MASSACHUSETTS LABOR RELATIONS REPORTER

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Department of Labor Relations

Administrative Law Decisions

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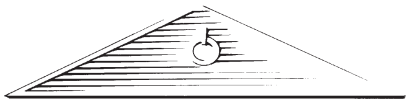

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Massachusetts Department of Labor Relations—Administrative Law Decisions

NEWS HIGHLIGHTS

CERB AFFIRMS HEARING OFFICER'S COMPLIANCE DECISION ORDERING CITY OF BOSTON TO PAY SUPERIOR OFFICERS MORE THAN $138,000 IN BACK PAY. Rejecting appeals by both the City of Boston and the Boston Police Superior Officers Federation, the CERB affirmed Hearing Officer Susan Atwater's compliance decision ruling that the City must pay the Union more than $138,000, plus statutory interest, to make it whole for the City's failure to implement a 2005 settlement agreement requiring that a City Hall security position be filled by a bargaining unit member. The amount, stemming from a $420 weekly stipend associated with the position, is to be allocated among all unit members serving in the position of sergeant during the relevant time periods. 10

SCHOOL COMMITTEE VIOLATED THE LAW WHEN IT PROHIBITED UNIT MEMBERS FROM WEARING BUTTONS IN SUPPORT OF THEIR FELLOW TEACHERS. Hearing Officer Kerry Bonner held that the Stoughton School Committee violated Section 10(a)(1) of the Law when it ordered bargaining unit members represented by the Stoughton Teachers Association to remove buttons which stated "I Support Stoughton Teachers." The teachers wore the buttons after three of their colleagues had been disciplined for commenting to students and staff, and in one case, contacting college officials, about a student who had been subject to disciplinary action for engaging in anti-Semitic speech. 9

TOWN DID NOT VIOLATE CONTRACT WHEN IT OFFERED OPEN SHIFTS TO PART-TIME DISPATCHERS. Arbitrator Timothy Hatfield held that the Town of Holden did not violate its contract with RECCA, MCOP, Local 450 when it refused to give full-time dispatchers the opportunity to fill open shifts on an overtime basis before offering them to part-time, non-bargaining unit dispatchers. 9

CITE BY VOLUME AND PAGE OF
Massachusetts Labor Cases THUS:
IUE-CWA, Local 81256 v. Town of Williamstown, 45 MLRR 1 (2018)

LABOR RELATIONS DEPARTMENT DOCKET—OCTOBER 2018

AGREEMENTS OF CONSENT ELECTIONS

Listed below are agreements of consent elections issued by the Department of Labor Relations in September - October 2018.

Greenfield Commonwealth Virtual School and Greenfield Commonwealth Virtual School Association of Professional Staff, MCR-18-6700 (September 27, 2018) All full-time and regular part-time general education teachers, special education teachers, guidance counselors, family engagement coordinators, title 1 teachers, and school nurses, but excluding all school administrators, secretaries, administrative staff, and all managerial, confidential and casual employees, and all other employees.

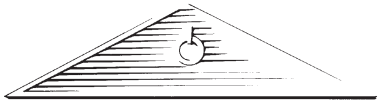
Town of Hampden and National Correctional Employees Union and IBPO, Local 583, MCR-18-6843 (September 28, 2018) All full-time and regular part-time dispatchers employed by the Town of Hampden, but excluding all managerial, confidential and casual employees, and all other employees.

CERTIFICATIONS OF REPRESENTATIVES

Listed below are certifications of representatives issued by the Department of Labor Relations in October - November 2018.

Town of Hampden and *National Correctional Employees Union* and IBPO, Local 583, MCR-18-6843 (November 2, 2018) All full-time and regular part-time dispatchers employed by the Town of Hampden, but excluding all managerial, confidential and casual employees, and all other employees.

MLRR Indices



MASSACHUSETTS LABOR RELATIONS REPORTER

Cumulative Decisions Reported — July-October 2018

Alphabetical Listing—Petitioner v. Respondent

NOTE: Decisions in **bold** appear in this issue.

Cumulative Decisions Reported — July-October 2018

Alphabetical Listing—Respondent; Petitioner v.

NOTE: Decisions in **bold** appear in this issue.

Cumulative Decisions Reported — July-October 2018

Alphabetical Listing—Third Party v. Respondent

NOTE: Decisions in **bold** appear in this issue.

Topical Index — July-October 2018

34. Criteria - In General

34.2 community of interest

Despite some overlap of duties with an administrative assistant title represented by AFSCME, the CERB ruled that a newly created Student Loan Manager position at UMass, Dartmouth shared a greater community of interest with the American Federation of Teachers, Education Services Unit than with the unit represented by AFSCME. *Board of Trustees, University of Massachusetts, Dartmouth and AFSCME, Council 93, AFL-CIO*, CAS-16-5404 (August 30, 2018), 45 MLRR 4

34.91 accretion

The CERB dismissed a unit clarification petition filed by AFSCME seeking to accrete a newly created Student Loan Manager position at UMass, Dartmouth to its bargaining unit. The position required a bachelor's degree and was more similar in terms of duties, level of discretion exercised, work contact, and requisite training and experience to positions included in the American Federation of Teachers, Education Services Unit than with those represented by AFSCME. *Board of Trustees, University of Massachusetts, Dartmouth and AFSCME, Council 93, AFL-CIO*, CAS-16-5404 (August 30, 2018), 45 MLRR 4

35.65 other professional workers

A newly created Student Loan Manager position at UMass, Dartmouth had been properly placed in the bargaining unit represented by the American Federation of Teachers, Education Services Unit. In dismissing a unit clarification petition filed by AFSCME, the CERB held that the position was assigned duties that required the exercise of judgment and discretion in addition to some duties that had previously been performed by an administrative employee in the AFSCME bargaining unit. *Board of Trustees, University of Massachusetts, Dartmouth and AFSCME, Council 93, AFL-CIO*, CAS-16-5404 (August 30, 2018), 45 MLRR 4

