training.<sup>16</sup>

18 Not all members of the Department hired before 2011 hold FF I/II certification.

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<sup>13</sup> The City is allowed to administer the written portion of the exam at its training site, but recruits must go to the MFA for the two practical exams.

<sup>14</sup> Lopez attended a recruit training program in the City run by Department personnel.

<sup>15</sup> Toli attended a recruit training program in the City of Brookline (Brookline), which City and Brookline Fire Department personnel ran.

<sup>16</sup> Currently, the City sends its recruits to the MFA.

1 For instance, Chief Proia, Lopez and Toli do not have FF I/II certification.<sup>17</sup> However, it  
2 is undisputed that other members of the Department are FF I/II certified.<sup>18</sup> The City  
3 does not maintain a complete record of which firefighters hold FF I/II certifications.<sup>19</sup>

4 Between 2003-2011, some but not all appointees to vacant firefighter positions  
5 executed letters stating that they agreed to be FF I/II certified by the end of their one-  
6 year probationary period.<sup>20</sup> Chief Proia acknowledged that the City did not enforce the  
7 requirement that appointees sign the letters<sup>21</sup> or that as FFOPs, they obtain the FF I/II

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<sup>17</sup> In 1978, when the City hired Chief Proia, there was no FF I/II certification. In the 1990's, the MFA grandfathered non-certified firefighters based on their time on the job. In 2012, Chief Proia learned that the MFA would require officers to be grandfathered or FF I/II certified to take MFA classes. At an unidentified point in time, he asked shift commanders to spread the word about the new MFA requirement, but he did not make a formal announcement. Also, Chief Proia has not notified unit members with more than two years of experience that they must obtain FF I/II certification.

<sup>18</sup> The record before me shows that prior to 2011, eight unit members held a Firefighter I (FF I) certification, three unit members held a Firefighter II (FF II) certification, and one unit member held a FF I/II certification.

<sup>19</sup> Chief Proia encourages firefighters to submit their certifications to the employer but not all do. Only individual firefighters may request their certification records from the MFA. Chief Proia has not asked the Union to assist in this effort.

<sup>20</sup> Chief Proia testified that, as assistant chief of operations from 2003-2011 (eight-year period), he handed out packets at orientation that contained letters that new firefighters had to sign. The letters notified them that the Department required them to be FF I/II certified by the end of their probationary period. Chief Proia acknowledged that he did not know what happened to the letters after the new firefighters received them. It is also unclear whether any of the successful candidates had commenced their employment with the City when they received the letters.

When Toli asked unit members, whom the City hired during the eight-year period, whether they signed the letters, some recalled signing the letters, while others claimed that they had not signed. Thus, I decline to find that all new firefighters in the operative time period executed letters agreeing to become certified FF I/II before the end of their probationary periods.

<sup>21</sup> The record before me does not contain copies of those letters.

1 certification before the end of their one-year probationary periods. The City also did not  
2 send copies of those letters to the Union.

3 In 2006, the City hired three individuals as firefighters from the Civil Service re-  
4 hire list,<sup>22</sup> Joe Collela (Collela), Jim Pomeroy (Pomeroy) and Anthony Burgie (Burgie).  
5 The City gave Collela, Pomeroy and Burgie identical memoranda of agreements (2006  
6 MOAs) stating:<sup>23</sup>

7 This memorandum incorporates an understanding reached between the  
8 parties to the AGREEMENT regarding Firefighter Level 1 and 2 tests for  
9 employees hired from the Civil Service re-hire list effective October 20,  
10 2003.

11  
12 The understanding is as follows:

13  
14 Those Firefighters who are hired off of the Civil Service re-hire list, who  
15 are not certified Firefighter 1 and 2, agree to take and pass the test offered  
16 by the Massachusetts State Fire Academy.

17  
18 The Firefighters will pass the required tests within one year of their date of  
19 hire.

20  
21 If this test is not passed within one-year disciplinary action may be taken,  
22 up to and including termination.

23  
24 This agreement only applies to new hires from the 8/8/03 Civil Service list  
25 and does not set a precedent for any other hires and cannot be used as a  
26 precedent in any other matter.

27  
28 On May 1, 2006, Colella, Pomeroy and Burgie also executed separate  
29 documents (May 1, 2006 documents) that stated in part:

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<sup>22</sup> The Civil Service re-hire list contained the names of firefighters who previously were laid off by other communities.

<sup>23</sup> Each of the 2006 MOAs has a signature line for the firefighter, the Union and the City. Collela signed his 2006 MOA but Pomeroy and Burgie did not. The City and the Union did not sign any of the 2006 MOAs despite the fact that the 2006 MOAs bear the heading "Memorandum of Agreement between City of Newton and IAFF, Local 863."

1 Dismissal notices shall be issued to recruits who fail to meet the  
2 educational requirements<sup>24</sup> as set forth in the rules and regulations and a  
3 dismissal hearing shall be held.  
4

5 Then Fire Chief Joseph LaCroix and Training Officer Michael Castro signed the  
6 documents on behalf of the City. The Union did not sign the May 1, 2006 documents.

7 Colella and Pomeroy subsequently obtained the FF I/II<sup>25</sup> certification but Burgie,  
8 who recently retired from the Department, did not obtain that certification.

