MANAGEMENT RIGHTS

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PREFACE

Municipal officials and department heads have come to recognize that few actions they may wish to take or changes they may wish to implement can be done without at least some union involvement. In many cases, the prospect of protracted negotiations has paralyzed some managers. Even when faced with the prospect of trying to implement needed improvements, some department heads decide to live with the status quo rather than face what appears to be a lengthy battle with the union. This can often amount to an abdication of their responsibility to the public. In reality, while consultation is often required - and virtually always recommended as a good management practice - it is not always necessary to reach agreement with the union. In many instances, unless constrained by the terms of a collective bargaining agreement, management has the right to make changes. The law simply requires that management provides the union with notice and the opportunity to demand bargaining. If such bargaining is requested, the obligation on both sides is to make a good faith effort to reach agreement, keeping an open mind, to the point of agreement or impasse. Upon reaching impasse, management may implement its pre-impasse position. This need not be an extremely protracted endeavor. The goal of this manual is to help department heads and other municipal officials recognize what items require union involvement and what actions are required in such instances.

This manual is one of a series of MPI publications aimed at providing chiefs, managers and municipal officials with a reference guide to some of the most pressing issues they face. MPI is the charitable, non-profit research and training affiliate of the Massachusetts Chiefs of Police Association, Inc.

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Readers are reminded that this is a resource manual. It is not intended as a substitute for consultation with municipal labor counsel.

INTRODUCTION

Public safety unions have done a commendable job in advancing compensation and benefit levels for their members. In many cases the unions were ahead of municipal officials when it came to understanding and benefiting from the State's collective bargaining laws. One result has been the steady erosion of management rights. Often trading away essential tools a chief or other municipal manager needs to operate efficiently, some municipal officials failed to grasp the significance of certain "no cost" contract clauses. Unfortunately, efforts to regain such squandered rights have proven difficult and expensive.

The advent of collective bargaining has produced more changes in the administration of virtually all municipal departments than probably any other legislative action. Few active managers recall a time when unions did not play a role in virtually every personnel and organizational decision they make. Both management and labor share the goal of rendering a high level of service to the public. One of the challenges facing municipal managers and officials, however, is how to balance the competing needs of enhancing working conditions and delivering increased levels of service while living within perpetually tight budgets.

"Practice Pointers" throughout the manual contain commentary which managers and other municipal officials may find helpful, especially when used in conjunction with advice from a municipality's labor counsel.

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CHAPTER 1 - MANAGEMENT RIGHTS

Prior to the enactment of collective bargaining laws, management had the right to do almost anything it deemed appropriate to carry on its business. When municipal employees started to bargain collectively, the contracts which resulted contained items which improved wages, hours and working conditions. There appeared to be little need to insert a "management rights" clause in the early collective bargaining agreements. Essentially management retained all rights which it did not explicitly bargain away. Those contracts which did embody management rights clauses said little more than that.

Over the years public employee unions grew stronger, even as those in the private sector continued to loose members and public sympathy. As wages and hours grew closer to those in the private sector, unions started to press for other benefits, most notably seniority. This hallmark of the union movement worked its way into public sector contracts as well. Bargaining proposals that tied seniority to vacations and step increases came easily. When public sector unions started asking to have promotions, for example, be based solely on seniority, municipal officials and managers balked.

This increased emphasis on benefits tied more to seniority than performance or qualifications prompted an increasing number of municipal employers to negotiate management rights articles into their collective bargaining agreements. Although more detailed than their one-paragraph predecessors, these expanded articles were rapidly agreed to by the unions since they were not so expansive as to take away virtually any benefits the unions had won in prior contracts. They spoke in generalities of the kinds of things that management could do in conducting the public enterprise. Rarely were they the subject of controversy rising to the level of an appellate court decision, for example. The few that did found the courts continuing the tradition of either "favoring management" or "maintaining the long-standing public policy" of recognizing certain matters as inherent management rights, depending on one's point of view.
In recent years, the Labor Relations Commission (LRC) has stopped enforcing those traditional management rights clauses. The Commission finds them too general in nature. In order for an employer to argue that the union *waived* certain rights, the Commission requires a clear showing that there was an awareness of the right, some opportunity if not actual discussion, and a "meeting of the minds". The LRC insists that for

management rights clauses to be enforceable, they must be far more detailed -- preferably containing examples -- than their predecessors.

PRACTICE POINTERS

It is important to recognize the possible sources of management rights. Some are contained in statutes while others are "inherent" in the nature of public administration. Where neither is the case, a municipal employer is still free to negotiate for certain rights, just as are the unions when seeking benefits. The challenge is to recognize when something is an inherent managerial prerogative. In that case, numerous consequences follow. For example, certain items need not be discussed even if the union proposes them at the bargaining table. Moreover, even when they are discussed, management may be free to refuse to include them in any resulting contract. Lastly, in certain circumstances, they may not be enforceable even when they are included in a collective bargaining agreement.

In a 2002 Supreme Judicial Court decision involving the Worcester Police Department, the court upheld the Labor Relations Commission's ruling that the decision to engage police officers in enforcing laws pertaining to school attendance implicated the city's ability to set its law enforcement priorities, and thus was not subject to bargaining.[1] The city was not required to explain its decision, so long as it was a matter of policy.[2] Since the city failed (neglected?) to raise an argument on appeal to the SJC concerning the Commission's order requiring bargaining over the impact of the city's policy decision, the court treated that as a waiver and (reluctantly?) upheld that part of the LRC's decision.[3]

PRACTICE POINTERS

The Court's decision in the City of Worcester case contains an extensive discussion of management rights. It points out, for example, that setting the priorities for the deployment of law enforcement resources is purely a matter of policy and not a proper subject for collective bargaining.

Other examples of exclusive managerial prerogative cited by the SJC in City of Worcester include: the decision to reduce staff; having one as opposed to two officers assigned to each cruiser; requiring police officers suspected of criminal conduct to take a polygraph examination; reassigning duties formerly performed by police prosecutors to town counsel; and ceasing to require the presence of arresting officers at arraignment. While the latter two examples required impact bargaining, the court in Worcester hinted that if the city had properly raised the argument on appeal, the court might have ruled that no impact bargaining was required.

In its 1977 decision in the leading case of *Town of Danvers and Local 2038, IAFF*, the Labor Relations Commission set the tone for municipal collective bargaining in Massachusetts on the issue of mandatory subjects of bargaining. The following excerpt is informative:

> The public employer, like the private employer, must have the flexibility to manage its enterprise. Efficiency of governmental operations cannot be sacrificed by compelling the public employer to submit to the negotiating process those core governmental decisions which have only a marginal impact on employees' terms and conditions of employment.
>
> The public employer has a greater responsibility to all citizens of the community than its counterpart in the private sector. The government, as employer, must be responsible not merely to narrow corporate interests but to the overall public interest.
>
> When management in the public sector gives up some if its "prerogatives" . . . it foregoes the right to make decisions in the name of all the people. When management in the private sector loses its unilateral power to act, however, the public loses little or nothing because the decision-making process is merely transferred from one private group to another, rather than from public to private. The loss of the power to manage unilaterally in the public service is, therefore, more serious than the same phenomenon in the private sector. Kilber, Appropriate Subjects for Bargaining in Local Government Labor Relations, 30 Md. L. Rev. 179, 193 (1970)
>
> Therefore, those management decisions which do not have direct impact on terms and conditions of employment must not be compelled to be shared with the representatives of employees through the collective bargaining process. Those decisions must remain within the prerogative of the public employer. To compel the sharing of core governmental decisions grants to certain citizens (i.e.,

> organized public employees) an unfair advantage in their attempt to influence public policy.
>
> In the public sector employees already have, as citizens, a voice in decision making through customary political channels. The purpose of collective bargaining is to give them, as employees, a larger voice than the ordinary citizen. Therefore, the duty to bargain should extend only to those decisions where the larger voice is appropriate. Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1193 (1970).
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> This special access to governmental decisions is appropriate only when those decisions directly affect terms and conditions of employment.

The Supreme Judicial Court's 1979 decision involving the Boston School Committee echoed the LRC's analysis.[4] The court quoted from Clark, *The Scope of the Duty to Bargain in Public Employment* in Labor Relations Law in the Public Sector at 82-83 (A. Knapp, Ed. 1977) as follows:

> "Public policy" . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it.

The court went on to explain its rationale:

> Underlying this development is the belief that unless the bargaining relationship is carefully regulated, giving public employees a collective power to negotiate labor contracts poses the substantial danger of distorting the normal political process for patrolling public policy." Citing Welling & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107 (1969).

In a decision in which the SJC ruled that the abolition of the position of supervisor of music was committed to the exclusive, nondelegable decision of the school committee and thus the issue of the propriety of abolition should not have been submitted to the arbitrator, the court quoted with approval the following from a New York school district case:

> Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may . . . restrict the freedom to arbitrate. *Susquehanna Valley Cent. School District at Conklin v. Susquehanna Valley Teachers Ass'n*, 37 N.Y.2d 616-617, 376 N.Y.S.2d 427, 429, 339 N.E.2d 132, 133 (1975).[5]

The Massachusetts courts have made it clear that -- even if agreement is reached and a provision is included in a contract -- there are certain matters of inherent managerial prerogative which cannot be bargained away. Therefore, a municipal employer is not bound by such provisions, even if they are inserted by agreement in a collective bargaining agreement. For example, in a case involving the Ayer Police Department, the appeals Court found that the decision to appoint police officers was a non-delegable managerial prerogative.[6]

There the contract required that the Selectmen reappoint police officers unless there was *just cause* found for not doing so. The court overturned the arbitration decision and stated:

> We need not decide whether the parties agreed to submit the question of [the police officer's reappointment] to arbitration . . . because, even if they did so agree, [the Board] would not be bound by an agreement to arbitrate its [reappointment] decision.

Arguing that the Appeals Court holding in *Ayer* should be limited to departments organized under G.L. c. 41, § 96, a challenge was made concerning the actions of the Northborough Board of Selectmen (where G.L. c. 41, § 97A -- the “strong chief law” -- applied) to the Supreme Judicial Court.[7] There the Board voted not to reappoint an officer (union president) at the expiration of his term of appointment. The court found no logic for any distinction focusing on the statutory basis under which a department is organized. It reiterated the reasoning of the *Ayer* decision and stated:

> A town may not by agreement abandon a nondelegable right of management. *Billerica v. International Ass'n of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993). Therefore, even if the arbitration clause in the present case could be interpreted to grant an arbitrator the right to decide whether a police officer is entitled to reappointment, such an agreement would be unlawful and unenforceable. "[A]n agreement to

> arbitrate a dispute which lawfully cannot be the subject of arbitration [is] equivalent to the absence of a controversy covered by the provision for arbitration." *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Ass'n*, 372 Mass. 116, 119 (1977).

PRACTICE POINTERS

Be careful not to include language in a collective bargaining agreement that conflicts with a municipal employer's management rights. This could result in expensive and unnecessary arbitration. One particular area of concern for Civil Service departments is a provision that notes that "just cause" is required for discipline. This may afford employees with an election of remedies, viz., the Civil Service Commission or an arbitrator.

[1] *City of Worcester v. Labor Relations Commission*, 438 Mass. 177, 779 N.E.2d 630 (2002).
[2] Id.
[3] Id.
[4]*School Committee of Boston v. Boston Teachers Union, Local 66, American Federation of Teachers (AFL-CIO)*, 375 Mass. 65, 389 N.E.2d 970 (1979)
[5]*School Committee of Hanover v. Curry*, 343 N.E.2d 144 (1976)
[6]*Board of Selectmen of Ayer v. Sullivan*, 29 Mass. App. Ct. 931, 558 N.E.2d. 1, *review denied*, 408 Mass. 1102, 56 N.E.2d 121 (1989)
[7]*Mass. Coalition of Police v. Board of Selectmen of Northborough*, 416 Mass. 252, 620 N.E.2d 765 (1993)

CHAPTER 2 - SCOPE OF ARBITRATION

Municipal managers may be faced with the prospect of arbitration in two contexts. The first is at the end of regular collective bargaining contract negotiations. The second is often the last step in a contractual grievance procedure.

§ 1 INTEREST ARBITRATION

When arbitration is involved in an effort to settle an impasse during regular collective bargaining negotiations, it is referred to as "interest arbitration." In Massachusetts, the Collective Bargaining Law (MGL c. 150E) only mandates interest arbitration for contractual disputes involving either police officers or firefighters. Other bargaining groups may include interest arbitration in their collective bargaining contract by voluntary agreement with the municipal employer, but as a practical matter this is rarely done. By and large, mediation and occasionally fact-finding are the last formal steps in the impasse resolution process for such other bargaining groups. The latter are carried out under the auspices of the Massachusetts Board of Conciliation and Arbitration.

In police and fire negotiations, the Joint Labor-Management Committee essentially supervises the process once it takes jurisdiction following a petition by one or both parties. After mediation efforts have failed, the JLMC will usually order the parties to binding arbitration. (Note: virtually all true arbitration is *binding*. If it were simply a recommendation, it would be fact-finding, or in some cases even mediation – where a mediator makes a recommendation and asks the parties to submit it to their respective constituencies.)

If mediation efforts are not successful, the JLMC often refers outstanding issues to arbitration. The form of arbitration may vary. Occasionally there will be a three-person panel, with one (serving as the chair) and one representative of management and one of union. Often these persons come from the committee's membership, with the chair or vice-chair serving as the arbitration panel's chair. Alternatively, a single arbitrator is sometimes asked to handle the case. Often a list of private arbitrators is provided to each side, with the parties' ranking determining who the arbitrator will be. In both instances, the result is the same. The municipality is required to submit the arbitration award to its legislative body (Town Meeting, City Council, etc.) for funding. The Board of

Selectmen or the Mayor is required, in fact, to support the funding of the award.

The statute which established the Joint-Labor Management Committee (JLMC) includes a provision specifying what matters may not be the subject of arbitration following the breakdown of contract negotiations.[1] The relevant section states:

> . . . ; provided, however, that the scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees; and provided, further, that the scope of arbitration in firefighter matters shall not include the right to appoint and promote employees. Assignments shall not be within the scope of arbitration; provided, however that the subject matters of initial station assignment upon appointment or promotion shall be within the scope of arbitration. The subject matter of transfer shall not be within the scope of arbitration, provided however, that the subject matters of relationship of seniority to transfers and disciplinary and punitive transfers shall be within the scope of arbitration. Notwithstanding any other provisions of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum staffing of shift coverage, with an employee organization representing municipal police officers and firefighters**.** Nothing in this section shall be construed to include within the scope of arbitration any matters not otherwise subject to collective bargaining under the provisions of chapter one hundred and fifty E of the General Laws.

The Massachusetts courts have recognized consistently that there are a number of inherent managerial prerogatives which a municipal employer cannot relinquish even by agreement with a union and which an arbitrator may not include in an award. In the 1993 case of *Town of Billerica v. International Association of Firefighters, Local 1495*[2], the Supreme Judicial Court made this clear by saying:

> There are certain non-delegable rights of management, matters that are not mandatory subjects of collective bargaining (G.L. c. 150E, § 6 [1990 ed]), that a municipality and its agents may not abandon by agreement, and that an arbitrator may not contravene.

The determination that a topic involves an inherent managerial prerogative is significant in several ways. It presumably means that the matter is not a mandatory subject of bargaining. If so, management need not discuss the proposal at negotiations. In fact, the union commits a prohibited (unfair labor) practice if it insists, at least to the point of impasse, on bargaining over a non-mandatory subject of bargaining. In other situations, even if the matter is a mandatory subject of *bargaining*, it still may not be a proper subject for arbitration. For example, standards of productivity and performance are included in G.L. c. 150E, § 6 as a mandatory subject of bargaining. However, the JLMC statute omits this topic from the scope of arbitration. Lastly, even where a contract already contains a provision purporting to restrict a chief's managerial prerogative, e.g., power of assignment, a municipal employer may be able to disregard the impermissible restriction and, in any event, can insist that it not be included in a successor agreement.

PRACTICE POINTERS

A municipality is free to discuss certain matters during negotiations without waiving its right to refuse to allow an arbitrator to rule on them. This does not imply that topics impinging on inherent managerial prerogatives are therefore permissive subjects *of bargaining. If this were the case, management would be bound, at least for the term of the contract, by an agreement reached on such matters. Moreover, at any point in the negotiations, a municipal employer is free to remove a matter of inherent managerial prerogative from discussions.*

It is necessary to insist that the JLMC exclude certain "non-arbitral" topics from any referral to arbitration. Unless this is done, virtually any dispute is likely to be included in an arbitration award. While it is possible to object later, this will result in unnecessary delay, costs and animosity.

A. SCHOOLS

In addition to decisions involving police and fire departments, the Massachusetts courts have addressed a municipal employer's bargaining rights in numerous school committee cases. For example, even though the school committee might include in a collective bargaining agreement

provisions concerning the hiring of substitute teachers to replace regular, absent teachers, this is not a provision to which the school committee must adhere, if, in its discretion, it determines that -- for educational policy reasons -- it should be disregarded.[3]

> What we decide in this case should not be construed as a requirement that, in the course of collective bargaining, a school committee must reach an agreement on class size, teaching load, or the use of the substitute teachers. A school committee is entitled to maintain its own position on these subjects as matters of fiscal management and educational policy.

When the parties have agreed to submit a dispute to arbitration, the courts will generally enforce that agreement and decline to interfere with the arbitration process.[4] In labor disputes between public employers and employees, however, where a statute confers upon the public employer a particular managerial power, an arbitrator is not permitted to direct the employer to exercise that power in a way that interferes with the discretion granted to the employer by statute.[5]

B. DEPUTY SHERIFFS

While the sheriff may not surrender his statutory authority to make deputy appointments, the sheriff may enter into a binding agreement to follow certain procedures in making the appointments.[6] In a 2005 Appeals Court case involving the managerial prerogative of the Middlesex County Sheriff to appoint deputy sheriffs, the Court held that the sheriff's decision not to appoint a member of the union to position of deputy was a non-arbitrable managerial prerogative, and that the collective bargaining agreement did not bind the sheriff to particular appointment procedures.[7] Under G.L. c. 37, § 3, a sheriff is vested with the discretion to appoint deputies who have law enforcement powers, and are thus able to perform certain functions beyond those that can be exercised by correction officers or other employees of the sheriff.[8] A correction officer does not need to be a deputy sheriff. The powers of a deputy sheriff are not exercised in carrying out the duties of a correction officer. By posting an invitation for correction officers to apply for the position of deputy, the sheriff was simply offering an opportunity for correction officers to enhance their incomes by performing duties outside the scope of their duties as correction officers. Thus, the Court explained that the appointment of a deputy by the sheriff can be viewed as the equivalent of appointing someone to exercise police-type power, and this case is closely analogous to cases such as *Massachusetts Coalition of Police, Local 165, AFL-CIO v.*

Northborough.[9] (Which involved the right not to reappoint police officers when their term of appointment expired.)

Relying on its claim that the sheriff "discriminated" against a correction officer, the union argued that this case was controlled by *Blue Hills Regional Dist. Sch. Comm. v. Flight,*[10] which carved out an exception to the non-delegability doctrine in cases of constitutionally impermissible discrimination. In *Blue Hills Regional Dist. Sch.. Comm. v. Flight*, an arbitrator agreed with a female tenured teacher who claimed that the school committee had violated provisions of the CBA that expressly addressed procedures for promotions and required appointments to be made without regard to gender. The court in that case held the grievance was arbitrable, and created an exception to the non-delegability doctrine, confirming the arbitrator's remedy that required the teacher's promotion and stating that "[d]enial of promotion to a public employee because of her sex is constitutionally impermissible and violates statutory proscriptions, and makes appropriate an order granting the promotion with back pay."[11]

The Court ruled that the *Middlesex* case falls outside of the impermissible discrimination exception. In *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough,* the court stated in dictum that even if a claim of discrimination based on union activity had not been waived, an arbitrator could make no lawful award to the grievant without conflicting with the town's non-delegable managerial authority to reappoint police officers.[12] The correction officer's claim in the *Middlesex* case invokes Article XIII of the CBA, which prohibits discrimination on the basis of constitutionally protected categories, such as race and gender, as well as union membership. There were no factual allegations anywhere in the record that refer to alleged discrimination based upon anything other than union membership. The Court found that the union's reliance on Article XIII of the CBA was insufficient to trigger the exception to the non-delegability doctrine established in *Blue Hills Regional Dist. Sch. Comm. v. Flight.*[13].

The Court explained that while it is clear that an arbitrator could not require the sheriff to appoint the grievant correction officer or order damages that would have the indirect effect of compelling his appointment as deputy sheriff, on the facts of this case and the relevant CBA provisions, "no [other] lawful remedy could be granted without conflicting with the town's non-delegable managerial prerogative."[14]

§ 2 PUBLIC POLICY

When parties agree to arbitrate a dispute, courts accord their election great weight. The strong public policy favoring arbitration requires a court to uphold an arbitrator's decision even where it is wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous.[15] A court's deference to the parties' choice of arbitration to resolve their disputes is especially pronounced where that choice forms part of a collective bargaining agreement.[16] In such cases, the Legislature has severely limited the grounds for vacating arbitration awards.[17] But extreme deference to the parties' choice of arbitration does not require a court to turn a blind eye to an arbitration decision that itself violates the law. A court will not permit an arbitrator to order a party to engage in an action that offends strong public policy.[18]

"'[T]he question of public policy is ultimately one for resolution by the courts and not by arbitrators."[19] A court will apply a stringent, three-part analysis to establish whether the narrow public policy exception requires us to vacate the arbitrator's decision:

> To meet the criteria for application of the public policy exception, the public policy in question 'must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests."[20] 'The public policy exception does not address "disfavored conduct, in the abstract, but [only] disfavored conduct which is integral to the performance of employees duties . . ."'[21] 'Finally, we require[ ] a showing that the arbitrator's award reinstating the employee violates public policy to such an extent that the employee's conduct would have required dismissal.'[22]

This case of *City of Boston v. Boston Police Patrolmen's Association*,[23] was one of those "rare instances" in which an arbitrator's award must be vacated as contrary to "an explicit, well-defined, and dominant public policy."[24] The arbitrator, chosen by mutual agreement of the Boston Police Patrolmen's Association (association) and the City of Boston (city) pursuant to a collective bargaining agreement, required the city to rescind its termination of John DiSciullo, a police officer. The arbitrator, concluding that DiSciullo, while on duty, had engaged in "egregious" and "outrageous" misconduct toward two civilians and that his subsequent reports of the incident over a two-year period demonstrated that he was "lacking" in both "integrity and trust," nevertheless determined that

DiSciullo's actions warranted a one-year suspension without pay, rather than termination. On cross motions for summary judgment, a Superior Court judge affirmed the award, as did the Appeals Court.[25] The SJC granted the city's application for further appellate review. The SJC ruled that because DiSciullo's continued employment as a police officer would frustrated strong public policy against the kind of egregious dishonesty and abuse of official position in which he was proved to have engaged, it vacated the arbitrator's award.

In the *Boston* case, the parties did not disagree that DiSciullo's misconduct, as determined by the arbitrator, satisfied the first two prongs of the court's test. To prevail, the city had to therefore demonstrate that public policy required that DiSciullo's conduct, as found by the arbitrator, was grounds for dismissal, and that a lesser sanction would frustrate public policy.[26] According to the SJC, "The question to be answered is not whether [DiSciullo's conduct] itself violates public policy, but whether the agreement to reinstate him does so."[27] "If an award is permissible, even if not optimal for the furtherance of public policy goals, it must be upheld."[28] Given the arbitrator's findings that DiSciullo had falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and over a period of two years about his official conduct, and knowingly and intentionally squandered the resources of the criminal justice system on false pretexts, the court found that an agreement to reinstate DiSciullo would offend public policy. "One of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials."[29] "The image presented by police personnel to the general public . . . ' also permeates other aspects of the criminal justice system and impacts its overall success.'"[30]

The SJC explained that a police officer who uses his or her position of authority to make false arrests and to file false charges, and then shrouds his or her own misconduct in an extended web of lies and perjured testimony, corrodes the public's confidence in its police. The Court noted that there is no lack of positive law expressing the Legislature's strong instruction that such individuals not be entrusted with the formidable authority of police officers.[31] For example, the state's Conflict of Interest Law provides: "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district."[32] That DiSciullo had not been convicted of any felony and that the arbitrator did not credit the assault and battery charges against him were, in the Court's opinion, contrary to the association's assertion, beside the point. There was no question that DiSciullo lied under oath, in the criminal complaints against Rodriguez and Caminero and at the arbitration hearing, if not elsewhere.

The Court explained that it is the felonious misconduct, not a conviction of it, that is determinative.

For an arbitration award to violate public policy, it need not violate the letter of a statute.[33] "Courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law"). As the Court explained, exoneration of some felonious conduct did not cleanse or mitigate other felonious conduct. DiSciullo committed his serious breaches of the law while on the job and presuming to carry out his duties. The Legislature has forbidden persons found to have engaged in such conduct from becoming police officers and, by implication, from remaining police officers. Here, DiSciullo's misconduct could not have been committed but for the authority vested in him as a police officer. His actions thus go "to the heart of [his] responsibilities."[34]

The *Boston* court noted that, in addition to the above statutes, the Legislature specifically has mandated that commissioners of police of Boston take all necessary actions to uphold the probity of officers under their command, and where necessary punish misconduct and terminate officers' employment.[35] Pursuant to his statutory authority, the commissioner had issued clear, explicit regulations against the very misconduct in which DiSciullo engaged.[36] The cumulative message of these regulations is clear: Police officers themselves must obey the law and be truthful in all of their official dealings, or they may face termination.[37]

In partial mitigation of DiSciullo's conduct, the arbitrator noted that he had "no history of misconduct of this nature" in his ten years on the police force. If anything, DiSciullo's status as an officer with what the arbitrator characterized as a "ten-year history [as a police officer] in racially diverse areas of the city" makes his conduct more offensive rather than, as the association claims, less so. The arbitrator's other two grounds for reinstatement were that two of the most serious charges against DiSciullo – assault and battery on Rodriguez and Caminero – had not been proved, and that the department had meted out lesser sanctions to others for misconduct at least as egregious as DiSciullo's. That other police officers may have received lesser sanctions for their serious misconduct was not persuasive of how this case should be handled. According to the Court, each case must be judged on its own facts, and the factual record in those cases was not before the SJC. In any event, there was no suggestion that the reasons for DiSciullo's termination were pretexts or motivated by improper considerations. Nor did the Court credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. As the Court explained, leniency toward egregious police misconduct in the past (assuming that such

leniency occurred) cannot lead a police officer to commit reprehensible actions in the expectation that he or she will receive a light punishment.

The court found additional evidence that DiSciullo's misconduct requires (rather than merely permits) dismissal in the agreement itself. Article VI, § 5, of the agreement provides that arbitration decisions will be "final and binding", except for decisions that "amend[ ], ad [ ] to or detract [ ]" from the agreement, or that "modif[y] or abridge[ ] the rights and prerogatives of municipal management." Although the agreement itself does not specify the "rights and prerogatives" to which it alludes, they must surely encompass the commissioner's statutory obligations to establish and enforce disciplinary policies, including the sanction of termination, for misconduct that will raise doubts in the community about a police officer's evenhanded application of the law and the veracity of his sworn testimony. This is not merely a case where an officer fired for feloniously abusing his position. The association characterizes DiSciullo's misconduct as "a one-time first offense that occurred on a single night." But the arbitrator found that DiSciullo's final two years on the police force had been spent carrying out a "charade of innocence" in a "calculated effort to cover his tracks."

Reported cases from other jurisdictions show that courts consistently have refused to enforce arbitration awards reinstating public safety officials who have been found to have abused their power illegally and to the detriment of those they are entrusted to protect.[38]

The public policy against requiring the reinstatement of police officers who have committed felonious misconduct stems from the necessity that the criminal justice system appear legitimate to the people it services. People will not trust the police – on the street or in court – unless they are confident that police officers are genuine in their determination to uphold the law. As the city pointed out in its Brief, police legitimacy would be damaged severely by reports that the city continued to employ a police officer who had illegally abused his power and repeatedly lied about it under oath. Indeed, the SJC noted that DiSciullo's involvement in an investigation could prejudice the public against an otherwise flawless criminal prosecution.

Although arbitration decisions are given great deference, they are not sacrosanct. Here the SJC noted that it could not say that the strong public policy favoring arbitration should trump the strong (and in the Court's view, stronger) public policy, "explicit, well-defined and dominant,"[39] that police officers be truthful and obey the law in the performance of their official duties.

[1]Chapter 730 of the Acts of 1977, as amended.
[2]*Town of Billerica v. International Association of Firefighters, Local 1495*, 415 Mass. 692, 694, 615 N.E.2d 564, 565 (1993)
[3]*Boston Teachers Union, Local 66, American Federation of Teachers (AFL-CIO) v. School Committee of Boston*, 370 Mass. 455, 350 N.E.2d 707 (1976)
[4] *Local no. 1710, Intl. Assn of Fire Fighters, AFL-CIO v. Chicopee*, 430 Mass. 417-421, 721 N.E.2d 378 (1999).
[5] See *Berkshire Hills Regional Sch. Dist. Comm. v. Berkshire Hills Educ. Assn.*, 375 Mass. 522, 526-527, 377 N.E.2d 940 (1978) (where the subject of the proposed arbitration is within the employer's exclusive and nondelegable statutory authority, it is not a proper subject for collective bargaining or arbitration).
[6] See *School Comm. of Danvers v. Tyman*, 372 Mass. 106, 113, 360 N.E.2d 877 (1977).
[7] *Sheriff of Middlesex County v. International Broth. of Correctional Officers, Local R1-193* , 62 Mass.App.Ct. 830, 821 N.E.2d 512 (2005).
[8] See *Tedeschi v. Reardon*, 5 F.Supp.2d 40, 42 n.3 (D.Mass. 1998) (noting that appointing as a deputy sheriff confers "general law enforcement powers" and the correction officers in Essex County must be sworn as deputy sheriffs to be eligible for street detail); *Commonwealth v. Howe*, 405 Mass. 332, 334, 540 N.E.2d 677 (1989) (finding that deputy sheriffs are common-law "peace officers" with the authority to make an arrest for a breach of the peace); *Commonwealth v. Baez*, 42 Mass.App.Ct. 565, 567, 569 n.6, 678 N.E.2d 1335 (1997) (providing examples of statutes authorizing deputy sheriffs to serve criminal process and to make arrests in certain circumstances). Indeed, one of the reasons cited by Cassidy for wanting to be appointed as a deputy sheriff was so he could "expand both [his] job duties and [his] earning potential.
[9] *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough*, 416 Mass. 252, 255, 620 N.E.2d 765 (1993) (holding that a board of selectmen's decision not to reappoint a police officer is a nondelegable and nonarbitrable managerial prerogative pursuant to G.L. c. 41, § 97A); *Selectmen of Ayer v. Sullivan*, 29 Mass.App.Ct. 931, 932, 558 N.E.2d 1 (1990) (holding nondelegable the right of town's selectmen to appoint police officers under G.L. c. 41, § 96; *Boston v. Boston Police Patrolmen's Assn., Inc.* 41 Mass.App.Ct. 269, 272, 669 N.E.2d 466 (1996) (discussing a broad "zone of managerial authority" statutorily reserved to the police commissioner for purpose of "public safety and a discipline police force [that] require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel").
[10] *Blue Hills Regional Dist. Sch. Comm. v. Flight*, 383 Mass. 642, 644, 421 N.E.2d 755 (1981).
[11] *Id.* At 644, 421 N.E.2d 755. Se, Art. 1 of the Declaration of Rights of the Mass. Constitution.
[12] *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough*, 416 Mass. at 257, 620 N.E.2d 765.
[13] *Blue Hills Regional Dist. Sch. Comm. v. Flight*, 383 Mass. at 644, 421 N.E.2d 755.
[14] *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough*, 416 Mass. at 257, 620 N.E.2d 765. See *Higher Educ. Coordinating Council v. Massachusetts Teachers Assn.*, 423 Mass. 23, 33, 666 N.E.2d 479 (1996); *School Comm. of New Bedford v. New Bedford Educators Assn.*, 9 Mass.App.Ct. 793, 801-802, 405 N.E.2d 162 (1980).
[15] See *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990), and cases cited.
[16] *School Dist. of Beverly v. Geller*, 435 Mass. 223, 229, 755 N.E.2d 1241 (2001) (Cordy, J., concurring).
[17] See G.L. c. 150C, §11. See also *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 758, 784 N.E.2d 11 (2003) ("Arbitration has long been viewed as a particularly appropriate and effective means to resolve labor disputes").
[18] See *Lynn v. Thompson*, 435 Mass 54, 61, 754 N.E.2d 54 (2001); *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., supra*. See G.L. c. 150C, § 11(a)(3). (Superior Court judge "shall" vacate arbitration award where "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law").
[19] *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 603, 722 N.E.2d 441 (2000), quoting *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93,* 420 Mass. 13, 16 n. 5, 648 N.E.2d430 (1995).

[20] *Massachusetts Highway Dep't. v. American Fed'n of State, County & Mun. Employees, Council 93, supra* at 16, 648 N.E.2d 430.
[21] *Id*. At 17, 648 N.E.2d 430.
[22] *Bureau of Special Investigations v. Coalition of Pub. Safety*, *supra* at 605, 722 N.E.2d 441 . . ." *Lynn v. Thompson*, *supra* at 62-63, 754 N.E.2d 54.
[23] *City of Boston v. Boston Police Patrolmen's Association*, 443 Mass. 813, 824 N.E.2d 855, 176 L.R.R.M. (BNA) 3265.
[24] *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62, 63, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000). See *Lynn v. Thompson*, 435 Mass. 54, 754 N.E.2d 54 (2001), *cert. denied*, 534 U.S. 1131, 122 S.Ct. 1071, 151 L.Ed.2d 973 (2002).
[25] *Boston v. Boston Police Patrolmen's Ass'n*, 60 Mass.App.Ct. 920, 805 N.E.2d 527 (2004).
[26] *Id.* At 63, 754 N.E.2d 54. *Bureau of Special Investigations v. Coalition of Pub. Safety*, *supra*.
[27] *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62-63, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000).
[28] *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, *supra* at 19, 648 N.E.2d 430.
[29] *Clancy v. McCabe*, 441 Mass. 311, 328, 805 N.E.2d 484 (2004) (Ireland, J., dissenting).
[30] *Civil Serv. Comm'n v. Johnson*, 653 N.W.2d 533, 538 (Iowa 2002), quoting *Fort Dodge v. Civil Serv. Comm'n*, 562 N.W.2d 438, 440 (Iowa Ct.App. 1997).
[31] General Laws c. 41, § 96A
[32] See G.L. c. 268, § 1 (criminal offense of perjury, which in this case applies to DiSciullo's swearing to false criminal charges and testifying falsely under oath). See also G.L. c. 268, § 6A (criminalizing false police reports); G.L. c. 265, § 37 (crime for person acting under color of law to violate or interfere with constitutional rights); For the criminal liability of police officers engaging in such felonious conduct, see, e.g., *Commonwealth v. Luna*, 418 Mass. 749, 641 N.E.2d 1050 (1994) (affirming convictions of perjury and filing false police reports of officer on account of his false affidavit in support of search warrant.) *Cambridge v. Civil Serv. Comm'n*, 43 Mass.App.Ct. 300, 682 N.E.2d 923 (1997) (upholding decision of personnel administrator to authorize bypass of otherwise qualified candidate for police officer position based on her prior false testimony **862 under oath and involvement in domestic violence dispute several years prior to her eligibility for appointment).
[33] See *Eastern Associated Coal Corp. v. United Mine Workers*, Dist. 17, supra at 63, 121 S.Ct. 462.
[34] Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, supra at 17, 648 N.E.2d 430, quoting United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 823, 825 (1st Cir.1984). Cf. Lynn v. Thompson, supra (reinstatement proper where charges of using excessive force not proved); Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, supra (arbitration award upheld if employee's harmful conduct not related to job activities).
[35] See St.1962, c. 322, § 1, amending St.1906, c. 291, § 11 (police commissioner of Boston "shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force").
[36] See note 4, supra.
[37] See, e.g., rule 102, § 35 ("An employee of the [d]epartment who commits any criminal act shall be subject to disciplinary action up to and including discharge from the [d]epartment. Each case shall be considered on its own merits, and the circumstances of each shall be fully reviewed before the final action is taken").
[38] See, e.g., *South Windsor v. South Windsor Police Union*, 41 Con. App. 649, 677 A.2d 464 (1996) (police officer deliberately revealed identity of confidential informant); *Chicago Fire Fighters Union Local No. 2 v. Chicago*, 323 Ill.App.3d 168, 256 Ill. Dec. 332, 751 N.E.2d 1169 (2001) (fire fighters found to have been intoxicated while on duty). See also, *State v. American Fed'n of State, County & Mun. Employees, Council 4, Local 387*, 252 Conn. 467, 747 A.2d 480 (2000) (correctional officer, while on duty, used State-owned telephone to place obscene call to State senator).
[39] *Eastern Associated Coal. Crop. V. United Mine Workers, Dist. 17*, 531 U.S. 57, 63, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000).

CHAPTER 3 - SUBJECTS OF BARGAINING

Most topics that unions and management could be asked to discuss fall into one of three categories: mandatory; non-mandatory (permissive); and prohibited (illegal.) It is important to be able to recognize into which category a subject falls in order for a municipality or manager to respond properly.

§ 1 MANDATORY SUBJECTS

The state's Labor Relations Law, MGL c. 150E § 6, provides:

> The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect *to wages, hours, standards or productivity and performance, and any other terms and conditions of employment*, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within the scope of negotiation. (emphasis added)

Generally, if a subject of negotiation is classified as a mandatory subject of bargaining, a party commits a prohibited practice if it refuses a demand to bargain over that subject. The LRC has found that subjects that have a direct effect on the terms and conditions of employment, such as wages and hours,[1] health insurance benefits,[2] and job duties and work assignments,[3] are mandatory subjects of bargaining.