54. Scope of Bargaining

54.31 impact of management rights decisions

CERB affirmed City's obligation to bargain with two police unions over the impacts on disciplinary procedures, hours of work, and uniform requirements that resulted from City's decision to implement a new mediation program to handle citizen complaints. *City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation*, MUP-16-5315 and MUP-16-5350 (August 30, 2018) (Decision on Appeal Hearing Officer's Decision), 45 MLRR 4

54.694 mediation programs

CERB upheld a Hearing Officer's decision which found that the City violated the Law when it implemented a mediation program for citizen complaints against officers without first bargaining to resolution or impasse with the patrol and superior officers unions over the impacts of the decision to implement the program and ordered the program rescinded with respect to these two bargaining units until the City meets its bargaining obligation. *City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation*, MUP-16-5315 and MUP-16-5350 (August 30, 2018) (Decision on Appeal Hearing Officer's Decision), 45 MLRR 4

54.8 mandatory subjects

Where the impacts of a decision to implement a mediation program were mandatory subjects of bargaining, the CERB affirmed a Hearing Officer's decision which found the City had violated the Law when it implemented the program before bargaining to impasse or resolution with two police unions over issues of disciplinary procedures, uniform requirements, and hours of work that emanated from the decision. *City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation*, MUP-16-5315 and MUP-16-5350 (August 30, 2018) (Decision on Appeal Hearing Officer's Decision), 45 MLRR 4

62. Discharge and Discipline - Just Cause

62.8 unsatisfactory work performance

State university was able to establish that its discharge of a career services employee was due to her work performance and was not motivated by any animus towards the employee's protected, concerted activity. Where the Union was unable to present any direct or indirect evidence of an unlawful motive on the part of the employer, the Hearing Officer dismissed the complaint. *Board of Higher Education/Salem State University and Association of Professional Administrators/MTA/NEA*, SUP-16-5246 (September 6, 2018) (Hearing Officer's Decision), 45 MLRR 7

65. Interference, Restraint or Coercion

65.23 wearing buttons

Where there was no proof that "I Support Stoughton Teachers" buttons were directed against a student or caused any disruption to the educational process, School Committee could not prohibit teachers from wearing them in support of their fellow teachers. Teachers wore the buttons after three of their colleagues were disciplined for their conduct in the aftermath of disciplinary action taken against a high school student who had engaged in anti-Semitic speech. *Stoughton School Committee and Stoughton Teachers Association*, MUP-17-5762 (October 2, 2018) (Hearing Officer's Decision), 45 MLRR 9

65.27 exercising rights under the contract

A career services employee at a state university had engaged in protected, concerted activity when she submitted a rebuttal statement to an annual performance evaluation, a right established in the collective bargaining agreement between the Union and the employer. *Board of Higher Education/Salem State University and Association of Professional Administrators/MTA/NEA*, SUP-16-5246 (September 6, 2018) (Hearing Officer's Decision), 45 MLRR 7

65.91 request for representation at disciplinary interview

An employee's request for representation at a non-disciplinary meeting is protected activity under Section 2 of the Law even though no such right to representation attached and the request was appropriately denied by the employer. *Board of Higher Education/Salem State University and Association of Professional Administrators/MTA/NEA*, SUP-16-5246 (September 6, 2018) (Hearing Officer's Decision), 45 MLRR 7

67. Refusal to Bargain

67.165 bargained to impasse

Where the parties had unresolved issues, and the City had never declared an impasse or expressed a belief that it was deadlocked with the two police unions after engaging in bargaining over a mediation program for citizen complaints, the CERB upheld a Hearing Officer's decision that found that the parties were not at an impasse in negotiations over the details of the program's implementation. *City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation*, MUP-16-5315 and MUP-16-5350 (August 30, 2018) (Decision on Appeal Hearing Officer's Decision), 45 MLRR 4

67.3 furnishing information

Hearing Officer found that DCF was required to provide SEIU, Local 509 with a copy of an investigative report concerning an employee's breach of client confidentiality even after the parties had settled the underlying disciplinary matter. Citing *Providence Hosp.* v. *NLRB*, 93 F.3d 1012, 1020 (1st Cir. 1996), the Hearing Officer noted that "[t]he relevance of requested information is determined by the circumstances that exist at the time the union makes the request, not by the circumstances that obtain at the time an agency or a court finally vindicates the union's right to divulgement." *Commonwealth of Massachusetts/Secretary of Administration and Finance/Department of Children and Families and Service Employees International Union, Local 509*, SUP-17-5896 (August 24, 2018) (Hearing Officer's Decision), 45 MLRR 3

72. Duty of Fair Representation

72.3 agency service fee

In light of the United States Supreme Court's decision in *Janus* v. *American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. ___ (2018), the Hearing Officer dismissed a complaint filed by an employee against the Massachusetts Corrections Officers Federated Union with respect to a demand for two years of agency fees after the Union notified the DLR that it was no longer seeking agency fees from the employee. *Massachusetts Corrections Officers Federated Union and Brian V. Jansen*, ASF-16-5586 and ASF-18-6576 (August 24, 2018) (Hearing Officer's Decision), 45 MLRR 4

TOPICAL INDEX — JULY-OCTOBER 2018

76. Refusal to Bargain in Good Faith

76.8 good faith test (totality of union's conduct)

Hearing Officer held that the totality of the circumstances, with respect to negotiations between the Town and the Union representing its firefighters, warranted the dismissal of a complaint of prohibited practice lodged against the Union. The Hearing Officer ruled that the Union was under no obligation to compromise its position with respect to a 42-hour work week for firefighters working 24-hour shifts and did not violate the Law when it refused to consider the Town's counterproposal that the move to 24-hour shifts be a part of an expanded, 56-hour work week. *Seekonk Firefighters Association, Local 1931, IAFF and Town of Seekonk*, MUPL-16-5526 (September 20, 2018) (Hearing Officer's Decision), 45 MLRR 7