9 The Class of 2011 and Letters Regarding FF I/II Certification

10 After Chief Proia became Fire Chief in 2011, he decided that ten new firefighters  
11 whom the City planned to hire, referred to as members of the Class of 2011 for the  
12 purposes of this decision, needed to be FF I/II certified.<sup>26</sup> He did not notify the Union  
13 about his decision. During the interview process, the Department discussed the FF I/II  
14 certification with candidates for the Class of 2011. Chief Proia then sent members of  
15 the Class of 2011 letters regarding the FF I/II certification after their appointments as  
16 firefighters but before they actually began their employment with the City. In letters  
17 dated August 26, 2011 (August 26, 2011 letters) to J.S. and A.H.,<sup>27</sup> Chief Proia stated in  
18 relevant part:

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<sup>24</sup> The record is devoid of any facts about why Collela, Pomeroy and Burgie and the City's representatives executed the May 1, 2006 documents or a description of the educational requirements to which the May 1, 2006 document refers.

<sup>25</sup> The record does not contain the time frame in which they became FF I/II certified.

<sup>26</sup> The record does not show that Chief Proia was enforcing any statutory or regulatory requirement when he decided that the members of the Class of 2011 needed to be FF I/II certified.

<sup>27</sup> I have used initials for members of the Class of 2011.

1 I would like to congratulate you on becoming a member of the Newton Fire  
2 Department.

3  
4 Today, you will begin training<sup>28</sup> that will provide you with all the skills  
5 necessary to perform your duties as a firefighter. Our goal is to insure that  
6 you will be both competent and confident in your new job. As your training  
7 proceeds there will be progress checks on fireground evolutions, as well as  
8 program study materials. You will be required to demonstrate competency  
9 in all applicable skills. Upon completion of your training, you will be  
10 assigned to a fire company.

11  
12 You are required to become certified [as a] Firefighter 1 and 2 by the end of  
13 your probationary period of one (1) year. Your appointment date is  
14 09/12/11; certification must be completed by 09/12/12. The certification is  
15 done at the state level through the Department of Fire Services. The  
16 Training Division will work closely with you to get you through this process.

17  
18 I look forward to working with you and wish you well as you begin your  
19 career as a Newton Firefighter.

20  
21 Good Luck!

22 Chief Proia wrote similar letters dated August 29, 2011 (August 29, 2011 letters)  
23 to other Class of 2011 members, including N.A., M.D., P.L., J.O., J.P., R.R. and S.M.  
24 The only difference between the August 29, 2011 letters and the August 26, 2011 letters  
25 is that the first sentence of paragraph three of the August 29, 2011 letters states: "You  
26 are required to become Firefighter 1 and 2 by the close of your first year on the job."  
27 Additionally, Chief Proia wrote a similar letter dated September 13, 2011 (September  
28 13, 2011 letter) to another Class of 2011 member, T.C.<sup>29</sup> The September 13, 2011  
29 letter is similar to the August 26, 2011 letters with the only difference being the initial

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<sup>28</sup> Although the letter states "[t]oday, you will begin training," Chief Proia indicated that the City issued the letters approximately one month before members of the Class of 2011 were appointed to the Department. On cross-examination, he characterized the City as having issued the letters in the hiring context.

<sup>29</sup> The Department also employs T.C.'s father K.C. as a firefighter.

1 sentence of the first paragraph of the September 13, 2011 letter that states: "I would like  
2 to congratulate you on becoming a member of the Newton Fire Department conditional  
3 upon your success[ful] completion of all testing required by the [D]epartment."<sup>30</sup> None  
4 of the letters identify discipline or termination as a consequence of failure to obtain the  
5 certification.<sup>31</sup>

6 Chief Proia required members of the Class of 2011 to sign the letters or be  
7 bypassed in the hiring process. All of the Class of 2011 members signed the respective  
8 letters on the dates that the Department issued the letters to them. Chief Proia did not  
9 copy the Union on the letters or offer to bargain with the Union before implementing the  
10 requirement that the Class of 2011 be FF I/II certified by the end of their one-year  
11 probationary periods. None of the Class of 2011 members informed the Union that they  
12 had executed the letters.

### 13 Class of 2011 Recruit Training and FF I/II Certification

14 Members of the Class of 2011 attended an eight week City-run training academy  
15 using the MFA books and syllabus.<sup>32</sup> During the training classes, instructors  
16 communicated with Chief Proia about the member's progress. All members of the

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<sup>30</sup> T.C.'s appointment date was September 13, 2011.

<sup>31</sup> Chief Proia did not seek the Mayor's approval before he issued the August 26, August 29 or September 13, 2011 letters.

<sup>32</sup> The record does not contain the actual dates that the Class of 2011 members attended the City-run fire training academy. It is also unclear whether the City conducted the training academy on its own or in conjunction with the Town of Brookline. Lopez testified that the personnel from the City's and Brookline's training divisions provided joint instruction and that the classes were held in Brookline. Chief Proia testified that the City did not conduct a joint training academy with Brookline in 2011. However, I need not reconcile this contradictory testimony because it is not material to the outcome of the case.

