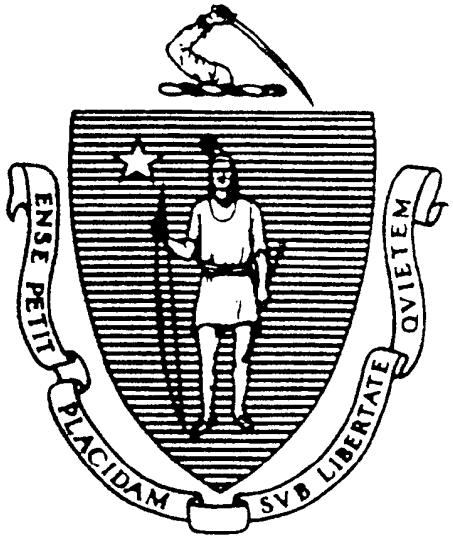
Executive Office of Public Safety
Massachusetts Municipal Police Training Committee

THE CHIEF'S GUIDE TO LABOR RELATIONS



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PREFACE

This manual has been produced under a contract from the Massachusetts Municipal Police Training Committee to the Municipal Police Institute, Inc. (MPI). MPI is the charitable, non-profit research and training affiliate of the Massachusetts Chiefs of Police Association, Inc. It is one of a series of publications aimed at providing chiefs, managers and municipal officials with a reference guide to some of the most pressing issues they face.

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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 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 police departments than probably any other legislative action. Few active chiefs recall a time when unions did not play a role in virtually every personnel and organizational decision they make. Both management and labor share common goals of professionalism and rendering a high level of service to the public. One of the challenges facing chiefs, 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 chiefs may find helpful, especially when used in conjunction with advise from a municipality's labor counsel.

The following abbreviations are used throughout the manual:

LRC	Labor Relations Commission
JLMC	Joint Labor Management Committee
SJC	Supreme Judicial Court
ALJ	Administrative Law Judge
The Law	M.G.L. c. 150E – The Collective Bargaining Law
NLRB	National Labor Relations Board
ADA	Americans With Disabilities Act
FLSA	Fair Labor Standards Act
Commission	Labor Relations Commission
FID	Firearms Identification Card
FMLA	Family Medical Leave Act
DPW	Department of Public Works
MCAD	Massachusetts Commission Against Discrimination

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Executive Summary

Public safety unions play a role in virtually every personnel and organizational decision made by police chiefs. As a result of a lack of understanding of the state's collective bargaining laws by some municipal officials, there has been a steady erosion of management rights. This manual seeks to provide chiefs and municipal officials with the information they need to properly manage public employees and to deal with municipal unions.

MANAGING PUBLIC EMPLOYEES

In dealing with public employees, a chief or manager must keep in mind all of the Law's bargaining requirements. There are few changes involving or affecting working conditions that a public employer can make without giving notice to, and if requested, discussing the matter first with the employees' elected representative, through either impact or decisional bargaining.[1] Gone are the days of saying, "effective immediately."

DEALING DIRECTLY WITH EMPLOYEES

An employer may not bypass the union and deal directly with an employee on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. Such an action would violate the employer's duty to bargain in good faith and would constitute a "prohibited practice" under Massachusetts law.[2] An employer's direct dealing with employees in the bargaining unit violates the employee organizations statutory right to speak exclusively for the employees who have selected it to serve as their sole representative.[3] Dealing directly also undermines the employees' belief that the union actually possesses the power of exclusive representation to which it is entitled by statute.[4] Thus, a chief must give notice and an opportunity to bargain to the union whenever the chief wants to implement a change involving or affecting an employee's wages, hours, and other terms and conditions of employment.

HIRING AND CREATING A NEW POSITION

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 Chapter 150E.[5] Requiring a certain level of education or experience of applicants

is an exclusive managerial prerogative. Similarly, requiring drug and alcohol tests of all applicants is outside the scope of bargaining.[6]

Nevertheless, when an employer's hiring decisions impact the terms and conditions of employment of future or 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, [7] and 2) imposing new obligations on applicants which carry over into employment.[8]

WORKPLACE RULES AND PRACTICES

An 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. Only material changes (not merely procedural ones) require notice and bargaining.[9] The following issues are but a few examples of mandatory subjects of bargaining:

1. hours that an employee is required to work;[10]
2. implementing a new work schedule;[11]
3. changing job descriptions;[12]
4. changing promotion criteria;[13]
5. performance evaluation systems;[14]
6. dress and grooming regulations;[15] and
7. implementing a new sexual harassment policy.[16]

CHANGING SCHEDULES TO AVOID OVERTIME

While it is rarely done in municipal police agencies, in the absence of any restriction in the collective bargaining agreement, a municipal employer may change employees' schedules 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.

BENEFITS, COMPENSATION AND LEAVES

Compensation, including wages, pensions, severance pay, insurance, and educational incentives, is a mandatory subject of bargaining.[17] Rest

periods, such as coffee or snack breaks, require compensation. Employers must bargain before changing a past practice or contract provision regarding holidays[18], vacation, leaves of absence, or take-home vehicle[19] policies.

EMPLOYEE PERFORMANCE

Because performance evaluations have a direct impact on job security and professional advancement, they are a mandatory subject of bargaining.[20] An employer must bargain over the decision to implement or change the performance evaluation method, in addition to the impact of the decision.[21] Testing, including drug and psychological tests, may be used on employment applicants. However, if used in the course of employment, such tests may only be instituted after notice and bargaining.[22] Prior bargaining is not required for tests administered to an employee in the course of a criminal investigation.[23] The establishment or unilateral change of discipline procedures is a mandatory subject of bargaining.[24] Whenever disciplining an employee, the employer must be cautious to avoid infringing on the employee's exercise of Constitutional as well as collective bargaining rights. Discipline must be commensurate both with the nature or severity of the violation and with the discipline given to other similarly situated employees.

MANAGEMENT RIGHTS

The Labor Relations Commission has refused to enforce general "management rights" clauses. In order to show that the union waived certain rights in a management rights clause, 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 possible sources of management rights are statutes, "inherent" in the nature of public administration, and the collective bargaining agreement.

PUBLIC POLICY

Massachusetts courts and the Labor Relations Commission have made it clear that, even if an agreement is reached and a provision is included in a contract, there are certain matters of inherent managerial prerogative which cannot be bargained away as a matter of public policy. To do so would pose the danger of distorting the normal political process for patrolling public policy.[25]

PROMOTIONS

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 the bargaining unit.[26] If the union makes a timely demand to bargain, the employer must engage in good faith negotiations until either agreement or impasse before implementing the proposed changes.

APPOINTMENTS

An employer is free to determine non-discriminatory qualifications for job vacancies. Both the National Labor Relations Board and the Massachusetts Labor Relations Commission have held that hiring decisions and qualification standards are not subject to bargaining.[27] However, establishing wages for entry-level employees is a mandatory subject of bargaining.[28] If a municipal employer wants to hire someone at a rate or step different from that set by a collective bargaining agreement, it must so notify the union. It is not necessary to secure the union's consent, so long as the municipal employer provides notice and opportunity to bargain.[29] While the cases are not clear, it is likely that bargaining in good faith to the point of agreement or impasse is all that is required.

CONTRACTING-OUT UNIT WORK

Often, to save money or improve efficiency, municipal employers want to contract-out certain tasks, currently being performed by bargaining unit personnel, to the private sector or other non-unit employees. Whether an employer is restricted from contracting-out work depends on whether it is expressly barred from doing so in the collective bargaining agreement.[30] 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. 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.[31]

Section 10 (a)(5) of the Law requires an employer to give the exclusive bargaining representative prior notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel.[32] To prove that an employer unilaterally transferred bargaining unit work to non-unit personnel, the charging party mush show that: 1) the employer transferred bargaining 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 exclusive bargaining representative with prior notice or an opportunity to bargain over the decision to transfer the work.[33]

CIVILIAN DISPATCHERS

Police departments may utilize civilian dispatchers in place of sworn personnel. If dispatching is bargaining unit work, assigning it to persons outside the bargaining unit is subject to mandatory bargaining to agreement or impasse.[34] In order to prevail in a charge of prohibited (unfair labor) practice before the Labor Relations Committee, the union must prove that the work assigned constituted bargaining unit work and that the change had a substantially detrimental effect on the bargaining unit.[35]

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.[36] Notice to the union and bargaining upon demand to the point of agreement or impasse is generally required.[37]

LIGHT DUTY

A department may require injured police officers to perform modified or *light duty* rather than allowing such individual to remain out of work with pay on either sick or injured on duty status. If a department has traditionally allowed injured employees to remain on § 111F until able to perform all their duties, 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.[38]

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, and/or returning to work in either a light or full-duty capacity. In the absence of any controlling provision in the collective bargaining agreement, an employer is free to provide the union with notice and opportunity to bargain regarding its intention to require a doctor's certificate as a condition for sick leave eligibility.

GOOD FAITH BARGAINING

DUTY TO BARGAIN

Massachusetts General Law Chapter 150E directly imposes a duty to bargain in good faith on both labor and management. A party that bargains in bad faith commits a prohibited practice pursuant to sections 10(a)(5) (employer) and 10(b)(2) (employee organization) of the Law.

SCOPE OF BARGAINING

Collective bargaining subjects are divided into three categories: mandatory, nonmandatory, and illegal. The composition of each category is somewhat fixed by precedent, but the Labor Relations Commission and the courts have the discretion to define what constitutes a mandatory versus permissive subject.[39] Mandatory subjects include those subjects that have a direct effect on the terms and conditions of employment, such as wages and hours,[40] health insurance benefits,[41] and job duties and work assignments[42]. Nonmandatory subjects of bargaining are those which involve core governmental decisions, such as the reduction of nonscheduled overtime opportunities,[43] the decision to create or abolish positions,[44] staffing levels and wage parity clauses[45].

THE MEANING OF 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, both at the bargaining table as well as away from it.[46] The duty to bargain under Chapter 150E, Section 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.

GOOD FAITH REQUISITES

Fundamentally, neither management nor labor may refuse to bargain over a mandatory subject of bargaining.[47] Beyond this requirement, the parties to a labor negotiation have several additional duties: avoid surface and regressive bargaining;[48] establish ground rules for negotiations; conduct meetings; reduce the agreement to writing;[49] and bargain to agreement or impasse over mandatory subjects of bargaining.

REMEDIES FOR FAILURE TO BARGAIN IN GOOD FAITH

The Labor Relations Commission has the authority to fashion remedies for violations of the Law. The usual remedy when a respondent has refused

to bargain in good faith is to issue a cease and desist order and an order that the respondent bargain in good faith on demand.[50]

MANAGEMENT'S DUTY TO BARGAIN IN GOOD FAITH

Aside from the good faith requisite applicable to both parties, there are a number of party-specific duties. Neither labor nor management can refuse to negotiate after a timely request for bargaining. A public employer can be charged with refusing to bargain by directly turning down a union's request to bargain, or by acting in a manner that demonstrates that the employer is avoiding the duty to bargain. The following are examples of actions which constitute a refusal to bargain by a public employer: attempting to bypass the union and deal directly with an employee on topics that are properly the subject of negotiation;[51] conditioning bargaining on the outcome of pending litigation;[52] failing to appoint a negotiator;[53] failure to support the agreement before the legislative body and to submit the cost items for funding to the appropriate financing authority;[54] failure or delay in furnishing requested information to the union which is relevant and reasonably necessary for the union to perform its duties;[55] and making unilateral changes at the expiration of a collective bargaining agreement without at least notice to the union.[56]

UNION'S DUTY TO BARGAIN IN GOOD FAITH

Public employee labor unions have the same duty to bargain in good faith as employers.[57] There is no obligation to bargain over a permissive subject of bargaining, but if the union fails to bargain, management may implement its mid-term proposal.[58] A union can fail to satisfy the good faith requirement if it refuses to even consider the employer's proposals[59] or circumvents the employer's selected representative[60]. The Law also prohibits strikes, including slowdowns or withholding of services.[61] Failure to provide information requested by the employer which is reasonably related to the bargaining process or to administering the contract will also be a violation of the good faith requirement.

IMPASSE RESOLUTION PROCEDURES

Deadlocks occurring during negotiations over a collective bargaining agreement involving public safety bargaining units may be submitted to the Joint Labor-Management Committee for investigation and resolution. The JLMC may invoke all traditional methods of impasse resolution procedures including mediation, fact-finding and arbitration.

CONTRACT INTERPRETATION

The parties to a collective bargaining agreement may disagree about the proper interpretation of the contract's provisions. The collective bargaining agreement itself may provide a resolution mechanism for contract disputes in the form of binding grievance arbitration. In the absence of such a provision, the Labor Relations Commission may order the parties to participate in a binding grievance arbitration.

GRIEVANCE ARBITRATION

In this country, there is a long-standing public policy favoring the submission of contractual labor disputes to arbitration through the grievance procedure. Parties to a collective bargaining agreement can arrive at binding grievance arbitration in one of two ways. The first way is by inserting a provision in the collective bargaining agreement mandating arbitration as a means of settling disputes with respect to the interpretation of the contract.[62] Second, the parties can arrive at mandatory arbitration by an order of the Labor Relations Commission when there is no provision in the collective bargaining agreement dealing with grievance arbitration.[63]

REPUDIATING AGREEMENT

A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of c. 150.[64] If there was no "meeting of the minds", or where the parties hold differing good faith interpretations of the language at issue, no repudiation will be found.[65]

UNILATERAL CHANGES

A public employer violates Section 10 (a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing the employee's exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse.[66] The duty to bargain extends to both conditions of employment that are established through past practices, as well as conditions of employment that are established through a collective bargaining agreement.[67] To establish a violation, the Union 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.[68]

The existence of a past practice is often important in the labor relations context during grievance arbitration or when a union files a prohibited

practice charge at the Labor Relations Commission. Unless a certain practice is incorporated in the collective bargaining agreement, or there is a "past practice clause" in the contract, management is free to propose a change. When the proposal is made outside regular contract negotiations, all that is required is that the union be provided with notice and the opportunity to bargain.

ARBITRATORS' VIEWS

When an arbitrator attempts to interpret the meaning of a provision in the collective bargaining agreement, he or she will look to the course of conduct between the parties (i.e. past practice) to help determine what the parties had in mind when they included such a provision in the contract. Arbitrators are free to adopt their own definition of what constitutes a past practice.

In the arbitration context, whichever party asserts the existence of a past practice must prove that mutuality exists by showing that there was some implied agreement by mutual conduct on the part of both management and labor and show the scope of the alleged past practice.

Arbitrators generally utilize the determination of a past practice in one of the following ways: to clarify any ambiguous language in the agreement; to enforce general contract language; to alter or amend the plain language of the agreement; or to establish new and independent working conditions.

THE L.R.C.'S VIEW

The Commission views past practices as "the way things are done," even in the absence of a "meeting of the minds." When a past practice involves a mandatory subject of bargaining, an employer commits a prohibited practice when it unilaterally changes such a past practice without providing the union with notice and an opportunity to bargain to the point of agreement or impasse. Even where employer action is authorized unilaterally (e.g., where a management right is involved), an employer must bargain upon request with the union over the impact of such change upon mandatory subjects of bargaining. The Labor Relations Commission requires a union to prove the existence of a condition of employment in order to sustain a charge of prohibited practice which alleges a unilateral change.[69]

MID-TERM BARGAINING

Unless specifically prevented from doing so by the provisions of a collective bargaining agreement, a municipal employer is free to institute changes during the life of a contract. Where the proposed change involves an

exclusive managerial prerogative or a permissive subject of bargaining, negotiations are required upon request to bargain only over the impact of the change on mandatory subjects of bargaining. Prior to implementing a change in a mandatory subject of bargaining, the union is entitled to notice and the opportunity to request bargaining over both the decision and the impact, to either agreement or impasse. As long as the negotiations proceed in good faith, management may implement its position upon reaching impasse (or whenever the union bargains in bad faith.)

FURNISHING INFORMATION

As part of its requirement to conduct good faith bargaining, a public employer has an obligation to furnish information in its possession which is requested by the union – so long as the requested information is relevant and reasonably necessary to the union's duties as a collective bargaining representative.[70] The obligation to provide information arises both in the context of contract negotiations and contract administration.[71] An employer may not refuse to provide the requested information simply because it is otherwise available to the union through the same source, e.g. public records request.[72] A public employer may lawfully refuse to furnish a union with information it has requested if the employer has met its burden of demonstrating that its concerns about disclosure are legitimate and substantial when weighed against the union's need for the information.[73] The union has a reciprocal duty to furnish management with information, but this rarely becomes an issue.

PROHIBITED PRACTICES

Under Section 10 of Chapter 150E, it is a prohibited practice for an employer or its designated representative to:

- Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- Discharge or otherwise discriminate against any employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because he or she has informed, joined, or chosen to be represented by an employee organization;

- Refuse to bargain collectively in good faith with the exclusive representative as required in section six; or
- Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine.

UNION RIGHTS AND RESPONSIBILITIES

DUTY OF FAIR REPRESENTATION

A union has a duty to represent fairly all of the employees who are in its bargaining unit, not just those who are union members.[74] It must do so without hostility or discrimination toward any, and must exercise its discretion in complete good faith and honesty.[75] The goal of this duty is to protect an individual's rights in a bargaining unit without undermining the collective interests.[76] As to what constitutes "fair representation", the most common area of disputes arise in the context of an employee who believes the union has breached its duty of fair representation when it failed to process his or her grievance and/or arbitrate such grievance.[77] Where a union has breached its duty of fair representation, it has committed an actionable prohibited (unfair labor) practice under Chapter 150E.[78]

UNION'S REFUSAL TO BARGAIN IN GOOD FAITH

Where a union is found to have refused to bargain or has bargained in bad faith, its conduct violates Section 10(b)(2) of Chapter 150E. Bad faith bargaining or refusals to bargain fall primarily into two categories: those which pertain to the union's lack of interest in reaching an agreement through "surface bargaining";[79] and those based on overt acts.[80] The use of illegal or other inappropriate work delays or stoppages as part of the negotiation process constitutes a refusal to bargain in good faith where it is used as a tactic to obtain concessions at the bargaining table.[81] A second area where union refusal to bargain cases arise occurs where the union has a highly inflexible attitude toward the employer's proposals.[82]

DRUG TESTING

Drug testing among governmental workers has increased in recent years. However, in Massachusetts, public safety unions have resisted most efforts at testing employees. Although permitted by the U.S. Constitution, the random testing of tenured public safety employees violates the Massachusetts Constitution.[83] Probable cause testing, on the other hand, may be conducted without a warrant.

Drug testing is a mandatory subject of bargaining.[84] As such, an employer is required to provide the union with notice and the opportunity to bargain before implementing a new drug testing policy or changing an existing one. Pre-employment testing of applicants, as well as random testing of probationary employees and those attending a basic academy, are lawful.

REPRESENTATION AND THE BARGAINING UNIT

The public employer will face a number of issues pertaining to the composition of the bargaining unit. These issues include: the proper place for supervisory personnel (including, in some cases, managers such as the chief), challenges to the existing bargaining unit, representation proceedings and elections, and unit membership of part-time or casual employees. Unit composition issues have an effect on the entire bargaining relationship, and often influence the tenor and progress of individual negotiation sessions.

Chapter 150E grants the Labor Relations Commission the power to establish regulations for representation elections and criteria for appropriate bargaining units. The LRC is required to take into account the following criteria for bargaining units: community of interest, efficiency of operations and effective dealings, and safeguarding the rights of employees to effective representation.

SELECTING AN EMPLOYEE REPRESENTATIVE

There are two main procedures for establishing a bargaining representative. First, a public employer may voluntarily recognize an employee organization designated by a majority of employees in the bargaining unit as the exclusive bargaining representative.[85] Second, the LRC is empowered with the authority to conduct hearings and elections.[86]

ESTABLISHING THE BARGAINING UNIT

While the parties may stipulate to an appropriate bargaining unit, the LRC retains the authority to make a final determination based on statutory and public policy considerations.[87] Although bargaining unit composition issues first arise when the unit is formed, compositional challenges may also arise later in the parties' bargaining relationship if conditions have changed since the unit was certified or voluntarily recognized.

ADDING OR SEVERING POSITIONS FROM THE BARGAINING UNIT

After a bargaining unit has been certified, issues regarding "appropriateness" of the bargaining unit may continue to arise. [88] The LRC generally favors larger units and discourages the severance of

positions from an existing bargaining unit unless the employees at issue have distinct issues apart from other unit employees.[89] However, they generally adopt an agreement or stipulation of the parties concerning exclusion of a position from an existing unit unless the stipulation violates the Commission's rules and/or practices.

[1] *School Comm. of Newton v. Labor Relations Commis.*, 388 Mass. 557, 447 N.E.2d 1201 (1983); *Town of Andover*, 1 MLC 1103, 1106 (1974).
[2] *Town of Auburn*, 8 MLC 1266 (1981) (town impermissibly approached two bargaining unit members and offered to pay them a wage increase for quitting the union.); *Lawrence School Committee*, 3 MLC 1304 (1976) (determining that school committee violated state law when it negotiated with junior high school principals to change summer wages and scheduled paydays.); *Suffolk County Sheriff's Department*, 28 MLC 253 (2002); *Millis School Committee*, 23 MLC 99 (1996); *Blue Hills Regional School Committee*, 3 MLC 1613 (1977).
[3] *Service Employees International Union v. Labor Relations Commission* 431 Mass. 710 (2000).
[4] *Id.*
[5] *Boston School Committee*, 3 MLC 1603, 1608 (1977).
[6] *Star Tribune*, 295 NLRB 63 (1989).
[7] *City of Lawrence*, 21 MLC 1691 (1995).
[8] *See Lowell School Committee*, 22 MLC 1321 (1996).
[9] *Board of Trustees, University of Mass.*, 7 MLC 1577 (1980).
[10] *Medford School Committee*, 1 MLC 1250 (1975).
[11] *Suffolk County House of Correction*, 22 MLC 1001 (1995).
[12] *Town of Wilbraham*, 6 MLC 1668 (1980).
[13] *Town of Norwell*, 18 MLC 1263 (1992).
[14] *Town of Wayland*, 5 MLC 1738 (1979).
[15] *Town of Dracut*, 7 MLC 1342 (1980).
[16] *Harris-Teeter Super Markets*, 293 NLRB 743, 131 LRRM 1296 (1989).
[17] G.L. c. 150E, §6; *See Malden*, 20 MLC 1400 (1994); *City of Everett v. Labor Relations Commission*, 416 Mass. 620; 624 N.E.2d 552 (1993); *Framingham*, 20 MLC 1536 (1994).
[18] *Everett*, 22 MLC 1275 (1995).
[19] *Town of Dedham*, 16 MLC 1235 (1989).
[20] *Com. v. Labor Relations Commission,* 404 Mass. 124, 533 N.E.2d 1325 (1989).
[21] *Boston School Committee*, 3 MLC 1603 (1977).
[22] *City of Fall River*, 20 MLC 1352 (1994).
[23] *Mass. Labor Relations Commission v. IBPO*, 391 Mass. 429, 462 N.E.2d 96 (1984).
[24] *Mass. Comm'r of Admin. and Finance*, 15 MLC 1575 (1989).
[25] Welling & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107 (1969).
[26] *Commonwealth of Massachusetts*, 9 MLC 1082 (1982); *Town of Danvers*, 3 MLC 1559 (1977).
[27] *Allied Chemical Workers v. Pittsburgh Plate & Glass*, 407 U.S. 157, 92 S.Ct. 383 (1971).

[28] *Melrose School Committee*, 3 MLC 1299 (1976); *Northeast Reg. Sc. Dist.*, 1 MLC 1075 (1974).
[29] *Dracut School Committee*, 13 MLC 1055 (1986).
[30] *Gaylord Container Corp.*, 93 LA 465 (Abrams 1989); *Champion International Corp.*, 91 LA 245 (Duda 1988).
[31] *Board of Regents*, 19 MLC 1248 (1992); *Melrose School Committee*, 9 MLC 1713 (1983).
[32] *Commonwealth of Massachusetts and AFSCME, Council* 93, 21 MLC 1029, 1039 (1994); *Board of Regents of Higher Education and Massachusetts Community College Council*, 19 MLC 1485, 1487 (1992); *City of Gardner*, 10 MLC 1218, 1219 (1983).
[33] *Commonwealth of Massachusetts*, 21 MLC at 1039; *Board of Regents*, 19 MLC at 1487-1488; *City of Gardner*, 10 MLC at 1219.
[34] *Town of Watertown*, 8 MLC 1376 (1981); *Town of Danvers*, 3 MLC 1559 (1977).
[35] *City of Boston*, 7 MLC 175 (1981).
[36] *City of Boston*, 3 MLC 1450 (1977); *City of Springfield*, 12 MLC 1051 (1985).
[37] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983); *Town of Easton*, 16 MLC 1407 (1989)
[38] *City of Springfield*, 12 MLC 1051 (1985).
[39] *West Bridgewater Police v. Labor Relations Commission*, 18 Mass. App. Ct. 550, 468 N.E.2d 659 (1984).
[40] *Medford School Committee*, 1 MLC 1250 (1975).
[41] *Board of Regents of Higher Education*, 19 MLC 1069 (1992).
[42] *Town of Danvers*, 3 MLC 1559 (1977).
[43] *Town of West Bridgewater*, 10 MLC 1040 (1983).
[44] *School Committee of Braintree v. Ramond*, 369 Mass. 686, 343 N.E.2d 145 (1976).
[45] *City of Cambridge,* 4 MLC 1447 (1977), See, JLMC statute (c.589 of the Acts of 1987, as amended).
[46] *Harwich School Committee*, 10 MLC 1364 (1984); *King Phillip Regional School Committee,* 2 MLC 1393 (1976).
[47] *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).
[48] *Town of Saugus*, 2 MLC 1480 (1976).
[49] M.G.L. Chapter 150E, § 7(a).
[50] *City of Norfolk*, 11 MLC 1346 (1985).
[51] *Town of Auburn*, 8 MLC 1266 (1981).
[52] *Town of Dracut*, 14 MLC 1127 (1987); *Town of Hopedale*, 11 MLC 1413 (1985); *Southern Worcester County Regional Vocational School District*, 2 MLC 1488 (1976); *Town of Ipswich*, 4 MLC 1600 (1977).
[53] *City of Chelsea*, 3 MLC 1169 (1976).

[54] M.G.L. Chapter 150E, §§ 7(b) and 10(a).
[55] *Higher Education Coordinating Council,* 19 MLC 1035 (1992).
[56] *City of Peabody*, 9 MLC 1447 (1982); *Town of Billerica*, 8 MLC 1957 (1982); *Commonwealth of Massachusetts*, 9 MLC 1455 (1982).
[57] M.G.L. Chapter 150E, §10(b)(2).
[58] *IAFF, Local 1820*, 12 MLC 1398 (1985).
[59] *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 451 N.E.2d 124 (1983).
[60] *AFSCME, Local 1462*, 9 MLC 1315 (1982).
[61] M.G.L. Chapter 150E, §9A; *Holbrook Education Assoc.*, 14 MLC 1737 (1988).
[62] M.G.L. Chapter 150 E, §8.
[63] *Id.*
[64] *Town of Falmouth,* 20 MLC 1555 (1984); *Aff'd Sub. Nom. Town of Falmouth V. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997).
[65] *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1986).
[66] *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557 (1983).
[67] *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).
[68] *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1984); *City of Boston*, 20 MLC 1603, 1607 (1994).
[69] *City of Peabody*, 9 MLC 1447 (1982).
[70] *Boston School Committee,* 22 MLC 1383 (1996); *Whittier Regional School Committee*, 19 MLC 1183 (1992); *Adrian Advertising*, 13 MLC 1233 (1986).
[71] *Boston School Committee,* 19 MLC 1501 (1984).
[72] *Commonwealth of Massachusetts*, 12 MLC 1590 (1986).
[73] *City of Boston*, 12 MLC 1454 (1985).
[74] M.G.L. chapter 150E, § 5.
[75] *Massachusetts State College Association*, 24 MLC 1 (1998); *Local 285, SGIU*, 9 MLC 1760 (1983).
[76] *Id.*
[77] *See e.g., NAGE v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 650 N.E.2d 101 (1995).
[78] M.G.L. Chapter 150E, §10(b)(2).
[79] *Everett*, 22 MLC 1275 (1995).
[80] *Local 285, SEIU, AFL-CIO*, 17 MLC 1432 (1991).
[81] *City of Fitchburg*, 2 MLC 1126 (1975); *Local 285, SEIU,* 17 MLC 1610 (1991); *Woods Hole*, 14 MLC 1501 (1987).
[82] *Town of Braintree*, 8 MLC 1197 (1981).
[83] *Guiney v. Police Commissioner of Boston,* 411 Mass. 328, 582 N.E. 2d 523 (1991).

[84] *Town of Fairhaven*, 20 MLC 1343 (1994).
[85] M.G.L. Chapter 150E, § 4.
[86] *See* generally, 456 CMR § 14.
[87] M.G.L. Chapter 150E, §3; *See Fall River School Committee*, 8 MLC 1028 (1981).
[88] Issues related to whether a position is managerial or professional may be raised at virtually any time.
[89] *City of New Bedford*, 12 MLC 1058 (1985); *Northeast Metropolitan Regional School District*, 7 MLC 1743 (1981); *Massachusetts Port Authority*, 2 MLC 1408 (1976).

CHAPTER 1 - MANAGING PUBLIC EMPLOYEES

Notwithstanding the complicated nature of the employer's bargaining duty, the public employer also has a responsibility to effectively manage employees. This chapter will address particular management issues public employers must face each day, and will attempt to provide some insight into what standards or practices a manager can reasonably expect or request (before bargaining), or enforce (after bargaining).[1]

In dealing with public employees, a chief or manager must keep in mind all of the Law's bargaining requirements; there are few changes involving or affecting working conditions that a public employer can make without discussing the matter first with the employees' elected representative, through either impact or decisional bargaining.[2]

In a 2002 Supreme Judicial Court decision involving the Worcester Police Department, the court upheld the Labor Relations Commission's finding 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.[3] The city was not required to explain its decision, so long as it was a matter of policy.[4] 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.[5]

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.

§ 1 DEALING DIRECTLY WITH EMPLOYEES

An employer may not bypass the union and deal directly with an employee on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. Such an action would violate the employer's duty to bargain in good faith and would constitute a prohibited practice under Massachusetts law.[6] An employer's direct dealing with employees in the bargaining unit violates the employee organizations statutory right to speak exclusively for the employees who have selected it to serve as their sole representative.[7] Dealing directly also undermines the employees' belief that the union actually possesses the power of exclusive representation to which it is entitled by statue.[8]

When employees join a union, they surrender their ability to bargain individually with their employer as to matters either governed by a collective bargaining agreement, or as to which the employer is legally obligated to bargain collectively with the union.[9] Generally, employees represented by a collective bargaining unit cannot negotiate directly with their employer regarding the terms and conditions of their employment.[10]

It is clear that an employee of a private employer may contract directly with the employer as to matters outside the scope of those two parameters; that is, matters governed by a collective bargaining agreement and matters concerning which the employer is obligated by law to bargain collectively with the union. [11] It is less clear whether an employee of a public employer may do so. Although several Massachusetts decisions concern issues of whether public employees have the right to engage in direct dealing with public employers about maters outside the two parameters, permitting such independent arrangements in the public sector seems risky. The statutory requirements governing public employment signify that such "side" arrangements are ill-favored.

Thus, a chief must give notice and an opportunity to bargain to the union whenever he/she has a proposed change involving or affecting the wages, hours, and other terms and conditions of employment (i.e., *mandatory* subjects of bargaining). A very narrow exception would be when an employer conducts an informational survey of employees but this is not related to bargaining nor intended to undermine the union.[12]

In a 2000 SJC care, a union sought review of a decision of the Labor Relations Commission[13] concluding that a public employer did not violate its statutory duty to bargain in good faith.[14] The Supreme Judicial Court held that the employer's survey of employees regarding sick leave, issued

when the employees' union and the employer were engaged in collective bargaining, was statutorily prohibited direct dealing.

In reversing the LRC's ruling, the Supreme Judicial Court noted that although it gives weight to the Labor Relations Commission's experience and authority, it does not affirm Commission decisions that are inconsistent with law.[15]

The court noted that a public employer has a duty to refrain from circumventing a union by dealing directly with bargaining unit employees as to mandatory subjects of negotiations.[16]

The court ruled that a public employer may not survey its employees about mandatory subjects of collective bargaining if the employees belong to a bargaining unit represented by a union at a time when the union is engaged or preparing to engage in collective bargaining with the employer, regardless of whether the employer intends to erode the bargaining position of the union. Employers who solicit this information directly from employees vitiate the union's role as the exclusive voice of employees in negotiations, and obtain a valuable index of employees' willingness to consider various combinations of bargaining terms from the employer.

Employers are responsible for the foreseeable consequences of employee surveys regardless of their subjective intent. The intent on the part of a public employer to erode the bargaining position of a union is not a necessary element of statutorily prohibited direct dealing. Such intent is extraordinarily difficult to prove, and unions are harmed by direct dealing regardless of whether it is intended by the employer.

When direct evidence of an employer's intent to gain an advantage in negotiations is available, such evidence can be relevant to whether the employer's activity was statutorily prohibited direct dealing.

An employer's communication with its employees is direct dealing if its purpose or effect is the erosion of the union's status as exclusive bargaining representative.

In a 2002 unpublished Appeals Court decision (which the SJC declined to review] the Town of Mansfield appealed from a decision of the Commission concluding that the town had violated G.L. c. 150E, §§ 10(a)(1) and 10(a)(5), by eliminating three patrol officer positions from the police department's split shift in such a manner as to present the union with a *fait accompli*.[17] The town was ordered, among other things, to bargain collectively in good faith, upon request of the union, over the impact of eliminating the positions of three patrol officers from the split shift.

On January 2, 1996, the police chief posted a memorandum which stated that the split shift would no longer be available to patrol officers and only a sergeant and a dispatcher would be assigned to that shift. Formerly, three patrol officers, as well as a sergeant and a dispatcher, had been

assigned to the split shift. The memorandum stated that the closing date for the annual shift bidding was January 9, 1996, and the new assignments would take effect on January 19, 1996. The union did not make a demand to bargain.

The Commission ruled that while the town's decision to eliminate three positions on the split shift was a decision over which it was not obligated to bargain, that decision had a direct impact on the patrol officers' hours of work, and hence the impact was a mandatory subject of bargaining under G.L. c. 150E, § 6.

The Appeals Court held that the town's claim that its decision to reduce the staffing of the split shift did not alter the terms and conditions of employment or that the impact was *de minimis* is without merit. See *Burlington v. Labor Relations Commn.*, where the court held that when two members of the union suffered a loss of pay, this was a matter directly affecting the wages, terms, and conditions of employment.[18] Here, the court noted, contrary to the town's contention, the decision directly affected the hours, a matter included within G.L. c. 150E, § 6, of at least three patrol officers. (It may also have affected officers on the other three shifts who may have been displaced because officers who would otherwise have bid on the split shift were obliged to bid on one of the other three shifts.)

As regards the town's claim that requiring it to bargain over the impact of its decision interferes with its ability to determine important municipal policy, the court stated that this was likewise without merit. In *Boston v. Boston Police Patrolmen's Assn.*, the police department instituted a plan which, among other things, provided for the assignment of one officer per marked patrol vehicle instead of two.[19] While, as here, that decision was a managerial one that the department could undertake without bargaining, the court pointed out that "the city correctly concede[d] that, if a managerial decision has impact upon or affects a mandatory topic of bargaining, negotiation over the impact is required."[20]

The town also challenged what it called the Commission's conclusion that the union did not waive its right to bargain over the impact of the decision. It claimed that, because the union did not request to bargain when it had a reasonable opportunity to negotiate and unreasonably or inexplicably failed to bargain or to request bargaining, it waived its right to bargain.[21] The Commission did not rule on waiver because, according to the court, it appropriately took the position that the doctrine of waiver by inaction does not apply where the union is presented with a *fait accompli*.[22] It determined that given the short period of time that the bargaining unit members had to apply for their shifts, the employer's conduct presented the union with a *fait accompli*; that is, under all the facts, the employer's conduct had progressed to that point at which a demand to bargain would have been fruitless.[23] The town's contention that the commission should

have looked to the date of implementation, January 19, rather than the date of bidding, January 9, is a matter within the discretion of the agency which the court declined to overrule.

The Lowell Police Department bypassed the union and dealt directly with School Resource Officers when their supervisor asked them to agree to alter the practices of compensatory time for the two administrative days off they had been receiving under a Monday-Sunday schedule.[24] The City's duty to bargain before changing mandatory subjects goes hand-in-hand with its duty to refrain from bargaining directly with employees represented by a union.[25]

In another Lowell case, the Lowell Police Superintendent's letter to all police officers did not violate Section 10 (2) (1) of the Law, even though much of it was critical of the union and its officials.[26] The LRC concluded that the letter would not tend to interfere with a reasonable employee. The Commission recognized the context in which its letter was written. The Superintendent was sincerely concerned for the well-being of a female officer that had been sexually harassed by other officers – including union officials-on a bus trip, left the bus and encountered other dangers. She was shunned by the union and harassed by other officers.

The Superintendent also had the right to respond to union leaders' threats to "bring the department down" and their unfounded allegations of racism and corruption.[27]

A. OPERATIONAL AND EMERGENCY DECISION-MAKING

In an emergency situation, such as calling in off-duty personnel to respond to such things as a fire, hazmat situation, a violent public disturbance, etc., common sense would indicate that a chief may make any necessary decisions to preserve public safety and execute the duties of the department. On several occasions, Massachusetts courts have recognized the need for allowing municipal employers the flexibility to deal with emergencies and public safety issues.[28]

PRACTICE POINTERS

There are as yet no Labor Relations Commission (LRC) cases specifically designating an "emergency exception" to the employer's responsibility to consult the union prior to implementing changes affecting the terms and conditions of employment. Therefore, a chief should be careful to ascertain whether the situation is truly an emergency, or whether the matter can first safely be taken up with the union prior to the change.

A chief may implement strictly operational decisions not affecting mandatory subjects of bargaining, without consulting the union. While this

is true as a general principle, a chief must be cautious in defining what is a strictly operational decision. Any time wages, hours or terms and conditions of employment are implicated, the union must be notified and given the opportunity to bargain. Examples of operational decisions could include changing the method of executing a search warrant, altering patrol routes, or the order in which off-duty personnel are called back to work.

B. DECISION-MAKING AFFECTING EMPLOYMENT

Whenever a proposed change could potentially affect terms and conditions of employment, the chief must notify the union prior to making the change. Sufficient notice must be given so that the Union has the opportunity to request bargaining. Instituting a unilateral change involving a *mandatory* subject of bargaining without so notifying the union is a prohibited (unfair labor) practice.[29] Even if the subject matter of the decision implicates only *non-mandatory* or *permissive* subjects of bargaining, the employer is still required to give notice to the union and the opportunity to bargain *before* making the change if the change will *affect* a mandatory subject.[30] It is essential that a chief allow sufficient time to bargain with the union beforehand. The employer must then bargain in good faith until agreement or impasse, and then may implement the change.

PRACTICE POINTERS

If the decision involves a mandatory subject of bargaining, the employer should first determine whether the issue was addressed in the collective bargaining agreement. If the issue was specifically dealt with in the agreement, or presented but consciously waived during bargaining[31], the union probably will refuse to bargain and insist that the employer wait until the current contract expires before discussing the change. So long as the matter has not been dealt with comprehensively in the existing contract, or unless the contract contains a zipper clause *(See Chapter 7), the union would commit a prohibited practice (M.G.L. c. 150E, § 10(b)) if it refused to negotiate in good faith over a mandatory subject of bargaining. Where such a refusal occurs, the employer should notify the union that it has* waived *its right to demand bargaining and that unless it reconsiders promptly, the municipal employer will implement its proposed change.*

If the decision is not specifically addressed in the labor contract, the employer may propose the change to the union and, if a timely request is made, bargain over it, with some possible exceptions. First, a zipper clause *in the collective bargaining agreement might preclude mid-term bargaining on the proposed change unless the union agrees to re-negotiate the contract. Second, the change could be* preempted *by the agreement if*

the general issue involving the decision was dealt with extensively in the contract (or during negotiations) even though the specific issue was not.

Where there is no zipper clause or preemption, the employer may propose the change to the union, and the union has a duty to bargain in good faith (see Chapter 3) over the proposal. The duty to bargain also extends to proposed changes in past practices *not specifically addressed in the collective bargaining agreement.*[32] *With respect to decisions affecting mandatory subjects of bargaining not addressed in the collective bargaining agreement, unless the union waives its right to bargain, a chief may not implement the decision until agreement or impasse*[33]*, or until the union fails to bargain in good faith.*

A chief must be careful to notify the union when hearing an employee's grievance. A union representative has the right to be present at such hearings to make sure the resolution does not conflict with the collective bargaining agreement, even if the employee does not choose to have the representative present for his/her or her own benefit.[34] The employee also has the right to have a union member present during an interrogation by the employer which he or she reasonably expects could lead to disciplinary action, but the employee may waive this right.[35] If the Union sends its attorney to such interview as its representative, the chief must allow the attorney to attend.[36] However, it is likely that the chief could limit the number of union representatives present to one (so long as there was no past practice otherwise.)