The phrase "terms and conditions of employment" in the statute requiring school committees to negotiate in good faith on matters concerning wages, hours, standards of productivity and performance, and any other terms and conditions of employment is general and broad and must be determined on a case by case basis.[4]

When a public sector employer acts under authority of a municipal personnel statute, by-law, or regulation, the employer's freedom of action is always subject to collective bargaining in relation to mandatory subjects, including wages and terms and conditions of employment.[5]

The following have also been found by the Commission to be mandatory subjects of bargaining:

- wages and hours,[6]
- initial wages for new positions,[7]
- medical library hours,[8]
- drug testing or screening, [9] or instituting a new drug policy,[10]
- assigning work to non bargaining unit personnel,[11]
- work schedules, generally,[12] and for police detectives,[13]
- pay day schedules,[14]
- certain fringe benefits, such as reduced work schedules on holidays,[15] and health and welfare trust fund contributions,[16]
- promotional procedures,[17]
- safety issues,[18]
- work load,[19]
- productivity issues,[20]
- allotments of gasoline,[21]
- regularly scheduled overtime,[22]
- changes in *scheduled* overtime,[23]
- class size,[24]
- use of psychological testing in hiring,[25]
- contributions to health and welfare trust funds,[26]
- selection of health insurance plans,[27] as well as health insurance benefits and premiums generally,[28]
- percentage of group insurance contributions,[29]
- compensation for added duties,[30]
- overtime pay,[31]
- granting leave,[32]
- seniority,[33]
- grooming standards,[34]
- on-call status,[35]
- time for cashing checks on duty,[36]
- residency requirements,[37]
- physical exams by a municipality’s doctor for disability leave,[38]
- performance evaluation standards,[39]
- copying charges for union requested information,[40]
- scope of bargaining unit work,[41]

- patent rights for inventions,[42]
- transaction of union business during work hours,[43]
- penalty for not paying agency service fee,[44]
- agency service fee,[45]
- pay check deductions,[46]
- attendance at professional meetings[47]
- paid injury leave criteria,[48]
- wage re-opener clause,[49]
- number of firefighters on a piece of equipment when responding to alarm if safety issue involved,[50]
- impact of non-bargaining unit employees on work load and working conditions,[51]
- grievance procedure administration,[52]
- outside employment restrictions,[53]
- reduction of force impacts,[54]
- non-active work time use,[55]
- smoking,[56]
- use of seat belts,[57]
- sick leave bank,[58]
- contracting out bargaining unit work,[59]
- parking rates (and free parking),[60]
- holding employees accountable for issued equipment,[61] and
- use of defibrillators.[62]

A. SCHOOL COMMITTEE

Chapter 71, §§ 37 and 68 conferring on school committee exclusive general authority over operation and maintenance of public schools did not preclude committee from first being required to bargain with union over its decision to reduce level of janitorial services by layoffs or concerning impact of a reduction in force by layoffs. 63 The decision to reduce level of janitorial services was an exclusive school committee prerogative, but means of achieving a reduction in force, by layoffs or otherwise, and impact of that decision on terms and conditions of employment were matters as to which there was a duty to bargain with exclusive representative of those employees.[64] The timing of any decision by the school committee to lay off janitorial employees, the number of employees to lay off, and which employees to lay off were mandatory subjects of bargaining with the union representing those employees. [65] A provision of a city charter authorizing the school committee to discharge employees at its pleasure did not operate to preclude the committee from being required to bargain with the union over its decision to reduce the level of janitorial services by layoffs or concerning the impact of a reduction in force by layoffs.[66]

§ 2 NON-MANDATORY SUBJECTS

Non-mandatory subjects of bargaining, according to the LRC, are those which involve core governmental decisions, such as the reduction of nonscheduled overtime opportunities,[67] the decision to abolish or create positions,[68] and wage parity clauses.[69] Other non-mandatory subjects of bargaining include:

- the decision to hire additional employees to perform unit work;[70]
- school curriculum decisions;[71]
- the decision to place an article on the town warrant seeking to rescind a local option law not enumerated in Section 7(d) of M.G.L. c. 150E;[72]
- the decision to limit the number of bargaining unit employees who appear at arraignments;[73]
- loss of ad hoc or unscheduled overtime opportunities;[74]
- the decision to reassign district court prosecutor's duties from police officers to town counsel;[75]
- decision to reorganize;[76]
- decision to abolish or create positions;[77]
- decision of employer to conform its method of calculating retirement benefits to the requirements of M.G.L. c.32;[78]
- decision to discontinue providing private police details at liquor service establishments;[79]
- the decision to use polygraph examination in the investigation of criminal activity by police officers;[80]
- wage parity clauses;[81]
- minimum manning per shift;[82]
- minimum manning per piece of fire apparatus while responding to mutual aid calls where there is no safety issue;[83]
- terms of employment which will apply to individuals after they leave the bargaining unit and become members of another unit;[84]
- decision to discontinue the prior practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement instead of accrued unused vacation because the decision was made by an independent third party. However, the City must bargain over the impacts of that decision.[85]
- decision to enter into a Consent Order settling a matter before the Massachusetts Commission Against Discrimination (MCAD); however, an employer is obligated to

> bargain with the Union over the impact of the Consent Order on terms and conditions of employment.[86]

A party also commits a prohibited practice if it insists to the point of impasse on bargaining over a non-mandatory subject of bargaining.[87]

§ 3 IMPROPER (ILLEGAL) SUBJECTS

Illegal (or "improper" by the SJC definition) subjects of bargaining may not be the subject of an agreement between the parties. In general, the parties may not incorporate a provision in a collective bargaining agreement which conflicts with a statute. The exceptions to that rule are contained in M.G.L. c. 150E § 7(d), which specifies that parties *may* contract around certain enumerated statutes through a collective bargaining agreement.[88] Aside from these exceptions, a party commits a prohibited practice if it persists in requesting bargaining over an illegal or improper subject of bargaining. An employer may not, for example, suggest a provision which would exempt police officers in a "civil service" department from the civil service statutes. On the other hand, a union may not demand that employees be allowed the power to appoint new firefighters.[89] Further, even if one of the parties agreed to a contractual provision involving an illegal subject of bargaining, the provision would not be enforceable.[90]

There is no obligation to engage in collective bargaining as to matters controlled entirely by statute.[91] For example, the Town of North Attleboro was not required to negotiate before refusing the firefighter union's request to increase the dues of certain employees to cover their cost of a union-sponsored dental insurance plan.[92] M.G.L. c.180, §17J controls the subject and precludes a municipality from making payroll deductions for such dental plans unless the plan was being offered "in conjunction with the employee organization."

Ordinarily, a public employer has no right to inquire of a union what it does with its union dues.[93] However, in *North Attleboro*, where the "dues" deductions were a guise for circumventing c.180, §17J, and the town knew it, the town had a right to refuse to participate.[94]

PRACTICE POINTERS

One of the most common and most difficult-to-reverse mistakes a municipal employer makes is to include non-mandatory subjects in a collective bargaining agreement. Once an article makes its way into a contract, it is extremely difficult and often very expensive to remove it. Before starting

each new round of negotiations, an analysis should be made of the existing agreement as well as the union's proposals. Municipalities that conduct negotiations without labor counsel are especially vulnerable to mistakes in this area.

Chiefs should insist that the municipal negotiator not agree even to discuss non-mandatory subjects. Despite loud protests and threats of complaints over "bargaining in bad faith," management should stand strong. It is clear that if the law were in the reverse, no union would make the same mistakes that so many municipal employers have in this regard.

[1] *Medford School Committee*, 1 MLC 1250 (1975).
[2] *Board of Regents of Higher Education*, 19 MLC 1069 (1992).
[3] *Town of Danvers*, 3 MLC 1559 (1977).
[4] *School Committee of Newton v. Newton School Custodians Ass'n, Local 454, SEIU,* 438 Mass. 739, 784 N.E.2d 598 (2003) .
[5] *City of Lynn v. Labor Relations Com'n*, 43 Mass.App.Ct. 172, 681 N.E.2d 1234 (1997).
[6] M.G.L. c. 150E, § 6
[7] *Melrose School Committee*, 3 MLC 1302 (1976)
[8] *City of Boston*, 9 MLC 1021 (1982).
[9] *Town of Fairhaven*, 20 MLC 1343 (1994).
[10] *City of Fall River*, 20 MLC 1352 (1994).
[11] *Town of Andover*, 3 MLC 1710 (1977).
[12] *Mass. Comm. of Admin*., 9 MLC 1001 (1982).
[13] *Town of North Adams*, 21 MLC 1646 (1995).
[14] *Lawrence School Committee*, 3 MLC 1304 (1976).
[15] *City of Everett*, 22 MLC 1275 (1995).
[16] *Mass. Comm. of, Secretary of Admin. and Finance*, 19 MLC 1069 (1992).
[17] *Town of Danvers*, 3 MLC 1559 (1977).
[18] *Town of Shrewsbury*, 14 MLC 1309 (1987) (requiring seat belts to be worn by police officers); *Whitman Hanson Regional School Comm.,* 10 MLC 1283 (1984). *But, c.f., City of Melrose*, 22 MLC 1209 (1995) (reducing number of firefighters utilized per apparatus was not a mandatory subject because it did not affect safety or workload).
[19] *Medford School Committee*, 1 MLC 1250 (1975); *City of Worcester*, 25 MLC 169 (1999).
[20] *Mass. Comm. of, Comm. of Admin. and Finance*, 14 MLC 1719 (1988).
[21] *Everett Housing Authority*, 9 MLC 1263 (1982).
[22] *City of Peabody*, 9 MLC 1447 (1982).
[23] *Town of Tewksbury*, 19 MLC 1189 (1992).
[24] *Peabody School Committee*, 13 MLC 1313 (1986).
[25] *City of Haverhill*, 16 MLC 1077 (1989).
[26] *Commonwealth of Massachusetts*, 19 MLC 1069 (1992).
[27] *Town of Milton*, 16 MLC 1725 (1990).
[28] *City of Revere*, 18 MLC 1179 (1991); *Board of Regents of Higher Education*, 19 MLC 1248 (1992).
[29] *Medford School Committee*, 4 MLC 1450 (1977), *aff'd sub. nom. School Committee of Medford v. Labor Relations Commission*, 38 Mass. 932 (1980).
[30] *Lawrence School Committee*, 3 MLC 1304 (1976).
[31] *City of Peabody*, 9 MLC 1447 (1977).
[32] *City of Boston*, 4 MLC 1104 (1977).
[33] *Medford School Committee*, 1 MLC 1250 (1975).
[34] *Town of Dracut*, 7 MLC 1342 (1980).
[35] *Wakefield Municipal Light Department*, 8 MLC 1838 (1981).
[36] *Norwood School Committee*, 4 MLC 1751 (1978).
[37] *Boston School Committee*, 3 MLC 1630 (1977).; (se also, *Town of Lee v. Labor Relations Com'n,* 21 Mass.App.Ct. 166, 485 N.E.2d 971 (1985).)
[38] *Town of Avon*, 6 MLC 1390 (1979).
[39] *Town of Wayland*, 5 MLC 1738 (1979).
[40] *Commonwealth of Massachusetts*, 9 MLC 1824 (1983).
[41] *Town of Andover*, 3 MLC 1710 (1977).
[42] *Board of Regents*, 10 MLC 1107 (1983).
[43] *Town of Marblehead*, 1 MLC 1140 (1975).
[44] *Whittier Regional School Committee*, 13 MLC 1325 (1986), *aff'd sub. nom. Whittier Regional School Committee v. Labor Relations Commission*, 401 Mass. 560 (1988).
[45] *Mass. Board of Regents of Higher Education*, 10 MLC 1048 (1984).
[46] *Commonwealth of Massachusetts*, 4 MLC 1869 (1978).

[47] *Whitman Hanson Regional School Committee*, 10 MLC 1283 (1984).
[48] *City of Springfield*, 12 MLC 1001 (1985).
[49] *Medford School Committee*, 3 MLC 1413 (1977).
[50] *City of Newton*, 4 MLC 1282 (1977); *Town of Bridgewater*, 12 MLC 1612 (1986).
[51] *City of Boston*, 16 MLC 1437 (1989).
[52] *City of Boston*, 3 MLC 1450 (1977).
[53] *City of Pittsfield*, 4 MLC 1905 (1978); *Board of Trustees, University of Massachusetts*, 7 MLC 1577 (1980).
[54] *Newton School Committee*, 5 MLC 1061 (1978), *aff'd sub. nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[55] *City of Everett*, 2 MLC 1471 (1976); *Town of Lexington*, 22 MLC 1676 (1996).
[56] *Abington School Committee*, 21 MLC 1630 (1995); *Town of Lexington*, 22 MLC 1676 (1996).
[57] *Town of Shrewsbury*, 14 MLC 1664 (1988).
[58] *Commonwealth of Massachusetts*, 22 MLC 1459 (1996).
[59] *City of Boston*, 7 MLC 1775 (1981); *Franklin School Committee*, 6 MLC 1297 (1979).
[60] *Board of Trustees of the University of Massachusetts*, 21 MLC 1995 (1995); *Commonwealth of Massachusetts*, 27 MLC 11 (2000).
[61] *New Bedford Housing Authority*, 27 MLC 21 (2000).
[62]
[63] *School Committee of Newton v. Labor Relations Com'n*, 388 Mass. 557, 447 N.E.2d 1201 (1983).
[64] Id.
[65] Id.
[66] Id.
[67] *Town of West Bridgewater*, 10 MLC 1040 (1983).
[68] *School Committee of Braintree v. Raymond*, 369 Mass. 689 (1976).
[69] *City of Cambridge*, 4 MLC 1447 (1977).
[70] *Town of Andover*, 3 MLC 1710 (1977).
[71] *Groton School Committee*, 1 MLC 1224 (1974).
[72] *Weymouth School Committee*, 9 MLC 1091 (1982), *aff'd. sub. nom. National Association of Government Employees v. Labor Relations Commission*, 17 Mass. App. Ct. 542 (1984).
[73] *Town of West Bridgewater*, 10 MLC 1040 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984).
[74] *Town of West Bridgewater, supra.* (reverses *City of Everett*, 7 MLC 1012 (1980) and *City of Lowell*, 6 M LC 1173 (1979)); *see, also, Town of Billerica*, 8 MLC 1957 (1982) and *Town of Dracut*, 9 MLC 1702 *(1983); compare City of Peabody*, 9 MLC 1447 (1982) (regularly scheduled overtime equivalent to a wage item).
[75] *Town of Burlington v. Labor Relations Commission*, 390 Mass. 157 (1983).
[76] *Cambridge School Committee*, 7 MLC 1026 (1980)
[77] *School Committee of Braintree v. Raymond*, 369 Mass. 689 (1976); *School Committee of Hanover v. Curry*, 369 Mass. 683 (1976).
[78] *City of Springfield*, 12 MLC 1021 (1985).
[79] *Town of Dennis*, 12 MLC 1027 (1985); *City of Westfield*, 12 MLC 1036 (1985).
[80] *Town of Ayer*, 9 MLC 1376 (1982), *aff'd. sub nom. Local 346, IBPO v. Labor Relations Commission,* 391 Mass. 429 (1984)
[81] *City of Cambridge*, 4 MLC 1447 (1977).
[82] *Town of Danvers*, 3 MLC 1559 (1977).
[83] *Town of Reading*, 9 MLC 1730 (1983).
[84] *Chelmsford School Committee*, 8 MLC 1515 (1981).
[85] *City of Malden*, 20 MLC 1400 (1994).
[86] *Town of Dedham*, 21 MLC 1011 (1994).
[87] This rule was adopted in Massachusetts from the NLRB position on the subject. *See, NLRB v. Wooster Division of Borg-Warner Corp* ., 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958).
[88] See Appendix under § 7(d) for a complete listing of the statutes which may be contravened by collective bargaining agreement. The most notable exception is that the injured on duty statute (c. 41 § 111(f)) may be contracted around.

[89] The power to appoint would involve an inherent managerial prerogative which a public employer may not abandon by agreement, because allowing public employers to contract away these rights would be contrary to public policy. The subject of managerial prerogatives and rights will be further examined in the chapter on Management Rights.

[90] *See School Committee of Springfield v. Springfield Administrators' Association*, 36 Mass. App. Ct. 916 (1994) (holding that School Committee could not bargain away its statutory authority of appointment and thus could not be bound by a collective bargaining provision for binding seniority preference).

[91] *Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 183, 681 N.E.2d 1234 (1997).

[92] *Town of North Attleboro v. Labor Relations Commission*, 56 Mass. App. Ct. 635, 779 N.E.2d 654 (2002).

[93] *Town of North Attleboro v. Labor Relations Commission*, supra.

[94] Id.

CHAPTER 4 - "GOOD FAITH"

Both the federal and state approach to defining the term "good faith" in the bargaining context involve looking at the totality of the parties' conduct.[1] The standard is a subjective one; in essence, a court or agency attempts to gauge the state of mind of the parties. As the Supreme Judicial Court stated in *School Committee of Newton v. Labor Relations Commission:*

> The duty to bargain under G.L. c. 150E § 6 is a duty to meet and negotiate and to do so in good faith. Neither party is compelled, however, to agree to a proposal or to make a concession. "Good faith" implies an open and fair mind as well as a sincere effort to reach common ground. The quality of the negotiations is evaluated by the totality of the conduct.[2]

The "totality of conduct" standard includes conduct at the bargaining table as well as conduct occurring away from it. Hostility toward the union is evidence of bad faith, but, standing alone, union animosity is not sufficient to prove a charge of bad faith. The LRC has held, however, that negotiations "which are generally conducted in good faith can be tainted by the absence of good faith in a single aspect of those negotiations. This is especially true when the offensive conduct is central to the negotiations."[3]

There are two main facets of the good faith requirement. First, the parties are required to go through the required procedures or "externals" of bargaining, i.e. they must arrange meeting times, attend bargaining sessions, appoint negotiators, etc. Second, the parties must possess a *bona fide* (good faith) intention to reach an agreement.[4] As the LRC indicated in the *County of Norfolk* case, "The parties must approach the table with an open mind, seeking an agreement which is fair and mutually satisfactory."[5]

Refusal of party to ratify a labor agreement, otherwise fully bargained, by executing it amounts to breach of the duty to bargain collectively in good faith, and same holds true though duty is cast by statute on public rather than private employer.[6]

The duty to bargain is a duty to meet and negotiate and to do so in good faith, but neither party is compelled to agree to a proposal or to make a

concession, since good faith implies an open and fair mind as well as a sincere effort to reach a common ground, and quality of negotiations is evaluated by totality of conduct. [7]

An employer has a duty to bargain in good faith regarding a change of a mandatory subject prior to implementing that change. [8]

§ 1 GOOD FAITH REQUISITES

The duty to bargain is a duty to meet and negotiate and to do so in good faith; neither party is compelled, however, to agree to a proposal or to make a concession.[9]

Fundamentally, neither management nor labor may refuse to bargain over a mandatory subject of bargaining.[10] Beyond this requirement, the parties to a labor negotiation have several additional duties which are discussed below. There is a difference between "hard" bargaining and bad faith bargaining. The good faith requirement was not intended to completely tie the hands of the parties or to prevent a party from aggressively advocating its position.

The term "good faith" implies an open and fair mind as well as a sincere effort to reach a common ground.[11] Indeed, the very concept of collective bargaining presupposes a desire to reach ultimate agreement.[12] While such an obligation does not compel either party to agree to a proposal or make a concession, it does require that each party enter into discussions with an open and fair mind, have a sincere purpose to find a basis of agreement and make reasonable efforts to compromise their differences.[13] The employer is obliged to make some reasonable effort in some direction to compromise differences with the Union if the good faith requirement imposes any substantial obligation at all. Agreement by way of compromise cannot be expected unless the one rejecting a claim or demand is willing to make a counter suggestion or proposal.[14]

§ 2 MANAGEMENT VIOLATIONS

Aside from the good faith requisites applicable to both parties, there are a number of party-specific duties. Public employers, for example, have a variety of obligations they must fulfill to satisfy the Labor Relations Commission (LRC's) definition of bargaining in good faith.

A. REFUSAL TO NEGOTIATE

While neither labor nor management can refuse to negotiate after a request to bargain has been received from the other party, most frequently it is the employer who is charged with refusal to bargain. A public employer can be charged with refusing to bargain by directly or explicitly turning down a union's specific request to bargain, or by acting in a manner that demonstrates that the employer is avoiding the duty to bargain.[15] The public employer has an obligation to bargain with a union which is approved by a majority vote of the employees, or which has been voluntarily recognized by the employer.[16]

PRACTICE POINTERS

Unions often try to bully management into making a concession, claiming (incorrectly) that good faith requires it. This tactic should be resisted.

Often, there is a fine line between "hard" bargaining and a refusal to bargain. The Law does not require that either party agree to a proposal or make a concession, but neither party can absolutely refuse to discuss a mandatory subject of bargaining. Thus, an employer may propose a 0% wage increase for economic or other reasons, but may not entirely refuse to discuss wages.[17] Further, a union may not refuse to discuss an employer's proposed "take away" provisions if they involve a mandatory subject of bargaining.[18] A public employer can freely advance 0% wage increases, take away items, and other hard bargaining positions, as long as it is not presented as a "take it or leave it" proposition.[19] A party may be guilty of surface bargaining if it rejects the other side's proposals, while tendering its own, without attempting to reconcile the two.[20]

B. UNILATERAL CHANGES[21]

A public employer violates Sections 10(a)(5) and (1) of the Law when it implements a change in a mandatory subject of bargaining without first providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse.[22] The duty to bargain extends to both conditions of employment that are established through past practice as well as conditions of employment that are established through a collective bargaining agreement.[23]

To establish a unilateral change violation, the charging party must show that:

1) the employer altered an existing practice or instituted a new one;

2) the change affected a mandatory subject of bargaining; and
3) the change was established without prior notice or an opportunity to bargain.[24]

To determine whether a practice exists, the Commission analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue.[25] A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time the circumstances precipitating the practice recur.[26]

When a collective bargaining agreement expires, an employer is not free unilaterally to change wages, hours, or other working conditions without at least providing the union notice and, if requested, engaging in good faith negotiation.[27] In *Commonwealth of Massachusetts*, the LRC found that the expiration of the contract and the change of union did not relieve the employer of its continuing duty to contribute on the employees' behalf to the health and welfare trust fund established under the contract.[28] To establish a violation of the Law, an actual change in an existing condition of employment must have occurred,[29] and the change must involve or impact a mandatory subject of bargaining.[30] The employer's duty to maintain the status quo after a contract expires applies not only to contractual provisions, but also long-standing past practices.[31]

The employer, upon the parties' reaching impasse, may implement changes in terms and conditions of employment which are reasonably comprehended within its pre-impasse proposals.[32] However, in *Town of Bellingham*, the LRC found that the employer's change in its health insurance contribution rates constituted an unlawful unilateral change since the parties had not reached impasse after only four meetings, based on such factors as the employer's regressive bargaining and the parties' bargaining history.[33]

PRACTICE POINTERS

One of the most opportune times for an employer to regain lost management rights and to implement constructive changes in department operations may be following the expiration of a collective bargaining agreement. Unfortunately, many contracts have either an "evergreen" clause or a provision which requires the employer to maintain all benefits and keeps the contract in place until a successor is executed. Employers should seek to delete each of the latter two provisions from an existing contract. Certainly they should not be added to agreements of which they are not already a part.

When a contract is in effect and negotiations are not in progress, a chief is free to propose changing a past practice in a way which would not violate the agreement. Providing the union with notice of the proposed change and affording the union the opportunity to request bargaining is required. If bargaining is demanded, good faith negotiations must continue until agreement or impasse is reached. In the latter case, the chief is free to implement his/her pre-impasse position.

Some labor attorneys interpret c.150E, §9 as precluding any changes to police and fire contracts after they expire, even in the absence of an "evergreen clause".

The SJC's decision in the *Billerica Firefighters* case discussed above appears to exclude all matters of inherent managerial prerogative from the arena of mandatory subjects of bargaining. This would be a logical progression form the Court's earlier rulings. In a 1976 decision, the court ruled that there is no requirement that all matters which are mandatory subjects of bargaining must be subject to arbitration.[34] The court explained that there is no direct correlation between what the LRC classifies as a mandatory as opposed to permissive subject and the issue of arbitrability when it said:

> We do not decide any question with respect to the mandatory or permissive scope of collective bargaining. "A naked distinction exists between a duty to engage in collective bargaining, and a freedom to submit controversies, whether or not subject to mandatory bargaining, to arbitration." *Susquehanna Valley Cent. School District at Conklin v. Susquehanna Valley Teachers Ass'n.*, 37 N.Y.2d 614-617, 376 N.Y.S.2d 427, 429, 339 N.E.2d 132, 134 (1975).

The Appeals Court decision involving the pay requirement for a sergeant assigned as a *temporary lieutenant*, distinguished this case from one which might involve the *decision* of assignment itself.[35] After citing numerous cases discussing the "broad administrative control and discretion" of the police commissioner, the Court stated:

> The demands of public safety, ibid., and a disciplined police force underscore the importance of management control over matters such as staffing levels, assignments, uniforms, weapons, and definition of duties.[36]

The Appeals Court explained that its holding in this case was consistent with earlier decisions which ruled that the means of implementing managerial decisions, especially touching on compensation, may be the subject of an enforceable provision in a collective bargaining agreement.

PRACTICE POINTERS

The decisions of the Appeals Court and the Supreme Judicial Court would appear at variance with certain Labor Relations Commission (or Hearing Officer) decisions. Since relatively few Commission rulings are appealed to the Courts, it is only a matter of conjecture as to what the courts would have done in some cases involving assignment.

The traditional three-part distinction among subjects of bargaining (mandatory, permissive and illegal/prohibited) is one followed more closely by the LRC than the Massachusetts courts. The distinction may be only semantic. However, it is possible that a municipal employer will receive conflicting rulings from the Commission and the Courts. The LRC might well order bargaining over some matters which ultimately need not (and should not) be submitted to arbitration. Unfortunately, a municipality may have to appeal an adverse Commission ruling to court if it wishes to challenge a bargaining order over a matter the city or town believes is an inherent managerial prerogative.

Two Leominster cases involved the issue of police officer assignments[37] and resulted in orders compelling bargaining over at least some aspects of assignments. It does not appear that the City decided to appeal to the courts in either case.

In the 1991 case it appears that the City of Leominster allowed shift bidding (to learn the officer's preferences) but the chief retained the right to make shift assignments, with seniority being one factor. This was in keeping with the contract provision which specified that "[a]ssignments to shifts of all men in the uniformed branch shall be by seniority where determined practicable and expedient by the chief of the department."

The 1993 Leominster case, a superior officers case with the same shift bidding language, involved both shift bidding and specialist bidding. The LRC's decision focused more on the chief's failure to provide the union with notice and opportunity to bargain before changing annual shift bidding than on the pure issue of assignment as a managerial prerogative. Several LRC decisions, especially certain Hearing Officer rulings, appear to place the issue of assignments in the category of a mandatory subject of bargaining.[38] However, some were decided before the JLMC statute was enacted which removes *assignments* from the scope of arbitration. Others were decided before certain court decisions found public safety

assignments an inherent managerial prerogative. Moreover, none seem to have been appealed to the courts.

On the other hand, one LRC case held that a union proposal regarding the *assignment* of off-duty police officers in Worcester to paid details involved a core governmental decision and was, therefore, not subject to bargaining.[39]

While the matter is, therefore, not free from doubt, it is likely that a court would overturn (or at least modify) any LRC decision ordering bargaining over the pure issue of police officer assignments. Even if the court was to allow the Commission's *bargaining* order to stand, it would likely uphold a municipal employer's right to insist that the matter not proceed to arbitration. Similarly, in those contracts already containing an otherwise objectionable provision, should an employer refuse to proceed to grievance arbitration, their position presumably would be upheld by the court (assuming the union filed a complaint under G.L. c. 150E, § 8, seeking to compel arbitration). This is consistent with the conclusion reached by the Supreme Judicial Court in a 1979 Boston School Committee case.[40] After discussing the public policy basis for declaring certain inherent managerial prerogatives beyond the scope of arbitration, the court upheld the school committee's refusal to participate in arbitration even though the contract contained a provision (which the Committee arguably violated) which impinged on such prerogatives.

The SJC stated that whether the case was before the Labor Relations Commission, or before the Courts in an action to stay arbitration or in an action to either vacate or confirm an arbitration award, the issue is "whether the ingredient of public policy in the issue subject to dispute is so comparatively heavy that collective bargaining, and even voluntary arbitration, on the subject is, as a matter of law, to be denied effect. Cf. *School Committee of Boston v. Boston Teachers, Local 66*, 372 Mass. 605, 614, 363 N.E.2d 485 (1977)."[41]

1) Notice to Union

The burden is on the employer at a Labor Relations Commission hearing to prove that adequate notice of the proposed new rule or change in policy was provided to the union. The Commission utilizes the following principle regarding the adequacy of notice:

> The information conveyed to the union must be sufficiently clear for the union to make a

> judgment as to an appropriate response. The union is not required to respond to rumors of proposed changes, speculation, or proposals so indefinite that no response could be formulated.[42]

Notice should be provided directly -- and preferably in writing -- to the appropriate union officials, e.g., president, steward, and/or business agent. Simply showing that certain union members (or even officers) knew or should have known of a proposed new rule or change in policy may not be sufficient to satisfy management's burden on the issue of notice.[43] The LRC held that a union is not put on notice of a change where individual union members, who are not acting in their capacity as union officers or agents, learned that certain matters were being examined by the employer.[44] For example, where the Town of Wayland contemplated a new evaluation procedure for police officers, the union was not put on notice by the participation of two bargaining unit members in the discussions which formulated the new policy.[45] An employer should make it clear that a change will extend beyond the year in which it is implemented. When a school committee failed to indicate that the elimination of a convention day would be permanent, it did not meet its duty of providing sufficient notice that the union's failure to demand bargaining met the test of being a "knowing, conscious or unequivocal waiver" of its right to bargain over the change.[46] In addition, in another school committee case, the Commission held that information communicated to the union about possible layoffs was inconsistent and not legally sufficient where one document received by the union was a "tentative proposal for discussion purposes" and others indicated no reduction in personnel.[47]

2) Opportunity to Bargain/Waiver

There is no statutory requirement specifying how much advance notice must be provided to a union for intended changes in rules or policies. The LRC attempts to use a common sense approach on a case-by-case basis. In situations where there is not an externally imposed deadline (e.g., grant deadline, loss of funding, cancellation of insurance carrier, statutory change in health insurance percentage contributions, etc.), the Commission tries to decide whether the notice provided sufficient time for the union to make a determination of whether it should demand bargaining. If a union knows of a proposed change, has a reasonable opportunity to bargain, and unreasonably fails to request bargaining, it will be found to have waived its right to demand bargaining.[48]

A union's obligation to demand bargaining regarding a change in terms and conditions of employment arises when the union has actual knowledge of the proposed change.[49] To establish a union's waiver by inaction, an employer must show by a preponderance of the evidence that the union had actual knowledge or notice of the proposed action, had a reasonable opportunity to negotiate over the subject, and unreasonably or inexplicably failed to bargain or request bargaining.[50] A union's waiver of its statutory right to bargain over a subject will not be readily inferred. There must be a "clear and unmistakable" showing that a waiver occurred.[51]

Where a public employer raises the affirmative defense of waiver by inaction, it bears the burden of proving that the union had: 1) actual knowledge of the proposed change; 2) a reasonable opportunity to negotiate prior to the employer's implementation of the change; and, 3) unreasonably or inexplicably failed to bargain or to request bargaining.[52]

In a case involving the refusal of the City of Malden for seven weeks to start negotiating with the firefighters union over the means of accomplishing a reduction in force after the passage of Proposition 2 1/2, coupled with the City's insistence that all negotiations be completed in no more than two and one-half weeks, the Commission ruled that there was no impasse at the time of layoffs. It further found that there were no circumstances beyond the control of the City which might justify such action prior to impasse. It therefore ordered the City to reinstate the unlawfully laid off firefighters with back pay and to bargain with the union over the layoff impact issues.[53]

In a 1979 case involving the Avon Police Department, the Commission held that a failure to seek bargaining for three months after the union became aware of the department's new rule requiring examination by a town-designated physician, was too long. The union "was not entitled to sit back, once it was aware of the Town's intention to institute the examinations by a town-selected physician, and wait until the policy was implemented before it demanded bargaining."[54]

In a Raynham firefighter case, the union knew or should have known that a captain’s position would not be filled when the poster was removed from the board.[55] The union’s letter “raised concerns” but never demanded bargaining.

Where an employer raises the affirmative defense of contract waiver, it must show that the union knowingly and unmistakably waived its

right.[56] The employer bears the burden of proving that the contract clearly, unequivocally and specifically authorizes its actions.[57] Where the parties' agreement is silent on an issue, it must be shown that the matter allegedly waived was fully explored and consciously yielded.[58] Where contract language exists but is ambiguous, bargaining history or the manner in which the parties have implemented the disputed contract provision are helpful.[59] However, where contract language contained in a management rights clause is not ambiguous, it is necessary only to examine the specificity of the clause and to determine whether the disputed action is within its scope.[60] The 2003 *City of Cambridge* case found that the management rights clause authorized the police chief to change the criteria for overtime and to implement a new form of discipline without providing the union prior notice and an opportunity to bargain to resolution or impasse.[61]

Notice must be provided to the union far enough in advance of implementation of the change to afford the union the opportunity to bargain.[62] Should the union fail promptly and effectively to request bargaining after receiving proper notice, it *waives by inaction* its right to bargain over the proposed change.[63] However, a union's demand to bargain need not be *immediate* in order to be *timely*.[64] How much time must pass before a union will be found to have waived its right to bargain will be determined from the facts.[65] Waiver is an affirmative defense to a charge of unlawful unilateral change.[66]

In *Holliston School Committee*, the Commission decided that the School Committee's vote in May to increase the length of the school day the next September was not a *fait accompli*, but rather a proposal over which the parties could have bargained.[67] Further, the Commission determined that the Union had ample opportunity to bargain between the date Union had actual notice of the impending change and its implementation.[68] In the 2002 case of *Commonwealth of Massachusetts*, notifying the Union in late January 1998 that it intended to implement a consolidated service model in fourteen (14) DTA offices between April 1, 1998 and June 1, 1998, and offering to meet, constituted both actual notice of the impending change and a reasonable opportunity for the Union to negotiate over the impacts of the decision to implement this service model prior to implementation.[69] (Absent justification for a deadline, nine (9) days between the date of actual notice and the date of the change is insufficient time to afford a union a meaningful opportunity to bargain.) Upon receiving this notice, the Union was obligated to demand negotiations about the impacts of the Commonwealth's decision to implement the consolidated service delivery model on

employees' terms and conditions of employment, or risk waiving its right to do so.[70]

In *Town of Westborough*,[71] the Commission reaffirmed that "[a] party to a collective bargaining agreement need not bargain during the term of that agreement over subjects that were part of the bargain when the parties negotiated the agreement."[72] For the Union to prevail in its argument that the Commonwealth was precluded from implementing the consolidated service model during the term of the Alliance agreement absent the Union's consent, the evidence must demonstrate that the issue was "consciously explored" and "consciously yielded" during negotiations.[73]

There was no evidence that the Union made any proposals about any mandatory subjects of bargaining directly affected by the Commonwealth's decision to implement the consolidated service delivery model in fourteen (14) DTA offices and the Commonwealth subsequently refused to bargain over these proposals. Further, there was no evidence that the Union requested additional meetings with the Commonwealth to offer any proposals or counter-proposals about the planned implementation of the consolidated service model, or that the Commonwealth refused to meet at reasonable times and places to discuss the Union's proposals. Rather, the Union consistently maintained its position that it was under no obligation to engage in mid-term contract negotiations over consolidation and failed to make proposals addressing the mandatory subjects of bargaining implicated by the Commonwealth's decision. Thus, the Union waived its right to bargain with the Commonwealth to resolution or impasse over the impacts of the Commonwealth's decision to implement the consolidated service delivery model in its DTA offices prior to implementation.[74]

The doctrine of *waiver by inaction* is not applicable to a situation where the union is presented with a *fait accompli* (i.e., done deal).[75] In determining whether a *fait accompli* exists, the Labor Relations Commission considers "whether, under all the attendant circumstances, it can be said that the employer's conduct has progressed to the point that a demand to bargain would be fruitless."[76]

In a 1986 case involving an increase in the length of the school day, the Commission dismissed the union's complaint for failure to demand bargaining in a timely manner.[77] The Holyoke School Committee sent a letter on August 9 to the Association President who was on vacation when the letter was sent. The LRC stated that the union could have protested or demanded bargaining before the

School committee's vote on August 16. Moreover, it could have demanded bargaining after the vote but before the implementation of the change when school started on September 2.

In a 1982 decision in *Scituate School Committee*, a LRC Hearing Officer was faced with the issue of whether the employer's lengthening of the work day to provide for an unpaid half-hour lunch period, when such periods were previously provided with pay, was an unlawful unilateral change.[78] However, the hearing officer dismissed the complaint after finding that the union failed to object to the change in a timely manner. It had been notified of the School Committee's July 23 vote. The change went into effect September 8, yet the union let that time go by without demanding bargaining.

Even when an employer has not met its bargaining obligations, the LRC may modify its remedial order if it also finds the union delayed in demanding bargaining. For example, the Commission found that the Middlesex County Commissioners failed to bargain in good faith by cutting off negotiations over the impact of a reduction in force; however, it ruled that the union's delay in requesting bargaining foreclosed a *status quo ante* remedy.[79]

Some guidance concerning what is a reasonable period may be gleaned from the rulings of the Commission in cases where unions have successfully challenged unilateral changes by municipal employers. After finding the employer violated the Law, the Commission generally orders the employer to bargain with the union provided a demand for bargaining is received within five days of the union's receipt of an offer to bargain.[80]

PRACTICE POINTERS

In an effort to avoid litigating the issue of whether the union waived its right to bargain by unreasonably delaying its demand to do so, management could incorporate a reasonable response deadline in its notice. By inserting the following phrase in any such notice, so long as the amount of time is not unreasonably short (at least five (5) days except in urgent/emergency situations), it is likely that the Commission would find a waiver by the union if it failed to comply with a reasonable deadline:

"Unless the union provides the undersigned with a written request to negotiate over the proposed change(s) by _____, it will be presumed that the union has waived any right it may have to bargain over such change(s) or the impact of such change(s) on mandatory subjects of bargaining."

3) Contractual Waiver

> A union may also waive its right to bargain over proposed changes by the provisions of the collective bargaining agreement. The Commission is reluctant to find such a waiver in the absence of clear contract language.[81] When an employer raises the affirmative defense of contract waiver, it must show that the subject was consciously considered by the parties, and that the union knowingly and unmistakably waived its right.[82] The initial inquiry focuses on the language of the contract.[83] The employer bears the burden of proving that the contract clearly, unequivocally and specifically authorizes its actions.[84] A waiver cannot be found on the basis of a broad, but general, management rights clause.[85] The LRC must determine whether the contract language "expressly or by necessary implication" confers upon the employer the right to implement the change in the mandatory subject of bargaining without negotiating with the union.[86] If the language clearly, unequivocally and specifically permits the public employer to make the change, no further inquiry is necessary.[87] However, if the contract's language is ambiguous, the Commission reviews the parties' bargaining history to determine their intent.[88]

A comprehensive Management Rights clause, which specifically addresses the action an employer intends to take, may constitute a waiver by the union of its rights to notice and bargaining. However, unless the language is specific and on point, the Commission is not likely to uphold it as a waiver. As the LRC Hearing Officer in the *Town of Hull* case stated:

> It is well established that a contractual waiver of the right to bargain over a mandatory subject will not be readily inferred. The employer must establish that the parties consciously considered the situation that has arisen and that the union knowingly waived its bargaining rights.[89]

(and in the same decision)

> In reviewing the language of a contract, the Commission assesses whether the language expressly or by necessary implication gives the employer the right to implement changes in a subject without bargaining.[90]

In its 1992 decision in *Commonwealth of Massachusetts*, the Commission dismissed the union's complaint that the state's unilateral changing of the hours of work of correction counselors violated Sections 10(a)(5) and (1).[91] The union was found to have waived its right to bargain by agreeing to the following language in the contract:

> Where the employer desires to change the work schedule of employee(s), the employer shall, whenever practicable, solicit volunteers from among the group of potentially affected employees, and select from among the qualified volunteers. The employer shall, whenever practicable, give any affected employee whose schedule is being involuntarily changed ten (10) days written notice of such contemplated change. The provisions of this subsection shall not be used for the purpose of avoiding the payment of overtime.

4) Impasse or Agreement

Assuming the union makes a timely request to bargain, and negotiations produce an agreement, management is obviously free to implement the terms of such agreement. Likewise, if negotiations proceed in good faith to impasse, management may implement its pre-impasse position.

NOTE: If the union stops negotiating in good faith, management may also implement.

PRACTICE POINTERS

Where negotiations are conducted in good faith (at least by management) and impasse is reached, the municipal employer is free to implement its impasse position. Although no case has yet been decided by the LRC on the subject, it is arguable that the failure by the union to bargain in good faith may relieve management of its bargaining obligation, thus enabling it to implement its proposed change (at least as it existed immediately prior to the union's statutory violation). In fact, LRC decisions compelling municipal employers to enter into impact bargaining routinely include a clause ordering the employer to bargain in good faith until agreement or

impasse is reached or until the union stops bargaining in good faith. One word of caution is in order, however: it may take the LRC many months (if not longer) to decide whether the union bargained in bad faith. An employer should be very certain before making such a determination on its own.

C. REMEDY FOR VIOLATION

When the LRC finds that an employer has made a unilateral change in a working condition, typically it will order a return to the *status quo ante* (i.e. as it was before).[92] Some exceptions have been made where an employer has raised an employee's wages. If ordering reimbursement would be unfair, the Commission might not be inclined to do so, especially where the employee is being penalized for the employer's unlawful conduct.[93] Similarly, the Commission has declined to order reimbursement in cases where this might result in friction between the union and the employee, which is not in keeping with the spirit of the law.[94] (An exception was made where an increase was implemented during negotiations.)[95]

Where it appears that a pay raise is the only violation and no other employee was harmed, the Commission is unlikely to order a roll-back in a pay raise which was granted improperly.[96]

In a case where the Commission determined that but for the change in a past practice, a certain officer would have been the person promoted to sergeant, it ordered the town to promote him.[97] In another case where such a clear determination was not possible, an LRC hearing officer did not order rescission but rather ordered the town to return to the *status quo ante* with regard to the promotion procedures for temporary sergeant which involved the consideration of all candidates on the Civil Service list. The town was also ordered to bargain with the union upon demand regarding the procedure for promotion to temporary sergeant. The hearing officer instructed the town not to penalize the previously unsuccessful candidate for not having served as temporary sergeant nor to reward the individual who earlier received such temporary promotion when considering either of them for any future promotion opportunities.