1 Class of 2011 graduated from the training academy. The City subsequently paid for  
2 and scheduled the Class of 2011 members to take the FF I/II certification exam at the  
3 MFA in November 2011. The majority of the members passed the certification exam  
4 and obtained their FF I/II but others did not.<sup>33</sup>

#### 5 January and February 2012 Events

6 On Friday, January 27, 2012, K.C. called Toli and asked why his son T.C. had  
7 been ordered to find another firefighter to cover his shift the following day and to report  
8 to the MFA. K.C. explained that he would have to cover the shift because his son could  
9 not find another firefighter willing to exchange shifts, which the firefighters referred to as  
10 swaps. After his conversation with K.C., Toli discussed the issue with Lopez, who was  
11 with him at the time. This was the first time that Lopez learned that Chief Proia had  
12 ordered certain unit members to report to the MFA off duty and, if on duty, to use a  
13 swap. Lopez assumed that the City had ordered unit members to report to the MFA for  
14 continued training, such as a live burn.<sup>34</sup> Lopez suggested that Toli ask Union  
15 Secretary Lieutenant Tom McGary (McGary), who worked with T.C., about the situation.

16 Toli then called McGary, the shift officer on duty and asked him to send an email  
17 message regarding the situation. On the afternoon of January 27, 2012, McGary sent  
18 an email message to Toli stating that: J.S., R.R., S.M. and A.H. had reported to the

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<sup>33</sup> Lopez was aware that S.M., A.H. and J.S. had not passed the FF I/II test, because they and/or the Department told him. However, he did not recall when he learned that they had not passed.

<sup>34</sup> The City regularly conducts on-duty training from single engine company drills to multi-company drills. The City also provides EMS training in CPR or defibrillator use. Usually, Chief Proia or the Training Division sends out a schedule a week in advance so that firefighters are aware of the dates and times of the training schedule.

1 MFA that day to take the written portion of the certification exam. Also, six other  
2 members of the Class of 2011 had to go to the MFA on Saturday for their practical skills  
3 test, including N.A. and T. C., who were told to get swaps. Toll and McGary had several  
4 additional conversations about the issue.

5 Toll subsequently began a grievance investigation. He then discussed the matter  
6 with the Union grievance committee, and in February 2012, he filed a grievance with  
7 Chief Proia at Step 2 of the contractual grievance procedure.<sup>35</sup> The grievance alleged  
8 that on January 27 and January 28, 2011, the City violated various provisions of the  
9 2011-2014 MOU (January 27 and 28 allegations) by: 1) ordering unit members to report  
10 to the MFA off duty; and 2) requiring members, if on duty, to report to the MFA, and  
11 forcing them to use a contractual benefit, exchanges. Thereafter, the Chief denied the  
12 Step 2 grievance.

### 13 March 2012 Events

14 In March 2012, the Union filed the grievance at Step 3 of the contractual  
15 grievance with the City's Director of Human Resources Dolores Hamilton (Hamilton).  
16 During a March labor-management meeting, the parties discussed the January 27 and  
17 28 allegations.<sup>36</sup> Lopez, Troli and certain other unidentified members of the negotiating  
18 committee represented the Union, while Hamilton, Chief Proia, Assistant Fire Chief Paul  
19 Chagnon (Chagnon), City Solicitor Donnalynn Kahn (Kahn) and Assistant City Solicitor  
20 Jeffrey Honig (Honig) represented the City. During the meeting, the Union expressed

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<sup>35</sup> The record does not reveal why the Union initiated the grievance at Step 2 of the contractual grievance procedure.

<sup>36</sup> The parties discussed certain other pending grievances and issues as well.

1 concern that Chief Proia had mandated that unit members participate in swaps and off  
2 duty training.<sup>37</sup> In response, Chagnon told Toli that the City decides conditions of hire.  
3 The City also told the Union for the first time that as a condition of hire, members of the  
4 Class of 2011 had signed letters agreeing to obtain FF I/II certification by the end of  
5 their probationary periods. The City also told the Union that new firefighters had been  
6 signing such letters as a condition of hire since 2003. Ultimately, the grievance was not  
7 resolved at Step 3, and the Union submitted the grievance to arbitration.<sup>38</sup>

8 August 2012

9 By August of 2012, all but three members of the Class of 2011, R.R., A.H. and  
10 J.S., had obtained their FF I/II certification.<sup>39</sup> Chief Proia contemplated discharging  
11 them because they were not on track to be FF I/II certified by the end of their one-year  
12 probationary periods. In lieu of termination, Chief Proia decided to extend their  
13 probationary periods. Proia and Hamilton discussed the extensions with Lopez.  
14 However, Lopez refused to negotiate about the extensions because the Union had a

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<sup>37</sup> The Union also questioned whether under those circumstances, unit members would be eligible for injured-on-duty benefits under G.L.c.41, §111F or accidental disability retirement benefits under G.L.32, §7. The City indicated that it would contact the Public Employee Retirement Administration Commission (PERAC) regarding the accidental disability issue. In a July 10, 2012 letter, PERAC informed the City those unit members, who are required to take and pass exams as a condition of employment while off duty, are not eligible for accidental disability retirement.

<sup>38</sup> In preparation for the Step 3 meeting, Toli investigated how other cities and towns addressed the issue of FF I/II certification and determined that Manchester-by-the-Sea, Duxbury, Wayland and Wellesley addressed training and certification issues in collective bargaining agreements with the bargaining representatives of their firefighters. Toli stated at hearing that he shared this information with the City but provided no more detailed information on this point.

<sup>39</sup> Two additional FFOPs became FF I/II certified on March 10, 2012.