76.81 failure to consider proposals

Union did not engage in unlawful surface bargaining when it refused to consider Town's counterproposal regarding a change to a 24-hour schedule for firefighters. The Hearing Officer held that the Union was under no obligation to make concessions with respect to its proposal that the 24-hour schedule be implemented as part of a 42-hour work week, and not a 56-hour work week, as proposed by the Town. *Seekonk Firefighters Association, Local 1931, IAFF and Town of Seekonk*, MUPL-16-5526 (September 20, 2018) (Hearing Officer's Decision), 45 MLRR 7

82. Remedial Orders

82.11 back pay

On an appeal of a decision on compliance, the CERB affirmed a decision of a Hearing Officer ordering the City of Boston to make the Superior Officers Federation whole for the loss of a weekly $420 stipend over the period the City had failed to comply with a 2005 settlement agreement requiring it to fill a City Hall security position with a bargaining unit employee. The Union was ordered to distribute the more than $138,000 in back pay, along with statutory interest, among all of the sergeants who were employed by the City while the position was not filled by a bargaining unit members. The CERB, however, rejected the Union's argument that the backpay award should have included base pay, in addition to the stipend. *City of Boston and Boston Police Superior Officers Federation*, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision), 45 MLRR 10

82.111 interest

After the City had repudiated a settlement agreement regarding the filling of a City Hall security position, the CERB affirmed a compliance decision of a Hearing Officer which ordered the City to pay the Superior Officers Federation more than $138,000 in back pay for stipends it had avoided paying by not honoring the settlement agreement. The CERB also affirmed the Hearing Officer's award of interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly. *City of Boston and Boston Police Superior Officers Federation*, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision), 45 MLRR 10

82.21 posting orders

On a request for enforcement filed by the Union, the CERB affirmed a Hearing Officer's decision which found that MassDOT had failed to fully comply with the posting requirement and issued an order requiring it to post the Notice to Employees at two locations it had missed. *Massachusetts Department of Transportation and United Steelworkers, Local 5696*, SUP-14-3576 and SUP-14-3640, (August 21, 2018) (Decision on Appeal Hearing Officer's Compliance Decision), 45 MLRR 3

82.3 status quo ante

The CERB found that the Hearing Officer had correctly imposed a *status quo ante* order in an impact bargaining case which required the City of Boston to rescind its mediation program with respect to the participation of superior and patrol officers for any new citizen complaints until the City bargains the impacts of the implementation of the program with the two unions to resolution or impasse. *City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation*, MUP-16-5315 and MUP-16-5350 (August 30, 2018) (Decision on Appeal Hearing Officer's Decision), 45 MLRR 4

83. Compliance

The CERB affirmed a Hearing Officer's decision that the City of Boston must pay the Boston Police Superior Officers Federation more than $138,000, plus statutory interest, to make the Federation whole for its failure to implement a 2005 settlement agreement requiring the City to fill a City Hall security position with a bargaining unit member. The CERB rejected the City's argument that the agreement was unenforceable due to its interference with the City's non-delegable rights and noted that a compliance hearing "does not provide a second chance to the party alleged to be in non-compliance to raise . . . arguments, that it failed to properly appeal, either to the CERB or to the Appeals Court." *City of Boston and Boston Police Superior Officers Federation*, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision), 45 MLRR 10

Rejecting new evidence submitted for the first time on appeal, the CERB declined to overturn a Hearing Officer's decision on compliance that required that MassDOT post a notice at two locations where employees typically congregate. MassDOT had requested the record be reopened after the Hearing Officer's decision had issued and had submitted affidavits and other materials to show that the notice had in fact been posted at the two locations. *Massachusetts Department of Transportation and United Steelworkers, Local 5696*, SUP-14-3576 and SUP-14-3640, (August 21, 2018) (Decision on Appeal Hearing Officer's Compliance Decision), 45 MLRR 3

92. In General

92.45 to re-open

When a motion to re-open the record was made after the Hearing Officer's decision had issued, the CERB denied the motion and did not allow consideration of new information relating to the employer's compliance with a posting requirement for the first time on appeal. *Massachusetts Department of Transportation and United Steelworkers, Local 5696*, SUP-14-3576 and SUP-14-3640, (August 21, 2018) (Decision on Appeal Hearing Officer's Compliance Decision), 45 MLRR 3

92.56 proper issues on appeal

Affirming a Hearing Officer's decision on compliance and rejecting MassDOT's submission of new evidence, the CERB held that, consistent with longstanding precedent, it will not consider information that is provided for the first time on appeal. *Massachusetts Department of Transportation and United Steelworkers, Local 5696*, SUP-14-3576 and SUP-14-3640, (August 21, 2018) (Decision on Appeal Hearing Officer's Compliance Decision), 45 MLRR 3

111. Employees Involved

111.47 public works employees

Arbitrator reduced a termination to a written warning for a DPW employee who failed to leave his water department vehicle in park while running into Town Hall, causing damage to both the vehicle and to a shed located on private property. Although the employee had passed a breathalyzer immediately following the incident, the Town had attempted to link it to an earlier incident where the employee had responded to an off-duty call while intoxicated. Where the employee had not been disciplined for this earlier incident, but required to attend a substance abuse program, the Arbitrator ruled that the employee had committed a first offense under the collective bargaining agreement and should have received a written warning. *Town of Williamstown and IUE-CWA, Local 81256*, ARB-18-6474 (July 20, 2018) (Arbitrator's Decision), 45 MLRR 1