§ 2 HIRING & CREATING NEW POSITIONS

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."[37] The U.S. Supreme Court has said:

> The obligation to bargain extends only to the terms and conditions of employment of the employer's employees in the unit appropriate for such purposes which the unit represents.[38]

The National Labor Relations Board has held that requiring drug and alcohol tests of all applicants was outside the scope of bargaining.[39] 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.[40] Thus in *Boston*

School Committee and *Town of Lee*, the LRC upheld residency requirements as a precondition to employment. [41]

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,[42] and 2) imposing new obligations on applicants which carry over into employment.[43]

The *City of Lawrence* case encompasses the first type of dispute.[44] There the employer alleged that its transfer of work (previously performed 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.[45] 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".[46]

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.[47] 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."[48] 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.[49]

While an employer is also free to create new positions and establish the hiring criteria for those positions, 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.[50]

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.

§ 3 WAIVERS

1) Waiver by Inaction

Waiver is an affirmative defense to a charge of unlawful unilateral change.[51] 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.[52] 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.[53]

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.[54]

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

Notice must be provided to the union far enough in advance of implementation of the change to afford the union the opportunity to bargain.[56] 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.[57] However, a union's demand to bargain need not be *immediate* in order to be *timely*.[58]

How much time must pass before a union will be found to have waived its right to bargain will be determined from the facts.[59]

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.[60] 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.[61]

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.[62] (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.[63]

In *Town of Westborough*,[64] 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."[65] 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.[66]

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 LRC ruled that 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.[67]

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).[68] 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."[69]

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.[70] 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.[71] 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.

2) Waiver by Contract

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.[72] 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.[73] The initial inquiry focuses on the language of the contract.[74] The employer bears the burden of proving that the contract clearly, unequivocally and specifically

authorizes its actions.[75] A waiver cannot be found on the basis of a broad, but general, management rights clause.[76] 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.[77] 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.[78] 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.[79] If the language clearly, unequivocally and specifically permits the public employer to make the change, no further inquiry is necessary.[80] However, if the contract's language is ambiguous, the Commission reviews the parties' bargaining history to determine their intent.[81]

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).[82] 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 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.[83] Only material changes (not merely procedural ones) require notice and bargaining.[84] 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.[85]

A. HOURS

The hours that an employee is required to work is, of course, a mandatory subject of bargaining.[86] 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[87], changing lunch hours[88], eliminating flex-time[89], and changing the time when officers were required to report to court[90], 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.[91] 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[92] or week.[93] 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.[94] 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.[95]

PRACTICE POINTERS

In the absence of any requirements in the collective bargaining agreement, an employer is free to set hours of 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 times, 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 53 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 shifts 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.

B. 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.[96] 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.[97] 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.[98] 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.[99]

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.[100] Thus, an employer may not unilaterally change the method of assigning paid details without bargaining.[101] 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.[102] Changes to contractual detail assignment procedures can only be done through regular contract negotiations. Informal arrangements may be changed after giving notice and opportunity to bargain and reaching agreement or impasse. 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.[103]

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.[104] 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.[105]

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.[106]

C. WORK SHIFTS AND SCHEDULES

Hours and shift schedules are both mandatory conditions of employment and mandatory subjects of bargaining.[107] An employer may not, as a rule, implement a new work shift without providing notice and, if requested, bargain first.[108] Similarly, the employer should bargain first over a change in work shift coverage or the elimination of a shift.[109] 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.[110] Occasionally, an employer may wish to change employee schedules in an effort to reduce overtime costs.[111] 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.[112]

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.[113]

D. JOB DESCRIPTIONS AND WORK ASSIGNMENTS

Job duties are a mandatory subject of bargaining.[114] The employer is required to bargain prior to changing the job description of any position.[115] 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.[116] Some minor changes, however, may be so insignificant (*de minimus*) as to not 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.[117] 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.[118] 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.[119] 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.[120] 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;[121]
- discontinuing the practice of assigning "night captains" in the police force;[122]
- involuntarily transferring workers;[123]
- changing transfer and work schedule assignment procedures;[124]
- assigning "breakfast duty" in a school to paraprofessionals outside the bargaining unit;[125]
- adding billing duties to the position of engineering clerk;[126]

- assigning firefighters to visit a vacant school building to inspect for signs of intrusion, arson, or fire hazards;[127] and
- changing a contract compliance officer's workload.[128]

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.[129] 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.[130] 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.[131] 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.[132]

E. 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.[133] 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.[134]

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.[135] 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[136] or a lost promotional opportunity.[137]

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.

F. 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.[138] 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.[139] 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.[140]

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."[141] In prior cases, federal courts had upheld such regulations only where they could be linked to safety justifications.[142] 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."[143]

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.[144] A department which has continuously enforced its grooming regulations is free to continue to do so.[145] 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.[146]

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.[147] 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. 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."[148] According to the court, 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."[149] In *United States Dept. of Justice, Immigration & Naturalization Serv. v. Federal Labor Relations Authy.*, a case on which the sheriff heavily relied for his analysis of special circumstances, the court held that the management rights provisions of the Federal Labor Relations Act, 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.[150] 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.[151]

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.[152]

The court ventured no opinion on whether a waiver of the statutory right to wear union insignia in a collective bargaining contract would be legally enforceable.[153]

As regards to the issue of special circumstances, both the union and the commission argued that none exist in this case. The sheriff disagreed, urging that special circumstances did exist and, relied 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).[154]

"Special circumstances" rarely, if ever, are found in the absence of a comprehensive ban on all nonstandard adornments.[155] The record in this case, however, according to the court, disclosed nothing remotely resembling a comprehensive prohibition.

The court agreed with the sheriff that "the need for discipline, uniformity and an absolutely impartial appearance exists at the Jail." The court noted that people with violent tendencies live at the jail and that a paramilitary organization and command structure are essential for the safety of inmates and correction officers alike. However, 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, supported 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.[156] Therefore, the court ruled that 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.

The court did 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.[157]

A similar issue was addressed by the LRC in 2004. 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.[158]

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.[159] 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.[160]

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 if they refuse, 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, so long as no other non-uniform pins have been allowed, 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.

G. 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.[161] 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.[162] The Court had previously held in *Hicks v. Miranda* that this type of ordinance was "not irrational" as a valid exercise of state authority.[163] 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.[164] 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.[165]

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.[166] 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.[167] 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.[168]

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.[169] 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.[170]

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

H. 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,[171] 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.[172] 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.[173]

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.[174]

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.*

I. 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.[175] However, a chief may not arbitrarily remove a police officer's right to carry a firearm and

then assign him/her to dangerous areas.[176] 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.[177]

Federal legislation has added an additional complication to police officers carrying firearms.[178] 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.[179] Any officer who in the past has been convicted 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. [180]

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.[181]

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.[182]

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);[183]*

- *permanent reassignment, to a position (if there is one) 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.[184]*

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.[185] *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.[186]

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.[187] 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.[188] The issue was whether the City failed to bargain in good faith by requiring certain unit members to use beanbag shotguns and super-sock 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.[189] Here, as a result of the City's decision to deploy the beanbag shotgun and super-sock 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.

J. 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.[190] 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."[191] 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.[192]

K. 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.[193] 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.[194]

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.[195] 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.

L. 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.[196] 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.

M. SEXUAL HARASSMENT POLICY

The implementation of a new sexual harassment policy is a mandatory subject of bargaining.[197] This is because it impacts upon the terms and conditions of employment.[198] 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.[199]

N. 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.[200]

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.[201] 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.[202] 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.[203] 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.

O. 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.[204]

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.[205] 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.[206] 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.[207] Moreover, any change in the employees' job duties is a mandatory subject of bargaining.[208] In addition, policies that provide for the discipline and/or discharge of employees who violate them are a mandatory subject of bargaining.[209] Furthermore, procedures for promotions affect an employee's condition of employment to a significant degree and are a mandatory subject of bargaining.[210]

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.

P. 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.[211] 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.[212] 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.

Q. 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.[213] 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.

§ 5 CHANGING SCHEDULES TO AVOID OVERTIME

In the absence of any restriction in the collective bargaining agreement, a municipal employer may change employees' schedules 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. However, the results of arbitration where a municipal union alleges a violation of a contractual provision, should be similar.

A. 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.

B. 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 1978 *Georgia-Pacific Corp.* 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."[214] While this is consistent with the majority view, there are some arbitrators who have reached opposite results.[215] 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.[216]

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.[217]

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.[218]

C. 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.[219] 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.[220]

A *past practice* requires more than a long-standing tradition. (See Chapter 9). 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.[221] 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;[222] when the employer does not have a legitimate business reason for the change;[223] or where regular overtime compensation has been used by management as an economic inducement to the union to accept a compromise on other benefits.[224] 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.[225] 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.[226]

D. UNILATERAL CHANGE

Even where the terms of a contract do not limit a municipal employer's ability to change schedules, such employer must still satisfy its bargaining obligations under G.L. c. 150E prior to implementing such a change. A public employer violates Sections 10(a)(5) and (1) of the Collective Bargaining Law when it unilaterally alters a pre-existing term or condition of employment involving a mandatory subject of bargaining without providing the exclusive representative (union) of its employees notice and an opportunity to negotiate over the change.[227]

The working hours of bargaining unit members have been held to constitute a mandatory subject bargaining.[228]

While the Massachusetts Collective Bargaining Law is not so absolute, the National Labor Relations Act (NLRA) deems it a *per se* violation where an employer refuses to bargain concerning hours of employment. Under the NLRA none of the following facts will justify a refusal to bargain, that:

- the employer instituted the changes in good faith;[229] (See Chapter 10)
- the employer was motivated by sound business reasons or economic considerations;[230]
- there was no loss of employees' pay because of the change in hours;[231]
- there was only a minimal change of hours, or the change of hours affected only a minimum number of workers;[232] or,
- the change of work schedules was arranged for the special convenience or personal preference of individual employees.[233]

In order to prevail at the LRC, the charging party must show by a preponderance of the evidence that:

- there was a pre-existing condition of employment;
- the employer unilaterally changed that condition; and
- the change affected a mandatory subject of bargaining.[234]

E. 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.[235] 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.[236] 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.

F. MINIMUM STAFFING

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.[237] 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.[238] 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.

The Labor Relations Commission has ruled that while minimum staffing for shift coverage is not a mandatory subject of bargaining, minimum staffing per piece of firefighting apparatus is, at least when the piece is being placed in service at a fire.[239] The issue of two or one-person police vehicles was not a mandatory subject of bargaining in Boston.[240]

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*.[241] 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. As regards the Town's action in the cancellation of scheduled overtime on two dates, the Hearing Officer ruled that since this was a mandatory subject of bargaining, the Town violated the law by refusing to bargain over this change.

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. 150E, § 11E, and is limited in scope.[242] "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."[243] "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."[244]

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.[245] 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."[246] "[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."[247] 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,"[248] 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.[249] 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 . . ."[250]

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.[251] Similarly, in *Saugus v. Newbury*, 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.[252] 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.[253] 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 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 JLMC 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.

§ 6 BENEFITS, COMPENSATION AND LEAVES

A. WAGES

Wages are, of course, a mandatory subject of bargaining.[254] 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.[255] 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.[256] Further, an employer must comply with applicable minimum wage laws.[257]

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).[258]

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.[259] Such clauses violate Section 10(a)(5) of the Law.[260] 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.[261]

Other types of compensation, such as pensions,[262] severance pay, insurance (health[263] or life), and educational incentives,[264] 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.

B. MEAL AND COFFEE BREAKS

The Fair Labor Standards Act (FLSA) requires that employees be compensated for all hours worked. [265] 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.[266] However, for police officers on extended surveillance activities, any meal periods would be compensable given that they are not completely relieved of duty.[267]

As a mandatory federal law, unions may not bargain away employee rights under the FLSA,[268] and an individual employee may not voluntarily waive these rights.[269]

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.[270] This was the case even though the employer implemented the change unilaterally and gave no prior notice to the union.[271] There she found no change in the existing practice that had each department head deciding precisely when breaks would be taken.

C. HOLIDAYS AND VACATIONS

The criteria for granting vacation leave is a mandatory subject of bargaining.[272] 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.[273] 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.).[274] 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.[275]

The LRC has generally approached vacations in the same manner as holidays. Thus, an employer may not unilaterally change the vacation leave policy.[276] Further, the LRC has stated that an employer may not unilaterally change the manner in which vacation leave is assigned or approved.[277] An employer must provide notice and opportunity to bargain to agreement or impasse before making any changes in the vacation leave policy.[278]

D. 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.[279] 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[280]).[281]

Leave for public safety personnel injuries raises a host of issues under M.G.L. c. 41, § 111F, the "injured on duty" provision.[282] 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.[283] 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.[284]

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.[285]

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.[286] 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.[287]

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).[288] 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.[289] However, benefits or seniority need not accrue during the leave.[290]

E. 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.[291]

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.[292] 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.[293]

F. 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.[294]

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 a $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."[295] 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.[296] 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*.[297] 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, is a mandatory subject of bargaining.[298] 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.[299] 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.[300]

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.[301] 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, which directly and only affects employee's wages after hire, into a pre-condition of hire that an applicant must fulfill before beginning work.[302]

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.

G. INCREASES UNDER EXPIRED CONTRACT

It is not unusual for a city or town to continue honoring the terms of an expired collective bargaining agreement. In most cases, unless the

employer has proposed a change, and impasse has been reached, it may be obligated to continue such benefits. However, where a benefit under an expired contract has not become a "past practice", a city or town may be able to withhold certain increases or payments such as step raises or longevity bonus increases.

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 giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse.[303] The obligation to bargain extends to working conditions established through past practice as well as to working conditions contained in a collective bargaining agreement.[304] The rule prohibiting public employers from making unilateral changes in established conditions of employment that affect mandatory subjects of bargaining applies both during the terms of the collective bargaining agreement and after it expires.[305] Established terms and conditions of employment in effect at the time the contract expires constitute the *status quo*, which cannot be altered without satisfying the bargaining obligation.[306] The status quo is composed of the terms and conditions of employment that prevail when the contract expires.[307]

In the *Town of Chatham* case, to identify the terms and conditions of employment that were in effect when the parties' 1989-1992 agreement expired, the Commission looked both at the relevant provisions of the expired contract, and the established practice between the parties.[308] This rule is consistent with the Commission's traditional analysis for defining what working conditions constitute the status quo during the hiatus between collective bargaining agreements.[309] Accordingly, under existing Commission precedent, the issue does not merely turn on the language of the expired contract, but requires a factual analysis of the prior practice between the Union and the Town concerning the payment of longevity and step increment increases.

The LRC, in the *Chatham* case, concluded that the contractual step and longevity increases at issue had become part of the *status quo*. Because the Town's practice of continuing to pay step and longevity payments, both during the term of, and in the hiatus period between collective bargaining agreements, had occurred with regularity over a sufficient interval of time, it was reasonable for employees to expect this practice would continue.[310] Therefore, by failing to pay step and longevity increases after the parties' 1989-1992 agreement expired, without notice, or bargaining to impasse, the Town unilaterally departed from the working conditions that had prevailed unbroken for at least the past seven years.[311]

H. 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.[312] 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.[313]

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.[314]

I. 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;[315]
- free parking; [316]
- choice and amount of food available to correction officers;[317]
- gas allotment policy;[318] and
- library hours.[319]

J. 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.[320]

The issue in the *Town of 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.[321] 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.[322]

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-proof vests is a mandatory subject of bargaining.[323] Therefore, absent an affirmative defense, the Chief's unilateral change in a mandatory subject of bargaining is a violation of the Law.[324]

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.[325] 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."[326] 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.

K. 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.[327] The terms and costs of health insurance benefits, including co-payments, are conditions of employment that constitutes mandatory subjects for bargaining.[328] 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.[329] The Commission has also held that employer-subsidized health insurance is a form of compensation.[330] 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.[331]

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*,[332] 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.[333]

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.[334] 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.[335] The Commission similarly found that there is no independent agency analogous to the GIC for purchasing health insurance for municipal employees.[336] 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.[337]

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.

L. FREE PARKING

Parking may be a mandatory subject of bargaining.[338]

When the Department of Environmental Protection unilaterally stopped providing free parking to its employees, the Appeals Court upheld the LRC's order that it bargain in good faith to agreement or impasse before making such charge.[339]

§ 7 EMPLOYEE PERFORMANCE

A. PERFORMANCE EVALUATIONS

Because performance evaluations have a direct impact on employee job security and professional advancement, they are a mandatory subject of bargaining.[340] 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,[341] and 2) they serve as a basis for promotions.[342] 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.[343]

Performance evaluation systems that measure standards of productivity and performance are mandatory subjects of bargaining.[344] 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.[345] An employer is prohibited from unilaterally changing the criteria upon which employees are evaluated.[346] 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.[347] 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.[348]

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.[349] 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.[350] 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.[351] The LRC has recognized, however, that certain data of a highly personal, intimate, or confidential nature may be withheld.[352] 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.[353]

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.[354] Implementing a new written evaluation[355] and changing the wording of an existing evaluation,[356] 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.[357]

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.[358] 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.[359] 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.[360]

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.[361] Second, most non-civil service employers who conduct written evaluations do so once per year.[362] The evaluations are generally conducted by an employee's immediate supervisor.[363] The CBA will usually specify the procedure by which an employee can challenge the results of the evaluation.[364]

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.[365] 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.[366]

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

- use standardized evaluation forms;[367]
- conduct annual evaluations;[368]
- have face-to-face meetings between evaluators and the employee to discuss the review;[369]
- use only objective facts (as much as possible) when forming conclusions;[370]
- write down everything relevant to the evaluations;[371]

- avoid general and ambiguous phrases such as "unsatisfactory" without elaborating;[372] and
- do not consider facts which are outside the agreed upon performance criteria.[373]

B. TESTING

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.[374] However, if the tests are administered to an employee in the course of a criminal investigation, e.g., polygraph, prior bargaining is not required.[375]

Psychological tests are employed to evaluate both applicants[376] 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. [377] 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.[378] 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.[379]

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,[380] probationary employees,[381] employees exhibiting erratic behavior,[382] and random or periodic testing (without cause).[383] Moreover, an employee lawfully requested to perform a psychological evaluation may be disciplined if he/she or she refuses to submit to the exam.[384] Also, an employee may not insist on having a lawyer present during the exam.[385]

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.[386] 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.[387] 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.[388] 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.[389]

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.[390] 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.[391]

C. DISCIPLINE[392]

The subject of discipline raises a myriad of issues related to the employer's bargaining duty. The establishment of discipline procedures is a mandatory subject of bargaining.[393] An employer may not unilaterally change the discipline procedure by adding or removing a level in a progressive discipline scheme,[394] prohibiting additional activities,[395] or instituting a new policy carrying possible disciplinary penalties for noncompliance.[396] However, the LRC has held that certain types of changes to the discipline policy are not unlawful unilateral changes. For example, in *City of Boston*, the LRC found that the creation of a Community Appeals Board (CAB) was not unlawful, because the CAB was merely advisory and final discipline authority still rested with the Commissioner.[397]

Whenever disciplining an employee, an employer must be cautious to avoid infringing on the employee's exercise of collective bargaining rights. Disciplining an employee in retaliation for engaging in protected union activities, such as participating in a LRC hearing[398] or filing a grievance,[399] is unlawful.[400] The LRC may find that the *actual* reason for discipline is unlawful retaliation where the employer's *stated* reason for the discipline was "stale" (i.e., where a significant amount of time had passed since the incident supposedly giving rise to the current disciplinary actions).[401] However, the LRC has refused to find unlawful retaliation in the 30-day suspension of an employee, where there was no direct evidence of anti-union animus and only a single adverse statement by a supervisor.[402] In addition, the decision not to re-appoint a police officer is a non-delegable managerial prerogative which may not be challenged without explicit evidence of retaliation.[403] (Note: See G.L. c. 41, §133 for more recent guidelines.)

Discipline is generally appropriate whenever an employee violates an employer's rule or policy. However, the discipline must be commensurate

both with the nature or severity of the violation and with the discipline given to other similarly situated employees.[404]

While a public employer may discipline an employee for insubordination, often an employee's comments may implicate some protected rights as well. Thus, one employee's "irreverent" comments over the employer's e-mail system were found to be protected union activities because they involved a discussion of working conditions.[405] Moreover, in *Holyoke*, when the union president was fired for using profanity, the LRC reinstated the employee because he/she had not been previously warned that such comments would result in discipline.[406] However, where an employee called the Town's bargaining team "pigs, cheats, and liars," both the LRC and the SJC on appeal found that these comments were not protected.[407]

***WEINGARTEN* RULE**

An employer, prior to disciplining an employee, may need or want to discuss the violation with the employee or to obtain information about the incident(s) giving rise to the need for discipline. The LRC has adopted the National Labor Relations Board's approach to investigatory interviews (which could result in discipline) conducted by the employer. In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview in violation of Section 10 (a) (1) of the Law, the Commission has been guided by the general principles enunciated in *NLRB v. Weingarten*.[408] The right to union representation attaches when an employee reasonably believes an investigatory meeting will result in discipline[409] and the employee makes a valid request for Union representation.[410] A meeting is investigatory in nature if when the employer's purpose is to investigate the conduct of an employee and the interview is convened to elicit information from the employee or to support a further decision to impose discipline.[411] The right to union representation is not triggered merely by a meeting with the employer or its agents. Further, no right to representation attaches when the sole purpose of a meeting is to inform an employee of or to impose previously determined discipline and no investigation is involved.[412] In *NLRB v. Weingarten*, the employer denied the employee's request for union representation at an investigatory interview.[413] The Supreme Court of the United States held that the employer's refusal constituted an unfair labor practice, because it restrained and coerced the employee's right to participate in concerted activities given the potential for disciplinary action as a result of the interview.[414] The LRC has applied this rationale to public employees covered by the Law as well, holding that the failure to permit representation at an investigatory interview which could result in discipline constitutes a prohibited practice.[415] In its 2002 decision, the LRC in *Town of Hudson*, ruled that if the union sends its attorney to the interview as its representative, the chief may not refuse to allow the lawyer to attend.[416] (This does not require that any other union

"buddies" be allowed to attend, nor does it increase the role of such person at the interview.)

There appears to be no decision from the Massachusetts Supreme Judicial Court nor the Massachusetts Court of Appeals which has addressed an employee's right to counsel at an internal investigation. However, the United States First Circuit Court of Appeals has. That court held in *Downing v. LeBritton,* that employees are not entitled to have an attorney present during an internal investigation.[417] The court found no reason why an attorney would be preferable to a sympathetic and articulate fellow employee such as the union agent in helping the aggrieved employee to recall facts and to communicate his position. That court opined that by the insertion of counsel into an investigatory interview or termination proceeding would stimulate lawyer representation of the employer; would formalize hearings; would force hearings into an adversary mold; would cause a litigation chill on decisions to terminate; and would increase the likelihood that many other ordinary personnel actions would become cases celebres.[418]

Additionally, the National Labor Relations Board has consistently rejected the assertion that an employee is entitled to counsel at an investigatory review.[419]

Moreover, the failure to provide the union with information necessary to defend bargaining unit members at a disciplinary hearing or interview has been similarly held to be unlawful.[420] However, if the employee fails to request union representation, the employer has no duty to inform the union or request representation for the employee.[421] If the interview is not investigatory in nature, there is also no duty for the employer to allow union representation.[422] Where the union sends an attorney to an investigatory interview, the Commission held that the employer must allow the lawyer to be with the employee (as a union "buddy").[423]

In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview, the Commission has been guided by the general principles enunciated in the United States Supreme Court case of *NLRB v. Weingarten*.[424] A public employer that denies an employee the right to union representation at an investigatory interview the employee reasonably believes will result in discipline interferes with the employee's Section 2 rights in violation of Section 10(a)(1) of the Law.[425] The right to union representation arises when the employee reasonably believes that the investigation will result in discipline and the employee makes a valid request for union representation.[426] A meeting is investigatory in nature if the employer's purpose is to investigate the conduct of an employee and the interview is convened to elicit information from the employee or to support a further decision to impose discipline.[427] An interview is investigatory if a

reasonable person in the employee's situation would have believed that adverse action would follow.[428]

The Supreme Court in *NLRB v. Weingarten* determined that a union representative is present in an interview to assist the employee, and to attempt to clarify the facts or suggest other employees who may have knowledge of them. [429] The Court reasoned that:

> [a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest.[430]

In a footnote, the Court, citing *Independent Lock Co.*, additionally reasoned that, participation by the union representative might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. [431]

Similarly, in *Massachusetts Correction Officers Federated Union v. Labor Relations Commission*,[432] the Supreme Judicial Court observed that a union representative in an investigatory interview may not be "relegate[d] to the role of a passive observer"[433], nor may the representative be precluded from "assist[ing] the employee [or] clarify[ing] the facts."[434] In *Southwestern Bell Tel Co. v. NLRB*, the court held that the employer did not violate an employee's right to union representation at an investigatory interview where the employer requested that the representative not interfere with questioning, where the representative was present in the interview, was allowed time to consult with the employee prior to the interview, and was free to make any additions, suggestions, or clarifications after the interview. In a 2002 case involving the Suffolk County Jail a union representative requested that the employer's interviewer clarify a question posted to a union member. In response, the interviewer's instruction to the union representative that he "was not allowed to speak during the interview" and the reiteration that the union

representative was "only present as a witness and could not request clarification of the questions" indeed relegated the union representative to the role of a passive observer without an opportunity to speak.[435] Moreover, there was no testimony at the hearing that the union representative was informed that he would have an opportunity to clarify any questions at the end of the interview, as in *Southwestern Bell*. Therefore, by denying the union representative to speak, the LRC ruled that the employer interfered with the employee's right to Union representation in violation of the Law.

STRIKES

While employees in the private sector generally are permitted to strike, in Massachusetts the Law prohibits strikes or work stoppages for public sector employees. [436] Section 9A of the Law provides:

> (a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.
>
> (b) Whenever a strike occurs or is about to occur, the employer shall petition the Commission to make an investigation. If, after investigation, the Commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

While part (b) of § 9A does indicate that the employer must petition the LRC when a strike is about to occur or is occurring, the Supreme Judicial Court of Massachusetts, in *Lenox Education Association v. Labor Relations Commission,* ruled that an employer need not petition the LRC prior to disciplining striking employees.[437] Both the LRC and the SJC, in finding for the employer, reasoned that as long as the employer is acting in good faith, it is entitled to take emergency precautions to protect public services threatened by an illegal strike.[438]

[1] Information in this Chapter is based primarily on prohibited practice cases filed at the LRC by labor unions. The intent is to show possible problem areas and things generally to watch out for in managing employees. Additionally, this chapter deals primarily with issues directly relating to terms and conditions of employment, as opposed to issues more generally impacting the collective bargaining relationship.

[2] *See* Chapter 3 on Good Faith and Chapter 10 on Mid-Term Bargaining for more information on the employer's responsibility to bargain with the union. In general, an employer may not alter the terms and conditions of employment without first providing the union with prior notice and an opportunity to bargain over the proposed changes. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 574 (1983). Remember also that an employer makes an unlawful unilateral change when: (1) the employer has changed an existing practice or instituted a new one; (2) the change affected employees' wages, hours or working conditions and thus impacted a mandatory subject of bargaining; and (3) the change was implemented without prior notice or an opportunity to bargain. *Town of Andover*, 1 MLC 1103, 1106 (1974). The duty to bargain extends to both contractual obligations and past practices. *City of Everett*, 9 MLC 1694, 1699 (1993).

[3] *City of Worcester v. Labor Relations Commission*, 438 Mass. 177, 779 N.E.2d 630 (2002).

[4] *Id.*

[5] *Id.*

[6] *Town of Auburn,* 8 MLC 1266 (1981) (town impermissibly approached two bargaining unit members and offered to pay them a wage increase for quitting the union); *Blue Hills Regional School Committee*, 3 MLC 1613 (1977) (finding school committee guilty of a prohibited labor practice when it gave wage increases to new teachers but withheld increase for incumbent teachers until they signed the new contract); *Lawrence School Committee*, 3 MLC 1304 (1976) (determining that school committee violated state law when it negotiated with junior high school principals to change summer wages and scheduled paydays). *See* M.G.L. c.150E § 10.

[7] *Service Employees International Union v. Labor Relations Commission*, 431 Mass. 710 (2000).

[8] *Id.*

[9] *Horner v. Boston Edison Co.*, 45 Mass.App.Ct. 139, 144 (1998).

[10] *Service Employees Int'l Union, AFL-CIO, Local 509 v. Labor Relations Comm'n*, 431 Mass. 710, 714-715 (2000).

[11] *See Horner, supra*, at 144.

[12] *Commonwealth of Massachusetts Commission of Administration and Finance*, 25 MLC 48 (1998). (See dissent of Commissioner Moreschi).

[13] *Com. of Mass.*, 25 MLC 48 (1998).

[14] *Service Employees International Union, AFL-CIO, LOCAL 509 v. Labor Relations Commission,* 431 Mass. 710, 729 N.E.2d 1100 (2000).
[15] M.G.L.A. c. 150E, §§ 6, 10(a)(5).
[16] M.G.L.A. c. 150E, §§ 6, 10(a)(5).
[17] *Town of Mansfield v. Labor Relations Commission,* 54 Mass. App. Ct. 1111, 766 N.E.2d 128 (table) (2002).
[18] See *Burlington v. Labor Relations Commn.,* 390 Mass. 157, 166 (1983).
[19] *Boston v. Boston Police Patrolmen's Assn.,* 403 Mass. 680 (1989).
[20] *Id.* at 685. *See also School Comm. of Newton v. Labor Relations Commn.,* 388 Mass. 557, 564-567 (1983); *Burlington v. Labor Relations Commn.,* 390 Mass. at 167.
[21] *See School Comm. of Newton v. Labor Relations Commn.,* 388 Mass. at 570.
[22] *Holyoke Sc. Comm.,* 12 M.L.C. 1443, 1452 (1985). *See Anderson v. Board of Selectman of Wrentham,* 406 Mass. 508, 512 (1990).
[23] See *Holyoke Sc. Comm.,* 12 M.L.C. at 1452.
[24] *City of Lowell*, 29 MLC 100 (2002).
[25] *City of Springfield*, 17 MLC 1380 (1990).
[26] *City of Lowell*, 29 MLC 30 (2002).
[27] *Id.*
[28] *City of Taunton v. Taunton Branch of Massachusetts Police Association*, 10 Mass. App. Ct. 237, 406 N.E.2d 1298 (1980) (reversing arbitrator's decision imposing shift assignments because it hampered the chief's discretion and his/her ability to maintain public safety); *City of Boston v. Boston Police Patrolmen's Association, Inc.*, 8 Mass. App. Ct. 220, 392 N.E.2d 1202 (1979) (affirming police commissioner's right to refuse to issue service revolver to police officer even though it resulted in deprivation of overtime assignments and paid details).
[29] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983). Mandatory subjects of bargaining are those with a direct impact on terms and conditions of employment, and have been found to include: work assignments, promotional procedures, and job duties, *Town of Danvers*, 3 MLC 1559 (1977); working hours, work load, and seniority, *Medford School Committee*, 1 MLC 1250 (1975); pay schedules, *Lawrence School Committee*, *supra*; etc.
[30] Generally non-mandatory subjects of bargaining include those which involve "core governmental decisions," *Town of Danvers*, *supra*, such as limiting the amount of unscheduled overtime, *Town of West Bridgewater*, 10 MLC 1040 (1983); the decision to hire more employees, *Town of Andover*, 3 MLC 1710 (1977); minimum staffing per shift, *City of Cambridge*, 4 MLC 1447 (1977), etc.
[31] *Town of Westborough*, 25 MLC at 87. *See also, Franklin School Committee*, 6 MLC 1297, 1300 (1979).

[32] *City of Boston*, 5 MLC 1796, 1797 (1979). A past practice can become a condition of employment for the employees in the bargaining unit if they have a reasonable expectation that the practice in question will continue. *Id.*; *see also*, *Higher Education Coordinating Council*, 22 MLC 1433, 1437 (1996).

[33] *Commonwealth of Massachusetts, Department of Public Welfare*, 22 MLC 1478, 1486 (1996) (holding that unilateral changes by the employer violate the law but that employer did not make a unilateral change when negotiating with employees about resolving conflicting vacation schedules).

[34] *Town of Billerica*, 13 MLC 1427 (1987).

[35] *Commonwealth of Massachusetts*, 9 MLC 1567 (1983) (establishing that employee, not union, must request the union's presence at an investigatory interview and that the employee may waive this right); *Commonwealth of Massachusetts*, 6 MLC 1905 (1980) (determining that status of requested representative is irrelevant, can be a fellow employee or union steward); *Commonwealth of Massachusetts*, 4 MLC 1415 (1977) (affirming right to have union present at disciplinary meeting).

[36] *Town of Hudson*, 25 MLC 143 (2002).

[37] *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.

[38] *Allied Chemical Workers v. Pittsburgh Plate & Glass Co.*, 407 U.S. 157, 92 S. Ct. 383 (1971).

[39] *Star Tribune*, 295 NLRB 63 (1989).

[40] *Boston School Committee*, 3 MLC 1603. Discrimination will be covered in a later chapter.

[41] *Id.*; *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).

[42] *See Lawrence*, 21 MLC 1691 (1995).

[43] *See Lowell School Committee*, 22 MLC 1321 (1996).

[44] *City of Lawrence,* 21 MLC 1691 (1995).

[45] *Id.* at 1694.

[46] *Id.*

[47] *City of Haverhill,* 16 MLC 1077 (1989).

[48] *Id.* at 1082. *See also, Lockheed Shipping Co.*, 273 NLRB 1711, 118 LRRM 1254 (1984).

[49] *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).

[50] *City of Leominster*, 17 MLC 1391 (1991).

[51] *Id.* at 1915.

[52] *Boston School Committee and Administrative Guild*, 4 MLC 1912, 1914-15 (1978).

[53] *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). *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).

[54] *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).

[55] *Town of Raynham*, 30 MLC 56 (2003).

[56] *Boston School Committee*, 4 MLC 1912, 1914 (1978).

[57] *Id.* at 1915.

[58] *Id.* at 1916.

[59] *Id.* at 1914.

[60] *Holliston School Committee*, 23 MLC at 212-213, *quoting, Scituate School Committee*, 9 MLC 1010, 1012 (1982).

[61] *Holliston School Committee*, 23 MLC at 213.

[62] *Cf. Town of Hudson*, 25 MLC 143, 148 (1999).

[63] *City of Cambridge*, 23 MLC at 37, *citing*, *Town of Milford*, 15 MLC 1247, 1253 (1988).

[64] *Town of Westborough*, 25 MLC 81 (1997).

[65] *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).

[66] *Town of Westborough*, 25 MLC at 87. *See also, Franklin School Committee*, 6 MLC 1297, 1300 (1979).
[67] *See, Holliston School Committee*, 23 MLC at 212-213.
[68] *City of Boston*, 8 MLC 1800 (1982).
[69] *Scituate School Committee*, 9 MLC 1010, 1012 (1982).
[70] *Holyoke School Committee*, 12 MLC 1443 (1986).
[71] *Scituate School Committee*, 8 MLC 1726 (1982).
[72] *See, Town of Andover,* 28 MLC 264 (2002).
[73] *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). *Town of Andover*, 28 MLC at 270, *citing Town of Mansfield*, 25 MLC 14, 15 (1998).
[74] *Town of Mansfield*, 25 MLC 14, 115 (1998).
[75] *City of Boston v. Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (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).
[76] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 569.
[77] *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *see Ador Corp.*, 150 NLRB 1658, 58 LRRM 1280 (1965).
[78] *City of Cambridge*, 29 MLC 134 (2003).
[79] *Melrose School Committee*, 9 MLC 1713, 1725 (1983)
[80] *City of Worcester*, 16 MLC 1327, 1333 (1989).
[81] *Town of Marblehead,* 12 MLC 1667, 1670 (1986); *Peabody School Committee*, 28 MLC 19, 21 (2001); *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).
[82] *Commonwealth of Massachusetts*, 19 MLC 1454 (1992)
[83] Again, these rules and procedures must also be applied in a nondiscriminatory fashion.
[84] *Board of Trustees, University of Massachusetts*, 7 MLC 1577 (1980).
[85] *Town of Shrewsbury*, 25 MLC 12 (1998).
[86] *Medford School Committee*, 1 MLC 1250 (1975).
[87] *Mass. Commissioner of Admin. & Fin.*, 20 MLC 1195 (1993).
[88] *City of Somerville*, 20 MLC 1523 (1994).
[89] *Mass. Commissioner of Admin. & Fin.*, 20 MLC 1298 (1993).
[90] *Town of Middleborough*, 18 MLC 1409, aff'd, 19 MLC 1200 (1992).
[91] *City of Taunton*, 17 MLC 1420 (1991).
[92] *Suffolk County House of Correction*, 22 MLC 1001 (1993).
[93] *Nahant School Committee*, 19 MLC 1666 (1993).

[94] *City of Leominster*, 3 MLC 1579 (1977).
[95] *Duxbury School Committee*, 25 MLC 22 (1998).
[96] *Town of West Bridgewater*, 1 MLC 1040 (1983). *See Massachusetts Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984).
[97] *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).
[98] *Mass. Commissioner of Admin. & Fin.*, 21 MLC 1637 (1995).
[99] *Town of Brookline*, 15 MLC 1631 (1989).
[100] *Town of Natick*, 12 MLC 1732 (1986).
[101] *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).
[102] 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).
[103] 16 MLC at 1351.
[104] *Town of Falmouth,* 25 MLC 24 (1998).
[105] *Id.*
[106] *City of Boston*, 31 MLC 25 (2004).
[107] *Commonwealth of Mass.*, 30 MLC 60 (2003).
[108] *Suffolk County House of Correction*, 22 MLC 1001 (1995); *City of Boston*, 14 MLC 1029 (1987).
[109] *Town of Halifax*, 19 MLC 1560 (1993); *Springfield Hospital*, 22 MLC 1645 (1996).
[110] *Higher Education Coordinating Council*, 22 MLC 1433 (1996).
[111] *See supra* section on "Overtime".
[112] *Boston School Committee*, 27 MLC 121 (2001).
[113] *Taunton School Committee*, 28 MLC 378 (2002).
[114] *Town of Danvers*, 3 MLC 1559, 1576 (1977); *City of Boston* 30 MLC 38 (2003).
[115] *Town of Wilbraham*, 6 MLC 1668 (1980). The bargaining requirement applies to positions which are filled or unfilled.

[116] *Town of Plainville*, 20 MLC 1217 (1993) (holding employer unlawfully unilaterally assigned leaf burning duties to firefighters).
[117] *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).
[118] *Burlington v. Labor Relations Commission,* 390 Mass. 157, 454 N.E.2d 465 (1983).
[119] *Id.*
[120] *Town of Dennis*, 26 MLC 203 (2000).
[121] *Town of Wayland*, 17 MLC 1286 (1990).
[122] *City of Boston*, 18 MLC 1254 (1992).
[123] *Mass. Commissioner of Admin. & Fin.*, 18 MLC 1220 (1991).
[124] *City of Everett*, 15 MLC 1298 (1989).
[125] *Springfield School Committee*, 18 MLC 1357 (1992).
[126] *Peabody Municipal Light Department*, 28 MLC 88 (2001).
[127] *City of Newton*, 14 MLC 1287 (1988), *aff'd*, 16 MLC 1036 (1989).
[128] *Commonwealth of Massachusetts*, 27 MLC 20 (2000).
[129] *Town of Scituate*, 16 MLC 1195 (1989).
[130] *City of Boston*, 25 MLC 6 (2002).
[131] *See, e.g., City of Leominster*, 17 MLC 1931 (1991).
[132] *City of Leominster*, 19 MLC 1636 (1993).
[133] *Town of Norwell*, 18 MLC 1263 (1992).
[134] *City of Boston,* 21 MLC 1487, 1491 (1995).
[135] *Mass. Commissioner of Admin & Fin.*, 14 MLC 1280 (1987).
[136] *City of Boston*, 14 MLC 1713 (1988).
[137] *City of Quincy*, 15 MLC 1048 (1988).
[138] *Kelley v. Johnson,* 425 U.S. 238 (1976).
[139] *Board of Selectmen of Framingham v. Civil Service Commission,* 366 Mass. 547, 321 N.E.2d 649 (1974) (*Framingham I*).
[140] *Board of Selectmen of Framingham v. Civil Service Commission,* 7 Mass. App. 398, 387 N.E.2d 1198 (1979) (*Framingham II*).
[141] *Quinn v. Muscare*, 425 U.S. 560, 96 S. Ct. 1752 (1976).
[142] *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).
[143] *Quinn v. Muscare,* 425 U.S. at 562-3, 96 S. Ct. at 1753.
[144] *Town of Dracut*, 7 MLC 1342 (1980).

[145] *Town of Winchester*, 24 MLC 44 (1997).
[146] *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).
[147] *Sheriff of Worcester County*, 27 MLC 103 (2001).
[148] *Boston v. Board of Educ.,* 392 Mass. 788, 792, 467 N.E.2d 1318 (1984).
[149] *Commonwealth v. Graham*, 388 Mass. 115, 125, 445 N.E.2d 1043 (1983).
[150] *United States Dept. of Justice, Immigration & Naturalization Serv. v. Federal Labor Relations Authy.*, 955 F.2d 998 (5th Cir.1992) (INS); Federal Labor Relations Act, 5 U.S.C. § 7106(b)(1) (1996).
[151] INS, 955 F.2d at 1003.
[152] *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).)
[153] 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).
[154] *INS*, 955 F.2d at 1004.
[155] *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"); *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.
[156] *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).
[157] *See, e.g., Meijer, Inc. v. National Labor Relations Bd.*, 130 F.3d 1209, 1217 (6th Cir.1997) (requiring "affirmative showing" of negative impact).
[158] *Town of Oxford*, 31 MLC 40 (2004).
[159] *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).
[160] *Id.*
[161] *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645, 96 S. Ct. 1154 (1976).
[162] *Id.* at 1155.