1 pending grievance and the prohibited practice charge in this case regarding Chief  
2 Proia's underlying decision mandating FF I/II certification.<sup>40</sup>

3 Chief Proia then approached S.M., A.H. and J.S. regarding their situations. On  
4 August 30, 2012, Chief Proia and Hamilton signed individual employment agreements  
5 (August 30, 2012 Agreements) with them extending their probationary periods for an  
6 additional six months.<sup>41</sup> The City's August 30, 2012 Agreement with A.H. stated in  
7 relevant part:

8 WHEREAS, Firefighter [A.H.] was hired by the City on September 12,  
9 2011;

10  
11 WHEREAS Firefighter [A.H.'s] Civil Service probationary period is due to  
12 expire on September 12, 2012;

13  
14 WHEREAS, as a condition of hiring, Firefighter [A.H.] was required to  
15 become certified Firefighter 1 and 2 within one (1) year from his date of  
16 hire;

17  
18 WHEREAS, as the date hereof, Firefighter [A.H.] has not sufficiently met  
19 the qualifications and standards expected of a City of Newton firefighter,  
20 as set forth in the Civil Service Firefighter Task Survey Analysis ...

21  
22 WHEREAS, in lieu of termination, the Parties wish to allow Firefighter  
23 [A.H.] to continue his employment with the City for the purpose of meeting  
24 the qualifications and standards expected of a City of Newton firefighter,  
25 as evidenced by his becoming certified Firefighter 1 and 2.

26  
27 NOW THEREFORE, in consideration of the mutual covenants and  
28 promises herein contained, and intending to be legally bound hereby, the  
29 Parties agree as follows:  
30

---

<sup>40</sup> Lopez told Hamilton that if the City wanted to extend the probationary period, the City would have to enter into an agreement with the individuals involved. Lopez also told her that the Union did not agree with the City on the FF I/II certification issue. However, the Union did not file a separate challenge to the agreements that the City subsequently entered into with the individuals.

<sup>41</sup> The Union did not challenge the August 30, 2012 Agreements.



1 128, 129, MUP-2180 (March 1, 2000); City of Boston, 16 MLC 1429, 143, MUP-6697  
2 (December 19, 1989); Town of Wilmington, 9 MLC 1694, 1697, MUP-4688 (Mach 18,  
3 1983). To establish a unilateral change violation, the charging party must show that: 1)  
4 the employer altered an existing practice or instituted a new one; 2) the change affected  
5 a mandatory subject of bargaining; and 3) the change was established without prior  
6 notice and an opportunity to bargain. Commonwealth of Massachusetts, 20 MLC 1545,  
7 1552, SUP-3460 (May 13, 1994); City of Boston, 20 MLC 1603, 1607, MUP-4976 (May  
8 20, 1994).

9 In determining whether a binding past practice exists, the Commonwealth  
10 Employment Relations Board (CERB) analyzes the combination of facts upon which the  
11 alleged practice is predicated, including whether the practice has occurred with  
12 regularity over a sufficient period of time so that it is reasonable to expect that the  
13 practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, MUP-  
14 2456 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-  
15 3586 (January 30, 1997). The CERB inquires whether employees in the unit have a  
16 reasonable expectation that the practice will continue and looks to whether the practice  
17 is unequivocal, has existed substantially unvaried for a reasonable period of time, and is  
18 known and accepted by both parties. Commonwealth of Massachusetts, 34 MLC 143,  
19 146, SUP-04-5052 (June 17, 2008). A condition of employment may be found despite  
20 sporadic or infrequent activity where a consistent practice that applies to rare  
21 circumstances is followed each time that circumstances preceding the practice recur.  
22 Commonwealth of Massachusetts, 23 MLC at 172.

1 Here, it is undisputed that in 2011, the City required certain FFOPs, members of  
2 the Class of 2011, to become FF/I/II certified by the end of their probationary periods.  
3 However, the City argues that the requirement is not a change in a past practice  
4 because since 2003, the City has required FFOPs to become FF I/II certified as a  
5 condition of hire. I do not find the City's argument to be persuasive for two reasons.

6 First, the City ignores the distinction between a condition of hire and a condition  
7 of continued employment, a distinction which will be discussed further below. Also, a  
8 review of the record does not support the City's contention that it always imposed the  
9 FF I/II certification as a condition of hire during the period from 2003 to 2011. When the  
10 City hired certain FFOPs, it gave the FFOPs letters to sign in which they agreed to  
11 become FF I/II certified by the end of their probationary periods. However, Chief Proia  
12 acknowledged that he did not know whether the FFOPs actually signed the letters and  
13 that the City did not enforce the requirement. Compare Town of Lee v. Labor Relations  
14 Commission, 21 Mass. App. Ct. 166 (1985) (permitting three police officers to live out of  
15 town is substantial evidence in support of a finding that employer had a past practice of  
16 not enforcing a thirty-year old residency requirement bylaw for police officers). Further,  
17 although the City introduced the 2006 MOAs for Collela, Pomeroy and Burgie, which  
18 required them to obtain FF I/II certification within one year of their hiring from the Civil  
19 Service rehire list, the MOAs also clearly state the agreements do not set a precedent  
20 for any other hires and cannot be used as a precedent in any other matter.<sup>44</sup> Turning to  
21 the May 1, 2006 documents that Collela, Pomeroy and Burgie executed, even assuming  
22 that the undefined "educational requirements" in the May 1, 2006 documents refer to FF

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<sup>44</sup> The 2006 MOA's also lack a signature from a representative of the Union as well as the signatures of Pomeroy and Burgie.

1 I/II certification, the City did not enforce the requirement. Burgie retired approximately  
2 six or seven years later without having obtained FFI/II certification.