111.82 police

In conjunction with an increase in the work week for police officers, from 37.5 to 40 hours, a JLMC Panel issued an award requiring a .5% increase in each year of a three-year collective bargaining agreement between the Town of Chelmsford and the Fraternal Order of Police, Lodge 110. The Panel also increased the shift differential from $1.73 to $2.00 but allowed the Town's proposal that officers would no longer be compensated on an overtime basis for firearms training. *Town of Chelmsford and Fraternal Order of Police, Lodge 110*, JLM-16-5531 (September 11, 2018) (Interest Arbitration Award), 45 MLRR 8

111.824 patrol officers

Arbitrator denied a grievance filed on behalf of a patrol officer who had been removed from Section 111F status by the City after it received a determination from a PERAC medical panel that he was not incapacitated as a result of a work-related injury. A subsequent panel reached the opposite decision and the Union had sought backpay and benefits for the approximately six-month period he had been removed from Section 111F status. *City of Lowell and Lowell Police Association*, ARB-18-6517 (August 23, 2018) (Arbitrator's Decision), 45 MLRR 3

111.85 dispatchers

Town did not violate its contract with Union when it refused to provide a right of first refusal to full-time dispatchers before offering an unfilled shift to part-time, non-bargaining unit dispatchers. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLRR 9

113. Grievance Arbitration Awards

113.101 discharge of employees

Town did not have just cause to discharge a public works employee who forgot to leave his vehicle in park and caused damage to both the vehicle and private property. The Arbitrator ruled that the employee had committed a first offense under the contractual disciplinary procedure which required a written warning be imposed. The Town was not able to show that the employee had also been insubordinate when a police officer administered a breathalyzer test following the accident, a test which the employee ultimately passed. The Arbitrator further determined that the Town could not use an earlier incident where the employee had responded to an off-duty call for service while intoxicated to support its decision to terminate him. The earlier incident had not resulted in any disciplinary action, only a requirement that the employee complete a substance abuse program. *Town of Williamstown and IUE-CWA, Local 81256*, ARB-18-6474 (July 20, 2018) (Arbitrator's Decision), 45 MLRR 1

113.1101 assignment of overtime

Contract provision governing assignment of overtime was neither clear nor unambiguous resulting in the Arbitrator reviewing parties' bargaining history to determine that the Town did not violate the contract when it first offered an open shift to a part-time non-unit employee rather than to a full-time dispatcher on an overtime basis. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLRR 9

113.123 injury on duty leave

The parties' collective bargaining agreement did not require the City to continue Section 111F benefits for a police officer after a PERAC medical panel determined that the officer's injuries were not the result of a work-related injury. *City of Lowell and Lowell Police Association*, ARB-18-6517 (August 23, 2018) (Arbitrator's Decision), 45 MLRR 3

113.22 past practices

Arbitrator found that there was no binding past practice or contractual requirement that prevented the City from relying on a determination from a PERAC medical panel to remove a police officer from Section 111F status. *City of Lowell and Lowell Police Association*, ARB-18-6517 (August 23, 2018) (Arbitrator's Decision), 45 MLRR 3

113.24 bargaining history

After finding the parties' contract neither clear nor unambiguous, Arbitrator examined the bargaining history which established that the Union had insisted on a right of first refusal for full-time dispatchers to fill open shifts on an overtime basis and the Town had clearly rejected this proposal. This history, together with a reading of the parties' contract as a whole, provided the basis for the Arbitrator's decision to deny the Union's grievance protesting the Town's decision to offer an open shift to a part-time, non-unit dispatcher without first providing the opportunity a full-time dispatcher on an overtime basis. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLRR 9

113.38 timeliness

Noting that the agreement contained a "Stability of Agreement" provision stating that the failure of either party to insist upon performance of any of the terms of the agreement will not be considered a waiver or relinquishment of a right, the Arbitrator rejected Town's argument that a grievance concerning assignment of overtime was not timely filed and reached the merits of the dispute. The Town had assigned overtime to part-time, non-bargaining unit employees on three occasions prior to the incident giving rise to the grievance and had argued that the grievance was untimely where it had been filed more than 30 days after the incident first arose. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLRR 9

116. Joint Labor-Management Committee Proceedings

A JLMC Panel made determinations outside of the formal hearing process and issued an award increasing the work week for Chelmsford police officers from 37.5 to 40 hours and providing for a .5% increase each year of the three-year contract, along with an increase to the shift differential. The Town's proposal to change the payment for firearms training from overtime to compensatory time was also part of the award. *Town of Chelmsford and Fraternal Order of Police, Lodge 110*, JLM-16-5531 (September 11, 2018) (Interest Arbitration Award), 45 MLRR 8

Topical Index Outline — 2018-2019

TOPICAL INDEX OUTLINE — 2018-2019

STOUGHTON SCHOOL COMMITTEE AND STOUGHTON TEACHERS ASSOCIATION, MUP-17-5762 (October 2, 2018) (Hearing Officer's Decision)

65.23 wearing buttons

Hearing Officer Kerry Bonner, Esq. held that the Stoughton School Committee (Committee) violated Section 10(a)(1) of Mass. General Laws, Chapter 150E (the Law), when it ordered bargaining unit members represented by the Stoughton Teachers Association (Union) to remove buttons which stated "I Support Stoughton Teachers."

On January 11, 2017, the Superintendent of the Stoughton Public Schools disciplined three high school teachers in connection with complaints that they had bullied a student after an incident for which the student had been disciplined. The student had been disciplined for anti-Semitic speech and the teachers had been disciplined for discussing the student and the disciplinary action with other students and teachers. Two of the teachers received written reprimands. One teacher, who also reported the matter to a college the student had applied to, was suspended for 20 days.

The Union filed grievances seeking to overturn the disciplinary action and asked unit members to wear buttons in support of their fellow teachers. On January 17, 2017, high school teachers wore buttons which stated "I Support Stoughton Teachers." That same day, the student's mother contacted the Superintendent and told him that her son was extremely upset and intimidated because everyone knew that they were supporting the teacher who had bullied him. The attorney for the Committee contacted the Union's field representative to ask if the teachers would voluntarily stop wearing the buttons because they were making the student uncomfortable. The Union declined to do so and the Superintendent directed the Principal to order them to remove the buttons. The Principal did so and the unit members complied and began to wear orange and black as a show of support in lieu of the buttons.