[163] *Hicks v. Miranda,* 422 U.S. 332, 343-345, 95 S. Ct. 2281, 2288-2289 (1975).
[164] *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.
[165] *Id.*
[166] *Town of Milton v. Civil Service Commission*, 312 N.E.2d 188 (Mass. 1974).
[167] *Id.*
[168] *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).
[169] *Mello v. Mayor of Fall River,* 495 N.E.2d 876 (Mass. App. Ct. 1986)
[170] *Id.*
[171] This issue is discussed further in the chapter on Union Rights and Responsibilities.
[172] *See Cosby,* 32 Mass. App. Ct. 392 (1992); *Mass. Dept. of Corrections*, 17 MLC 1293 (1990).
[173] *See City of Boston*, 17 MLC 1711 (1991); *Mass. Comm'r of Admin. & Finance*, 19 MLC 1235 (1992).
[174] *School Committee of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 784 N.E. 11 (2003).
[175] *City of Boston v. Boston Police Patrolman's Association*, 8 Mass. App. Ct. 220 (1979).
[176] *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.
[177] *See Mass. Bd. of Regents (Fitchburg State College)*, 8 MLC 1483 (1981); 8 MLC *University of Mass.*, 7 MLC 1503 (1980)
[178] *See* Federal Gun Control Act (1968, as amended 1996).
[179] *See, e.g., U.S. v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996).
[180] 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.
[181] Chapter 180 of the Acts of 1998.
[182] *Wheeler v. Town of Franklin*, Norfolk Superior Ct., No. 01-02834 (2003).

[183] 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.
[184] *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).
[185] 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.
[186] *Commonwealth of Massachusetts*, 25 MLC at 205 (1999*); citing, Town of Danvers,* 3 MLC 1559 (1977).
[187] *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).
[188] School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 564.*
[189] *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).
[190] *See Wilmarth v. Town of Georgetown*, 28 Mass. App. Ct. 697, 555 N.E.2d 597 (1990).
[191] *See Town of Milton v. Civil Service Commission*, 365 Mass. 368, 312 N.E.2d 188 (1974).
[192] *Befi v. District Court of Holyoke*, 314 Mass. 622, 625, 51 N.E.2d 328 (1943).
[193] *Abington School Committee*, 21 MLC 1630 (1995).
[194] *Town of Lexington*, 22 MLC 1676 (1996).
[195] *Commonwealth of Massachusetts/Commission of Administration and Finance*, 24 MLC 17 (1997).
[196] *North Middlesex Regional School District Committee*, 24 MLC 42 (1997).
[197] *Harris-Teeter Super Markets*, 293 NLRB 743, 131 LRRM 1296 (1989).
[198] *Dracut School Committee*, 29 MLC 1013 (H.O. 1993); *City of Boston*, 25 MLC 76 (H.O. 1998).
[199] *City of Boston*, 25 MLC 76 (1998).
[200] *Town of Natick,* 28 MLC 85 (2001).
[201] *Town of Dennis, 12 MLC 1027 (1985).*
[202] See *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 554 (1983); *Commonwealth of Massachusetts*, 25 MLC 201 (1999).
[203] *City of Medford*, 30 MLC 34 (2003).
[204] *City of Lowell*, 28 MLC 126 (2001).
[205] City *of Peabody,* 9 MLC 1447, 1452 (1982).
[206] *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).
[207] City *of Peabody,* 9 MLC at 1452.
[208] *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).
[209] *Johnson Bateman Co.,* 295 NLRB at 183.
[210] *Town of Danvers,* 3 MLC at 1574.
[211] 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).
[212] *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).
[213] *Suffolk County Sheriff's Department*, 29 MLC 63 (2002).
[214] *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).
[215] *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).
[216] *Stanley Works*, 39 LA 375 (Summers 1962).
[217] *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).
[218]*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).
[219] *Kimberly-Clark Corp.*, 42 LA 983 (Sembower 1964).
[220] *Pacific Towboat & Salvage Co.*, 82-2 ARB § 8554 (Rule 1982).
[221] *Hopwood Foods, Inc.*, 73 LA 418 (Leahy 1979).
[222] *Ohio Corrugating Co.*, 77-1 ARB § 8294 (Dworkin 1974).
[223] *General Precision, Inc.* 42 LA 589, 593 (Roberts 1963).
[224] *Witco Chemical Co.*, 30 LA 901 (Whitney 1958).
[225] *General Precision, Inc.*, supra.
[226] *Stanley Works*, 39 LA 374, 377 (Summers 1962).
[227] *Scituate School Committee*, 9 MLC 1010 (1982); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983); see also, *NLRB v. Katz,* 369 U.S. 726 (1962).

[228] *Medford School Committee*, 1 MLC 1250 (1975).
[229] *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966); *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969); *International Woodworkers of America, AFL-CIO, Local 3-10 v. NLRB*, 380 F.2d 628 (D.C. Cir. 1967); *Master Appliance Corp.*, 158 NLRB 1009, 62 LRRM 1170 (1960); *Homer Gregory Co.*, 123 NLRB 1842, 44 LRRM 1249 (1959); *Fleming Mfg. Co.*, 119 NLRB 452, 41 LRRM 1115 (1957); *Valley City Furniture Co.*, 110 NLRB 1589, 35 LRRM 1265 (1954), *enf'd* 230 F.2d 947 (5th Cir. 1956); *W. T. Grant Co.*, 94 NLRB 1133, 28 LRRM 1146 (1951) *enf'd* 199 F.2d 711 (9th Cir. 1952); *Tennessee Valley Broadcasting Co.*, 38 NLRB 895, 24 LRRM 1167 (1949), *enf'd* 192 F.2d 82 (5th Cir. 1951).
[230] *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966); *International Woodworkers of America, AFL-CIO, Local 3-10 v. NLRB*, 380 F.2d 628 (D.C. Cir. 1967); *Wittock Supply Co.*, 171 NLRB 201, 68 LRRM 1043 (1968); *Homer Gregory Cor.*, 123 NLRB 1842, 44 LRRM 1249 (1959); *Fleming Mfg. Co.*, 119 NLRB 452, 41 LRRM 115 (1957)
[231] See, e.g.: *W.T. Grant Co.*, 94 NLRB 1133, 28 LRRM 1146 (1951) *enf'd* 199 F.2d 711 (9th Cir. 1952), reduction in hours accompanied by wage increase; and *Tennessee Valley Broadcasting Co.*, 38 NLRB 895, 24 LRRM 1167 (1949), *enf'd* 192 F.2d 82 (5th Cir. 1951), reduction in hours without loss of wages.
[232] In *Blue Jeans Corp.*, 177 NLRB 198, 73 LRRM 1114 (1969), *enf'd on other grounds* 432 F.2d 1341 (D.C. Cir. 1970), while contract negotiations were being conducted, the company announced a new workday for all employees without first discussing it with the union. The change was designated to provide a uniform workday by eliminating a ten minute differential that was necessary only when the company employed more people. The NLRB ruled that the unilateral change of hours, even though a minor action, amounted to a violation of the company's bargaining obligations.

In the *International Woodworkers' case supra* N. 4, the District of Columbia Circuit ruled that the Board erred when it refused to enter a remedial order even though it found an employer violated Section 8(a)(5) by unilaterally changing the workweek of one of its 16-18 employees from Monday-Friday to Tuesday-Saturday.

Although premium pay was required by contract on Saturday work, the employer refused to pay it to the affected employee. The court ruled that once a refusal to bargain was found, the Board was statutorily bound to order a remedy despite the fact that only one employee in the bargaining unit was affected by the violation.
[233] In *Chanticleer, Inc.*, 161 NLRB 241, 63 LRRM 1237 (1966), an employee had been allowed for two years to report to work at a later time than the regular shift two days a week because of his church duties as a practicing minister. Shortly after a successful union organizational drive

of which he was a leader, the employee's privilege was canceled by the employer. Another union proponent was directed to work the night shift instead of his unusual day shift, despite the employer's past practice in arranging work schedules after ascertaining and accommodating the shift preference of its individual employees. The NLRB ruled that both the unilateral actions by the employer constituted violations of its bargaining duty.

[234] *Boston School Committee*, 3 MLC 1603 (1977).

[235] *City of Springfield*, 7 MLC 1832 (1981).

[236] *Dedham School Committee*, 5 MLRR 1179 (1979).

[237] *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).

[238] Chapter 594 of the Acts of 1979; amended by Chapter 726 of the Acts of 1985.

[239] *City of Newton*, 4 MLC 1282 (1977); *Town of Bridgewater*, 12 MLC 1612 (1986).

[240] *City of Boston*, 18 MLC 1335 (1992).

[241] *Town of Halifax*, 19 MLC 1560 (1992).

[242] *School Comm. of Hanover v. Hanover Teachers Ass'n*, 435 Mass. 736, 740 (2002).

[243] *Id.,* citing *Plymouth Carver Regional School Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990) (internal quotations omitted).

[244] *School Comm. of Hanover*, 435 Mass. at 740.

[245] *Lynn v. Labor Relations Commission*, 43 Mass.App.Ct. 172, 178 (1997).

[246] *Billerica*, 415 Mass. at 694.

[247] *Boston v. Boston Police Superior Officers Federations*, 29 Mass.App.Ct. 907, 908 (1990).

[248] See *Boston v. Boston Police Patrolmen's Assoc., Inc.*, 403 Mass. 680, 684 (1989) (decision regarding number officers assigned to cruisers is non-delegable).

[249] *Billerica*, 415 Mass. at 694-695, citing *Boston Teachers Union, Local 66 v. School Comm. of Boston*, 386 Mass. 197, 212 (1982).

[250] *Id.* At 695.

[251] *Id.* At 694-695.

[252] *Saugus v. Newbury*, 15 Mass.App.Ct. 611, 613 (1983); *see also, Melrose and Melrose Firefighters Union, Local 1627*, 22 MLC 1209, 1218-1219 (1995).

[253] *Local 2071, International Association of Firefighters v. Town of Bellingham*, 18 Mass.L.Rptr. 697, 2005 WL 350962 (Mass.Super.) (2005)

[254] 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).

[255] *Boston School Committee*, 10 MLC 1410 (1984).
[256] *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).
[257] 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).
[258] *Worcester County Sheriff's Department*, 28 MLC 1 (2001).
[259] *Medford School Committee*, 3 MLC 1413 (1977).
[260] *Town of Mashpee*, 19 MLC 1572 (1992).
[261] *Norfolk County*, 24 MLC 104 (1998).
[262] 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).
[263] 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).
[264] *See Framingham*, 20 MLC 1536 (1994).
[265] 29 U.S.C. § 207(e).
[266] 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).

[267] 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.

[268] *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

[269] *Brooklyn Savings Bank v. O'Neal*, 328 U.S. 697 (1981).

[270] *City of Lynn*, 24 MLC 92 (1998).

[271] *Id.*

[272] *Massachusetts Port Authority*, 26 MLC 100, 101 (2000).

[273] *See Everett*, 22 MLC 1275 (1995) (holding that employer unilaterally and unlawfully altered the pay and compensation schedule for Christmas and Thanksgiving).

[274] *See New Bedford School Committee*, 2 MLC 1181 (1975).

[275] *Town of Billerica*, 11 MLC 1302 (1985).

[276] *See* City of *Revere*, 21 MLC 1325 (1994). But cf., *City of Leominster*, 17 MLC 1699 (1991).

[277] *See Mass. Comm'r of Admin. & Fin.*, 21 MLC 1637 (1995).

[278] *Sheriff of Suffolk County*, 28 MLC 72 (2001).

[279] *City of Everett*, 12 MLC 1418 (1986).

[280] *See Town of Westfield*, 10 MLC 1232 (1983).

[281] *Somerville School Committee*, 13 MLC 1024 (1986).

[282] 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.

[283] *See Newton Branch of the Massachusetts Police Assn. v. City of Newton*, 484 N.E.2d 1326 (1985).

[284] *See, e.g., City of Springfield*, 15 MLRR 1133 (1989); *Town of Arlington*, 15 MLRR 1130 (1989).

[285] *Town of Wilmington,* 9 MLC 1694 (1983).

[286] *See Atterberry v. Police Commissioner of Boston*, 392 Mass. 550, 467 N.E.2d 150 (1984).

[287] *Id.*

[288] 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.

[289] 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.

[290] Health insurance, however, must be maintained by the employer during the leave.
[291] *Town of Dedham*, 16 MLC 1235 (1989).
[292] *City of Boston*, 25 MLC 92 (1998).
[293] See *Town of Tewksbury*, 11 MLC 1170 (1984); *Town of Hingham*, 19 MLC 1543 (1992).
[294] 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."
[295] We have modified these facts in response to the Town's request.
[296] *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).
[297] *Town of South Hadley,* 27 MLC 161 (2001).
[298] *Town of South Hadley*, 27 MLC at 162.
[299] *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)).
[300] *Town of South Hadley*, 27 MLC at 163.
[301] *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).
[302] *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).
[303] Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); *School Committee of NexTon v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 16 MLC 1429 (1989).
[304] *City of Gloucester*, 26 MLC 128 (2000). *City of Everett*, 19 MLC 1304 (1992).
[305] *Commonwealth of Massachusetts*, 19 MLC 1069, 1079 (1992); *Commonwealth of Massachusetts*, 9 MLC 1355, 1358 (1982); *Chatham* 1, 21 MLC 1526, 1529 (1995). *See also, National Labor Relations Board v. Katz*, 369 U.S. 736, 743 (1962).
[306] *Chatham* 1, 21 MLC at 1529.
[307] *Id.*
[308] *Chatham* I at 1530, citing *Commonwealth of Massachusetts*, 9 MLC at 1359.
[309] *Id.*

[310] *City of Boston*, 5 MLC 1796, 1797 (1979).
[311] *Town of Chatham*, 28 MLC 56 (2001); *Town of Chatham*, 21 MLC 1526 (1995).
[312] *Town of East Longmeadow*, 28 MLC 67 (2001).
[313] *Id.; see City of Taunton*, 26 MLC 225, 226 (2000).
[314] *Town of East Longmeadow*, 28 MLC 67, 69 (2001); *City of Taunton* at 226.
[315] *Town of Shrewsbury*, 28 MLC 44 (2001).
[316] *Commonwealth of Massachusetts*, 27 MLC 11 (2000);
[317] *City of Boston*, 15 MLC 1209 (H.O. 1988), *aff'd* 16 MLC 1086 (1989).
[318] *Everett Housing Authority*, 9 MLC 1263 (1982).
[319] *City of Boston*, 9 MLC 1021 (1982).
[320] *Town of Shrewsbury*, 28 MLC 70 (2001).
[321] *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).
[322] *City of Boston*, MLC 1429, 1434 (1989).
[323] *See, e.g., Town of Shrewsbury*, 14 MLC 1664 (1988) (use of seat belts a mandatory subject.)
[324] *See, e.g., Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994) and cases cited therein.
[325] *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).
[326] *School Committee of Newton*, 388 Mass. at 569; *City of Worcester*, 16 MLC 1327, 1333 (1989); *Town of Andover*, 4 MLC 1086, 1089 (1977); *Town of Hudson*, 25 MLC 143 (1999).
[327] *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).
[328] *Town of W. Dennis*, 28 MLC 297 (2002).
[329] *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).
[330] *Board of Regents of Higher Education*, 19 MLC 1248, 1265 (1992), citing *Anderson v. Board of Selectmen of Wrentham*, 406 Mass. 508 (1990).
[331] *Town of Dennis*, 28 MLC 297 (2002).
[332] *MCOFU v. Labor Relations Commission*, 417 Mass. 7 (1994).

[333] *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.)
[334] *MCOFU v. Labor Relations Commission* , 417 Mass. at 9 (1994).
[335] *Id. at* 9, n.3, *citing Town of Ludlow*, 17 MLC 1191, 1198 (1990).
[336] *City of Malden*, 23 MLC 181, 184 (1997).
[337] 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
[338] *See City of Cambridge*, 4 MLC 1620; 5 MLC 1291 (1978); *Board of Trustees of the Univ. of Mass.*, 21 MLC 1795 (1995).
[339] *Commissioner of Administration and Finance v. Labor Relations Commission*, 60 Mass.App.Ct. 1122, 805 N.E.2d 531 (Table) (2004) (unpublished opinion).
[340] *Commonwealth of Mass. v. Labor Relations Commission*, 404 Mass. 124, 533 N.E.2d 1325 (1989).
[341] *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).
[342] *Boston School Committee*, 3 MLC 1603 (1977).
[343] *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.
[344] *Town of Wayland*, 5 MLC 1738 (1979).
[345] *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).
[346] *Commonwealth of Massachusetts*, 18 MLC 1161 (1991).
[347] *Id.;* See also *Commonwealth of Massachusetts*, 13 MLC 1717 (1987).
[348] *Boston Department of Health and Hospitals,* 8 MLC 1077 (1981).
[349] *Commonwealth of Massachusetts*, 13 MLC 1717 (1987).
[350] *City of Boston*, 24 MLC 89 (1998).
[351] *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).

[352] *Board of Trustees, Univ. of Mass. (Amherst)*, 8 MLC 1148, 1152 (1981).
[353] *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).
[354] *City of Boston*, 5 MLC 1796 (1979).
[355] *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).
[356] *Town of Arlington*, 4 MLC 1614 (1977), *aff'd* 4 MLC 1946 (1978*); see also, Trading Port Inc.*, 224 NLRB 160 (1976).
[357] *City of Boston,* 5 MLC 1796, 1797 (1977).
[358] *Commonwealth of Massachusetts,* 18 MLC 1161, 1164 (1991).
[359] *Id.* at 1163.
[360] *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).
[361] *Comm. of Mass.*, 18 MLC 1161, 1163 (1991).
[362] *Comm. of Mass.*, 16 MLC 1751 (1989).
[363] *Comm. of Mass.*, 15 MLC 1541 (1988).
[364] *Comm. of Mass.*, 16 MLC at 1753 (discussing challenge to employee evaluation result by means of grievance procedure).
[365] *Massachusetts Department of Public Welfare,* 19 MLC 1340 (1992).
[366] *Id.*
[367] *See* Hirsch, LABOR AND MANAGEMENT IN MASSACHUSETTS, 135 (1990).
[368] *Broken Arrow, City of Oklahoma City*, 96 LA 439 (1991).
[369] *Ashway County Board of Mental Health*, 94 LA 303 (1990).
[370] *See* Hirsch, *supra*, at 135-136.
[371] *See generally*, *Commonwealth of Mass.*, 20 MLC 1336 (1996).
[372] *Id.*
[373] *Ohio State, County & Municipal Employees*, 92 LA 1167 (1989); City of Erie, 96 LA 557 (1991).
[374] *City of Fall River*, 20 MLC 1352 (1994).
[375] *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).
[376] *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).
[377] *See* City of *Haverhill*, 16 MLC 1215, *aff'd* 17 MLC 1215 (1989).
[378] *McKenna v. Fargo*, 451 F. Supp. 1355 (D.N.J. 1978), *aff'd* 601 F.2d 575 (1976).
[379] *Id.*
[380] *See McKenna*, *supra* note 156.
[381] *Redmond v. City of Overland Park*, 672 F. Supp. 473 (D. Kan. 1987).
[382] *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)
[383] *Hild v. Brunner*, 496 F. Supp. 93 (D.N.J. 1980).
[384] *See, e.g.*, *Lucheso v. Dillon*, 439 N.Y.S.2d 783 (1981).
[385] *Nolan v. Police Commissioner of Boston*, 420 N.E.2d 335 (1981) (holding that due process only required that the psychological evaluation be recorded).
[386] *Town of Fairhaven*, 20 MLC 1348 (1994).
[387] *City of Fall River*, 20 MLC 1352 (1993); *City of Boston*, 13 MLC 1706 (1986).
[388] *Id.*
[389] *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)
[390]
[391] *Patch v. Mayor of Revere*, 397 Mass. 454, 492 N.E.2d 77 (1988).
[392] The subject of disciplining employees intersects with civil service issues, which will not be discussed herein.
[393] *Mass. Comm'r of Admin. & Fin.*, 15 MLC 1575 (1989).
[394] *Metropolitan District Commission*, 17 MLC 1325 (1990) (eliminating procedure whereby employee could petition for removal of an oral reprimand from his/her personnel file was unlawful).
[395] *Mass. Comm'r of Admin. & Fin.*, 15 MLC 1575 (1989) (new rule prohibiting firearms at work was unlawful).
[396] *Dracut School Committee*, 22 MLC 1013 (1995) (instituting new sexual harassment policy unilaterally is unlawful).
[397] *City of Boston*, 21 MLC 1725 (1995).
[398] *City of Boston*, 17 MLC 1026 (1990).
[399] *Mass. Dept. of Public Welfare*, 22 MLC 1222 (1995) (finding it unlawful to increase a supervisor's workload in retaliation for the filing of a grievance);*Athol-Royalston Regional School Committee*, 21 MLC 1385 (1994) (finding unlawful retaliation for the filing of a grievance); *Somerville*, 20 MLC 1126 (1993) (unlawful to discourage employee in exercising right to file grievances).
[400] *City of Northampton*, 21 MLC 1390 (1994) (holding that employee's comments to fellow employees over email, though "irreverent," were

nonetheless protected union activities); *Mass. Comm'r of Admin. & Fin.*, 13 MLC 1075 (1986).
[401] *See, e.g., City of Attleboro*, 20 MLC 1037 (1993). *But see, Mass. Comm'r of Admin. & Fin.*, 22 MLC 1200 (1995) (firing was not pretext for retaliation because it resulted from a logical progression of discipline).
[402] *City of Boston*, 22 MLC 1488 (1996).
[403] *Mass. Coalition of Police v. Town of Northborough*, 416 Mass. 252 (1993).
[404] Also, discipline must be progressive.
[405] *See City of Northampton*, note 177, *supra*.
[406] *City of Holyoke,* 21 MLC 1307 (1993).
[407] *Plymouth Police Brotherhood v. Labor Relations Commission*, 417 Mass. 436 (1994).
[408] *NLRB v. Weingarten*, 420 U.S. 251 (1975); *Commonwealth of Massachusetts, 4 MLC 1418 (1977); Commonwealth of Massachusetts*, 22 MLC 1741, 1747 (1996).
[409] *Commonwealth of Massachusetts*, 8 MLC at 1289.
[410] *Commonwealth of Massachusetts,*26 MLC 141 (2000) citing *Commonwealth of Massachusetts*, 9 MLC 1569 (1983);g *Id.*
[411] *City of Peabody*, 25 MLC at 193; Commonwealth of Massachusetts*, 26 MLC at 141, citing* Baton Rouge Water Works*, 103 LRRM 1056 (1979);* Commonwealth of Massachusetts*, 8 MLC 1287 (1981).*
[412] *Commonwealth of Massachusetts*, slip op. Case No. SUP-4301 (March 9, 2000); *Commonwealth of Massachusetts*, 8 MLC 1281, 1289 (1981).
[413] 420 U.S. 251, 95 S. Ct. 959 (1975).
[414] *Id.*
[415] *See, e.g., Mass. Bd. of Regents of Higher Education*, 15 MLC 1195 (1988).
[416] *Town of Hudson, 25 MLC 143 (2002).*
[417] *Downing v. LeBritton,* 550 F.2d 689, 692 (1st Cir. 1977).
[418] *Downing v. LeBritton*, supra at 692.
[419] *TCC Center Cos., Inc.,* 275 N.L.R.B. 604 (1985); *Montgomery Ward Co.,* 269 N.L.R.B. 904 (1984); *Consolidated Casinos Corp.,* 266 N.L.R.B. 988 (1983).
[420] *City of Lawrence*, 17 MLC 1515 (1990).
[421] *Worcester County Jail*, 21 MLC 1672 (1995).
[422] *Town of Winchester*, 21 MLC 1206 (1994).
[423] *Town of Hudson,* 25 MLC 143 (2002).
[424] *NLRB v. Weingarten*, 420 U.S. 251 (1975); *Commonwealth of Massachusetts*, 4 MLC 1415, 1418 (1977); *Commonwealth of Massachusetts*, 22 MLC 1741, 1747 (1996).
[425] *Commonwealth of Massachusetts*, 26 MLC 139, 141 (2000) *citing Commonwealth of Massachusetts*, 9 MLC 1567, 1569 (1983).

[426] *Commonwealth of Massachusetts*, 26 MLC at 141 citing *Commonwealth of Massachusetts*, 4 MLC 1415, 1418 (1977).
[427] *Commonwealth of Massachusetts*, 26 MLC at 141, *citing Baton Rouge Water Works*, 103 LRRM 1056, 1058 (1979); *Commonwealth of Massachusetts*, 8 MLC 1287, 1289 (1981).
[428] *Commonwealth of Massachusetts*, 8 MLC at 1289.
[429] *NLRB v. Weingarten*, 420 U.S. 251 (1975).
[430] *Id.* at 263.
[431] *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958); *NLRB v. Weingarten*, 420 U.S. 251, 263, fn. 7 (1975).
[432] *MCOFU v. LRC*, 424 Mass. 191, 194 (1997)
[433] *NLRB v. Texaco, Inc.*, 659 F.2d 124, 126-127 (9th Cir. 1981)
[434] *See Southwestern Bell Tel Co. v. NLRB*, 667 F.2d 470, 473 (5th Cir. 1982)
[435] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002).
[436] G.L. c. 150E § 1 defines a strike as "a public employee's refusal, in concerted action with others, to report for duty, or his willful abstinence in while or in part from the performance of the duties of employment as established by an existing collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike." *See also*, § 9A of the Act (prohibiting strikes).
[437] *Lenox Education Association v. Labor Relations Commission,* 393 Mass. 276, 471 N.E.2d 81 (1984).
[438] *Id.*

CHAPTER 2 - 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 City of Worcester hinted that if the city had properly raised the argument on appeal, the court might have ruled that no impact bargaining was required.

§ 1 PUBLIC POLICY

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).
>
> 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, non-delegable 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. ch. 41, § 96, a challenge was made concerning the actions of the Northborough Board of Selectmen (where G.L. ch. 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 non-delegable 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 Sc. Comm. v. Dennis Teachers Ass'n*, 372 Mass. 116, 119 (1977).

A. SCOPE OF ARBITRATION

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.[8] 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*, 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.[9]

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. ch. 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

The right to assign public safety employees is an inherent managerial prerogative which cannot be the subject of arbitration. 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.*

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 would 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.

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.*

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.

> 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.[10]

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.[11] 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.[12]

Under G.L. ch. 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.[13]

Under the holding of *Sheriff of Middlesex County v. International Brotherhood of Correctional Officers*, it does not appear that a correction officer needs to be a deputy sheriff or that the powers of a deputy sheriff would be exercised in carrying out the duties of a correction officer.[14] The court stated that 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 appointment of a deputy by the sheriff can be viewed as the equivalent of appointing someone to exercise police-type power. This case is closely analogous to cases such as *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough,*.[15]

Relying on its claim that the sheriff "discriminated" against the Plaintiff, the union argued that this case was controlled by *Blue Hills Regional Dist. Sc. Comm. v. Flight,* which carved out an exception to the nondelegability doctrine in cases of constitutionally impermissible discrimination.[16] In *Blue Hills Regional Dist. Sc. Comm. v. Flight*, an arbitrator agreed with a female tenured teacher who claimed that the school committee had violated provisions of the Collective Bargaining Agreement (CBA) that expressly addressed procedures for promotions and required appointments to be made without regard to gender. The court 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 makes appropriate an order granting the promotion with back pay."[17]

The case of the *Sheriff of Middlesex County v. International Brotherhood of Correctional Officers* 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.[18] The Plaintiff's claim in this case involved Article XIII of their CBA, which prohibited discrimination on the basis of constitutionally protected

categories, such as race and gender, as well as union membership. However, there are no factual allegations anywhere in the record that refer to alleged discrimination based upon anything other than union membership. The court ruled 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. Sc. Comm. v. Flight.*[19]

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.[20] In the *Sheriff of Middlesex County v. International Brotherhood of Correctional Officers* case, however, the sheriff was not bound by the collective bargaining contract (CBA) to follow any specific appointment procedures. Indeed, the CBA did not address or even mention deputy sheriff appointments in any of its provisions. The union's sole claim was that the sheriff discriminated against the Plaintiff by failing to deputize him in violation of Article XIII of the CBA. Article XIII did not relate to deputy sheriff appointments. Instead, it set forth a general policy against discrimination on the basis of union membership or with regard to "race, color, religious belief, national origin, age, sex, and/or disability." The court noted that neither Article XIII nor any other provisions of their CBA supported the stance that the sheriff bound himself to particular procedures relating to deputy sheriff appointments. Claiming a violation of a general nondiscrimination provision is insufficient to find a procedural basis to reverse the stay of arbitration.

B. MANDATORY SUBJECTS OF BARGAINING

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 the 1976 decision of *School Committee of Braintree v. Raymond*, the court ruled that there is no requirement that all matters which are mandatory subjects of bargaining must be subject to arbitration.[21] 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:

> 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).[22]

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.[23] 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.[24]

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 (LRC) (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 and resulted in orders compelling bargaining over at least some aspects of assignments.[25] It does not appear that the City decided to appeal to the courts in either case.

In the earlier 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.[26] 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.[27]

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.[28] 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)."[29]

C. ASSIGNMENT

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.[30] It ruled that the assignment of a police officer by the police commissioner is a decision committed to the non-delegable 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).[31]

PRACTICE POINTERS

The 1998 amendments to c. 150E were aimed at depriving the Boston Police Commissioner of some of his 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.*

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.[32]

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.[33] 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.[34]

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.[35]

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.[36] 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 therefore the disputed provisions of the agreement would be totally subversive of the discipline and efficiency which is indispensable to a public law enforcement agency.[37]

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.[38] In addition, it ruled that the Commissioner has the power to order a psychiatric examination as a condition of reissuance 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.[39]

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.[40]

§ 2 PROMOTIONS

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.

A. MANDATORY SUBJECT

The Labor Relations Commission has ruled that the procedures and requirements for promotion within the bargaining unit are mandatory subjects of bargaining.[41] 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.[42]

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[43], psychological testing[44], new procedures[45], and an added new evaluation procedure[46].

B. 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."[47]

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.[48]

1) Notice

Notice must be sufficiently clear so as to afford the union the opportunity to decide whether to request/demand bargaining.[49] It is not sufficient to *discuss* the matter with certain bargaining unit representatives.[50] Unless the union leadership has been provided actual notice, it is unlikely that the Commission will find that adequate notice has been given.[51] Vague reference to the proposed change will not suffice.[52]

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.[53] 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.[54]

2) Opportunity to Bargain

Once a timely demand has been made, the employer and the union must engage in good faith negotiations.[55] So long as such negotiations are in progress, the status quo should be preserved.[56]

Upon reaching agreement or impasse, the employer may implement the change.[57] Similarly, should the union fail to negotiate in good faith, the employer may stop negotiating and implement its proposal.[58] 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.[59]

Where an externally imposed deadline is involved, the length of any such negotiations may be curtailed.[60] 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.*[61]

The Commission decisions in promotion cases 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.

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).[62] 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.[63] 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.[64] (An exception was made where an increase was implemented during negotiations.)[65]

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.[66]

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.[67] 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.

§ 3 APPOINTMENTS

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 is not 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 likely that bargaining in good faith to the point of agreement or impasse is all that is required.

A. HIRING DECISIONS AND QUALIFICATION 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.

In *Allied Chemical Workers v. Pittsburgh Plate & Glass Co.*,[68] 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.[69]

Similarly, the LRC, in *Boston School Committee*, held that a public employer has no duty to bargain over a requirement which is purely a condition of hire.[70] 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.[71]

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.[72] 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.[73]

In both *Boston School Committee*,[74] and *Town of Lee*,[75] 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*, the National Labor Relations Board (NLRB) held that requiring drug and alcohol tests of all applicants was outside the scope of bargaining.[76] In *City of Haverhill*, the LRC held that an employer could impose a qualification that all applicants undergo a psychological exam as a condition of being hired.[77] 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.[78] *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.

B. ENTRY-LEVEL WAGES

Unlike establishing qualifications for applicants, establishing wages for entry-level employees is a mandatory subject of bargaining.[79] 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.[80] 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 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.)[81] 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".[82]

Addressing each of the school committee's arguments in order, the LRC first found that since one's step level directly affects his "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.[83]

It next concluded that there is a clear distinction between "educational policy" and "terms and conditions of employment".[84] 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".[85]

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. (See Chapter 15.)

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.

§ 4 CONTRACTING OUT OR TRANSFERRING 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.[86] To establish that a public employer has violated the Law, an employee organization must demonstrate that: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit work had an adverse impact on individual employees or the bargaining unit itself; and 3) the employer failed to give the employee organization prior notice and an opportunity to bargain to resolution or impasse over the decision to transfer the work.[87]

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.[88] 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.[89]

In the 2003 case of *Town of Saugus*, 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.[90] 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.[91] The courts have supported these positions.[92]

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 constitutes 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.

Transfer of Bargaining Unit Work

The ALJ and the Commission agreed that bargaining unit work was transferred from RSIIs to PMIIs. The department argues that because the RSIs in the four-person houses were filling the role formerly held by the RSIIs, "the duties and responsibilities performed by the Program Managers had not changed" in that the PMIs were still supervising residential supervisors in their roles as "house managers."

There was substantial evidence to support the commission's rejection of the department's analysis based on the role of house managers. Moreover,

as the commission noted, the department failed to consider whether there were RSIIs who could have supervised the RSIs. The failure to explore these options violated the law.[93]

Adverse impact

The transfer of bargaining unit work, even when accompanied by no apparent reduction in the total number of bargaining unit positions, constitutes a detriment to the bargaining unit because it could result in the eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties.[94] There were fewer RSII positions to which an increased number of RSIs could aspire, including three vacant positions formerly occupied by RSIIs who had been laid off.[95] The bargaining unit thus suffered an adverse impact when the opportunities for promotion to RSIIs were reduced.[96]

Notice and an Opportunity to Bargain

The department did not give the union notice of the change and an opportunity to bargain. That it had such a duty did not, according to the court, require that it surrender its policy making function to the union.[97] "The duty to bargain under G.L. c. 150E is a duty to meet and negotiate and to do so in good faith. G.L. c. 150E, § 6. Neither party is compelled, however, to agree to a proposal or to make a concession."[98]

Pursuant to G.L. c. 150, § 11, the commission is empowered to restore the status quo ante temporarily. The permanent restoration of certain duties to the bargaining unit, however, is not part of the duty to meet and bargain in good faith.

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.[99]

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.[100] 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.[101] Rather, the employer is only required to bargain if there is a calculated displacement of unit work.[102] 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 unit members with a corresponding increase in the work performed by

non-unit employees may demonstrate a calculated displacement of unit work.[103]

Having determined that the task of identifying latent prints was the exclusive work of patrol officers, the Labor Relations Commission turned to determine whether the City unlawfully transferred that work outside the bargaining unit. When the City promoted the two officers to the rank of detective in October 1998, they became members of one of the Society's bargaining units. Yet, the city continued to assign them to identify latent prints recovered from crime scenes. Because the LRC had previously determined that as of October 1998, the City had established a seven-year practice of assigning only members of the Association's bargaining unit to identify these latent prints, the City's assignment of these two persons to perform the same duties constituted a transfer of unit work. 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.[104] 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[105], and reduced the opportunities for bargaining unit members to perform this work in the future.[106] 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.

The Commission ruled that the City violated the Law by failing to bargain over its decision to transfer bargaining unit work to non-bargaining unit personnel.

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.*[107] 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.[108] 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.

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.

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.[109] In order to prove that an employer unlawfully transferred work outside the bargaining unit, the union must show:

- the employer transferred unit work to non-unit personnel;
- the transfer of work had an adverse impact on either individual employees or on the bargaining unit itself; and
- the employer did not provide the union with prior notice of the decision to transfer the work and opportunity to bargain.[110]

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.[111]

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 continue to receive on-call pay and overtime associated with responding to the clandestine lab requests, and because managers do 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.[112] 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.[113] In determining whether a union has contractually waived its right to bargain, the Commission will first examine the language of the contract.[114] 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.[115]

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.[116] (City's decision to provide fire prevention inspections at a vacant school building constitutes a level of services decision)[117]; (the number of custodians assigned to each building is a managerial decision)[118]; (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*, 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.[119] 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.[120] 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.[121]

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.[122] 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.

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.[123] 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 transfer 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.
- 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 sale continue until the earliest of the enumerated conditions, set forth in paragraph 2(b) are met
- 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.
- Notify the Commission within ten (10) days of receipt of this Order of the steps taken to comply with it.

A. 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.[124] 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.[125] 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.[126]

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.[127] 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.[128] The employer must, however, afford the union an opportunity to bargain over the impact of that decision.[129]

B. 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.[130] 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.[131]

Notice of a proposed employer action will be imputed to a union when a union officer with authority to bargain is first made aware of the employer's proposed plan.[132] The information that the employer conveys to the union must be sufficiently clear for the union to respond appropriately and must be received far enough in advance to allow effective bargaining to occur.[133] The Commission has found notice to be sufficient to evoke a union response in several cases in which the employer stated it was considering certain actions, without specifying a date or deadline.[134] The Commission will not apply the doctrine of waiver by inaction where the union is presented with a *fait accompli*, (i.e., "done deal") where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless."[135]

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.[136] Only where the waiver is reasonably ambiguous will the Commission consider the bargaining history between the parties.[137]

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.[138] 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*.[139] [Emphasis added.]

C. 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.[140]

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.[141] Lowell was guilty of falling to provide formal notice to the union before eliminating its Ashes and Waste Division.[142] 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.[143]

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?[144]

By definition, in virtually all contract-out clause cases, the first two inquiries are answered affirmatively.[145] 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.[146]

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.[147] So long as good faith negotiations are held if the union so requests, management may implement its proposal upon reaching either agreement or impasse.

§ 5 REORGANIZATION

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.[148] This is the case even where the reorganization involves transferring bargaining unit work to a position outside the bargaining unit.[149]

There is no dispute that a governmental employer's decision to reorganize a department is within its managerial prerogative.[150]

However, it still must negotiate over the impacts of a core governmental decision on mandatory subjects of bargaining prior to implementation.[151] Such duty to impact bargain generally includes the duty to reach agreement or impasse with the union prior to implementation of the reorganization decision.[152]

§ 6 CIVILIAN DISPATCHERS

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.[153] 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.[154] 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.[155]

A. 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.[156]

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.[157] 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.[158] 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.[159]

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

- assigning nursing duties to a special education paraprofessional[160]
- assigning laborers' work to prisoners and welfare recipients[161]
- creating a new "working supervisor" with regular maintenance and custodial duties.[162]

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).[163] 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."[164]

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.

B. SUBSTANTIAL DETRIMENT

The next issue to be addressed is whether the elimination of certain job duties from the bargaining unit causes it substantial detriment.[165]

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.[166] 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.[167] 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.[168] 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.[169]

C. WAIVER OF BARGAINING RIGHTS

A union may waive its right to bargain by inaction, i.e. by not demanding to do so after receiving notice of management's intention to transfer bargaining unit work. A Hearing Officer concluded that the union waived

its rights to bargain over the issue of the University of Massachusetts Medical Center's unilateral assignment of bargaining unit work to non-bargaining unit employees. Management discussed the matter with the union two months earlier and the union failed to demand bargaining. This case involved a decision to hire part-timers to fill the unpopular weekend shifts and to fund the same by leaving several vacant full-time positions in the bargaining unit unfilled.[170]

Another manner in which a union may waive its bargaining rights is by a written waiver, typically in the language of a collective bargaining agreement. It is not usual to have an article devoted exclusively to the issue of the employer's right to transfer unit work to non-unit dispatchers. If one does exist, the issue of *contractual waiver* will be easier to resolve. In the absence of such an article, the Management Rights clause should be reviewed to determine if the parties specifically agreed that the employer could reassign dispatch or other work when it deemed it appropriate. An employer will be unable to rely on a broad and general Management Rights clause to indicate a waiver by a union of its rights to bargain over the assignment of job duties.[171]

D. SHARED WORK EXCEPTION

The prohibition against unilaterally assigning work does not generally apply to "shared work" situations.[172] The work will not be recognized as exclusive bargaining unit work.[173] 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.[174] 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.[175] 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.[176] Rather, the employer is only required to bargain if there is a calculated displacement of unit work.[177] 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.[178]

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.[179] 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.[180] In analyzing what constitutes bargaining unit work, the focus should be on the nature of the functions

performed.[181] For example, the duties of assistants to the supervisors of cases were the same at all Boston district courts.[182]

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.[183] An employer may not unilaterally change a pre-existing pattern of shared work.[184]

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.[185]

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.[186]

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.[187]

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.[188] A loss of bargaining unit positions deprives bargaining unit members of work opportunities.[189] 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.[190] This is what happened in Hanson where the employer created a librarian position and transferred bargaining unit duties to that position.[191] 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.[192] 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.[193]

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.[194] 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.[195] 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.[196]

PRACTICE POINTERS

Chiefs or 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.