3 Mandatory Subject of Bargaining

4 Section 6 of the Law requires public employers to negotiate in good faith with  
5 respect to wages, hours, standards of productivity and performance, and any other  
6 terms and conditions of employment. To decide whether a subject properly falls within  
7 the scope of bargaining, the CERB balances a public employer's legitimate interests in  
8 maintaining its managerial prerogative to effectively govern against the impact on  
9 employees' terms and conditions of employment. Town of Danvers, 3 MLC 1559, 1577,  
10 MUP-2292 and 2299 (April 6, 1977). The CERB previously has held that a condition of  
11 continued employment is a mandatory subject of bargaining, while a condition of hire,  
12 with rare exception, is not. Boston School Committee, 3 MLC 1603, 1608-1609, MUP-  
13 2541 (April 15, 1977). Conditions of hire are not subject to bargaining because job  
14 applicants with no prior employment within the bargaining unit are not employees or  
15 bargaining unit members. Id. However, once the employer hires an applicant, even  
16 conditionally, and that person begins performing work for wages, the individual has  
17 become a bargaining unit member, thus dissipating the rationale that the individual is  
18 merely a job applicant. City of Haverhill, 16 MLC 1077, 1082, MUP-7194 (July 6, 1989),  
19 aff'd, 17 MLC at 1215. Once the employer has entered into an economic relationship  
20 with an employee, the conditions under which that relationship will continue are literally  
21 conditions of continued employment affecting bargaining unit members, even if only  
22 new employees are affected. Id.

1           An employer may not unilaterally establish terms and conditions of employment  
2 under the guise of establishing conditions for hire, merely by telling employees at the  
3 time of their hire that their employment would continue to be subject to certain  
4 conditions. City of Haverhill, 17 MLC at 1216-1217 n.6. For example, the fact that  
5 student officers signed a training fee waiver agreement prior to the date that they  
6 started work as town employees did not turn the fee assessment, that directly and only  
7 affected the employees' wages after hire, into a pre-condition of hire that an applicant  
8 must fulfill before beginning work. Town of Ludlow, 28 MLC 365, 367, MUP-2422 (May  
9 17, 2002). Whether the condition is an obligation to maintain a particular level of  
10 physical conditioning, or to maintain a certain psychological profile during employment,  
11 or even to agree to receive certain wages during the period of employment, once the  
12 condition is imposed upon an employee, as opposed to a job applicant, it becomes a  
13 condition of continued employment rather than a condition of hire. City of Haverhill, 17  
14 MLC at 1216-1217 n.6. The bargaining unit's exclusive representative has a right to  
15 negotiate with the employer prior to the imposition of terms and conditions on  
16 bargaining unit employees, including conditions that will determine whether an  
17 employee will continue employment. Id.

18           Chief Proia issued the August 26, August 29 and September 13, 2011 letters  
19 requiring FF I/II certification to members of the Class of 2011 after their appointments as  
20 firefighters but before they actually began their employment with the City. Although  
21 Chief Proia required them to sign the letters or be bypassed in the hiring process, the  
22 FFI/II certification was not merely a condition of hire but a condition of continued  
23 employment. Individuals could not sit for the FF I/II certification unless they were

1 members employed by a Massachusetts Fire Department.<sup>45</sup> Also, FFOPs became  
2 bargaining unit members on their first day of employment with the City. Cf. City of  
3 Gloucester, 26 MLC 128, 129, MUP-2180 (March 1, 2000) (decision to cease crediting  
4 student officers with compensatory time and the impacts of that decision on the  
5 bargaining unit members' terms and conditions of employment is a mandatory subject of  
6 bargaining because the police officers were permanent city employees at the time that  
7 they sought to use the compensatory time). Additionally, unit members S.M., A.H, and  
8 J.S. had been unit members for nearly eleven months when Chief Proia contemplated  
9 discharging them because they had not yet obtained their FF I/II certification. Instead,  
10 Chief Proia presented them with the August 30, 2012 Agreements in which they agreed  
11 to a six-month extension of their probationary periods in order to obtain their FFI/II  
12 certifications. The August 30, 2012 Agreements also stated that the employees' failure  
13 to obtain the FF I/II during the six month extension period would constitute just cause for  
14 discipline, up to and including termination from employment. Cf. Boston School  
15 Committee, 3 MLC at 1606 (subjecting employees to discharge or loss of promotion  
16 when they fail to satisfy residency requirements within three months of employment is a  
17 condition of continued employment). Furthermore, the record before me does not show  
18 that the City previously compelled employees to attain FF I/II certification or face  
19 possible termination from their positions. Therefore, the City's requirement that FFOPs  
20 obtain FF I/II certification prior to the end of their probationary periods is a change in a  
21 mandatory subject of bargaining.

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<sup>45</sup> The application for the FFI/II certification examination required firefighters to list their current fire department memberships and the dates of their appointments.

Waiver by Contract

1 It is undisputed that the City did not provide the Union with notice and an  
2 opportunity to bargain before implementing the change. However, the City contends  
3 that no statutory bargaining obligation attached because certain provisions of the 2011-  
4 2014 MOU, including certain sections of Article VI and Article XXI, constitute waivers of  
5 the Union's right to bargain.