PRACTICE POINTERS

Unless a community is prepared to spend considerable time (and money) in litigation over whether management is free to act unilaterally, it is advisable to notify the union of any substantive change in the criteria or procedure for promotions to positions within the bargaining unit or to those outside the unit which are not represented by some other union and are

not managerial or confidential. Consultation with labor counsel is essential before proceeding in this area.

Unless labor counsel advises that the facts of a particular case warrant unilateral changes, upon request, the employer should engage in good faith negotiations until agreement or impasse is reached.

[1] *Harwich School Committee*, 10 MLC 1364 (1984); *King Phillip Regional School Committee*, 2 MLC 1393 (1976).
[2] *School Committee of Newton v. Labor Relations Commission*, 447 N.E.2d 1201, 1211; 388 Mass. 557 (1983). Citations omitted.
[3] *County of Norfolk*, 11 MLC 1346, 1348 (1985).
[4] *See General Electric Co*., 150 NLRB 192, 57 LRRM 1491 (1964): "Good faith bargaining . . . involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining, and a bona fide intention . . . ."
[5] *County of Norfolk,* 11 MLC 1348 (1985).
[6] *Springfield Housing Authority v. Labor Relations Com'n,* 16 Mass.App.Ct. 653, 454 N.E.2d 507 (1983).
[7] *School Committee of Newton v. Labor Relations Com'n* , 388 Mass. 557, 447 N.E.2d 1201 (1983).
[8] Id.
[9] *Com. v. Labor Relations Com'n,* 60 Mass.App.Ct. 831, 806 N.E.2d 457, review denied 442 Mass. 1111, 816 N.E.2d 1222, (2004).
[10] *Everett School Committee*, 9 MLC 1308 (1982); *Commonwealth of Massachusetts*, 8 MLC 1183 (1981); *City of Chelsea*, 3 MLC 1169 (1976), *aff'd*., 3 MLC 1384 (1977). One exception to the rule that parties must bargain over mandatory subjects of bargaining involves comprehensive "zipper clauses". If the collective bargaining agreement contains a provisions stating that the contract represents the entire agreement between the parties (i.e. anything not discussed in the agreement specifically is excluded from future mid-term negotiations), then a party may be excused from the duty to bargain. *See City of Salem*, 5 MLC 1433 (1978) (stating that a contract without a zipper clause creates a duty during the term of the agreement to bargain over mandatory subjects not addressed in the agreement). This topic will be further elaborated upon in the chapter on Mid-Term Bargaining.
[11] *School Committee of Newton*, 388 Mass. at 572 (citations omitted).
[12] *Id.*
[13] *Id.; King Phillip Regional School Committee*, 2 MLC 1393, 1396 (1976).
[14] *City of Chelsea*, 3 MLC 1048, 1050 (H.O. 1976) *citing NLRB v. Polling & Son Co.*, 119 F2d. 32 (1941).
[15] The sections below all constitute examples of actions which constitute a refusal to bargain by a public employer.
[16] M.G.L. Chapter 150E, § 4; § 6 requires negotiations with the elected representative. Under federal law, an employer commits an unfair labor practice if it refuses to bargain collectively with a union that has met the criteria for an "exclusive bargaining representative" under 29 U.S.C. § 159(a) (National Labor Relations Act).
[17] *Brockton School Committee*, 19 MLC 1120 (1992).
[18] *Utility Workers of America*, 8 MLC 1193 (1981).
[19] In the federal arena, the "take it or leave it" approach by management is called "Boulwarism", named for a former Vice President of General Electric who exemplified and defined the approach. He would research and develop what he considered to be the best possible collective bargaining agreement for the employees, and then present it to the union during "bargaining". Besides refusing to budge on all major contract items, he would also initiate a company-wide campaign to convince employees of the value of his proposal. The NLRB has held that a "take it or leave it" attitude can violate the NLRA, and that direct dealing with employees (during the campaigns) also violated the Act.
[20] *Town of Saugus*, 2 MLC 1480 (1976).
[21] The subject of unilateral changes generally arises in the context of changes in terms and conditions of employment during the term of the collective bargaining agreement. This section will only address the issue in a context where there is no contract in effect.
[22] *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557 (1983).
[23] *Commonwealth of Massachusetts*, 27 MLC 1, 5 (2000); *City of Gloucester*, 26 MLC 128, 129 (2000); *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1697 (1983).
[24] *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1984); *City of Boston*, 20 MLC 1603, 1607 (1994).
[25] *Swansea Water District*, 28 MLC 244,245 (2002); *Commonwealth of Massachusetts*, 23 MLC 171,172 (1997); *Town of Chatham, 21* MLC 1526, 1531 (1995).
[26] *Commonwealth of Massachusetts, 23* MLC at 172.

[27] Because the union often lacks the actual power to make a unilateral change, generally it is the employer who is charged with making an unlawful unilateral change.
[28] *Commonwealth of Massachusetts*, 19 MLC 1069 (1992).
[29] *City of Peabody*, 9 MLC 1447 (1982).
[30] *Town of Billerica*, 8 MLC 1957 (1982).
[31] *Commonwealth of Massachusetts*, 9 MLC 1355 (1982).
[32] *Hanson School Committee* , 5 MLC 1671 (1979), discussed *supra* in § 4, "Reaching Impasse".
[33] *Town of Bellingham*, 21 MLC 1441 (1994).
[34]*School Committee of Braintree v. Raymond*, 369 Mass. 686, 343 N.E.2d 145 (1976)
[35]*City of Boston v. Boston Police Superior Officers Federation*, 29 Mass. App. Ct. 907, 556 N.E.2d 1053 (1990)
[36]*City of Boston, supra*, at 1055.
[37]*City of Leominster*, 17 MLC 1391 (1991) and *City of Leominster*, 19 MLC 1636 (1993)
[38]*City of Boston*, 5 MLC 1691 (1979); *Town of Danvers*, 3 MLC 1559 (1977)
[39]*City of Worcester*, 4 MLC 1378 (1977)
[40]*School Committee of Boston v. Boston Teachers Union, Local 66, American Federation of Teachers (AFL-CIO)*, 378 Mass. 65, 389 N.E.2d 970 (1979)
[41]*Id.* at 973.
[42]*City of Boston School Committee*, 4 MLC 1912, 1915 (1978); *Quincy School Committee*, 11 MLC 1179 (1984)
[43]*Town of Ludlow*, 17 MLC 1203 (1990); *Town of Milford*, 15 MLC 1247 (1988)
[44]*Boston School Committee*, 4 MLC 1912, 1915 (1978)
[45]*Town of Wayland*, 3 MLC 1724, 1729 (H.O. 1977); see also, *Leominster School Committee*, 3 MLC 1530 (H.O. 1977), modified on other grounds, 4 MLC 1512 (1977)
[46]*Whitman-Hanson Regional School Committee*, 10 MLC 1283, 1285-1286 (1983)
[47]*Boston School Committee*, 10 MLC 1501, 1510 (1984)
[48]*City of Gardner*, 10 MLC 1218, 1221 (1983); citing *Scituate School Committee*, 9 MLC 1010 (1982) and *Boston School Committee*, 4 MLC 1912, 1915 (1978); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 570, 447 N.E.2d 1201 (1983)
[49]*Boston School Committee and Administrative Guild*, 4 MLC 1912, 1914-15 (1978)
[50]*Id.* at 1915; *School Committee of Newton v. Labor Relation Commission*, 388 Mass. 557, 570, 447 N.E.2d 1201 (1983); *Town of South Hadley*, 26 MLC 161 (2000).
[51]*City of Everett*, 2 MLC 1471, 1476 (1976), *aff'd sub. nom., Labor Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826, 391 N.E.2d 694 (1979); *Commonwealth of Massachusetts*, 28 MLC 36, 40 (2001), *citing City of Everett*, 2 MLC 1471, 1476 (1976), *aff'd Labor Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826 (1979). *See also City of Cambridge*, 23 MLC 28, 37 (1996), *aff'd sub nom. Cambridge Police Superior Officers Association et al. v. Labor Relations Commission*, 47 Mass. App. Ct. 1108 (1999).
[52] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 570 (1983); *City of Cambridge*, 23 MLC 28, 37-38 (1996), *aff'd sub nom. Cambridge Police Superior Officers Association & another v. Labor Relations Commission*, 47 Mass. App. Ct. 1108 (1999). *Town of Andover*, 28 MLC at 270, *citing City of Boston v. Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (1999); *see School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 569 (a waiver must be shown clearly, unmistakably, and unequivocally and cannot be found on the basis of a broad, but general, management rights clause).
[53]*City of Malden*, 8 MLRR 1356, 8 MLC 1620 (1981)
[54]*Town of Avon*, 5 MLRR 1148 (1979)
[55] *Town of Raynham*, 30 MLC 56 (2003).
[56] *Town of Andover*, 28 MLC at 270, *citing Town of Mansfield*, 25 MLC 14, 15 (1998).
[57] *Town of Andover*, 28 MLC at 270, *citing City of Boston v. Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (1999); *see School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 569 (a waiver must be shown clearly, unmistakably, and unequivocally and cannot be found on the basis of a broad, but general, management rights clause).
[58] *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *citing City of Everett*, 2 MLC 1471, 1475 (1976); *Press Co., Inc.*, 121 NLRB 976, 42 LRRM 1493 (1958).

[59] *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *citing City of Boston*, 3 MLC 1450, 1461, n.13 (1977).
[60] *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *see Ador Corp.*, 150 NLRB 1658, 58 LRRM 1280 (1965).
[61] *City of Cambridge*, 29 MLC 134 (2003).
[62] *Boston School Committee*, 4 MLC 1912, 1914 (1978)
[63] *Id.* at 1915
[64] *Id.* at 1916
[65] *Id.* at 1914
[66] *Id.* at 1915
[67] *Holliston School Committee*, 23 MLC at 212-213, *quoting, Scituate School Committee*, 9 MLC 1010, 1012 (1982).
[68] *Holliston School Committee*, 23 MLC at 213.
[69] *Cf. Town of Hudson*, 25 MLC 143, 148 (1999)
[70] *City of Cambridge*, 23 MLC at 37, *citing, Town of Milford*, 15 MLC 1247, 1253 (1988).
[71] *Town of Westborough*, 25 MLC 81 (1997).
[72] *Id*. at 87 (1997), *citing, City of Salem*, 5 MLC 1433, 1436-1437 (1978) (Commission adopts the general policy expressed by Section 8(d) of the Labor Management Relations Act). *See also*, *Jacobs Mfg. Co.*, 94 NLRB 1214, 28 LRRM 1162 (1951), *enf'd* 196 F.2d 680, 30 LRRM 2098 (CA 2, 1952).
[73] *Town of Westborough*, 25 MLC at 87. *See also, Franklin School Committee*, 6 MLC 1297, 1300 (1979).
[74] *See, Holliston School Committee*, 23 MLC at 212-213.
[75] *City of Boston*, 8 MLC 1800 (1982)
[76] *Scituate School Committee*, 9 MLC 1010, 1012 (1982)
[77] *Holyoke School Committee*, 12 MLC 1443 (1986)
[78] *Scituate School Committee*, 8 MLC 1726 (1982)
[79] *Middlesex County Commissioners*, 9 MLRR 1148, 9 MLC 1579 (1983)
[80] See attached Order issued to the South Shore Regional School District.
[81] *See, Town of Andover*, 28 MLC 264 (2002).
[82] *Town of Mansfield*, 25 MLC 14, 15 (1998). *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988) citing *Town of Marblehead*, 12 MLC 1667, 1670 (1986)
[83] *Town of Mansfield*, 25 MLC 14, 115 (1998).
[84] *City of Boston v. Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (1999).
[85] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 569.
[86] *Melrose School Committee*, 9 MLC 1713, 1725 (1983)
[87] *City of Worcester*, 16 MLC 1327, 1333 (1989).
[88] *Town of Marblehead*, 12 MLC 1667, 1670 (1986); *Peabody School Committee*, 28 MLC 19, 21 (2001).
[89] *Town of Hull*, 17 MLC 1678 (1991) *citing Town of Marblehead*, 12 MLC 1667, 1670 (1986)
[90] *Town of Hull*, 17 MLC 1678 (1991) *citing Massachusetts Board of Regents*, 15 MLC 1265, 1269-1270 (1988)
[91] *Commonwealth of Massachusetts*, 19 MLC 1454 (1992)
[92] *Framingham School Committee*, 4 MLC 1809 (1978); *Town of Marblehead*, 12 MLC 1667, 1672 (1986).
[93] *City of Quincy*, 7 MLC 1391 (1980).
[94] *City of Boston*, 98 MLC 1664 (1983).
[95] *City of Quincy*, supra.
[96] *City of Boston*, 12 MLC 1203 (1985).
[97] *Town of Stoneham*, 8 MLC 1275 (1981).

CHAPTER 5 - ASSIGNMENT

The right to assign public safety employees is an inherent managerial prerogative which cannot be the subject of arbitration.[1] While it is arguable that management must negotiate at the request of the union over certain *procedures* relative to assignments, the ultimate decision-making power must rest with the chief.

In its 1978 decision, the Supreme Judicial Court addressed the issue of the assignment and appointment of police officers in a Boston Police Department case.[2] It ruled that the assignment of a police officer by the police commissioner is a decision committed to the nondelegable statutory authority of the commissioner and is not a proper matter for arbitration. In this case an arbitrator found that the commissioner violated the provisions of the collective bargaining agreement by making a provisional promotion of a lieutenant to a captain and transferring that individual to a new assignment. The Court said, ". . . the commissioner exercised his inherent managerial power to assign and transfer superior officers. The commissioner's authority is derived from St. 1906, c. 291 as amended by St. 1962, c. 322, §1 . . . , in particular §10, which grants the commissioner 'authority to appoint . . . and organize the police . . . [and to] appoint . . . captains and other officers as he/she may from time to time deem proper,' and §11 giving the commissioner 'cognizance and control of the government, administration [and] disposition . . . of the department . . .'".

The court concluded "the provisions of c. 291 prevail over Article XII, §3 [in the collective bargaining agreement] which purports to limit the commissioner's authority to assign superior officers by delineating the procedures for promoting officers from a district in which a temporary vacancy occurs and for which no civil service list exists, based on qualifications, ability and seniority. *Berkshire Hills*, 375 Mass. 522, 377 N.E.2d 940 (1978)."[3]

PRACTICE POINTERS

The 1998 amendments to c. 150E were aimed at depriving the Boston Police Commissioner of some of his or her powers to override the terms of a collective bargaining agreement. It is possible that future court decisions in this area will address whether some of the Commissioner's rights (and possibly those of all chiefs) are inherent *and are not dependent on certain statutes for their existence.*

Despite the fact that many collective bargaining agreements purport to restrict a chief's ability to make assignments, such clauses may not be enforceable. For example, a clause which purports to require absolute shift assignments by seniority might be voidable if it left no leeway for the chief to make certain shift assignments for legitimate reasons. A similar result would apply where a contract clause leaves no room for a chief to use his/her judgment or discretion in making specialist assignments. In any event, a municipality is free to refuse to include overly restrictive provisions in future contracts. In fact, a union may commit a prohibited (unfair labor) practice if it insists to the point of impasse on a proposal to deprive the chief of the ability to make assignments.

In a 1983 case arising from the Burlington Police Department, the SJC ruled that the decision to assign prosecutorial duties, subject only to the authority of the attorney general and district attorney, is an exclusive managerial prerogative and is not a proper subject for collective bargaining.[4]

Although the procedures for resolving contractual impasses have changed since the Appeals Court's 1980 decision involving arbitration with the Taunton Police Department, the court's rationale is still applicable.[5] The court ruled that the last best offer arbitration panel acted beyond the scope of its authority when it included in its award articles which: (1) set forth a procedure to be followed by the city when involuntarily transferring a police officer from one shift to another; (2) included an article prohibiting rotation of shifts; and (3) contained an article providing that all assignments on each shift be filled by regular officers.

The court stated that while the city could agree to these provisions (as it had in a previous agreement), it was not required to do so. It was free to adopt the position at arbitration that such provisions place overly inflexible or cumbersome restrictions upon the police chief's ability to assign his officers to their duties.

> When a city or town is simply required to bargain collectively concerning a subject, the ultimate decision whether to accept a particular proposal of a union remains with the city or town.[6]

The court noted that there is a distinction between mandatory subjects of bargaining in c. 150E, §6 and those matters which are within the scope of arbitration as provided in Chapter 730 of the Acts of 1977, as amended. The latter contains no reference to "standards of productivity and performance" and specifies that arbitration in police matters shall not include matters of inherent managerial policy.

> A police chief's authority to assign his officers to particular duties is a matter that concerns the public safety.[7]

The court went on to say: ". . . the Legislature did not intend to empower the *arbitration panel* in making its award to deprive the chief of his authority to 'exercise his own discretion and judgment as to the number, qualifications and identity of officers needed for particular situations at any given time.'" (The court referred to its prior decisions in the case of *Labor Relations Commission v. Natick*, 369 Mass. at 442, 339 N.E.2d 900 (1976) and was quoting from *Chief of Police of Dracut v. Dracut*, 357 Mass. at 502, 258 N.E.2d at 537 (1970).

The court included the following example to explain its reasoning: "For example, suppose a reserve officer had special experience in a problem which a particular detail was likely to face over a limited period of time and the chief deemed that the experience made him/her uniquely qualified to serve on that detail for that period of time. Article IX, §3, would prevent the chief from assigning the reserve officer to the detail in preference over a regular officer. See *Boston v. Boston Police Superior Officers Federation*, 9 Mass. App. Ct. 898, 402 N.E.2d 1098 (1980)."

In its 1970 decision, the SJC discussed the rights of a police chief and found that the right to assign was an inherent managerial prerogative which could not be contravened by the provisions of a collective bargaining agreement.[8] The union proposed requiring the chief to give exclusive consideration to the individual request, personal preference, seniority and rank of a police officer in determining the assignment of duties, shifts, vacations and leaves of absence. The court found such proposals not to be mandatory subjects of bargaining and stated:

> To deprive the chief of his authority to assign his officers to their respective duties and to substitute therefor the disputed provisions of the agreement would be totally subversive of the discipline and efficiency which is indispensable to a public law enforcement agency.[9]

Several court cases addressing the ability to assign officers have involved the Boston Police Department. In its 1979 decision, the Appeals Court ruled that the Boston Police Commissioner's assignment of an officer to a desk job and the refusal to issue a service revolver to the police officer, which resulted in the deprivation of overtime assignments and paid details, was not a proper dispute for arbitration since a matter of inherent managerial prerogative was involved.[10] In addition, it ruled that the Commissioner has the power to order a psychiatric examination as a

condition of re-issuance of the officer's service revolver since this involved a matter of public safety.

The arbitrator's finding that the officer had recovered from his illness and that he was now performing well and should be reassigned to the streets was void in the absence of a showing that the Commissioner had abused his managerial powers, e.g., motivated by personal hostility.

An earlier decision determined that the Commissioner was authorized to assign civilians to ride in police cruisers without any obligation to provide notice or an opportunity for comment to the union.[11]

Despite the fact that an employer has the right to determine staffing levels, it may be required to bargain over the impact of a change on mandatory subjects of bargaining. For example, the Town of Mansfield was required to reinstate and make up lost compensation to three patrol officers after it eliminated their positions from the department's split shift without providing the union with notice and the opportunity to bargain.[12]

Although decision to assign prosecutorial duties, subject only to authority of Attorney General and district attorney, was exclusive managerial prerogative of town and not proper subject for collective bargaining, town was required to bargain over impact of decision which would not interfere with town's right to determine policy. [13]

[1] Chapter 730 of the Acts of 1977 as amended.
[2] *City of Boston v. Boston Police Superior Officers Federation*, 9 Mass. App. 898, 402 N.E.2d 1098 (1980)
[3] *Id.* at 1099.
[4] *Town of Burlington v. Labor Relations Commission*, 390 Mass. 157, 454 N.E.2d 465 (1983)
[5] *City of Taunton v. Taunton Branch of the Massachusetts Police Association*, 10 Mass. App. Ct. 237, 406 N.E.2d 1298 (1980)
[6] *Id.* at 1302.
[7] *Id.* at 1302.
[8] *Chief of Police of Dracut v. Town of Dracut*, 357 Mass. 492, 258 N.E.2d 531 (1970)
[9] *Id.* at 533.
[10] *City of Boston v. Boston Police Patrolmen's Association, Inc.*, 8 Mass. App. Ct. 220, 392 N.E.2d 1202 (1979)
[11] *Boston Police Patrolmen's Association, Incorporated v. Police Commissioner of Boston*, 4 Mass. App. Ct. 673, 357 N.E.2d 779 (1976).
[12] *Town of Mansfield*, 25 MLC 14 (1998).
[13] *Town of Burlington v. Labor Relations Com'n*, 390 Mass. 157, 454 N.E.2d 465 (1983).

CHAPTER 6 - PROMOTIONS

The promotion of public safety (police and fire) employees is an inherent managerial prerogative which is not subject to arbitration.[1]A municipal employer must provide the union (or other bargaining representative) with notice of any proposed change in the procedures to be used in making promotions to positions within the bargaining unit and to certain "non-unionized" positions outside of the bargaining unit. If the union makes a timely demand to bargain, the employer must engage in good faith negotiations until reaching either agreement or impasse before implementing the proposed changes.

Typically the use of psychological exams, interview panels, assessment centers, oral or written exams or similar screening devices for the first time will trigger a bargaining obligation, as will any substantive change on these areas.

§ 1 MANDATORY SUBJECT

The Labor Relations Commission has ruled that the procedures and requirements for promotion within the bargaining unit are mandatory subjects of bargaining.[2] However, to the extent that a proposal would violate a Civil Service provision (or presumably some other statute not listed in M.G.L. c. 150E, § 7(d)), it would not be mandatorily bargainable.[3] As noted above, the statute which describes the authority and procedure of the Joint Labor-Management Committee (JLMC) makes it clear that the right to promote is an inherent managerial prerogative.

A variety of promotional procedures have been found to be mandatory subjects of bargaining. For example, changed reliance on exams[4], psychological testing[5], new procedures[6], and an added new evaluation procedure[7].

§ 2 BARGAINING OBLIGATION

A public employer violates G.L. c. 150E, § 10(a)(1), (5), if it unilaterally alters a condition of employment involving a mandatory subject of bargaining without first giving the union representing its employees notice and an opportunity to bargain to agreement or good faith impasse. "A failure to meet and negotiate when there is a duty to do so and unilateral action without prior discussion can constitute an unlawful refusal to bargain, without regard to the party's good or bad faith."[8]

The obligation to bargain usually arises in the context of a management decision (or proposal) to institute new promotional requirements or procedures. For example, if promotions to a rank within the same bargaining unit have always been made in generally the same way, an *existing condition of employment* may be found by the Commission. In order to make a substantive change, the exclusive bargaining representative of the employees must be given notice of a planned or proposed change and the opportunity to request and engage in bargaining. The obligation to negotiate in good faith does not require parties to reach agreement or make a concession.[9]

1) Notice

Notice must be sufficiently clear so as to afford the union the opportunity to decide whether to request/demand bargaining.[10] It is not sufficient to *discuss* the matter with certain bargaining unit representatives.[11] Unless the union leadership has been provided actual notice, it is unlikely that the Commission will find that adequate notice has been given.[12] Vague reference to the proposed change will not suffice.[13]

The timing of such notice must be sufficiently in advance of the proposed change that the union has the ability to decide whether to forward a demand to bargain to the municipal employer.[14] Failure to make a timely demand to bargain may be found to constitute a waiver on the union's part, thus enabling management to implement its proposed change without further involvement with the union.[15]

2) Opportunity to Bargain

Once a timely demand has been made, the employer and the union must engage in good faith negotiations.[16] So long as such negotiations are in progress, the status quo should be preserved.[17]

Upon reaching agreement or impasse, the employer may implement the change.[18] Similarly, should the union fail to negotiate in good faith, the employer may stop negotiating and implement its proposal.[19] Whenever the employer implements a change without the union's agreement in such cases, it should use its *pre-impasse* position as the basis for such implementation.[20]

Where an externally imposed deadline is involved, the length of any such negotiations may be curtailed.[21] For example, where a vacancy occurs in a rank for which the Civil Service eligibility

list is due to expire in a short time, an employer may be able to insist on an expedited or truncated (curtailed) bargaining process.

PRACTICE POINTERS

An argument could be made that the matter of promotions is entirely a managerial prerogative and, therefore, bargaining is not required. However, as discussed above, the Labor Relations Commission has determined that this is not the case. The courts would be likely to impose some bargaining obligation, even if they determined that promotional criteria and procedures were an exclusive managerial prerogative. In such cases the courts probably would still impose an obligation to bargain about the impact *of the proposed change on a mandatory subject of bargaining.*[22]

The Commission decisions in promotion cases generally do not refer either to impact *or* decisional *bargaining. However, the remedies awarded and the* dicta *of such cases support the proposition that the LRC views such cases as requiring* decisional *bargaining.*

In the context of changing promotional criteria or procedures, the distinction may not be terribly significant. It is clear that in either case an employer must engage in good faith negotiations with the exclusive representative (union) until reaching either agreement or impasse. In impact cases, the employer might be able to confine the union's role to questions concerning the impact of management's decision to use a new testing component, for example. In decisional bargaining, the employer would have to engage in good faith discussions and keep an open mind to union-proposed alternatives. As a practical matter, it is likely that virtually identical topics would be discussed in either context.

[1] Chapter 730 of the Acts of 1977, as amended.
[2] *Commonwealth of Massachusetts*, 9 MLC 1082, 1083 (1982); *Town of Danvers*, 3 MLC 1559 (1977); *Town of Wilbraham*, 6 MLC 1668 (1979); *Boston School Committee*, 3 MLRR 1148 (1977).
[3] *Town of Wilbraham*, *supra* note 1; *Town of Danvers*, *supra*, note 1.
[4] *Town of Norwell*, 16 MLC 1575 (1990)
[5] *Town of Danvers*, 9 MLC 1829 (1983)
[6] *Town of Stoneham*, 8 MLC 1275 (1981)
[7] *Town of Wayland*, 5 MLC 1773 (1978)
[8] *School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. 557, 572 (1983).
[9] *Commissioner of Administration and Finance v. Labor Relations Commission*, 60 Mass.App.Ct. 1122, 805 N.E.2d 531 (Table) (2004) (unpublished).
[10] *Comm. of Mass.*, 17 MLC 1282 (1991)
[11] *Boston School Comm.*, 4 MLC 1912 (1978)
[12] *City of Gardner*, 10 MLC 1218 (1983)
[13] *Id.*
[14] *Comm. of Mass.*, 21 MLC 1029 (1994)
[15] *City of Boston*, 13 MLC 1706 (1987)
[16] *Town of Marblehead*, 12 MLC 1668 (1985)
[17] *City of Gardner*, 10 MLC 1218 (1983)
[18] *Town of Arlington*, 21 MLC 1125 (1994)
[19] *Woods Hole, Martha's Vineyard*, 12 MLC 1531 (1986)
[20] *Town of Brookline*, 20 MLC 1570 (1994)
[21] *Town of Wilbraham*, 6 MLC 1668 (1979)
[22] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983).

CHAPTER 7 - APPOINTMENTS

The appointment of public safety (police and fire) employees is an inherent managerial prerogative that is not subject to arbitration.[1] An employer is free to determine non-discriminatory qualifications for job vacancies. There is no need to involve the union in this matter of managerial prerogative. However, the starting pay or step is a matter of union concern. If a municipal employer wants to hire someone at a rate or step different from that set by the collective bargaining agreement, it must so notify the Union. It may not be necessary to secure the union's consent so long as the municipal employer provides notice and opportunity to bargain. While the cases are not clear, it is possible that bargaining in good faith to the point of agreement or impasse is all that is required. (A safer practice is to include a notation in a contract that management reserves this right. It is often easier to reach agreement when no one is about to be hired.)

§ 1 HIRING STANDARDS

An employer does not need to bargain over hiring decision and qualification standards. Both the National Labor Relations Board (NLRB) and the Massachusetts Labor Relations Commission (LRC) have held that a union cannot insist on bargaining over terms and conditions of employment of persons who are not yet members of the bargaining unit.[2] In *Allied Chemical Workers v. Pittsburgh Plate & Glass Co.*,[3] the Supreme Court said:

> The obligation to bargain extends only to the [wages, hours and] terms and conditions of employment of the employer's employees in the unit appropriate for such purposes which the unit represents.

Conditions imposed on applicants for a job, i.e., "conditions for hire", are not subject to a bargaining obligation, because "mere applicants for hire, who have had no prior employment within the bargaining unit in question, are not 'employees in the unit' within the meaning of Section 5 of the Law."[4] The LRC, in *Boston School Committee*[5],held that a public employer has no duty to bargain over a requirement which is purely a condition of hire. The LRC said:

> The law gives the exclusive representative the right to act for and negotiate agreements covering [only] employees in the unit. Mere

> applicants for hire, who have had no prior employment within the bargaining unit in question, are not employees in the unit. The exclusive bargaining representative does not have the right . . . to bargain in behalf of such applicants.[6]

The National Labor Relations Board has held that requiring drug and alcohol tests of all applicants was outside the scope of bargaining.[7] Similarly, the LRC, in the *Boston School Committee* case, made it clear that the employer can use any hiring criteria it wants as a condition of hire, so long as the criteria employed are not discriminatory.[8] Thus in *Boston School Committee*[9] and *Town of Lee*[10], the LRC upheld residency requirements as a precondition to employment.

Nevertheless, when an employer's hiring decisions impact the terms and conditions of employment of existing bargaining unit members, the LRC has allowed the unions to challenge the practice. Challenges to an employer's hiring practices generally involve two types of disputes: 1) transfer of bargaining unit work to non-bargaining unit members,[11] and 2) imposing new obligations on applicants which carry over into employment.[12]

The *City of Lawrence* case encompasses the first type of dispute.[13] There the employer alleged that its transfer of work (previously held by city bargaining unit members) to prisoners and welfare recipients was not an unlawful transfer of bargaining unit work because the transferees were not "hired" or "employed" by the city.[14] The ALJ rejected this defense, stating that the employer could not escape an unlawful transfer of bargaining unit work charge by claiming that the transferees were not "hired".[15]

The second type of dispute is more common. In *City of Haverhill*, the employer imposed a requirement on applicants that they take a psychological examination, the results of which were not made known until after the applicant became employed.[16] The Hearing Officer noted the general rule that an employer's hiring practices cannot be the subject of debate or bargaining with the union, but stated that the psychological testing requirement in *Haverhill* was more of a "condition for continued employment" than a "condition of hire". Thus, "once the employer hires an applicant, even conditionally, and that person performs work for wages, the individual has become a bargaining unit member, thus dissipating the 'mere applicant' rationale."[17] In *Haverhill*, the "applicants" had actually been employed for five months at the time they were terminated based on the results of the psychological examination. The Hearing Officer found that the employer's imposition of the test without

providing the union with an opportunity to bargain, as a requirement of continued employment, constituted a prohibited practice.[18]

While an employer is also free to create new positions and establish the hiring criteria for those positions,[19] the new positions may be included in the bargaining unit. The employer may not, as a means of evading union representation, eliminate a bargaining unit position and "create" a new one outside of the unit.[20]

PRACTICE POINTERS

In the public safety service, it is essential to evaluate thoroughly all applicants for employment. The union's role starts once an individual begins work. Whatever the municipal employer does by way of recruitment, background check, evaluation, and testing (including aptitude, intelligence, medical, drug/alcohol and psychological), is of no lawful concern to the union.

Employers must be mindful of the requirements of the Americans with Disabilities Act (ADA) as well as M.G.L. c. 151B when medical and psychological testing is used. It is necessary that the applicant be given a "conditional offer of employment" before such testing is performed. Thus, if they pass the physical and/or psychological tests, they have the job. (Psychological testing which is limited to personality and other non-disease screening may be done before the conditional offer of employment, however.)

If certain test results have not been received as of the planned date of appointment, the only way an employer can hire the individual "conditionally" is with the consent of both the individual and the union.

In *Boston School Committee*, the Labor Relations Commission made it clear that an employer can set any qualification it wishes as a condition of hire, so long as it is not discriminatory.[21] Nonetheless, there have been a few cases where a union has challenged an employer's ability to impose a certain qualification. Couched in terms of pre-hire *conditions*, the analysis in these cases is the same as it would be for *qualifications*. The LRC's decisions regarding pre-hire conditions have concluded consistently that pre-hire qualifications are an exclusive managerial prerogative which need not be bargained with a union.

While an arbitrator may void an appointment if it violates a provision in a collective bargaining agreement, the arbitrator cannot direct that another individual be appointed.[22]

In both *Boston School Committee*,[23] and *Town of Lee*,[24] the LRC upheld the imposition of a residency requirement on all new hires as a condition of hire. As a condition of hire, it only pertained to applicants who, as *potential* or *prospective* employees, are not members of the bargaining unit. Similarly, in *Star Tribune*,[25] the National Labor Relations Board (NLRB) held that requiring drug and alcohol tests of all applicants was outside the scope of bargaining. In *City of Haverhill*,[26] the LRC held that an employer could impose a qualification that all applicants undergo a psychological exam as a condition of being hired. In each of these cases, the key inquiry was whether or not the qualification was imposed on applicants or employees; so long as the qualification only affected applicants, they were upheld.

PRACTICE POINTERS

While the distinction between applicant and employee seems clear, there is one nuance of which employers should be aware. Any qualifications or conditions of hire must be imposed and decided before *the person is hired, even if only conditionally.*

While whether a person meets the qualifications such as college degrees, CPR training, etc., can be decided immediately, some qualifications often take longer to consider. Where such a delay occurs, and the employer chooses to conditionally-hire the applicant, permitting the person to work pending the confirmation of a qualification, the LRC will likely consider the person an "employee" and require the employer to bargain over that qualification. Psychological testing which was not given until after an employee started work is such an example.[27] Where the results are not known or the test is not even administered until after the person was put to work, the qualification actually becomes a condition of continued "employment", not a condition of "hire".

Attention should also be paid to the requirements of various federal and state anti-discrimination laws. For example, the Americans With Disabilities Act (ADA) (and presumably G.L. c.151B) precludes medical and psychological illness testing until a conditional offer of employment is made.

§ 2 ENTRY-LEVEL WAGES

Unlike establishing qualifications for applicants, establishing wages for entry-level employees is a mandatory subject of bargaining.[28] Wages, because they are earned *after* an applicant becomes an employee and a member of the bargaining unit, must be negotiated if the union so requests.[29] An employer may not unilaterally decrease *or* increase the

entry-level wage of a bargaining unit position without giving the bargaining representative notice and an opportunity to bargain.

Dracut School Committee[30] held that an employer cannot offer an applicant for a bargaining unit position a different pay rate than it is paying present bargaining unit members without offering to bargain (or at least providing the union with notice and an opportunity to bargain.) In that case, the school committee and the teachers' association were parties to a collective bargaining agreement which provided that all newly-hired teachers were to be placed at a salary step commensurate with their teaching experience. For more than fifteen years, the school committee capped the step placement of new-hires at Step 5 regardless of their experience. Realizing the difficulty such a cap had on attracting qualified teachers, the Committee unanimously voted to remove the Step 5 cap for new-hires.

While the union argued that the school committee could not unilaterally change its past practice without first giving the union an opportunity to bargain over that mandatory subject, the school committee argued that it had three grounds on which to justify its decision. First, it argued that the establishment of an individual's salary-step level was purely between it and the individual. The school committee argued that since the individual was not yet a bargaining unit member, the union had no right to demand bargaining. Next, the school committee argued that the establishment of step levels was a non-bargainable management right because it involved the establishment of educational policy. Finally, the school committee argued that if it were required to bargain over the step levels given to new-hires, it could be impermissibly constrained from hiring the applicant of its choice, which it argued was a management right.

Beginning its opinion by stating the general rule that initial wages for a newly-created bargaining unit position are "wages" for bargaining purposes, the LRC then cited a recent case where it held that payments made to employees because of their work performance and length of service did constitute "wages".[31]

Addressing each of the school committee's arguments in order, the LRC first found that since one's step level directly affects his or her "wages", it was a mandatory subject of bargaining. In deciding as it did, the LRC said:

> It is true that mere applicants for hire who have not had prior employment within the unit are not employees in the unit. However, it is the bargaining unit position, not the individual applicant, that is the focus of this case. If a bargaining unit is under contract and subject to certain conditions of employment and an

> employee is hired into a bargaining unit position, the new employee's wages are governed not only by the existing contract but also any established practice that affects that position.[32]

It next concluded that there is a clear distinction between "educational policy" and "terms and conditions of employment".[33] Salary levels, it said, were not matters of educational policy but are terms and conditions of employment.

Turning lastly to the school committee's argument that bargaining over step-levels would infringe on its management rights by restricting it from hiring the applicant of its choice, the LRC found that the duty to bargain does not affect the school committee's choice of candidates for bargaining unit positions. Moreover, while conceding that the decision to remove the top "step" was done pursuant to the school committee's need to attract experienced teachers into the school system, the LRC said it would only uphold the unilateral action if it found great economic necessity. Removing the top step for new hires, said the Commission, was not such an economic necessity. While sympathetic to the school committee's needs, it refused to uphold the change because "where the action of an employer is certain to undermine the status of the union, the overall employer's justification of economic necessity may not serve as a defense".[34]

PRACTICE POINTERS

An employer that wishes to create a new position is free to do so. There is no need to discuss with the union whether the position should be created. The qualifications are totally up to the employer. However, the sooner some discussion is started with the union, the smoother the process is likely to flow when it comes to matters which the union is entitled to discuss.

One matter deserving attention is whether the new position should be included in an existing bargaining unit, and, if so, which unit. Usually this will not be a difficult decision. However, if management seeks to have a new position excluded from any unit, a CAS Petition is likely to be filed by one or more unions with the LRC.

Assuming the employer agrees the new position should be included in an existing bargaining unit, it will be helpful to notify the union of plans to recruit and hire for the position. Showing the union a draft job description and the proposed salary range and qualifications will satisfy management's obligations to afford the union with notice. *Unless the*

union requests bargaining in a timely manner, the employer is free to recruit and hire consistent with the pay specified in the notice.

It may not be possible to utilize mid-term bargaining where the employer wants to change the entry-level pay for a position which is already covered by the existing contract. If the union refuses to discuss a proposed change, management may have to wait until successor contract negotiations get started.