On January 24, 2017, the President of the Union read a statement at the School Committee meeting, on behalf of the membership, detailing a succession of incidents of anti-Semitic speech at the high school, criticizing the administration's inadequate response and the discipline meted out to teachers. He stated that the teachers were using "their best professional judgment to address the issue with their colleagues . . . and students" in the wake of the school's failure to properly address the issue.

Noting that the Committee acknowledged that employees generally have a protected right under Section 1 of the Law to wear union insignia, including buttons, in the workplace, the Hearing Officer rejected its argument that the special circumstances—the student's feelings of intimidation—permitted the Committee to order teachers to stop wearing the buttons. In the absence of any testimony from the student, the Hearing Officer found that there was no credible evidence that the student was intimidated or that his feeling of intimidation was reasonable given that the buttons only contained a generic message of support. The Hearing Officer also determined that the buttons were not disruptive to the educational process and there was no evidence that any teachers told any students that the buttons were directed against the student.

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TOWN1 OF HOLDEN AND RECCA, MCOP, LOCAL 450, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision)

111.85 dispatchers
113.1101 assignment of overtime
113.24 bargaining history
113.38 timeliness

Arbitrator Timothy Hatfield, Esq. ruled that the Town of Holden (Town) did not violate its collective bargaining agreement with RECCA, MCOP, Local 450 (Union) when it scheduled a part-time dispatcher for an open shift without first offering the shift to a full-time dispatcher on an overtime basis.

At the time of the grievance, the Town and the Union were parties to a first collective bargaining agreement that was in effect from August 19, 2016 to June 30, 2018. Prior to the negotiation of the contract and the unionization of the dispatchers, the Town would offer shifts left open when full-time dispatchers called out prior to the day of the shift to part-time dispatchers before offering it to full-time dispatchers on an overtime basis. During negotiations for the contract, the Union proposed giving these opportunities first to full-time dispatchers and the Town rejected the proposal as too costly. The Town's position was that it had the right to fill the shift with a part-timer unless the opening became known the day of the shift, in which case it would be offered as an overtime opportunity to a full-time dispatcher.

The parties eventually agreed to the following language:

> A*ssignment of Overtime 10.2 b. The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering the unfilled shift to an employee outside the bargaining unit.*
>
> *Assignment of Non-Bargaining Unit Personnel 18.1 The Town may assign part-time dispatchers who are not in the bargaining unit to perform duties from time to time.*

Shortly after the contract was finalized, the Union raised the issue of the right of first refusal for full-time dispatchers. In a letter dated September 30, 2016, the Town's attorney wrote to the Union's attorney that full-time dispatchers did not have this right and that the Town would continue to fill shifts and offer overtime as it had done prior to the adoption of the contract.

On January 31, 2017, a full-time dispatcher, Union President Max Jette, put in for a day off on February 3, 2017. When the Town offered the shift to a part-time dispatcher, the Union filed a grievance.

Before the Arbitrator, the Town argued that the grievance was not arbitrable because it had not been timely filed. The contract required that a grievance be filed within 30 days of the date the dispute arose and the Town had filled open shifts with part-timers on three prior occasions without the Union filing a grievance. Noting that the agreement contained a "Stability of Agreement" provision

stating that the failure of either party to insist upon performance of any of the terms of the agreement will not be considered a waiver or relinquishment of a right, the Arbitrator rejected this argument and reached the merits of the dispute.

With respect to the merits, the Arbitrator determined that the language of Section 10.2 regarding assignment of overtime was neither clear nor unambiguous and proceeded to examine the bargaining history and past practice of the parties. Noting that the Town and the Union had only been parties to a contract for a short time and that the practice prior to the establishment of the Union was irrelevant, the Arbitrator disregarded the Town's insistence that there was a binding past practice accepted by both sides which should control the issue.

With respect to the bargaining history, however, the Arbitrator held that the evidence established that the Town had repeatedly rejected the Union's proposal to give the right of first refusal to full-time dispatchers and expressed a desire to continue to fill shifts with part-time employees as it had done prior to unionization. Emphasizing that the contract must be read as a whole and citing the bargaining history, the Arbitrator found the Union failed to meet its burden of proof and denied the grievance.

* * * * * *

CITY OF BOSTON AND BOSTON POLICE SUPERIOR OFFICERS FEDERATION, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision)

82.11 back pay
82.111 interest
83. Compliance

On an appeal of a Hearing Officer Susan Atwater's decision on compliance [44 MLC 63, 44 MLRR 7], the CERB affirmed the Hearing Officer's ruling that the City of Boston (City) must pay the Boston Police Superior Officers Federation (Union) more than $138,000, plus statutory interest, to make the Federation whole for the City's failure to implement a 2005 settlement agreement requiring that a City Hall security position be filled by a bargaining unit member. The amount, stemming from a $420 weekly stipend associated with the position, is to be allocated among all unit members serving in the position of sergeant during the relevant time periods.

The case begin in 2006, when the Union filed a charge alleging that the City had violated Sections 10(a)(5) and (1) of Mass. General Laws, Chapter 150E (the Law) when it repudiated the terms of a 2005 settlement agreement requiring that a City Hall security position be staffed by a member of the bargaining unit. After the Hearing Officer found that the City had violated the Law, the City appealed. On March 30, 2012, the CERB affirmed the Hearing Officer's decision [38 MLC 233, 38 MLRR 31] as well as the order requiring the City to make whole any bargaining unit employee who had suffered an economic loss as the result of the City's repudiation of the settlement agreement. The City appealed and the Appeals Court affirmed the decision and order of the CERB. *City of Boston* v. *Commonwealth Empl. Rels. Bd.*, 87 Mass. App. Ct. 1137 (2015) (Rule 1:28 Decision). In August 2016, the Union filed a petition for enforcement and a new charge alleging a prohibited practice based upon the failure to fill the City Hall position between February 29 and September 24, 2016. The Union subsequently withdrew the new charge and these allegations were incorporated into the compliance proceeding.