§ 7 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.[197] 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.[198] 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.[199]

The eligibility criteria for paid injured on duty leave under G.L. c. 41 § 111F is a mandatory subject of bargaining.[200] 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.[201]

In *Town of Hingham*,[202] 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.[203] Similarly, in *Town of Weymouth*[204], 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 by 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.[205]

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.[206] 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.[207]

Only a finding of *fait accompli* (done deal) relieves the union of the obligation to demand bargaining over the change.[208] 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.[209] 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."[210] An offer by the employer to bargain after a prohibited unilateral change has been made does not cure the violation.[211] 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.[212] 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.[213] 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.[214]

A. 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[215] and criteria for eligibility for injured on duty leave[216] 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.[217]

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.[218] 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.[219] A past practice was found where, on at least eleven occasions over an eight year period, every officer who exhausted his 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.

B. 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.[220]

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.[221] 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.[222] 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.[223] 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.[224] 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.[225]

C. 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.[226]

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.[227]

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."[228]

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.[229]

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.[230]

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."

D. CONTRACTUAL WAIVER

In addition to waiting too long (as discussed above) to request bargaining, in certain circumstances the Commission may find that the union waived its right to bargain by the language of a collective bargaining agreement.

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.[231]
>
> (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.[232]

E. 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.

F. 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.[233] 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*[234], 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."[235] 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.[236] 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.[237]

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.[238] 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.[239] Similar reasoning was followed, for example, when the Commission approved the use of time clocks without a requirement to bargain with the union.[240]

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*.[241]

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.

G. 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.[242]

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.*[243] 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.*[244] 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.[245] 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.

H. 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.[246] 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.[247]

§ 8 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.[248] 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.[249]

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.[250] 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.[251] 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.[252] 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.

§ 9 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.[253] 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).

A. 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.[254] 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.[255]

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.[256] 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 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 employer 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 Corrections was found to have violated § 10(a)(3) of the Law when it refused to allow a Corrections Officer to return to work after sick leave, even after he/she produced a doctor's note clearing him/her for full duty as the employer had demanded.[257] *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.*

§ 10 DEFIBRILLATORS

An employer violates the Law when 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.[258] 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.[259]

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.[260] 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.

§ 11 EQUIPMENT, WORKLOAD & SAFETY

A public employer violates Section 10(a)(5) and derivatively, Section 10(a)(1) of 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 giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse.[261] 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.[262]

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.[263] A topic does not become a mandatory subject of bargaining merely because an employer's actions marginally or indirectly implicate safety or workload issues.[264] Rather, the topic must directly and significantly affect safety or workload to outweigh the employer's interest in making a core management decision.[265]

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.[266] 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.[267] 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 a firefighters' terms and conditions of employment.[268] Accordingly, we turn to examine if the Town's decision to purchase and to deploy the Quint affected the safety and workload of the firefighters represented by the Union, requiring the Town to impact bargain with the Union.[269]

The preponderance of the evidence shows that firefighters' workload did not increase in a direct and significant manner when McNamee readjusted the geographic areas of those fire districts. Based on the record before us, we conclude that the Town did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain with the Union over the impacts of the decision to change the vehicle used to respond to emergency incidents. Accordingly, we dismiss the complaint of prohibited practice.[270]

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.[271] Failure to do so not necessarily result in a cease and desist order, just a prospective bargaining order.[272]

[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)
[8]Chapter 730 of the Acts of 1977, as amended.
[9]*Town of Billerica v. International Association of Firefighters, Local 1495*, 415 Mass. 692, 694, 615 N.E.2d 564, 565 (1993)
[10]*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)
[11] *Local no. 1710, Intl. Assn of Fire Fighters, AFL-CIO v. Chicopee*, 430 Mass. 417-421, 721 N.E.2d 378 (1999).
[12] See *Berkshire Hills Regional Sc. 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 non-delegable statutory authority, it is not a proper subject for collective bargaining or arbitration).
[13] 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.
[14] *Sheriff of Middlesex County v. International Brotherhood of Correctional Officers*, 62 Mass.App.Ct. 830, 821 N.E.2d 512 (2005).
[15] *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 non-delegable 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 non-delegable 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").

[16] *Blue Hills Regional Dist. Sc. Comm. v. Flight*, 383 Mass. 642, 644, 421 N.E.2d 755 (1981).

[17] *Id.* At 644, 421 N.E.2d 755.

[18]*Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough*, 416 Mass. at 257, 620 N.E.2d 765.

[19] *Blue Hills Regional Dist. Sc. Comm. v. Flight*. 383 Mass. at 644, 421 N.E.2d 755.

[20] See *School Comm. of Danvers v. Tyman*, 372 Mass. 106, 113, 360 N.E.2d 877 (1977).

[21]*School Committee of Braintree v. Raymond*, 369 Mass. 686, 343 N.E.2d 145 (1976)

[22] *School Committee of Braintree v. Raymond*, 369 Mass. at 691 (1976).

[23]*City of Boston v. Boston Police Superior Officers Federation*, 29 Mass. App. Ct. 907, 556 N.E.2d 1053 (1990)

[24]*City of Boston, supra*, at 1055.

[25]*City of Leominster*, 17 MLC 1391 (1991) and *City of Leominster*, 19 MLC 1636 (1993)

[26]*City of Boston*, 5 MLC 1691 (1979); *Town of Danvers*, 3 MLC 1559 (1977)

[27]*City of Worcester*, 4 MLC 1378 (1977)

[28]*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)

[29]*Id.* at 973.

[30]*City of Boston v. Boston Police Superior Officers Federation*, 9 Mass. App. 898, 402 N.E.2d 1098 (1980)

[31]*Id.* at 1099.

[32]*Town of Burlington v. Labor Relations Commission*, 390 Mass. 157, 454 N.E.2d 465 (1983)

[33]*City of Taunton v. Taunton Branch of the Massachusetts Police Association*, 10 Mass. App. Ct. 237, 406 N.E.2d 1298 (1980)

[34]*Id.* at 1302.

[35]*Id.* at 1302.

[36]*Chief of Police of Dracut v. Town of Dracut*, 357 Mass. 492, 258 N.E.2d 531 (1970)

[37]*Id.* at 533.

[38]*City of Boston v. Boston Police Patrolmen's Association, Inc.*, 8 Mass. App. Ct. 220, 392 N.E.2d 1202 (1979)
[39]*Boston Police Patrolmen's Association, Incorporated v. Police Commissioner of Boston*, 4 Mass. App. Ct. 673, 357 N.E.2d 779 (1976).
[40] *Town of Mansfield*, 25 MLC 14 (1998).
[41]*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).
[42]*Town of Wilbraham, supra* note 1; *Town of Danvers*, *supra*, note 1.
[43]*Town of Norwell*, 16 MLC 1575 (1990)
[44]*Town of Danvers*, 9 MLC 1829 (1983)
[45]*Town of Stoneham*, 8 MLC 1275 (1981)
[46]*Town of Wayland*, 5 MLC 1773 (1978)
[47] *School Comm. of Newton v. Labor Relations Commn.,* 388 Mass. 557, 572 (1983).
[48] *Commissioner of Administration and Finance v. Labor Relations Commission*, 60 Mass.App.Ct. 1122, 805 N.E.2d 531 (Table) (2004) (unpublished).
[49]*Comm. of Mass.*, 17 MLC 1282 (1991)
[50]*Boston School Comm.*, 4 MLC 1912 (1978)
[51]*City of Gardner*, 10 MLC 1218 (1983)
[52]*Id.*
[53]*Comm. of Mass.*, 21 MLC 1029 (1994)
[54]*City of Boston*, 13 MLC 1706 (1987)
[55]*Town of Marblehead*, 12 MLC 1668 (1985)
[56]*City of Gardner*, 10 MLC 1218 (1983)
[57]*Town of Arlington*, 21 MLC 1125 (1994)
[58]*Woods Hole, Martha's Vineyard*, 12 MLC 1531 (1986)
[59]*Town of Brookline*, 20 MLC 1570 (1994)
[60]*Town of Wilbraham*, 6 MLC 1668 (1979)
[61]*School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983).
[62]*Framingham School Committee*, 4 MLC 1809 (1978); *Town of Marblehead*, 12 MLC 1667, 1672 (1986).
[63]*City of Quincy*, 7 MLC 1391 (1980).
[64]*City of Boston*, 98 MLC 1664 (1983).
[65]*City of Quincy*, supra.
[66]*City of Boston*, 12 MLC 1203 (1985).
[67]*Town of Stoneham*, 8 MLC 1275 (1981).
[68]*Id.*
[69]*Allied Chemical Workers v. Pittsburgh Plate & Glass Co.*, 407 U.S. 157, 92 S.Ct. 383 (1971).
[70]*Boston School Committee*, 3 MLC 1063 (1977).

[71]*Id.* at 1068. *See, Chelmsford Sc. Admin. Assoc.*, 8 MLC 1515 (1981); *Saugus Sc. Comm.*, 7 MLC 1849 (1981); *Town of Randolph*, 8 MLC 2044 (1984)
[72]*Boston School Committee*, 3 MLC 1063 (1977)
[73] 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).
[74]*Id.*
[75]*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.)
[76]*Star Tribune*, 295 NLRB 63 (1989).
[77]*City of Haverhill*, 16 MLC 1077 (1989).
[78]*City of Haverhill*, 16 MLC 1077 (1989).
[79]*Melrose School Committee*, 3 MLC 1299 (1976); *Northeast Reg. Sc. Dist.*, 1 MLC 1075 (1974).
[80]*Boston School Committee*, 10 MLC 1410 (1984).
[81]*Dracut School Committee*, 13 MLC 1055 (1986).
[82]*Natick School Committee*, 11 MLC 1387 (1985).
[83]*Dracut School Comm.*, 13 MLC at 1057.
[84]*See, School Committee of Hanover v. Curry*, 369 Mass. 683, 343 N.E.2d 144 (1976).
[85]*Dracut School Committee*, 13 MLC at 1058 *citing Blue Hills Regional School District*, 3 MLC 1613 (1977).
[86] *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).
[87] *Lowell School Committee*, 28 MLC 29, 31 (2001); *City of Gardner*, 10 MLC 1218, 1219 (1983).
[88] *City of Holyoke*, 26 MLC 97, 99 (2000); *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998), citing *City of Gardner*, 10 MLC at 1221 (1983).
[89] *City of Holyoke*, 26 MLC 97, 98 (2000); *Town of Norwell*, 13 MLC 1200, 1208 (1986).
[90] See *Town of Saugus*, 26, 29 MLC 208 (2003).

[91] 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).
[92] 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.)
[93] G.L. c. 150E, § 10(a)(1) & (5).
[94] See *Commonwealth of Massachusetts*, 24 M.L.C. 116, 119 (1998).
[95] See *City of Cambridge*, 23 M.L.C. 28, 36 (1996).
[96] See generally *City of Boston*, 4 M.L.C. 1202, 1212 (1977); *City of Boston*, 6 M.L.C. 1117, 1121 (1979) (citing *Fibreboard Paper Prods. Corp. v. National Labor Relations Bd.,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 [1964]); *Franklin School Comm.,* 6 M.L.C. 1297, 1299-1300 & n. 4 (1979); City of Gardner, 10 M.L.C. 1218, 1220-1221 (1983) (citing *AMCAR Div., ACF Indus., Inc. v. National Labor Relations Bd.*, 596 F.2d 1344 [8th Cir.1979]).
[97] See *Worcester v. Labor Relations Commn.*, 438 Mass. 177, 185, 779 N.E.2d 630 (2002), citing *Burlington v. Labor Relations Commn.,* 390 Mass. 157, 164-167, 454 N.E.2d 465 (1983) (town could reassign duties formerly held by police prosecutors to town counsel, but required to bargain over impact on officers who lost pay).
[98]*School Comm. of Newton v. Labor Relations Commn.,* 388 Mass. at 572, 447 N.E.2d 1201.
[99] *City of Boston*, 28 MLC 369 (2002).
[100] *Higher Education Coordinating Council*, 23 MLC 90, 92 (1996); *City of Boston*, 6 MLC 1117, 1125 (1979).
[101] *City of Somerville*, 23 MLC 256, 259 (1997).
[102] *Town of Bridgewater*, 23 MLC 103, 104 (1998).
[103] *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).
[104] *City of New Bedford*, 15 MLC 1732, 1737 (1989).
[105] *See e.g. Commonwealth of Massachusetts*, 24 MLC 118, 119 (1998).
[106] *See e.g. City of Cambridge*, 23 MLC at 50; *Franklin School Committee*, 6 MLC 1297 (1979).
[107] *Supra; see e.g., Higher Education Coordinating Council*, 23 MLC 90, 92 (1996); *City of Quincy*, 15 MLC 1239, 1240 (1988).
[108] *Town of Saugus*, 29 MLC 208 (2003).
[109] *Commonwealth of Massachusetts*, 24 MLC 116 (1998); *City of Quincy*, 15 MLC 1239 (1988); *Town of Danvers*, 3 MLC 1559 (1977).
[110] 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).
[111] *Commonwealth of Massachusetts*, 28 MLC 308 (2002).
[112] *See City of New Bedford*, 15 MLC 1732, 1739 (1989).
[113] *Town of Marblehead*, 12 MLC 1667, 1671 (1986).
[114] *Id.*
[115] *Board of Trustees of the University of Massachusetts/University Medical Center*, 21 MLC 1795, 1802 (1995).
[116] *See City of Newton*, 16 MLC 1036 (1989)
[117] *Boston School Committee*, 13 MLC 1444 (1987)
[118] *City of Worcester*, 4 MLC 1378 (1977).
[119] *Town of Dennis*, 12 MLC 1027 (1985).
[120] *Id.* at 1031.
[121] *See City of Boston*, 4 MLC 1202, 1210 (1977) (employer had an obligation to bargain over subcontracting bargaining unit work to private employees).
[122] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[123] See, e.g., *Commonwealth of Massachusetts*, 31 MLC 112 (2004).
[124] *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).
[125] *Safeway Stores, Inc.*, 95 LA 668 (Goodman 1990)
[126] *See, Town of Acushnet*, 11 MLC 1423 (1985).
[127] *Champion International Corp.*, 91 LA 245 (Duda 1988).
[128] *Town of Marblehead*, 12 MLC 168 (1985).
[129] *Id.*
[130] Town of Dennis, 26 MLC 203, 204 (2000); Town of Hudson, 25 MLC 143, 148 (1999).
[131] 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).
[132] City of Holyoke, 13 MLC 1336, 1343 (1986), citing Boston School Committee, 4 MLC 1912, 191, 415 (1978).
[133] *Town of Hudson*, 25 MLC at 148; *Boston School Committee*, 4 MLC at 1915.
[134] *Id., citing Scituate School Committee,* 9 MLC 1010, 1012 (1982).
[135] *Town of Hudson*, 25 MLC at 148; *Holliston School Committee*, 23 MLC 211, 212-13 (1997), *quoting Scituate School Committee*, 9 MLC 1010, 1012 (1982); *City of Everett*, 2 MLC at 1471.

[136]*Bd. of Regents*, 19 MLC 1248 (1992); *Melrose Sc. Comm.*, 9 MLC 1713 (1983).
[137]*City of Boston*, 7 MLC 2013 (1981).
[138]*See, e.g., Comm. of Mass.*, 21 MLC 1029 (1994); *Boston School Comm.*, 4 MLC 1912 (1978); *Town of Marblehead*, 12 MLC 168 (1985).
[139]*Town of Acushnet*, 11 MLC 1425 (1985).
[140]*Comm. of Mass.*, 21 MLC 1039 (1994); *Mass Board of Regents*, 19 MLC 1485, 1487-88 (1992).
[141]*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).
[142] *City of Lowell*, 25 MLC 33 (1998).
[143] *Id.*
[144]*City of Gardner*, 10 MLC 1218, 1218 (1983).
[145]*Comm. of Mass.*, 21 MLC 1039 (1994).
[146]*Boston School Committee*, 4 MLC 1912, 1915 (1978), *as cited in City of Gardner*, 10 MLC 1218, 1221 (1983).
[147]*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).
[148] *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557, 447 N.E.2d 1201 (1977).
[149] *Boston School Committee*, 10 MLC 1410 (1984).
[150] *City of Boston*, 21 MLC 1350 (1994); *Cambridge School Committee*, 7 MLC 1206 (1980); *Commonwealth of Massachusetts*, 26 MLC 228 (2000).
[151] *Mass Board of Regents of Higher Education*, 14 MLC 1469 (1988); See *Board of Higher Education (Quinsigamond Community College)*, 30 MLC 141 (2004).
[152] *Id.*
[153] *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)
[154] *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).
[155] *City of Boston*, 7 MLC 175 (1981)
[156] *Town of Watertown*, 8 MLC 1376 (1981)
[157] *Avon Products Inc.*, 26 L.A. 422 (1956; see also Elkouri and Elkouri, *How Arbitration Works*, at 515 and n. 473 (3rd Ed. 1973)
[158] *City of Boston*, 9 MLC 1173 (1982)
[159] *Town of Halifax*, 20 MLC 1320 (1993)
[160] *Lowell School Committee*, 21 MLC 1102 (1994)
[161] *City of Lawrence*, 21 MLC 1691 (1995)
[162] *Southshore Regional School District Committee*, 22 MLC 1414 (1996)

[163] *City of Fall River*, 27 MLC 47 (2000).
[164] *Citing Commonwealth of Massachusetts*, 26 MLC 161 (2000).
[165] *City of Boston*, 9 MLC 1173 (1982).
[166] *City of Boston*, 7 MLC 1975 (1981).
[167] *Town of Norwell*, 13 MLRR 1083 (1984).
[168] *City of Haverhill*, 11 MLRR 1083 (1984).
[169] *Wellesley Housing Authority*, 13 MLRR 1032 (1986).
[170] *Mass Board of Regents/U-Mass Medical Center*, 13 MLRR 1013 (1986)
[171] *City of Everett*, 2 MLC 1471 (1976) aff'd 7 Mass. App. Ct. 826 (1979); *Town of Milford*, 4 MLC 1793 (H.O. 1978); *Town of Andover*, 3 MLC 1710 (H.O.) (1977).
[172] *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).
[173] *Town of Saugus*, 28 MLC 13, 17 (2001).
[174] *Town of Wilmington,* 11 MLRR 1152 (1985).
[175] *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).
[176] *Town of Bridgewater*, 25 MLC 103 (1999); *City of Somerville*, 23 MLC 256, 259 (1997).
[177] *Town of Bridgewater*, 23 MLC 103, 104 (1998).
[178] *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).
[179] *City of Boston*, 28 MLC 194 (2002).
[180] *Town of Saugus*, 28 LRC 13 (2001).
[181] *See generally Town of Norwell*, 13 MLC 1200, 1208 (1986).
[182] *City of Boston*, 29 MLC 122 (2003).
[183] *See City of Boston,* 26 MLC 144, 147 (2000); *Town of Natick*, 11 MLC 1434, 1438 (1985); *City of Boston*, 29 MLC 122 (2003).
[184] *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).
[185] *City of Boston*, 29 MLC 122 (2003).
[186] *Town of Natick*, 11 MLC 1125 (1985).
[187] *Town of Watertown*, 8 MLC 1376 (1981).
[188] *Town of Hanson*, 29 MLC 71 (2002).
[189] *See e.g., Town of Bridgewater*, 25 MLC 103 (1999); *City of Gardner*, 10 MLC 1218 (1983).
[190] *See Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998); citing *City of Gardner*, 10 MLC at 1221.
[191] *Town of Hanson*, 29 MLC 71 (2002).

[192] *City of Boston*, 7 MLC 2006 (1981); *City of Boston*, 6 MLC 2035 (1980).
[193] *City of Boston*, 6 MLC 2035 (1980).
[194] *Town of Dartmouth*, 9 MLC 1834 (1983).
[195] *City of Boston*, 10 MLC 1539 (1984).
[196] *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.
[197] *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).
[198] *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).
[199] *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).
[200] *City of Springfield*, 12 MLC 1051 (1985).
[201] *Town of Avon*, 6 MLC 1290, 1291-92 (1979).
[202] 21 MLC 1237 (1994).
[203] *Id.* at 1240.
[204] *Town of Weymouth*, 11 MLC 1448 (1985).
[205] *Id.* at 1456.
[206] *City of Chicopee*, 2 MLC 1071 (1975).
[207] *Boston School Committee*, 4 MLC 1912 (1978) (only a finding of *fait accompli* (done deal) relieves the union from the obligation to demand bargaining).
[208] *Town of Andover*, 4 MLC 1086, 1089 (1977).
[209] *Boston School Committee*, 4 MLC 1912 (1978).
[210] *Scituate School Committee*, 9 MLC 1010, 1012 (1982).
[211] *City of Everett*, 2 MLC 1471, 1476 (1976).
[212] *City of Holyoke*, 12 MLC 1516, 1628 (H.O. 1986).
[213] *Town of Lee*, 11 MLC 1274 (1984); *City of Worcester*, 5 MLC 1914, 1415 (1978).
[214] *Town of Lee*, 11 MLC 1274 (1984); *City of Springfield*, 4 MLC 1517 (1977).
[215] *City of Boston*, 3 MLC 1450 (1977).
[216] *City of Springfield*, 12 MLC 1051, 1054 (1985); *City of Springfield*, 16 MLC 1127, 1132 (1989).

[217] *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).
[218] *Town of Wilmington*, 9 MLC 1694, 1699 (1983).
[219] *Town of Hull*, 17 MLC 1678 (1991), *aff'd* 19 MLC 1780 (1993).
[220] *City of Boston School Committee*, 4 MLC 1912, 1915 (1978); *Quincy School Committee*, 11 MLC 1179 (1984).
[221] *Town of Ludlow*, 17 MLC 1203 (1990); *Town of Milford*, 15 MLC 1247 (1988).
[222] *Boston School Committee*, 4 MLC 1912, 1915 (1978).
[223] *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).
[224] *Whitman-Hanson Regional School Committee*, 10 MLC 1283, 1285-1286 (1983).
[225] *Boston School Committee*, 10 MLC 1501, 1510 (1984).
[226] *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).
[227] *City of Malden*, 8 MLRR 1356, 8 MLC 1620 (1981).
[228] *Town of Avon*, 5 MLRR 1148 (1979).
[229] *Middlesex County Commissioners*, 9 MLRR 1148, 9 MLC 1579 (1983)
[230] See attached Order issued to the South Shore Regional School District.
[231] *Town of Hull*, 17 MLC 1678 (1991) *citing Town of Marblehead*, 12 MLC 1667, 1670 (1986).
[232] *Town of Hull*, 17 MLC 1678 (1991) *citing Massachusetts Board of Regents*, 15 MLC 1265, 1269-1270 (1988).
[233] *School Committee of Leominster v. Labor Relations Commission*, 486 N.E.2d 756 (Mass. App. 1985).
[234] *Somerville School Committee*, 13 MLC 1027 (1986).
[235] *Id.* at 1024, citing *School Committee of Leominster v. Labor Relations Commission*, 21 Mass. app. Ct. 245, 251 (1985).
[236] *City of Medford*, 11 MLC 1107, 1114 (1984).
[237] *Somerville School Committee*, 13 MLC 1027 (1986).
[238] *Town of Wilmington*, 9 MLC 1694 (1983).
[239] *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).
[240] *City of Taunton*, 10 MLC 1399 (1984).
[241] *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).

[242] *City of Lowell*, 28 MLC 157 (2001).
[243] *Rein v. Marshfield*, 16 Mass. App. Ct. 519, 524, 452 N.E.2d 298 (1983).
[244] *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).
[245] *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).
[246] *City of Lynn v. Labor Relations Commission, et al*, 43 Mass. App. Ct. 172, 681 N.E. 2d 1234 (1997).
[247] *See Sullivan v. Belmont*, 7 Mass. App. Ct. 214, 386 N.E. 2d 1288 (1979).
[248] *Votour v. City of Medford*, 335 Mass. 403, 140 N.E.2d 177 (1957).
[249] *City of Westfield v. Labor Relations Commission*, 437 Mass. 1104, 772 N.E.2d 589 (2002).
[250] *City of Springfield*, 12 MLC 1051, 1054 (1985); *City of Springfield*, 16 MLC 1127, 1133 (1989).
[251] *Id.*
[252] *Town of Natick*, 18 MLC 1155 (1991).
[253] *City of Boston*, 5 MLRR 1077 (1978).
[254] M.G.L. c. 41, § 111F (West, 1993).
[255] *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973).
[256] *City of Newton*, 27 MLC 74 (2000).
[257] *Commonwealth of Massachusetts*, 16 MLC 1779 (1990).
[258] *Commonwealth of Massachusetts,* 25 MLC 201, 205 (1999); *City of Worcester,* 25 MLC 169, 170 (1999).
[259] *Town of Hudson,* 25 MLC 143, 146, (1999); *Commonwealth of Massachusetts,* 20 MLC 1545, 1552 (1994).
[260] *Town of Arlington,* 21 MLC 1125, 1130 (1994).
[261] *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[262] *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).
[263] *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.
[264] *See e.g., Town of Dracut,* 23 MLC at 114; *City of Melrose*, 22 MLC at 1217; *Town of Halifax*, 20 MLC at 1324.

[265] *See e.g., Town of Bridgewater*, 12 MLC at 1616-1618; *Town of Billerica*, 8 MLC at 1962.
[266] *City of Newton*, 4 MLC at 1283.
[267] *Town of Danvers*, 3 MLC at 1573; *Town of Billerica*, 8 MLC at 1961; *Town of Reading*, 9 MLC at 1740.
[268] *Town of Halifax*, 20 MLC at 1325; *Town of Bridgewater*, 12 MLC at 1617-1618.
[269] *Town of Mansfield,* 30 MLC 164 (2004).
[270] *Id.*
[271] *Town of Somerset,* 30 MLC 47 (2004).
[272] *Id.*

CHAPTER 3 - GOOD FAITH BARGAINING

§ 1 THE DUTY TO BARGAIN

In Massachusetts, and numerous other states, there was some resistance to encouraging (or even allowing) public sector employees to organize and bargain collectively despite the national policy favoring bargaining.

The debate over the issue of public sector bargaining was resolved in the Commonwealth by the passage in 1965 of various amendments to Chapter 149, § 178. That law was replaced in 1973 by the current law (effective July 1, 1974) governing public employee collective bargaining, Chapter 150E of the Massachusetts General Laws (hereinafter referred to as "the Law" or "the Collective Bargaining Law"), which established and regulates labor relations and collective bargaining between public employers and employees. Additionally, the Law created the Massachusetts Labor Relations Commission ("LRC", or "the Commission"), the state agency charged with administering the Law's mandates. Pursuant to the Law, public employees have the right to organize and bargain collectively as to the terms and conditions of employment.[1] Regarding the quality of negotiations between employer and employees, the Law states:

> "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 of productivity and performance, and any other terms and conditions of employment . . ., but such obligation shall not compel either party to agree to a proposal or to make a concession ...[2]"

The Law directly imposes a duty to bargain in good faith on both labor and management, and Labor Relations Commission decisions subsequent to the Law's passage have refined the meaning of "good faith" to provide guidance to parties engaged in collective bargaining.

"The duty to bargain under G.L. c. 150E is duty to meet and negotiate . . ."[3] "It is not necessary that a solution be reached, 'but rather than the union be afforded an opportunity to meet management's legitimate complaints."[4]

A party to collective bargaining negotiations who bargains in bad faith commits a "prohibited practice" pursuant to sections 10(a)(5) (employer) and 10(b)(2) (employee organization) of the Law. Either an employer or an employee organization may bring a complaint to the LRC charging the other party with violating the duty to bargain in good faith. However, a single employee acting alone has no standing to pursue a refusal to bargain charge against an employer, even if the union has failed in its duty to represent that employee fairly.[5]

§ 2 HISTORY OF THE NLRB

The Concept in Massachusetts

The concept of imposing a duty to bargain in good faith on parties involved in labor negotiations arose initially from federal labor laws. The National Labor Relations Act (NLRA, also commonly known as the Wagner Act) was enacted by Congress in 1935.[6] The NLRA established the right of employees to organize and bargain collectively with their employer, and considered a refusal by an employer to bargain with the employees' representative to be an unfair labor practice. While only applicable to private sector employees, the NLRA has had a significant impact on the manner and substance of all collective bargaining. The NLRA established a national policy favoring collective bargaining, its purpose being "to eliminate the causes of certain substantial obstructions to the free flow of commerce."[7] The obligation to bargain in good faith with an employee representative was not specifically addressed in the text of the NLRA, but the National Labor Relations Board (NLRB), created to administer the NLRA, imposed this condition as being within the intention of the Act.[8] The Taft-Hartley or Labor Management Relations Act (LMRA) later created a reciprocal duty for labor unions to bargain in good faith. Thus, both management and labor are required, under federal law, to approach the bargaining table with a sincere desire to reach agreement and to minimize sources of conflict.

The NLRA does not, however, apply to public sector employers and employees, and the LMRA precludes the National Labor Relations Board from having jurisdiction over any state or its political subdivisions.[9] Thus, while the decisions of the National Labor Relations Board are influential and relevant authority on state public sector labor issues, they are not precedent (i.e., controlling) in Massachusetts.

§ 3 SCOPE OF BARGAINING

Traditionally, collective bargaining subjects are divided into three categories: mandatory, non-mandatory (or permissive), and illegal. The

composition of each category is somewhat fixed by precedent, but the Labor Relations Commission has the discretion to define what constitutes a mandatory versus permissive subject. In *West Bridgewater Police v. Labor Relations Commission*, the Massachusetts Appeals Court quoted *Ford Motor Co. v. NLRB*: [10]

> The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade unions, and in the second place, to any administrative agency skilled in the field. . . . It cannot and should not be strait-jacketed by legislative enactment.[11]

Aside from the LRC, the courts also have the discretion to interpret the Law and determine what constitutes a mandatory subject of bargaining. As a result, there is some semantic if not substantive distinction between decisions of the LRC and the Massachusetts courts on this issue. The Supreme Judicial Court (SJC) of Massachusetts, for example, generally frames its inquiry in terms of whether something is a "proper" (i.e., not illegal) subject of bargaining. Proper subjects of bargaining include both mandatory and permissive subjects of bargaining.[12]

§ 4 MANDATORY SUBJECTS

Generally, if a subject of negotiations 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 which have a direct effect on the terms and conditions of employment, such as wages and hours,[13] health insurance benefits,[14] and job duties and work assignments,[15] are mandatory subjects of bargaining. The following have also been found by the Commission to be mandatory subjects of bargaining:

- wages and hours;[16]
- initial wages for new positions;[17]
- medical library hours;[18]
- drug testing or screening, [19] or instituting a new drug policy;[20]
- assigning work to non bargaining unit personnel;[21]

- work schedules, generally,[22] and for police detectives;[23]
- pay day schedules;[24]
- certain fringe benefits, such as reduced work schedules on holidays,[25] and health and welfare trust fund contributions;[26]
- promotional procedures;[27]
- safety issues;[28]
- work load;[29]
- productivity issues;[30]
- allotments of gasoline;[31]
- regularly scheduled overtime;[32]
- changes in *scheduled* overtime;[33]
- class size;[34]
- use of psychological testing in hiring;[35]
- contributions to health and welfare trust funds;[36]
- selection of health insurance plans,[37] as well as health insurance benefits and premiums generally;[38]
- percentage of group insurance contributions;[39]
- compensation for added duties;[40]
- overtime pay;[41]
- granting leave;[42]
- seniority;[43]
- grooming standards;[44]
- on call status;[45]
- time for cashing checks on duty;[46]
- residency requirements;[47]
- physical exams by a municipality's doctor for disability leave;[48]
- performance evaluation standards;[49]
- copying charges for union requested information;[50]
- scope of bargaining unit work;[51]
- patent rights for inventions;[52]
- transaction of union business during work hours;[53]
- penalty for not paying agency service fee;[54]
- agency service fee;[55]
- pay check deductions;[56]
- attendance at professional meetings;[57]
- paid injury leave criteria;[58]
- wage reopener clause;[59]
- number of firefighters on a piece of equipment when responding to alarm if safety issue involved;[60]
- impact of non-bargaining unit employees on work load and working conditions;[61]

- grievance procedure administration;[62]
- outside employment restrictions;[63]
- reduction of force impacts;[64]
- non-active work time use;[65]
- smoking;[66]
- use of seat belts;[67]
- sick leave bank;[68]
- contracting out bargaining unit work;[69]
- parking rates (and free parking);[70]
- holding employees accountable for issued equipment;[71] and
- use of defibrillators.[72]

§ 5 NON-MANDATORY SUBJECTS

A party also commits a prohibited practice if it insists to the point of impasse over a non-mandatory subject of bargaining.[73] Non-mandatory subjects of bargaining, according to the LRC, are those which involve core governmental decisions, such as the reduction of nonscheduled overtime opportunities,[74] the decision to abolish or create positions,[75] and wage parity clauses.[76] Other non-mandatory subjects of bargaining include:

- the decision to hire additional employees to perform unit work;[77]
- school curriculum decisions;[78]
- 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;[79]
- the decision to limit the number of bargaining unit employees who appear at arraignments;[80]
- loss of ad hoc or unscheduled overtime opportunities;[81]
- the decision to reassign district court prosecutor's duties from police officers to town counsel;[82]
- decision to reorganize;[83]
- decision to abolish or create positions;[84]
- decision of employer to conform its method of calculating retirement benefits to the requirements of M.G.L. c.32;[85]
- decision to discontinue providing private police details at liquor service establishments;[86]
- the decision to use polygraph examination in the investigation of criminal activity by police officers;[87]
- wage parity clauses;[88]
- minimum manning per shift;[89]

- minimum manning per piece of fire apparatus while responding to mutual aid calls where there is no safety issue;[90]
- terms of employment which will apply to individuals after they leave the bargaining unit and become members of another unit;[91]
- 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.; and[92]
- 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.[93]

There is no obligation to engage in collective bargaining as to matters controlled entirely by statute.[94] Therefore, 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.[95] 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 by "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.[96] 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.[97]

§ 6 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.[98] 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.[99] Further, even if one of the parties agreed to a contractual provision involving an illegal subject of bargaining, the provision would not be enforceable.[100]

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.

§ 7 THE MEANING OF "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.[101] 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.[102]

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."[103]

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.[104] 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."[105]

§ 8 GOOD FAITH REQUISITES

Fundamentally, neither management nor labor may refuse to bargain over a mandatory subject of bargaining.[106] 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, nor 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.[107] Indeed, the very concept of collective bargaining presupposes a desire to reach ultimate agreement.[108] 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.[109] 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.[110]

A. AVOIDING SURFACE AND REGRESSIVE BARGAINING

Surface bargaining occurs when a party makes a pretense of bargaining but is merely going through the motions of negotiations without any real intent to reach an agreement. Similarly, a party may be guilty of surface bargaining if it rejects the other side's proposals while tendering its own, without making any attempt to reconcile the two positions.[111] The LRC has also indicated that a party is surface bargaining if it merely attends a prescribed number of meetings without engaging in meaningful discussions.[112] The NLRB and the Massachusetts Labor Relations Commission have specified several factors that each will consider in

determining whether a party is guilty of surface bargaining, including:

- the prior bargaining history of the parties;[113]
- the length of the current negotiations (i.e. whether they were purposefully shortened to avoid bargaining) ;[114]
- a party's willingness to make concessions (though failing to yield on a major issue while making other concessions is not evidence of surface bargaining) ;[115]
- the character of the proposals or demands made, including whether the party makes insincere proposals to sidestep important issues, as well as the number, substance, timing, reasonableness, and predictable unacceptability of proposals or demands;[116]
- any occurrence of dilatory (stalling or delaying) tactics during the negotiations, including the failure to schedule meetings, the frequent postponement of meetings, prolonged discussions on formalities, long lapses between meetings, etc.;[117]
- whether unrealistic conditions were imposed for agreement, including demands that the other party cease pending litigation (including prohibited practice charges),[118] or make concessions on ground rules which would render the other party's right to bargain meaningless;[119]
- whether there were unilateral changes made in bargaining subjects during negotiations;[120]
- the employer's attempts to deal directly with the employees instead of communicating to them through their selected representative;[121]
- any evidence that either party failed or delayed in providing requested information;[122]
- the maintenance of an extreme bargaining position without providing any justification;[123] and
- any other unfair (prohibited) labor practices.[124]

This list is not exhaustive, but it does provide some guidance as to what constitutes surface bargaining in the context of labor negotiations.

Each party to collective bargaining must endeavor to move the negotiations forward, toward agreement.[125] To move backward is considered "regressive".[126] A party bargains regressively in violation of its duty to bargain in good faith by withdrawing an offer made in earlier bargaining sessions.[127] Where the School Committee's negotiator withdrew agreement on a three-year wage offer, it was guilty of regressive bargaining.[128] This was the case even though the Committee contended that its projected revenues could not support all three years of the wage offer. The Commission found that there were sufficient funds for the first

year and that the Committee failed to demonstrate the kind of fiscal emergency that might have excused a withdrawal of their wage proposal. One who retracts an offer on the table for retaliatory reasons also engages in regressive bargaining. Negotiators, however, are free to make *tentative* proposals and later retract them during bargaining, as long as the retraction is not retaliatory.[129]

PRACTICE POINTERS

It is advisable to include in the ground rules the right to make "package offers" which may be withdrawn if not accepted, leaving a party free to return to an earlier position. If no such rule has been adopted, a party can condition any package or even individual proposal on the ability to return to an earlier position and, especially if the other party does not object, no claim for regressive bargaining should succeed.

B. ESTABLISHING GROUND RULES AND CONDUCTING MEETINGS

The LRC views the environment in which negotiations take place as critical to the process of collective bargaining. For this reason, the LRC has established several rules concerning meetings and ground rules.

Ground rules for any negotiations are a mandatory subject of bargaining. Thus, the parties may bargain to impasse over ground rules, but "neither party can be permitted to prevent the commencement of bargaining by insisting on ground rules which are patently unreasonable or which in and of themselves prevent bargaining."[130] The ground rules may establish meeting times and places, and any other preliminary matters incident to starting collective bargaining. For example, normally parties may make any new proposal that is not regressive or in bad faith, but the parties may agree to a ground rule establishing a cut-off date after which no new proposals may be raised.[131] Another typical ground rule for public sector bargaining is requiring ratification of any agreement by the parties' principals in order for the contract to be finalized.

A party may not, however, insist on a ground rule which requires open, public negotiations. While M.G.L. c. 39, § 23B, does require that governmental bodies conduct meetings open to the public, this law does not require open sessions for collective bargaining or grievance procedures.[132] The Commission has stated that neither party may insist on open bargaining sessions.[133] A party (generally the public employer) commits a *per se* (i.e., automatic) violation of Sections 10(a)(5) and (1) of the Law by insisting upon open bargaining sessions once the other party (generally the union) has objected to the presence of the public.[134] The

reason for this rule was articulated in *Holbrook School Committee*, when the Labor Relations Committee stated, "The norm is closed sessions; parties will not be permitted to scuttle bargaining by insisting otherwise."[135] As a permissive subject of bargaining, the issue of open negotiating sessions nevertheless may be discussed at the table and agreed to by the parties.[136]

With respect to participation in bargaining sessions, neither party may require disclosure of the composition of the other side's bargaining team as a prerequisite to negotiations, or coerce the other party in its choice of bargaining representative.[137]

The Law requires that the parties meet "at reasonable times," and often parties will establish in the ground rules the meeting time and place for future negotiations. As to the time for negotiations, an employer may refuse to agree to a union's proposal that bargaining take place on weekends and evenings.[138] In one LRC case, the City of Somerville charged that the union unlawfully refused to bargain, by insisting on negotiating only during the workday.[139] The City, on the other hand, was insisting that holding the bargaining sessions during the day would disrupt its operations. The LRC found that this "procedural standoff" did not violate the Law.[140]

Thus, while it is not entirely clear whether a union or an employer may insist on bargaining during a particular time of the day or week, there is some authority for the proposition that the parties may bargain on this issue to the point of impasse.

PRACTICE POINTERS

An employer is free to refuse to allow on-duty personnel to attend negotiations. However, good faith probably requires that it should then be willing to hold such sessions outside of regular work hours or to allow employees to make arrangements for substitutions.

As a practical matter, ground rules rarely make much of a difference in how negotiations are conducted. Non-objectionable rules include not exceeding two hour sessions unless both parties agree and scheduling the next session at the end of each negotiation session. The requirement that neither party make public statements prior to impasse (and then only after 24 hour's notice) is a good one, but hard to enforce. Neither party can insist on restricting who the other has on its negotiating team (unless on-duty personnel are involved.)

Experience shows that initializing all tentative agreements may prove cumbersome and is not always a good idea. On the other hand, making sure everyone knows that all arguments are tentative until a package is agreed upon, and then subject to ratification, is very important.