[1] Chapter 730 of the Acts of 1977.
[2] *Allied Chemical Workers v. Pittsburgh Plate & Glass Co.*, 407 U.S. 157, 92 S.Ct. 383 (1971).
[3] *Id.*
[4] *Boston School Committee*, 3 MLC 1603, 1608 (1977). *See also, Town of Lee*, 11 MLC 1274, 1276, n. 5 (1984). The LRC has decided a number of cases that find an exception to this rule, however. *See, e.g., Dracut School Committee*, 13 MLC 1055 (1986) (finding that employer violated law by unilaterally changing the salary caps for newly hired employees). Wages will be discussed further in another section of this Chapter.
[5] *Boston School Committee*, 3 MLC 1063 (1977).
[6] *Id*. at 1068. *See, Chelmsford Sch. Admin. Assoc.*, 8 MLC 1515 (1981); *Saugus Sch. Comm.*, 7 MLC 1849 (1981); *Town of Randolph*, 8 MLC 2044 (1984)
[7] *Star Tribune*, 295 NLRB 63 (1989).
[8] *Boston School Committee*, 3 MLC 1603. Discrimination will be covered in a later chapter.
[9] *Id*.
[10] *Town of Lee*, 11 MLC 1274 (1984). But see, City of Worcester, 5 MLC 1414 (1978) (holding that City did have duty to bargain over imposition of residency requirement as a condition of *continued* employment).
[11] *See Lawrence*, 21 MLC 1691 (1995).
[12] *See Lowell School Committee*, 22 MLC 1321 (1996).
[13] *City of Lawrence*, 21 MLC 1691 (1995).
[14] *Id*. at 1694.
[15] *Id*.
[16] *City of Haverhill*, 16 MLC 1077 (1989).
[17] *Id*. at 1082. *See also, Lockheed Shipping Co*., 273 NLRB 1711, 118 LRRM 1254 (1984).
[18] *City of Haverhill*, 16 MLC at 1083. *See also, Lowell School Committee*, 22 MLC 1321, 1325 (1996) (ALJ holding that School Committee's change in the method of appointing coaches and advisors, who had previously been appointed until they chose to relinquish the position and who now had to undergo re-appointment procedures, constituted an unlawful unilateral change in working conditions).
[19] *City of Lowell*, 12 MLC 1656 (1986) (holding that it was employer's managerial prerogative to reestablish a position previously eliminated).
[20] *City of Leominster*, 17 MLC 1391 (1991).
[21] *Boston School Committee*, 3 MLC 1063 (1977)
[22] See *School Committee of Lowell v. Local 159, Service Employees Int'l Union*, 42 Mass.App.Ct. 690, 679 N.E.2d 583 (1997); *School Commission of Peabody v. Peabody Fed'n of Teachers, Local 1289*, 51 Mass.App.Ct. 909, 748 N.E.2d 992 (2001); *School Committee of Newton v. Newton School Custodians Association, Local 454, SEIU*, 438 Mass. 739, 784 N.E.2d 598 (2003).
[23] *Id.*
[24] *Town of Lee*, 11 MLC 1274 (1984). *See, City of Worcester*, 5 MLC 1414 (1978) (held Town did have obligation to bargain over imposing a residency requirement as a condition of *continued* employment.)
[25] *Star Tribune*, 295 NLRB 63 (1989).
[26] *City of Haverhill*, 16 MLC 1077 (1989).
[27] *City of Haverhill*, 16 MLC 1077 (1989).
[28] *Melrose School Committee*, 3 MLC 1299 (1976); *Northeast Reg. Sch. Dist.*, 1 MLC 1075 (1974).
[29] *Boston School Committee*, 10 MLC 1410 (1984).
[30] *Dracut School Committee*, 13 MLC 1055 (1986).
[31] *Natick School Committee*, 11 MLC 1387 (1985).
[32] *Dracut School Comm*., 13 MLC at 1057.
[33] *See, School Committee of Hanover v. Curry*, 369 Mass. 683, 343 N.E.2d 144 (1976).
[34] *Dracut School Committee*, 13 MLC at 1058 *citing Blue Hills Regional School District*, 3 MLC 1613 (1977).

CHAPTER 8 - BARGAINING UNIT WORK

A public employer violates Section 10(a)(5) of the Law when it transfers work performed by bargaining unit members to non-bargaining unit personnel without giving its employees' exclusive collective bargaining representative prior notice and an opportunity to bargain to resolution or impasse.[1] To determine whether a department may contract out bargaining unit work, and whether there are bargaining obligations for doing so, one must look first to the language contained in the collective bargaining agreement itself. A public employer must bargain with the union before transferring work traditionally performed by bargaining unit employees to personnel outside the unit.[2] In order to prove that an employer unlawfully transferred work outside the bargaining unit, the union must show:

1. the employer transferred unit work to non-unit personnel;
2. the transfer of work had an adverse impact on either individual employees or on the bargaining unit itself; and
3. the employer did not provide the union with prior notice of the decision to transfer the work and opportunity to bargain.[3]

The Commission has held consistently that a transfer of bargaining unit work, even if accompanied by no apparent reduction in bargaining unit positions, constitutes a detriment to the bargaining unit because it could result in an eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties.[4] Similarly, the Commission has held consistently that losing the opportunity to perform unit work in the future is a sufficient detriment to the unit to trigger a bargaining obligation.[5] In a recent case, while the number of bargaining unit members may have remained the same, the bargaining unit lost a specialized position that was specifically enumerated in the collective bargaining agreement.[6] Bargaining unit members therefore lost the opportunity to perform that position, and to earn the stipend associated with that position. These factors constitute an adverse impact that is sufficient to trigger the bargaining obligation.[7] The courts have supported these positions.[8] In a 2004 Appeals Court case involving the *State Department of Mental Retardation*, the department transferred bargaining unit work from second-level residential supervisors to non-union program managers when it allowed managers to directly supervise first-level supervisors in new four-person group homes; the transfer of bargaining unit work constituted a detriment to the bargaining unit; and the Department failed to give

union notice and opportunity to bargain. However, the Commission was required to modify its order to eliminate the suggestion that the end result of bargaining would be the restoration of certain duties to the bargaining unit.

In a 2002 case involving the Boston Police Department, the Association argued that the City transferred bargaining unit work when it assigned two individuals to identify latent prints recovered from crime scenes after they were promoted to detective.[9]

To determine whether the City transferred bargaining unit work, the LRC must first determine whether the duty of latent print identification was the exclusive bargaining unit work of patrol officers or whether patrol officers shared the work with non-unit personnel. When work is shared by bargaining unit members and non-unit employees, the Commission has determined that the work will not be recognized as exclusively bargaining unit work.[10] In those shared work situations, an employer is not obligated to bargain over every incidental variation of job assignments between unit and non-unit employees.[11] Rather, the employer is only required to bargain if there is a calculated displacement of unit work.[12] Therefore, if unit members have performed an ascertainable percentage of the work, a significant reduction in the portion of the work performed by unit members with a corresponding increase in the work performed by non-unit employees may demonstrate a calculated displacement of unit work.[13]

An employer must bargain about a transfer of unit work if the transfer of unit work results in an adverse impact on individual employees or the bargaining unit as a whole.[14] Here, the City's assignment of latent print identification duties to the two individuals after they became detectives denied individual unit members the opportunity to perform the specialized duty of identifying latent prints[15], and reduced the opportunities for bargaining unit members to perform this work in the future.[16] Accordingly, the City's transfer of the latent print identification work had an adverse impact on individual bargaining unit members and to the bargaining unit as a whole that triggered the City's statutory obligation to bargain to resolution or impasse with the Association prior to transferring that work. However, the record indicates that the City did not notify the Association that it planned to transfer unit work to non-unit employees or bargain with the Association prior to transferring the exclusive bargaining unit work at issue here.

Often, during the life of an existing bargaining agreement, public safety and other municipal departments realize that certain tasks, such as custodial and maintenance work, for example, could be performed in a more efficient or cost effective manner if they were contracted out to the

private sector rather than performed by bargaining unit personnel. Similarly, an employer may desire to transfer bargaining unit work to other municipal employees outside of the bargaining unit.

An employer's decision to transfer bargaining unit work to non-unit personnel and the impacts of that decision are mandatory subjects of bargaining that trigger the bargaining obligation defined in *School Committee of Newton.*[17] This was the case where the Saugus Police Department decided to transfer vehicle repair duties to the DPW garage once the full-time police officer mechanics retires after thirty years on the job.[18] Even though certain work (transmissions, etc.) had been contracted out, the LRC found that the "shared work" exception did not apply. The town was required to restore the position and bargain to agreement or impasse before transferring out such work.

In a 2002 case involving the State Police Crime Lab, the Labor Relations Commission found that on-call duty for the purpose of receiving calls from the DEA to assist in clandestine lab investigations was exclusively bargaining unit work.[19]

In addressing the second element of the Commission's analysis, the Commonwealth argued that the Union has suffered no adverse impact as a result of the alleged transfer of work, because the affected chemists continued to receive on-call pay and overtime associated with responding to the clandestine lab requests, and because managers did not perform the duties of the DEA-trained chemists at clandestine labs. A bargaining unit suffers an adverse impact whenever it loses an opportunity to perform work in the future.[20] The LRC noted that after the Commonwealth rescinded the on-call list, the bargaining unit lost the opportunity to earn on-call pay at the same level as it had prior to the change. Therefore, the evidence established that the revocation of the list directly and adversely impacted the bargaining unit's ability to earn on-call pay in the future.

In addressing the third factor in the transfer of bargaining unit work analysis, the Commonwealth argued that it had no obligation to bargain over the alleged transfer of work because the Union contractually waived its right to bargain, maintaining that the parties already negotiated a stand-by provision in the parties' collective bargaining agreement. A contractual waiver must be knowing, conscious, and unequivocal.[21] In determining whether a union has contractually waived its right to bargain, the Commission will first examine the language of the contract.[22] The Commission has consistently held that an employer asserting the affirmative defense of contract waiver must show that the subject was consciously considered and that the union knowingly and unmistakably waived its rights to bargain.[23]

The Commonwealth additionally contended that it had no duty to bargain with the Union because revocation of the on-call list was a managerial decision concerning the provision of services. Decisions concerning the deployment of public services are management prerogatives, not subject to bargaining.[24] (City's decision to provide fire prevention inspections at a vacant school building constitutes a level of services decision)[25]; (the number of custodians assigned to each building is a managerial decision)[26]; (decision concerning whether to require police presence at certain construction details is a core governmental decision impacting the level of services to be offered.)

Relying on *Town of Dennis*[27], the Commonwealth asserted that due to the extremely low numbers of requests for assistance from the DEA with clandestine lab investigations, 24-hour on-call duty by chemists was no longer warranted. In *Town of Dennis*, the Commission found that the Town's decision to discontinue providing private police details at liquor service establishments was a level of service decision, and determined that the Town was only required to bargain over any impacts of that decision on bargaining unit members.[28] However, the LRC determined that this case does not concern a level of services decision because the DSP continues to provide 24-hour, seven day a week coverage for calls from the DEA requesting assistance with clandestine lab investigations. Moreover, the Commission has held that where the same services previously performed by unit employees are to still be used by the employer in its operations, but are to be performed by non-unit employees, the bargaining obligation will arise unless the employer can show a compelling nondiscriminatory reason why it should be excused from the obligation.[29] Although the Commonwealth alleged that the chemists' on-call duty for clandestine lab investigations was costly and unnecessary given the small number of requests for assistance from the DEA, the Commission did not find that these reasons to be sufficiently compelling to excuse its duty to bargain with the Union over the transfer of that on-call duty to management personnel. Lastly, the Commission noted that even if this case concerned a level of services decision, the Commonwealth was still required to bargain with the Union over the impacts of the decision to transfer stand-by duty.[30] There was no evidence that the Commonwealth bargained over the impacts of the decision to transfer on-call duty from bargaining unit members to management personnel.

For all of the above reasons, the Commission concluded that the Commonwealth violated the Law by transferring on-call duty from bargaining unit members to non-unit personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse.

§ 1 REMEDY

If the LRC concludes that an employer has unilaterally transferred bargaining unit work to non-unit personnel, without first giving the union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision, a remedial order will issue.[31] The following items are likely to be included in such order:

- Upon request, bargain in good faith with the union to resolution or impasse concerning the decision to transfer _____ _____ duties to non-union employees.
- Restore to the bargaining unit the following duties that were transferred to a non-unit employees:_____ _____.
- The obligation to restore the foregoing duties to the bargaining unit shall continue until the earliest of the following conditions is met:

  1. Mutual agreement is reached with Union relating to the subjects of bargaining set forth in paragraph 2(a) above;
  2. Good faith bargaining results in a bona fide impasse
  3. The Union fails to request bargaining within fifteen (15) days of this Modified Order; OR
  4. The Union subsequently fails to bargain in good faith.
  5. Make whole any bargaining unit member who suffered a monetary loss as a result of the Commonwealth's decision to transfer the duties. The obligation to make employees whole shall continue until the earliest of the enumerated conditions, set forth in paragraph 2(b) are met
  6. Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, the attached Notice to Employees.
  7. Notify the Commission within ten (10) days of receipt of this Order of the steps taken to comply with it.

§ 2 CONTRACT OUT/NON-CONTRACT OUT CLAUSES

Whether an employer is restricted from subcontracting out work depends on whether it is expressly barred from doing so in the collective bargaining agreement.[32] In the absence of a contractual prohibition, an employer is free to contract out bargaining unit work so long as it fulfills its mid-term bargaining obligations. A "non-contract out" or "work preservation" clause is a provision contained in a collective bargaining agreement whereby the

employer agrees that it will not subcontract bargaining unit work outside the bargaining unit.[33] Alternatively, an employer and its employees may adopt a bargaining agreement provision in which the employer expressly reserves the right to contract out bargaining unit work.[34]

Under a "non-contract out" clause, an employer may not contract out services irrespective of whether it is willing to engage in decision or impact bargaining.[35] Conversely, where there exists a contract provision which expressly grants the employer the right to contract out bargaining unit work, the employer may exercise that right without bargaining over its decision to do so.[36] The employer must, however, afford the union an opportunity to bargain over the impact of that decision.[37]

1) Waiver

The Commission has consistently held that a union waives its right to bargain by inaction if the union: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining.[38] The employer must prove these elements by a preponderance of the evidence, as the Commission does not infer a union's waiver of its statutory right to bargain without a "clear and unmistakable" showing that a waiver occurred.[39]

Because "contract out" and "non-contract out" clauses constitute a waiver of a party's respective rights, the Labor Relations Commission will only enforce them if they are clear and unambiguous.[40] Only where the waiver is reasonably ambiguous will the Commission consider the bargaining history between the parties.[41]

With regard to "contract out" provisions, the Commission has most frequently found that the clauses at issue did not sufficiently afford the employer the right to contract out work without having to bargain with the union first.[42] In those cases, the employers unsuccessfully sought to rely on the wording in the management right's clause to "layoff because of lack of work or other legitimate reasons."

Speaking on what does constitute a contractual waiver, the Commission has held that the following clause is sufficiently clear:

> [Management retains the right] to manage the affairs of the Town and to maintain and improve the efficiency of its operation; to determine the methods, means, processes and persons by which operations are to be conducted *including the contracting out of work*.[43] [Emphasis added.]

2) Absence of Clause

In the absence of a clear and unequivocal provision restricting or expanding an employer's right to contract out bargaining unit work, an employer may contract out such work so long as it does not do so in an unlawful manner.[44]

To lawfully contract out bargaining unit work, an employer must afford the union an opportunity to bargain over the decision and impact of the proposed change, and allow the union the opportunity to possibly make its bargaining unit competitive with other employers prior to implementing that decision.[45] Lowell was guilty of falling to provide formal notice to the union before eliminating its Ashes and Waste Division.[46] Even though it held 18 negotiating sessions with the union over the City's Department of Public Works (DPW) reorganization plan, no actual notice of the elimination of the division was given to the union.[47]

The Commission will determine whether an employer unlawfully transferred work outside the bargaining unit by asking:

(1) Did the employer transfer bargaining unit work to non-unit individuals?
(2) Did the transfer of work have an adverse impact on either the individual employees or on the bargaining unit itself? and
(3) Did the employer give the exclusive bargaining representative prior notice and an opportunity to bargain over the decision to transfer the work?[48]

By definition, in virtually all contract-out clause cases, the first two inquiries are answered affirmatively.[49] Turning to the third question, the Commission analyzes whether the employer gave the union notice and an opportunity to bargain.

As to what constitutes "notice", the Commission requires that notice be actual rather than based upon rumor or mere speculation.[50]

With regards to the "opportunity to bargain", the Commission requires that the employer be willing and available to bargain over a proposed change before implementing it.[51] So long as good faith negotiations are held if the union so requests, management may implement its proposal upon reaching either agreement or impasse.

[1] *City of Cambridge*, 23 MLC 28, 36 (1996), *aff'd sub. nom., Cambridge Police Superior Officers Association v. Labor Relations Commission*, 47 Mass. App. Ct. 1108 (1999). *School Committee of Newton v. Labor Relations Commission*¸388 Mass. 557 (1983); *Lowell School Committee*, 28 MLC 29 (2001); see also, e.g., *City of Somerville*, 23 MLC 256, 259 (1997); *City of Quincy*, 15 MLC 1239, 1240 (1988); *City of Boston*, 6 MLC 1117, 1123 (1979); *Town of Danvers*, 3 MLC 1559, 1576 (1977); *City of Boston*, 21 MLC 1350 (1994).
[2] *Commonwealth of Massachusetts*, 24 MLC 116 (1998); *City of Quincy*, 15 MLC 1239 (1988); *Town of Danvers*, 3 MLC 1559 (1977).
[3] Commonwealth of Massachusetts and AFSCME, Council 93, *21 MLC 1029 (1999);* Commonwealth of Massachusetts, 24 MLC 116 (1998); *Higher Education Coordinating Council*, 25 MLC 69 (1998); B*oard of Regents of Higher Education*, 19 MLC 1485 (1992); *City of Gardner*, 10 MLC 1218 (1983); *Lowell School Committee*, 28 MLC 29, 31 (2001); *City of Gardner*, 10 MLC 1218, 1219 (1983); *Town of Bridgewater*, 25 M.L.C. 103, 104 (1998).
[4] *City of Holyoke*, 26 MLC 97, 99 (2000); *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998).
[5] *City of Holyoke*, 26 MLC 97, 98 (2000); *Town of Norwell*, 13 MLC 1200, 1208 (1986).
[6] See _____ 29 MLC
[7] See *City of Holyoke*, 26 MLC 97, 98 (2000); *Town of Norwell*, 13 MLC 1200, 1208 (1986); *Franklin School Committee*, 6 MLC1297, 1299 n. 4 (1979).
[8] See *Burlington v. Labor Relations Commission*, 390Mass. 157, 454 N.E.2d 465 (1983); *City of Boston v. Labor Relations Commission*, 58 Mass.App.Ct. 1102, 787 N.E.2d 1154 (Table) (2003) (unpublished opinion.)
[9] *City of Boston*, 28 MLC 369 (2002).
[10] *Higher Education Coordinating Council*, 23 MLC 90, 92 (1996); *City of Boston*, 6 MLC 1117, 1125 (1979).
[11] *City of Somerville*, 23 MLC 256, 259 (1997).
[12] *Town of Bridgewater*, 23 MLC 103, 104 (1998).
[13] *Commonwealth of Massachusetts*, 27 MLC 52, 56 (2000); *City of New Bedford*, 15 MLC 1732, 1737 (1989); see also *Commonwealth of Massachusetts*, 29 MLC 43 (2002).
[14] *City of New Bedford*, 15 MLC 1732, 1737 (1989).
[15] *See e.g. Commonwealth of Massachusetts*, 24 MLC 118, 119 (1998).
[16] *See e.g. City of Cambridge*, 23 MLC at 50; *Franklin School Committee*, 6 MLC 1297 (1979).
[17] *Supra; see e.g., Higher Education Coordinating Council*, 23 MLC 90, 92 (1996); *City of Quincy*, 15 MLC 1239, 1240 (1988).
[18] *Town of Saugus*, 29 MLC 208 (2003).
[19] *Commonwealth of Massachusetts*, 28 MLC 308 (2002).
[20] *See City of New Bedford*, 15 MLC 1732, 1739 (1989).
[21] *Town of Marblehead*, 12 MLC 1667, 1671 (1986).
[22] *Id*.
[23] *Board of Trustees of the University of Massachusetts/University Medical Center*, 21 MLC 1795, 1802 (1995).
[24] *See City of Newton*, 16 MLC 1036 (1989)
[25] *Boston School Committee*, 13 MLC 1444 (1987)
[26] *City of Worcester*, 4 MLC 1378 (1977).
[27] *Town of Dennis*, 12 MLC 1027 (1985).
[28] *Id*. at 1031.
[29] *See City of Boston*, 4 MLC 1202, 1210 (1977) (employer had an obligation to bargain over subcontracting bargaining unit work to private employees).
[30] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[31] See, e.g., *Commonwealth of Massachusetts*, 31 MLC 112 (2004).
[32] *Gaylord Container Corp.*, 93 LA 465 (Abrams 1989). *See, e.g., Champion International Corp.*, 91 LA 245 (Duda 1988) (bargaining agreement specifically prohibited paper mill from contracting out work "normally performed" by maintenance employees); *Hoffman-Marmolejo*, 93 LA 132 (1989) (employer violated bargaining agreement's no-subcontracting clause when it subcontracted utility work).

[33]*Safeway Stores, Inc.*, 95 LA 668 (Goodman 1990)
[34]*See, Town of Acushnet*, 11 MLC 1423 (1985).
[35]*Champion International Corp.*, 91 LA 245 (Duda 1988).
[36]*Town of Marblehead*, 12 MLC 168 (1985).
[37]*Id.*
[38] Town of Dennis, 26 MLC 203, 204 (2000); Town of Hudson, 25 MLC 143, 148 (1999).
[39] Holyoke School Committee, 12 MLC 1443, 1452 (1985), citing City of Everett, 2 MLC 1471, 1476 (1976), affd. Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979).
[40]*Bd. of Regents*, 19 MLC 1248 (1992); *Melrose Sch. Comm.*, 9 MLC 1713 (1983).
[41]*City of Boston*, 7 MLC 2013 (1981).
[42]*See, e.g., Comm. of Mass.*, 21 MLC 1029 (1994); *Boston School Comm.*, 4 MLC 1912 (1978); *Town of Marblehead*, 12 MLC 168 (1985).
[43]*Town of Acushnet*, 11 MLC 1425 (1985).
[44]*Comm. of Mass.*, 21 MLC 1039 (1994); *Mass Board of Regents*, 19 MLC 1485, 1487-88 (1992).
[45]*Fireboard Products Inc. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398 (1964). *See also, Comm. of Mass.*, 17 MLC 1282 (1991); *City of Boston*, 4 MLC 1202 (1977).
[46] *City of Lowell*, 25 MLC 33 (1998).
[47] *Id.*
[48]*City of Gardner*, 10 MLC 1218, 1218 (1983).
[49]*Comm. of Mass.*, 21 MLC 1039 (1994).
[50]*Boston School Committee*, 4 MLC 1912, 1915 (1978), *as cited in City of Gardner*, 10 MLC 1218, 1221 (1983).
[51]*City of Gardner*, 10 MLC 1218, 1219 (1983). *See, e.g., Comm. of Mass.*, 21 MLC 1029 (1994) (employer refused union's repeated requests to bargain); *Town of Marblehead*, 12 MLC 1668 (1985) (employer gave notice, but then refused union's request to bargain).

CHAPTER 9 - REORGANIZATION

A governmental employer's decision to reorganize a department is within its managerial prerogative.[1] A public employer may exercise its managerial prerogative to determine the nature and level of its services without first bargaining over this decision with its employees' exclusive collective bargaining representative.[2] This is the case even where the reorganization involves transferring bargaining unit work to a position outside the bargaining unit.[3]

A public employer still must negotiate over the impacts of a core governmental decision on mandatory subjects of bargaining prior to implementation.[4] Such duty to impact bargain generally includes the duty to reach agreement or impasse with the union prior to implementation of the reorganization decision.[5]

In an effort to reduce costs and/or free up uniformed public safety employees, some departments have considered utilizing civilian dispatchers in place of sworn personnel. This can be done in an individual department or could involve combining one or more public safety dispatch functions into a central communications center. So long as the proper procedures are followed, this can be done at almost any time.

As a general rule, the assignment of bargaining unit work to persons outside of the bargaining unit is a mandatory subject of bargaining.[6] An employer violates the Massachusetts Collective Bargaining Law, M.G.L. c. 150E, by unilaterally changing employees' terms or conditions of employment without providing the union with notice and an opportunity to bargain.[7] In order to prevail in a charge of prohibited practice (unfair labor practice) before the Labor Relations Commission (LRC), an employee representative (union) must prove that the work assigned constituted bargaining unit work and that the change had a substantially detrimental effect on the bargaining unit.[8]

§ 1 BARGAINING UNIT WORK

In order to determine what constitutes bargaining work, an examination must first be made of the parties' collective bargaining agreement, or, if that is not conclusive, their past customs and practices.[9]

In the private sector, management may argue that the reassignment of work out of the bargaining unit is lawful and requires no bargaining where

the work is supervisory in nature.[10] In the public sector, however, employers probably will only be successful if the duties to be transferred somehow qualify as managerial (not simply supervisory) in nature.[11] Certainly this would not apply to dispatch duties.

The Town of Halifax was guilty of unlawfully transferring bargaining unit work when it filled a full-time firefighter position with a temporary replacement firefighter who was not a bargaining unit member.[12]

Other examples of unlawful unilateral assignment of bargaining unit work to non-bargaining unit personnel include:

- assigning nursing duties to a special education paraprofessional[13]
- assigning laborers' work to prisoners and welfare recipients[14]
- creating a new "working supervisor" with regular maintenance and custodial duties.[15]

The City of Fall River was held to have violated Section 5 and derivatively Section 1 of the Law by refusing to bargain in good faith with the union over the City's decision to transfer bargaining unit work (firefighter/dispatchers) to non-bargaining unit personnel (civilians, E-911, dispatchers located at the police station).[16] The LRC rejected the City's contention that this was a level of services decision and, therefore, an exclusive managerial prerogative exempt from decisional bargaining. The Commission declared the City's decision to transfer fire dispatch duties historically performed by bargaining unit members to non-unit personnel constitutes a mandatory subject of bargaining. The Commission noted that City employees would continue to perform fire dispatch duties, and when a public employer continues to have the same work performed, but at a lower cost, the decision to transfer bargaining unit work to non-unit personnel is not a level of services decision exempt from collective bargaining, but an economically motivated decision "particularly suitable to collective bargaining."[17]

PRACTICE POINTERS

Municipalities considering transferring dispatch duties to a new E-911 center should read City of Fall River carefully. It is likely that, with certain adjustments, the decision could amount to a level of services one and, therefore, be exempt from decisional bargaining. However, impact bargaining would still be required.

Regardless of whether decisional or impact bargaining was involved, the employer would still need to provide the union with notice and opportunity

to bargain, and, if requested, negotiate in good faith to agreement or impasse.

§ 2 SUBSTANTIAL DETRIMENT

The next issue to be addressed is whether the elimination of certain job duties from the bargaining unit causes it substantial detriment.[18]

A review of several LRC decisions will be helpful to illustrate the types of cases likely to result in adverse Commission rulings. No violation was found where the City of Boston hired traffic supervisors over the summer and expanded their duties to encompass issuing tickets and directing traffic at intersections.[19] Police officers normally performed that type of work. However, there was apparently enough work to go around. No officer lost overtime or was laid off and otherwise this work would not have been performed. The Commission concluded that there was no substantial detrimental impact on the police officer bargaining unit.

In a case involving the decision to staff firehouses with call firefighters at night, rather than permanent full-time members of the union, the Commission found this to be an unlawful unilateral assignment of bargaining unit work.[20] If the night shifts had not been filled with call firefighters, the regulars would have been used (as contrasted with the Boston case above).

While a decision simply to reduce the level of services is a managerial prerogative, the decision to transfer bargaining unit work previously performed by a security supervisor to employees outside of the bargaining unit, without giving the union prior notice and an opportunity to bargain, was held unlawful by the Commission.[21] Similarly, a Hearing officer found a violation where the employer transferred to the Executive Director the supervisory duties formerly performed by the position of maintenance foreman in a bargaining unit without first affording the union an opportunity to bargain over the decision.[22]

§ 3 SHARED WORK EXCEPTION

The prohibition against unilaterally assigning work does not generally apply to "shared work" situations.[23] The work will not be recognized as exclusive bargaining unit work.[24] When work is performed by individuals both inside and outside of a complaining bargaining unit, the Commission will not require bargaining unless the union can show a "clear pattern" of assigning the work to bargaining unit members.[25] When work is shared by bargaining unit members and non-unit employees, the Commission has determined that the work will not be recognized as exclusively

bargaining unit work.[26] In these shared work cases, an employer is not obligated to bargain over every incidental variation in job assignments between unit and non-unit employees.[27] Rather, the employer is only required to bargain if there is a calculated displacement of unit work.[28] Therefore, if unit members have performed an ascertainable percentage of the work, a significant reduction in the portion of the work performed by non-unit (sic) employees may demonstrate a calculated displacement of unit work.[29] In a 2002 case involving the Boston Police Department, the LRC dismissed a union charge that the hiring of a civilian instructor at the police academy amounted to a transfer of union work to non-union personnel, as work had been shared.[30] In a Saugus case, the use of both truant officers and police officers to perform similar work precluded the issuance of a prohibited practice charge.[31] In analyzing what constitutes bargaining unit work, the focus should be on the nature of the functions performed.[32] For example, the duties of assistants to the supervisors of cases were the same at all Boston district courts.[33]

In shared work situations, the Commission's analysis focuses on the pre-existing pattern of shared work and the impact that any changes in that pattern may have on the allegedly aggrieved party.[34] An employer may not unilaterally change a pre-existing pattern of shared work.[35]

In a 2003 case, the record revealed that from 1987 to 1999 patrol officers held the majority of the positions of assistant to the supervisor of cases, while detectives held a smaller number of those positions. Since the City's appointing a non-union individual did not change the pre-existing patterns and so no calculated displacement took place, the City did not violate the law.[36]

The union must introduce specific evidence concerning the percentage of such work performed by members of the bargaining unit. It failed to do so in a police case involving dispatching and ticketing in a shared work situation involving police officers, superior officers and even the chief, and thus the union's charge was dismissed.[37]

The Commission likewise ruled that the Town of Watertown was not guilty of unilaterally assigning police officer work to civilian dispatchers since the department had used Comprehensive Employment and Training Act (CETA) employees as dispatchers previously. However, the Town was still required to bargain the impact (or even the possibility of reversing the decision) upon the request of the union in the future.[38]

The Commission next analyzes whether the calculated displacement of union work had an adverse impact on either the bargaining unit members or the bargaining unit itself.[39] A loss of bargaining unit positions deprives bargaining unit members of work opportunities.[40] The transfer of

bargaining unit work, even accompanied by no apparent reduction in bargaining unit positions, constitutes a detriment to the bargaining unit (in the LRC's eyes, at least) because it could result in an eventual elimination of the bargaining unit through a gradual erosion of bargaining unit opportunities.[41] This is what happened in Hanson where the employer created a librarian position and transferred bargaining unit duties to that position.[42] The town failed to provide notice and opportunity to bargain in violation of the law.

The union is entitled to request bargaining in an attempt to change the status quo.[43] A community is not required to cease the past practice of employing civilian dispatchers; however, unless it has a "zipper clause" in its collective bargaining agreement, it is required to make itself available to negotiate the topic on demand. The fact that a union has not objected to a practice for several years does not eliminate its right, at some later date, to request bargaining on that practice.[44]

In a case also involving civilian dispatchers, the Town of Dartmouth was held to have violated the law when it laid off civilian dispatchers and assigned the dispatching work to the police officer bargaining unit.[45] This was not a shared work situation and the complete reassignment of all bargaining unit work was found to constitute a substantial detriment.

The Commission dismissed a complaint in a shared work situation involving the abolition of the position of Automobile Investigator and the reassignment of those duties to detectives. The decision was based primarily on the fact that the reassignment of duties resulted from a union-initiated representation petition which split-off the detectives in a "professional" bargaining unit from the police officers.[46] Similarly, a charge was dismissed where the Massachusetts Rehabilitation Commission had a long history of purchasing services similar to those provided by its vocational rehabilitation counselors.[47]

PRACTICE POINTERS

Municipalities contemplating replacing public safety personnel with civilian dispatchers (or other "civilianization" changes) should provide clear notification to the exclusive bargaining representative (union) of all affected bargaining units months in advance of any anticipated conversion date, except in an emergency. An exception may be found in a shared work situation where desk or dispatcher duties were not performed exclusively by members of only one bargaining unit unless the union can demonstrate the exact percentage of work their members performed or show a clear pattern of assigning the work to bargaining unit members.

If the union demands bargaining, management must bargain in good faith until reaching either impasse or resolution (agreement). The importance of this matter to the affected union is great. Therefore, management must be willing to meet a reasonable number of times (at least several) and keep an open mind to issues raised and suggestions made by the union. While it is difficult to generalize, a department which learns at a spring town meeting that its budget has been cut should be prepared to commence negotiations promptly thereafter if it hopes to implement changes at the start of the next fiscal year (July 1). Labor counsel should be consulted concerning what role, if any, the Joint Labor-Management Committee might be expected to play, especially if regular contract negotiations are underway at the same time.

[1] *City of Boston*, 21 MLC 1350 (1994); *Cambridge School Committee*, 7 MLC 1206 (1980); *Commonwealth of Massachusetts*, 26 MLC 228 (2000).
[2] *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557, 447 N.E.2d 1201 (1977).
[3] *Boston School Committee*, 10 MLC 1410 (1984).
[4] *Mass Board of Regents of Higher Education*, 14 MLC 1469 (1988); See *Board of Higher Education (Quinsigamond Community College)*, 30 MLC 141 (2004).
[5] *Id*.
[6] *Town of Watertown*, 8 MLC 1376 (1981); *Town of Danvers*, 3 MLC 1559 (1977); *Fireboard Paper Products Co. v. NLRB*, 379 U.S. 703 (1964)
[7] *Boston School Committee*, 3 MLC 1603 (1977); *City of Quincy*, 15 MLC 1239 (1988); *City of Boston*, 6 MLC 1117 (1979); *Town of Danvers*, 3 MLC 1559 (1997); *Commonwealth of Massachusetts*, 26 MLC 228 (2000).
[8] *City of Boston*, 7 MLC 175 (1981)
[9] *Town of Watertown*, 8 MLC 1376 (1981)
[10] *Avon Products Inc.*, 26 L.A. 422 (1956; see also Elkouri and Elkouri, *How Arbitration Works*, at 515 and n. 473 (3rd Ed. 1973)
[11] *City of Boston*, 9 MLC 1173 (1982)
[12] *Town of Halifax*, 20 MLC 1320 (1993)
[13] *Lowell School Committee*, 21 MLC 1102 (1994)
[14] *City of Lawrence*, 21 MLC 1691 (1995)
[15] *Southshore Regional School District Committee*, 22 MLC 1414 (1996)
[16] *City of Fall River*, 27 MLC 47 (2000).
[17] *Citing Commonwealth of Massachusetts*, 26 MLC 161 (2000).
[18] *City of Boston*, 9 MLC 1173 (1982)
[19] *City of Boston*, 7 MLC 1975 (1981)
[20] *Town of Norwell*, 13 MLRR 1083 (1984)

[21] *City of Haverhill*, 11 MLRR 1083 (1984)
[22] *Wellesley Housing Authority*, 13 MLRR 1032 (1986)
[23] *See, Higher Education Coordinating Council*, 23 MLC 90 (1996), citing *City of Quincy/Quincy Hospital*, 15 MLC 1239 (1998); *Commonwealth of Massachusetts*, 27 MLC 52 (2000).
[24] *Town of Saugus*, 28 MLC 13, 17 (2001).
[25] *Town of Wilmington*, 11 MLRR 1152 (1985)
[26] *Higher Education Coordinating Council*, 23 MLC 90, 92 (1996); *City of Boston*, 6 MLC 1117, 1125 (1979); *Town of Saugus*, 28 MLC 13, 17 (2001).
[27] *Town of Bridgewater*, 25 MLC 103 (1999); *City of Somerville*, 23 MLC 256, 259 (1997).
[28] *Town of Bridgewater*, 23 MLC 103, 104 (1998).
[29] *Commonwealth of Massachusetts*, 27 MLC 52, 56 (2000); *City of New Bedford*, 15 MLC 1732, 1737 (1989); *City of Boston*, 26 MLC 144, 146 (2000).
[30] *City of Boston*, 28 MLC 194 (2002).
[31] *Town of Saugus*, 28 LRC 13 (2001).
[32] See generally *Town of Norwell*, 13 MLC 1200, 1208 (1986).
[33] *City of Boston*, 29 MLC 122 (2003).
[34] See *City of Boston*, 26 MLC 144, 147 (2000); *Town of Natick*, 11 MLC 1434, 1438 (1985); *City of Boston*, 29 MLC 122 (2003).
[35] See *City of Boston*, 28 MLC 194, 195 (2002); *City of Quincy, Quincy City Hospital*, 15 MLC 1239, 1241 (1988); *City of Boston*, 6 MLC 1117 (1979).
[36] *City of Boston*, 29 MLC 122 (2003).
[37] *Town of Natick*, 11 MLC 1125 (1985)
[38] *Town of Watertown*, 8 MLC 1376 (1981)
[39] *Town of Hanson*, 29 MLC 71 (2002).
[40] See e.g., *Town of Bridgewater*, 25 MLC 103 (1999); *City of Gardner*, 10 MLC 1218 (1983).

[41] See *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998); citing *City of Gardner*, 10 MLC at 1221.
[42] *Town of Hanson*, 29 MLC 71 (2002).
[43] *City of Boston*, 7 MLC 2006 (1981); *City of Boston*, 6 MLC 2035 (1980)
[44] *City of Boston*, 6 MLC 2035 (1980)
[45] *Town of Dartmouth*, 9 MLC 1834 (1983)
[46] *City of Boston*, 10 MLC 1539 (1984)
[47] *Commonwealth of Massachusetts*, 24 MLC 13 (1998) there the union also tried unsuccessfully to argue that there was a pattern of a calculated effort to displace "VR" counselors. Since the Administrative Law Judge found that the duties in dispute were shared, she concluded that it was not necessary to consider whether there was a calculated displacement of unit work.

CHAPTER 10 - SICK AND INJURY LEAVE RULES

Chiefs may make rules concerning eligibility for sick or injury leave, so long as they do not conflict with the terms of the collective bargaining agreement. Notice to the union and bargaining upon demand to the point of agreement or impasse is generally required. An employer violates the Law if it unilaterally alters a pre-existing condition of employment or implements a new condition of employment affecting a mandatory subject of bargaining without providing the exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse.[1] The employer's obligation to bargain before changing conditions of employment extends not only to actual contract terms, but also to working conditions that have been established through custom and past practice.[2] To establish a violation, the Union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and (3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse.[3]

The eligibility criteria for paid injured on duty leave under G.L. c. 41 § 111F is a mandatory subject of bargaining.[4] Further, an employer's requirement that an employee claiming disability leave submit to an examination by a physician designated by the employer rather than an employee is a mandatory subject of bargaining.[5]

In *Town of Hingham*,[6] the Commission determined that the Town did not unilaterally change the criteria for receiving injury leave benefits when it required two police officers receiving G.L. c. 41 §111F benefits to undergo an examination by a Town-designated physician. The Commission concluded that, because the Town had used its discretion to order officers to be examined by a Town-designated physician on at least two prior occasions, the Town had not changed a pre-existing condition of employment regarding injured leave.[7] Similarly, in *Town of Weymouth*[8], the Commission found that the Union failed to prove the Town had changed a pre-existing condition of employment when the Chief of Police required officers to submit to a physical by a Town-designated physician. The Commission concluded that the Town had established a past practice by demonstrating that, although it did not require every officer on Section 111F leave to be examined by a Town-designated physician, it did require some officers to be examined by a Town-designated physician.[9]

When faced with a strike or job action (e.g., sick out), an employer may take reasonable action, including requiring a doctor's certificate and/or employee's affidavit of illness, as a condition of sick leave eligibility.

PRACTICE POINTERS

A strongly-worded Management Rights clause may constitute a waiver of the union's rights to bargain over certain rules or changes in sick leave policy. Unless a contract contains clear language, the LRC is not likely to find that a union waived its right to demand bargaining over changes in mandatory subjects of bargaining.

Where a collective bargaining agreement contains language concerning sick or injury leave, the municipal employer is not free to promulgate a rule at variance with the contract without the union's permission. Such changes must ordinarily await regular contract negotiations. However, where a contract is silent, or does not address the issue to be covered by a proposed new rule or policy, the employer -- generally acting through its chief -- may institute such a rule or policy to effectuate a legitimate municipal objective, so long as the employer satisfies its labor relations obligations (i.e., notice and opportunity to bargain).