After two days of hearing and 199 stipulations of fact, the Hearing Officer ruled that the City had not fully complied with the CERB's March 2012 decision as it had not made the bargaining unit employees whole for the pay they had lost due to the City's failure to adhere to the terms of the settlement agreement. The Hearing Officer ordered the City to pay $125,618, plus statutory interest, to be proportionally divided between the individuals who held the position of sergeant from April 12, 2006 to January 22, 2011 and from July 23, 2011 to June 6, 2012. For the period between February 29 and September 24, 2016, the Hearing Officer ordered the City to pay $12,628.57, plus statutory interest.

Both the City and the Union appealed the Hearing Officer's decision on compliance. The Union argued that the Hearing Officer erred when she declined to award any backpay other than the stipend and in determining that the stipend amount owed was $425 per week rather than the $480 per week that the Union had sought. The City continued to assert that the 2005 settlement agreement was not enforceable and disputed the Hearing Officer's determination that it had waived its right to make this argument in the compliance proceeding. The City also contended it had the right to leave the position vacant temporarily and that the parties had never interpreted the settlement agreement to contain a minimum manning requirement.

The CERB affirmed the Hearing Officer's finding that the City had waived its non-delegability argument when it had not been raised at the original hearing. Noting that the Appeals Court had affirmed the CERB's decision and had rejected the City's appeal of issues it had not raised before the Hearing Officer, the Board observed that a compliance hearing "does not provide a second chance to the party alleged to be in non-compliance to raise . . . arguments, that it failed to properly appeal, either to the CERB or to the Appeals Court."

Noting there was unrefuted evidence that the City employed sufficient sergeants available to fill the City Hall position, the Board also affirmed the Hearing Officer's decision that the a backpay award including base wages, in addition to the stipend, was not required.

Rejecting the Union's contention that the stipend should have been calculated at $480 per week, the Board affirmed the Hearing Officer's analysis and found that $425 weekly rate was appropriate. The Board noted that the City had paid $425 per week to the sergeants who held the position in the aftermath of the settlement agreement and the Union never protested this amount and to impose a higher rate on the City for instances when the position was left unfilled made no sense.

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PROMOTION

In *Town of Blackstone and Blackstone Police Union, Local 442*, AFL-CIO, 44 MLRR 18 (February 23, 2018), Hearing Officer Margaret M. Sullivan found that the Town of Blackstone (Town) violated Section 10(a)(3) of the Law by discriminating against former Union president Maxwell Hurwitz (Hurwitz) for engaging in concerted, protected activities, which included objecting to a proposed consent form for a background check for promotional candidates.

Hurwitz was an active Union president who spoke out at Town Meeting on matters that pertained to unit members' terms and conditions of employment, including the installation of GPS devices in police cruisers. He also negotiated with the Town over issues concerning compensatory leave, the impacts of Narcan requirements on unit members, and in six instances, to reduce or remove discipline that a unit member previously incurred. Further, Hurwitz was involved in concerted, protected activity in the months prior to the Employer's decision to bypass him for promotion. He represented the Union in successor contract negotiations with the Town. Beginning in January 2016, Hurwitz also attended the four to six meetings in which the Employer and the Union successfully negotiated over the two-part promotional process to fill the three vacancies for sergeant. Additionally, Hurwitz met with the Police Chief to protest the April 27, 2016 consent, which the Chief proposed that unit members execute as part of the promotional process for the sergeant position. Hurwitz characterized the April 27, 2016 consent as too threatening and too invasive and informed the Chief that he had advised his unit members not to execute it. The Chief was not happy with Hurwitz' rebellious side. Thereafter, the Town posted the three promotional opportunities for sergeant and used an assessment center and a hiring panel to evaluate the candidates. Although Hurwitz ranked third of the six candidates after the promotional process, the Town bypassed him in favor of a candidate who was ranked fourth.

The Hearing Officer rejected all but two of the Town's cited reasons for the bypass as not being legitimate reasons. The two legitimate reasons that the Town provided were that Hurwitz had less seniority than the fourth-ranked candidate and that the Town recently had received documents with derogatory information about Hurwitz from a prior employer. However, the Hearing Officer concluded that despite Hurwitz's seniority date, the Town would have promoted him but for his concerted, protected activity because it had promoted another candidate who had nearly the same seniority date as Hurwitz. Also, the Hearing Officer found that the Town could not have relied upon the information from Hurwitz's prior employer as the reasons for his bypass because it decided not to promote him more than a week before it received the documents relating to his prior employment.

EMPLOYER BARGAINING OBLIGATIONS

To bargain in good faith is to allow discussion on all proposals, to listen to each other's arguments, and to show a willingness to consider compromise. In *Newton School Committee and Newton Public Schools Custodians Association*, 44 MLRR 22 (March 14, 2018), Hearing Officer Kerry Bonner found that the Newton School Committee (School Committee) failed to bargain in good faith with the Union when it preconditioned its willingness to bargain on the Union's acceptance of its outsourcing proposal. The Hearing Officer further held that the School Committee engaged in surface bargaining when it failed to make any counterproposals, and that it failed to timely comply with an information request. However, the School Committee did not engage in bad faith bargaining or retaliated against Union activity when it made the outsourcing proposal.