As to the location of bargaining sessions, negotiations may be held in any mutually agreeable location. However, neither party may insist that sessions be held outside of the municipality. Thus, when the Plainville School Committee refused to meet with the union out of town, the LRC held that this action was not evidence of bad faith bargaining.[141]

C. REDUCING THE AGREEMENT TO WRITING

Section 7(a) of the Law provides that agreements must be reduced to writing and may not exceed a term of three years. An agreement which automatically continues beyond three years, unless either party proposes to change it ("evergreen" clause), does not violate the Law. In *Town of Burlington*, the LRC stated that by not proposing changes, the parties are in effect agreeing to a new contract.[142]

The LRC has stated that when the parties have reached agreement on all substantive issues, the agreement must be reduced to writing. Thus, a party commits a prohibited practice if it refuses to execute a written contract that sets forth the terms of the negotiated agreement.[143] This obligation extends to so-called side agreements or side letters as well as to comprehensive collective bargaining agreements.[144] An alleged lack of funds to pay for the cost items of the agreement does not justify a refusal by the public employer to sign the negotiated agreement.[145] The only exception to this rule involves oral modifications to a written contract, where the LRC has held that such oral modifications are effective without a writing.[146] After agreement has been reached and the writing effected, neither party is free unilaterally to change any provision of the contract.[147]

The issue often arises as to whether the parties have, in fact, reached agreement, and thus have triggered the writing requirement. In determining whether an agreement has been reached, the LRC looks at whether there has been a "meeting of the minds" on the actual terms of the agreement. The Law recognizes that a meeting of the minds can occur without anything having been reduced to writing or having been signed by either party,[148] but it must be found that the parties actually reached agreement on all the substantive issues.[149] Simply presenting language that had previously been proposed by the other party does not amount to a meeting of the minds if there is a dispute as to the meaning involved.[150] Additionally, it must be found that the agreement or meeting of the minds occurred between the authorized representatives of the public employer and the union.

PRACTICE POINTERS

Negotiators are not signatories to the collective bargaining agreement. Make it clear in the ground rules that a contract must first be ratified by

the Mayor or Selectmen and, once fully typed and reviewed, signed by them to be binding on the city or town. Similarly, it is helpful to remind the union that the contract is subject to funding by the city council or town meeting.

D. REACHING IMPASSE

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of 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 prior notice and an opportunity to bargain to resolution or lawful impasse.[151]

To determine whether impasse has been reached, the Commission considers the following factors: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations.[152] Further, the Commission focuses specifically on whether the parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be futile because the parties are deadlocked.[153]

Thus, to fulfill its responsibility to bargain in good faith, the employer is obligated to: 1) make itself available at reasonable times and places for the purpose of negotiating over the decision and impacts of block scheduling,[154]; 2) participate in such negotiations in good faith,[155] and 3) refrain from unilaterally establishing block scheduling until impasse had been reached on all mandatory aspects of the block scheduling decision.[156]

Impasse occurs when the parties have made a good faith effort at bargaining which, despite their best intentions, does not conclude in agreement. Parties may bargain to impasse over any mandatory subject of bargaining. However, as discussed earlier, insisting on a non-mandatory provision in the contract to the point of impasse (or an illegal one) constitutes a prohibited practice.[157] A finding that impasse has been reached during mid-term bargaining means that the parties have satisfied their duty to bargain and that the employer may implement changes in terms and conditions of employment which are reasonably comprehended within its pre-impasse proposals.[158] (See Chapter 10 - Midterm Bargaining) During regular contract negotiations aimed at producing an initial or successor collective bargaining agreement, certain statutory impasse resolution procedures apply.[159] (See Chapter 6 - Impasse Resolution Procedures)

Impasse in negotiations occurs only when "both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked."[160] The traditional rule at the LRC was that if one party to the negotiations indicates a desire to continue bargaining, it demonstrates that the parties have not exhausted all possibilities of compromise and precludes a finding of impasse.[161] Although the Commission considers a union's unilateral expression of desire to continue bargaining as evidence that the parties may not have bargained to impasse[162], the ultimate test remains whether there is a "likelihood of further movement by either side" and whether the parties have " exhausted all possibility of compromise."[163]

In *Commonwealth of Massachusetts,* the employer rejected the union's request for an additional meeting to " devise a more creative plan" after the employer had presented the union with what the employer had characterized as the "final draft" of its proposal. In determining that the parties had not bargained to impasse, the Commission pointed out that the union's request came after the employer had: 1) indicated that, despite what it characterized as its "final draft," the union could have input into the proposed policy and; 2) explained to the union why it had rejected the union's most recent proposals.

In City *of Boston,* after the employer rejected the union's proposal concerning the impacts of a planned reorganization in the context of mid-terns negotiations, the union presented a proposal during successor collective bargaining agreement negotiations, which had been occurring simultaneously. *[164]* Although the employer did not refuse to bargain over the proposal, it maintained its position that the parties had bargained to impasse over the impacts of the reorganization in the context of mid-term negotiations and, therefore, the employer would continue with its plan to implement the changes. On the day before the employer implemented its plan, the union presented an additional proposal, part of which the employer incorporated into its final implementation. In determining that the parties had not bargained to impasse, the Commission rejected as inflexible the employer's argument that, despite the union's proposal during successor negotiations, the parties had bargained to impasse in the context of mid-term negotiations.[165]

In both *Commonwealth of Massachusetts,* and *City of Boston,* the Commission recognized that collective bargaining is a dynamic process that is influenced by many factors. Changing circumstances, like the union learning why the employer had rejected its proposals as in *Commonwealth of Massachusetts* or the context in which the union makes its proposal as in *City of Boston,* could affect the parties' relative positions on any outstanding issues and, coupled with the union's expressed desire to continue bargaining, improve the likelihood of further compromise.[166]

In a Boston case, a review of the history of the parties' negotiations over the use of take-home vehicles lead the LRC to the conclusion that, even if the union was sincere in its expressed willingness to continue bargaining over the matter, there was little likelihood that either party would or could ever present a proposal that would move the parties any closer toward resolution.[167]

In *Mass. Commissioner of Administration and Finance*, the LRC listed several criteria that it will examine in determining whether impasse has been reached:

- the bargaining history of the parties,
- evidence of good faith by the parties,
- the length of the negotiations,
- the importance of the issues on which the parties disagree, and
- the contemporaneous understanding of the parties about the state of bargaining (i.e., both parties believe that impasse has been reached).[168]

The LRC also commented in the *Mass. Commissioner* case that it will focus specifically on whether the parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked.[169] Thus, in *City of Boston*, the Union's request for continued bargaining precluded the LRC from finding that impasse had occurred.[170] After an alleged impasse, the duty to bargain is revived when either party indicates a desire to negotiate in good faith over previously deadlocked issues.[171] Similarly, neither party may attempt to foreshorten bargaining by establishing an artificial or unreasonable deadline for completion of negotiations.[172]

The jurisdiction of the Joint Labor-Management Committee (JLMC) may be invoked by either party to police or fire contract negotiations upon reaching impasse during regular contract negotiations.[173] While the LRC has the exclusive statutory prerogative to decide issues of good faith bargaining and the existence of impasse, it has deferred to the JLMC when charges are filed while the JLMC is handling a case. The JLMC has the authority during regular contract negotiations to utilize its impasse resolution procedures, such as mediation, fact-finding and arbitration, to move the negotiations forward.[174]

§ 9 REMEDIES FOR FAILURE TO BARGAIN IN GOOD FAITH

Section 11 of the Law grants the Commission broad discretion in formulating remedies which will best effectuate the policies of the Law and to vitiate the effects of the violation.[175] The remedial power of the LRC under § 11 encompasses the authority to fashion "make whole" remedies to compensate a party which suffers due to the other party's unlawful action.[176] When fashioning remedies, the Commission attempts to place the affected parties in the position they would have been in, absent the unlawful conduct.[177] Even if an employer ultimately complies with the law or even an LRC order, the Commission need not consider the matter moot if there is a possibility that the conduct could reoccur in substantially the same form.[178]

The usual remedy when a respondent has refused to bargain in good faith is to issue a cease and desist order and an order that the respondent bargain in good faith on demand.[179] There are instances where the LRC has found that this type of remedy is not sufficient to put the parties back into the position they were in prior to the bad faith conduct (i.e., the *status quo ante*) and is thus inadequate. Where the respondent's conduct substantially impairs bargaining between the parties, the Commission will grant extraordinary relief to remedy the full consequences of the violation.[180] Thus, the LRC will order compensatory relief where warranted.[181] However, the Commission is not authorized to issue awards compelling one party to pay the other's legal fees in presenting its case."[182]

A make whole order was not included in the Commissions remedy where, although the town unlawfully transferred bargaining unit work to non-unit personnel, it was too speculative to conclude that unit members were financially harmed.[183] The union could not show that unit members would have performed the assistant assessor's job duties on an overtime basis in that case.[184]

Where the City of Lawrence delayed funding a grievance arbitration settlement agreement for more than 8 months, the LRC found this was unreasonably long.[185] As a remedy under Section 11 of the Law, the Commission awarded interest, retroactive to 6 weeks after the parties signed the grievance settlement agreement.

The Commission is usually asked by the union to restore the "states quo ante," i.e., the situation that existed before the employer engaged in its unlawful conduct. This might involve such remedies as rescinding a new rule or revoking certain personnel transfers. In some cases, however, the Commission might just order the employer to offer to engage in good faith bargaining to the point of agreement or impasse (along with the customary posting requirement.) In a Boston case, the Commission did not order the

Police Commissioner to rescind the implementation of the use of less-lethal super-sock ammunition in beanbag shotguns.[186] There the parties had been engaged in impact bargaining for months when, according to the LRC, management prematurely implemented what the Commission acknowledged was a managerial decision.

In a 1982 *City of Boston* case, the LRC held that: Where the respondent to a unilateral change charge is willing to effectively restore the *status quo ante* and bargain over the proposed change without restriction, the charging party risks foregoing its right to a *status quo ante* remedy if it declines the offer. The burden in such cases is of course on the respondent to show that the subsequent opportunity to bargain was genuine and unrestricted.[187]

It is customary for the Commission to order an employer to post a Notice to Employees in "conspicuous places where employers usually congregate or where notices to employees are usually posted." This contemplates multiple locations as necessary to ensure the adequate publication of the notice.[188]

§ 10 INTEREST

The Commission has considerable discretion under Section 11 of the Law to fashion appropriate remedies, including evading interest on back pay awards. As a result of the Supreme Judicial Court's decision, the Commission now follows M.G.L. c. 23, §I, which has a floating rate of interest.[189] The Commission orders interest to accrue from the date of the monetary loss until the date of reimbursement.[190]

The Commission's traditional remedy in a case in which an employer fails to timely implement a grievance settlement is to order the employer to cease and desist from its unlawful conduct, to make whole any employee who sustained an economic loss as a result of the employer's unlawful actions, and to post a notice to employees.[191] Affected bargaining unit members are also entitled to earn interest on the money owed for the period of their loss.[192] If the settlement does not specify when it must be implemented, the Commission looks at what amount of time is reasonable to implement grievance settlements and to pay any amount agreed upon.[193]

[1] M.G.L. c. 150E § 2.
[2] *Id.* at § 6.
[3] *School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. at 572, 447 N.E.2d 1201.
[4] *City of Gardner*, 10 MLC at 1121, quoting from *Fibreboard Paper Prods, Corp. v. National Labor Relations Bd.*, 379 U.S. 203, 214, 85 S.Ct. 398, 12 L.Ed.2d 233 (1964).
[5] *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340 (1989).
[6] 29 U.S.C. § 151, et seq. The Supreme Court of the United States upheld the validity of the Act in *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L.Ed. 893 (1937).
[7] *Id.*
[8] *See Atlantic Refining Co.*, 1 NLRB 359, 1 LRRM 405 (1936).
[9] 29 U.S.C. § 152(2). *See, Labor Relations Commission v. Blue Hill Spring Water Company*, 11 Mass. App. Ct. 50, 414 N.E.2d 351 (1980).
[10] *West Bridgewater Police v. Labor Relations Commission*, 468 N.E.2d 659, 661, 18 Mass. App. 550, 552 (1984).
[11] *Ford Motor Co. v. NLRB,* 441 U.S. 488, 496, 99 S. Ct. 1842, 1847, fn. 8.
[12] *See e.g., School Committee of Watertown v. Watertown Teachers Association*, 397 Mass. 346, 391 N.E.2d 615 (1986); *Town of Burlington v. Labor Relations Commission*, 390 Mass. 157, 454 N.E.2d 465 (1983) (holding that decision to assign prosecutorial duties is an exclusive managerial prerogative and not a proper subject of bargaining); *School Committee of Boston v. Boston Teachers Union, Local 66*, 378 Mass. 65, 389 N.E.2d 970 (1979) (stating that where public interest in bargaining subject "is so comparatively heavy that collective bargaining, and even voluntary arbitration on the subject is, as a matter of law, to be denied effect"); *Bradley v. School Committee of Boston*, 373 Mass. 53, 364 N.E.2d 1229 (1977); *School Committee of Boston v. Boston Teachers Union*, 372 Mass. 605, 363 N.E.2d 485 (1977) (affirming arbitrator's award and finding that none of the items in the award, including a mandate for a remedial reading program, were "improper" subjects for an award); *Boston Teachers Union v. School Committee of Boston*, 370 Mass. 455, 454 N.E.2d 465 (1976) (stating that the determination of whether something is a proper subject of bargaining will be done on a case by case basis).
[13] *Medford School Committee*, 1 MLC 1250 (1975).
[14] *Board of Regents of Higher Education*, 19 MLC 1069 (1992).
[15] *Town of Danvers*, 3 MLC 1559 (1977).
[16] M.G.L. c. 150E, § 6.
[17] *Melrose School Committee*, 3 MLC 1302 (1976).
[18] *City of Boston*, 9 MLC 1021 (1982).

[19] *Town of Fairhaven*, 20 MLC 1343 (1994).
[20] *City of Fall River*, 20 MLC 1352 (1994).
[21] *Town of Andover,* 3 MLC 1710 (1977).
[22] *Mass. Comm. of Admin.*, 9 MLC 1001 (1982).
[23] *Town of North Adams*, 21 MLC 1646 (1995).
[24] *Lawrence School Committee*, 3 MLC 1304 (1976).
[25] *City of Everett*, 22 MLC 1275 (1995).
[26] *Mass. Comm. of, Secretary of Admin. and Finance*, 19 MLC 1069 (1992).
[27] *Town of Danvers*, 3 MLC 1559 (1977).
[28] *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).
[29] *Medford School Committee*, 1 MLC 1250 (1975); *City of Worcester*, 25 MLC 169 (1999).
[30] *Mass. Comm. of, Comm. of Admin. and Finance*, 14 MLC 1719 (1988).
[31] *Everett Housing Authority*, 9 MLC 1263 (1982).
[32] *City of Peabody*, 9 MLC 1447 (1982).
[33] *Town of Tewksbury*, 19 MLC 1189 (1992).
[34] *Peabody School Committee*, 13 MLC 1313 (1986).
[35] *City of Haverhill*, 16 MLC 1077 (1989).
[36] *Commonwealth of Massachusetts*, 19 MLC 1069 (1992).
[37] *Town of Milton*, 16 MLC 1725 (1990).
[38] *City of Revere*, 18 MLC 1179 (1991); *Board of Regents of Higher Education*, 19 MLC 1248 (1992).
[39] *Medford School Committee*, 4 MLC 1450 (1977), *aff'd sub. nom. School Committee of Medford v. Labor Relations Commission*, 38 Mass. 932 (1980).
[40] *Lawrence School Committee*, 3 MLC 1304 (1976).
[41] *City of Peabody*, 9 MLC 1447 (1977).
[42] *City of Boston*, 4 MLC 1104 (1977).
[43] *Medford School Committee*, 1 MLC 1250 (1975).
[44] *Town of Dracut*, 7 MLC 1342 (1980).
[45] *Wakefield Municipal Light Department*, 8 MLC 1838 (1981).
[46] *Norwood School Committee*, 4 MLC 1751 (1978).
[47] *Boston School Committee*, 3 MLC 1630 (1977).
[48] *Town of Avon*, 6 MLC 1390 (1979).
[49] *Town of Wayland*, 5 MLC 1738 (1979).
[50] *Commonwealth of Massachusetts*, 9 MLC 1824 (1983).
[51] *Town of Andover*, 3 MLC 1710 (1977).
[52] *Board of Regents*, 10 MLC 1107 (1983).
[53] *Town of Marblehead*, 1 MLC 1140 (1975).

[54] *Whittier Regional School Committee*, 13 MLC 1325 (1986), *aff'd sub. nom. Whittier Regional School Committee v. Labor Relations Commission*, 401 Mass. 560 (1988).
[55] *Mass. Board of Regents of Higher Education*, 10 MLC 1048 (1984).
[56] *Commonwealth of Massachusetts*, 4 MLC 1869 (1978).
[57] *Whitman Hanson Regional School Committee*, 10 MLC 1283 (1984).
[58] *City of Springfield*, 12 MLC 1001 (1985).
[59] *Medford School Committee*, 3 MLC 1413 (1977).
[60] *City of Newton*, 4 MLC 1282 (1977); *Town of Bridgewater*, 12 MLC 1612 (1986).
[61] *City of Boston*, 16 MLC 1437 (1989).
[62] *City of Boston*, 3 MLC 1450 (1977).
[63] *City of Pittsfield*, 4 MLC 1905 (1978); *Board of Trustees, Unversity of Massachusetts*, 7 MLC 1577 (1980).
[64] *Newton School Committee*, 5 MLC 1061 (1978), *aff'd sub. nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[65] *City of Everett*, 2 MLC 1471 (1976); *Town of Lexington*, 22 MLC 1676 (1996).
[66] *Abington School Committee*, 21 MLC 1630 (1995); *Town of Lexington*, 22 MLC 1676 (1996).
[67] *Town of Shrewsbury*, 14 MLC 1664 (1988).
[68] *Commonwealth of Massachusetts*, 22 MLC 1459 (1996).
[69] *City of Boston*, 7 MLC 1775 (1981); *Franklin School Committee*, 6 MLC 1297 (1979).
[70] *Board of Trustees of the University of Massachusetts*, 21 MLC 1995 (1995); *Commonwealth of Massachusetts*, 27 MLC 11 (2000).
[71] *New Bedford Housing Authority*, 27 MLC 21 (2000).
[72] *Commonwealth of Massachusetts,* 25 MLC 201, 205 (1999); *City of Worcester,* 25 MLC 169, 170 (1999).
[73] 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).
[74] *Town of West Bridgewater*, 10 MLC 1040 (1983).
[75] *School Committee of Braintree v. Raymond*, 369 Mass. 689 (1976).
[76] *City of Cambridge*, 4 MLC 1447 (1977).
[77] *Town of Andover,* 3 MLC 1710 (1977).
[78] *Groton School Committee,* 1 MLC 1224 (1974).
[79] *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).
[80] *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).

[81] *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).
[82] *Town of Burlington v. Labor Relations Commission,* 390 Mass. 157 (1983).
[83] *Cambridge School Committee,* 7 MLC 1026 (1980).
[84] *School Committee of Braintree v. Raymond,* 369 Mass. 689 (1976); *School Committee of Hanover v. Curry,* 369 Mass. 683 (1976).
[85] *City of Springfield,* 12 MLC 1021 (1985).
[86] *Town of Dennis,* 12 MLC 1027 (1985); *City of Westfield,* 12 MLC 1036 (1985).
[87] *Town of Ayer,* 9 MLC 1376 (1982), *aff'd. sub nom. Local 346, IBPO v. Labor Relations Commission,* 391 Mass. 429 (1984).
[88] *City of Cambridge,* 4 MLC 1447 (1977).
[89] *Town of Danvers,* 3 MLC 1559 (1977).
[90] *Town of Reading,* 9 MLC 1730 (1983).
[91] *Chelmsford School Committee,* 8 MLC 1515 (1981).
[92] *City of Malden*, 20 MLC 1400 (1994).
[93] *Town of Dedham,* 21 MLC 1011 (1994).
[94] *Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 183, 681 N.E.2d 1234 (1997).
[95] *Town of North Attleboro v. Labor Relations Commission*, 56 Mass. App. Ct. 635, 779 N.E.2d 654 (2002).
[96] *Town of North Attleboro v. Labor Relations Commission*, supra.
[97] *Id.*
[98] *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.
[99] 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.
[100] *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).
[101] *Harwich School Committee*, 10 MLC 1364 (1984); *King Phillip Regional School Committee*, 2 MLC 1393 (1976).
[102] *School Committee of Newton v. Labor Relations Commission*, 447 N.E.2d 1201, 1211; 388 Mass. 557 (1983). Citations omitted.

[103] *County of Norfolk*, 11 MLC 1346, 1348 (1985).
[104] *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 . . . ."
[105] *County of Norfolk*, 11 MLC 1348 (1985).
[106] *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.
[107] *School Committee of Newton*, 388 Mass. at 572 (citations omitted).
[108] *Id.*
[109] *Id.; King Phillip Regional School Committee*, 2 MLC 1393, 1396 (1976).
[110] *City of Chelsea*, 3 MLC 1048, 1050 (H.O. 1976) *citing NLRB v. Polling & Son Co.,* 119 F2d. 32 (1941).
[111] *Town of Saugus*, 2 MLC 1480 (1976).
[112] *Southern Worcester County*, 2 MLC 1488 (1976).
[113] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).
[114] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201, 1213 (1983) (affirming Commission's ruling that "the School Committee could not refuse to bargain for a period of over four months, negotiate for two days prior implementation of a change, and then contend that it had fulfilled its bargaining obligation").
[115] While G.L. c. 150E, § 6 does not compel either party "to agree to a proposal or make a concession," a party's complete inflexibility to compromise is evidence of bad faith. *See*, *Towne Taxi*, 4 MLC 1509 (1977) (refusing to make any attempt to compromise is unlawful); *Newton School Committee*, 4 MLC 1334 (1977), *aff'd* 5 MLC 1016 (1978) (affirming hearing officer's decision that school committee's failure to make a concession it was authorized to make as part of bargaining over layoffs was bad faith bargaining); but cf., *Taunton Municipal Lighting Plant*, 5 MLC 1515 (1979) (finding that mere refusal to offer wage increase due to economic constraints was not bad faith bargaining in the absence of other bad faith tactics). *See also, Reed & Prince Mfg.* at 134-5, "While the [National Labor Relations] Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular

position, the employer is obliged to make *some* reasonable efforts in *some* direction to compose his/her differences with the union."

[116] *See e.g. International Typographical Union Local 38, AFL-CIO v. NLRB*, 278 F.2d 6 (1st Cir. 1960); *Framingham School Committee,* 4 MLC 1809 (1978) (holding that School Committee bargained in bad faith by making predictably unacceptable offer).

[117] *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981) (holding that series of delays, adherence to unacceptable proposals, and refusal to make concessions constituted dilatory tactics); *General Motors Corp. v. NLRB*, 476 F.2d 850 (1st Cir. 1973) (stating that change in bargaining sites, limiting of time and number of bargaining meetings, and unavailability of employer's bargaining team deemed to be indicia of company's dilatory attitude). *See also*, *Holyoke*, 9 MLC 1556 (1983) (finding that City unlawfully failed to meet at reasonable times with the union); *Middlesex County*, 3 MLC 1594 (1977).

[118] *NLRB v. Kit Mfg. Co.*, 335 F.2d 166 (9th Cir. 1964); *Town of Dracut*, 14 MLC 1127 (1987); *Town of Hopedale*, 11 MLC 1413 (1985); *Southern Worcester County Vocational School District*, 2 MLC 1488 (1976); *Town of Ipswich*, 4 MLC 1600 (1977).

[119] *Wavetronics Indus., Inc.*, 147 N.L.R.B. No. 33, 56 L.R.R.M. 1212 (1964) (holding that employer violated duty to bargain by conditioning the commencement of contract negotiations on the union's agreement to discuss only preliminary matters and to hold the negotiations in another state); *see also*, *Falmouth School Committee*, 12 MLC 1383 (1985) (holding that "neither party can be permitted to prevent the commencement of bargaining by insisting upon ground rules which in and of themselves prevent bargaining").

[120] *See e.g., NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L.Ed.2d 230 (1962); *Easton*, 14 MLC 1623 (1988), *aff'd*, 16 MLC 1407 (1990). A unilateral change occurs when an employer makes a change in a mandatory subject of bargaining without bargaining with the union, or, if he/she does bargain with the union, when he/she makes a change prior to reaching agreement with the union. Unilateral changes will be discussed further in § 5 below.

[121] *J.I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 764 (1944) established the parameters of the employer's ability to deal directly with employees. *See also, Springfield*, 15 MLC 1460 (1989), *aff'd*, 17 MLC 1380 (1991). The rules for direct dealing between a public employer and an employee will be discussed later in § 5B of this chapter.

[122] *NLRB v. New England Newspapers, Inc.* 856 F.2d 409 (1st Cir. 1988); *Wilmington*, 11 MLC 1534 (1985). This subject will be discussed further in § 5F below as well as in Chapter 5: Furnishing Information.

[123] *Revere School Committee*, 10 MLC 1245 (1983) (holding that School Committee violated the law when it categorically rejected the Union's proposals with little or no discussion).

[124] Among other things, this would include, of course, regressive bargaining. *See, e.g.*, *Norfolk (Agricultural School Board of Trustees)*, 11 MLC 1346 (1985), *aff'd*, 12 MLC 1005; *Holyoke*, 11 MLC 1155 (1984)
[125] *Framingham School Committee*, 4 MLC 1809, 1813 (1978).
[126] *Bellingham*, 21 MLC 1441 (1994) (ALJ finds that employer engaged in regressive bargaining when it altered its initial offer of lowering its contribution to employees' health insurance by 5% after unsuccessful mediation).
[127] *City of Norfolk*, 12 MLC 1005 (1985).
[128] *Springfield School Committee*, 24 MLC 7 (1998).
[129] *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518 (1987) (affirming dismissal of union's charge against employer based on charge of regressive bargaining for withdrawing from prior agreement on wage retroactivity); *City of Quincy*, 10 MLC 1330 (1983) (finding no probable cause to establish the City engaged in regressive bargaining when it dropped wage increase proposal where union membership voted not to satisfy a condition of the proposal).
[130] *Holbrook School Committee*, 5 MLC 1491, 1494 (1978).
[131] *Boston School Committee*, 14 MLC 1369 (1987), aff'd., 15 MLC 1541 (1988) (affirming that School Committee acted unlawfully when it offered new proposals in violation of an agreed upon ground rule that no new proposals be submitted after a cut-off date).
[132] *Ghiglione v. School Committee of Southbridge*, 376 Mass. 70 (1978).
[133] *Town of Marion*, 2 MLC 1256 (1975), *aff'd sub nom.*, *Board of Selectmen of Marion v. Labor Relations Commission*, 7 Mass. App. Ct. 360 (1979).
[134] *Holbrook School Committee*, 5 MLC 1491. In *Holbrook*, the Commission stated, "[I]t would seem that once a party has requested closed sessions the other party should comply immediately." *Id.* at 1495, n. 2.
[135] *Id.* at 1495.
[136] *City of Attleboro*, 3 MLC 1408 (1977).
[137] *Southern Worcester County*, 2 MLC 1488 (1976).
[138] *Mass. Bd. of Regents of Higher Education*, 16 MLC 1565 (1990) (Dismissal Letter).
[139] *City of Somerville*, 10 MLC 1527.
[140] *Id.*
[141] *Plainville School Committee*, 4 MLC 1461 (1977).
[142] 3 MLC 1440 (1977).
[143] *City of Boston*, 8 MLC 1113 (1981).
[144] *Town of Ipswich*, 11 MLC 1403, *aff'd, Ipswich v. Labor Relations Commissions*, 21 Mass. App. Ct. 1113 (1986).
[145] *City of Lawrence*, 16 MLRR 1370 (1990). See § 5 for further discussion of the employer's duty in this situation.

[146] *Service Employees International Union, Local 509 v. Labor Relations Commission,* 410 Mass. 141 (1991).
[147] *Blue Hills Regional School Committee*, 3 MLC 1613 (1977).
[148] *Commonwealth of Massachusetts*, 19 MLC 1235 (1992).
[149] If the parties agreed in the ground rules that any agreement required the ratification of the principals to be effective, then there is no "meeting of the minds" until those principals agree to the contract. See, e.g., *Suffolk County House of Correction*, 22 MLC 1001 (1995) (finding no agreement where the union, pursuant to a ground rule, was required to submit the contract to the membership for ratification, but the membership voted against the contract).
[150] *Acushnet Permanent Firefighters Association*, 7 MLC 1265 (1980).
[151] *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 574 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989).
[152] *Town of Weymouth*, 23 MLC 70, 71 (1996); *Town of Westborough*, 25 MLC 81, 88 (1997); *City of Leominster*, 23 MLC 62, 66 (1996).
[153] *Commonwealth of Massachusetts*, 22 MLC 1039, 1051 (1995) *citing Town of Brookline*, 20 MLC 1570, 1594 (1994).
[154] *City of Chelsea*, 3 MLC 1169 (H.O. 1976), *aff'd* 3 MLC 1384 (1977).
[155] *King Philip Regional School Committee*, 2 MLC 1393 (1976).
[156] *Melrose School Committee*, 3 MLC 1299 (1976); *Newton School Committee*, 5 MLC 1016, 1024 (1978) *aff'd School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 572 n.9.
[157] As discussed above, *see Town of Andover*, 4 MLC 1081 (1977).
[158] *Hanson School Committee*, 5 MLC 1671 (1979). In c. 150E § 9, public employers are prohibited from implementing unilateral changes (after impasse has been reached or otherwise) after a petition for mediation has been filed with the Board of Conciliation and Arbitration, but this section does **not** apply to police and fire negotiations.
[159] *See* JLMC statute, Chapter 1078 of the Acts of 1973, as amended for police and fire.
[160] Town *of Plymouth,* 26 MLC 222, 223 (2000); *Commonwealth of Massachusetts,* 25 MLC 201, 205 (1999). *Town of Brookline,* 20 MLC 1570, 1594 (1994); See also *School Committee of Newton v. Labor Relations Commission,* 388 Mass. 557, 574 (1983)(impasse is a question of fact requiring a consideration of the totality of circumstances to decide whether, despite their good faith, the parties are simply deadlocked).
[161] *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999).
[162] *Commonwealth of Massachusetts,* 25 MLC 201 (1999); City *of Boston,* 21 MLC 1350 (1994).

[163] *Commonwealth of Massachusetts,* 25 MLC at 205; *Town of Plymouth*, 26 MLC 220, 223 (2000); *Woods Hole Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518, 1529-1530 (1988).
[164] *City of Boston,* 21 MLC 1350 (1994),
[165] 21 MLC at 1361.
[166] *See also, Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority, 14* MLC 1518 (1988) (no impasse where hiatus in bargaining and major change in employer's bargaining proposal significantly altered the framework for the negotiations); *Town of Arlington,* 15 MLC 1452 (1989) (no impasse because union membership's rejection of Town's offer changed the dynamics of bargaining and created need for both sides to bargain further); *Town of Plymouth,* 26 MLC 220 (2000)(same); *City of Lawrence School Committee,* 3 MLC 1304 (1976), (no impasse where passage of time created possibility that parties could retreat from earlier positions, allowing for eventual settlement).
[167] *City of Boston*, 28 MLC 175 (2001).
[168] 22 MLC 1039, 1051. *See also, Town of Brookline*, 20 MLC 1570, 1594 (1994), *City of Worcester*, 9 MLC 1022 (1982).
[169] *Mass. Commissioner of Administration,* 22 MLC at 1051.
[170] *City of Boston*, 21 MLC 1350 (1994).
[171] *Lawrence School Committee*, 3 MLC 1304 (1976).
[172] *Town of Natick*, 19 MLC 1753.
[173] The JLMC only has authority over police and fire negotiations. *See* c. 589, § 1 of the Acts of 1987.
[174] *Town of Stoughton*, 19 MLC 1154 (1992). Impasse and JLMC procedures will be discussed further in Chapter 11: Impasse Resolution Procedure.
[175] *Millis School Committee,* 23 MLC 99 (1996); Labor *Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826 (1979); *Boston Police Patrolmen's Association, Inc.* 8 MLC 1993, 2002 ( ); citing *Board of Regional Community Colleges v. Labor Relation Commission*, 377 Mass 847 (1979).
[176] *Town of Shrewsbury*, 15 MLC 1230 (1988).
[177] *See City of Malden*, 20 MLC 1400, 1406-1407 (1994).
[178] *See* e.g., *City of Boston* 7 MLC 1701 (1980); *Matter of Town of Dennis*, 30 MLC 119 (2004).
[179] *City of Norfolk*, 11 MLC 1346, 1350 (1985).
[180] *Watertown School Committee*, 9 MLC 1301 (1982); *Framingham School Committee*, 4 MLC 1809 (1978); *Middlesex County Commissioners*, 3 MLC 1594 (1977).
[181] *Middlesex County Commissioners*, 3 MLC 1594 (1977).
[182] *City of Boston*, 8 MLC 1113 (1981), *rev'd. sub. nom.*, *City of Boston v. Labor Relations Commission*, 15 Mass. App. Ct. 122 (1983) (further appellate review denied); *County of Suffolk*, 8 MLC 1573 (1981), *rev'd.*

sub. nom. County of Suffolk v. Labor Relations Commission, 15 Mass. App. Ct. 127 (1983) (further appellate review denied).
[183] *Town of Marion*, 30 MLC 11 (2003).
[184] *Id.*
[185] *City of Lawrence*, 27 MLC 57 (2000).
[186] *City of Boston*, 30 MLC 23 (2003).
[187] 8 MLC at 1805.
[188] *See City of Boston*, 14 MLC 1751, 1753, m. 5 (1998) (citing *NLRBU. Ohmite Mfg. Co.*, 557 F. 2d 577 (7th cin 1977);
[189] *Secretary of Administrations and Finance v. Labor Relations Commission*, 434 Mass. 340, 347-348 (2001); *Ashburnham-Westminster Regional School District*, 29 MLC 191 (2003).
[190] *Everett School Committee*, 10 MLC 1609, 1613-1614 m. 7 (1984).
[191] *Essex County*, 22 MLC at 1566, *Board of Regents of Higher Education*, 10 MLC at 1205.
[192] *See City of Lawrence*, 27 MLC 57 (2000).
[193] *Id.*

CHAPTER 4 - MANAGEMENT'S DUTY TO BARGAIN IN GOOD FAITH

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.[1] 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.[2]

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.[3] Further, a union may not refuse to discuss an employer's proposed "take away" provisions if they involve a mandatory subject of bargaining.[4] 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.[5] As discussed in Chapter 3, 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.[6]

B. ATTEMPTS TO BYPASS THE UNION

When employees join a union, they surrender their ability to bargain individually with their employer as to matters either governed by a collective bargaining agreement, or as to which the employer is legally obligated to bargain collectively with the union.[7] Generally, employees represented by a collective bargaining unit cannot negotiate directly with their employer regarding the terms and conditions of their employment.[8]

"Direct dealing is impermissible for at least two related reasons. First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. This right necessarily includes the power to control the flow of communication between the employer and represented employees concerning subjects as to which the union is empowered to negotiation. Second, direct dealing undermines employees' belief that the union actually possesses the power of exclusive representation to which the statute G.L. c. 150E entitles it."

An employer may not bypass the union and deal directly with an employee on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. Such an action would violate the employer's duty to bargain in good faith and would constitute a prohibited practice under Massachusetts law.[9] An employer's direct dealing with employees in the bargaining unit violates the employee organization's statutory right to speak exclusively for the employees who have selected it to serve as their sole representative.[10] Dealing directly also undermines the employees' belief that the union actually possesses the power of exclusive representation to which it is entitled by statue.[11] Granting salary adjustments following a survey violates the Law if the employer does not involve the union.[12] Even where the legislature enacted a health insurance buy-out program, the employer was required to provide the union with notice and an opportunity to bargain to resolution or impasse about the amount of money to be paid to eligible employees who elect to participate in the program.[13]

Thus, in most circumstances, a chief must give notice and an opportunity to bargain to the union whenever he/she has a proposed change involving or affecting the wages, hours, and other terms and conditions of employment (i.e., *mandatory* subjects of bargaining). In certain limited circumstances, a chief might be able to make operational decisions or to deal with an employee directly without consulting the union.

1) Operational and Emergency Decision-Making

In an emergency situation, such as calling in off-duty police officers or firefighters to respond to a violent public disturbance or fire,

common sense would indicate that a chief may make any necessary decisions to preserve public safety and execute the duties of the department. On several occasions, Massachusetts courts have recognized the need for allowing municipal employers the flexibility to deal with emergencies and public safety issues.[14] However, there are as yet no LRC cases specifically designating an "emergency exception" to the employer's responsibility to consult the union prior to implementing changes affecting the terms and conditions of employment.

PRACTICE POINTERS

A chief should be careful to ascertain whether the situation is truly an emergency, or whether the matter can first safely be taken up with the union prior to the change.

A chief may also implement strictly operational *decisions not affecting mandatory subjects of bargaining, without consulting the union. While this is true as a general principle, a chief must be cautious in defining what is a strictly operational decision. Any time wages, hours or terms and conditions of employment are implicated, the union must be notified and given the opportunity to bargain. Examples of operational decisions in a police context could include changing the method of executing a search warrant or altering patrol routes.*

2) Matters Solely Affecting an Employee

Section 6 of the Law imposes upon public employers the obligation to negotiate in good faith with the exclusive bargaining unit representatives of their employees concerning wages, hours, standards or productivity and performance, and any other terms and conditions of employment. The duty to bargain collectively with the employee's exclusive collective bargaining representative prohibits the employer from negotiating directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative.[15] Direct dealing is impermissible for at least two related reasons. There is a narrow exception for the grievance process.[16] First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative.[17] Second, direct dealing undermines employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it.[18]

The Commission has held that involuntary deductions from the pay of employees is a mandatory subject of bargaining.[19] In *Millis School*

Committee, the Commission determined that a payment plan developed by the Superintendent and an individual employee to repay his retirement plus a 10% stipend was a mandatory subject of bargaining and concluded that the School Committee violated the Law by bypassing the Union and negotiating directly with the employee on the method of repayment.[20] Further, in *Town of South Hadley*, the Commission found that a training cost assessment and the repayment of training costs was a term and condition of employment.[21] The Town argued that the repayment schedule of a training fee for employees was authorized by statute that provided, "[u]pon completion of training, said training fee shall be deducted from the recruit's wages in eighteen monthly installments or as otherwise negotiated." The Commission rejected the Town's argument, holding that the statute identified only one possible method of recouping the training cost assessment, and that it did not restrict the Town's obligation to bargain with the Union.[22]

Claiming he did not receive certain compensation promised by the Fire Chief of the defendant, Town of Randolph ("Randolph"), for attending paramedic training, plaintiff Christopher Walsh ("Walsh"), a firefighter, brought a court action for non-payment of wages and breach of an oral contract.[23]

Public employers, including towns such as Randolph, are obligated by statute to negotiate with an "exclusive representative," such as the union here, "with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment . . ."[24]

PRACTICE POINTERS

Whenever a proposed change could potentially affect terms and conditions of employment, the chief must notify the union prior to making the change. Sufficient notice must be given so that the union has the opportunity to request bargaining. Instituting a unilateral change involving a mandatory *subject of bargaining without so notifying the union is a prohibited (unfair labor) practice.[25] Even if the subject matter of the decision involves only* non-mandatory *or* permissive *subjects of bargaining, the employer is still required to give notice to the union and the opportunity to bargain* ***before*** *making the change if the change will* affect *a mandatory subject.[26] It is essential that a chief allow sufficient time to bargain with the union beforehand. The employer or chief must then bargain in good faith until agreement or impasse, and then may implement the change.*

If the decision involves a mandatory subject of bargaining, the employer should first determine whether the issue was addressed in the collective bargaining agreement. If the issue was specifically dealt with in the agreement, the union probably will refuse to bargain and insist that the employer wait until the current contract expires before discussing the change. Unless the contract contains a zipper clause*, the union would commit a prohibited practice (M.G.L. c. 150E, s. 10(b)) if it refused to negotiate in good faith over a mandatory subject of bargaining which was not covered completely by the terms of the collective bargaining agreement. Where such a refusal occurs, the employer should notify the union that it has* waived *its right to demand bargaining and that unless it reconsiders promptly, the municipal employer will implement its proposed change.*

If the decision is not specifically addressed in the labor contract, the employer may propose the change to the union and, if a timely request is made, bargain over it, with some possible exceptions. First, a zipper clause *in the collective bargaining agreement would preclude mid-term bargaining on the proposed change unless the union agrees to re-negotiate that provision in the contract. Second, the change could be* preempted *by the agreement if the general issue involving the decision was dealt with extensively in the contract even though the specific issue was not.*

Where there is no zipper clause or preemption, the employer may propose the change to the union, and the union has a duty to bargain in good faith over the proposal. The duty to bargain extends to proposed changes in past practices *not specifically addressed in the collective bargaining agreement. With respect to decisions affecting mandatory subjects of bargaining not addressed in the collective bargaining agreement, unless the union waives its right to bargain, a chief may not implement the decision until agreement or impasse.*

A chief must be careful to notify the union when hearing an employee's grievance. A union representative has the right to be present at such hearings to make sure the resolution does not conflict with the collective bargaining agreement, even if the employee does not choose to have the representative present for his/her own benefit.[27] *The employee also has the right, if he/she so requests, to have a union member present during an interrogation by the employer which an employee could reasonably expect might lead to disciplinary action, but the employee may waive this right.*[28] *If the Union sends an attorney as its representative, the chief must also allow that person to attend.*[29]

Lastly, even though no LRC case has addressed the matter directly, an employer should provide the union with a copy of all disciplinary hearing notices and decisions.