The employer is required to provide the union with notice of the proposed new rule or policy, and, upon request, enter into good faith bargaining with the union until reaching either agreement or impasse.[10] Once the union is on notice of the contemplated change, the union is bound to make a prompt and effective demand for bargaining or it will be found to have waived its right to demand bargaining over the proposed change.[11]

Only a finding of *fait accompli* (done deal) relieves the union of the obligation to demand bargaining over the change.[12] An exception may be made by the LRC to the *fait accompli* rule where circumstances beyond the employer's control required immediate action, thus permitting bargaining after the fact.[13] In determining whether a *fait accompli* exists, the Commission considers "whether, under all the attendant circumstances, it can be said that the employer's conduct has progressed to the point that a demand to bargain would be fruitless."[14] An offer by the employer to bargain after a prohibited unilateral change has been made does not cure the violation.[15] In such a case, the employer is required to rescind the offending change and then offer to engage in good faith negotiations upon demand from the union.[16]

A municipal employer is not relieved of its obligation by the mere existence of a by-law or ordinance governing the subject. If there is a conflict between an ordinance or by-law and a collective bargaining agreement, the ordinance or by-law must give way to the collective bargaining

agreement.[17] The Commission has made it clear that it intends to apply Section 7 of the Law giving a contract precedence over ordinances/by-laws which are in existence at the time a contract is executed as well as those that post-date an agreement.[18]

§ 1 MANDATORY SUBJECT OF BARGAINING

The basis for such obligations concerning sick leave rules is clear. The Commission has ruled that sick leave pay is a term and condition of employment. Both sick leave policies[19] and criteria for eligibility for injured on duty leave[20] have been held by the Labor Relations Commission to be mandatory subjects of bargaining. The Commission has ruled that a public employer violates Section 10(a)(5) of Chapter 150E, when it unilaterally alters a condition of employment involving a mandatory subject of bargaining without first providing notice to, and, if requested, bargaining with the union in good faith to resolution (agreement) or impasse.[21]

An employer's obligation to bargain before changing conditions of employment extends to working conditions established through past practice, as well as those specified in a collective bargaining agreement.[22] In a case involving the Hull Police Department, the LRC ruled that the chief was not able unilaterally to discontinue the practice of allowing officers who exhausted their sick leave to *borrow* from future sick leave credits expected to be received in a subsequent fiscal year.[23] A past practice was found where, on at least eleven occasions over an eight year period, every officer who exhausted his or her accrued sick leave was allowed to remain off duty but on the payroll, with a bookkeeping entry amounting to borrowing from anticipated future sick leave accumulation.

PRACTICE POINTERS

If the chief or employer wants to stop allowing employees from borrowing against future sick leave, this is their right. All that is needed is to provide the union with notice that management plans on stopping the practice. If the union requests bargaining, it should be limited to the impact of the decision to stop the gratuitous practice.

If a chief (or his/her predecessor) has been lax in enforcing a rule or contract provision regarding sick leave, all that is required is notice to the union that the rule will be enforced in the future.

§ 2 MANAGEMENT OPTIONS

Several actions by management aimed at curbing suspected sick leave abuse or requiring employees to return to duty in a light duty capacity have been dealt with by the Labor Relations Commission and/or the courts.

1) Strike or Job Actions

An employer has the ability to take *reasonable* action in response to an actual or threatened strike or job action (such as a "sick out") involving abuse of sick leave.

When it learned that there might be a sick out in November of 1979, the Leominster School Committee sent letters to the Association's president and to its chief negotiator stating that if teachers took part in a suspected November 22 sick out, the School Committee would require verified physician's statements from absent employees.[24] With the exception of a note from the Association president to the Superintendent denying any knowledge of such plans, there was no other union response. While no job action took place in November, several times the normal number of teachers were absent on two days the next February. Teachers were required to produce doctors' certificates or face the loss of a day's pay in connection with the February sick out.

Although the procedural trail of this case is unusual, ultimately the Appeals Court reinstated the Commission's original decision which held that the Committee's action was a *reasonable response*. Moreover, the failure of the union to demand bargaining after the notice in November was a *waiver* of its right to bargain over the School Committee's proposed change in a mandatory subject of bargaining.

In the 1986 case of *Somerville School Committee*[25], an LRC Hearing Officer discussed the propriety of the School Committee's actions in response to a sick out. When negotiations became sufficiently strained that the parties entered mediation, Association members picketed School Committee meetings. In addition, the Association urged its membership to participate in a "work to rule" job action. This involved foregoing all voluntary tasks both during and after school hours. A two day sick out involving several times the normal number of sick leave absences included numerous

Association officials (except the president). The Association president denied any knowledge or official sanction and, in fact, organized an Association phone tree which restored the normal level of sick leave the next day. Although the contract contained no *self-help* provision, the School Committee vote to require absent teachers to forfeit a day's pay unless they submitted an affidavit of illness was held to be a "reasonable response to an illegal work stoppage."[26] However, since there was insufficient evidence to demonstrate that the Association had any responsibility for the sick out, that part of the charge against the Association was dismissed.

An employee organization acts only through its elected officials, not its individual members.[27] It is not enough that the membership engaged in a strike. In order to establish the union's liability, the employer must demonstrate that the illegal conduct was engaged in, induced, encouraged or condoned by the union leadership.[28]

2) Reporting Forms

Even without affording the union the opportunity to bargain, a new reporting form may be instituted where the new form imposes no new substantive requirements affecting such items as the amount of leave available, the criteria for granting injury/sick leave, or any other condition of employment. This was the result reached by the Labor Relations Commission in a 1983 case involving the Town of Wilmington Fire Department.[29] In that case, the Acting Fire Chief, in an attempt to curb what he felt was weekend sick leave abuse by firefighters, devised a form to be completed by all firefighters absent for one day or more upon their return to duty. The sickness/injury/off-duty report form contained a series of questions pertaining to the reason for the absence, the details of any medical treatment received, and the ability of the absent firefighter to perform regular duties. In reversing the Hearing Officer's decision, the full Commission found that the new form was merely a procedural modification in the method used by the employer to monitor sick leave and, therefore, there was no unilateral change in a mandatory subject of bargaining. The Commission has consistently ruled that an employer does not violate the Law when, without bargaining, it unilaterally alters procedural mechanisms for enforcing existing work rules, provided that the employer's action does not change underlying conditions of employment.[30] Similar reasoning was followed, for example,

when the Commission approved the use of time clocks without a requirement to bargain with the union.[31]

3) Restricting Conduct

The Boston Police Department established a rule requiring all officers on sick or injury leave to remain at their residences except for several specified reasons, and mandated that such officers notify and receive permission from the department prior to leaving their homes. The Supreme Judicial Court upheld the constitutionality of the rule and found that the Police Commissioner was empowered to make such a rule in a 1984 case entitled *Atterberry v. Police Comm'r of Boston*.[32]

The complete text of the rule follows:

SPECIAL ORDER NO. 83-1

SUBJECT: SICK OR INJURED OFFICERS REMAINING AT THEIR RESIDENCE

Rule 110, Section 22 provides, in part: The Police Commissioner may not allow pay from accumulated sick credit or for injury in the line of duty status if the officer shall fail to remain at his/her residence, unless permitted by the Police Commissioner to go elsewhere.

In order to aid in the administration of this rule, the following procedures are to be implemented effective immediately.

All officers disabled from work for sickness or injury and being carried on the time books of the Department pursuant to Rule 110, ss. 4, 5, or 16, shall remain at the residence officially listed in the Department's personnel records unless they receive permission from the Operations Division or their Commanding Officer to be elsewhere.

Officers shall contact the Operations Division to request permission to leave the residence for the following specific purposes. In each instance, with the exception noted, the Operations Division will grant permission to be absent from the residence for reasonable times for these specific purposes:

1. To keep scheduled appointments with physicians, dentists, physical therapists, and/or hospitals, or clinics, whether or not related to the officer's present sickness or injury.

2. To purchase food, household necessities and medication for the officer's present injury or illness or for the health care of minor children.

   NOTE: One four-hour period to complete such shopping, as described in Number 2 above, shall be granted each week. Additional requests shall be granted only for emergency purposes.

3. To attend church services.

4. To register to vote or to vote in elections for municipal, county, State or Federal offices, or regularly scheduled union elections.

5. To engage in physical exercise such as walking or swimming, recommended in writing by an attending physician.

6. To answer court subpoenas in cases arising out of the officer's employment.

7. To report to Headquarters or other police facilities when ordered to do so by a superior or commanding officer.

The officer should make such requests by contacting the Operations Division at 247-4590. In making the request, the officer will state his purpose or purposes in leaving his residence, his destination or destinations, his planned time of departure, his method of transportation, his companions, if any, and his estimated time of return to his residence. Upon returning to his/her residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

Permission to leave the residence for any purpose other than those listed above will not be granted unless approved by the officer's Commanding Officer. Sick and injured personnel should contact the commander at work during the commander's regularly scheduled working hours in order to obtain a determination prior to finalization of their plans to leave the residence.

Officers who obtain such permission from their Commanding Officers will notify the Operations Division at 247-4590 prior to leaving the residence of the fact that they are leaving, that permission was obtained of the purpose or purposes for leaving the residence, the destination or destinations, the departure time, method of transportation, companions, if any, and estimated time of return to residence.

Upon returning to the residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he/she has returned.

Operations Division personnel and Commanding Officers shall maintain records of all telephone requests and whether granted; as well as report of return to residence, on the Department form provided for such purpose.

Sick or injured officers must obtain permission for every absence from their residence until they return to work, including for time periods during which, if the officer were working, would be non-work hours or days off.

Officers not in compliance with this order or away from their residence without permission, will receive no pay for the day of their absence, or, if normally a day off, no pay for the next regularly scheduled work day. In addition, they may be subject to discipline for violation of Department Rules and Regulations.

The Bureau of Investigative Services, Staff Inspection Unit, and the Personnel Division shall be responsible for ensuring compliance with this order.

§ 3 MODIFYING I.O.D. BENEFITS

There is a major distinction between modifying reporting requirements for injured on duty (IOD) leave, and attempting to change eligibility criteria or benefit levels under Chapter 41, § 111F. While the former (changes in eligibility criteria) may be effected through notice and impact bargaining where requested, the latter (changes in benefit levels) requires agreement--generally following regular contract negotiations.

Certain statutes may be superseded by the provisions of a collective bargaining agreement. Among those statutes listed in Chapter 150E § 7(d) is the injured on duty statute for police and fire employees -- Chapter 41 § 111F. By securing the agreement of the union -- or probably even through an arbitration award following Joint Labor-Management Committee (JLMC) involvement -- the terms of § 111F may be modified or, presumably, even eliminated.

Even though G.L. c.32, §5 requires public employers to establish an Early Intervention Plan (EIP), they may not deal directly with employees and by-pass the union about mandatory subjects such as hours, duties, etc.[33]

The Labor Relations Commission and the courts are reluctant to find a waiver of bargaining rights or an outright modification of § 111F in the absence of clear language in a collective bargaining agreement. The Massachusetts Appeals Court first addressed the issue of a possible agreement to supersede § 111F by the language in a collective bargaining agreement in the case of *Rein v. Marshfield.*[34] While recognizing the ability of the parties -- as specified in Chapter 150E § 7(d) -- to do so, the Supreme Judicial Court confirmed the position the Appeals Court took in *Rein* in the SJC's 1989 decision entitled *Willis v. Board of Selectmen of Easton.*[35] In that case the court stated, "We are reluctant to construe a collective bargaining agreement as one which overrides statutory provisions absent clear language expressing that intent."

The Labor Relations Commission similarly has ruled that it will not find a waiver without evidence of a "knowing, conscious and unequivocal" surrender by the union of its rights to bargain.[36] When it comes to overriding § 111F, even the language of a strong but general Management Rights clause probably would be insufficient. The Commission has repeatedly found that vague, generally worded Management Rights clauses are ineffective to justify unilateral actions by management on a variety of much less important issues. It is, therefore, logical to conclude that unless the contract contains language specifying an agreement to supersede § 111F, neither the Commission nor the courts will find that the injured on duty statute has been overridden.

PRACTICE POINTERS

The following is a draft **Injured on Duty** *proposal which would radically alter many of the elements of § 111F. Some parts might be proposed as impact bargaining items, while others would require regular negotiations. This is provided only as an example of topics which a municipal employer might consider including in its contract negotiations proposal. A chief should not attempt to use it without consulting labor counsel.*

SAMPLE INJURED ON DUTY ARTICLE

Only an employee who is injured while responding to a call for service or providing such service when appropriate or required to do so by department rules, regulations, policies or procedures may, subject to the following, be eligible for a leave without loss of pay for the duration of any resulting disability which precludes such individual from performing his normal duties or any assignment which the Chief may make which is not inconsistent with the employee's training or ability. Employees who wish to apply for leave without loss of pay may do so by completing an application form supplied by the Department prior to the end of a shift or tour of duty on which the injury or illness occurs.

Pending a determination of eligibility for injured on duty leave, an employee may be placed on sick leave. Individuals requesting injury leave will cooperate in the Department's investigation, including, but not limited to, providing information concerning the circumstances of the occurrence causing the alleged disability and supplying or authorizing access to medical reports. Employees will submit to an examination by a municipally-designated physician, when instructed to do so.

The following will not constitute on duty time, and injuries occurring at such times will therefore not be considered to have occurred in the line of duty:

- *traveling to or from work (whether at the station or other place of assignment);*
- *traveling to or from paid details, court, any place of training or a mutual aid assignment; and*
- *during meal or coffee (rest) or other work breaks.*

No injured on duty leave will be allowed where the disability results from the use of drugs or alcohol, where the employee was negligent, where the employee was violating any departmental rule, regulation, policy or procedure, or was violating any law or by-law/ordinance.

In computing the pay to which a disabled employee is entitled, base pay *only will be used. Compensation will not include education incentive, specialist pay, shift differential, holiday pay, hazardous duty pay, longevity or other extra pay to which an individual might otherwise have been entitled in addition to base pay.*

No uniform allowance will be paid to or on behalf of persons absent on injury leave for more than six (6) months during any fiscal year.

Those injured through fault of their own will not be eligible for disability leave. For the purpose of this Article, fault shall mean any negligent or intentional conduct of the employee which is the primary factor contributing to the injury.

Disabled persons will, upon request, turn in their weapons and any departmentally issued property or equipment.

For administrative purposes, injured employees will be deemed to be assigned to the day shift. Therefore, should the individual be required to confer with department or municipal officials, attend court in connection with pending cases, or submit to an examination, or perform similar activities, no requirement for extra compensation will be involved.

Persons who are disabled as a result of an accident rather than a work-related assault or similar trauma, will receive leave at sixty (60%) percent of their regular base pay, and for a period not to exceed thirty (30) days. Thereafter, regular sick leave may be taken if a sufficient amount is available.

Persons who fail to complete the department's annual Wellness Program recommendations in a timely manner will not be eligible for injury leave unless the disability results from a work-related trauma occurring through no fault of the employee while responding to a call for or situation requiring services and which cannot be termed "accidental".

It is recognized that the provisions of this Article are at variance with the terms of M.G.L. c. 41, § 111F. Pursuant to M.G.L. c. 150E, § 7(d), the provisions of this Article will, therefore, supersede and entirely replace those of c. 41, § 111F which, by agreement of the parties, will no longer apply to members of the bargaining unit covered by this collective bargaining agreement.

§ 4 INVOLUNTARY RETIREMENT

After years of uncertainty, in 1997 the Massachusetts Appeals Court clarified the authority of a chief in filing an application for involuntary retirement.[37] The City of Lynn appealed an LRC decision that found the City guilty of a prohibited practice when the Fire Chief applied for and caused the superannuation retirement of a firefighter in 1989. The Commission held that it was a unilateral change in a working condition. This is because previously disabled firefighters had been allowed to remain on IOD leave (M.G.L. c. 41, §111F) while appealing a denial of their application for a disability pension.

The Appeals Court noted that the statute that gives chiefs the discretion to file for involuntary retirement (M.G.L. c. 32, §16(1)(a) is not among those listed in c. 150E, §7(d) as subject to being superseded by the terms of a collective bargaining agreement. The Court ruled that the chief's authority to file an involuntary retirement application is a matter of exclusive managerial prerogative. It noted that a different result might follow if the chief's action were taken in retaliation for protected union activities.[38]

[1] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 26 MLC 177, 181 (2000); *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999); *City of Worcester*, 25 MLC 169,170 (1999).
[2] *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).
[3] *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), *citing City of Boston*, 26 MLC 177, 181 (2000); *Town of Hudson*, 25 MLC 143,146 (1999); *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994).
[4] *City of Springfield*, 12 MLC 1051 (1985).
[5] *Town of Avon*, 6 MLC 1290, 1291-92 (1979).
[6] 21 MLC 1237 (1994).
[7] *Id.* at 1240.
[8] *Town of Weymouth*, 11 MLC 1448 (1985).
[9] *Id.* at 1456.
[10] *City of Chicopee*, 2 MLC 1071 (1975)
[11] *Boston School Committee*, 4 MLC 1912 (1978) (only a finding of *fait accompli* (done deal) relieves the union from the obligation to demand bargaining)
[12] *Town of Andover*, 4 MLC 1086, 1089 (1977)
[13] *Boston School Committee*, 4 MLC 1912 (1978)
[14] *Scituate School Committee*, 9 MLC 1010, 1012 (1982)
[15] *City of Everett*, 2 MLC 1471, 1476 (1976)
[16] *City of Holyoke*, 12 MLC 1516, 1628 (H.O. 1986)
[17] *Town of Lee*, 11 MLC 1274 (1984); *City of Worcester*, 5 MLC 1914, 1415 (1978)
[18] *Town of Lee*, 11 MLC 1274 (1984); *City of Springfield*, 4 MLC 1517 (1977)
[19] *City of Boston*, 3 MLC 1450 (1977)
[20] *City of Springfield*, 12 MLC 1051, 1054 (1985); *City of Springfield*, 16 MLC 1127, 1132 (1989)
[21] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983); *Town of Easton*, 16 MLC 1407, 1410 (1989)
[22] *Town of Wilmington*, 9 MLC 1694, 1699 (1983)
[23] *Town of Hull*, 17 MLC 1678 (1991), *aff'd* 19 MLC 1780 (1993)
[24] *School Committee of Leominster v. Labor Relations Commission*, 486 N.E.2d 756 (Mass. App. 1985)
[25] *Somerville School Committee*, 13 MLC 1027 (1986)
[26] *Id.* at 1024, citing *School Committee of Leominster v. Labor Relations Commission*, 21 Mass. app. Ct. 245, 251 (1985)
[27] *City of Medford*, 11 MLC 1107, 1114 (1984)
[28] *Somerville School Committee*, 13 MLC 1027 (1986)
[29] *Town of Wilmington*, 9 MLC 1694 (1983)
[30] *Board of Trustees, University of Massachusetts*, 7 MLC 1577 (1980) (form or approval for outside consulting work); *Brookline School Committee*, 7 MLC 1185 (1980); *Town of Wayland*, 5 MLC 1738 (1978) (performance evaluation forms for police officers)
[31] *City of Taunton*, 10 MLC 1399 (1984)
[32] *Atterberry v. Police Comm. of Boston*, 392 Mass. 550, 467 N.E.2d 150, *cert. den.* 105 S.Ct. 1172, 84 L.Ed.2d 322 (1984)
[33] *City of Lowell*, 28 MLC 157 (2001).
[34] *Rein v. Marshfield*, 16 Mass. App. Ct. 519, 524, 452 N.E.2d 298 (1983)
[35] *Willis v. Board of Selectmen of Easton*, 405 Mass. 159, 539 N.E.2d 524 (1989); *also citing Chalachan v. Binghamton*, 55 N.Y.2d 989, 990, 449 N.Y.S.2d 187, 434 N.E.2d 256 (1982)
[36] *Athol-Royalston Regional School Committee*, 16 MLC 1316 (1989) *citing Commonwealth of Massachusetts*, 9 MLC 1360, 1361; and *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988)
[37] *City of Lynn v. Labor Relations Commission, et al*, 43 Mass. App. Ct. 172, 681 N.E. 2d 1234 (1997).
[38] See *Sullivan v. Belmont*, 7 Mass. App. Ct. 214, 386 N.E. 2d 1288 (1979).

CHAPTER 11 - LIGHT DUTY

A department may require injured police or fire employees to perform modified or *light duty* rather than allowing such individuals to remain out of work with pay on either sick or injured on duty status.

Prior to 1985, it was commonly assumed that public safety employees injured in the line of duty were entitled to leave without loss of pay until their condition improved to the point where they were able to perform each and every aspect of their job to which they might be assigned.[1] The Supreme Judicial Court, in a 1985 decision involving the Newton Police Department, ruled that an injured police officer could be required to return to work and perform *light duty,* especially where such duties were within the job description of a police officer and/or were duties to which police officers might otherwise be assigned. In the *Newton* case, the court noted that the city imposed the requirement after reaching impasse following good faith negotiations with the union. In an unpublished 2002 SJC decision involving the Westfield Police Department, the court pointed out that nothing in the *Newton* case prohibits a city or town from offering police officers greater benefits than those set forth in §111F.[2]

The Labor Relations Commission has ruled that a municipal employer is required to provide notice and an opportunity to bargain where it intends to modify the criteria for determining eligibility for § 111F injury leave benefits.[3] The Commission recognizes that an employer does not violate § 111F by requiring an injured employee to resume work in a limited capacity; however, it has ruled that the municipal employer's imposition of a newly created 111F eligibility criteria without first exhausting its bargaining obligations violated § 10(a)(5) of Chapter 150E.

PRACTICE POINTERS

Even though some Hearing Officers have not focused on it, the Commission has noted the distinction between the employer's managerial prerogative to create *a light duty position and its obligation to bargain over the impact of that newly created position on mandatory subjects of bargaining.[4] There is also a distinction between criteria for § 111F eligibility and criteria for light duty assignment. Since 111F provides for leave without loss of pay, employees required to perform light duty are on the payroll and, by definition, are not receiving 111F* benefits *(i.e., paid leave). Therefore, the reference by certain Hearing Officers to a bargaining obligation for 111F eligibility criteria is technically not applicable to a light duty situation, unless they mean that partially disabled employees are ineligible for 111F*

leave if they are capable of performing in a light duty capacity. Presumably the full Commission will clarify this issue at the appropriate time. However, the results reached by Hearing Officers will probably not change, only the reasoning. If an employer has traditionally allowed public safety employees to remain on 111F leave until able to perform all the duties to which they might possibly be assigned, notice and an opportunity to bargain will be required before such 111F eligibility criteria are changed or, more properly, before assigning such partially disabled employees to a light duty position.

A more logical approach would be for the Commission to recognize the employer's right to create a light duty position and to require a municipal employer to provide notice and an opportunity to bargain, if the union so requests, before assigning bargaining unit members to such duty for the first time. It is arguable that the creation of a light duty *assignment is no different from creating such positions as prosecutor, planning officer, school liaison officer, training officer, records officer or desk officer. In fact, some departments utilize exactly those assignments when requiring a partially disabled (sick or injured on duty) employee to return to work. With this approach, a Management Rights clause which allows for the creation of such positions as the employer deems necessary or appropriate, should encompass a light duty position which involves duties reasonably expected of police officers or firefighters.*

Changing the shift of those on leave under § 111F requires notice and, if requested, bargaining with the affected union. This was the decision reached by an LRC Hearing Officer in a 1991 case involving the Natick Police Department.[5] In that case the Acting Police Chief issued a memorandum which altered the department's past practice of allowing officers who were on injured on duty leave to remain administratively on the shift to which they had been assigned at the time of their injury. Officers on 111F leave were reassigned administratively to the 8:00 a.m. to 4:00 p.m. shift. Among other things, this change was intended to eliminate eligibility for night shift differential.

PRACTICE POINTERS

So long as the employer meets its bargaining obligations (e.g., notice and opportunity to bargain) and does not violate a specific provision of the collective bargaining agreement, it could adopt a policy of administratively reassigning all sick or injured (on and off duty) employees to the day shift.

The reassignment of injured or even sick employees to the day shift may also result in other benefits. For example, should the employee be required to be examined by a municipally-designated physician, to report to the station for a conference with the chief, or to attend a court hearing on

behalf of the department, the employer's exposure to a claim for call-back pay might be reduced or eliminated.

The Hearing Officer in *Natick* did not question the Acting Chief's authority or ability to make the administrative reassignment, only the failure to meet the municipality's impact bargaining obligation. It is possible that regular (i.e., contract) bargaining, rather than impact or mid-term bargaining, may be required where the collective bargaining agreement contains some restriction on management's ability to move employees from one shift to another.

§ 1 DOCTOR'S CERTIFICATES

Under certain circumstances, a municipal employer may require a doctor's certificate as a condition of an injured employee being placed on sick or injury leave, continuing on such leave, and/or returning to work in either a light or full-duty capacity. With the exception of strike or job action situations discussed above, the lack of cases in this area makes any listing of guidelines speculative. An early Hearing Officer decision involving the Boston Police Department upheld the ability of the Police Commissioner to issue a Special Order directing the commanding officers to require certification for all employee absences of five days or more, or where the absences exceeded ten days in a year.[6] This action was taken after the Commissioner became concerned about the amount of sick leave being taken by police officers. The Hearing Officer held that the Department rule, giving the Commissioner discretion to require a physician's certificate, had been incorporated into the collective bargaining agreement. Therefore, the Commissioner was not changing a condition of employment, but exercising the discretion which was part of the conditions of employment. The fact that he had rarely exercised that discretion in the past did not indicate that the power had been abandoned.

PRACTICE POINTERS

In the absence of any controlling provision in the collective bargaining agreement, an employer is free to provide the union with notice of its intention to require a doctor's certificate as a condition for sick leave eligibility. Assuming the union demands bargaining, the employer must engage in good faith negotiations until either agreement or impasse is reached (whereupon the change may be implemented).

§ 2 INJURED ON DUTY SITUATIONS

Section 111F specifies that eligibility for leave without loss of pay for line of duty injuries terminates when a municipally-designated physician determines that the employee is able to return to work.[7] No obligation exists to notify the union of the employer's requirement that an injured worker submit to a physical by a municipally-designated physician to determine that employee's fitness for duty. In fact, failure to comply with an order to submit to such an examination would constitute insubordination and could provide grounds for termination (if not some lesser form of discipline). It has not yet been decided, but it is possible that such refusal might provide the basis for removing an injured employee from 111F leave status, presumably after notice and an opportunity for a due process hearing.[8]

PRACTICE POINTERS

The employee's physician has no role under the provisions of § 111F in determining eligibility for leave in the first place, the duration of any IOD leave, or the return of an injured employee to full or light duty status. However, to the extent that the present and prior chiefs have traditionally relied on the opinion of an employee's physician, and where no municipally-designated physician was ever used, the Labor Relations Commission has decided that a unilateral change in this past practice required notice and an opportunity to bargain.[9] While the chief argued that such reliance was not automatic, and that the chief's policy was to assess each case on an individual basis, this was not sufficient to persuade the LRC that no unilateral change was involved. Such an argument failed in the previously discussed Hull *case, presumably because the Hearing Officer doubted the explanation and also because there were no instances where the exercise of such discretion resulted in any action by the Chief in denying a request for future sick leave* borrowing.

Disputes often arise over a sick or injured employee's fitness for return to duty. In the absence of a controlling provision in a collective bargaining agreement, or a past practice to the contrary, a chief should be able to require an individual to produce a note from his or her doctor or a municipally-designated physician clearing the employee to return to duty. To the extent that the chief has not done so previously, notice and an opportunity to bargain may be required, (i.e., if the union challenges the chief's action and/or demands bargaining). In order to avoid confusion when this issue arises while an employee is out on leave, a chief could post a notice and inform the union that he/she may use such procedure if and when the occasion arises. As a practical matter, however, if the chief has not posted such notice and is faced with an issue of how to handle a

particular case, rather than engaging in the awkward practice of informing the union that a chief is about to alter a past practice by requiring a doctor's certificate as a precondition to allowing an employee to return from sick or injury leave, the chief could simply issue the order and, if the union protests, rescind the order and then engage in bargaining to agreement or impasse. There would be some delay, obviously. One other drawback might be the employer's inability to point to a union waiver of its bargaining rights should the same situation arise in the future. However, after several such instances, the employer could argue that a past practice no longer exists (or, more properly, that a new past practice *has been agreed to by the parties).*

A dispute between the opinion of an employee's doctor and that of the municipally-designated physician is not uncommon. A chief would be hard-pressed to justify ignoring the report of the municipally-designated physician. Occasionally the terms of a collective bargaining agreement address how such disagreements are handled -- at least where the city or town's doctor pronounces an employee fit to return to duty but the employee's doctor disagrees. If the agreement so provides, a chief should be able to rely on a third impartial *doctor's opinion in such a case.*

In the absence of such a third party resolution procedure (which, especially in the case of § 111F, is not recommended), the Chief's approach should focus on prevention *rather than* cure *wherever possible. Rather than waiting until such a situation arises, a municipal employer should promulgate guidelines for handling such cases. After providing notice and an opportunity to bargain to the affected union(s), and, if requested, bargaining to agreement or impasse, there will be a mechanism in place to handle such conflicting eventualities.*

One word of caution is in order. Chiefs should be careful not to let an employee's union activities or history of filing complaints, grievances or even lawsuits, influence their decision on how to handle fitness for duty determinations. The Department of Correction was found to have violated § 10(a)(3) of the Law when it refused to allow a Correction Officer to return to work after sick leave, even after he produced a doctor's note clearing him for full duty as the employer had demanded.[10] *In that case, the LRC Hearing Officer found that the fact that the employee had filed scores of bizarre grievances was the primary motivation in the Commonwealth's decision to keep the employee on sick leave.*

[1] *Votour v. City of Medford*, 335 Mass. 403, 140 N.E.2d 177 (1957)
[2] *City of Westfield v. Labor Relations Commission*, 437 Mass. 1104, 772 N.E.2d 589 (2002).
[3]*City of Springfield*, 12 MLC 1051, 1054 (1985); *City of Springfield*, 16 MLC 1127, 1133 (1989)
[4]*Id.*
[5]*Town of Natick*, 18 MLC 1155 (1991)
[6]*City of Boston*, 5 MLRR 1077 (1978)
[7]M.G.L. c. 41, § 111F (West, 1993)
[8]*Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973)
[9] *City of Newton*, 27 MLC 74 (2000).
[10]*Commonwealth of Massachusetts*, 16 MLC 1779 (1990)

CHAPTER 12 - DEFIBRILLATORS

The Commission has held that any increase or change in an employees' job duties, safety, or workload is a mandatory subject of bargaining, including the impacts of the implementation of a defibrillation program.[1] The City argued that the *Arlington* case is distinguishable from the facts in its case because the defibrillators in *Arlington* were used exclusively by the EMT's and, thus, the impact on job duties, safety, and workload would have been far more appreciable than here, where the fire fighters defer to AMR once the ambulance arrives on the scene. However, although the defibrillators are not used exclusively by the City's fire fighters, the facts demonstrate that the City's decision to implement a defibrillation program required the training of bargaining unit members in the use of the defibrillator, changed the fire fighters' job duties, and increased their workload. Therefore, consistent with its decision in *Arlington,* the LRC concluded that the impacts of the City's defibrillator program is a mandatory subject of bargaining.

§ 1 EQUIPMENT, WORKLOAD & SAFETY

Issues affecting workload and safety are mandatory subjects of bargaining, whereas issues concerning the level of public service to be delivered are permissive subjects of bargaining.[2]

To determine whether an employer made any changes that affected a mandatory subject of bargaining, the Commission has historically balanced the unions' interest in bargaining over safety and workload issues with the employer's interest in making the core management decision of what level of services to provide.[3] A topic does not become a mandatory subject of bargaining merely because an employer's actions marginally or indirectly implicate safety or workload issues.[4] Rather, the topic must directly and significantly affect safety or workload to outweigh the employer's interest in making a core management decision.[5]

Applying the above-referenced standard, the Commission has determined that staffing per piece of fire fighting equipment while responding to an alarm is a mandatory subject of bargaining to the extent that it raises a question of safety, because the number of firefighters who engage a fire has a direct and significant impact on safety.[6] In contrast, minimum staffing per shift, staffing per piece of equipment while awaiting an alarm, and staffing per piece of equipment while responding to a mutual aid call where no safety issue exist, remain core management decisions, because

they affect greatly the level of service provided to the public but have only a marginal or indirect effect on safety or workload.[7] With respect to firefighting equipment, the Commission has held that decisions about what equipment to purchase or to deploy are managerial prerogatives. However, if these decisions directly and significantly affect the safety and workload of firefighters, then the employer must bargain over the impacts of the decision on firefighters' terms and conditions of employment.[8] Accordingly, the LRC will examine if the Employer's decision to purchase and to deploy defibrillators affected the safety and workload of the firefighters represented by the Union, requiring the Town to impact bargain with the Union.[9]

In the 2004 LRC case of *Town of Somerset,* the Commission held that a municipal employer may decide to install defibrillators in cruisers and to train officers in their use. However, they must bargain with the union over the impacts if a timely request is made.[10] Failure to do so will not necessarily result in a cease and desist order, just a prospective bargaining order.[11]

PRACTICE POINTERS

Involving the union in the entire process of selection, training and implementation of defibrillators in police or fire vehicles is recommended. It will avoid needless disputes and may produce a level of cooperation where everyone has an opportunity for input.

[1] *Town of Arlington*, 21 MLC 1125, 1130 (1994).
[2] *Town of Halifax*, 20 MLC 1320, 1323 (1993); *Town of Bridgewater*, 12 MLC 1612, 1615-1616 (1986); *Town of Danvers*, 3 MLC 1559, 1574 (1977).
[3] *Town of Dracut*, 23 MLC 113, 114 (1996); *City of Melrose*, 22 MLC 1209, 1217 (1995); *Town of Halifax*, 20 MLC at 1323; *Town of Bridgewater*, 12 MLC at 1615-1616; *Town of Reading*, 9 MLC 1730, 1738 (1983); *Town of Billerica*, 8 MLC 1957, 1961 (1982); *City of Newton*, 4 MLC 1282, 1283-1284 (1977); *Town of Danvers*, 3 MLC at 1574.
[4] See e.g., *Town of Dracut* 23 MLC at 114; *City of Melrose*, 22 MLC at 1217; *Town of Halifax*, 20 MLC at 1324.
[5] See e.g., *Town of Bridgewater*, 12 MLC at 1616-1618; *Town of Billerica*, 8 MLC at 1962.
[6] *City of Newton*, 4 MLC at 1283.
[7] *Town of Danvers*, 3 MLC at 1573; *Town of Billerica*, 8 MLC at 1961; *Town of Reading*, 9 MLC at 1740.
[8] *Town of Halifax*, 20 MLC at 1325; *Town of Bridgewater*, 12 MLC at 1617-1618.
[9] *Town of Mansfield*, 30 MLC 164 (2004).
[10] *Town of Somerset*, 30 MLC 47 (2004).
[11] *Id.*

CHAPTER 13 - WORKPLACE RULES AND PRACTICES

The employer may impose and enforce a variety of workplace rules and regulations, ranging from dress codes to job procedures, as long as the union has notice and the opportunity to bargain.[1] Only material changes (not merely procedural ones) require notice and bargaining.[2] For example, a claim that a town changed its policy regarding lockers at the police station was dismissed when the Hearing Officer found that the new rule was simply a rewording of the existing practice.[3]

§ 1 HOURS

The hours that an employee is required to work is, of course, a mandatory subject of bargaining.[4] However, more particularized issues relating to hours often present special difficulties for a public employer. For example, the LRC has held that unilaterally eliminating the grace period for tardy employees[5], changing lunch hours[6], eliminating flex-time[7], and changing the time when officers were required to report to court[8], all constituted prohibited practices given the lack of notice and opportunity to bargain. Similarly, if the employer enters into an agreement with the union regarding hours--for example, allowing employees to swap shifts--it may not renege on the agreement.[9] However, unless it is incorporated into the collective bargaining agreement, an employer may make a change after providing the union with the required notice and opportunity to bargain. An employer must also bargain prior to changing the length of the work day[10] or week.[11] On the other hand, the installation of a time clock to record hours of work and break or meal periods is a management right which requires no bargaining so long as there will be no change in related practices, e.g., docking for tardiness stays the same.[12] Similarly, using video surveillance to record employees' departure times, after learning that some custodians were leaving work early and falsifying their time cards, was not a prohibited practice.[13]

PRACTICE POINTERS

In the absence of any requirements in the collective bargaining agreement, an employer is free to set hours for work so long as overtime is paid in conformity with the terms of the contract and the Fair Labor Standards Act (FLSA). (The Massachusetts statutes regarding overtime are not applicable to municipal employees.) There is no requirement that employees be assigned a fixed schedule with regular starting and quitting time, for

example. Changing hours of work to avoid overtime is not only lawful, traditionally it was expected of private industry managers.

All this is far removed from the practice in most municipalities today. Most contracts require overtime for all work in excess of eight hours per day and forty in a week. (The FLSA requires overtime in police cases after 43 -- with a 7 day work cycle -- and increasing proportionately to 171 hours if up to a 28 day cycle is used. For firefighters the thresholds are _____ and _____.) Typically contracts give employees credit for paid days off (sick, injured, holiday, vacation, personal or bereavement days) when counting towards the overtime threshold. None of these need be counted for FLSA purposes.

When a contract is silent on any aspect of the topic of hours of work, an employer may be able to propose a change in a practice or rule during the life of the agreement and, if the union so requests, bargain to agreement or impasse as a precondition to making the change.

The listing of shift or tours of duty in a contract should be avoided. The more detailed the contract becomes in this area, the less flexibility a chief will have to respond to changing needs. When the times for shifts are included, the employer should insist that some adjective such as current, usual, customary or typical is used. This implies to arbitrators that there is room for some variation when conditions so warrant.

§ 2 OVERTIME AND PAID DETAILS

Overtime, often implicating other issues such as minimum manning, paid details, and past practices, is a frequent area of dispute between employers and employees. Unless overtime is regularly scheduled, overtime remains a non-mandatory subject of bargaining.[14] However, reducing the number of firefighters assigned to each engine and ladder, thereby impacting the employees' regular overtime, without providing the union with notice and opportunity to bargain, was held to be an unlawful unilateral change.[15] In a case dealing with both scheduled and unscheduled overtime, the LRC held that unilaterally eliminating the scheduled overtime violated the law, but dismissed the charge that the employer unlawfully reduced unscheduled overtime.[16] Note that when an employer offers an option to employees to receive overtime pay or alternatively to receive time off for working extra hours, the employer cannot unilaterally eliminate the time off option without bargaining.[17]

Paid details may be assigned on an informal or formal (i.e., contractual) basis. Any change in a formal, contractual assignment system is a mandatory subject of bargaining, but informal systems of assigning paid

details must also be bargained over if a past practice has been created.[18] Thus, an employer may not unilaterally change the method of assigning paid details without bargaining.[19] However, if the employer has a past practice relating to the assignment of paid details, even though the practice was infrequent, the employer may be able to implement the practice.[20] In *Town of Arlington*, the Town was found not to have violated the Law when it canceled all paid details except a traffic detail for which no police officers had volunteered to work; the Town had created a "past practice" ten to twelve years earlier when it had canceled paid details until volunteers came forward for a street resurfacing detail.[21]

The Town of Falmouth was ordered to make whole nine superior officers for lost paid detail opportunities after the town failed to live up to the agreement it made to have superior officers and patrol officers continue to share in paid details.[22] The calculation of damages involved looking at the number of details the superior officers worked for the two year periods both before and after the violation.[23]

An employer may prioritize paid details and the decision is a management right; however, upon request, good faith negotiations to impasse or agreement are required over the means and method of implementing that decision and the impacts of such decision.[24]

§ 3 WORK SHIFTS AND SCHEDULES

Hours and shift schedules are both mandatory conditions of employment and mandatory subjects of bargaining.[25] An employer may not, as a rule, implement a new work shift without providing notice and, if requested, bargaining first.[26] Similarly, the employer should bargain first over a change in work shift coverage or the elimination of a shift.[27] As to changes in an individual's work schedule, an employer may change an employee's schedule without bargaining with the union unless there is a past practice of bargaining prior to schedule changes.[28] Occasionally, an employer may wish to change employee schedules in an effort to reduce overtime costs.[29] As long as the overtime is not "scheduled," and there is no applicable contract provision, the employer may restructure schedules after giving the union notice and an opportunity to bargain. Where a contract expressly permits altering shifts, no notice or bargaining is required.[30]

The Taunton School Committee violated the Law by failing to bargain in good faith by implementing a proposed teaching schedule that required teachers to teach an extra period without bargaining with the Union to resolution or impasse over its decision and the impacts of its decision.[31]

§ 4 JOB DESCRIPTIONS AND WORK ASSIGNMENTS

Job duties are a mandatory subject of bargaining.[32] The employer is required to bargain prior to changing the job description of any position.[33] Changing the job description and job duties of an employee constitutes an alteration in the terms and conditions of employment and is unlawful unless bargained over prior to implementation. Thus, an employer may not circumvent the requirement of bargaining over a change in workload by merely changing the job description.[34] Some minor changes, however, may be so insignificant (*de minimus*) as not to require bargaining.