On December 18, 2014, the School Committee and Union entered into negotiations for a successor contract to the 2011-2014 CBA and participated in between eight and eleven bargaining sessions. On July 23, 2015, the School Committee proposed that the parties delete Article XXIX, Work Jurisdiction, from the 2011-2014 CBA, which gave custodians exclusive right in their work, and to substitute for it language allowing the School Committee to outsource the work of all custodial positions in its discretion. Outsourcing the work would have added up to $3 million in savings. Accordingly, the School Committee sent its outsourcing proposal to the Union. It met with the Union several times to bargain over the outsourcing proposal, each submitting various proposals and/or counterproposals. At the start of the negotiations, the School Committee made it clear that it was not willing to proceed on any other issues until the outsourcing proposal was resolved. The Union also advanced multiple proposals to address the outsourcing issue, however the School Committee rejected "all" of them or "to be discussed later". When the School Committee did respond, it responded to the Union's counterproposals, and, even then, it rejected all of the Union's concerns.

The Hearing Officer found that the School Committee failed to bargain in good faith by conditioning its willingness to make economic proposals on the Union's acceptance of an outsourcing proposal. While the School Committee was not required to compromise or concede its position on outsourcing, it was obligated, at minimum, to discuss other economic proposals before it resolved the outsourcing issue. The Hearing Officer also found that the School Committee engaged in bad faith during negotiations by failing to make wage proposals and rejecting or setting

aside the majority of the Union's proposals without making any counterproposals.

The Hearing Officer, however, did not find that the School Committee's proposal to outsource the entire bargaining unit was part of its bad faith conduct as the School Committee continued to show a willingness to revise and discuss the proposal. The Hearing Officer rejected the Union's argument that the School Committee engaged in retaliation by making an outsourcing proposal in response to its filing of grievances because the outsourcing proposals were not "adverse actions". But even if they were, the School Committee met its burden of persuasion by showing that it would have pursued the outsourcing proposal even if the Union had not filed the grievances because of the monetary savings the outsourcing would provide.

Additionally, the Union had requested information from the School Committee regarding the revenue that the school obtained from renting its facilities which was relevant to the making of its proposals. The School Committee took three months to respond to this information request. The Hearing Officer found that the School Committee unreasonably delayed furnishing the requested information when it took three months to respond to this request, did so only after this action was brought by the Union, and admitted that the request "fell through the cracks."

DISCIPLINE

In City of Methuen and New England Benevolent Association, Local 117, 44 MLRR 23, (March 23, 2018), Arbitrator James Sunkenberg found that the City had just cause to discipline Police Dispatcher Sherri Ventrillo (Ventrillo) for incompetently handling a dispatch situation when she failed to contact the victim and advise him that police response would be delayed. The Arbitrator, however, found the five-day suspension to be excessive and reduced it to a two-day suspension.

On June 5, 2016, Ventrillo received a call from a victim caller (caller) who reported almost getting into a physical confrontation with an erratic driver. The caller dialed 911 and reported this incident. Accordingly, Officer Velazquez received this information from Ventrillo. Velazquez was additionally told that the victim was out in front of the Market Basket that the erratic driver had left the parking lot traveling in an unknown direction. However, Ventrillo never informed the Commanding Officer that the call for service was more substantial than just an erratic operator. Not long after this conversation, Velazquez was redirected to report to another call which caused a delay in police response. At no time did the Dispatcher attempt to notify the victim or the commanding officer that response would be delayed. Eventually, an officer did arrive late at the scene, but was unable to locate the caller. Following an investigation of this incident, the City issued Ventrillo a Notice of Discipline listing four alleged violations of the Police Department's Rules and Regulations and imposed a five-day unpaid suspension. The Union grieved the suspension where the City dismissed two of the four initial allegations against Ventrillo in Step 2 but affirmed the five-day suspension.

Upon hearing the Union's challenge, the Arbitrator upheld the City's finding of just cause to discipline the dispatcher for violating Section 8.2.n of the Operations Manual, and, derivatively, Rule 5, which require the reporting of any delay of response time to victims. Based on the dispatcher's testimony that she would have called the victim back if she knew that Officer Velazquez did not initially make contact with the victim, it was clear that she understood her obligations under Rule 5.1. However, the Arbitrator did not credit her lack of knowledge because Officer Velazquez was redirected only "seconds" after she spoke with him and she was aware of that. However, the Arbitrator found no violation of Chapter 7 of the Department's Rules and Regulations under Section 8.2n because Chapter 7 dealt with emergency calls and Section 8.2.n was silent as to whether it applied to non-emergency callers when delay in police response arises before any contact with the caller is made. Because the violation here did not implicate the public or the officer's safety, the five-day suspension was excessive in relation to the single less serious offense and was reduced to a two-day suspension.

PAST PRACTICE

In *Worcester and National Association of Government Employees, Local 495*, 44 MLRR 25 (April 6, 2018), Hearing Officer Margaret M. Sullivan found that the City of Worcester did not violate 10(a)(5) of the Law by hiring a new employee to work in the Department of Public Works (DPW) Reservoir Division as a motor equipment repairman (MER) without first offering the position to MERs already employed in the DPW.

MERs are mechanics, who work at the DPW's central garage or at a satellite garages in other divisions, including Water, Sewer and Reservoir. The DPW uses several methods to fill job openings for its Motor Equipment Repairman (MER) position, which include the use of Civil Service lists, newspaper advertisements and internal postings. Notices of MER openings are also posted within the DPW to determine whether current employees are interested. Employees may express interest in openings by signing their names to the notices, but the notices explicitly state that there are no guarantees that individuals will be appointed to the positions.

The parties disagreed as to whether the DPW permits MERs to transfer to open positions in other divisions within the DPW based upon their seniority but agreed that the DPW does not permit other employees to transfer between divisions based upon their seniority. The City alleges that, based on past practice, employees are prohibited from transferring between divisions based on their seniority. In contrast, the Union argued that there was a past practice that MERs would have the opportunity to exercise their seniority by moving to another garage or to a preferred work shift when there was an opening. None of the rules prohibiting transfers based on seniority were recorded in writing anywhere.