C. CONDITIONING BARGAINING ON THE OUTCOME OF PENDING LITIGATION

Neither party may refuse to bargain because a prohibited practice charge has been brought against it. Bargaining may not be contingent upon the withdrawal or resolution of pending prohibited practice charges or any other pending litigation.[30]

PRACTICE POINTERS

It is customary to resolve most pending LRC or arbitration cases which were filed during negotiations at the time agreement is reached on the collective bargaining agreement. This is especially true if the charges or grievances related to a party's conduct during negotiations. A party may propose including the resolution or dismissal of those cases as part of a settlement proposal. However, if the other party demands (to the point of impasse) that such "linkage" be dropped, it would be a prohibited practice to insist.

D. FAILING TO APPOINT A NEGOTIATOR

Both the public employer and the union usually designate representatives to act on their behalf at the bargaining table. The employer is required to appoint a negotiator.[31] Presumably so too is the union, but no LRC decision has involved this issue. The negotiator could be a third party (e.g., Labor Counsel or Personnel Board member(s)) or one or more members of the respective parties (e.g., Selectman or union member).

In order to satisfy its good faith obligations, the employer[32] must give its negotiating representative sufficient authority to make proposals at the bargaining table.[33] Although an employer does not have to be represented by a person with authority to conclude a binding contract, the character and powers of the employer's representative are factors which are considered in determining whether bargaining has been conducted in good faith. The LRC may find a violation of the duty if the employer's representative has authority to bargain but attends none of the bargaining sessions or has no authority to make commitments on any vital or substantive provision of a proposed agreement. The authority of an employer's representative is deficient if it is limited to the transmittal of proposals ("errand boy" doctrine) and the making of recommendations to the employer.[34]

The authority of the negotiator may be limited in some respects; for example, the parties (the public employer and the union) usually retain the right to ratify or disapprove the final contract package agreed upon by

their negotiating teams. If a party has limited the authority of its negotiator, it must inform the other party at the bargaining table. In the absence of an express limitation, the negotiating team will be deemed to have broad authority to bind contractually the party whom it represents.[35] For example, the Supreme Judicial Court has held that "in the absence of circumstances that make the assumption unreasonable, an employer has the right to assume that the principal officer of a union . . . has authority to act on behalf of that union . . . to bind it to agreements he/she makes."[36]

PRACTICE POINTERS

At the first bargaining session, the negotiators should fully disclose any limitations on their authority. This is best done by establishing clear ground rules for the conduct of the negotiations, so as to avoid claims of regressive bargaining and complaints of prohibited practice arising out of a negotiator's alleged lack of authority to make a proposal or reach an agreement.

A typical negotiating team for a municipality during negotiations for a collective bargaining agreement might include its labor attorney, the chief executive officer (manager, mayor, etc.) and/or a member of the board of selectmen, personnel board or finance committee. There is no requirement concerning who is appointed as a negotiator so long as that person or team has sufficient authority to conduct negotiations in good faith.

Unless there are compelling reasons not to do so, it is advisable to have the police or fire chief on the negotiating team as a resource person. The chief can point out during a caucus the implications of various union proposals. For example, some may impact overtime, others may conflict with management rights, and some may be impractical without hiring additional personnel. Also, claims that "we've always done it that way" can be refuted before the employer's negotiating team agrees to amend the contract inappropriately.

It is advisable to designate a principal spokesperson. Others on the team should refrain from speaking, holding most of their comments until a caucus is held.

Having a majority of the Board of Selectmen on the negotiating team is not recommended. Nor is it generally a good idea to include anyone who alone *has the authority to bind the employer. The Union could then argue that all oral "tentative agreements" discussed during negotiations are binding on the municipal employer without need of further ratification (or more thoughtful consideration).*

E. FAILURE TO SUPPORT A NEGOTIATED AGREEMENT

The employer's duty to bargain in good faith does not end once the contract has been signed by the parties. The public employer, through its chief executive officer, is also required to support the agreement before the legislative body and to submit the cost items in the contract for funding to the appropriate financing authority.[37] The cost items can include, for example, wage increases, uniform allowances, educational incentives, shift differential pay, etc. In a city or town, the appropriate legislative body is the city council or the town meeting (or any other body vested with the power of appropriation). Unless or until there is legislative appropriation to fund a cost item that cost item has no monetary significance.[38]

The duty to support the agreement before the appropriate legislative body extends to taking affirmative steps to defeat legislation which would prevent the employer from carrying out the terms of the agreement.[39] The chief executive officer (selectmen, mayor, manager, etc.) cannot sit silently while the funding request is being debated. This obligation rests with the chief executive officer alone; other municipal officials unconnected to the negotiations or members of the legislative body are free to speak out in opposition to the agreement. A belief by the chief executive officer that the legislative body will reject the funding request does not excuse the failure to submit the request. If, despite the support of the chief executive officer, the legislative body refuses to appropriate the funds required for any part of the agreement, the entire contract becomes, in effect, void, and the parties return to the bargaining table.[40]

An employer may not condition the funding of a contract on the outcome of a Proposition 2 ½ override.[41]

A town was found not to have committed a prohibited practice when members of the school committee successfully used their efforts to block funding of police and fire department contracts since the school committee is neither the town's chief executive officer nor the town's bargaining representative relative to the police and fire departments.[42]

Similarly, a town did not commit a prohibited practice when the town's finance committee (also know in some municipalities as the advisory committee) refused to support the funding of cost items in a negotiated collective bargaining agreement since the finance committee acts independently of the board of selectmen and since, in this case, there was no evidence that the board of selectmen were using the finance committee as a means of preventing funding for the agreement.[43]

A board of selectmen's obligation to support the negotiated agreement was not violated when the chairman of the board of selectmen gave to town meeting members an erroneous interpretation of the consequences of adopting a statutory provision relating to health insurance premium

contributions since his/her conduct as a whole really amounted to support for the agreement.[44]

No prohibited practice was committed, even though the members of the board of selectmen did not speak in favor of the funding request at the town meeting, where the town's executive secretary affirmatively spoke in support of the agreement and sat next to and spoke with the board of selectmen during the town meeting. After looking at the totality of the selectmen's conduct in connection with the allegation that there had been a failure to support the agreement, the Labor Relations Commission concluded that no prohibited practice occurred since the town meeting members could reasonably interpret the selectmen's action as being in support of the agreement where the executive secretary, who spoke in favor, was clearly acting as the agent of the Selectmen. The selectmen's silence, under the facts of this case, therefore, was not improper.[45]

On the other hand, a board of selectmen was found not to have satisfied its statutory obligation to seek funding of the agreement when it sat in silence and did not affirmatively support the funding request even though the finance committee had given a negative recommendation. The Labor Relations Commission noted that the selectmen's silence could be interpreted as agreement with the finance committee's recommendation, and that under the circumstances, the selectmen had the affirmative obligation "to convey clearly their support of the funding article."[46] The Labor Relations Commission also rejected various constitutional and public policy arguments made by the selectmen and concluded that requiring the board of selectmen to speak in favor of an agreement which they negotiated and to which they are a party does not infringe on their first amendment rights and does not impair the obligation of a public official to exercise independent judgment as to whether to support a negotiated collective bargaining agreement.

Such constitutional or public policy arguments could, however, be raised by a member of a board of selectmen who is elected to that position subsequent to the negotiation of a collective bargaining agreement.[47] Municipal officials did not fulfill their bargaining obligations to provide full funding of a minimum staffing obligation in a three-year collective bargaining agreement by submitting a budget that made full funding of the staffing provision contingent on town voters approving a property tax override to cover a budget shortfall.[48]

PRACTICE POINTERS

It is easier for a board of selectmen or mayor to support an agreement which it reached voluntarily with the union. However, this is not the case when an "agreement" is the result of an adverse award handed down by an arbitrator assigned by the Joint Labor-Management Committee (JLMC).

For example, if all other town employees and bargaining groups received a 3% pay increase, the selectmen or mayor may feel hypocritical having argued against a greater pay raise for police or fire employees for a year or more, only to be required now to "support" a 5% raise at town meeting or before the city council or board of aldermen.

The constitutional challenge raised before the LRC was not appealed to the courts. Therefore, it is possible that a freedom of speech argument could be made successfully in a judicial forum. However, rather than commit the time and money for such a challenge, most employers rely on other municipal officials to explain to the legislative (funding) body why the manager, mayor or selectmen appear *to have a change of heart.*

F. REPUDIATION OF AN AGREEMENT

The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement.[49] A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of the Law.[50] To determine whether the parties reached an agreement, the Commission considers whether there has been a meeting of the minds on the actual terms of the agreement.[51] If the evidence is insufficient to find an agreement, or if the parties hold differing good faith interpretations of the language at issue, the Commission will conclude that no repudiation has occurred.[52] If the language is ambiguous, the Commission examines applicable bargaining history to determine whether the parties reached an agreement.[53] There is no repudiation of an agreement if the language of the agreement is ambiguous and there is no evidence of bargaining history to resolve the ambiguity.[54] The Commission has long recognized that a meeting of the minds can occur without anything having been reduced to writing or having been signed by either party.[55] To achieve a meeting of the minds, parties must manifest an assent to the terms of an agreement.[56]

G. REFUSAL TO ACCEPT AND PROCESS GRIEVANCES

An employer's statutory obligation to meet and bargain with the exclusive representative under Section 6 of the Law necessarily extends to resolution of disputes under the grievance machinery of the collective bargaining agreement.[57] In a 2002 case, the Suffolk County Sheriff refused to accept and to process the approximately 200 grievances that Local 1134 filed on May 24, 2000 protesting the permanent appointments that he made on May 17, 2000. The employer defended his refusal to process the grievances on the grounds that the Union's filing of multiple

grievances is contrary to the basic tenets of the parties' collective bargaining agreement, namely cooperation and efficiency, and that Local 1134 should have filed a class action grievance. However, notwithstanding the fact that Local 1134's manner of filing the grievances may have been frustrating and inexpedient, Suffolk County did not have the right under the Law to refuse to process the grievances and demand that Local 1134 file a class action grievance instead.[58] If an employer elects not to file a prohibited practice charge against an employee organization for what it perceives to be an attempt to frustrate the grievance-arbitration process, it is not justified in resorting to self-help by unilaterally and arbitrarily insisting that its own view is the correct one, thus bypassing its duty to negotiate with its employees' exclusive representative.[59] Further, the record revealed that, even in the absence of a class action grievance, Suffolk County still could have held a single hearing on multiple individual grievances. Finally, Suffolk County insisted that the 200 grievances were both procedurally and substantively defective. However, it should have raised those defenses during the grievance process rather relying upon alleged flaws in the grievances as bases for refusing to accept the grievances. Accordingly, the LRC concluded that Suffolk County violated the Law by failing to bargain in good faith when it refused to accept and to process the grievances that Local 1134 filed on May 24, 2000.

H. FAILURE OR DELAY IN FURNISHING REQUESTED INFORMATION

A public employer's statutory obligation to bargain in good faith with the employees' exclusive bargaining representative includes the duty to disclose to the union information it requests which is relevant and reasonably necessary for the union to perform its duties as the exclusive bargaining representative (e.g., analyzing contract proposals or administering the contract).[60] The union's right to information includes that which assists it in determining whether a grievance should be filed or pursued.[61] A public employer has an obligation to provide only information that is within its possession or control[62], and it may not unreasonably delay in providing the union with such information.[63] Additionally, the fact that the information being sought by the union is a "public record"[64], or is available from some other source is no defense to a public employer's refusal to provide relevant and necessary information in its possession or control.[65] An employer may justify its refusal to provide information by demonstrating that it has legitimate and substantial concerns about disclosure of the information and that it has made reasonable efforts to provide as much of the information as possible.[66]

In determining whether an employer has violated its duty to provide requested information, the Labor Relations Commission applies a

balancing test. Under this test, the union must first show that the requested information is relevant and reasonably necessary for its duties as a bargaining agent. The standard for determining "relevancy" is broad and liberal.[67] Once the union has made this showing, the employer has the burden of demonstrating that its confidentiality or other concerns about disclosure of the information are legitimate and substantial, or that it has already made a reasonable effort to provide the union with as much of the requested information as possible.[68]

Note: See Chapter 11 - Furnishing Information.

I. AVOIDING UNILATERAL CHANGES[69]

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.[70] 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.[71] 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.[72] 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.[73] 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.[74]

Section 6 of the Law requires public employers and employee organizations to negotiate in good faith about wages, hours, standards of productivity and performance and any other term and condition of employment. It is well established that the manner in which an employer assigns overtime is a mandatory subject of bargaining.[75] Suffolk County's implementation of the February 24, 2000 policy changed the employer's method of assigning overtime because the policy did not permit LPN's to refuse one draft per year as was described in Osgood's notice that had been posted at the nurses' station since at least 1998. However, the evidence does not demonstrate that Suffolk County changed its method of assigning overtime by drafting off-duty LPN's and by ceasing to temporarily reassign LPN's who were drafted in

advance to fill a future vacancy as a result of the February 24, 2000 policy.

Finally, it is undisputed that Suffolk County did not provide Local 1134 with an opportunity to bargain to resolution or impasse before instituting this change in a mandatory subject of bargaining. Therefore, we conclude that Suffolk County violated Sections 10(a)(5) and (1) of the Law by unilaterally changing the method of assigning overtime without bargaining to resolution or impasse.

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.[76] 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.[77] To establish a violation of the Law, an actual change in an existing condition of employment must have occurred,[78] and the change must involve or impact a mandatory subject of bargaining.[79] 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.[80]

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.[81] 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.[82]

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.

Note: See Chapter 10: Mid Term Bargaining; Also, some labor attorneys interpret c.150E, §9 as precluding any changes to police and fire contracts after they expire.

J. GRANTING TIME OFF FOR BARGAINING

There is no requirement that union members be granted time off to attend bargaining nor to handle union business. Since this is a mandatory subject of bargaining, the employer must negotiate in good faith over a union proposal on the matter.

Even where a contract grants "unlimited time off for negotiations", an employer may require employees to respond to emergency calls for service during negotiations.[83] Where the practice has been to have all such calls handled by other on-duty personnel, it is likely that the employer must notify the union of its proposed change and afford the union an opportunity to bargain to agreement or impasse.

PRACTICE POINTERS

A large number of municipalities allow on-duty employees to attend negotiations. Most have not found this to be a big problem, especially if the number of eligible employees is limited (usually no more than 1 or 2). It is important to specify that on-duty personnel attend in uniform, with a radio, and respond to calls if needed.

Caution is urged to avoid having union officers or negotiating team members decide when on-duty time will be used to prepare for negotiations or to meet with other employees. Even if a practice has developed in this regard, a chief may tighten up the procedure if no contract provision specifically allows this. The chief would have to notify the union of a proposed change and, if requested, negotiate in good faith on a mid-term basis.

[1] The sections below all constitute examples of actions which constitute a refusal to bargain by a public employer.
[2] 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).
[3] *Brockton School Committee*, 19 MLC 1120 (1992).
[4] *Utility Workers of America*, 8 MLC 1193 (1981).
[5] 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.
[6] *Town of Saugus*, 2 MLC 1480 (1976).
[7] *Horner v. Boston Edison Co.*, 45 Mass.App.Ct. 139, 144 (1998).
[8] *Service Employees Int'l Union, AFL-CIO, Local 509 v. Labor Relations Comm'n*, 431 Mass. 710, 714-715 (2000).
[9] *Town of Auburn,* 8 MLC 1266 (1981) (town impermissibly approached two bargaining unit members and offered to pay them a wage increase for quitting the union); *Blue Hills Regional School Committee*, 3 MLC 1613 (1977) (finding school committee guilty of a prohibited labor practice when it gave wage increases to new teachers but withheld increase for incumbent teachers until they signed the new contract); *Lawrence School Committee*, 3 MLC 1304 (1976) (determining that school committee violated state law when it negotiated with junior high school principals to change summer wages and scheduled paydays). *See* M.G.L. c.150E § 10.
[10] *Service Employees International Union v. Labor Relations Commission*, 431 Mass. 710 (2000).
[11] *Id.*
[12] *Higher Education Council*, 25 MLC 69 (1998).
[13] *Commonwealth of Massachusetts Commissioner of Administration*, 24 MLC 113 (1998).
[14] *City of Taunton v. Taunton Branch of Massachusetts Police Association*, 10 Mass. App. Ct. 237, 406 N.E.2d 1298 (1980) (reversing arbitrator's decision imposing shift assignments because it hampered the chief's discretion and his ability to maintain public safety); *City of Boston v. Boston Police Patrolmen's Association, Inc.*, 8 Mass. App. Ct. 220, 392

N.E.2d 1202 (1979) (affirming police chief's right to refuse to issue service revolver to police officer even though it resulted in deprivation of overtime assignments and paid details).

[15] *Trustees of the University of Massachusetts Medical Center*, 26 MLC 149, 160 (2000); *Millis School Committee*, 3 MLC 1613 (1977).

[16] *Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission*, 431 Mass. 710, 715, n. 5 (2000], *citing* G.L. c. 150E, § 3.

[17] *Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission*, 431 Mass. 710, 715 (2000).

[18] *Id.*

[19] *Millis School Committee*, 23 MLC 99, 100 (1996); *Town of North Attleborough*, 4 MLC 1053, 1057 (H.O. 1977) aff'd 4 MLC 1585 (1977).

[20] *Id.* at 100.

[21] *Town of South Hadley*, 27 MLC 161, 163 (2001).

[22] *Id.*

[23] *Walsh v. Town of Randolph*, 2005 WL 17, § 2118 (Mass. App. Div.)

[24] G.L. c. 150E, § 6. *See* generally *City of Lynn v. Labor Relations Comm'n*, 43 Mass.App.Ct. 172 (1997); *Town of Randolph*, 8 M.L.C. 2044, 2052 (duty to refrain from direct dealing is corollary to employer's duty to bargain with exclusive representation). "To define the limits of direct dealing is therefore to do no less than to define the meaning of the exclusive representation concept, a basic building block of labor law policy under G.L. c. 150E." *Service Employees Int'l,* supra, at 715. More to the point, public employers such as Randolph are constrained in ways inapplicable to private employers; they are mandated by statute to "submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriate necessary to fund the cost items contained therein . . ." G.L. c. 150E, § 7(b). See, e.g., *Local 1652, Int'l Ass'n for Fire Fighters v. Town of Framingham*, 442 Mass. 463 (2004). The legislative body for Randolph is the town meeting. "If [that body] duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining." G.L. c. 150E, § 7(b). Simply put, the legislative and budgeting processes applicable to public employers seem to leave scant procedural room for separate pre-hire deals such as Walsh would enforce here. There is no evidence that the promise Wells made to Walsh was ever part of the reasoned procedure the Legislature has mandated. Suffering such "side" arrangements would circumvent this exclusive process, and would jeopardize the safeguarding of the public fisc it affords.

[25] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983). Mandatory subjects of bargaining are those with a direct impact on terms and conditions of employment, and have been found to include: work assignments, promotional procedures, and job

duties, *Town of Danvers*, 3 MLC 1559 (1977); working hours, work load, and seniority, *Medford School Committee*, 1 MLC 1250 (1975); pay schedules, *Lawrence School Committee*, *supra*; etc.

[26] Generally non-mandatory subjects of bargaining include those which involve "core governmental decisions," *Town of Danvers*, *supra*, such as limiting the amount of unscheduled overtime, *Town of West Bridgewater*, 10 MLC 1040 (1983); the decision to hire more employees, *Town of Andover*, 3 MLC 1710 (1977); minimum staffing per shift, *City of Cambridge*, 4 MLC 1447 (1977), etc.

[27] *Town of Billerica*, 13 MLC 1427 (1987).

[28] *Commonwealth of Massachusetts*, 9 MLC 1567 (1983) (establishing that employee, not union, must request the union's presence at an investigatory interview and that the employee may waive this right); *Commonwealth of Massachusetts*, 6 MLC 1905 (1980) (determining that status of requested representative is irrelevant; can be a fellow employee or union steward); *Commonwealth of Massachusetts*, 4 MLC 1415 (1977) (affirming right to have union representative present at disciplinary meeting).

[29] Town of Hudson*, 25 MLC 143 (1998).*

[30] *Town of Dracut*, 14 MLC 1127 (1987); *Town of Hopedale*, 11 MLC 1413 (1985); *Southern Worcester County Regional Vocational School District*, 2 MLC 1488 (1976); *Town of Ipswich*, 4 MLC 1600 (1977).

[31] *City of Chelsea*, 3 MLC 1169 (1976). A parallel duty involves not interfering with the employees' choice of negotiator.

[32] The duty to supply the negotiator with sufficient authority also falls to the union, but again the majority of cases involve insufficient authority for the employer's negotiator, and thus the point is addressed in this section to stress the issue for public employers.

[33] *County of Norfolk*, 12 MLC 1005 (1985); *Watertown School Committee*, 9 MLC 1301 (1982).

[34] *Middlesex County Commissioners*, 3 MLC 1594 (1977).

[35] *Commonwealth of Massachusetts*, 19 MLC 1235 (1992).

[36] *Service Employees International Union v. Labor Relations Commission*, 410 Mass. 141, 571 N.E.2d 18 (1981).

[37] M.G.L. c. 150E §§ 7(b) and 10(a) require the public employer to submit the cost items for funding within 30 days after the date on which the agreement is executed by the parties. However, where the agreement flows from an arbitration award, the JLMC statute requires that in towns it be submitted for funding at the next special or regular town meeting without any set number of days.

[38] *County of Suffolk v. Labor Relations Commission*, 15 Mass. App. Ct. 127, 444 N.E.2d 953 (1983).

[39] *Turners Falls Fire District*, 4 MLC 1658 (1977).

[40] *Commonwealth of Massachusetts*, 4 MLC 1869 (1978).

[41] *Local 1652, Intern. Ass'n of Firefighters v. Town of Framingham*, 442 Mass. 463, 813 N.E.2d 543 (2004).
[42] *Town of Swampscott*, 3 MLRR 1003 (1975).
[43] *Town of Webster*, 4 MLRR 1296 (1997).
[44] *Town of North Attleborough,* 4 MLRR 1300 (1977).
[45] *Town of Billerica*, 4 MLRR 1348 (1978).
[46] *Town of Rockland*, 16 MLRR 1211 (1989).
[47] *Labor Relations Commission v. Dracut*, 374 Mass. 619 (1978).
[48] *Local 1652, International Association of Firefighters v. Town of Framingham*, 442 Mass. 463, 813 N.E.2d 543 (2004).
[49] *Commonwealth of Massachusetts*, 26 MLC 165, 168(2000); *citing City of Quincy*, 17 MLC 1603 (1991); *Massachusetts Board of Regents of Higher Education,* 10 MLC 1196 (1983).
[50] *Town of Falmouth*, 20 MLC 1555 (1984); *aff'd sub. nom., Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997).
[51] *See Town of Ipswich,* 11 MLC 1403, 1410 (1985); *aff'd sub. nom, Town of Ipswich v. Labor Relations Commission,* 21 Mass. App. Ct. 1113 (1986).
[52] *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1986).
[53] *Id.; Commonwealth of Massachusetts*, 16 MLC 1143, 1159 (1989).
[54] *Commonwealth of Massachusetts*, 28 MLC 8, 11 (2001); *citing, Town of Belchertown*, 27 MLC 73 (2000).
[55] *Town of Ipswich,* 11 MLC 1403, 1410 (1985); *aff'd sub. nom., Town of Ipswich v. Labor Relations Commission,* 21 Mass. App. Ct. 1113 (1986); *citing Turner Falls Fire District*, 4 MLC 1658, 1661 (1977).
[56] *See Commonwealth of Massachusetts*, 26 MLC 211 (2000).
[57] *Suffolk County Sheriff's Department,* 28 MLC 253, 261 (2002); *Ayer School Committee,* 4 MLC 1478, 1483 (1977).
[58] *See Suffolk County Sheriff's Department,* 28 MLC at 261.
[59] *Town of Framingham,* 19 MLC 1661, 1663 (H.O. 1993), *aff ii,* 20 MLC 1563 (1994); *Town of Hudson,* 25 MLC 143,147 (1999).
[60] *Higher Education Coordinating Council*, 19 MLC 1035 (1992); *Board of Trustees, University of Massachusetts*, 8 MLC 1139 (1981); *Commonwealth of Massachusetts* 11 MLC 1440 (1985); *Boston School Committee*, 10 MLC 1501 (1984). While there is sparse case law on point, the obligation to furnish information applies to the union as well as to the public employer. Theoretically, a prohibited practice charge could be filed with the Labor Relations Commission against the union, alleging that the union has not bargained in good faith if it refuses a request by the employer for information relevant and reasonably needed by the employer in the performance of its bargaining obligations.
[61] *Commonwealth of Massachusetts*, 21 MLC 1499 (1994).
[62] *Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority*, 12 MLC 1531 (1986).

[63] *Higher Education Coordinating Council*, 19 MLC at 1036 (holding that delay of two years was unreasonable); *Massachusetts State Lottery Commission*, 22 MLC 1468 (1996); *City of Boston*, 8 MLC 1419 (1981).
[64] *See* M.G.L. c. 66 § 10, and its definitional counterpart, c. 4 § 7(26).
[65] *Board of Regents*, 19 MLC 1248 (1992).
[66] *Commonwealth of Massachusetts*, 11 MLC 1440 (1985).
[67] *City of Boston*, 19 MLC 1327 (1992).
[68] This issue will be addressed in Chapter 5 dealing with the duty to furnish information. In that section, the issue of financial disclosures and the Fair Information Practices Act will also be addressed.
[69] 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.
[70] *School Committee of Newton v. Labor Relations Commission,* 338 Mass. 557 (1983).
[71] *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).
[72] *Commonwealth of Massachusetts,* 20 MLC 1545, 1552 (1984); *City of Boston,* 20 MLC 1603, 1607 (1994).
[73] *Swansea Water District,* 28 MLC 244,245 (2002); *Commonwealth of Massachusetts,* 23 MLC 171,172 (1997); *Town of Chatham, 21* MLC 1526, 1531 (1995).
[74] *Commonwealth of Massachusetts, 23* MLC at 172.
[75] *See Commonwealth of Massachusetts,* 17 MLC 1007, 1012.
[76] 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.
[77] *Commonwealth of Massachusetts*, 19 MLC 1069 (1992).
[78] *City of Peabody*, 9 MLC 1447 (1982).
[79] *Town of Billerica*, 8 MLC 1957 (1982).
[80] *Commonwealth of Massachusetts*, 9 MLC 1355 (1982).
[81] *Hanson School Committee*, 5 MLC 1671 (1979), discussed *supra* in § 4, "Reaching Impasse".
[82] *Town of Bellingham*, 21 MLC 1441 (1994).
[83] *Town of Dracut*, 24 MLC 37 (1997).

CHAPTER 5 - UNION'S DUTY TO BARGAIN IN GOOD FAITH

Public employee labor unions also have some specific good faith bargaining responsibilities. While the charge of refusal to bargain in good faith is less frequently leveled against a labor union than an employer, there are some circumstances where unions have been found to have failed to satisfy the duty.

A. REFUSAL TO BARGAIN IN GOOD FAITH

Section 10(b)(2) of the Law prohibits the employees' exclusive bargaining representative (union) from refusing to bargain in good faith with the employer.[1] A union's obligation to bargain in good faith mirrors an employer's bargaining obligation under section 10(a)(5).[2] Thus, in *Fairhaven*, the Labor Relations Commission (LRC) ruled in an advisory opinion that the union could not refuse to bargain over a town's proposal for a drug-screening program.[3] After determining that drug testing of public works employees was a mandatory subject of bargaining,[4] the LRC went on to say that the union's concerns about impairing employees' constitutional rights by agreeing to drug screening were insufficient to justify a complete refusal to bargain.[5] There is no obligation, however, to bargain over a permissive subject of bargaining.[6] But, if the union fails to bargain, management may implement its mid-term proposal!

A union can also fail to satisfy the good faith requirement if it refuses even to consider the employer's proposals. In *Utility Workers of America*, the LRC found that the union had not bargained in good faith when it adopted a "rigid" position at the bargaining table and completely refused to discuss the employer's proposals.[7] Further, the Commission held that the union could not refuse to discuss the proposals merely because they were "take away" items.[8] Similarly, in *NAGE, Unit 6*, the union was found to have failed to bargain in good faith because its representatives insisted on discussing only non-economic items.[9]

Another way that a union can violate its duty to bargain in good faith would be to circumvent the employer's selected representative.[10] For example, when an AFSCME union lobbied for an increase in health insurance premium benefits at a town meeting, the union was found to have violated its good faith duty by failing to bargain with the employer's legal representatives.[11]

B. STRIKES AND WORK STOPPAGES

Section 9A of M.G.L. c. 150E (The Law) provides:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.[12]

Section 9A(b) provides further that the employer may petition the Commission to make an investigation when a strike has occurred or is about to occur. If the Commission finds a violation of § 9A(a), then it may institute proceedings in court against the union or employees involved in the strike. Prior to petitioning the LRC, the employer may take steps to prevent public services from being disrupted, as long at the action is taken in good faith.[13] The Commission has applied Section 9A(b) of the Law to situations where no further union activity is necessary before a strike begins. Under the Commission case law, that point is reached when a strike vote, as it did in the 2000 case of *Boston School Committee*, results in a decision to strike.[14] Section 9A(a) permits a public employer to petition the Commission to investigate alleged violations of Section 9A(a) "whenever a strike occurs or *is about to occur*." M.G.L. c. 150E, § 9A(b). (Emphasis added.). Where the evidence is speculative, or where the unit must take essential predicate action, such as a strike vote, before a strike can occur, the Commission has concluded that a threatened strike is not imminent.[15] However, where the union has taken all of the essential steps to undertake a strike, the Commission has found a violation of Section 9A(a). Under present Commission case law, that point is reached when a strike vote results in a decision to strike.[16]

The prohibition on strikes includes such activities as slowdowns or withholding of services.[17] Additionally, any type of work stoppage designed to influence bargaining or the conduct of negotiations violates the duty to bargain in good faith.[18] Thus, in *City of Medford*, the Commission found that the police officers engaged in an illegal strike since the level of absenteeism was excessive, and because the action immediately followed a failed attempt at mediation.[19]

The Commission and the courts have avoided addressing whether Section 9A of the law is unconstitutional because it impinges on the union's First Amendment right to communicate with its members about a possible strike. The LRC limits its orders to prohibiting only actually withholding of services and any associated union inducement, encouragement, or condonation. Therefore, any such order does not inhibit any right

employees or union representatives may have to advocate the right of public employees to strike.[20] (SJC expressly declined to decide whether discussion about the desirability of a strike is concerted protected activity).[21]

Section 1 of the Law defines a strike as:

> A public employee's refusal, in concerted action with others, to report for duty, or his [or her] position, or his [or her] stoppage of work, or his [or her] abstinence in whole or in part form the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the allege strike…

Where a petitioner files a strike petition solely against an employee organization, the Commission applies a two-part analysis to determine whether the employee organization has violated Section 9A of the Law. The petitioner must show by a preponderance of the evidence both that: (1) a concerted withholding of services took place; and (2) the employee organization induced, condoned, or encouraged the job action.[22]

Under the first prong of the analysis, the Commission, in the 2003 case of *City of New Bedford,* considered whether the City's police officers engaged in a concerted withholding of services on April 14 and April 15, 2003.[23] The Commission has held that an abnormally high rate of absenteeism, the similarity of employee excuses for absence, and the timing of the absenteeism coincident to expressions of frustration with labor relations may lead to an inference that bargaining unit members have engaged in a strike.[24] Possible indicia of union sponsorship of a job include: holding a strike vote, setting up picket lines, communicating to members encouraging them to withhold their services, and union leaders participating in the withholding of services.[25]

In *City of New Bedford*, although the city satisfied the first prong - with abnormally high absences, it could not show the union condoned or encouraged the withholding services.[26]

In a 2004 case, the Commission addressed several actions taken by the Bristol County Sheriff in response to an impending picket, including banning union notices at roll call, stopping the use of department phones for union business, curtailing time spent on duty for union business, issuing memos in violation of the negotiating ground rules and making a speech to employees threatening discipline for "troublemakers".[27]

PRACTICE POINTERS

The occurrence of a strike, slowdown, sick out or other job-action is rare among public safety personnel in Massachusetts. When contract talks are stalled, or tensions are high for other reasons, a chief should be watchful for such activities. Consultation with labor counsel is essential. The chief may use discipline to enforce work rules and standards of conduct, so long as this is not done in retaliation for the exercise of lawful union actions.

C. FAILING TO FURNISH INFORMATION

An employee organization is required to furnish information which the employer requests which is reasonably related to the bargaining process or to administering the contract.[28] This duty parallels the employer's duty to provide relevant information, and the standard for relevancy is the same liberal one as for employers.[29] The case law on this issue indicates that usually unions are charged with bad faith bargaining in regard to furnishing information only when they provide false or misleading information.[30] Accordingly, the LRC affirmed a hearing officer's ruling in *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority* that the union had failed to negotiate in good faith when it had knowingly provided the employer with false information concerning the operation of an employee pension plan, and failed to correct misrepresentations of material facts.[31]

PRACTICE POINTERS

An employer may charge the union with a violation of § 10(b)(1) if it interferes, restrains or coerces the employer in the exercise of any right guaranteed under the Law. As a practical matter, however, it is usually more expeditious for a chief or employer to take appropriate action themselves rather than seeking the assistance of the LRC. The latter would take a great deal of time and usually could only order the union to cease its improper conduct. An employer has a much broader array of powers at its disposal in most cases. It could order employees to do something and discipline them for insubordination if they refused, for example.

D. IMPASSE PROCEDURES

A similar situation occurs under § 10(b)(3) if the union fails to "participate in good faith in the mediation, fact-finding and arbitration procedures set forth in sections eight and nine." While the employer is authorized to file a

charge at the Commission, there is not usually a compelling reason to do so. In the rare case where there is no arbitration provision in the grievance procedure of a collective bargaining agreement, and the union is not participating in good faith in the arbitration process under section eight, the employer could call this to the attention of the LRC or the arbitrator. The absence of reported cases probably indicates this is either not a problem or the statutory remedy is not viewed as effective.

PRACTICE POINTERS

Where an employer believes the union is not participating in good faith with the process set in motion by the JLMC, it may be worth considering seeking a declaration by the LRC. However, the Commission has taken a "hands off" attitude in most cases once the JLMC has exercised jurisdiction, despite its ruling that it has the authority to decide whether either party is in breach of its good faith obligations. Of particular assistance might be a request for a declaration by the Commission that one or more of the union's proposals are not mandatory subjects of bargaining. It is, after all, a prohibited practice for either party to insist to the point of impasse *on a non-mandatory subject of bargaining. Certainly if a union proposal involved a matter of exclusive managerial prerogative, or was illegal and not included in § 7(d), such a declaration from the Commission would be helpful. When coupled with the Commission's hands off propensity and the JLMC's apparent belief that all items are ripe for negotiation, an employer will have to be very persistent if it wants to succeed in these areas.*

[1] *Massachusetts State Lottery Commission*, 22 MLC 1519 (1996). This issue generally arises during contract negotiations. An employer usually will file a refusal to bargain charge against a union only if the union refuses to discuss one of its proposals at the bargaining table. A slightly different situation arises during the term of the collective bargaining agreement, as will be discussed later in Chapter 4 on Mid-Term Bargaining.

[2] A union may also be found to have refused to bargain in good faith should it interfere with the employer's administration of the collective bargaining agreement, as will be discussed in the chapter on mid-term bargaining. *See*, *Mass. State Lottery Commission*, 22 MLC 1519 (1996).

[3] *Fairhaven,* 20 MLC 1343 (1994).

[4] Citing *Town of Danvers*, 3 MLC 1559 (1977), which established a balancing test to determine whether a subject is mandatorily bargainable: weighing the employer's interest in maintaining a managerial prerogative versus the employees' interest in bargaining about subjects that directly affect wages, hours, and other terms and conditions of employment.

[5] 20 MLC at 1351. The LRC cited state and federal case law which indicated that the Fourth Amendment prohibition on unreasonable searches and seizures would not be implicated in the town's proposed drug-screening program.

[6] *IAFF, Local 1820*, 12 MLC 1398 (1985) (dismissing refusal to bargain charge against union because the union was not required to bargain over minimum manning, a permissive subject of bargaining).

[7] *Town of Braintree,* 8 MLC 1193 (1981).

[8] *Id.*

[9] *Comm. of Mass, Com'r of Adm.,* 8 MLC 1484 (1981).

[10] *Id.*

[11] *AFSCME, Local 1462*, 9 MLC 1315 (1982).

[12] M.G.L. c. 150E, § 9A(a).

[13] *Lenox Education Asso. v. Labor Relations Commission*, 7 Mass. App. 245, 486 N.E.2d 756 (1985); *Utility Workers of America, Local 466 v. Labor Relations Commission*, 389 Mass. 500, 451 N.E.2d 124 (1983).

[14] *Boston School Committee*, 27 MLC 32, 34 (2000); *City of Worcester*, 13 MLC 1627, 1630 (1987); *Boston School Committee*, 10 MLC 1289, 1290 (1983).

[15] *City of Worcester*, 13 MLC 1627, 1629 (1987).

[16] *Boston School Committee*, 30 MLC 129 (2004); *Boston School Committee*, 27 MLC 32, 34 (2000); *City of Worcester*, 13 MLC 1627, 1629 (1987).

[17] *Holbrook Education Assoc.*, 14 MLC 1737 (1988) (finding employees unlawfully withheld services).

[18] *Local 285, SEIU*, 17 MLC 1432, *aff'd*, 17 MLC 1610.
[19] *City of Medford*, 14 MLC 1217 (1988).
[20] *City of Worcester*, 13 MLC at 1630n.2, *citing Boston Teachers Union, Local 66 v. Edgar*, 787 F.2d 12 (1st Cir. 1986); *See Belhumeur v. Labor Relations Commission*, 432 Mass. 458, 471 n. 16 (2000).
[21] *See above Boston School Committee*, 30 MLC 129 (2004).
[22] *See e.g., City of Chicopee*, 6 MLC 2116, 2120-2121 (1980) (dismissing a strike petition where there was insufficient evidence that the union induced, condoned or encouraged the work stoppage).
[23] *City of New Bedford,* 29 MLC 198 (2003).
[24] *See Shrewsbury Education Association*, 26 MLC 103, 104 (2000); *Boston School Committee,* 14 MLC 1406, 1408 (1987); *Wakefield Municipal Light Department*, 13 MLC 1521, 1523 (1987).
[25] *See generally Belmont School Committee,* 21 MLC 1533, 1536 (1995); *Tewsksbury School Committee*, 12 MLC 1353, 1354 (1985); *Chicopee School Committee*, 6 MLC at 2120.
[26] *City of New Bedford*, 29 MLC 197 (2003).
[27] *Bristol County Sheriff's Department*, 31 MLC 6 (2004).
[28] *Massachusetts Nurses Association*, 16 MLC 1285 (1989); *Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority*, 12 MLC 1531 (1986).
[29] *See* § 5(F), supra.
[30] Often, when a failure to provide relevant information arises with respect to unions, the information at issue involves agency service fees, but agency fees will not be addressed here, and will be discussed in depth later in the manual.
[31] *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 12 MLC 1531 (1986).

CHAPTER 6 - IMPASSE RESOLUTION PROCEDURES

The role of the chief in negotiation impasse resolution procedures is limited. Typically, the chief will attend hearings and may serve as a witness for the public employer. This chapter is inserted primarily to assist chiefs in understanding the entire process.

Deadlocks occurring during negotiations over an initial or successor collective bargaining agreement involving public safety bargaining units may be submitted to the Joint Labor-Management Committee (JLMC) for investigation and resolution. Originally created by Chapter 1078 of the Acts of 1973 and most recently amended by Chapter 489 of the Acts of 1987, the JLMC may invoke all traditional methods of impasse resolution procedures including mediation, fact-finding and arbitration. When the latter is used, however, it is not binding on a municipality's legislative branch (City Council, Town Meeting, etc.).

The JLMC statute also authorizes parties to design their own dispute resolution procedures, thereby divesting the Committee of jurisdiction, by presenting a written agreement of their procedures to the JLMC. The agreement must be found to contain procedures for a final resolution of the dispute without resort to strike, job action or lockout. If the Committee subsequently finds that either party failed to abide by the procedures, it shall assume jurisdiction. It appears that this provision is rarely, if ever, used.

§ 1 COMPOSITION OF COMMITTEE[1]

Falling originally within the state's Executive Office of Labor (now part of the Executive Office of Labor and Workforce Development), the JLMC is statutorily exempted from that Office's jurisdiction. It is composed of fourteen members including a chairman and vice-chairman and various alternate members.

All gubernatorial appointments, Committee members are nominated as follows: three firefighters from nominations submitted by the Professional Firefighters of Massachusetts, International Association of Firefighters, AFL-CIO; three police officers from nominations submitted by the International Brotherhood of Police Officers, NAGE, SEIU, AFL-CIO, and the Massachusetts Police Association; and six by the Advisory Commission on Local Government, an M.M.A. affiliate.

The police representatives are not allowed to vote on matters exclusively pertaining to municipal firefighters and vice versa. The number of Committee members representing the Advisory Commission on Local government and those representing police or fire organizations voting on any matter coming before the JLMC must be equal.