As discussed in Chapter 2, the right to assign employees is an inherent managerial prerogative. Thus, the Appeals Court held in *City of Boston v. Boston Police Superior Officers Federation* that statutory provisions granting the Boston Police Commissioner the power to appoint and promote police officers would *supersede* contractual provisions in the collective bargaining agreement purporting to limit the Commissioner's assignment authority.[35] The employer, however, will nonetheless be required to bargain over the *procedures* relative to assignments. (The 1998 amendments to M.G.L. c. 150E affecting the Commissioner's exemption may alter future decisions in this area.)

In its 1983 decision involving the Burlington Police Department, the Supreme Judicial Court held that the decision to assign police prosecutorial duties is an exclusive managerial prerogative, and not a mandatory subject of bargaining.[36] The *Burlington* case involved the transfer of prosecutorial duties from a sergeant (in a superior officer's unit) to a police officer in a separate unit.[37] In *Town of Dennis*, the Union's charge was dismissed as time-barred for failure to file within the Commission's 6-month statute of limitations.[38] However, it is clear that the employer had the duty to bargain about the impacts of its decision on terms and conditions of employment. There was some disagreement among the three Commissioners over the scope of the employer's obligations, especially when presented with a *fait accompli*. The majority concluded that regardless of whether the Town's notice of its intended reassignment was a "proposal" or a *fait accompli*, the union had six months from that date of notice to file a prohibited practice charge.

The Labor Relations Commission has dealt with a number of cases involving changes to work assignments, and has indicated that the following unilateral actions are unlawful:

- requiring firefighters on watch duty to man the front desk;[39]

- discontinuing the practice of assigning "night captains" in the police force;[40]
- involuntarily transferring workers;[41]
- changing transfer and work schedule assignment procedures;[42]
- assigning "breakfast duty" in a school to paraprofessionals outside the bargaining unit;[43]
- adding billing duties to the position of engineering clerk;[44]
- assigning firefighters to visit a vacant school building to inspect for signs of intrusion, arson, or fire hazards;[45] and
- changing a contract compliance officer's workload.[46]

However, the Commission has refused to find a violation where an employer implemented a policy requiring firefighters to perform dispatch duties, in light of a past (though infrequent) practice of assigning such duties to firefighters.[47] In a 2002 case involving the Boston Police Department, the Commission, while acknowledging the Commissioner's managerial authority to *decide* not to fill a supervisory position, made it clear that the city still had to meet its *impact bargaining* obligations by bargaining with the union to agreement or impasse prior to implementing its decision.[48] Since neither side moved at all during four 1-hour bargaining sessions, the commission concluded that impasse had been reached and dismissed the union's unilateral change complaint.

PRACTICE POINTERS

Shift bidding procedures present a special problem with respect to assignments. Most cases reported by the LRC involve collective bargaining contracts that allow shift bidding and seniority to be considered in making assignments, but that give the employer the ultimate right to make shift assignments.[49] Even if no such provision was contained in a contract, an employer could argue that as an inherent managerial prerogative, assignments cannot be subject to absolute bidding arrangements. At most, a procedure to advise the chief of an employee's preference may be required. However, the employer is required to provide notice and an opportunity to bargain when intending to change the shift bidding procedure.[50]

§ 5 PROMOTION

If an employer seeks to change the criteria for promotion, at least to a position in the unit, or in some cases to a non-union position, it may have to bargain first with the union if there is a past practice or if there is a relevant provision in the labor contract.[51] As long as the criteria have

been used by the employer in the past, the employer is generally free to continue to use those criteria in a more formal fashion. Thus, in *City of Boston*, the LRC found that the City had a past practice of considering attendance as a factor in promotions, and dismissed the unlawful unilateral change charge even though the City intended to use attendance *always* as a factor in promotion in the future.[52]

The denial of a promotion may also trigger the employer's responsibility to furnish the union with the reasons for the failure to promote, especially if the union plans to file a grievance with respect to the decision.[53] Similarly, the elimination of a position may activate the employer's duty to bargain, where the eliminated position represents an initial "toe hold" in the promotional ladder[54] or a lost promotional opportunity.[55]

PRACTICE POINTERS

Employers should refuse to negotiate over a proposal which seeks to require the promotion of certain employees based on seniority. Similarly, the employer should point out to the union whenever the latter proposes to control how promotions are made or what criteria will be used, that the law leaves all this exclusively to management. Bargaining over procedures for notifying unit members of an opening, on the other hand, are proper subjects of bargaining.

Employers should avoid the pitfalls of including any language in a contract which allows employees to file grievances over promotions. Therefore, even provisions which permit *the employer to determine qualifications but then require promoting the "senior most qualified" should never be included.*

The use of assessment centers for both initial hiring and promotions is becoming increasingly popular. This is one of the best ways of avoiding claims of cronyism and similar unfairness charges. Moreover, it goes a long way towards insulating the employer from charges of discrimination and other improprieties.

§ 6 DRESS AND GROOMING REGULATIONS

The constitutionality of public safety grooming regulations has been well established for many years. In 1976, the U.S. Supreme Court held in *Kelley v. Johnson,* that police departments did not infringe on an officer's First Amendment free speech and expression rights through the enforcement of grooming regulations.[56] For the regulations to be valid, a department was only required to demonstrate that the regulations bore a "rational relationship" to the goals the department was trying to achieve.

The regulations were justified according to the Court on two grounds: 1) as a means of making police officers readily recognizable to the public, and 2) as a means of fostering *esprit de corps* through similarity of appearance.

Similarly, the Supreme Judicial Court (SJC) in Massachusetts has upheld the decision to discipline a police officer for failing to comply with the departmental grooming code. In *Board of Selectmen of Framingham v. Civil Service Commission*, the SJC upheld the indefinite suspension of a police officer whose long hair violated the department's grooming policy.[57] Later, the Appeals Court also determined that the policy was not so "irrational as to be branded arbitrary," and upheld the regulation on the grounds that it promoted morale and engendered respect from the community.[58]

With respect to firefighters, the U.S. Supreme Court has also upheld grooming regulations. In a per curiam decision dismissing certiorari, the Supreme Court upheld a fire department hair grooming regulation, stating that the regulation was supportive of "the overall need for discipline, esprit de corps, and uniformity."[59] In prior cases, federal courts had upheld such regulations only where they could be linked to safety justifications.[60] For example, facial hair - beards or mustaches - prevented gas masks or SCBA equipment from sealing properly. In *Quinn v. Muscare*, however, the Supreme Court stated that any factual determination concerning a safety justification for the grooming rule was "immaterial."[61]

The LRC has held that dress and grooming standards are mandatory subjects of bargaining, so that an employer desiring to institute such regulations must first bargain with the union.[62] A department which has continuously enforced its grooming regulations is free to continue to do so.[63] However, a department which finds itself in the position of not having enforced its existing regulations for a considerable period of time, or having become lax in enforcing certain portions of the rules, may need to provide notice to the union before starting to enforce the rules again.[64] The Sheriff of Worcester County was found guilty of failing to bargain in good faith by unilaterally implementing a policy of prohibiting corrections officers from wearing union pins, including union insignia, without giving the union prior notice and an opportunity to bargain to resolution or impasse.65 In addition, the LRC ruled that the Sheriff interfered with, restrained and coerced his employees in the exercise of their rights guaranteed under the Law by prohibiting the wearing of union insignia, in violation of the Law. On appeal, the court held that prescribing uniforms for officers was a core management function exempt from collective bargaining requirements, but, the sheriff's asserted need for discipline and uniformity was not a "special circumstance" that would warrant banning union pins. The Appeals Court explained that it did not think the right to prescribe uniforms contained in G.L. c. 126, § 9A, supersedes the officers'

G.L. c. 150E, § 2, right to wear union insignia absent a showing of special circumstances. The "principles appli[ed] in construing the interrelation of different statutes" require us to give "reasonable effect to both statutes and [to] create[ ] a consistent body of law."[66] There is no explicit indication that the Legislature, in passing c. 126, § 9A, intended to override the well-established right to wear union insignia, and the two provisions are not so inconsistent with one another that "both cannot stand."[67] Indeed, in *United States Dept. of Justice, Immigration & Naturalization Serv. v. Federal Labor Relations Authy.*,[68] a case on which the sheriff heavily relies for his analysis of special circumstances, an analysis we discuss below, the court held that the management rights provisions of the Federal Labor Relations Act,[69] did not explicitly supersede the employee rights provisions of 5 U.S.C. § 7102 (1996), a statute similar to, but containing fewer employee rights than, G.L. c. 150E, § 2. As a consequence, the court stated that uniformed INS employees were presumptively entitled to wear union badges and buttons notwithstanding the employer's right to prescribe uniforms. INS, 955 F.2d at 1003.

We, too, think that the wearing of union insignia, unlike guardian angel buttons or tie clips, is a right protected by G.L. c. 150E, § 2, which, notwithstanding G.L. c. 126, § 9A, cannot be denied absent special circumstances or a "clear and unmistakable" indication that it was waived as a result of the bargaining process.[70]

We venture no opinion on whether a waiver of the statutory right to wear union insignia in a collective bargaining contract would be legally enforceable.[71]

Turning, then, to the issue of special circumstances, both the union and the commission argue that none exist in this case. The sheriff disagrees, urging that special circumstances do exist and, as noted, relies heavily on the Fifth Circuit's treatment of special circumstances in the INS case. There, the court's treatment of the issue resulted in the following conclusion:

> "The INS's anti-adornment/uniform policy is critical to its mission, in that it promotes uniformity, esprit de corps and discipline, and creates an appearance of neutrality and impartiality. Thus, even though the border patrol is not military, we hold that its law-enforcement mission and the means of accomplishing that mission are comparable in significant ways. It follows that its anti-adornment/uniform policy is similarly entitled to deference. We further hold that, when a law enforcement agency enforces an

> anti-adornment/uniform policy in a consistent and nondiscriminatory manner, a special circumstance exists, as a matter of law, which justifies the banning of union buttons" (emphasis added).[72]

"Special circumstances" rarely, if ever, are found in the absence of a comprehensive ban on all nonstandard adornments. See, e.g., Dighton School Comm., 8 M.L.C. at 1305 ("We are further convinced that no special circumstances exist to prohibit [union] buttons by the fact that other buttons were worn ... without ... interference or comment by the school administration. A rule which is enforced only against union buttons demonstrates the lack of any truly legitimate purpose for the rule").[73] The record in this case, however, discloses nothing remotely resembling a comprehensive prohibition.

We agree with the sheriff that "the need for discipline, uniformity and an absolutely impartial appearance exists at the Jail." People with violent tendencies live at the jail. A paramilitary organization and command structure are essential for the safety of inmates and correction officers alike. But the long period before April 22, 1997, during which the sheriff had no policy prohibiting pins, and the fact that his April 22 edict appears to have fallen with particular force on union pins, supports the commission's conclusion that no special circumstances connected to the jail's mission, command structure, need for discipline or other functional requirement justified the sheriff's unilateral prohibition of the union buttons employees presumptively were entitled to wear.[74] Therefore, the commission's conclusion that the April 22 directive, insofar as it affected union buttons, violated G.L. c. 150E, §§ 10(a)(1) and 10(a) (5), was supported by substantial evidence and did not amount to an error of law. We do not preclude the possibility that circumstances may change over time in a way that enables the sheriff to meet his burden at some point in the future.[75]

In light of the foregoing, paragraphs 1(a), 1(b), 2(a), and 2(b) of the commission's order are reversed insofar as they pertain to badges, pins, and any nonstandard uniform attire other than pins and badges containing union insignia. The commission shall modify the "Notice to Employees" referenced in paragraph 2(c) of its order so that it is consistent with this opinion. In all other respects, the commission's order is affirmed. So ordered.

The Oxford Police Chief could have banned *all* non-department-supplied pins and insignia on officers' uniforms. However, by allowing DARE patches and "guardian angel" pins, for example, and banning any union pins, the town violated the law by discriminating against the union.[76]

In contexts other than pubic safety, uniforms and grooming standards are common workplace practices (especially for hospital employees, maintenance workers, customer service types of positions, etc.), and are similarly upheld as long as they are not irrational or unreasonable. Typically, collective bargaining involving dress codes will focus on cleaning or uniform allowances. One of the few LRC cases dealing with dress standards involved a dispute over whether an employer was required retroactively to pay a cleaning allowance negotiated in a contract.[77] The LRC determined that where there was no specific agreement to make the cleaning allowance provision retroactive, and where there had been no past practice of providing such an allowance, the employer was not required to pay the retroactive allowance.[78]

PRACTICE POINTERS

Chiefs are free to set and enforce hair and grooming standards. This includes rules concerning beards, mustaches, hair length, sideburns, visible tattoos, body piercing and jewelry. If no rule currently exists, the chief should provide the union with notice and opportunity to bargain before implementing a change. If the rule exists but has not been enforced for some time or not consistently, the chief need only advise the union and the employees that he/she intends to start enforcing the rule, giving sufficient notice so the employees can comply.

Occasionally the growing of beards or long hair is done as a gesture of defiance or in protest of some actions of the chief or the municipality. Assuming there was no written rule on the subject, some chiefs have felt powerless to enforce what they believed was an "unwritten rule" for as long as they could remember. While the area is not free from doubt, it would appear that a prompt meeting with the employees involved as well as with the union would be an appropriate first step. The chief could order employees to shave and suspend (or so recommend to the appointing authority) such individuals until they comply. Rather than having a member be disciplined for insubordination, the union will probably advise the employee to obey and file a prohibited practice charge at the LRC. The chief should inform the union in writing that he/she is willing to negotiate if they so request; however, in the mean time the same status quo *which has existed for years (i.e., beard-free) will be maintained.*

To avoid the practical problems likely to result from objectionable tattoos or visible body piercing, chiefs should promulgate rules before the need arises. It is simple to order an employee to remove an earring. It is not so easy to make a tattoo go away from one's face, neck or forearms.

The decision of what items will be worn on uniforms is a management right. If union pins start appearing, and the chief objects, he/she may

order them to be removed. If they have been allowed, but the chief now objects, notice and opportunity to bargain is required before ordering them removed.

§ 7 RESIDENCY REQUIREMENTS

Public safety departments often require that employees live within the town or city limits, or that they live within a particular distance from the municipal limits. Additionally, some public employers, while not requiring residency, give preference to persons residing in the community. These types of regulations have been challenged on a number of occasions, at both the state and federal levels, but have been upheld.

The Supreme Court of the United States, in *McCarthy v. Philadelphia Civil Service Commission* had the opportunity to consider the legality of a residency requirement for firefighters.[79] The plaintiff had been employed as a firefighter in Philadelphia for 16 years when he was terminated because he moved his permanent residence from Philadelphia to New Jersey in contravention of a municipal regulation requiring city employees to be residents of the city.[80] The Court had previously held in *Hicks v. Miranda* that this type of ordinance was "not irrational" as a valid exercise of state authority.[81] The plaintiff in *McCarthy*, however, raised a new challenge to the residency requirement; he argued that the regulation infringed on his constitutionally protected right to travel.[82] The Supreme Court rejected this claim, distinguishing other "right to travel" cases as implicating fundamental rights such as voting or receiving welfare benefits and involving the requirement of a one year residency waiting period.[83]

In Massachusetts, the Supreme Judicial Court dealt directly with a one year residency rule which gave preference to applicants for the position of police officer who had lived in the town for that period.[84] In *Town of Milton v. Civil Service Commission*, the plaintiffs challenged the residency requirement on state and federal constitutional grounds. The SJC rejected this challenge, holding that the rule need only satisfy the "reasonable relationship to legitimate state purposes" test, not the more stringent "compelling state interest" test, because the rule did not "place a penalty" on the right to travel.[85] The court cited several advantages to the residency requirement: knowledge of local geography which leads to quicker response time; familiarity with the community which encourages trust and cooperation on the part of citizens; officers off-duty being in the community facilitates mobilization in an emergency; and facilitation of the local cadet program, which assists local students in obtaining a higher degree while working for the police force.[86]

Similarly, the Appeals Court upheld, in *Mello v. Mayor of Fall River*, the dismissal of a tenured civil service employee on the grounds of her moving outside of the city in violation of the residency requirement for city employees.[87] Moreover, the Court in *Mello* did not even require the City Council to make explicit findings, in enacting the ordinance, as to the importance and benefits to the city of the municipal employee residency requirement.[88]

In a 2003 case involving the Brockton Police Department, the Appeals Court held that residency clause in collective bargaining agreement, in which parties agreed that previously enacted ordinance requiring law enforcement officers to be city residents would be enforced only against officers hired after specified date, was lawful, as applied to officers hired prior to agreement's date.

§ 8 TRANSFERS

The Joint Labor Management Committee (JLMC) statute lists the right to transfer police officers as a matter of "inherent managerial policy". Although the wording is not clear, it appears that at least in firefighter situations, "the subject matter of transfer shall not be within the scope of arbitration, provided, however, that the subject matters of relationship of seniority to transfers and disciplinary and punitive transfers shall be within the scope of arbitration." The transfer cases which the LRC has decided have not involved police or fire service situations.

A public employer is free to transfer employees at will, as long as: 1) the motivation for the transfer was not related to the employee's union activities,[89] and 2) the transfer was not in violation of the collective bargaining agreement. Thus, the employer may not discriminate against an employee with respect to his or her union activities by transferring him or her.[90] Also, at least in non-public safety situations, if the employer has entered into an agreement with the union or has been subject to an arbitration award with respect to transferring employees, the employer may not violate the agreement.[91]

In the education context, the involuntary transfer procedure for teachers is not a "hiring decision" under the education reform act, but a proper subject for a collective bargaining agreement.[92]

PRACTICE POINTERS

In many ways, the exercise of the rights of transfer and assignment appear similar. A chief has traditionally used the power to transfer employees as an informal disciplinary tool. At least in firefighter cases,

this is no longer a matter which can be handled without regard to the union. However, where the chief is motivated by improving the efficiency of operations in general, or with the need for a particular employee's skills on a given shift or tour of duty, this should be free from any bargaining obligation, at least as far as the decision, if not the impact is concerned.

When confronted with a union proposal at bargaining that shifts be "bid", the employer may refuse to negotiate. If the union is willing to limit the matter to procedures *for affording employees the opportunity to express their* preferences*, this is another matter. The ambiguous language in the Joint Labor Management Committee statute -- which appears aimed primarily at firefighters -- has not yet been deciphered by the courts or the LRC. It would be prudent, then, for municipal employers to exclude or make some provision regarding "the relationship of seniority to transfers and disciplinary or punitive transfers" to minimize grievances or LRC charges in this area.*

§ 9 WEAPONS

Generally, a police chief has the authority to determine who will carry a firearm and under what conditions, so that the subject of carrying weapons cannot be included in an arbitrator's award.[93] However, a chief may not arbitrarily remove a police officer's right to carry a firearm and then assign him/her to dangerous areas.[94] Moreover, a chief may not change a past practice of having officers carry a firearm without giving the union the opportunity to bargain over the impact of the decision on mandatory subjects of bargaining, though the chief need not bargain over the decision itself.[95]

Federal legislation has added an additional complication to police officers carrying firearms.[96] Federal law prohibits anyone convicted of a misdemeanor crime of domestic violence from "selling or otherwise disposing of a firearm or ammunition." Apparently, this prohibition also encompasses police officers carrying firearms in the line of duty.[97] Any officer who in the past has been convicted[98] of a domestic violence offense may not carry a firearm in the line of duty or in the course of his/her employment, must return all departmentally-issued weapons, and must surrender or transfer custody of all personal firearms.

Legislation enacted in 1998 in Massachusetts expands the list of persons that have either a temporary (5 year) or lifetime disqualification from being issued a Firearms Identification Card (FID Card) and/or License to Carry firearms.[99]

An arbitrator upheld the termination of a Franklin police officer, even in the absence of a specific written requirement that officers posses a license to carry firearms.

PRACTICE POINTERS

Given that the deprivation of the right to carry a firearm may render the police officer unable to perform the duties of the job, police chiefs may deal with an officer convicted of a domestic violence offense in a number of ways:

- *temporary reassignment or leave of absence, if the officer plans to pursue one or more avenues of relief (pardon by the governor or by motion to revoke or revise sentence if the Massachusetts conviction is less than 60 days old);*[100]

- *permanent reassignment, to a position not requiring use of a firearm; or,*

- *discipline/discharge; as long as the department had a written or long-standing policy of requiring the carrying of a firearm.*[101]

The issue of a disqualification under Massachusetts law from securing a License to Carry firearms is more difficult. The provisions of M.G.L. c. 41, §98 allow a chief to authorize officers to carry weapons without the need of a License. Unless a department has a rule, or at least a practice, of requiring all officers to be licensed, it may be difficult for a chief to proceed in this area. Departments without a rule or practice should relieve an officer from duty with pay and notify the union of a proposed new rule. Upon reaching agreement or impasse, the rule may be implemented.

Should an officer be discharged because of his/her inability to carry a firearm, and he/she challenges the discharge, the courts would evaluate whether the ability to possess a firearm is rationally related to the person's fitness and ability to be a police officer.[102] *Most likely, the requirement would satisfy the rational relationship test and the discharge would be upheld.*

Decisions about the nature and level of services that a public employer provides lie within the exclusive prerogative of management, and are not mandatory subjects of bargaining.[103]

The City of Boston's decision to implement a less lethal force policy requiring certain unit members to use beanbag shotguns and super-sock ammunition was clearly a managerial prerogative because it implicated the nature of the services that the City's Police Department provided,

including how the City chose to deploy its law enforcement resources.[104] The City made the policy decision that in certain situations involving individuals that were armed with an edged weapon, its police officers should have the option of using a weapon and ammunition that administered a type of force that fell somewhere between lethal force and non-lethal force on the force continuum. Although the City's decision to have certain unit members use the specialized shotguns and ammunition as part of the less lethal force policy was excepted from the statutory bargaining obligation, the City was nevertheless required to negotiate over the impacts of that core governmental decision on mandatory subjects of bargaining prior to implementation.[105] The issue was whether the City failed to bargain in good faith by requiring certain unit members to use beanbag shotguns and supersock ammunition as part of a less –lethal force policy without giving the union an opportunity to bargain to resolution or impasse over the impacts of that decision on the terms and conditions of employment of unit members. The Commission previously decided that an increase or change in employees' job duties, compulsory training, and workload are mandatory subjects of bargaining.[106] Here, as a result of the City's decision to deploy the beanbag shotgun and supersock rounds as part of a less lethal force policy, the City required patrol supervisors, who were bargaining unit members, to undergo mandatory training four times per year. Further, the patrol supervisor's job duties had changed because they were now responsible for deciding whether the beanbag shotgun should be deployed at a particular incident scene and for actually firing the weapon. Finally, the workload of the district lieutenants who were also bargaining unit members increased because the district lieutenants became responsible for securing the weapon between shifts and conducting weekly inspections of the weapons and the ammunition. Having decided that the City had an obligation to bargain with the union over the impacts of the specialized shotgun and ammunition on the terms and conditions of employment of unit members, the only remaining issue was whether the parties bargained to impasse.

§ 10 OFF-DUTY EMPLOYMENT

A municipality has the right to regulate the off-duty employment of law enforcement officers. The emergency nature of law enforcement, the need to ensure that officers report for duty in good physical and mental condition, and the need to avoid conflicts of interest, all combine to justify a department's regulation (or even prohibition) of off-duty employment.[107] The Supreme Judicial Court has held that while the opportunity to earn a living is certainly fundamental in our society, "it is an equally basic axiom that there is no right to public employment."[108] Thus, a police department may restrict outside employment as a condition of employment for police

officers. Similarly, officers may also lawfully be required to seek the chief's approval prior to obtaining outside employment.[109]

§ 11 NON-SMOKING RULE

In its 1995 decision in *Abington School Committee*, the Labor Relations Commission first addressed the issue of a public employer's ability to ban smoking in the workplace.[110] The Commission ruled that the decision to prohibit smoking did not result from any overriding interest or educational policy concern. It therefore attempted to balance the employees' interest in bargaining over workplace smoking policies with the employer's interest in creating a smoke-free working environment. The Commission ruled that the employer could not unilaterally impose such a ban. It noted, however, that there might be cases where the employer's interest in prohibiting smoking is so intertwined with its mission that no bargaining would be required.

In a 1996 case involving the Lexington Police Department, the Commission held that absent evidence that smoking in police vehicles poses a direct public health hazard, there was no managerial prerogative that overrode the union's interest in bargaining.[111]

A 1997 case involving employees at the Springfield Long Term Care Unit in the Division of Medical Assistance required notice and the opportunity to bargain before the state could abolish a smoking lounge.[112] During renovations, the smoking lounge was converted to a supply/fax/mail room. Although the state offered evidence at the hearing of the dangers of second hand smoke, it did not take this into account in deciding to abolish the smoking lounge. As a remedy, the state was ordered to restore a smoking area and to negotiate to agreement or impasse before implementing smoking restrictions that are not necessary to protect the health and welfare of the public.

§ 12 VACATIONS

In a 1997 decision, the LRC upheld its deferral to arbitration in a case involving a charge that a school district unilaterally changed its vacation policy.[113] An arbitrator found that the collective bargaining agreement was silent as to whether the School Committee could unilaterally change the school calendar. The management rights clause provided that the Committee retained all rights except those modified by the terms of the contract. The Commission dismissed the union's charge that the employer violated the Law by unilaterally changing the vacation schedule without offering the union an opportunity to bargain.

§ 13 SEXUAL HARASSMENT POLICY

The implementation of a new sexual harassment policy is a mandatory subject of bargaining.[114] This is because it impacts upon the terms and conditions of employment.[115] Therefore, despite the fact that a state law requires municipalities to adopt some form of a sexual harassment policy, the employer must still bargain over the impact of such policy if the union makes a timely request.

When the Boston Police Department implemented a new sexual harassment policy that included new reporting requirements for superior officers, the LRC ruled that it should have offered the union notice and the opportunity to bargain.[116]

§ 14 SHIFT SWAPS

The ability and criteria for swapping shifts is a mandatory subject of bargaining. In a case involving the Natick Fire Department's shift swap policy for EMT's, the Commission ruled that the Town violated the Law by failing to give the union prior notice or an opportunity to bargain about restrictions on shift swaps.[117]

In *Natick*, the Town argued that the ALJ erred in refusing to consider that the Town's decision to maintain an EMT-I on every shift is a level of services decision. The Town argued that the underlying intent of the restriction on shift swaps was to ensure that the ambulance was capable of administering advanced life support services on all shifts. The LRC noted that decisions covering the level of services that a governmental entity will provide lie within the exclusive prerogative of management, and are not mandatory subjects of bargaining.[118] However, even if the decision to maintain an EMT-I on every shift was within the Town's exclusive prerogative, the Town was obligated to bargain over the impacts of that decision, including whether EMT's would continue to be allowed to swap shifts without regard to their certification.[119] Therefore, whether the Town's bargaining obligation is considered as an obligation to bargain over its *decision* to restrict shift swaps among EMT's or as an obligation to bargain over the *impacts* of its decision to maintain an EMT-I on every shift, the result is the same; the Town was obligated to give the Union notice and an opportunity to bargain before changing its policy of allowing EMT's to swap shifts without regard to their EMT certification. Accordingly, even if the ALJ failed to consider the Town's argument that the decision was a level of services decision, the Town was still obligated to bargain even under the analysis it claimed the ALJ should have applied.

The City of Medford did not change its shift swapping procedures when the fire Chief instructed a Captain and Lieutenant to stop their weekly arrangement to create 24-hour schedules.[120] The Chief's concerns about the two individual's "weekly deal" did not affect the shift swapping practice for the other bargaining members, but only addressed his concerns that an individual bargaining unit member was abusing the shift swapping practice.

§ 15 DOMESTIC VIOLENCE POLICY

The adoption of a new or revised policy on domestic violence will require notice to the union and, if requested, good faith bargaining to impasse or agreement. In a 2001 decision involving the Lowell Police Department, the LRC concluded that the City's domestic violence policy was a mandatory subject of bargaining.[121]

In the Lowell case, the issue was whether the City unilaterally implemented a domestic violence policy for bargaining unit members, without providing the Union with prior notice and an opportunity to bargain to resolution or impasse.

It was undisputed that, prior to September 29, 1998, there were no policies pertaining to domestic violence. Although the City had a reporting requirement for any police officer who had been arrested, named as a defendant in a criminal matter or was the subject of a criminal complaint application, the evidence demonstrated an absence of a domestic violence policy or practice. Further, unilaterally implementing a policy that represents a change in working conditions constitutes a mandatory subject of bargaining.[122] The City implemented the domestic violence policy without providing notice to the Union and an opportunity to bargain to resolution or impasse. Therefore, all three elements of the Commission's unilateral change analysis were satisfied.

The City argued that the domestic violence policy did not constitute a change in working conditions and did not have to be bargained with the Union. On the basis of the record before the Commission, it determined that the City's domestic violence policy, which sets out a reporting requirement for the bargaining unit members, details the disciplinary penalty, and specifies that this policy can be considered in making determinations of promotions, constituted a mandatory subject of bargaining.[123] It is well established that an employer may not impose a work rule that affects the terms and conditions of employment without bargaining with the union.[124] Moreover, any change in the employees' job duties is a mandatory subject of bargaining.[125] In addition, policies that provide for the discipline and/or discharge of employees who violate them

are a mandatory subject of bargaining.[126] Furthermore, procedures for promotions affect an employee's condition of employment to a significant degree and are a mandatory subject of bargaining.[127]

In *Lowell*, the City's domestic violence policy contained new procedures and duties for reporting involvement in domestic violence, which were mandatory for the members of the bargaining unit. In addition, members of the bargaining unit who had committed or threatened to commit domestic violence would be disciplined for their acts. Moreover, under the policy, acts of domestic violence could be considered in promoting and making other work-related determination about members of the bargaining unit. Accordingly, the LRC concluded this domestic violence policy was a mandatory subject of bargaining.

§ 16 RADIO PROCEDURES

Section 6 of the Law requires a public employer and employee organization to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment.[128] According to the 2002 LRC case of *Town of Andover*, the radio procedure implemented by the Town was a mandatory subject of bargaining because it established standards of performance for patrol officers that were required as a condition of continued employment.[129] Therefore, the Town was obligated under the Law to give the Union notice and an opportunity to bargain before implementing the radio procedure. Because the Town refused to bargain over the radio procedure on demand by the Union, the LRC found that the Town violated the Law by unilaterally implementing a new radio procedure and by refusing to bargain on demand over a mandatory subject of bargaining.

§ 17 PERSONAL CELL PHONES

The Sheriff had the right to promulgate a rule banning personal cell phones on duty, even without providing the union with any opportunity to bargain over the decision or the impact of such new rule.[130] The Commission found that any interest the jail officers may have in carrying a personal cell phone on duty is outweighed the employer’s interest in maintaining public safety by ensuring that the jail officers are performing the necessary functions of providing care, custody and control of the jails inmates in a safe and attentive manner.

[1] Again, these rules and procedures must also be applied in a nondiscriminatory fashion.
[2] *Board of Trustees, University of Massachusetts*, 7 MLC 1577 (1980).
[3] *Town of Shrewsbury*, 25 MLC 12 (1998).
[4] *Medford School Committee*, 1 MLC 1250 (1975).
[5] *Mass. Commissioner of Admin. & Fin*., 20 MLC 1195 (1993).
[6] *City of Somerville*, 20 MLC 1523 (1994).
[7] *Mass. Commissioner of Admin. & Fin*., 20 MLC 1298 (1993).
[8] *Town of Middleborough*, 18 MLC 1409, aff'd, 19 MLC 1200 (1992).
[9] *City of Taunton*, 17 MLC 1420 (1991).
[10] *Suffolk County House of Correction*, 22 MLC 1001 (1993).
[11] *Nahant School Committee*, 19 MLC 1666 (1993).
[12] *City of Leominster*, 3 MLC 1579 (1977)
[13] *Duxbury School Committee*, 25 MLC 22 (1998).
[14] *Town of West Bridgewater*, 1 MLC 1040 (1983). *See Massachusetts Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984).
[15] *City of Melrose*, 21 MLC 1519 (1995). *See also, Town of Tewksbury*, 19 MLC 1189 (1992) (reversing hearing officer and holding that town's appointment of a provisional lieutenant constituted a unlawful unilateral change because of the impact on regular, scheduled overtime). Compare another *City of Melrose* case, 22 MLC 1209 (1995), where the Commission found no unlawful unilateral change given that the reduction in number of firefighters assigned to each engine and ladder had no impact on safety and/or workload. *See also, Town of Halifax*, 20 MLC 1320 (1993), *aff'd*, 38 Mass. App. Ct. 1121 (1995) (finding no unlawful unilateral change when town reduced number of firefighters assigned to work weekend shift where there were no safety or workload implications).
[16] *Mass. Commissioner of Admin. & Fin*., 21 MLC 1637 (1995).
[17] *Town of Brookline*, 15 MLC 1631 (1989).
[18] *Town of Natick*, 12 MLC 1732 (1986).
[19] *City of Revere*, 20 MLC 1015 (1993); *Town of Falmouth*, 19 MLC 1498 (1992); *City of Taunton*, 17 MLC 1575 (1991); *City of Springfield*, 17 MLC 1001 (1990).
[20] A consistent practice that applies to rare circumstances may become a condition of employment if it is followed each time the circumstances precipitating the practice occur. *See Town of Arlington*, 16 MLC 1350 (1989); *Town of Lee*. 11 MLC 1274, 1277, n. 8 (1984).
[21] 16 MLC at 1351.
[22] *Town of Falmouth*, 25 MLC 24 (1998).
[23] *Id*.
[24] *City of Boston*, 31 MLC 25 (2004).
[25] *Commonwealth of Mass. _____*, 30 MLC 60 (2003).
[26] *Suffolk County House of Correction*, 22 MLC 1001 (1995); *City of Boston*, 14 MLC 1029 (1987).
[27] *Town of Halifax*, 19 MLC 1560 (1993); *Springfield Hospital*, 22 MLC 1645 (1996).
[28] *Higher Education Coordinating Council*, 22 MLC 1433 (1996).
[29] See *supra* section on "Overtime".
[30] *Boston School Committee*, 27 MLC 121 (2001).
[31] *Taunton School Committee*, 28 MLC 378 (2002).
[32] *Town of Danvers*, 3 MLC 1559, 1576 (1977); *City of Boston* 30 MLC 38 (2003).
[33] *Town of Wilbraham*, 6 MLC 1668 (1980). The bargaining requirement applies to positions which are filled or unfilled.
[34] *Town of Plainville*, 20 MLC 1217 (1993) (holding employer unlawfully unilaterally assigned leaf burning duties to firefighters).
[35] *City of Boston v. Boston Superior Officers Federation*, 9 Mass. App. Ct. 157, 454 N.E.2d 1298 (1980). Note, however, that until 1998 the City of Boston had greater power and authority in this area than other towns and cities because of the special statute granting such authority. Normally, certain inherent managerial prerogatives may be bargained away by an employer voluntarily during contract negotiations (as long as the right at issue is not nondelegable, such as the right to appoint), though such a prerogative

may never be mandated by an arbitrator's decision. *See Berkshire Hills*, 375 Mass. 522, 377 N.E.2d 940 (1978).
[36] *Burlington v. Labor Relations Commission*, 390 Mass. 157, 454 N.E.2d 465 (1983).
[37] *Id*.
[38] *Town of Dennis*, 26 MLC 203 (2000).
[39] *Town of Wayland*, 17 MLC 1286 (1990).
[40] *City of Boston*, 18 MLC 1254 (1992).
[41] *Mass. Commissioner of Admin. & Fin*., 18 MLC 1220 (1991).
[42] *City of Everett*, 15 MLC 1298 (1989).
[43] *Springfield School Committee*, 18 MLC 1357 (1992).
[44] *Peabody Municipal Light Department*, 28 MLC 88 (2001).
[45] *City of Newton*, 14 MLC 1287 (1988), *aff'd*, 16 MLC 1036 (1989).
[46] *Commonwealth of Massachusetts*, 27 MLC 20 (2000).
[47] *Town of Scituate*, 16 MLC 1195 (1989).
[48] *City of Boston*, 25 MLC 6 (2002).
[49] *See, e.g., City of Leominster*, 17 MLC 1931 (1991).
[50] *City of Leominster*, 19 MLC 1636 (1993).
[51] *Town of Norwell*, 18 MLC 1263 (1992).
[52] *City of Boston*, 21 MLC 1487, 1491 (1995).
[53] *Mass. Commissioner of Admin & Fin*., 14 MLC 1280 (1987).
[54] *City of Boston*, 14 MLC 1713 (1988).
[55] *City of Quincy*, 15 MLC 1048 (1988).
[56] *Kelley v. Johnson*, 425 U.S. 238 (1976).
[57] *Board of Selectmen of Framingham v. Civil Service Commission*, 366 Mass. 547, 321 N.E.2d 649 (1974) (*Framingham I*).
[58] *Board of Selectmen of Framingham v. Civil Service Commission*, 7 Mass. App. 398, 387 N.E.2d 1198 (1979) (*Framingham II*).
[59] *Quinn v. Muscare*, 425 U.S. 560, 96 S. Ct. 1752 (1976).
[60] *See, e.g*., *Yarbrough v. Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (regulation valid where effect on safety shown); *Lindquist v. Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971) (regulation invalid where no such effect was shown).
[61] *Quinn v. Muscare*, 425 U.S. at 562-3, 96 S. Ct. at 1753.
[62] *Town of Dracut*, 7 MLC 1342 (1980).
[63] *Town of Winchester*, 24 MLC 44 (1997).
[64] *See City of Worcester*, 4 MLC 1317 (1977) (upholding right of new police chief to begin enforcing regulations which had previously been under enforced, as long as he/she provided adequate notice to employees of his/her intent to do so).
[65] *Sheriff of Worcester County*, 27 MLC 103 (2001).
[66] *Boston v. Board of Educ*., 392 Mass. 788, 792, 467 N.E.2d 1318 (1984).
[67] *Commonwealth v. Graham*, 388 Mass. 115, 125, 445 N.E.2d 1043 (1983).
[68] *United States Dept. of Justice, Immigration & Naturalization Serv. v. Federal Labor Relations Authy*., 955 F.2d 998 (5th Cir.1992) (INS)
[69] Federal Labor Relations Act, 5 U.S.C. § 7106(b)(1) (1996).
[70] *National Labor Relations Bd. v. Mead Corp*., 73 F.3d 74, 79 (6th Cir.1996), quoting from *Metropolitan Edison Co. v. National Labor Relations Bd.*, 460 U.S. 693, 708, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983).)
[71] See *Lodge 743, International Assn. of Machinists v. United Aircraft Corp.*, 337 F.2d 5 (2d Cir.1964), cert. denied, 380 U.S. 908, 85 S.Ct. 893, 13 L.Ed.2d 797 (1965) (distinguishing between enforceable and unenforceable waivers of statutory rights).
[72] INS, 955 F.2d at 1004.
[73] See also *National Labor Relations Bd. v. Harrah's Club*, 337 F.2d 177, 178 (9th Cir.1964); *Burger King Corp. v. National Labor Relations Bd*., 725 F.2d 1053, 1055 (6th Cir.1984); *Immigration & Naturalization Serv. v. Federal Labor Relations Authy*., 855 F.2d at 1465.
[74] See *Boise Cascade Corp*., 300 N.L.R.B. 80, 84 (1990) (evidence that pins were worn for six months without incident was "most important point" in determining absence of special circumstances).