6 Where an employer raises the affirmative defense of waiver by contract, it bears  
7 the burden of demonstrating that the parties consciously considered the situation that  
8 has arisen and that the Union knowingly waived its bargaining rights. Massachusetts  
9 Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988); Town of  
10 Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986). The initial inquiry  
11 focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567  
12 (August 4, 1998). If the language clearly, unequivocally and specifically permits the  
13 public employer to make the change, no further inquiry is necessary. City of Worcester,  
14 16 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the language is ambiguous, the  
15 CERB will review the parties' bargaining history to determine their intent. Peabody  
16 School Committee, 28 MLC 19, 21, MUP-2073 (June 21, 2001); Town of Marblehead,  
17 12 MLC at 1670. Here, the City contends that the disputed provisions clearly and  
18 unambiguously waive the Union's right to bargain over the City's imposition of the FF I/II  
19 certification as a continued condition of employment. Upon review of the language of  
20 those provisions, I conclude that the Union has not contractually waived its right to  
21 bargain.

1 Turning first to Article VI, the management rights provision, the City relies on  
2 Sections 6.01B, C, E and F to argue that the Union waived its statutory right to bargain.  
3 First, the City argues that when Section 6.01C and Section 6.01F are read together,  
4 those two provisions permit the City to determine employee qualifications and, thus,  
5 comprise a waiver of the Union's right to bargain over the FF I/II requirement. Section  
6 6.01C states that the City has the right:

7 To select and to determine the number and types of employees required  
8 to perform the City's operations.  
9

10 Also, Section 6.01F states that the City has the right:

11 To establish, continue and/or change policies and/or regulations pertaining  
12 to standards for hiring and enforcement thereof.

13 Reading the language of the provisions carefully, giving the words their plain and  
14 normal meaning, I conclude that the provisions do not address the issue of whether the  
15 City can require FFOPs to attain FF I/II certification as a continued condition of  
16 employment. Rather, the provisions potentially discuss conditions of hire, which as was  
17 discussed above, are not mandatory subjects of bargaining.

18 Next, Section 6.01B describes the City's right:

19 [t]o establish or continue the policies and procedures for the conduct of  
20 the [City] business and, from time to time, to change or abolish such  
21 policies, practices or procedures."

22 The City argues that the cited language permits it to change its prior practice of "lax  
23 enforcement" of the FF I/II certification requirements and to impose strict enforcement of  
24 those requirements without bargaining. However, the broad language of Section 6.01B  
25 is limited by the following specific language, which is present near the end of Article VI:

26 The foregoing is not to be regarded as a waiver by the [Union] of its rights  
27 under M.G.L. c.150E.

1 A plain reading of that sentence shows that none of the language in Article VI is to be  
2 regarded as a waiver of the Union's right to bargain over changes in mandatory subjects  
3 of bargaining pursuant to the Law.

4 Finally, the City contends that Section 6.01E, when read together with Article  
5 XVII, Section 21.03D, permits the City to send FFOPs to the MFA for FF I/II certification  
6 testing without bargaining with the Union. Section 6.01E describes the City as having  
7 the right:

8 [T]o insure that related duties connected with department operations,  
9 whether enumerated in job descriptions or not, shall be performed by  
10 employees.

11 Also, Section 21.03D states:

12 Academy Training: Notwithstanding the twenty-four (24) hour tour  
13 schedule, scheduling of employees for training at the Massachusetts Fire  
14 Academy may be arranged for the employees involved in accordance with  
15 present practice.

16 The City argues that the duties referred to in Section 6.01E are contained in the Task  
17 Survey Analysis and that a requirement that FFOPs become FF I/II certified ensures  
18 that they are capable of performing those duties. Further, the City argues that it would  
19 be illogical to allow the City to train candidates at the MFA but to require the City to  
20 bargain with the Union before requiring FFOPs to take the FF I/II certification test.  
21 However, the City misapprehends the allegations in this case. The dispute does not  
22 concern whether the City can require the FFOPs to perform certain job duties, even  
23 though the Task Survey Analysis does not refer to FF I/II certification, or schedule the  
24 FFO's for training at the MFA, all of which are topics that are referenced in Section  
25 6.01E and Section 21.03D. Rather, the dispute in the present case concerns whether  
26 the City can require the FFOPs to attain FF I/II certification, i.e. to pass the FF I/II

1 certification exam, as a condition of continued employment. A plain reading of the  
2 language in Section 6.01E and Section 21.03D does not show that the Union clearly  
3 and specifically waived its right to bargain over the imposition of the FF I/II certification  
4 requirement as a condition of continued employment.

5 Statutory Waiver

6 The City also contends that its actions are specifically authorized by c.31, §§34  
7 and 61, and because those sections are not listed in Section 7(d) of the Law, no  
8 statutory bargaining obligation attached. Section 34 states in pertinent part:

9 Following his original appointment to a civil service position as a  
10 permanent full-time employee, a person shall actually perform the duties  
11 of such position on a full-time basis for a probationary period of six months  
12 before he shall be considered a full-time tenured employee, except as  
13 otherwise provided by sections sixty-one and sixty-five, by other law, or by  
14 civil service rule.

15  
16 During the probationary period, he may be subject to a performance  
17 evaluation during his first two months of service and a second evaluation  
18 may be conducted at least one month prior to his six month anniversary  
19 date of service. The appointing authority may extend the probationary  
20 period for a period of two months if the second evaluation of the  
21 probationary employee is unsatisfactory. Such evaluation may be utilized  
22 by the appointing authority, but in no instance shall the appointing  
23 authority be required to consider the results of such evaluation in a  
24 determination of granting such employee permanent or tenured status.  
25 Nothing contained herein shall require an appointing authority to evaluate  
26 a probationary employee and in no such instance shall such evaluation  
27 grant such probationary employee any greater rights than those contained  
28 in this section....