The chairman is the chief administrative officer of the Committee. Prior to 2004, the JLMC has had one chairman since its creation, Professor John Dunlop of Harvard University, former U.S. Secretary of Labor. This accounted for the common reference to the JLMC as the "Dunlop Committee". Currently, the chairman is Samuel E. Zoll. The statute provides that the chairman may designate the vice chairman (currently Dr. Morris Horowitz) to act with full authority in his/her absence. The staff includes a management and a labor representative. They also employ several field staff persons who function as investigators and mediators.

§ 2 JURISDICTION[2]

The JLMC has oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters. It is authorized to take jurisdiction in any dispute over the negotiations of the terms of a police or fire collective bargaining agreement. In this regard it may decide whether a prohibited practice charge filed with the Labor Relations Commission (LRC or Commission) shall or shall not prevent arbitration pursuant to the Commission's procedures.

The JLMC appears to be authorized to investigate the status of all police and fire contract negotiations, requiring the parties to submit a variety of documents and information. However, in practice the Committee acts in response to a petition filed either jointly or by one party to such negotiations, typically after negotiations become stalled. The JLMC is given thirty days to determine whether to exercise jurisdiction over the dispute. The failure to exercise jurisdiction, or failure to act within thirty days, theoretically means that the petition is automatically referred to the state's Board of Conciliation and Arbitration. The latter is the agency charged with resolving impasses in all other public sector bargaining unit negotiations. (It also provides a mediation and arbitration service for grievances.) While the JLMC's statute states that such referral takes place "automatically", such is not the case. Since the Committee is authorized to remove any such matter from the Board at any time, the Committee simply retains the petition, continuing it periodically until a determination is made. If they exist at all, instances in which the Committee has declined jurisdiction are rare.

§ 3 INVESTIGATION AND MEDIATION

Upon receipt of a petition,[3] one of the JLMC's field investigators is assigned to meet with the parties and report to the Committee at one of its periodic meetings on the status of negotiations and the issues in dispute. The "investigator" often engages in mediation efforts if that is seen as worthwhile. While this occasionally has resulted in a deferral of a formal vote to exercise jurisdiction, the trend appears to be towards taking the vote and authorizing the staff member to continue to pursue mediation, providing periodic reports to the Committee on the status of such efforts.

Following the formal exercise of jurisdiction, the Committee has available to it the full range of traditional impasse resolution procedures, i.e., mediation, fact-finding and arbitration. Prior to invoking the latter two (which require a formal hearing under subsection (3)(a)), the Committee typically engages in many months of mediation. These efforts are conducted both in the municipality and at the Committee's Boston office. Typically the former are conducted by the field investigator. he/she meets with the parties separately most of the time, engaging in "shuttle diplomacy". Face to face meetings are typically reserved for situations where the number of issues have been narrowed to the point where final agreement (or disagreement) is near at hand. Where additional mediation efforts appear justified, the parties may be required to "come to Boston" for more formal sessions. Note: While rarely used, the JLMC has subpoena powers. Mediation sessions held at the Committee's office often also involve the JLMC's management and labor staff members. In more difficult cases, a representative from the police or fire and management side of the Committee, and often the vice chairman, may attend such mediation efforts. While there are no rules preventing it, rarely are more than two or three of such sessions held before the Committee moves the process to the next level.

§ 4 FACT FINDING AND ARBITRATION

Should mediation efforts fail to produce a collective bargaining agreement, the JLMC may hold a hearing -- called a "(3)(a) hearing" based on its statutory origin -- to decide how to proceed. The hearing is held at the Committee's Boston office, usually under the direction of the vice-chairman, with a Committee member representing management and one from the police or fire side as appropriate.

At a (3)(a) hearing, the parties are given the opportunity to present their views on the status of negotiations, to submit a list of unresolved issues, and to make a recommendation as to how the Committee should proceed (e.g. more mediation, fact-finding or arbitration.) The statute requires the Committee to identify:

- the issues that remain in dispute;
- the current position of the parties;
- the views of the parties as to how the continuing dispute should be resolved; and
- the preferences of the parties as to the mechanism to be followed in order to reach a final agreement between the parties.

The statute also requires the Committee to make a finding that there is an apparent exhaustion of the process of collective bargaining which constitutes a potential threat to public welfare as a precondition to notifying the parties of its findings and the invocation of additional dispute resolution mechanisms. However, this is viewed as a mere formality and little attention is paid to this provision of the statute. Unions appear free to submit little or no evidence on the subject. Management efforts to dispute the proposition are generally viewed as a waste of time.

In most instances, an agreement by the parties as to how to proceed appears to be adopted by the Committee. While fact-finding is an option, the majority of cases reaching the (3)(a) level are sent to some form of arbitration. The Committee maintains a list of approved private arbitrators, some of which also serve on the panel of the well-recognized American Arbitration Association (AAA), and have extensive experience in public sector labor cases. Some arbitrators act alone, while others have a union and management representative from the Committee on the panel. On occasion, the chairman or vice-chairman may act as the arbitrator, in which case there will be one labor and one management representative from the Committee assigned.

The scheduling and conduct of the arbitration hearings are left to the arbitrator. However, the Committee's field investigator usually monitors the progress. Although theoretically the arbitrator arrives with a "clean slate", the close relationship of the JLMC staff and both inside and outside arbitrators often means that the history of the bargaining and the parties' earlier positions are "common knowledge".

The statute lists eleven factors among those to be given weight in both fact-finding and arbitration hearings and awards:

(1) such an award which shall be consistent with: (i) section twenty-one C of chapter fifty-nine of the General Laws, and (ii) any appropriation for that fiscal year from the fund established in section two D of chapter twenty-nine of the General Laws;

(2) the financial ability of the municipality to meet costs. The commissioner of revenue shall assist the committee in determining such financial ability. Such factors which shall be taken into

consideration shall include but not be limited to: (i) the city, town, or district's state reimbursements and assessments; (ii) the city, town or district's long and short term bonded indebtedness; (iii) the city, town, or district's estimated share in the metropolitan district commission's deficit: (iv) the city, town, or district's estimated share in the Massachusetts Bay Transportation Authority's deficit; and (v) consideration of the average per capita property tax burden, average annual income of members of the community, the effect any accord might have on the respective property tax rates on the city or town;

(3) the interests and welfare of the public;

(4) the hazards of employment, physical, educational and mental qualifications, job training and skills involved;

(5) a comparison of wages, hours and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public and private employment in comparable communities;

(6) the decisions and recommendations of the fact-finder, if any;

(7) the average consumer prices for goods and services, commonly known as the cost of living;

(8) the overall compensation presently received by the employees, including direct wages and fringe benefits;

(9) changes in any of the foregoing circumstances during the pendency of the dispute;

(10) such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service or in private employment; and

(11) the stipulation of the parties.

Should a case be sent to a fact-finder, the statute is less specific than it is in arbitration cases about what is involved. While not required to do so, the Committee appears to look for guidance at the fact-finding proceedings specified in Chapter 150E in non-police and fire cases where the Board of Conciliation and Arbitration is involved. The selection of a fact-finder and the composition of a single or three-person panel parallels the procedure for arbitration. The conduct of the hearings and the criteria to be considered are similar as well. The major distinction, of course, is the non-binding nature of the fact-finder's final report.

A fact-finder's report is usually given to the parties for a short time before it is made public, in the hopes that it will prompt the parties to reach an agreement. If no agreement results, with or without additional mediation efforts by the JLMC and its staff, the case presumably will be referred to arbitration. This appears to require an additional (3)(a) hearing unless the Committee's order in the first place encompassed arbitration in the event fact-finding did not result in an agreement.

§ 5 SCOPE OF ARBITRATION

The statute authorizes the JLMC to refer some or all of the issues still in dispute at a (3)(a) hearing to an arbitrator. The Committee claims to possess the authority to require parties not only to limit issues in dispute, but to drop those not referred to arbitration. However, if not all such issues are sent to arbitration, the statute envisions that the Committee "direct the parties to conduct further negotiations concerning issues not specified for arbitration."[4]

The scope of arbitration in police cases is limited to wages, hours, and conditions of employment. The statute does not specify "standards of productivity and performance" as does c. 150E and no case has decided whether this is encompassed within "conditions of employment." However, the JLMC statute excludes the following which it refers to as "matters of inherent managerial policy": the right to appoint, promote, assign, and transfer employees.

§ 6 LIMITATIONS

In public safety cases, the JLMC statute states that no municipal employer is required to negotiate over subjects of minimum staffing of shift coverage. This language also excludes minimum staffing (manning) from the scope of arbitration. Despite this, unions have been successful, especially in firefighter cases, in convincing the Labor Relations Commission (and the courts) that where safety is implicated, an exception to the blanket prohibition against negotiating over minimum staffing may exist.[5]

PRACTICE POINTERS

Neither fact-finding nor arbitration cases may include public safety personnel who will work less than full time. This little-known provision of the JLMC statute should be emphasized during any (3)(a) hearing so that the Committee's instructions to the fact-finder or arbitrator will contain this limitation.

Municipal employers should consider raising objections to non-mandatory subjects and issues of non-arbitrarily early in the negotiation process. This would involve filing a prohibited practice charge or request for an advisory opinion at the Labor Relations Commission. Waiting until the JLMC has become involved is unlikely to produce any administrative determination, or at least one in a timely manner. The LRC is likely to refer (defer) the matter to the JLMC which is unlikely to conduct a hearing or render a decision as the LRC might have done if the case had been brought prior to the JLMC's involvement. It is even possible that a more timely prohibited practice filing, where no decision has been issued, may be referred to the JLMC once that agency takes jurisdiction. All this may require a municipality to proceed to court before the arbitration is conducted for an injunction or declaratory judgment, or after an award issued for a declaratory judgment. It is also possible that a municipal employer could simply refuse to honor or submit for funding an arbitration award and raise the issue of arbitrability as a defense to a union-initiated case before the LRC or in court.

§ 7 FUNDING THE CONTRACT

In the event that an arbitration award would require funding, a municipal employer is required to submit it to the appropriate legislative body along with a recommendation for approval of said request. Where the legislative body is a town meeting, the submission must take place at the earlier of either the next occurring annual town meeting or the next occurring special town meeting. In all other situations, the funding request must be submitted within thirty days after the date on which the arbitration decision or determination is issued. Where the employer fails to make a timely request for funding, the remedy would be the filing of a complaint in superior court for a Writ of Mandamus seeking to compel such submission. The employer may not condition funding on the outcome of a Proposition 2 ½ override.[6]

When the Mayor of Melrose delayed beyond thirty (30) days in submitting a request to the Board of Aldermen to fund a JLMC award, the firefighters asked the Commission to award interest.

The Appeals Court noted that as the party challenging the commission's decisions, the union has failed to meet its burden of proving that the commission abused its discretion by refusing to order the city to make the interest payments which its seeks.[7] While the commission generally enjoys considerable discretion in fashioning its remedies,[8] under the circumstances presented by these cases, the commission's arsenal of remedies is limited because "no 'cost item' which is called for by a collective bargaining agreement between a 'public employer' and an '[e]mployee organization' . . . can assume any monetary significance unless

or until there is a legislatively established appropriation from which the item can be paid."[9] The commission observed that pursuant to St. 1973, c. 1078, § 4A(3)(a), as appearing in St. 1987, c. 589, § 1, the JLMC award was subject to the same type of funding contingency as a collective bargaining agreement under G.L. c. 150E, § 7(b); consequently, this principle also applies to the JLMC's July 25, 1994, award. A 70. During the periods in issue, there was no legislatively established appropriation upon which an order to pay interest could be based. Accordingly, the commission's decisions are affirmed.

Both the municipal employer and the union are required to support the arbitration award or decision in the same way they are required to support any other decision or determination they agreed to under c. 150E.

PRACTICE POINTERS

This "duty to support" causes some difficulty for certain local government officials. When the arbitration award is contrary to the position they took throughout negotiations, it is hard to embrace and recommend that the City Council or Town Meeting fund it. While "free speech" rights issues are often discussed in this context, no such constitutional challenge has been decided to an appellate court to date. (In Dracut, the SJC declined to rule on this constitutional issue.) A similar situation occurs when certain selectmen, for example, are not in support of a negotiated, never mind an arbitrated contract. While the LRC is not likely to agree, selectmen in the minority who cast their vote against ratifying a contract, might be free to speak at a Town Meeting against its funding. Where the composition of the board of selectmen was changed between the arbitration award and the town meeting, newly elected selectmen would not be required to support the funding at town meeting.[10]

The failure to support a funding request would likely result in the filing of a prohibited practice charge by the union alleging a violation (presumably of §10 (a)(5)) of the duty to bargain in good faith. Any remedy, however, would not include a requirement that a municipality fund the agreement.

The JLMC statute contains a rarely if ever used penalty clause which authorizes the Superior Court to fine either side which "willfully disobeys a lawful order of enforcement or willfully encourages or offers resistance to such order, whether by strike or otherwise." The amount of fine, calculated daily, is to be in addition to such other remedies as the court may determine.

Should the legislative body vote not to fund the award or decision, it ceases to be binding on the parties and the matter is returned to the parties for future bargaining. The statute allows the JLMC to take such further action as it deems appropriate.

An arbitration award may be retroactive to the expiration of the last contract. This provision of the JLMC statute appears to conflict with the statutory provision which limits a municipality's ability to appropriate funds to the current year and back to the start of the prior fiscal year. While a court might rule differently, the LRC has decided that the conflict is to be resolved in favor of the broader provision in the JLMC statute. Therefore, subject only to the three year contract duration provision of c. 150E § 7(a), an arbitration award requiring funding for multiple prior fiscal years may be approved by the municipality's legislative body.

[1] *See* JLMC § 4 A (1) of Chapter 489 of the Acts of 1987 regarding the appointment of JLMC members.
[2] *See* § 4 A (2) of the Acts of 1987 regarding the jurisdiction of the JLMC.
[3] *See* Appendix Form 13 for copy of forms.
[4] *See* § (3)(a) of the JLMC statute regarding the conducting of a hearing and the referral of disputes to fact-finding or arbitration.
[5] *See* § (3)(a)(2) or in the second set of subsections listing authorized procedures and mechanisms.
[6] *Local 1652, Intern. Ass'n of Firefighters v. Town of Framingham*, 442 Mass. 463, 813 N.E.2d 543 (2004).
[7] *See School Comm. of Boston v. Labor Relations Commission*, 40 Mass.App.Ct. 327, 330 (1996).
[8] *Secretary of Admn. & Fin. V. Labor Relations Commn.*, 434 Mass. 340, 343 (2001).
[9] *County of Suffolk v. Labor Relations Commn.*, 15 Mass.App.Ct. 127, 132, 133 (1983), *quoting from* G.L. C. 150E, § 1.
[10] *Labor Relations Commission v. Board of Selectmen of Dracut*, 374 Mass 619, 373 N.E.2d 1165 (1978).

CHAPTER 7 - CONTRACT INTERPRETATION

This chapter will examine various general contract interpretation problems, such as the effect of oral agreements, multi-year contracts, past practices, zipper clauses, and duties under an expired contract. The nature of the inquiry into whether the parties had a "meeting of the minds" on the meaning of a particular contract provision will be evaluated as well.

The parties to a collective bargaining agreement may disagree about the proper interpretation of the agreement's provisions. The collective bargaining agreement itself may provide a resolution mechanism for contract disputes in the form of binding grievance arbitration. In the absence of such a provision, the Labor Relations Commission (LRC) may order the parties to participate in binding grievance arbitration in the event of a dispute concerning the interpretation or application of the contract.

The parties to a collective bargaining agreement (primarily the union) typically invoke the grievance procedure when there is a dispute over a provision of the contract, and these disputes are often based on some common problem areas.[1] Frequent areas of dispute involve oral agreements, past practices, multi-year contract provisions, zipper clauses, and also whether the parties ever had a meeting of the minds on the particular contract provision.

"The first principle is that 'arbitration is a matter of contract' and cannot therefore be imposed if it is not a part of the bargained-for exchange.[2] Courts recognize, however, that "a collective bargaining agreement is not an ordinary contract."[3] A collective bargaining agreement governs an entire, evolving labor-management relationship. It is negotiated in a highly regulated environment that determines the certification and decertification of unions and establishes bargaining obligations of unions and employers. A collective bargaining agreement also promotes the equitable, efficient, and peaceful resolution of workplace disputes. Arbitration provisions play an important part of in the entire process, as they provided for the expeditious resolution of workplace disputes by decision-makers with expert knowledge of the common law of the shop.[4]

For these reasons, where the collective bargaining agreement "contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless

it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . particularly . . . where the clause is . . .broad' (emphasis added)."[5] In addition, when the arbitration provision being interpreted involves expiring contracts and changes in union representation, courts carefully consider the statutory context in which the agreements are negotiated.[6]

It is possible for a union to continue with a grievance even though an employee initiates an action that the contract says terminates the grievance process, so long as the union's issues are separate from those of the employee.[7]

Where a collective bargaining agreement contained grievance procedures, a 2002 Superior Court decision involving the Town of Acushnet dismissed a DPW worker's breach of contract claim for failure to first pursue his contractual grievance remedies.[8]

PRACTICE POINTERS

Occasionally a municipal employer may be faced with a court claim over a matter of contract interpretation. If the union or aggrieved employee has not filed a grievance and proceeded through arbitration, the employer should ask the court to dismiss the case for failure to exhaust administrative remedies.

A. JUDICIAL REVIEW

A court's role in reviewing an arbitrator's award pursuant to G.L. c.150C, §11, is limited.[9] General Laws c. 150C, § 11, inserted by St.1959, c. 546, § 1, provides, "(a) Upon application of a party, the superior court shall vacate an award if:--(1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party; (3) 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; (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party; (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or

grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award." "Courts inquire into an arbitration award only to determine if the arbitrator has exceeded the scope of his authority, or decided the matter based on 'fraud, arbitrary conduct, or procedural irregularity in the hearings.... To do otherwise would undermine the predictability, certainty, and effectiveness of the arbitral forum that has been voluntarily chosen by the parties.'"[10]

However, in a 2005 case involving the *Town of Watertown*, the Appeals Court stated: "The arbitrator's interpretation of the agreement was not based on any specific contractual language, nor has any contractual language supporting his interpretation been brought to our attention by the town."[11]

The *Watertown* court concluded that the Superior Court properly vacated the arbitrator's decision that the grievance was not arbitrable.

Once the decision in *Watertown* was vacated and the case was remanded, the arbitrator proceeded to consider the merits of the grievance itself. The Appeals Court had to decide whether the trial court properly affirmed the arbitrator's finding that there was no just cause to terminate an employee under the contract. This determination involved a core arbitrable function, and the court's review of the arbitrator's factual findings and contractual interpretation was extremely limited.[12]

The town contended that the arbitration award violated public policy by returning an employee to work despite proof that the employee had secured Family Medical Leave Act (FMLA) leave by deception. The arbitrator, however, essentially concluded that the individuals injury was serious enough and was sufficiently supported by medical evidence not to constitute an abuse of FMLA leave despite the exaggeration of his limitations and outright lies. The arbitrator also concluded that it was not unexpected for the employee's condition to improve during the FMLA leave. It is not the court's role to reinterpret the facts or to measure the level of misconduct justifying discipline or discharge under the contract.[13] It affirmed the arbitrator's conclusion that there was no just cause for termination, but imposing a two-week suspension.

Pursuant to its cross appeal, the union also sought attorney's fees because, under Federal labor law, a party may be ordered to pay attorney's fees and costs when "a challenge to an arbitration award is without justification."[14] Recognizing that there is no precedent to support its argument, WMEA requested that the Appeals Court create a State analogue. It declined to do so.

An arbitrator does not exceed his authority unless he ignores unambiguous provisions in a collective bargaining agreement or awards relief "of a nature which offends public policy or which directs or requires

a result contrary to express statutory provision…or otherwise transcends the limits of the contract of which the agreement to arbitrate is but a part."[15] A court has "no business overruling an arbitrator because [it gives] a contract a different interpretation."[16]

The 2003 case of *Massachusetts Correction Officers Federated Union v. Commissioner of Correction*, found that the Superior court had jurisdiction to confirm an arbitrator's award finding that the Department of Correction had violated the collective bargaining agreement by refusing to treat an employee's absences as substantiated by medical documentation, even though six years had passed since the award was issued. [17] No time limits existed for filing an action to confirm award, and the Department had never initiated an action to vacate or modify the award.

The court ruled that a party who fails to initiate an action to vacate or modify a labor arbitrator's award within the 30-day time limit specified in statutes is barred from asserting as a defense lack of jurisdiction. The court explained that the avowed purpose of the statutory provisions setting forth time limits for vacating, modifying or correcting labor arbitration awards is to afford finality and stability to the awards.

The court concluded that confirmation of an arbitrator's award finding was unwarranted six years after the award issued, where the Department had complied with the award, the union was trying to extend the award to six other employees whose medical evidence the Department had rejected as unsubstantiating, factual issues remained as to whether the employees' medical evidence substantiated their use of sick leave, and confirmation of the award would serve no useful purpose except to set the stage for possible, futile actions for contempt.

An arbitration award that offends public policy "is beyond the arbitrator's powers and is therefore subject to vacation under G.L. c. 150C, § 11 (a) (3)."[18] "[B]ecause the public policy 'doctrine allows courts to by-pass the normal heavy deference accorded to arbitration awards and potentially to "judicialize" the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy.' "[19]

In a 2002 case involving laid off instructors in Dedham, the Supreme Judicial Court found that the Superior Court judge's conclusion that the arbitration award violated public policy was clearly erroneous.[20] The sole reason for his conclusion was his determination that the award "clearly ignore[d] the law as stated in *Brophy v. School Comm. of Worcester.*[21] An alleged error of law is not a violation of public policy.[22] Nor is an error of law a permissible basis for vacating an arbitration award.[23] It is well settled that "[w]e do not, and cannot, pass on an arbitrator's alleged errors of law…." [24]

The City of Lynn appealed from Superior Court summary judgment effectively confirming an arbitration award in favor of a labor organization representing various city employees. The Appeals Court held that: (1) issue of remedy for city's violation of the collective bargaining agreement was arbitrable, and thus, the merits of the remedy chosen by the arbitrator was beyond the scope of judicial review, and (2) the award did not intrude on the city's management prerogative and statutory duty to decide matters of public safety.[25]

The court noted that the issue of a remedy for the city's violation of the seniority requirement in bypassing city employees within the bargaining unit represented by a labor union and appointing persons outside that unit to new "call taker" positions was arbitrable, and thus, the merits of the remedy chosen by the arbitrator was beyond the scope of judicial review, absent grounds for vacation of the award.[26]

In the absence of agreement as to the issues to be submitted to arbitration, the parties' underlying labor agreement controls.

The court held that the labor arbitration award did not intrude on the city's management prerogative and statutory duty to decide matters of public safety, where the arbitrator neither limited the city's authority to establish the qualifications and training of the persons to be appointed to newly created positions, nor contravened its obligation to "establish, staff, and operate" an around-the-clock public answering system.[27]

In a grievance proceeding filed by a teachers' association, an arbitrator determined that a state college violated its collective bargaining agreement with the association by terminating a full-time day tenured faculty member from teaching during evenings in the college's division of graduate and continuing education (DGCE) for one semester, and by indefinitely suspending the faculty member from teaching in DGCE thereafter, and the arbitrator awarded money damages to the faculty member.

The Appeals Court, held that:

(1) whether state college disciplined or terminated faculty member, and whether any such discipline or termination was without cause, were issues within ambit of arbitrator's authority;

(2) arbitrator's decision was not an impermissible delegation of college's statutory authority concerning staffing and personnel; and

(3) arbitrator's decision did not violate public policy.

A 2000 Appeals Court case involved the county sheriff's department's application to vacate arbitration award which ordered reinstatement of a previously-discharged jail officer with back pay. The Superior Court Department vacated the award and ordered a rehearing before a new arbitrator within 60 days and the officer's union appealed. The Appeals Court held that order vacating the arbitration award and ordering a

rehearing was not appealable.[28] A trial court's order for a rehearing before a labor arbitrator is not an act finally adjudicating the rights of the parties affected and, thus, is not appealable; the final adjudication occurs when the court acts after the arbitration proceeding is terminated.[29]

After the trial court vacated a labor arbitration award and ordered a rehearing before a new arbitrator, such court action would stand in abeyance pending the conclusion of course of arbitration proceedings; such decision of the trial court, and any subsequent decision of trial court, could be reviewed by the Appeals Court on any subsequent appeals to that court.[30]

In a 2005 Appeals Court case involving the Department of Corrections, the Union sued in Superior Court seeking confirmation of arbitration award, directing the employer to rescind the demotion of a union member and to substitute in its place a twenty workday unpaid suspension, as well as to make the member whole for lost pay and benefits, less the amount represented by the disciplinary suspension. The Appeals Court held that, although the union could have relied solely on the grievance procedure and treated the dispute as a new one under the collective bargaining agreement, the union was not required to do so before pursuing in Superior Court confirmation of the arbitration award.[31]

B. MEETING OF THE MINDS

In order for a contract or a contract provision to be enforceable in an arbitration proceeding or at the LRC, the parties must have reached a "meeting of the minds" on the substantive issues involved. When the parties attach fundamentally different meanings to a particular contract provision, then there is no meeting of the minds with respect to that provision. Thus, in *South Shore Regional School District Committee*, the ALJ found that each party had a fundamentally different impression as to whether the Supervisor of Building and Grounds was required to perform routine maintenance and custodial duties, and ruled that the School Committee did not repudiate the collective bargaining agreement because there had been no "meeting of the minds."[32] Predictably, the LRC has held repeatedly that when the parties never had a meeting of the minds, and as a result no agreement was formed, the employer cannot be required to execute the agreement as interpreted by the union.[33] Further, the LRC has required a meeting of the minds as to the specific contract provision at issue, not merely a general agreement to the contract.[34]

In making the factual determination as to whether a meeting of the minds has in fact occurred, the fact-finder (either an arbitrator or a LRC Hearing Officer/ALJ) in a contract interpretation dispute will look first to the written contract. In public sector bargaining, the parties are required to reduce the agreement to writing pursuant to Section 7(a) of c. 150E. In

the absence of a written contract, the fact-finder may still find that a meeting of the minds occurred, especially if the inference is supported by other documentation.[35] Where the parties agree to a proposal that is subject to ratification (by the union membership and/or the mayor/town board of selectmen, etc.), there is no meeting of the minds until that ratification occurs.[36] After the contract has expired, the fact-finder will not infer that the meeting of the minds continues unless the parties have explicitly agreed to continue the coverage of the collective bargaining agreement.[37]

PRACTICE POINTERS

The ground rules provide an opportunity to avoid subsequent disputes over whether an enforceable meeting of the minds occurred during negotiations. Negotiators should make it clear that all agreements are tentative and subject to ratification by the union membership and the Mayor, Manager or Selectmen.

C. ORAL AGREEMENTS

Though a collective bargaining agreement must be reduced to writing under Section 7(a), the LRC has held that oral modifications to an existing contract are effective if adequately documented. One of the few court cases dealing with the issue of oral agreements was *Service Employees International Union v. Labor Relations Commission.*[38] In that case, the SJC held that an oral agreement to amend the terms of a collective bargaining agreement was effective as long as the parties to the oral agreement were properly authorized to make such a change.[39] The Supreme Judicial Court (SJC) further held that a fact-finder charged with evaluating whether an oral agreement has in fact been reached is entitled to rely on the testimony of one or more of the parties to the oral agreement as evidence of the agreement and its terms.[40]

PRACTICE POINTERS

It is customary to insert a clause in a collective bargaining agreement that no oral modifications are allowed. In the absence of compelling circumstances, this should prevent a court from finding an oral agreement enforceable which contradicts the express terms of a collective bargaining agreement.

D. MULTI-YEAR CONTRACTS

A collective bargaining agreement may not exceed a term of three years.[41] The administration and interpretation of multi-year collective bargaining agreements do present some special problems for an arbitrator. For example, a public employer may not be required to maintain a minimum staffing provision after the first year of a multi-year contract if the municipality's legislative funding source (e.g., city council, town meeting, etc.) refuses to appropriate sufficient funds to adequately administer the provision.[42] Further, the SJC held in *City of Somerville v. Somerville Municipal Employees Association* that an arbitrator exceeded his/her authority in ordering the City to pay a salary increase when the City had not appropriated any money for that purpose.[43]

Cases such as *Town of Billerica* and *City of Somerville* apply only to situations involving an inherent managerial prerogative such as staffing requirements or wage increases, and also only apply when the funding source has refused to fund the provision. Outside of this narrow class of cases, the employer may not refuse, after the first year, to enforce the provisions of a multi-year agreement.

PRACTICE POINTERS

To avoid unintended obligations, an employer should include a clause in a collective bargaining agreement requiring annual appropriations. This will override the general rule that once a community agrees to fund the first year, all subsequent years are automatically included. Without such a clause, an employer might have to lay off employees or cut back in other areas in order to cover the additional costs of pay raises and other benefit increases in the second and third years of a multi-year contract.

The union will object to any such annual-appropriation requirement.

E. ZIPPER CLAUSES

A zipper clause is a contract provision which expressly states that all aspects of the collective bargaining agreement are contained within the four corners of the document.[44] The purpose of the zipper clause is to give notice that there are no outstanding matters which are to be incorporated into the contract.[45] A typical zipper clause will state that the collective bargaining agreement represents the complete and entire contractual agreement between the parties.[46] Additionally, zipper clauses are intended to remove a party's continuing obligation to bargain over all mandatory subjects of bargaining which have not yet been bargained over or incorporated into the bargaining agreement.[47] Traditionally, zipper

clauses were proposed by management to prevent a union from seeking additional benefits during the term of the contract.

Employers will often assert that the union, in agreeing to the clause, waived its right to demand bargaining during the life of the contract, and that management cannot be forced to negotiate during the term of the contract. However, the Labor Relations Commission (or an arbitrator) will not infer a broad waiver of the right to bargain when evaluating a very general zipper clause. In order for waiver to occur, the zipper clause must relate expressly or by way of reference to the particular activity in question.[48] Since most zipper clauses are rather general, they will only be enforced where the employer's particular actions are found to be covered or contained somewhere within the document.[49] Matters which are not expressly addressed in the contract nonetheless may be implied by the trier of fact as covered or contained in the agreement if the bargaining history of the parties indicates an intent to address the particular conduct at issue, by including it or purposefully leaving out the matter.[50]

In *Whitman-Hanson Regional School Committee*, the LRC examined whether the contract's zipper clause indicated that the union had waived its right to bargain over a particular issue.[51] The zipper clause read:

> This Agreement incorporated the entire understanding of the Parties on all issues which were or could have been the subject of negotiations. During the term of this Agreement neither Party shall be required to negotiate with respect to any such matter, whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the Parties at the time they negotiated or signed this Agreement.[52]

In determining the effect of the zipper clause, the LRC stated that in order for it to infer a waiver of the right to bargain, the employer must establish a waiver by showing, "a 'knowing, conscious or unequivocal' waiver of the right to bargain over a particular subject."[53] The LRC further held that a zipper clause "will not preclude a union from bargaining over *employer-initiated* changes affecting terms and conditions of employment unless those changes are contained in the language of the collective bargaining agreement."[54] Thus, in *Whitman-Hanson*, the LRC determined that the union had not waived the right to mid-term bargaining over attendance at a professional convention in light of the past practice allowing the teachers a day off to attend.

In *Town of Bellingham*, an ALJ found that a Town and its School Committee were not guilty of repudiating a zipper clause when they

unilaterally lowered the health insurance contribution rate.[55] This was because the ALJ found that the subject had not been considered by the parties during negotiations. Moreover, it was not dealt with directly in the contract nor had there been any understanding on the subject.

Typically, the zipper clause is invoked by the employer to avoid bargaining and as an affirmative defense to a union's charge of failure to bargain. In cases dealing with zipper clauses and enforcement of bargaining rights, the LRC takes a narrow view of whether a given matter is contained in the bargaining agreement. For example, in *Melrose School Committee* the LRC evaluated whether a zipper clause operated to bar the union from bargaining over the elimination of several teacher and administrator positions after a budget reduction.[56] The LRC held that although the layoff had been discussed in the initial negotiations, the employer had failed to carry its burden of proving that the matter had been discussed in depth and that the parties purposefully excluded it from the agreement.[57] Thus, the union did not expressly waive its right to bargain over the layoffs in the zipper clause.

In another *Whitman-Hanson Regional School Committee* case, the School Committee attempted to implement a bonus system for teachers who performed exceptionally well.[58] The LRC found that the bonus system was not contained in the agreement, and had not been intentionally left out of the agreement during negotiations. As a result, Commission determined that the School Committee had in fact committed a prohibited practice when it refused to engage in mid-term bargaining as the union requested.

Occasionally, there have been instances where the LRC has found that the union waived its right to bargain. For example, in *Commonwealth of Massachusetts*, the union alleged that the State unilaterally changed the hours of correction counselors without bargaining.[59] The State argued that the union contractually waived its right to bargain by agreeing to the following contract provision:

> When the employer desires to change the work schedule of employees, the employer shall, whenever practicable, solicit volunteers from among the group of potentially affected employees, and select from the qualified volunteers. The employer shall, whenever practicable, give any affected employees whose schedule is being involuntarily changed ten (10) days written notice of such contemplated changes.[60]

Here, the LRC found that the union did expressly and unambiguously waive its right to bargain over changes in work schedules. The difference between this provision and the zipper clauses in the above-cited cases is the level of specificity and the explicit reference to work schedule changes in this provision. Absent such an express, particularized waiver, the LRC has been loath to imply a waiver of a union's bargaining rights.

PRACTICE POINTERS

The sample Management Rights Clause (Appendix Form 12) contains a form of zipper clause. However, this retains much of the historical purpose of such clauses. It allows management to make mid-term proposals so long as they are not contradictory of specific contract provisions. On the other hand, the union is not allowed to insist on mid-term bargaining over its proposals, requiring the union to wait until regular negotiations are scheduled.

F. PAST PRACTICES

The existence of a relevant past practice becomes important in the event of a dispute between labor and management over the administration of the labor contract. Issues relating to past practices can arise either in the grievance arbitration context or the LRC prohibited practice context.[61] When a past practice implicates a mandatory subject of bargaining,[62] an employer commits a prohibited practice if it unilaterally changes this practice without providing the union with notice and an opportunity to bargain.[63] With respect to non-mandatory subjects, the employer must still bargain over the impact of the decision prior to implementing the change, if the union makes a timely request.

When a particular course of conduct takes place over a protracted period of time and is not objected to by the parties, a past practice is said to be in effect even though the collective bargaining agreement may not mention the practice. Arbitrators often require that a past practice be clearly enunciated, unequivocal, consistently followed over a reasonably long period of time, and shown by the record to be mutually accepted by the parties.[64] The LRC, however, downplays the mutuality requirement and focuses more on the consistency, frequency, and duration of the past practice (or "pre-existing condition of employment").[65] As a result, in determining whether a past practice exists, the fact-finder must weigh the facts of each individual case for evidence of the practice and must carefully evaluate the language of the contract.[66] In determining whether a past practice is binding, both arbitrators and the LRC also will consider the reason for which the past practice is asserted: to support an interpretation of an ambiguous or general contract term, to create an

independent term or condition of employment, or to modify or amend the clear language of the agreement. Predictably, most fact-finders are more comfortable establishing a past practice as a condition of employment when it can be tied in some fashion to the language of the contract.

The party seeking to assert a past practice, generally the union, must be careful to provide sufficient factual evidence confirming the existence of the past practice. Merely showing that a prior contract contained a provision relating to a particular practice has been held insufficient for demonstrating the existence of the past practice in the absence of additional evidence that the parties actually engaged in the practice.[67]

As long as the past practice is supported and confirmed by sufficient factual evidence, the LRC will enforce the practice as a condition of employment. Thus, the LRC has found that the following situations constitute unlawful unilateral changes in past practices:

- requiring a psychiatric exam as a condition of returning to duty after a disciplinary suspension;[68]
- requiring a break in service as a condition precedent to paying police officers their four hour minimum under the "call back" clause of the collective bargaining agreement";[69]
- no longer allowing union materials in the fire station or union meetings to be held there;[70]
- no longer allowing the union to address new recruits during the orientation program;[71] and
- transferring duties previously performed by members of the bargaining unit to non-unit employees.[72]

While frequency of occurrence is typically a factor considered in the determination of a past practice, the LRC has occasionally affirmed a past practice even though the practice was infrequent and utilized only in particular situations. In *Town of Arlington*, the Chief of Police had canceled all paid detail work because of a lack of volunteer officers to work an unpopular but critical paid detail.[73] Overturning the Hearing Officer, the LRC held that the Chief had established a past practice of assigning priorities to paid details, and had canceled all paid details ten to twelve years previously when officers refused to volunteer for a public works project.[74] The LRC cited an earlier case, *Town of Lee*, which held that a consistent past practice that applies to rare circumstances may nonetheless be a condition of employment whenever the circumstances precipitating the practice recur. [75] Thus, in *Arlington*, the LRC held that the town had not unlawfully unilaterally changed the means of assigning paid detail work when it canceled the low priority details until the critical detail was filled.[76]

NOTE: See Chapter 9 - Unilateral Changes in Working Conditions.

G. EXPIRED CONTRACTS

While most municipalities continue to honor the terms of a collective bargaining agreement even after it expires, this may not be their only option in police and fire cases. So long as an employer provides the union with notice and opportunity to bargain, and, if requested, bargains to agreement or impasse, *unless G.L. c. 150E, s. 9 is applied to police and fire cases*, changes may be made after a collective bargaining agreement's expiration. (Chiefs should consult with labor counsel, as there is a difference of opinion on whether section 9 also prevents police and fire contracts from "expiring".)

Even if the agreement could be characterized as having expired, "[t]he fact that the term of a collective bargaining agreement has expired does not mean that there can be no duty to arbitrate issues arising out of that agreement …."[77] Rights that were violated or which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. "Since the incident for which the teacher was disciplined took place while the contract was in effect, the dispute" ... arose under the agreement and the teacher was entitled to arbitration pursuant to the terms of the agreement.[78]

Established terms and conditions of employment in effect at the time the contract expires (which *actual conditions* may or may not be the same as the language of the contract) constitute the *status quo*, which cannot be altered without satisfying the bargaining obligation. In public safety (police and fire) cases, the terms of an expired collective bargaining agreement may be significant to the extent that they help define the "status quo." In a 1997 case, the Labor Relations Commission, using language similar to that used by Federal judges and the National Labor Relations Board, noted that expired contract rights "have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the *status quo* of the entire plant operation."[79] Therefore, the LRC stated, the right established by the contract must also have become an established practice between the parties. Without evidence that the contract right is an established practice, the Commission cannot find that the right articulated by the contract, alone, constitutes the *status quo*.[80]

To identify the terms and conditions of employment that were in effect when the contract between the parties expired, the Labor Relations Commission (LRC) must look both to the relevant provisions of the expired contract, and the established practice between the parties.[81]

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.[82] The Commission has found a past practice to exist where the action has been repeated over a number of years.[83] However, the Commission has found a past practice to exist despite a sporadic or infrequent action if "a consistent practice that applies to rare circumstances…is followed each time the circumstances precipitating the practice recur."[84]

There is no statutory requirement that the terms of a police or fire collective bargaining agreement "survive" its expiration. This is not the case, however, for contracts with other municipal bargaining units. Under the provisions of M.G.L. c.150E, § 9, (which in this writer's opinion **does not apply** to police or fire negotiations), upon the filing of a petition with the Massachusetts Board of Conciliation and Arbitration (*not the Joint Labor Management Committee*) for a determination of impasse following negotiations for a successor agreement, "an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding and arbitration, if applicable, shall have been completed." Certainly if the legislature intended police and fire case to be included, it would have so stated here or under the JLMC section of the law.

Arbitrator exceeded his powers in determining that a grievance filed by the municipal employees' union, which was certified the day after town employee's employment was terminated, challenging the termination was not arbitrable. The collective bargaining agreement (CBA) provided for the arbitration of discharges, and contained an extension provision indicating that the CBA would remain in full force and effect until a successor agreement was negotiated. However, no successor agreement had been negotiated at the time of the employee's termination.[85] The Fact that an arbitration term of a collective bargaining agreement (CBA) has expired does not mean that there can be no duty to arbitrate issues arising out of CBA.[86]

Where a collective bargaining agreement (CBA) contains an arbitration clause, there is a presumption of arbitrability in the sense that a order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers asserted the dispute.[87]

Doubts should be resolved in favor of the arbitration clause's coverage, particularly where the clause, which is included in the collective bargaining agreement (CBA), is broad.[88]

The arbitrator's decision that there was no just cause for a town employee's termination and arbitrator's resulting award to the employee did not violate public policy, despite the contention that the employee

secured FMLA leave by deception, where the employee's injury was serious and supported by medical evidence, and it was not unexpected for the employee's condition to improve during his FMLA leave.[89]

When an arbitration provision of a collective bargaining agreement (CBA) being interpreted involves expiring contracts and changes in union representation, courts carefully consider statutory context in which agreements are negotiated.[90]

It is not the role of Appeals Court in reviewing an arbitrator's decision to interpret facts or to measure level of misconduct justifying discipline or discharge under collective bargaining agreement (CBA).[91]

1) Unilateral Change

Public employers are prohibited from making unilateral changes in established conditions of employment that affect mandatory subjects of bargaining. This rule applies both during the term of the collective bargaining agreement and after it expires.[92] Following the expiration of a collective bargaining agreement, the employer must first notify the union of any proposed changes to the status quo and provide it with an opportunity to bargain to resolution or good faith impasse.