[75] See, e.g., *Meijer, Inc. v. National Labor Relations Bd*., 130 F.3d 1209, 1217 (6th Cir.1997) (requiring "affirmative showing" of negative impact).
[76] *Town of Oxford*, 31 MLC 40 (2004).
[77] *Boston Water and Sewer Commission*, 15 MLC 1319 (1989), *aff'd sub nom*, *Boston Water and Sewer Workers v. Labor Relations Commission*, 28 Mass. App. Ct. 359 (1990).
[78] *Id*.
[79] *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S. Ct. 1154 (1976).
[80] *Id*. at 1155.
[81] *Hicks v. Miranda,* 422 U.S. 332, 343-345, 95 S. Ct. 2281, 2288-2289 (1975).
[82] *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. at 1155. On the issue of "right to travel," refer to *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322.
[83] *Id*.
[84] *Town of Milton v. Civil Service Commission*, 312 N.E.2d 188 (Mass. 1974).
[85] *Id*.
[86] *Id*. at 194. *See also, Doris v. Police Commissioner of Boston*, 373 N.E.2d 944 (Mass. 1978) (holding that the city was not stopped from enforcing its residency requirement despite the city's previous failure to enforce the requirement).
[87] *Mello v. Mayor of Fall River,* 495 N.E.2d 876 (Mass. App. Ct. 1986)
[88] *Id*.
[89] This issue is discussed further in the chapter on Union Rights and Responsibilities.
[90] *See Cosby,* 32 Mass. App. Ct. 392 (1992); *Mass. Dept. of Corrections*, 17 MLC 1293 (1990).
[91] *See City of Boston,* 17 MLC 1711 (1991); *Mass. Comm'r of Admin. & Finance*, 19 MLC 1235 (1992).
[92] *School Committee of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 784 N.E. 11 (2003).
[93] *City of Boston v. Boston Police Patrolman's Association*, 8 Mass. App. Ct. 220 (1979).
[94] *See Mayor of Somerville v. Caliguri*, 8 Mass. App. Ct. 335 (1979). Note, however. that the *Somerville* case also involved some race discrimination issues, where the police chief had denied a black officer the right to carry a firearm and then sent him/her into an area in which the citizens had previously been hostile to him. Thus, it appears that a court will only question a chief's decision relative to firearms assignment when the motivation is improper.
[95] *See Mass. Bd. of Regents (Fitchburg State College)*, 8 MLC 1483 (1981); 8 MLC *University of Mass*., 7 MLC 1503 (1980)
[96] *See* Federal Gun Control Act (1968, as amended 1996).
[97] *See, e.g., U.S. v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996).
[98] If the conviction was expunged or set aside, or the officer was pardoned or his/her civil rights restored (in a jurisdiction other than Massachusetts), then the federal law does not require that the officer be relieved of his/her weapon.
[99] Chapter 180 of the Acts of 1998.
[100] A police chief is not required to accommodate a police officer who cannot carry a weapon as a result of a domestic violence conviction, regardless of whether or not he/she plans to pursue such relief.
[101] *See Town of Stoughton*, D-3306 (8/7/90) (Civil Service Commission cases) (holding that the town could suspend a police officer for losing his/her driver's license where having a license was required for the job).
[102] Such a challenge has not been heard by a court yet, but most likely the courts would treat the firearm carrying requirement the same as the residency requirement (see discussion above) and only require a rational relationship between the rule and ability to do the job.
[103] *Commonwealth of Massachusetts*, 25 MLC at 205 (1999*); citing, Town of Danvers,* 3 MLC 1559 (1977).
[104] *City of Boston*, 30 MLC 20 (2003), *See City of Worcester,* 438 Mass. 177, 181 (2002) (employer was not obligated to bargain over its decision to assign truancy enforcement duties to its police officers because the decision implicated the city's ability to set its law enforcement priorities).
[105] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 564.
[106] *Peabody Municipal Light Department*, 28 MLC 88, 89 (2001); City of Boston, 26 MLC 177, 181 (2000); *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000).
[107] *See Wilmarth v. Town of Georgetown*, 28 Mass. App. Ct. 697, 555 N.E.2d 597 (1990).
[108] *See Town of Milton v. Civil Service Commission*, 365 Mass. 368, 312 N.E.2d 188 (1974).
[109] *Befi v. District Court of Holyoke*, 314 Mass. 622, 625, 51 N.E.2d 328 (1943).

[110] *Abington School Committee*, 21 MLC 1630 (1995).
[111] *Town of Lexington*, 22 MLC 1676 (1996).
[112] *Commonwealth of Massachusetts/Commission of Administration and Finance*, 24 MLC 17 (1997).
[113] *North Middlesex Regional School District Committee*, 24 MLC 42 (1997).
[114] *Harris-Teeter Super Markets*, 293 NLRB 743, 131 LRRM 1296 (1989).
[115] *Dracut School Committee*, 29 MLC 1013 (H.O. 1993); *City of Boston*, 25 MLC 76 (H.O. 1998).
[116] *City of Boston*, 25 MLC 76 (1998).
[117] *Town of Natick*, 28 MLC 85 (2001).
[118] *Town of Dennis*¸*12 MLC 1027 (1985).*
[119] See *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 554 (1983); *Commonwealth of Massachusetts*, 25 MLC 201 (1999).
[120] *City of Medford*, 30 MLC 34 (2003).
[121] *City of Lowell*, 28 MLC 126 (2001).
[122] City *of Peabody*, 9 MLC 1447, 1452 (1982).
[123] *Commonwealth of Massachusetts*, Case No. SUP-4345 (Slip Op. June 29, 2001); City *of Peabody*, 9 MLC at 1452; *Johnson Bateman Co.*, 295 NLRB 180, 183, 131 LRRM 1393, 1397 (1989); *Town of Danvers*, 3 MLC 1559, 1574 (1977).
[124] City *of Peabody*, 9 MLC at 1452.
[125] *Commonwealth of Massachusetts*, Case No. SUP-4345 (Slip Op. June 29,2001); *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000); *Town of East Longmeadow*, 25 MLC 128,129 (1999).
[126] *Johnson Bateman Co.*, 295 NLRB at 183.
[127] *Town of Danvers*, 3 MLC at 1574.
[128] M.G.L. c.150E, §6; *Lowell School Committee*, 23 MLC 216 (1997), *aff'd sub nom. School Committee of Lowell v. Labor Relations Commission*, 46 Mass. App. Ct. 921, (1999).
[129] *Town of Andover*, 28 MLC 264 (2002); see *City of Lowell*, 28 MLC 126 [Case No. MUP-2299 (Slip. Op. October 10, 2001)]; *see also City of Fall River*, 20 MLC 1352, 1358 (1994).
[130] *Suffolk County Sheriff's Department*, 29 MLC 63 (2002).

CHAPTER 14 - CHANGING SCHEDULES

The working hours of bargaining unit members have been held to constitute a mandatory subject bargaining.[1] In the absence of any restriction in the collective bargaining agreement, a municipal employer may change employees' schedules to enhance coverage or in an effort to reduce overtime costs. Even where no contractual constraints are present, the employer must provide advance notice to the union of the intention to change the schedule and, if requested, bargain in good faith to either agreement or impasse over the impact of such change on mandatory subjects of bargaining.

In municipal public safety departments which operate on a 24 hour per day, 7 day a week basis, traditionally there has not been the same pressure to reduce overtime by avoiding assigning employees to night or weekend shifts as there is in the case of many private employers. However, as the inclusion of night and weekend differential clauses in contracts increases, the pressure may mount on chiefs to consider such extra costs in determining scheduling and in making vacancy replacement decisions. Holiday pay is another area which might receive consideration for schedule adjustment. Many police and fire contracts pay every employee eleven extra days' pay -- generally at straight time -- in lieu of computing holiday pay for those who actually work on the legal holiday. There would be little benefit to adjust holiday schedules in such cases. However, where holiday pay (often at premium and even double time rates) is tied to actual work on a holiday, savings may result if a *skeleton crew* is assigned to holidays.

In addition to the economic justification, there is a strong public policy favoring the avoidance of overtime pay. In fact, the purpose of premium pay is to discourage the scheduling of overtime as much as possible. The Fair Labor Standards Act is specifically intended to encourage the hiring of additional employees rather than overworking current employees by making it expensive for an employer which schedules employees outside of their normal work week.

Since private employers, in an effort to reduce expenses and increase profits, have attempted to rearrange schedules to avoid overtime, many of the arbitration decisions in this regard involve non-municipal employers.

§ 1 CONTRACTUAL CONSTRAINTS

Some collective bargaining agreements include a provision prohibiting the changing of shifts to avoid overtime. It is unlikely that an arbitrator would approve a unilateral shift change in such case, regardless of the economic or business justification.

Other contractual provisions, while not specifically referencing restrictions on shift changes, may have similar effects. For example, some contracts specify the only authorized shift schedules to which members of the bargaining unit may be assigned. On the other hand, where a collective bargaining agreement specifies how schedule changes are to be accomplished, such a provision is likely to be controlling, at least for the life of the contract. In the absence of any reference to how and when schedule changes may be made, both parties will be left to argue over whether and under what circumstances management may change workers' schedules.

§ 2 NORMAL WORK-WEEK CLAUSES

Contracts which contain clauses describing a “normal” or “standard” work-week or shift usually do not prevent an employer from changing existing schedules or creating new shifts. From a management point of view, there is little, if any, benefit from including a listing of shifts in a collective bargaining agreement. In the *Georgia-Pacific Corp.* 1978 arbitration case, the arbitrator stated, "(t)he very notion of normal hours of work suggests there may be times when abnormal hours are necessary and proper, if such a shift is fully justified by operational or production requirements -- in other words if business conditions dictate."[2] While this is consistent with the majority view, there are some arbitrators who have reached opposite results.[3] While it is not absolutely necessary when such *normal work week* clauses are included, it is advisable to add a provision similar to the following language contained in a contract involved in the 1962 *Stanley Works* arbitration case:

> This article shall not be construed to be a guarantee of hours of work per day or per week. Determination of daily or weekly work schedules shall be made by the [city/town/chief] and such schedules may be changed by the [city/town/chief] from time to time to suit the needs of the [city/town and department]; provided that the changes deemed necessary . . . shall be made known to the union

> representatives in advance whenever circumstances permit.[4]

Where an employer attempts to flaunt its management rights to change schedules for legitimate purposes by doing so in a capricious or arbitrary manner, an arbitrator may find a contract violation.[5]

Lastly, where the employer attempted unsuccessfully to negotiate a change in the *normal hours of work* clause, an arbitrator will be reluctant to find that a unilateral change is simply an exercise of a managerial prerogative.[6]

§ 3 PAST PRACTICE CLAUSES

Some unions point to the *past practice* or *maintenance of standards* clause when arguing that the employer violated a contractual provision. Especially where only a temporary change or one which affects only a fraction of the bargaining unit is involved, such clauses are not generally interpreted by arbitrators as prohibiting schedule changes.[7] A different result has been reached where the *prevailing practice* clause was found to require that employees continue to be paid for an entire shift -- as was the past practice -- regardless of when they were called to work, despite changes in business conditions.[8]

A *past practice* requires more than a long-standing tradition. At least as far as most arbitrators are concerned, it also requires joint thought and effort. In a case involving the changing of a twenty-two year practice of scheduling an employee off work on Saturdays, the arbitrator found that the past practice clause did not prevent the employer from making such change.[9] The arbitrator concluded that the evidence simply showed that management scheduled in the manner it thought best over the years.

There has been a reluctance on the part of arbitrators to approve schedule changes made to avoid overtime when certain employers have changed schedules temporarily, especially where the contract required "agreement" on all new schedules;[10] when the employer does not have a legitimate business reason for the change;[11] or where regular overtime compensation has been used by management as an economic inducement to the union to accept a compromise on other benefits.[12] One arbitrator, while recognizing management's "exclusive right" to schedule production, found that it was not proper to require the union to choose between a temporary change in the work week -- which resulted in a reduced work week -- or the loss of premium pay.[13] This is in contrast to another arbitrator's decision which approved generalized schedule changes based on

legitimate external economic considerations and was not a manipulation of schedules merely to avoid overtime.[14]

§ 4 HOLIDAY SCHEDULES

The LRC, in its 1981 decision in the *City of Springfield* case, addressed the City's obligation to bargain in good faith over a change in its practice of paying overtime for a holiday.[15] In this case the collective bargaining agreement with the Massachusetts Nursing Association, which "expired" on June 30, 1979, provided for 11 specified paid holidays and called for overtime pay, in addition to a regular day's pay, for nurses required to work on a holiday. Without conferring with the Association, the City issued a memorandum to department heads advising them that the Mayor "has indicated that October 1, 1979 will be a paid holiday." The state had recently voted to declare October 1, 1979 as a Papal Holiday, in honor of the Pope's visit to Boston. When the City later failed to pay the extra compensation to nurses who worked the "holiday", the LRC found that the City's conduct constituted a refusal to bargain in good faith. Rather than order the extra compensation as the Association requested, the Commission simply ordered the City to cease and desist from failing or refusing to bargain in good faith with the Association over compensation for unit members who worked on October 1, 1979 in reliance upon the September 28, 1979 memorandum from the Mayor.

In another LRC decision which involved the granting of half day holidays on the day preceding Thanksgiving and Christmas, the Hearing Officer dismissed a complaint alleging a unilateral change in a past practice.[16] The union contended there were no prerequisites to early release, while the School Committee stated that they were contingent upon the successful completion of work assignments. The Hearing Officer found the union's position "questionable and unrealistic" and ruled in the School Committee's favor.

[1]*Medford School Committee*, 1 MLC 1250 (1975)
[2]*Georgia-Pacific Corp.*, 71 LA 1256, 1259 (Howell 1978); see also *FMC Corp.*, 85 LA 18, 20 (Karlins 1985); *Dresser Industries*, 66 LA 1201 (Mills 1976); *Scott Paper Co.*, 48 LA 591 (Williams 1967); *Ideal Corrugated Box Co.*, 46 LA 129 (Hayes 1965); *Universal Food Corp.*, 44 LA 226 (Hebert 1965); *U.S. Steel Corp.*, 41 LA 1051, 1052 (Mittenthal 1963); *United States Pipe & Foundry Co.*, 28 LA 467 (Hepburn 1957); *Wasau Iron Works*, 22 LA 473, 475 (Slavney 1954)
[3]*Mississippi Aluminum Co.*, 27 LA 625 (Reynard 1956); *Robertshaw-Fulton Controls Co.*, 21 LA 436 (Wolff 1953); *Armstrong Rubber Co.*, 17 LA 463 (Conn. Bd. of Med. and Arb. 1951)
[4]*Stanley Works*, 39 LA 375 (Summers 1962)
[5]*Collingwood General and Marine Hospital*, 82 LA 1073, 1075 (Adams 1984); *United Carbon Co.*, 39 LA 311 (Hale 1962); *Aro, Inc.*, 34 LA 254 (Tatum 1960)
[6]*Kroger Co.*, 36 LA 129 (Updegraff 1960); *St. Regis Paper Co.*, 51 LA 1102, 1110 (Solomon 1968); *Traylor Engineering and Manufacturing*, 36 LA 687 (Crawford 1961); *City of Highland Park*, 76 LA 811 (McDonald 1981)
[7]*Kimberly-Clark Corp*., 42 LA 983 (Sembower 1964)
[8]*Pacific Towboat & Salvage Co.*, 82-2 ARB § 8554 (Rule 1982)
[9]*Hopwood Foods, Inc.*, 73 LA 418 (Leahy 1979)
[10]*Ohio Corrugating Co.*, 77-1 ARB § 8294 (Dworkin 1974)
[11]*General Precision, Inc*. 42 LA 589, 593 (Roberts 1963)
[12]*Witco Chemical Co.*, 30 LA 901 (Whitney 1958)
[13]*General Precision, Inc*., supra.
[14]*Stanley Works*, 39 LA 374, 377 (Summers 1962)
[15]*City of Springfield*, 7 MLC 1832 (1981)
[16]*Dedham School Committee*, 5 MLRR 1179 (1979)

CHAPTER 15 - MINIMUM STAFFING

The number of police officers or firefighters on a shift is a decision left entirely to the employer. It is an exclusive managerial prerogative. When renegotiating a collective bargaining agreement, a municipal employer may refuse to even discuss minimum staffing for shift coverage in public safety contracts. When faced with union insistence upon such a provision, an employer may file a Prohibited Practice Charge at the Labor Relations Commission or, if the matter proceeds to arbitration under the jurisdiction of the Joint Labor-Management Committee, the municipal employer may insist that the arbitrator refrain from ruling on minimum staffing pursuant to the terms of the statute which created the JLMC.[1] The JLMC act specifically provides:

> Notwithstanding any other provision of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum staffing of shift coverage, with an employee organization representing municipal police officers and firefighters.

Unions may point to a minimum staffing clause as a bar to reducing coverage on holidays or at other premium pay times. Such challenges should prove unsuccessful for a variety of reasons. Such clauses are only enforceable for the first year of a multi-year contract.[2] The Labor Relations Commission has ruled that while minimum staffing for shift coverage is not a mandatory subject of bargaining[3], minimum staffing per piece of firefighting apparatus is, at least when the piece is being placed in service at a fire. The issue of two or one-person police vehicles was not a mandatory subject of bargaining in Boston.[4]

An LRC Hearing Officer was faced with a variety of firefighter minimum staffing and unilateral change issues in the 1992 case of *Town of Halifax*.[5] The Hearing Officer concluded that minimum staffing per shift is a *permissive* subject of bargaining because shift coverage in a fire department has a greater impact on the level of delivery of a public service than on the workload and safety of firefighters. On the other hand, she ruled that the number of firefighters on a piece of fire apparatus when that apparatus responds to an alarm is a mandatory subject of bargaining to the extent that such coverage raises a question of safety or workload.

A municipal employer may not submit a funding request to meet its obligations under a minimum staffing clause which is contingent on a Proposition 2 ½ override.[6]

In a 2005 case, the Town of Bedford brought an action to vacate an arbitration award pursuant to G.L. c. 150C, § 11(a)(3). The Town contended that it did not violate the collective bargaining agreement when the Chief of the Fire Department unilaterally changed the number of call-back firefighters from four to three. The Town argued that this type of decision falls within the Chief's managerial prerogative and is not the proper subject of arbitration.

The court's review of an arbitrator's decision is governed by G.L. c. 150C, § 11E, and is limited in scope.[7] "Courts inquire into an arbitration award only to determine if the arbitrator has exceeded the scope of his authority, or decided the mater based on fraud, arbitrary conduct or procedural irregularity in the hearings."[8] "An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement . . . by awarding relief beyond that which the parties bound themselves . . . or by awarding relief prohibited by law."[9]

The Town argued that issues concerning call-back procedures should not have been submitted to arbitration because the subject is reserved for the Town's discretion under a managerial rights theory. The Union contended that call-back procedures are not managerial prerogatives, but even if they are so construed, the call-back provision was at least enforceable during the first year of the agreement.

When one party to a collective bargaining agreement is a public employer, there are certain subjects that cannot be arbitrated, even if they inadvertently become part of an agreement. The courts have held that some subjects are so central to the role of a government agency and its accountability in the political process, that decisions regarding these topics are reserved for the sole discretion of the public employer.[10] These subjects are considered non-delegable rights of management "that a municipality and its agents may not abandon by agreement, and that an arbitrator may not contravene."[11] "[T]o the extent subjects within that zone find their way into a collective bargaining agreement, the provisions of the collective bargaining agreement are not enforceable."[12] While determinations of staffing levels that affect public safety might appear to be non-delegable management prerogatives that are "beyond the scope of public sector bargaining."[13] The Supreme Judicial Court has held that minimum staffing requirements that are, or are similar to job security provisions, such as the minimum number of firefighters required to be on duty at any time, are enforceable for periods not exceeding one fiscal year.[14] The Court reached this conclusion despite its express recognition

that "a minimum-staffing requirement in a fire department may involve public safety considerations," because "such a requirement has a direct effect on the number of people that will be employed and is similar to a job security clause . . ."[15]
The Court held, however, that although minimum staffing provisions were managerial rights that could be bargained for, they were not enforceable in the second year of the agreement without funding appropriated by the town because such a provision would interfere with a town's exclusive managerial prerogative to annually determine staff levels and appropriate funding.[16] Similarly, in *Saugus v. Newbury*,[17] the Appeals Court held that job security clauses are not enforceable for more than one fiscal year, and that a collective bargaining provision that attempts to control a public employer's ability to determine staffing levels beyond one year intrudes upon an exclusive managerial prerogative.[18] In other words, a minimum staffing provision that is in the nature of a job security provision can be enforced under a collective bargaining agreement during a fiscal year in which funding is appropriated.

The 2005 case of *Local 2071, International Association of Firefighters v. Town of Bellingham* arose out of a labor-management dispute between the Town of Bellingham and a local firefighters union which is the representative of firefighters employed by the Town.[19] The dispute was committed to the Joint Labor-Management Committee ("JLMC") pursuant to St. 1987, c. 589, § 4A. The JLMC in turn referred the dispute to a panel of arbitrators. The arbitrators made an award consisting of a 3% annual wage increase in favor of the employees and the imposition of a twenty-four hour shift. The Town did not challenge the award of a wage increase, but disputed the validity of the order for the twenty-four hour shift, and has filed a motion in opposition.

The Town maintained that the setting of shift schedules is a non-arbitrable issue as it is a "core management right."

The fundamental question before the court was whether the matter of a twenty-four hour work shift as ordered by the arbitrators is equivalent to the assignment of firefighters, a non-arbitrable subject, or is subject to any other explicit exemption under the JMLC law. From the context of the JLMC statute which excludes assignments and transfers of employees from arbitration, the Superior Court Judge noted that it is evident that the Legislature sought to exempt from arbitration any issue directly related to the type of work performed by employees, but not work hours. Thus, based upon the record before the court, the Judge ruled that the issue was arbitrable, and that there is support in the record for the decision by the arbitrators.

NOTE: This case is on appeal. The SJC has agreed to decide it. This is often an indication that it may reverse the trial court's ruling.

PRACTICE POINTERS

An employer may refuse to include a minimum staffing clause in any future collective bargaining agreement. The union cannot insist on even discussing the topic, as it is not a mandatory subject of bargaining. The employer can refuse to allow the issue to be included in a reference to an arbitrator in the event the case reaches the JLMC.

Where a department is in the midst of a multiyear contract, it is necessary to submit a funding request each year to cover the cost of such clause. However, once the contract expires, this obligation ceases, probably even if there is an "evergreen" clause.

Simply because someone must support the funding request does not preclude other town or city officials from opposing it. For example, the Chair of the Finance Committee is not bound to support a request, even if the Town Manager or Selectmen are.

[1]Chapter 594 of the Acts of 1979; amended by Chapter 726 of the Acts of 1985
[2]*Chelsea Firefighters Union v. Receiver for the City of Chelsea*, 1992 Superior Court Decision. See also, *Town of Billerica v. International Ass'n of Firefighters, Local 1495* 415 mass. 692, 615 N.E.2d 564, 144 BNA LRRM 2513(1993)
[3] *City of Newton*, 4 MLC 1282 (1977); *Town of Bridgewater*, 12 MLC 1612 (1986).
[4] *City of Boston*, 18 MLC 1335 (1992)
[5]*Town of Halifax*, 19 MLC 1560 (1992)
6 *Local 1652, IAFF v. Town of Framingham, 442 Mass. 463, 813 N. E. 2d 543 (2004).*
[7] *School Comm. of Hanover v. Hanover Teachers Ass'n*, 435 Mass. 736, 740 (2002).
[8] *Id.*, citing *Plymouth Carver Regional Schol Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990) (internal quotations omitted).
[9] *School Comm. of Hanover*, 435 Mass. at 740.
[10] *Lynn v. Labor Relations Commission*, 43 Mass.App.Ct. 172, 178 (1997).
[11] *Billerica*, 415 Mass. at 694.
[12] *Boston v. Boston Police Superior Officers Federations*, 29 Mass.App.Ct. 907, 908 (1990).
[13] See *Boston v. Boston Police Patrolmen's Assoc., Inc.*, 403 Mass. 680, 684 (1989) (decision regarding number officers assigned to cruisers is nondelegable).
[14] *Billerica*, 415 Mass. at 694-695, citing *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197, 212 (1982).
[15] *Id.* At 695.
[16] *Id.* At 694-695.
[17] *Saugus v. Newbury*, 15 Mass.App.Ct. 611, 613 (1983).
[18] See also, *Melrose and Melrose Firefighters Union, Local 1627*, 22 MLC 1209, 1218-1219 (1995).
[19] *Local 2071, International Association of Firefighters v. Town of Bellingham*, 18 Mass.L.Rptr. 697, 2005 WL 350962 (Mass.Super.) (2005)

CHAPTER 16 - BENEFITS, COMPENSATION AND LEAVES

§ 1 WAGES

Wages are, of course, a mandatory subject of bargaining.[1] Establishing entry-level wages is also a mandatory subject of bargaining given that wages are earned *after* an applicant becomes an employee and a member of a bargaining unit.[2] Thus, an employer may not unilaterally decrease or increase the entry-level wage of a bargaining unit position without giving the bargaining unit notice and an opportunity to bargain.[3] Further, an employer must comply with applicable minimum wage laws.[4]

Changing the payment schedule from weekly to monthly without providing the union with notice and opportunity to bargain was a violation of Section 10(a)(5).[5]

A parity clause is a provision in a collective bargaining agreement that directly links the wages and/or benefits of one bargaining unit to those of another bargaining unit.[6] Such clauses violate Section 10(a)(5) of the Law.[7] However, if the provision is worded such that it will apply only "to the extent permitted by law," it will not be enforceable and, therefore, it will not violate the collective bargaining law.[8]

Other types of compensation, such as pensions,[9] severance pay, insurance (health[10] or life), and educational incentives,[11] also qualify as "wages" for collective bargaining purposes, and thus are mandatory subjects of bargaining.

The terms of employment, upon reinstatement after disability may be governed by a collective bargaining agreement. The statute providing for a public employee's return to "the position from which he retired or a similar position within the same department," after the employee has taken disability retirement, does not entitle the employee to the same pay grade or level of seniority that he may have had at the time of the disability retirement.

§ 2 MEAL AND COFFEE BREAKS

The Fair Labor Standards Act (FLSA)[12] requires that employees be compensated for all hours worked. Thus, rest periods, such as coffee or snack breaks, require compensation. If employees are completely relieved

from duty during meal periods (which must be at least thirty minutes long), no payment is required.[13] However, for police officers on extended surveillance activities, any meal periods would be compensable given that they are not completely relieved of duty.[14]

As a mandatory federal law, unions may not bargain away employee rights under the FLSA,[15] and an individual employee may not voluntarily waive these rights.[16]

A department head may schedule breaks at specific times, even if this changes the manner in which employees previously scheduled their breaks, according to a 1998 Administrative Law Judge's (ALJ) ruling.[17] This was the case even though the employer implemented the change unilaterally and gave no prior notice to the union.[18] There she found no change in the existing practice that had each department head deciding precisely when breaks would be taken.

§ 3 HOLIDAYS AND VACATIONS

The criteria for granting vacation leave is a mandatory subject of bargaining.[19] If an employer has agreed to certain holidays explicitly in a collective bargaining agreement or implicitly by creating a past practice, an employer may not unilaterally alter the holiday work schedule or compensation.[20] Thus, the decision not to pay teachers for Good Friday contrary to past practice was found to be unlawful by the LRC because it was a mandatory subject of bargaining (and no notice and opportunity to bargain was given.).[21] Similarly, another public employer was found to have violated the Law when it discontinued (without notice and opportunity to bargain) its past practice of allowing officers on injury leave to accumulate vacation credits and holiday pay.[22]

The LRC has generally approached vacations in the same manner as holidays. Thus, an employer may not unilaterally change the vacation leave policy.[23] Further, the LRC has stated that an employer may not unilaterally change the manner in which vacation leave is assigned or approved.[24] An employer must provide notice and opportunity to bargain to agreement or impasse before making any changes in the vacation leave policy.[25]

§ 4 LEAVES OF ABSENCE

The LRC generally treats leaves – resulting from injury, sickness, family obligations, meetings, conventions, etc. – in the same manner as vacation or holiday leaves, and requires the employer to bargain prior to changing a

past practice or contract provision relative to any leave policy. However, some types of leaves raise special issues which require additional comment.

With respect to sick leave, an employer may not unilaterally require an employee to submit to physicals conducted by employer-designated physicians.[26] However, if the employer makes a unilateral change in the sick leave policy in response to an illegal "sick-out" by employees, then its conduct would not violate the Law (even though generally such conduct would be unlawful[27]).[28]

Leave for public safety personnel injuries raises a host of issues under M.G.L. c. 41, § 111F, the "injured on duty" provision.[29] In 1985, the SJC ruled that a city could require an officer injured on duty to perform "light duty" if so assigned by the chief, even though the officer was not yet able medically to resume all of his/her prior duties.[30] This case and subsequent LRC decisions have stressed the importance of bargaining with the union to impasse or agreement prior to implementing a new "light duty" policy.[31]

With respect to both sick and injury leave, an employer may, without bargaining with the union, institute a new "reporting form" which inquires about the reason for the absence, any medical treatments received, and the ability to perform regular duties. In *Town of Wilmington*, the LRC upheld a new fire department reporting form, because the new form was "procedural" in nature and imposed no new substantive requirements affecting the amount of leave available, the criteria for granting leave, or any other condition of employment.[32]

For both sick and injury leave, a chief may require that an employee receiving benefits as a result of sickness or injury remain in the individual's residence except for specific department-approved activities outside of the residence.[33] In the *Atterbury* case, the Boston Police Department required approval for all reasons for leaving one's home except for voting, doctor's appointments, purchasing foods or medicines, attending church, physical exercises, or care of minor children.[34]

Employers must make available to employees unpaid leave for certain family obligations, including the birth of a child, adoption, foster care, care for sick family members, or personal sickness or injury (not work related), pursuant to the Family and Medical Leave Act (FMLA).[35] The FMLA, a federal law, requires that an employer allow at least twelve consecutive weeks of unpaid leave to any qualifying employee (who worked at least 1250 hours in the prior year) requesting leave for any of the above reasons. The employer may require the employee to provide documentation regarding the reasons for the leave, from a health care

provider or otherwise, and can mandate that the employee obtain a second opinion if the employer has reason to doubt the justification for the leave. Moreover, an employer may require that the employee utilize accrued vacation, personal, or sick leave for any part of the twelve-week period, and may require 30-days' notice if the medical leave is foreseeable (e.g., in the case of childbirth). The FMLA requires that the twelve weeks be consecutive, unless the employer agrees to an alternate arrangement. Upon returning to work, an employee is entitled to the same position held before the leave or a position equivalent to the previous position with equivalent benefits, pay and other terms and conditions of employment.[36] However, benefits or seniority need not accrue during the leave.[37]

§ 5 TAKE-HOME VEHICLES

The LRC has determined that the convenience and commuting cost savings resulting from a free take-home vehicle constitutes a mandatory subject of bargaining.[38]

In its 1998 decision involving the Boston Police Department, the Commission ruled that the City violated the Law by discontinuing the practice of assigning district sergeant detectives take-home vehicles without first giving the union notice and an opportunity to bargain in good faith to resolution or impasse.[39] Even though the written policies since 1997 had stated that such vehicles required the Commissioner's express authorization, he/she had never exercised it. The employer may not begin to utilize its discretion, having never done so before, without giving the union notice and the opportunity to bargain.[40]

§ 6 RECRUIT ACADEMY FEES

A 2002 decision involving the Town of Ludlow held that the Town failed to bargain in good faith by unilaterally implementing a requirement that new police officers either sign an agreement promising to remain on the Town's police force for five (5) years or reimburse the Town for the cost of their police academy training without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

In mid-1995, the legislature enacted and the Governor approved Section 305 of Chapter 38 of the Acts of 1995 (Section 305) that provides:

> Section 305. Notwithstanding the provisions of any general or special law to the contrary, the criminal justice training council is hereby authorized and directed to charge one thousand

> eight hundred dollars per recruit for training programs operated by the council for recruits of municipal police departments who began training on or after July first, nineteen hundred and ninety-five. The state comptroller is hereby authorized and directed to transfer one thousand eight hundred dollars multiplied by the number of such recruits from each municipality from the local aid payments of the municipality in which said recruit shall serve. Said transfers shall be made in the fiscal quarter immediately following the completion of training. The state comptroller shall certify all such transfers to the house and senate committees on ways and means no later than thirty days after completion of said transfer. Upon completion of training, said training fee shall be deducted from the recruit's wages in eighteen equal monthly installments or as otherwise negotiated.

Section 71 of Chapter 120 of the Acts of 1995 amended Section 305 by striking out, in line 4, the word "operated" and inserting in place thereof the word "approved".

After the enactment of Section 305, the Town prepared and gave to all newly-appointed student officers a "Recruit Training Fee Agreement, Conditional Waiver Provision" (fee waiver agreement) for their signature. This fee waiver agreement between the Town and the individual employee provides that the Town will assume and be responsible for the $1,800.00 municipal police recruit training academy fee authorized by Section 305, provided that the student officer remains in the Town's employ for five (5) years after completing the academy training. The fee agreement further provides that if the police officer leaves the Town's employ within five (5) years after the training, the police officer will reimburse the Town the full sum of $1,800.00 that the Town may deduct from any severance monies due the officer at the completion of Town employment. If the officer's severance monies are insufficient to cover the total amount due, the officer will be individually responsible for the balance.[41]

The Town did not notify the Union of the fee waiver agreement before giving it to the officers for their signature in March 1996, August 1997, and June 1998. Prior to the enactment of Section 305 in mid-1995, there was no statute that imposed an $1,800.00 police academy training fee that was deducted from the Town's local aid payments. Moreover, prior to the enactment of Section 305, no statute stated that: "[u]pon completion of training, said training fee [$1,800.00] shall be deducted from the

recruit's wages in eighteen equal monthly installments or as otherwise negotiated."[42] Prior to March 1996, the Town did not have a procedure or fee waiver agreement in place that waived the training cost assessment if officers remained in the Town's employ for five (5) or more years.

A public employer violates the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse.[43] The issue here was whether the Town violated the Law when, in March 1996, the Town began requiring new police officers to either reimburse the Town for the cost of their police academy training or sign an agreement promising to remain on the Town's police force for five (5) years in return for which the Town agreed to waive the police academy training reimbursement. The Town argued that the fee waiver agreement did not involve a mandatory subject of bargaining because Section 305 is not listed in Section 7(d) of the Law, and by offering the police officer and the student officers the choice of either signing a fee waiver agreement or reimbursing the Town in the method provided for in Section 305, it complied fully with the mandates of Section 305 and the Law.

The general issue of whether the police academy training cost assessment contained in Section 305 of the Acts of 1995 (Section 305) constitutes a mandatory subject of bargaining was first addressed by the Commission in *Town of South Hadley*.[44] In that opinion, the Commission decided that a requirement that employees pay the costs of their police academy training is a condition of employment that directly affects employees' wages, and, therefore, a training cost assessment, including the procedures for implementing the assessment, including the procedures for implementing the assessment, is a mandatory subject of bargaining.[45] Further, because Section 305 is not listed in Section 7(d) of the Law, the Commission examined carefully its specific language to determine if a public employer has a duty to bargain under the Law.[46] The Commission concluded that Section 305 identifies only one method for a municipality to recoup the costs of police academy training and does not preclude or alleviate a public employer's statutory obligation to bargain over this training cost assessment, including the procedures for implementing it, with its employees' exclusive representative.[47] The Commission concluded, in accord with its prior decision, that the training cost assessment, including the procedures for implementing it, like a fee waiver agreement, constitute a mandatory subject of bargaining.

The Town also contended that it had no obligation to bargain with the Union about the fee waiver agreement because the officers who signed that agreement were, pursuant to M.G.L. c.41, Section 96B, student

officers who are specifically exempt from certain statutory protections afforded to police officers, including collective bargaining agreements under the Law. Further, the Town argued that, because the five (5) student officers were not Town employees and bargaining unit members on the dates they signed the fee waiver agreements, the Town had no obligation to bargain about issues that impact persons who are not in the Union's bargaining unit. The Commission disagreed.

Section 305 provides in relevant part that: "[u]pon completion of training, said training fee shall be deducted from the recruit's wages in eighteen equal monthly installments or as otherwise negotiated." Therefore, under Section 305, the $1,800.00 training fee is due and payable after the student officer has completed the police academy training or as otherwise negotiated. After the student officers have completed the training, they are no longer student officers, but police officers accorded the full protections under the Law and whose wages and other terms and conditions of continued employment are governed by the parties' collective bargaining agreement. Therefore, the Law required the Town to bargain with the Union about the training cost assessment, including the procedures for implementing it, because the officers were Town police officers and members of the Union's bargaining unit when the training cost assessment attached.[48] Moreover, the fact that student officers signed the fee waiver agreement prior to the date they started working for the Town does not turn the training fee assessment under Section 305, that directly and only affects employee's wages after hire, into a pre-condition of hire that an applicant must fulfill before beginning work.[49]

The Labor Relations Commission stated that its decision in *Ludlow* did not require it to determine whether the Town required the student officers to sign the fee waiver agreement or whether, as the Town asserted, the Town offered the student officers the choice of either signing the fee waiver agreements or reimbursing the Town in the manner identified in Section 305. Under either scenario, the outcome is the same. The Law requires the Town to give the Union prior notice and an opportunity to bargain over the new training cost assessment, including the procedures for implementing it, like the fee waiver agreement, prior to implementation.

§ 7 BICYCLE PATROLS

The LRC has ruled that the manner in which a municipal employer implements its bicycle patrol program directly affects mandatory subjects of bargaining.[50] These include employees' job duties, workload and safety when responding to calls, use of safety equipment, and work assignments, all of which are mandatory subjects of bargaining.[51]

An employer must notify the union of a potential change before it is implemented, so that the bargaining representative has an opportunity to present arguments and proposals concerning the physical alternatives.[52]

§ 8 OTHER BENEFITS

The Commission has held that certain amenities provided by an employer at the workplace amount to benefits on which employees may rely as condition of employment and which constitute mandatory subjects of bargaining.

Examples include:

- Providing lockers and the manner in which they may be used;[53]
- free parking; [54]
- choice and amount of food available to correction officers;[55]
- gas allotment policy;[56] and
- library hours.[57]

§ 9 BULLET-RESISTANT VESTS

The LRC reversed a Hearing Officer and ruled that the Town of Shrewsbury violated the Law by unilaterally implementing a rule that officers must wear bullet-resistant vests for paid details and court appearances.[58]

The issue in the Shrewsbury case was whether the Police Department unilaterally changed a condition of employment by the Chief's memorandum requiring all officers to wear bulletproof vests when on duty. On appeal, the Union challenged the Hearing Officer's conclusion that there was no unilateral change and no violation of the Law. The full Commission disagreed with the Hearing Officer's conclusion and held that the Town violated the Law, for the reasons set forth below.

A public employer violates the Law when it unilaterally alters a condition of employment involving a mandatory subject of bargaining without first bargaining with the exclusive collective bargaining representative to resolution or impasse.[59] An employer's duty to bargain encompasses working conditions established through custom and practice, as well as those governed by the terms of a collective bargaining agreement.[60]

The uncontroverted evidence in this case established that regardless of how officers got their vests, they did not always wear them. Further, the officers who testified never wore their vests, without consequence, prior to the Chief's memorandum. Therefore, the memorandum's requirement that all officers wear their vests at all times constituted a unilateral change in the established practice. The requirement to use safety equipment such as bullet-resistant vests is a mandatory subject of bargaining.[61] Therefore, absent an affirmative defense, the Chief's unilateral change in a mandatory subject of bargaining is a violation of the Law.[62]

The Town defended its action by relying on the language of the parties' collective bargaining agreement, and the LRC considered whether the Union waived its right to bargain about the vesting requirement by agreeing to that language. The relevant question therefore was whether the Union knowingly and unequivocally waived its bargaining rights over the requirement that all officers wear the vests at all times. A contract waiver requires evidence that the parties consciously explored and knowingly yielded the right to bargain further about a matter during the life of an agreement.[63] A waiver of the statutory right to bargain over a particular subject cannot be inferred lightly. Rather, it must be "shown clearly, unmistakably, and unequivocally."[64] The contract language on which the Town relied and the parties' bargaining history established that there was no waiver in this case.