Upon review of the evidence, the Hearing Officer held that the Union failed to establish by a preponderance of the evidence that there was a binding past practice of transferring MERs by seniority. The Union presented no evidence that the City used seniority to fill the positions at any time for the past ten years. As such, the Hearing Officer found that an established past practice of not using seniority to fill the positions existed. The Hearing Officer also noted that that even if there was a past practice of hiring by seniority as the Union claimed, there was evidence that that the

City deviated from that practice seven to nine years ago by hiring others who were not current MERs employees working in the DPW. As a result, she concluded that the purported practice of offering current MERs an open position before hiring a new employee no longer remained a consistent practice that occurred each time there was an opening.

TRANSFER OF DUTIES

In *City of Boston and American Federation of State, County and Municipal Employees, AFL-CIO, Council 93*, 44 MLRR 27, (May 9, 2018), Hearing Officer Will Evans found that the City of Boston had violated its bargaining obligation by transferring animal quarantining duties to non-bargaining unit members without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment.

Prior to 2000, the City had a contract with the Animal Rescue League of Boston to perform animal quarantines. After the contract ended, the Employer created two AFSCME bargaining unit positions as Dog/Animal Control Officers to perform animal quarantines within City limits. Although the Animal Rescue League of Boston continued to perform animal quarantines within its privately-owned shelter, it ceased going out into the field to handle animal quarantines after 2000. Additionally, the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) also performed animal quarantines, but solely within their privately-owned shelter in Boston. Both the Animal Rescue League and MSPCA are non-bargaining unit members and are not City employees.

The Hearing Officer found that since 2000, animal quarantining duties were given exclusively to bargaining unit members. The Hearing Officer found that after 2000, non-bargaining unit members no longer performed animal quarantines on City-owned property. Consequently, this practice established a departure from having shelters performing animal quarantines on City-owned property. The Hearing Officer further noted that the fact that shelters currently perform animal quarantines on their own private property was irrelevant as to the question of whether the work was shared with City employees. And, even assuming arguendo that the work was shared, there was no evidence presented showing that the Union was aware of this practice. But, even if the Union was aware of the shared work, the Hearing Officer nonetheless found that there was "calculated displacement" of bargaining unit work as a result of the transfer of those duties to non-bargaining unit members. Bargaining unit member quarantine duties witnessed a significant drop, which, on its own, was enough to prove that the unilateral transfer of duties violated the Law.

The Hearing Officer rejected the City's argument that the duties of animal quarantines were statutorily non-delegable duties and that to bargain over such effort to ensure this work is done would put public safety at risk and leave many quarantines undone. First, the statute cited by the City did not grant any explicit authority regarding the appointment or assignment of inspectors. Second, while the City emphasized it as a public safety issue, it presented no evidence of any critical safety interest that would outweigh the public interest in collective bargaining. There was no evidence that bargaining with the Union regarding a change in duties would interfere with the City's ability to manage animal inspectors or to deal with the backlog of animal quarantines. To the contrary, the Hearing Officer found that the City had assigned fewer animal quarantine duties than it had in the past years which contradicted its public safety concern. Finally, the Hearing Officer also found that transferring quarantine duties to non-bargaining unit members resulted in a substantial and permeant effect of eroding bargaining unit members' animal quarantine duties.

CONTRACT REPUDIATION

Documenting negotiation discussions and placing them in writing can be crucial when disputing an oral agreement. In *City of Boston and Boston Public Library Professional Staff*, 44 MLRR 28 (May 29, 2018), the Hearing Officer found that the City did not violate the parties' oral agreement regarding sick leave when it deducted 7.5 days from bargaining unit members' sick leave balances in March 2016.

The parties began negotiations for a successor CBA in 2010. When they were unable to reach an agreement, the parties submitted their dispute to fact-finding with Arbitrator Gary Altman. On September 4, 2013, the City provided its last best offer to Altman, which granted members sick leave at the rate of one and a quarter (1.25) days for each month of service. The CBA previously provided that on each January 1 and each July 1 employees within the bargaining unit would receive 7.5 days of sick leave for use during the six-month period, this resulted in a total of 15 days of sick leave per year. The main dispute here is that the parties disagree as to whether they discussed during prior negotiations on what to do with the 7.5 days that the members were previously receiving.

On December 23, 2014, the Library Weekly was sent out with an excerpt reminding unit members that in addition to beginning to accrue sick leave at the rate of 1.25 day per month, they would receive 7.5 sick days on January 1, 2015 for the sick time earned from July 1, 2014 - December 31, 2014. However, it appeared that the 7.5 sick leave accrual language in the Library Weekly was an error and the City immediately identified and clarified the error. On March 4, 2016, the City sent a letter to all members of the PSA bargaining unit announcing its intention to remove some sick leave from each member's bank and it did so soon after. The Union brought this action, claiming that the City removal of the 7.5 day sick leave accrual was a breach of an oral agreement it made during previous bargaining sessions.

Upon review of the evidentiary record, the Hearing Officer examined the Union's last best offer which stated that, "The PSA is willing to modify this existing language so that sick leave accrues at the rate of one and a quarter (1.25) days for each month of actual service or paid time." The Hearing Officer indicated that there was no additional language conditioning the Union's acceptance of the City's proposal on an additional one-time award of 7.5 days at the beginning of the year. In addition, the Union offered no bargaining notes to bolster its position, or an explanation as to why Union members did not have any notes reflecting this agreement or even reflecting discussions about the topic of a one-time award of 7.5 days. On the other hand, the City was able to provide detailed notes of the meetings, all reflecting no discussions about the award

of 7.5 sick days. While the Union argued that the City's agreement is indicated through its post in the Library Weekly newspaper that members would receive the 7.5 sick day, this argument had little merit because the City identified and clarified this error. Lastly, the Hearing Officer also found that the Union had waived its right to bargaining over the sick leave by having refused to bargain with the City over the course of several months. ■