29  
30 If the conduct or capacity of a person serving a probationary period or the  
31 character or quality of work performed by him is not satisfactory to the  
32 appointing authority, he may, at any time, after such person has served  
33 thirty days and prior to the end of such probationary period, give such  
34 person written notice to that effect, stating in detail the particulars wherein  
35 his conduct or capacity or the character or quality of his work is not  
36 satisfactory, whereupon his service shall terminate. The appointing  
37 authority shall at the same time send a copy of such notice to the

1 administrator. In default of such notice, such person shall be deemed to  
2 be a tenured employee upon the termination of such period....

3 Further, Section 61 states:

4 Following his original appointment as a permanent full-time police officer  
5 or firefighter in a city, or in a town where the civil service law and rules are  
6 applicable to such position, a person shall actually perform the duties of  
7 such position on a full-time basis for a probationary period of twelve  
8 months before he shall be considered a full-time tenured employee in  
9 such position, except as otherwise provided by civil service rule. The  
10 administrator, with the approval of the commission, may establish  
11 procedures to ensure the evaluation by appointing authorities, prior to the  
12 end of such probationary period, of the performance of persons appointed  
13 as regular police officers or firefighters.

14 Section 7(d) of the Law provides that, with respect to matters within the scope of  
15 negotiations under Section 6 of the Law, the terms of a collective bargaining agreement  
16 prevail over contrary terms in certain enumerated statutes. See Adams v. Boston  
17 (Adams), 461 Mass. 602, 607-608 (2012). Chapter 31 is not one of the statutes listed in  
18 Section 7(d) of the Law. If a statute implicates mandatory subjects of bargaining and  
19 the statute is not listed in Section 7(d), the CERB examines the specific language of that  
20 statute to determine if a public employer has a duty to bargain under the Law. General  
21 grants of legislative authority in statutes not listed in Section 7(d) do not supersede the  
22 statutory bargaining obligation. School Committee of Newton v. Labor Relations  
23 Commission (Newton), 388 Mass. at 566. To recognize a broad, general management  
24 power as exclusive would undermine the purpose of Section 6 of the Law to provide for  
25 meaningful collective bargaining as a general rule with respect to compensation and  
26 other terms and conditions of employment. See Lynn v. Labor Relations Commission,  
27 43 Mass. App. Ct. 172, 182 (1997).

1 As was discussed above, the City's requirement that FFOPs attain FF I/II  
2 certification as a condition of continued employment is a mandatory subject of  
3 bargaining. The City asserts that requiring it to bargain over its imposition of the FF I/II  
4 certification as a continued condition of employment would materially conflict with its  
5 rights to enforce hiring qualifications and standards for FFOPs pursuant to §§34 and 61  
6 of Chapter 31. The analysis begins with a review of the language of §§34 and 61 to  
7 determine whether the intent of the Legislature is apparent from the language itself. See  
8 Adams, 461 Mass. at 609. If the intent of the Legislature is unambiguously conveyed by  
9 the statutory language, the analysis ends and the legislative intent is given effect. Id. In  
10 deciding whether the legislative intent is expressed unambiguously by the words used,  
11 the entire text of the disputed provisions' terms must be given effect so that no part will  
12 be inoperative or superfluous. Id.

13 Upon review, I do not read M.G.L. c.31, §§34 and 61 as creating a specific,  
14 statutory mandate that controls all issues relating to the FFOPs' terms and conditions of  
15 employment. Compare City of Somerville, 470 Mass. 563, 572 (2015) (municipalities'  
16 contributions to retirees' health insurance premiums is not a mandatory subject of  
17 bargaining because Legislature expressly conferred authority to the municipalities over  
18 the provisions of this benefit), and City of Somerville, 451 Mass. 493, 498 (2008)  
19 (specific statutory authority of mayor trumps collective bargaining provision concerning  
20 the appointment of a veterans agent), with Adams, 461 Mass. at 608 (in light of  
21 statutory silence, municipalities may agree via collective bargaining to pay more than  
22 one-half of educational incentives to police officers), and Newton, 388 Mass. at 565  
23 (statutory obligation to bargain about layoffs supersedes general grant of statutory

1 authority to operate and maintain public schools). Turning to Section 34, the statute  
2 provides that if a probationary employee has worked at least sixty days and if the  
3 employee's character or quality of work is not satisfactory to the appointing authority,  
4 the appointing authority may terminate the employee. Section 61 provides that  
5 permanent full-time police officers and firefighters shall have a twelve-month  
6 probationary period before being considered full-time tenured employees. Additionally,  
7 Section 61 provides that the administrator, with the approval of the Civil Service  
8 Commission, may establish procedures to ensure the evaluation by appointing  
9 authorities of regular police officers and firefighters before the end of their probationary  
10 periods. First, requiring the City to bargain over a condition of continued employment  
11 does not override the City's authority to enforce hiring qualifications and standards by  
12 discharging FFOPs during their probationary periods. Thus, the policy of Section 34 of  
13 ensuring whether an appointing authority has sufficient time to determine whether  
14 probationary firefighters have the necessary courage, good judgment and ability to work  
15 under stress is not negated by the bargaining obligation. Compare City of Fall River, 61  
16 Mass. App. Ct. 404, 410 (2004) (provisions of collectively bargained agreement  
17 concerning provisional employees does not conflict with M.G.L. c.31, § 41 because they  
18 are designed to address different issues) with City of Leominster, 33 Mass. App. Ct.  
19 121, 127 (1992) (intent of Section 34 to provide sufficient time for employers to  
20 determine probationary employees' character and work performance conflicts with  
21 collectively bargained just cause standard for discharge of those employees).