There was no evidence that either party contemplated that all officers would receive free vests pursuant to the state grant program at the time the provision was negotiated. Evidence of bargaining history establishes that the Union sought to have the Town pay for vests for officers who wanted them, and the Town wanted the officers to wear the vests if the Town was going to pay for them. Furthermore, the evidence established that the Town encouraged the officers to obtain the free vests, and officers expressed concern and were reassured that there would be no "strings attached" if they obtained the vests pursuant to the state grant program. Therefore, the Commission ruled that the Town did not meet its burden of establishing that the Union waived its right to bargain over the mandatory use of vests by all officers.

§ 10 HEALTH INSURANCE

The general framework surrounding the issues raised in health insurance cases is well-settled. A public employer violates the Law when it unilaterally alters an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without providing to the exclusive representative of its employees prior notice and an opportunity to bargain.[65] The terms and costs of health

insurance benefits, including co-payments, are conditions of employment that constitutes mandatory subjects for bargaining.[66] It is undisputed that normally, under M.G.L. c.150E, a public employer must bargain over the terms and costs of health insurance coverage provided pursuant to M.G.L. c.32B and that such an employer would commit a prohibited practice by changing health insurance benefits without first bargaining over the subject.[67] The Commission has also held that employer-subsidized health insurance is a form of compensation.[68] Changes in the amount of a co-payment that employees are required to pay for prescription drugs or office visits under an employer's health insurance plans are clearly changes to both the terms and costs of health insurance affecting employees' overall compensation. Therefore, generally, the employer must bargain with a union to resolution or impasse prior to changing the amount of co-payments that employees are required to make under the employer's group health insurance plan.[69]

Although the Town of Dennis did not dispute that it had an obligation to bargain over the impacts of the decision to increase insurance co-payments, it contended , citing *MCOFU v. Labor Relations Commission*,[70] and several other Commission decisions, that it had no obligation to bargain over the *decision* to increase insurance co-payments because that decision was made by CCMHG and was therefore beyond the sole control of the Town.

The Commission rejected the Town of Dennis' argument that it was excused from bargaining over the decision to increase the co-payments because that decision was made by the CCMHG and therefore was beyond its control. The Commission has held that, where certain actions taken by parties like the Group Insurance Commission (GIC), the Legislature, or an insurance company are beyond the employer's control, the public employer may not be required to bargain over the third party's decision to take that action.[71]

In *MCOFU v. Labor Relations Commission*, the Supreme Judicial Court held that because it was inherent in the statutory scheme that the Commonwealth, as the public employer, and the union had no control over the GIC's decision to reduce health insurance benefits, the Commonwealth was relieved of its duty to bargain over the changes in health insurance coverage mandated by GID.[72] However, the Court specifically noted that its holding did not concern collective bargaining rights and health insurance coverage under M.G.L. c.32B for employees of political subdivisions of the Commonwealth.[73] The Commission similarly found that there is no independent agency analogous to the GIC for purchasing health insurance for municipal employees.[74] Moreover, although Section 12 of M.G.L. c.32B permits public authorities of two or more governmental units, it does not require those public authorities to do

so, nor does that statute relieve the participants in those groups of their respective obligations to bargain over changes to the terms and costs of its employees' benefits within their municipality.[75]

In *Town of Dennis*, the Labor Relations Commission stated that the record before it reflected that the CCMHG is a joint purchase group of governmental employers that arranges for the purchase and administration of health insurance for its constituent members. The CCMHG is run by a Board of Delegates, whose membership is drawn from various municipal officials of the constituent group of governmental employers.

The Commission concluded that the Town of Dennis violated the Law by unilaterally making increases to prescription drug and office visit co-payments in 1999 and July 2001 without first giving notice to the Union and bargaining to resolution or impasse.

[1] G.L. c. 150E, § 6. *See also, Lawrence School Committee*, 3 MLC 1304 (1976) (holding that paydays schedules are also a mandatory subject of bargaining).
[2] *Boston School Committee*, 10 MLC 1410 (1984).
[3] *See Dracut School Committee*, 13 MLC 1055 (1986) (holding that a public employer may not offer an applicant a higher wage than it is currently paying bargaining unit members without giving the union the opportunity to bargain).
[4] The federal minimum wage is currently set at $5.15 an hour; Massachusetts' minimum wage is $5.25/hour but does not apply to a municipal employee. Overtime pay rates for police and fire are computed under the Fair Labor Standards Act in a special manner. *See* 29 U.S.C. § 207(k).
[5] *Worcester County Sheriff's Department*, 28 MLC 1 (2001).
[6] *Medford School Committee*, 3 MLC 1413 (1977).
[7] *Town of Mashpee*, 19 MLC 1572 (1992).
[8] *Norfolk County*, 24 MLC 104 (1998).
[9] Where a decision regarding pensions and other retirement benefits is made by someone other than the employer, the employer may still have to bargain over the impact of the change. *See, e.g., Malden*, 20 MLC 1400 (1994) (requiring employer to bargain over impact of decision by the Retirement Board); *Higher Educ. Coordinating Council*, 22 MLC 1172 (1993) (requiring employer to bargain over impact of legislation establishing an optional retirement plan).
[10] This includes bargaining over contribution or premium rates. *See Everett*, 416 Mass. 620 (1993). However, where the insurance carrier cancels the policy, the employer may implement a new plan before reaching agreement or impasse with the union. *See Weymouth*, 21 MLC 1189 (1993).
[11] *See Framingham*, 20 MLC 1536 (1994).
[12] 29 U.S.C. § 207(e).
[13] 29 CFR § 785.19 reads as follows:
(a) *Bona fide meal periods*. Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily, 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special circumstances. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. [citations omitted]
(b) *Where no permission to leave premises*. It is not necessary that an employee be permitted to leave the premises if he/she is otherwise completely freed from duties during the meal period.
The courts have adopted two tests to determine whether meal time compensation is in fact necessary, and examine: 1) who receives the *greatest benefit* from meal periods, see *Amour & Co. v. Wantock*, 323 U.S. 126 (1944), or 2) whether employees are required to perform any *duties* during meal times, see *Culkin v. Glen L. Marting Nebraska Co*., 97 F. Supp. 661 (D. Neb. 1951), *aff'd* 197 F. 2d 981 (8th Cir. 1951).
[14] 29 CFR 553.223(b). This provision applies to police and fire departments under the 207(k) exemption of the FLSA, where the employer may take advantage between a seven and twenty-eight day consecutive work schedule.
[15] *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).
[16] *Brooklyn Savings Bank v. O'Neal*, 328 U.S. 697 (1981).
[17] *City of Lynn*, 24 MLC 92 (1998).
[18] *Id*.
[19] *Massachusetts Port Authority*, 26 MLC 100, 101 (2000).
[20] *See Everett*, 22 MLC 1275 (1995) (holding that employer unilaterally and unlawfully altered the pay and compensation schedule for Christmas and Thanksgiving).
[21] *See New Bedford School Committee*, 2 MLC 1181 (1975).
[22] *Town of Billerica*, 11 MLC 1302 (1985).
[23] *See* City of *Revere*, 21 MLC 1325 (1994). But cf., *City of Leominster*, 17 MLC 1699 (1991)
[24] *See Mass. Comm'r of Admin. & Fin.*, 21 MLC 1637 (1995).
[25] *Sheriff of Suffolk County*, 28 MLC 72 (2001).
[26] *City of Everett*, 12 MLC 1418 (1986).

[27] *See Town of Westfield*, 10 MLC 1232 (1983).
[28] *Somerville School Committee*, 13 MLC 1024 (1986).
[29] See "The Chief's Guide to Injured on Duty Claims" (published by the Municipal Police Institute, Inc.) for a full treatment of this complicated issue.
[30] *See Newton Branch of the Massachusetts Police Assn. v. City of Newton*, 484 N.E.2d 1326 (1985).
[31] *See, e.g., City of Springfield*, 15 MLRR 1133 (1989); *Town of Arlington*, 15 MLRR 1130 (1989).
[32] *Town of Wilmington*, 9 MLC 1694 (1983).
[33] *See Atterberry v. Police Commissioner of Boston*, 392 Mass. 550, 467 N.E.2d 150 (1984).
[34] *Id.*
[35] This only applies, however, to employers with 50 or more employees. Further, an employee is entitled to (i.e., "eligible" for) the 12 weeks unpaid leave only if he/she or she has worked 1,250 hours during the previous twelve-month period.
[36] The employer may deny restoration of an employee's job after the twelve weeks leave only if: 1) the employee is among the highest paid ten percent of the employer's employees; 2) the denial is necessary to prevent "substantial and grievous" economic injury to the employer's operations; and 3) the employer notifies the employee of its intent to deny restoration as soon as it determines such action is necessary.
[37] Health insurance, however, must be maintained by the employer during the leave.
[38] *Town of Dedham*, 16 MLC 1235 (1989).
[39] *City of Boston*, 25 MLC 92 (1998).
[40] See *Town of Tewksbury*, 11 MLC 1170 (1984); *Town of Hingham*, 19 MLC 1543 (1992).
[41] On October 7, 1996, town meeting members authorized the Town "to waive the training fee for new recruits to the Ludlow Police Department provided that they remain a member of the force for a period of five (5) years or more pursuant to the provisions of Section 305 of Chapter 38 of the Acts of 1995."
[42] We have modified these facts in response to the Town's request.
[43] *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989); *City of Holyoke*, 13 MLC 1336, 1343 (1986).
[44] *Town of South Hadley*, 27 MLC 161 (2001).
[45] *Town of South Hadley*, 27 MLC at 162.
[46] *See, City of Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 172 (1997) (public employer has no duty to bargain when acting pursuant to a specific, narrow, statutory mandate not listed in Section 7(d)).
[47] *Town of South Hadley*, 27 MLC at 163.
[48] *Cf. City of Gloucester*, 26 MLC 128 (2000) (decision to cease crediting student officers with compensatory time and the impacts of that decision on the bargaining unit members' terms and conditions of employment is a mandatory subject of bargaining because the officers were permanent city employees at the time they sought to use the compensatory time).
[49] *See, Boston School Committee*, 3 MLC 1603 (1977) (residency as a condition of continued employment is a mandatory subject of bargaining, but residency is purely as a condition of hire is not).
[50] *Town of East Longmeadow*, 28 MLC 67 (2001).
[51] *Id.; see City of Taunton*, 26 MLC 225, 226 (2000).
[52] *Town of East Longmeadow*, 28 MLC 67, 69 (2001); *City of Taunton* at 226.
[53] *Town of Shrewsbury*, 28 MLC 44 (2001).
[54] *Commonwealth of Massachusetts*, 27 MLC 11 (2000);
[55] *City of Boston*, 15 MLC 1209 (H.O. 1988), *aff'd* 16 MLC 1086 (1989).
[56] *Everett Housing Authority*, 9 MLC 1263 (1982).
[57] *City of Boston*, 9 MLC 1021 (1982).
[58] *Town of Shrewsbury*, 28 MLC 70 (2001).
[59] School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Town of Arlington, 21 MLC 1125 (1994); City of Boston, 21 MLC 1350, 1359 (1994).
[60] City of Boston, MLC 1429, 1434 (1989).
[61] See, e.g., Town of Shrewsbury, 14 MLC 1664 (1988) (use of seat belts a mandatory subject.)
[62] See, e.g., Commonwealth of Massachusetts, 20 MLC 1545, 1552 (1994) and cases cited therein.
[63] City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City of Leominster, 23 MLC 62, 65 (1996); Town of Marblehead,12 MLC 1667,1670 (1986).

[64] School Committee of Newton, 388 Mass. at 569; Cih, of Worcester, 16 MLC 1327, 1333 (1989); Town of Andover, 4 MLC 1086, 1089 (1977); Town of Hudson, 25 MLC 143 (1999).
[65] *City of Somerville*, 19 MLC 1795, 1798 (1993) citing *Town of Ludlow*, 17 MLC 1191, 1195 (1990); *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557, 572 (1983).
[66] *Town of W. Dennis*, 28 MLC 297 (2002).
[67] *Massachusetts Correctional Officers Federated Union* (MCOFU), *v. Labor Relations Commission*, 417 Mass. 7, 9, n.3 (1994); *City of Somerville*, 19 MLC at 1799, *citing Kerrigan v. City of Boston*, 361 Mass. 24 (1982); *Town of Ludlow*, 17 MLC 1191, 1195 (1990) *citing School Committee of Medford v. Labor Relations Commission*, 8 Mass. App. Ct. 139, 140 (1979).
[68] *Board of Regents of Higher Education*, 19 MLC 1248, 1265 (1992), citing *Anderson v. Board of Selectmen of Wrentham*, 406 Mass. 508 (1990).
[69] *Town of Dennis*, 28 MLC 297 (2002).
[70] *MCOFU v. Labor Relations Commission*, 417 Mass. 7 (1994).
[71] *See e.g., MCOFU v. Labor Relations Commission*, 417 Mass. 7, 1994 (employer not required to bargain over Group Insurance Commission's decision to reduce health insurance benefits); *Town of Weymouth*, 23 MLC 71 (1996) (insurance company's decision to cancel Town's coverage excused Town from bargaining over decision to cancel that coverage); *City of Somerville*, 19 MLC 1798 (1993) (Legislature's mandating increase in employee portion of HMO premium deduction excused City from bargaining over Legislature's decision to make change.)
[72] 417 Mass. at 9.
[73] *Id. at* 9, n.3, *citing Town of Ludlow*, 17 MLC 1191, 1198 (1990).
[74] *City of Malden*, 23 MLC 181, 184 (1997).
[75] M.G.L. c.32B, Section 12 states in pertinent part that "upon acceptance of this chapter, the appropriate public authorities of two or more governmental units *may* join together in negotiating and purchasing …one or more policies of insurance…for the employees of said governmental units." (Emphasis supplied).g

CHAPTER 17 - EMPLOYEE PERFORMANCE

Because performance evaluations have a direct impact on employee job security and professional advancement, they are a mandatory subject of bargaining.[1] The LRC has classified performance evaluations as mandatory subjects of bargaining for two primary reasons: 1) they establish standards by which performance of bargaining unit members will be evaluated,[2] and 2) they serve as a basis for promotions.[3] Moreover, the LRC has stated that performance evaluations do not fall in the "managerial prerogative" category, so an employer must bargain over the *decision* to implement or change the performance evaluation method in addition to the impact of the decision.[4]

Performance evaluation systems that measure standards of productivity and performance are mandatory subjects of bargaining.[5] Performance evaluations often have a direct relationship to promotions, so a change in the standards used to evaluate employee productivity or performance must be bargained over prior to implementation.[6] An employer is prohibited from unilaterally changing the criteria upon which employees are evaluated.[7] Evaluation procedures and criteria are changed if there is a material change in the criteria used, a new criterion is established, or there is a change in the purpose of the evaluation.[8] An employer may choose, however, to reinstate certain evaluation procedures which it has not used for a period of time. Thus, in *Boston Department of Health and Hospitals*, the LRC held that the employer could lawfully reintroduce written evaluation forms after a three-year hiatus.[9]

An employer need not bargain before implementing a new system if such new system measures the same criteria as the prior system, since such changes do not materially or substantially change conditions of employment.[10] In its 1998 ruling, the LRC upheld an Administrative Law Judge's (ALJ's) dismissal of the Boston Superior Officers Federation's charge following the creation of a Community Appeals Board (CAB) to review Internal Affairs Department (IAD) investigations and disciplinary hearings.[11] The union conceded that the department was entitled to create the CAB. However, it insisted that the City had a duty to bargain before unilaterally implementing the CAB. The LRC found that the CAB serves merely in an advisory capacity. The ultimate decisions continued to rest with the Commissioner. Therefore, the union failed to show that the CAB had a direct, identifiable impact on performance evaluations.

The employer also has a duty to provide the union with the personnel records and evaluations of both unit and non-unit employees if the union can demonstrate that the records are relevant and necessary for collective bargaining purposes.[12] The LRC has recognized, however, that certain data of a highly personal, intimate, or confidential nature may be withheld.[13] In cases where such confidential information is involved with respect to police officers, the SJC has ruled that partial disclosure of the employee evaluations is appropriate, given the public nature of such records.[14]

In order to establish that an employer has made an unlawful unilateral change with respect to performance evaluations, an employee must demonstrate that the employer effected a "material change" in the evaluation procedure. Thus, mere "mechanical," as opposed to "substantive," changes are permitted.[15] Implementing a new written evaluation[16] and changing the wording of an existing evaluation,[17] were considered mechanical changes by the LRC. Moreover, the LRC has indicated that an employer may utilize a new factor in evaluations if that factor is linked to one of the criteria agreed to in the contract. Thus, in *City of Boston*, the LRC upheld an employer's use of quantity and quality of arrests in judging performance, because these were reasonably (and predictably) related to productivity.[18]

An employer may not, however, alter the criteria upon which employees are evaluated, without first bargaining over that decision. In *Commonwealth of Massachusetts*, the LRC found that the employer had committed an unlawful employment practice when it introduced "performance targets" into the evaluation procedure.[19] The LRC came to this conclusion after finding that the parties had specifically agreed at the bargaining table that employees would not be held accountable to any specific goal or target achievement.[20] Moreover, in *Massachusetts Commissioner of Administration and Finance*, the LRC found that an employer who began a worksheet chronicling an employee's typing mistakes had unlawfully introduced a new criterion to the evaluation procedure.[21]

When examining the LRC cases dealing with performance evaluations, several trends emerge. First, the Commission will look to the collective bargaining agreement (CBA) to determine the proper manner, frequency, and content of performance evaluations.[22] Second, most non-civil service employers who conduct written evaluations do so once per year.[23] The evaluations are generally conducted by an employee's immediate supervisor.[24] The CBA will usually specify the procedure by which an employee can challenge the results of the evaluation.[25]

The most frequently challenged aspect of employee evaluations involves the terms categorizing the employee's performance. For example, in *Massachusetts Department of Public Welfare*, an employee complained when her evaluation rated her performance as "meeting" expectations.[26] The employer's evaluation procedure rated employees as "below," "meets," or "exceeds" standards. The employee argued that the evaluation caused her to be denied bonus money, and sought to gain access to other employee evaluations to determine whether similarly situated employees had been evaluated in a like manner. The hearing officer determined that the employee could see these other evaluations, and stated that it was unwise to rate employees according to such a limited scale.[27]

Federal and state cases indicate that performance evaluations will most likely be upheld if the following guidelines are followed:

- use standardized evaluation forms,[28]
- conduct annual evaluations,[29]
- have face-to-face meetings between evaluators and the employee to discuss the review,[30]
- use only objective facts (as much as possible) when forming conclusions,[31]
- write down everything relevant to the evaluations,[32]
- avoid general and ambiguous phrases such as "unsatisfactory" without elaborating;[33] and
- do not consider facts which are outside the agreed upon performance criteria.[34]

Employers often use various types of tests--including drug, and psychological tests--to measure an employee's fitness for the job. If used in the course of employment without prior agreement by the union, such tests may be instituted only if the employer bargains with the union to impasse first.[35] However, if the tests are administered to an employee in the course of a criminal investigation, e.g., polygraph, prior bargaining is not required.[36]

Psychological tests are employed to evaluate both applicants[37] and current employees. While management has the prerogative to implement such tests, except when use exclusively for applicants, it must first bargain over the impact on current employees with the union. [38] The use of psychological tests has been challenged on a variety of legal grounds. First, it was alleged that such tests violated constitutional First Amendment and privacy rights.[39] In the case of public safety personnel, at least one appellate court has determined that a state has a sufficiently

compelling interest in maintaining a qualified work force to justify the use of psychological tests.[40]

In addition to constitutional challenges, employees have challenged the use of psychological tests for particular purposes. Nonetheless, courts have upheld the use of psychological tests for applicants,[41] probationary employees,[42] employees exhibiting erratic behavior,[43] and random or periodic testing (without cause).[44] Moreover, an employee lawfully requested to perform a psychological evaluation may be disciplined if he/she or she refuses to submit to the exam.[45] Also, an employee may not insist on having a lawyer present during the exam.[46]

Typically, drug and alcohol testing is treated in a similar manner to psychological testing. Substance testing, according to the LRC, is a mandatory subject of bargaining.[47] Thus, an employer may not unilaterally implement a drug screening or testing proposal for employees without prior bargaining with the union, and may not refuse to bargain over such a proposal.[48] In the *Town of Fairhaven* case, the LRC also held that a union could agree to a drug testing provision in a labor contract, and that by doing so the union was not waiving any employee constitutional rights (search and seizure, privacy, etc.) as long as the testing occurred when the employer had "probable cause" to test a particular employee.[49] The Supreme Judicial Court of Massachusetts has indicated, however, that *random* (i.e., without cause) drug testing without an individual's consent violates the state constitution.[50]

Polygraph examinations are also treated like other testing procedures, but they present a special complication in that polygraph tests may only be given in the course of a criminal investigation. An employer may not even suggest that an employee submit to a polygraph exam as part of any hiring procedure or as a condition of continuing employment unless a criminal investigation is involved.[51] Where a police officer is under criminal investigation and is ordered to submit to a polygraph test, a police department was not required to bargain with the union prior to the test.[52]

[1] *Commonwealth of Mass. v. Labor Relations Commission*, 404 Mass. 124, 533 N.E.2d 1325 (1989).
[2] *See, Fall River School Committee*, 7 MLC 1843 (1981); *Burlington School Committee*, 6 MLC 1334 (1979); *Town of Wayland*, 5 MLC 1738 (1979); *Town of Wayland*, 3 MLC 1450 (1977).
[3] *Boston School Committee*, 3 MLC 1603 (1977).
[4] *Id.* Reprimands or directives to improve performance, however, do not fall into the category of "performance evaluations." *See Peters Township School Committee*, 73 LA 702 (1989); *see also* "Discipline" section below.
[5] *Town of Wayland*, 5 MLC 1738 (1979).
[6] *See, e.g., Mass. Commissioner of Admin. & Finance*, 21 MLC 1697 (1995) (finding that employer refused to bargain in good faith over decision to change the evaluation criteria for two positions).
[7] *Commonwealth of Massachusetts*, 18 MLC 1161 (1991).
[8] *Id.;* See also *Commonwealth of Massachusetts*, 13 MLC 1717 (1987).
[9] *Boston Department of Health and Hospitals,* 8 MLC 1077 (1981).
[10] *Commonwealth of Massachusetts*, 13 MLC 1717 (1987).
[11] *City of Boston*, 24 MLC 89 (1998).
[12] *Mass. Dept. of Public Welfare and Alliance*, 21 MLC 1499, 1506 (1995). *See also, Worcester School Committee*, 14 MLC 1682 (1988); *Commonwealth of Mass*., 11 MLC 1440 (1985); *Board of Trustees, Univ. of Mass. (Amherst)*, 8 MLC 1139 (1981).
[13] *Board of Trustees, Univ. of Mass. (Amherst)*, 8 MLC 1148, 1152 (1981).
[14] *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 293 (1979). The LRC has also modified orders to produce employee records in order to protect promotional candidates. *Town of Weymouth*, 16 MLC 1031 (1989).
[15] *City of Boston*, 5 MLC 1796 (1979).
[16] *City of Worcester*, 4 MLC 1317, *aff'd*, 4 MLC 1697 (1978); *see also, Boston Dept. of Health and Hospital*, 8 MLC 1077 (1981) (upholding employer's reintroduction of written evaluations after three year absence).
[17] *Town of Arlington*, 4 MLC 1614 (1977), *aff'd* 4 MLC 1946 (1978*); see also, Trading Port Inc*., 224 NLRB 160 (1976).
[18] *City of Boston*, 5 MLC 1796, 1797 (1977).
[19] *Commonwealth of Massachusetts*, 18 MLC 1161, 1164 (1991).
[20] *Id.* at 1163.
[21] *Massachusetts Commissioner of Administration and Finance*, 13 MLC 1125 (1986); *see also, Waltham School Committee*, 9 MLC 1034 (1983) (finding School Committee had unlawfully introduced a new evaluation criteria when it added a probationary period).
[22] *Comm. of Mass*., 18 MLC 1161, 1163 (1991).
[23] *Comm. of Mass*., 16 MLC 1751 (1989).
[24] *Comm. of Mass*., 15 MLC 1541 (1988).
[25] *Comm. of Mass*., 16 MLC at 1753 (discussing challenge to employee evaluation result by means of grievance procedure).
[26] *Massachusetts Department of Public Welfare*, 19 MLC 1340 (1992).
[27] *Id.*
[28] *See* Hirsch, LABOR AND MANAGEMENT IN MASSACHUSETTS, 135 (1990).
[29] *Broken Arrow, City of Oklahoma City*, 96 LA 439 (1991).
[30] *Ashway County Board of Mental Health*, 94 LA 303 (1990).
[31] *See* Hirsch, *supra*, at 135-136.
[32] *See generally*, *Commonwealth of Mass*., 20 MLC 1336 (1996).
[33] *Id.*
[34] *Ohio State, County & Municipal Employees*, 92 LA 1167 (1989); City of Erie, 96 LA 557 (1991).
[35] *City of Fall River*, 20 MLC 1352 (1994).
[36] *Mass. Labor Relations Commission v. IBPO*, 391 Mass. 429 (1984) (holding that administering polygraph test to an officer was not unlawful, even though the Town had not bargained with the union, because the test was administered as part of a criminal investigation).

[37] See section above on hiring criteria for discussion regarding tests for applicants*; see also, Swearer v. Karoleski*, 563 A.2d 586 (Penn. 1989) (approving the goal of testing personality traits of applicants based on a correlation between test results and future on-the-job performance, though invalidating the test because it lacked a pass/fail standard).
[38] *See* City of *Haverhill*, 16 MLC 1215, *aff'd* 17 MLC 1215 (1989).
[39] *McKenna v. Fargo*, 451 F. Supp. 1355 (D.N.J. 1978), *aff'd* 601 F.2d 575 (1976).
[40] *Id.*
[41] *See McKenna*, *supra* note 156.
[42] *Redmond v. City of Overland Park*, 672 F. Supp. 473 (D. Kan. 1987).
[43] *City of Boston v. Boston Patrolman's Association,* 8 Mass. App. 220. 392 N.E.2d 1202 (1979); *Conte v. Horcher*, 365 N.E.2d 567 (Ill. 1977)
[44] *Hild v. Brunner*, 496 F. Supp. 93 (D.N.J. 1980).
[45] *See, e.g.*, *Lucheso v. Dillon*, 439 N.Y.S.2d 783 (1981).
[46] *Nolan v. Police Commissioner of Boston*, 420 N.E.2d 335 (1981) (holding that due process only required that the psychological evaluation be recorded).
[47] *Town of Fairhaven*, 20 MLC 1348 (1994).
[48] *City of Fall River*, 20 MLC 1352 (1993); *City of Boston*, 13 MLC 1706 (1986).
[49] *Id.*
[50] *Robert T. Guiney v. Police Commissioner of Boston*, 411 Mass. 328 (1991); *Horsemen's Benevolent and Protective Ass'n v. State Racing Commission*, 403 Mass. 692, 699-700 (1989)
[51]
[52] *Patch v. Mayor of Revere*, 397 Mass. 454, 492 N.E.2d 77 (1988).

Appendix

SAMPLE FORM 1

SAMPLE NOTICE FORM *(OPTION 1)*

TO: Union President

FROM: Chief

DATE:

RE: Change in Rule or Practice

Be advised that effective thirty (30) days from now, i.e., _____, 200__, I intend to put the following rule/practice/policy into effect:

_____
_____
_____
_____
_____
_____
_____

SAMPLE FORM 2

SAMPLE NOTICE FORM *(OPTION 2)*

TO: Union President

FROM: Chief

DATE:

RE: Change in Rule or Practice - Decisional Bargaining

Be advised that effective thirty (30) days from now, i.e., _____, 200__, I intend to put the following rule/practice/policy into effect:

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice. Your reply should specify the mandatory subjects of bargaining which you contend will be impacted.

The following dates are available:

Please select one (or more) date(s) and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 200__.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed rule/practice/policy.

SAMPLE FORM 3

SAMPLE NOTICE FORM *(OPTION 3)*

TO: Union President

FROM: Chief

DATE:

RE: Change in Rule or Practice - Offer to Bargain Impact

Be advised that effective thirty (30) days from now, i.e., _____, 200__, I intend to put the following rule/practice/policy into effect:

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice. Your reply should specify the mandatory subjects of bargaining which you contend will be impacted.

The following dates are available:

Please select one (or more) date(s) and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 200__.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed rule/practice/policy.

SAMPLE FORM 4

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the South Shore Regional School District Committee (Employer) shall:

1. Cease and desist from failing and refusing to bargain collectively in good faith with the South Shore Regional Vocational Technical Teachers Federation, Local 1896, MFT, AFT, AFL-CIO (Union) over the impacts of the Employer's decision to not fund or fill certain extra-curricular positions.

2. Take the following affirmative action which will effectuate the policies of G.L. c. 150E:

   a. Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the Union over the impacts of the decision to not fund or fill certain extra-curricular positions by proposing to meet at a reasonable time and place.

   b. Beginning as of the date of receipt of this decision, pay the four (4) employees affected by the decision to not fund or fill certain extracurricular positions the additional wages and other benefits they formerly received for performing such duties until one of the following occurs:

      (1) Resolution of bargaining by the parties;
      (2) Failure of the Union to accept the offer to commence bargaining within five (5) days after notice of the offer;
      (3) Failure of the Union to bargain in good faith;
      (4) Good faith impasse between the parties.

   c. Post the attached Notice to Employees in places where employees usually congregate and leave posted for a period of thirty (30) days;

   d. Notify the Commission within ten (10) days of the steps taken to comply with this order.

SAMPLE FORM 5

SAMPLE DRUG TESTING ARTICLE

A. **Probationary Employees.** Employees may be tested periodically during the probationary period with or without reasonable suspicion at such times as may be determined by management.

B. **Absence from Duty.** An employee who is absent from duty for more than sixty (60) continuous calendar days on sick leave, injured-on-duty leave, disciplinary suspension, or leave of absence may be tested once within the first fourteen (14) calendar days after his/her return to active duty.

C. **Serious Incidents.** An employee involved in an incident on the job which is serious, life threatening, or involves serious bodily injury may be tested.

D. **Career Assignments.** An employee may be tested.

1. Youth Officer/D.A.R.E.
2. Detective
3. Drug Assignment
4. Undercover Task Force
5. As a condition for promotion to Sergeant

The Union will not discourage or interfere with an employee's seeking one of these positions. The employer will not make an appointment in bad faith as a pretext for testing an employee.

E. **Reasonable Suspicion.** An employee may be tested after a determination by the Chief or his/her designee that there is reasonable suspicion to test the employee. Reasonable suspicion is a belief based on objective facts sufficient to lead a reasonably prudent person to suspect that an employee is using or is under the influence of drugs so that the employee's ability to perform his/her duties is impaired. Reasonable suspicion shall be based upon information of objective facts obtained by the department and the rational inferences which may be drawn from those facts. The information, the degree of corroboration, the results of the investigation or injury and/or other factors shall be weighed in determining the presence or absence of reasonable suspicion.

F. **Random Testing.** Employees that sign a consent form, and those that may be placed on a disciplinary probation status, may be tested at such times as may be determined by management.

G. **Procedures.**

1. Hair samples, urine samples, or blood samples when requested by the Chief will be taken from an employee or a prospective employee according to directions provided by the testing facility. The sample will either be hand delivered to the testing facility or it will be mailed via overnight courier service such as provided by Federal Express.

2. The laboratory selected to conduct the analysis must be experienced and capable of quality control, documentation, chain of custody, technical expertise and demonstrated proficiency in radioimmunoassay testing. A certificate from such facility will be issued for use in all discipline cases. (Only a laboratory which has been properly licensed or certified by the state in which it is located to perform such tests will be used.) The testing standards employed by the laboratory shall be in compliance with the Scientific and Technical Guidelines for Drug Testing Programs, authored by the Federal Department of Health and Human Services, initially published on February 13, 1987, and as updated.

3. The employee to be tested will be interviewed to establish the use of any drugs currently taken under medical supervision.

Any employee taking drugs by prescription from a licensed physician as a part of treatment, which would otherwise constitute illegal drug use, must notify the tester in writing and include a letter from the treating physician. Any disclosure will be kept confidential with tester.

4. Test results will be made available also to the employee upon request. Employees having negative drug test results shall receive a memorandum stating that no illegal drugs were found. If the employee requests it, a copy of the memorandum will be placed in the employee's personnel file.

5. The testing procedures and safeguards provided in this policy shall be adhered to by all personnel associated with the administering of drug tests. The employees will be accompanied by an officer from the department assigned to supervise the taking of the sample and responsible for proper conduct and uniform procedures of the sampling process. The employee will be assigned a test code identification for the purposes of maintaining anonymity and to assure privacy throughout the sampling and testing procedure. The employee will sign and certify department documentation that the coded identification on the testing sample corresponds with the assigned test code identification.

6. The employee to be tested will be notified of the test requirement a reasonable time before testing and when blood or urine samples are to be taken, shall report to the station at the time designated for transportation to the medical facility or laboratory designated by the department to obtain the testing sample. Hair samples may be taken at the station.

7. The department will designate to the testing facility the specific drugs for which the sample is to be analyzed. The testing facility will report findings only as to those specific drugs for which the department requested testing.

The testing shall consist of an initial screening test, and, if that is positive, a confirmation test. The confirmation test shall be by gas chromatography or mass spectrometry.

8. Each step of the processing of the test sample shall be documented in a log to establish procedural integrity and the chain of custody. Where a positive result is confirmed, test samples shall be maintained in secured storage for as long as necessary.

H. **Prohibited Conduct.**

1. Illegal possession of any controlled substance.

2. Illegal use of any controlled substance.

3. Refusal to comply with the requirements of this drug policy.

4. Improper use of prescription medicine.

I. **Impairment by Prescription Medicine.** An employee shall notify the chief when required to use prescription medicine which the employee has been informed may impair job performance. The employee shall advise the chief of the known side effects of such medication and the prescribed period of use. The chief of police shall document this information through the use of internal confidential memoranda maintained in a secured file. The employee may be temporarily reassigned to other duties, or prohibited from working, where appropriate, while using prescription medicine which may impair job performance or create unsafe working conditions. An employee prohibited from working may utilize sick leave or I.O.D. leave where appropriate or may be placed on unpaid leave of absence if neither sick leave or I.O.D. leave is available.

SAMPLE FORM 6

SAMPLE DRUG TESTING POLICY NOTICE

The position of a professional law enforcement officer is a public trust. The illegal use of drugs by members of this department is strictly prohibited. As the Massachusetts Supreme Judicial Court stated in the case of *O'Connor v. Police Comm'r of Boston,* 408 Mass. 324 (1990):

> Drug use is often difficult to discern. Yet, drug use by police officers has the obvious potential, inimical to public safety and the safety of fellow officers, to impair the perception, judgment, physical fitness, and integrity of the users. Furthermore, the unlawful obtaining, possession and use of drugs cannot be reconciled with respect for the law. Surely, the public interest requires that those charged with responsibility to enforce the law respect it. Surely, too, public confidence in the police is a social necessity and is enhanced by procedures that deter drug use by police cadets.

Attached for your information are copies of the Law Enforcement Code of Ethics and the Police Code of Conduct as most recently amended by the International Association of Police Chiefs. These embody the noble goals of our profession.

Be advised that during the period of your probation and during your attendance at an approved police recruit training academy, you will be subject to drug testing. Such testing may take the form of urinalysis, hair analysis or blood testing. Samples may be collected on an unannounced (random) basis without any need to demonstrate reasonable suspicion/probable cause to suspect illegal drug use. The detection of a controlled substance will subject you to disciplinary action, including dismissal.

Please sign below indicating that you are aware of and consent to the department's drug testing policy and procedure.

CONSENT

I agree that during the period of my probation and during the period I am enrolled in an approved recruit training academy, I shall upon request submit urine, hair and/or blood samples for drug testing aimed at detecting the presence or residue of controlled substance. I understand that illegal drug use is strictly prohibited and that violation of this policy will result in discipline, including dismissal.

SIGNED:

_____
(Signature)

_____
(Name)

_____
(Address)

_____
(City/Town)

COMMONWEALTH OF MASSACHUSETTS

_____, ss. Date: _____, 200__

On this ____ day of _____, 200__, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was my personal knowledge of said individual, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

_____
, Notary Public
My Commission Expires:

Sample Form 7

MANAGEMENT RIGHTS CLAUSE

Nothing in this Agreement shall limit the City/Town in the exercise of its function of management and in the direction and supervision of the City/Town 's business. This includes, but is not limited to the right to: add or eliminate departments; require and assign overtime; increase or decrease the number of jobs; change process; contract out work; assign work and work to be performed; schedule shifts and hours to work and lunch or break periods; hire; suspend; demote, discipline, or discharge; transfer or promote; layoff because of lack of work or other legitimate reasons; establish rules, regulations, job descriptions, policies and procedures; conduct orderly operations; establish new jobs; abolish and change existing jobs; determine where, when, how and by whom work will be done; determine standards of proficiency in police skills and physical fitness standards; except where any such rights are specifically modified or abridged by terms of this Agreement.

Unless an express, specific provision of this Agreement clearly provides otherwise, the City/Town, acting through its City/Town Manager and Police Chief or other appropriate officials strictly adhering to the chain of command as may be authorized to act on their behalf, retains all the rights and prerogatives it had prior to the signing of this Agreement either by law, custom, practice, usage or precedent to manage and control the Police Department.

By way of example but not limitation, management retains the following rights:

- to determine the mission, budget and policy of the Department;
- to determine the organization of the Department, the number of employees, the work functions, and the technology of performing them;
- to determine the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or to any location, task, vehicle, building, station or facility;
- to determine the methods, means and personnel by which the Department's operations are to be carried;
- to manage and direct employees of the Department;

- to maintain and improve orderly procedures and the efficiency of operations;
- to hire, promote and assign employees;
- for legitimate safety purposes to transfer, temporarily reassign, or detail employees to other shifts or other duties;
- to determine the equipment to be used and the uniforms to be worn in the performance of duty;
- to determine the policies affecting the hiring, promotion, and retention of employees;
- to establish qualifications for ability to perform work in classes and/or ratings, including physical, intellectual, and mental health qualifications;
- to lay off employees in the event of lack of work or funds or under conditions where management believes that continuation of such work would be less efficient, less productive, or less economical;
- to establish or modify work schedules and shift schedules and the number and selection of employees to be assigned not inconsistent with the provisions of this agreement;
- to take whatever actions may be necessary to carry out its responsibilities in situations of emergency;
- to enforce existing rules and regulations for the governance of the Department and to add to or modify such regulations as it deems appropriate subject to fulfilling its bargaining obligations;
- to suspend, demote, discharge, or take other disciplinary action against employees, to require the cooperation of all employees in the performance of this function, and-to determine its internal security practices.

Management also reserves the right to decide whether, when, and how to exercise its prerogatives, whether or not enumerated in this Agreement. Accordingly, the failure to exercise any right shall not be deemed a waiver.

Nothing in this article will prevent the Union from filing a grievance concerning a violation of a specific provision of this contract. However, where no specific provision of the contract limits its ability to act, management may exercise its rights under this article without having such actions being subject to the grievance procedure.

The parties agree that each side had a full opportunity during the course of negotiations to bargain over any and all mandatory bargaining subjects, whether or not included in this Agreement. Accordingly, as to any such matter over which the contract is silent, the City/Town retains the right to make changes but only after prior consultation with the Union, involving notice and opportunity to bargain, if the Union so requests, to the point of agreement or impasse.

It is understood and agreed by the parties hereto that the City/Town does not have to rely on any collective bargaining contract with its employees as the source of its rights and management prerogatives. This contract does not purport to spell out the job responsibilities and obligations of the employees covered by this contract. Job descriptions are not meant to be all-inclusive. Management reserves the right to assign duties consistent with an officer's training and ability, regardless of whether the exact duty is listed in a written job description.