22 Furthermore, the City argues that because it uses the attainment of FF I/II  
23 certification as a means of evaluating FFOPs, the City will be hobbled in the process of

1 selection of employees for tenure because of the uncertain result that comes along with  
2 a mandatory obligation to bargain. However, the City incorrectly blends its right to  
3 decide whether FFOPs should become tenured employees and its decision to  
4 unilaterally impose a condition of continued employment. The City continues to have  
5 the unfettered discretion to determine whether FFOPs should become full-time tenured  
6 employees. It is the City's decision to impose a condition of continued employment as a  
7 means and method of employee assessment that triggers the statutory bargaining  
8 obligation. Further, I decline to find that the reference in Section 61 to the administrator  
9 establishing the procedure for the evaluation of probationary employees relieves the  
10 City from its obligation to bargain. The record before me does not show that personnel  
11 administrator or the Civil Service Commission authorized the use of the FF I/II  
12 certification as a means or method of employee assessment or that they had delegated  
13 the City to take over their responsibilities under Section 61. Finally, although the City  
14 raises speculative concerns about the alleged uncertain outcome of bargaining, those  
15 concerns do not transform the broad general authority of §§34 and 61 into a specific,  
16 narrow statutory mandate.

17 In the absence of a conflict between Sections 34 and 61 and Chapter 150E, the  
18 collective bargaining law is not superseded. See Town of Ludlow, 17 MLC at 1197.  
19 Instead, Chapter 31, §§34 and 61 can be harmonized with Chapter 150E. See Town of  
20 Dedham, 365 Mass. 392, 402 (1974) (reading Chapters 31 and 61 as constituting a  
21 harmonious whole by attributing to the Legislature certain common sense purposes).  
22 Accordingly, the City's requirement that FFOPs attain FF I/II certification as a condition  
23 of continued employment triggered the City's obligation to bargain to resolution or

1 impasse. It is undisputed that the City did not provide the Union with notice or an  
2 opportunity to bargain about the decision to implement the condition of employment or  
3 the impacts of that decision on the FFOPs' terms and conditions of employment.

4 CONCLUSION

5 Based on the record and for the reasons stated above, I conclude that the City  
6 violated the Law by unilaterally requiring FFOPs to attain FF I/II certification as a  
7 condition of continued employment.

8 ORDER

9  
10 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the  
11 City shall:

12  
13 1. Cease and desist from:

- 14  
15 a) Failing and refusing to bargain in good faith with the Union  
16 by unilaterally requiring FFOPs, who were members of the  
17 Class of 2011, to become FF I/II certified by the end of their  
18 probationary periods.  
19  
20 b) In any like or related manner, interfering with, restraining or  
21 coercing its employees in any rights guaranteed under the  
22 Law.

23  
24 2. Take the following action that will effectuate the purposes of the Law:<sup>46</sup>

- 25  
26 a) Restore the prior practice of not requiring FFOPs to become  
27 FF I/II certified by the end of their probationary periods.<sup>47</sup>

---

<sup>46</sup> The Union also requested as a remedy that I order the City to remove the letters that the City issued in August and September 2011 that required new firefighters to become FF I/II certified. However, I decline to do so because the facts before me show that the City issued those letters in the hiring context. As was discussed earlier in this decision, a condition of hire is not a mandatory subject of bargaining.

<sup>47</sup> The restoration of the prior practice does not pertain to the MFA's requirement that FFOPs attain FF I/II certification in order to graduate from its training program, an issue that is not before me. The MFA imposed the FF I/II certification requirement subsequent to the events in the present case.

- 1                   b) Upon request, meet and bargain in good faith with the Union
- 2                   over the imposition of a condition of continued employment
- 3                   by requiring FFOPs, who were members of the Class of
- 4                   2011, to become FF I/II certified by the end of their
- 5                   probationary periods.
- 6
- 7                   c) Post immediately in all conspicuous places where members
- 8                   of the Union's bargaining unit usually congregate, or where
- 9                   notices are usually posted, including electronically, if the City
- 10                  customarily communicates with these unit members via
- 11                  intranet or email and display for a period of thirty (30) days
- 12                  thereafter, signed copies of the attached Notice to
- 13                  Employees.
- 14
- 15                  d) Notify the DLR in writing of steps taken to comply with this
- 16                  decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

  
 MARGARET M. SULLIVAN  
 HEARING OFFICER

APPEAL RIGHTS

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



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

A hearing officer of the Massachusetts Department of Labor Relations has held that the City of Newton (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally requiring FFOPs to become Firefighter I and II (FF I/II) certified by the end of their probationary periods.

Section 2 of M.G.L. Chapter 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 fail and refuse to bargain in good faith with the Union by unilaterally requiring FFOPs, who were members of the Class of 2011, to become FF I/II certified by the end of their probationary periods.

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

1. Restore the prior practice of not requiring FFOPs to become FF I/II certified by the end of their probationary periods.
2. Upon request, meet and bargain in good faith with the Union over the imposition of a condition of continued employment by requiring FFOPs, who were members of the Class of 2011, to become FF I/II certified by the end of their probationary periods.

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City of Newton

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Date

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

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