The Labor Relations Commission (LRC) was confronted in 1982 with a non-public safety case that presented the following central question: where a provision in an expired contract arguably allowed the employer to set and change work schedules, but where the record reveals only that the "summer hours" option available at two work sites had remained unchanged for at least four years, does the status quo which the employer may not change unilaterally consist of the employer's *authority* as arguably set forth in the expired contract language, or the *actual hours* which have prevailed for four years?[93] The latter were found to be the actual existing conditions of employment. Therefore, the LRC ruled that the employer's action in discontinuing the "summer hours" option without bargaining was a unilateral change in conditions of employment in violation of Sections 10(a)(5) and (1) of the Law.

According to the duration clause in that agreement, the agreement was to expire when "an impasse in negotiations is reached." The parties did not dispute that the availability of a dual schedule, including the option of working "summer hours," is a mandatory subject of bargaining. The LRC noted that this directly affects employees' hours of work.[94] Thus, the employer in this case had a duty to bargain concerning the subject of work schedules.

In a case much like this, which arose under the National Labor Relations Act, 29 U.S.C. §§151 *et. seq.*, both the National Labor

Relations Board (NLRB) and the U.S. Court of Appeals for the Eight Circuit held that an employer violated its duty to bargain during a hiatus period (following a contract's expiration) when it laid off employees by utilizing a merit selection procedure, authorized by the expired contract, rather than continue the practice of lay-offs by strict seniority followed by the parties.[95] The Court of Appeals stated the following principle for determining the operative working conditions which must be maintained during the hiatus between contracts:

"An expired contract in the Labor-Management field must be viewed in light of its effect upon the past operation of the plant and the entire industrial pattern which has been established, in part, by it, together with the customs, practices, and traditions of the industry and the Company. Expired contract rights affecting mandatory bargaining issues, therefore, have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the *status quo* of the entire plant operation."[96]

The decision of the NLRB in *Shell Oil Co.*, 149 NLRB 283, 57 LRRM 1271 (1964), cited by the hearing officer in support of his decision, is consistent with the principles the Appeals Court applied in this case. In *Shell Oil*, actual practice (frequent sub-contracting over a 10-year period) coincided with contract language (establishing contractual wage standards for subcontracted work). In that case, the Board expressly relied upon the fact that the subcontracting had become "an established employment practice" rather than simply a contractual provision:

> "We are persuaded and find that Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of Article XIV, *had also become an established employment practice, and as such, a term and condition of employment."* 149 NLRB at 287 (emphasis added).

In a 1999 decision involving the Commonwealth's unilateral elimination of an in-service recognition bonus, the Commission concluded that there was no violation of c.150E.[97] Although there was evidence that the bonuses were paid on a consistent basis over a two-year period, that evidence was not sufficient for the LRC to infer that the in-service bonus rose to the level of an established condition of employment that was part of the *status quo* at the time the agreement expired. Rather, the fact that the Appendices to the collective bargaining agreement provided the bonus amounts only for fiscal years 1988 and 1989, in addition to the unrebutted

testimony that, at the time the bonus was negotiated, the parties intended for the bonus to be paid only for fiscal years 1988 and 1989, was persuasive evidence that the in-service bonus was not an established condition of employment.

Many cases on the issue of implementing changes after a contract's expiration have been decided under the National Labor Relations Act (NLRA). While the Massachusetts Labor Relations Commission generally follows NLRA precedents, it is not required to do so. However, the Commission has repeatedly cited NLRB decisions when faced with an issue involving implementation following the expiration of a collective bargaining agreement.

The following is a list of circumstances which, based on NLRB or federal court decisions, would appear to authorize a municipal employer to abandon a contract provision after expiration:

- the changes were made at a time when the union no longer represented a majority of the unit employees, or the employer had a good-faith doubt based on objective considerations, of the union's continued majority status;[98]
- agreement is reached with the union or those terms and conditions to be changed;
- the union has waived its right to bargain on the issue;[99]
- an impasse has been reached in bargaining, and the unilateral change is encompassed by the employer's pre-impasse proposals;[100] or
- the union has failed to bargain in good faith.

In its 2002 decision in *Town of Chatham*, the Massachusetts Labor Relations Commission referred extensively to other states' decisions when discussing an employer's obligations and ability to implement changes following the expiration of a collective bargaining agreement.[101] It noted that the Commission had considered the obligation to continue step and longevity increases referenced in an expired collective bargaining agreement only once before. In 1978, the Commission issued a notice dismissing a union's charge that the employer violated the Law by refusing to pay step increases provided by the collective bargaining agreement after the agreement had expired. The LRC never had an occasion to address this issue in a full post-hearing decision.

The dismissal in *City of Springfield School Committee* cited *Board of Cooperative Educational Service v. PERB*, where the Supreme Court of New York held that the *status quo* did not include automatic step increases.[102] In 1982, however, the New York Legislature effectively

overruled *Board of Cooperative Educational Services v. PERB* by statute when it amended New York Civil Service Law (the "Taylor Law") to provide that, "it shall be an improper practice for a public employer…to refuse to continue all the terms of an expired agreement." N.Y. Civ. Serv. Law Section 209-a(1)(e). Since that amendment, the New York courts have determined that the policy of New York public employee bargaining law is to continue automatic salary increases as part of the status quo.[103]

The New Hampshire Supreme Court has taken the position that the *status quo* does not include step and longevity increases and that the public employers in New Hampshire may, therefore, discontinue those payments if the collective bargaining agreement providing for them expires before a new agreement is reached.[104]

2) Successor Union

Once a new union is certified the decertified union loses all rights to represent the employees in the unit and retains no rights under the collective bargaining agreement.[105] Accordingly, the enforcement of contract violations predating the change in union representation is left to the new union, which steps into the shoes of its predecessor.[106] Otherwise, there would be no way to enforce the contract rights without prejudicing the employee's right to select new representation. The fact that the new union is not a signatory to the contract is not dispositive.[107]

In these circumstances, we conclude that the arbitrator's decision on arbitrability exceeded his powers.[108] His arbitrability ruling extinguished an otherwise arbitrable grievance arising out of the agreement solely because the employees selected a new collective bargaining representative. The ruling penalized and indirectly intruded on the employees' right to select new union representation, a collective bargaining right that is beyond the arbitrator's powers.[109] The logic of his interpretation would also preclude the enforcement of all grievances arising out of the expired contract that do not manifest themselves prior to the transition from one union to the next. It would likewise leave employees unprotected when a union that is decertified is inattentive or management uses the timing of the transition to manipulate contract rights.

3) Step Increases And Longevity

While the reference to step and longevity increases in the parties' expired agreement constitutes some evidence that the step and longevity increases were made, it does not, without evidence that the practice was consistent with the contract language, define the

practice.[110] Therefore, to decide whether the contractual step and longevity increases at issue in a particular case had become part of the *status quo*, the LRC must further inquire whether they had become a part of the established practice between the parties.

In a case involving the Town of Chatham, the Labor Relations Commission was faced with the issue of whether, where an expired collective bargaining agreement provided for automatic step and longevity increases, a public employer violated c.150E, §10(a)(5) when it unilaterally ceased paying step and longevity increases after the contract expired.[111]

The Commission noted that the employer must first notify the union of the proposed change and provide it with an opportunity to bargain to resolution or good faith impasse. The change must be in an established condition of employment that affects a mandatory subject of bargaining.

In the case of *Commonwealth of Massachusetts*, a case decided on stipulated facts, on the record before it, the LRC was unable to conclude that, on the date the contract expired, step increases or longevity had become terms and conditions of employment.[112] Therefore, it ruled that the state's failure to pay step and longevity increases after the contract expired did not violate c.150E.

After years of appeal, the LRC revisited the *Chatham* case in 2001.[113] It then concluded, based on additional evidence, that the Town's seven year practice of continuing to advance bargaining unit members on the longevity and step increases during the hiatus after the expiration of the parties' collective bargaining agreement and the effective date of its successor rose to the level of an established condition of employment that was a part of the *status quo* at the time the 1989-1992 agreement expired. The LRC ruled that the Town violated the Law (c.150E, §10(a)(5) and (1)) when it unilaterally altered this condition of employment without first bargaining with the union to resolution or impasse.

Other jurisdictions have held that automatic increases must be continued after expiration of a collective bargaining agreement on the ground that the system of automatic increases is itself an element of a "dynamic" *status quo*.[114] However, in *Chatham*, the LRC noted that it need not decide whether to define the *status quo* as static or dynamic in this case. Further, it stated that it need not consider how its analysis of this issue in future cases might be affected, if at all, by language like that in the parties' agreement providing that the contract covers a specific period but "in no event thereafter."

4) Management Rights

Employer actions that are consistent with a management rights clause in an expired contract do not constitute a unilateral change. However, to the extent that such change impacts a mandatory subject of bargaining, an employer, if in receipt of a timely request, should defer implementation, if possible, and engage in good faith negotiations to the point of either agreement or impasse.

Two cases illustrate this point.

An employer unilaterally instituted a requirement that candidates for the education instructor job classification, a bargaining unit position, possess a Master's Degree rather than a Bachelor of Science in Nursing, the previous requirement. The NLRB held that the employer was privileged to make that change under the management rights article in the expired contract.[115]

A management rights clause under an expired contract was sufficient to permit an employer to implement a reduction in hours worked, but not a requirement that the employees clock out when on their own time.[116] The latter did not come within the scope of any expired contract provision.

5) Federal Cases on Past Practice

The National Labor Relations Board also agrees that an employer may not unilaterally change or modify a non-contractual, past practice, after the expiration of a collective bargaining agreement without fulfilling its bargaining obligation. For example, without providing notice and opportunity to bargain, an employer violated the NLRA by failing to treat Memorial Day as a holiday in accord with its previous practice during the contract term.[117]

Some federal decisions are based on both past practice and the provisions of a management rights clause. For example:

An employer was authorized to cancel scheduled vacations (during a strike) and withhold payment of vacation benefits.[118]

An employer lawfully eliminated Sunday work and altered shifts as authorized by the management rights clause and past practice.[119]

6) Other Permitted Changes

Where the proposed changes are in areas of permissive subjects of bargaining, an employer is free under the NLRA to make unilateral changes after the expiration of a collective bargaining agreement.

Some examples include:

Terms and conditions of employment for non-bargaining unit employees that were voluntarily included in the unit by agreement of the parties (e.g. "student officers", intermittents or retirees.)[120]

Dues checkoff, a mandatory subject of bargaining, may be suspended after the expiration of a contract.[121] However, employers do not commit a prohibited (unfair labor) practice if they continue union dues deductions beyond the expiration of a collective bargaining agreement.[122]

The right to be disciplined or discharged only for "just cause" is strictly a creature of the collective bargaining agreement (at least in non-Civil Service departments) and does not extend beyond the expiration of the agreement.[123]

7) Grievance Arbitration

Under certain circumstances, the grievance provisions of an expired contract may "survive."[124] When the parties have agreed to a grievance and arbitration procedure, their obligations under the arbitration clause survive contract termination when the dispute is over an obligation arguably created by the expired agreement and arises under that agreement.[125]

Where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clear implication.[126] One way to negate the presumption is by specifying in the contract that the obligation to participate in the grievance process extends only for the life of the agreement.[127] The presumption also diminishes over time and grievances filed six months after a contract expired were found to be too remote.[128]

In an unpublished 2002 decision, the Massachusetts Appeals Court upheld the decision of the LRC which dismissed the union's untimely complaint.[129]

PRACTICE POINTERS

Where a city or town has a legitimate need to reduce employee benefits, it may be necessary to terminate the existing contract in order to do so. Where the benefit involves a mandatory subject of bargaining (which nearly all money benefits do), it will be necessary to provide the union with notice and opportunity to bargain before implementing the proposed change. (Recall, there is some disagreement among labor lawyers on the availability of implementing changes after a contract "expires".)

Where bargaining is requested, both parties must engage in good faith negotiations to the point of agreement or impasse. If the union fails to

make a timely request, or fails to bargain in good faith, the employer is free to implement its pre-impasse position.

The Joint Labor Management Committee (JLMC) is not likely to look kindly on a municipal employer that implements changes following the expiration of a contract if that agency is engaged in trying to settle the dispute. In the absence of decided LRC or court cases on the subject, any advice here is speculative. However, it would appear that the same principles apply regardless of whether the JLMC is involved.

Certainly, while active mediation is in progress, an employer would be hard-pressed to declare impasse unilaterally. It is unlikely that the LRC would find that impasse existed when the parties were still meeting with a JLMC mediator, especially if some progress was being made. However, should the mediator "throw up his/her hands" and refer the matter to the Committee for a "3a" hearing, an employer would have good grounds to contend that the parties were at impasse. While the statute does not use the word "impasse," an essential component of the "3a" process is a determination by the JLMC of the "apparent exhaustion of the collective bargaining process."

Municipal employers should not include "evergreen" clauses in their collective bargaining agreements with police and fire unions. Rather, they should insist that they retain the right to provide notice of termination (or at least simply specify a start and end date for the contract's term.) Where an evergreen clause is included, the city or town should insist on removing it. Since such a clause is not a mandatory subject of bargaining, the union cannot insist to the point of impasse on including an evergreen clause in a successor contract. Similarly, an arbitrator appointed by the Joint Labor Management Committee would not be empowered to impose such a clause as part of an arbitration award.

H. PUBLIC POLICY

The 2005 case of *City of Boston v. Boston Police Patrolmen's Association*, 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.[130] 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.[131] The SJC granted the city's application for further appellate review. Because DiSciullo's continued employment as a police officer would frustrate strong public policy against the kind of egregious dishonesty and abuse of official position in which he was proved to have engaged, the SJC vacated the arbitrator's award.

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.[132] 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.[133] In such cases, the Legislature has severely limited the grounds for vacating arbitration awards.[134] But extreme deference to the parties' choice of arbitration does not require the 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.[135]

"'[T]he question of public policy is ultimately one for resolution by the courts and not by arbitrators."[136] A court will apply a stringent, three-part analysis to establish whether the narrow public policy exception requires it 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.'"[137] "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 . . ."[138] 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.[139]

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 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.[140] "The question to be answered is not whether [DiSciullo's conduct] itself violates public policy, but whether the agreement to reinstate him does so.[141] "If an award is permissible, even if not optimal for the furtherance of public policy goals, it must be upheld."[142]

Given the arbitrator's findings that DiSciullo had falsely arrested two individuals on misdemeanor and felony charges, lied in sworn testimony and lied 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."[143] "The image presented by police personnel to the general public . . . ' also permeates other aspects of the criminal justice system and impacts its overall success.' "[144]

The *Boston* court explained that a police officer who uses his position of authority to make false arrests and to file false charges, and then shrouds his 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 dearth of positive law expressing the Legislature's strong instruction that such individuals not be entrusted with the formidable authority of police officers.[145] For example, "No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district."[146] That DiSciullo had not been convicted of any felony and that the arbitrator did not credit the assault and battery charges against him were, contrary to the association's assertion, beside the point. There was no question that DiSciullo lied under oath, in the criminal complaints and at the arbitration hearing, if not elsewhere. It is the felonious misconduct, not a conviction of it, which is determinative. For an arbitration award to violate public policy, it need not violate the letter of a statute.[147] "Courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law". The Court failed to see how exoneration of some felonious conduct cleanses or mitigates 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. 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."[148]

The *Boston* court noted that, in addition to the above statutes, the Legislature specifically has mandated that Boston police officers take all

necessary actions to uphold the probity of officers under their command, and where necessary punish misconduct and terminate officers' employment.[149] Pursuant to his statutory authority, the commissioner had issued clear, explicit regulations against the very misconduct in which DiSciullo engaged.[150] 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.[151] 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.

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. The arbitrator's other two grounds for reinstatement were that two of the most serious charges against DiSciullo – assault and battery on two individuals – 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 meant nothing in this case. According to the court, each case must be judged on its own facts, and the factual record in those cases was not before the court. In any event, there was no suggestion that the reason 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. 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 was fired for feloniously abusing his position. The association characterized 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.[152]

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 reminds us, 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, 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. The *Boston* court noted that it could not say that the strong public policy favoring arbitration should trump the strong (and in our view, stronger) public policy, "explicit, well-defined and dominant," that police officers be truthful and obey the law in the performance of their official duties.[153]

LIMITS OF REVIEW

"Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing."[154] The parties, having contractually agreed to abide by the determination of a third party, cannot ordinarily obtain judicial relief if they disagree with the decision rendered by the individual whom they have empowered to adjudicate the controversy. Exceptions to this principle are limited.[155] Fraud or other impropriety may furnish a basis for setting aside an arbitration award.[156] Likewise, confirmation shall be denied where the relief awarded offends public policy.[157] Such allegations are not present here. However, arbitration being the product of an agreement, the arbitrator is without authority to decide matters outside the scope of what the parties have agreed shall be arbitrated. This is reflected in G.L. c. 150C, § 11(a), which provides in relevant part that "[u]pon application of a party, the superior court shall vacate an award if ... (3) the arbitrators exceeded their powers."

Collective bargaining agreements "usually do not limit the arbitrator's power to formulate remedies in discharge or discipline cases," and arbitrators "have consistently held that an excessively harsh penalty for misconduct violates the requirement that discipline be imposed only for just cause." American Bar Association, Discipline & Discharge in Arbitration, at 85-86 (Norman Brand ed., 1998). "Normally, an arbitrator

is authorized to disagree with the sanction imposed for employee misconduct."[158] An arbitrator, resolution of issues within the scope of the parties' reference should be made final.[159]

In light of the Supreme Judicial Court's narrow view of what conduct might violate public policy, see cases collected in *Boston v. Boston Police Patrolmen's Assn.* The final element necessary to a proper finding that an arbitrator's award is contrary to public policy is that, "the conduct at issue cannot simply be 'disfavored conduct, in the abstract, ... [but must instead be] disfavored conduct which is integral to the performance of employment duties' (emphasis omitted).[160] While the result may be unpalatable it must be compelled. [161]

[1] Obviously, there is a whole universe of potential disputes which could result in the use of the grievance procedure or arbitration. This section is intended to discuss in general terms only the most commonly arising disputes, given that a full examination of all of the possible areas of dispute is not feasible in the space of this chapter.

[2] *Local Union No. 1710, Intl. Assn. of Fire Fighters v. City of Chicopee*, 430 Mass. 417, 420-421, 721 N.E.2d 378 (1999), quoting from *AT&T Technologies, Inc. v. Communications Wkrs. of America*, 475 U.S. 643, 648, 106 S.CT. 1415, 89 L.Ed.2d 648 (1986).

[3] *John Wiley & Sons v. Livingston, 376 U.S. 543, 550, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).*

[4] *United Steelworkers of America v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 580-582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

[5] *Local No. 1710, Intl. Assn. of Fire Fighters v. Chicopee, supra* at 421, 721 N.E.2d 378, quoting from *AT&T Technologies, Inc. v. Communications Wkrs. of America*, 475 U.S. at 649, 106 S.Ct. 1415.

[6] *See* e.g., *Nolde Bros. V. Local No. 358, Bakery & Confectionery Wkrs. Union*, 430 U.S. 243, 254, 97 S.Ct. 1067, 51 L.Ed2d 300 (1977) (discussing how parties drafted their arbitration clause "against a backdrop of well-established federal labor policy favoring arbitration").

[7] *City of Boston v. SENA, Local 9158*, 57 Mass.App.Ct. 1110, 784 N.E.2d 50 (Table) (2003) unpublished opinion.

[8] *Brienzo v. Town of Acushnet*, 2002 W.L. 1972138 (Mass. Super), citing *O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 664 N.E.2d 843 (196); *Johnson v. School Committee of Watertown*, 404 Mass. 23, 533 N.E.2d 1310 (1989); *Azzi v. Western Electric Co.*, 19 Mass. App. Ct. 406, 474 N.E.2d 1166 (1985); review denied, 394 Mass. 1103, 474 N.E.2d 1274 (table) (1985).

[9] *Bureau of Special Investigations v. Coalition of Pub. Safety,* 430 mass. 601, 603, 722 N.E.2d 441 (2000).

[10] (Citations omitted.) *Plymouth-Carver Regional Sc. Dist. V. J. Farmer & Co.,* 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990), *quoting from Marino v. Tagaris*, 395 Mass. 397, 400, 480 N.E.2d 286 (1985).

[11] *Town of Watertown v. Watertown Municipal Employees Association, 63 Mass.App.Ct. 285, 825 N.E.2d 572 (2005). Cf. Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 188, 466 N.E.2d 114 (1984) (courts must "consider whether an arbitrator's award draws its essence from the collective bargaining agreement"); *School Dist. of Beverly v. Geller*, 435 Mass. 223, 228-229, 755 N.E.2d 1241 (2001) (Cordy, J., concurring), quoting from *Georgia-Pac. Corp. v. Local 27, United Paperworks Intl. Union,* 864 F.2d 940, 944 (1st Cir. 1988) ("The power and authority of an arbitrator is ordinarily

derived entirely from a collective bargaining contract, and he violates his obligation to the parties if he substitutes "his own brand of industrial justice' . . ."). Rather, his interpretation, which conditions the fundamental rights to select union representation, appears to be grounded exclusively in a misreading of labor law cases and statutes. *Massachusetts Bay Transp.Authy. v. Local 589, Amalgamated Transit Union*, 406 Mass. 36, 40, 546 N.E.2d 135 (1989) (in determining whether arbitrator exceeded his authority by intruding into non-delegable public managerial rights determined by statute, court need not defer to arbitrator's interpretation of statute). See, *School Dist. of Beverly v. Geller, supra* at 230, 755 N.E.2d 1241, quoting from *School Comm. of Hanover v. Curry*, 3 MassApp.Ct. 151, 156, 325 N.E.2d 282 (1975), S.C., 369 Mass. 683, 343 N.E.2d 144 (1976) ("Where the determinations to be made are primarily issues of public law, the arbitrator possesses no special expertise"). Those cases and statutes, as discussed previously, compel rather than preclude arbitration here. See, e.g., *Local 1710, Intl. Assn. of Fire Fighters v. Chicopee, supra* at 421, 721 N.E.21d 378.

[12] See *Lynn v. Thompson*, 435 Mass. 54, 61, 754 N.E.2d 54 (2001), cert. denied, 534 U.S. 1131, 122 S.Ct. 1071, 151 L.Ed. 2d 973 (2002) ("Unlike our review of factual findings and legal rulings made by a trial judge, we are strictly bound by an arbitrator's findings and legal conclusions . . .") See also, *Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Assn./Mass. Community College Council, supra* at 27, 666 N.E.2d 479, quoting from *Concerned Minority Educators of Worcester v. School Comm. of Worcester, supra* at 187, 466 N.E.2d 114, ("[W]e have no business overruling an arbitrator because we give a contract a different interpretation").

[13] *Lynn v. Thompson, supra* at 61, 754 N.E.2d 54.

[14] *International Assn. of Machinists & Aerospace Wkrs., Dist. 776 v. Texas Steel Co.,* 538 F.2d 1116, 1121 (5th Cir. 1976), cert. denied, 429 U.S. 1095, 97 S.Ct. 1110, 51 L.Ed.2d 542 (1977). See *Crafts Precision Indus., Inc. v. Lodge No. 1836, Intl. Assn. of Machinists & Aerospace Wkrs,*, 889 F.2d 1184, 1186 (1st Cir. 1989).

[15] *Plymouth-Carver Regional Sc. Dist. V. J. Farmer & Co., supra*, *quoting from Lawrence v. Falzarano*, 380 Mass. 18, 28, 402 N.E.2d 1017 (1980).

[16] *Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 187, 466 N.E.2d 114 (1984).

[17] *Massachusetts Correction Officers Federated Union v. Commissioner of Correction*, 58 Mass.App.Ct. 832, 793 N.E.2d 1248, 175 L.R.R.M. (BNA) 2252.

[18] *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 16, 648 N.E.2d 430 (1995).

[19] *Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 604, 722 N.E.2d 441 (2000), quoting *E.I. DuPont de Nemours & Co.*

v. Grasselli Employees Indep. Ass'n of E. Chicago, 790 F.2d 611, 615 (7th Cir.), cert. denied, 479 U.S. 853, 107 S.Ct. 186, 93 L.Ed.2d 120 (1986).
[20] *Lyon v. School Committee of Dedham*, 440 Mass. 74, 794 N.E.2d 586 (2003).
[21] *Brophy v. School Comm. of Worcester,* 6 Mass.App.Ct. 731, 383 N.E.2d 521 (1978) (applicability of tenure to "long term substitutes" and "federal programs" teachers).
[22] *See Bureau of Special Investigations v. Coalition of Pub. Safety, supra* at 604-605, 722 N.E.2d 441 (delineating prerequisites for public policy exception), and cases cited.
[23] *Concerned Minority Educators of Worcester v. School Comm. of Worcester*, 392 Mass. 184, 187-188, 466 N.E.2d 114 (1984).
[24] *Id.* at 187, 466 N.E.2d 114, and cases cited.
[25] *City of Lynn v. Council 93, American Federation of State, County, and Municipal Employees, Local 193*, 51 Mass. App. Ct. 905, 746 N.E.2d 558 (2001).
[26] M.G.L.A. c. 150C, § 11.
[27] M.G.L.A. c. 6A, § 18D.
[28] *Suffolk County Sheriff's Dept. v. AFSCME Council 93, AFL-CIO, Local 1134*, 50 Mass. App. Ct. 473, 737 N.E.2d 1276 (2000).
[29] M.G.L.A. c. 150C, § 16(5).
[30] M.G.L.A. c. 150C, § 16.
[31] *Massachusetts Correction Officers Federated Union v. Commissioner of Correction*, 63 Mass App. Ct. 907, 826 N.E.2d 215 (2005).
[32] *South Shore Regional School District Committee,* 22 MLC 1414 (1996).
[33] *Massachusetts Municipal Wholesale Electric Co.*, 10 MLC 1085 (1983); *City of Marlborough*, 9 MLC 1708 (1983); *City of Boston*, 8 MLC 1001 (1981). The other side of this rule is that the union is not held to the employer's version of the contract provision when the employer seeks enforcement if the union has a fundamentally different interpretation of the provision. *See, e.g., Acushnet Firefighters*, 7 MLC 1265 (1980).
[34] *Mass. Commissioner of Admin. & Fin.*, 18 MLC 1161 (1991) (holding that employer did not violate the contract by using individual performance targets as criteria for evaluations since the agreement did not specify the standards for evaluations).
[35] *Town of Ipswich*, 11 MLC 1403, 1410 (1985), *citing Turner Falls Fire District*, 4 MLC 1658, 1661 (1977); *see also*, *Middlesex County*, 21 MLC 1822 (1995); *Mass. Commissioner of Admin. & Fin.*, 19 MLC 1235 (1992).
[36] *Suffolk County House of Correction*, 22 MLC 1001; *see also*, *Watertown School Committee*, 9 MLC 1301.
[37] *Walpole School Committee*, 11 MLC 1099 (1984).
[38] *Service Employees International Union,* 410 Mass. 141, 144, 571 N.E.2d 18, 20 (1991).
[39] *Id.*
[40] *Id.*

[41] G.L. c. 150E, §7(a).
[42] *Town of Billerica v. International Association of Firefighters*, 415 Mass. 692, 615 N.E.2d 564 (1993).
[43] *City of Somerville v. Somerville Municipal Employees Association*, 418 Mass. 21, 633 N.E.2d 1047 (1994).
[44] *See generally, Melrose School Committee*, 9 MLC 1713 (1983).
[45] *Id.*
[46] *See, e.g., City of Salem*, 5 MLC 1433 (1978).
[47] *Id.*
[48] *Whitman-Hanson Regional School Committee*, 10 MLC 1283 (1983).
[49] *Melrose School Committee*, 9 MLC 1317 (1983). In assessing whether the action is covered or contained within the agreement, the trier of fact must determine whether the contract "expressly or by necessary implication" creates a waiver. *N.L.R.B. v. C&C Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559 (1967).
[50] *Town of Marblehead*, 12 MLC 1667, 1670 (1986); *see also, Jacobs Manufacturing Co.*, 28 LRRM 1163 (1951). As noted in *City of Boston*, determining whether the contract implies a particular matter must be a case-by-case analysis, which unfortunately can be difficult and time-consuming. 12 MLC 2005 (1981).
[51] *Whitman-Hanson Regional School Committee*, 10 MLC 1283.
[52] *Id.* at 1285.
[53] *Id.*, *quoting Melrose School Committee*, 3 MLC 1299, 1302 (1976).
[54] *Id.* at 1286, *citing Melrose School Committee*, 9 MLC 1713, 1725 (1983).
[55] *Town of Bellingham*, 21 MLC 1441 (1994).
[56] *Melrose School Committee,* 9 MLC at 1714.
[57] *Id.*
[58] *Whitman-Hanson Regional School Committee,* 12 MLC 1629 (1986).
[59] *Commonwealth of Massachusetts,* 19 MLC 1454 (1992).
[60] *Id.* at 1455.
[61] This section will focus mainly on the LRC's view regarding past practices, given that a full discussion of grievance arbitration is outside the scope of this Manual.
[62] *See* Chapter 1, Good Faith Bargaining for a discussion of what constitutes mandatory and non-mandatory subjects of bargaining.
[63] If the employer does provide such notice and opportunity to bargain before implementing a change, it may make changes in mandatory and non-mandatory subjects after bargaining. *School Committee of Newton v. LRC*, 388 Mass. 557, 447 N.E.2d 1201 (1983).
[64] DOBBELAERE, LEAHY, AND REARDON, *The Effect of Past Practice on the Arbitration of Labor Disputes*, 40 ARB. J 27, 29 (1985); *Celanese Corp. of America*, 24 L.A. 168, 172 (Justin 1954).

[65] *Town of Chatham*, 21 MLC 1526, 1531 (1995); *Town of Higham*, 21 MLC 1237, 1240 (1994); *City of Boston*, 5 MLC 1796, 1797 (1979); *City of Worcester*, 4 MLC 1317, 1320 (H.O. 1977), *aff'd* 4 MLC 1697 (1978).
[66] *Town of Chatham* at 1531.
[67] *Id.*
[68] *City of Boston*, 19 MLC 1369 (1992).
[69] *Town of Dennis*, 18 MLC 1015 (1991).
[70] *Town of Marblehead*, 1 MLC 1140 (1974).
[71] *City of Boston*, 19 MLC 1613 (1993).
[72] *Town of Marblehead*, 12 MLC 1667 (1986); *City of Boston*, 6 MLC 1117 (1979); *but see City of Boston*, 4 MLC 1153 (1997).
[73] *Town of Arlington*, 16 MLC 1350 (1989).
[74] *Id.* at 1351.
[75] *Town of Lee,* 11 MLC 1274, 1277, n. 8 (1984).
[76] *Town of Arlington,* 16 MLC at 1351.
[77] *Boston Lodge 264, Intl. Assn. of Machinists v. Massachusetts Bay Transp. Authy.,* 389 Mass. 819, 821, 452 N.E.2d 1155 (1983). See *Old Rochester Regional Teacher's Club v. Old Rochester Regional Sc. Dist. Comm., 398 Mass.* 695, 699, 500 N.E.2d 1315 (1986); *Commonwealth, Secretary *291 of Admin. & Fin. & MCOFU*, 20 MLC 1087 (1993). See also *Nolde Bros. v. Local 358, Bakery & Confectionery Wkrs. Union, supra* at 255, 97 S.Ct. 1067.
[78] *Litton Fin. Printing Div., Inc. v. National Labor Relations Bd.*, 501 U.S. 190, 207, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991). As the Supreme Judicial Court stated in *Old Rochester Regional Teacher's Club v. Old Rochester Regional Sc. Dist. Comm., supra* at 699, 500 N.E.2d 1315.
[79] *Commonwealth of Massachusetts*, 23 MLC 171 (1997); *Id.* (citing *Commonwealth of Massachusetts*, 9 MLC at 1360, quoting *N.L.R.B. v. Frontier Homes*, 371 F.2d 974, 64 LRRM 2320 [1967]).
[80] *Id.*
[81] *Commonwealth of Massachusetts*, 9 MLC 1355 (1982).
[82] *Town of Hingham*, 21 MLC 1237, 1240 (1994); *City of Boston*, 5 MLC 1796, 1797 (1979); *City of Worcester*, 4 MLC 1317, 1320 (H.O. 1977), *aff'd* 4 MLC 1697 (1978).
[83] *See e.g., Ware School Committee*, 22 MLC 1507 (1996) (Twelve year history of giving preference to teachers over non-teachers when hiring constitutes a practice); *City of Boston*, 19 MLC 1613 (1993) (Nine year history of allowing union members to address new employees during their orientation period constitutes a practice).
[84] *City of Boston*, 19 MLC 1487, 1491 (1994); *Town of Arlington*, 16 MLC 1350, 1351 (1989); *Town of Lee*, 11 MLC 1274, 1277 (1984).
[85] M.G.L.A. c. 150C, §11(a)(3), *Town of Watertown v. Watertown Municipal Employees Ass'n,* 825 N.E2.d 572, 63 Mass.App.Ct. 285.
[86] *Id.*

[87] *Town of Watertown v. Watertown Municipal Employees Ass'n.* 825 N.E.2d 572, 63 Mass.App.Ct. 285.
[88] *Id.*
[89] Family and Medical Leave Act of 1993, § 2 et seq. 29 U.S.C.A. § 2601 et seq. *Town of Watertown v. Watertown Municipal Employees Ass'n,* 825 N.E.2d 572, 63 Mass.App.Ct. 285.
[90] *Town of Watertown v. Watertown Municipal Employees Ass'n,* 825 N.E.2d 572, 63 Mass.App.Ct. 285.
[91] *Id.*
[92] *Commonwealth of Massachusetts*, 19 MLC 1069, 1079 (1992); *Relations Board v. Katz*, 369 U.S. 736, 743, 50 LRRM 2177, 2180 (1962).
[93] *Commonwealth of Massachusetts*, 9 MLC 1355 (1982).
[94] See *Medford School Committee*, 1 MLC 1250 (1975); *City of Everett*, 2 MLC 1471 (1976); *Town of Dracut*, 8 MLC 1016, 1020 (H.O. 1981); *Scituate School Committee,* 8 MLC 1726 (H.O. 1982).
[95] *N.L.R.B. v. Frontier Homes Corp.*, 371 F.2d 974, 64 LRRM 2320 (8th Cir. 1967),. (1967), *enf'g in relevant part*, 153 NLRB 1070, 50 LRRM 1449 (1965).
[96] *Frontier Homes, supra*, 371 F.2d at 974, 64 LRRM 2320, 2324.
[97] *Commonwealth of Massachusetts*, 23 MLC 171 (1997).
[98] *See Cauthorne Trucking*, 256 NLRB 721, 722 (1981).
[99] *See Buck Brown Contracting Co.*, 272 NLRB 951, 953 (1984).
[100] *See id.*
[101] *Town of Chatham*, 28 MLC 56 (2001).
[102] *Board of Cooperative Educational Service v. PERB*, 41 N.Y.2d 753, 363 N.E.2d 1174, 95 LRRM 3046 (1971).
[103] *See Cobbleskill Central School District v. PERB*, 481 N.Y.S.2d 795 (1984).
[104] *See Milton School District v. Milton Education Association*, 137 N.H. 240 (1993).
[105] *Hardin & Higgins*, Developing Labor Law 1006 (4tgh ed.2001).
[106] *Cincinnati Newspaper Guild, Local 9 v. Cincinnati Enquirer, Inc.,* 863 F.2d 439, 445-446 (6th Cir.1988).
[107] *Ibid. Compare John Wiley & Sons v. Livingston*, 376 U.S. at 550, 84 S.Ct. 909 (union can arbitrate grievance against successor employer that did not sign the agreement).
[108] G.L. c. 150C, § 11(a)(3). *See Higher Educ. Coordinating Council/Roxbury Community College v. Massachusetts Teachers' Assn./Mass. Community College Council*, 423 Mass. 23, 27, 666 N.E.2d 479 (1996), quoting from *School Comm. of W. Springfield v. Korbut*, 373 Mass. 788, 792, 369 N.E.2d 1148 (1977) ("the question whether the arbitrator[ ] acted in excess of the authority conferred on [him] ... is always open for judicial review").

[109] *Cf. id.* at 28, 666 N.E.2d 479 (discussing exclusive managerial prerogatives); *School Comm. of W. Springfield v. Korbut*, 373 Mass. at 795, 369 N.E.2d 1148; *Sheriff of Middlesex County v. International Bhd. of Correctional Officers, Local R1-193*, 62 Mass.App.Ct. 830, 831-832, 821 N.E.2d 512 (2005). *Compare Boston v. McCarthy*, 5 Mass.App.Ct. 890, 890, 369 N.E.2d 465 (1977) ("We can discern no basis ... for concluding that that issue was one which could not lawfully be made the subject of arbitration").

[110] *Commonwealth of Massachusetts*, 9 MLC 15 1359.

[111] *Town of Chatham*, 21 MLC 1526 (1995); *Town of Chatham*, 28 MLC 56 (2001).

[112] *Commonwealth of Massachusetts,* 9 MLC 1355 (1982).

[113] *Town of Chatham*, 28 MLC 56 (2001).

[114] *See e.g., Auburn School Administrators Association v. Auburn School Committee*, ME LRB, Case No. 91-19 (10/8/91); *Yamhill County, OR ERB,* Case No. UP-76-86 (2/10/87); *City of Fostoria*, OH SEB, Case No. 84-UR-07-1650 (7/3/86); *City of Portage*, 352 N.W.2d 284 (MI Ct. App.) (5/14/84); *Snohomish County*, WA PERC, Case No. 4341-U-82-694 (3/6/84); and *Branford Board of Education*, CT SLRB, Case No. TPP-7450, Order No. 2274 (2/17/84).

[115] *Nazareth Literary & Benevolent Institute, Inc.*, 282 NLRB No. 10 (Nov. 7, 1986).

[116] *Cardinal Systems*, 259 NLRB 456 (1981).

[117] *The Saloon, Inc.*, 247 NLRB 1105 (1980).

[118] *Stokely-Van Camp, Inc. v. NLRB*, 722 F.2d 1324 (7th Cir. 1983).

[119] *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976).

[120] *Arizona Electric Power Corp., Inc.*, 250 NLRB 1132, 1134 N. 10 (1980).

[121] *Bethlehem Steel Co.*, 136 NLRB 1500 (1962).

[122] *Frito-Lay, Inc.*, 243 NLRB 137 (1979).

[123] *Teamsters Local 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. 1986).

[124] *Steelworkers v. Warrier & Gulf Navigation Company*, 363 U.S. 574 (1960).

[125] *Nolde Brothers v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

[126] *Id.* At 255.

[127] *S & W Motor Lines, Inc.*, 236 NLRB 938 (1978).

[128] *Teamsters Local 703 v. Kennicott Brothers*, 771 F.2d 300 (7th Cir. 1985).

[129] *Massachusetts Organization of State Engineers and Scientists v. Labor Relations Commission,* 56 Mass. App. Ct. 1102, 775 N.E.2d 1283 (2002).

[130] *City of Boston v. Boston Police Patrolmen's Association*, 443 Mass. 813, 824 N.E.2d 855 (2005) *quoting 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).

[131] *Boston v. Boston Police Patrolmen's Ass'n*, 60 Mass.App.Ct. 920, 805 N.E.2d 527 (2004).
[132] *See Plymouth-Carver Regional Sc. Dist. v. J. Farmer & Co.,* 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990), and cases cited.
[133] *School Dist. of Beverly v. Geller*, 435 Mass. 223, 229, 755 N.E.2d 1241 (2001) (Cordy, J., concurring).
[134] *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").
[135] *See Lynn v. Thompson*, 435 Mass 54, 61, 754 N.E.2d 54 (2001); *Plymouth-Carver Regional Sc. 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").
[136] *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).
[137] *Massachusetts Highway Dep't. v. American Fed'n of State, County & Mun. Employees, Council 93, supra* at 16, 648 N.E.2d 430.
[138] *Id.* At 17, 648 N.E.2d 430.
[139] *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.
[140] *Id.* At 63, 754 N.E.2d 54. *Bureau of Special Investigations v. Coalition of Pub. Safety, supra*.
[141] *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).
[142] *Massachusetts Highway Dep't v. American Fed'n of State, County & Mun. Employees, Council 93, supra* at 19, 648 N.E.2d 430.
[143] *Clancy v. McCabe*, 441 Mass. 311, 328, 805 N.E.2d 484 (2004) (Ireland, J., dissenting).
[144] *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).
[145] General Laws c. 41, § 96A
[146] *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).

[147] *See Eastern Associated Coal Corp. v. United Mine Workers*, Dist. 17, supra at 63, 121 S.Ct. 462.

[148] *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).

[149] *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").

[150] *See* note 4, supra.

[151] *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").

[152] *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).

[153] *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).

[154] *Lynn v. Thompson*, 435 Mass. 54, 61, 754 N.E.2d 54 (2001).

[155] *See* G.L. c. 150C, § 11.

[156] *See Plymouth-Carver Regional Sc. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990).

[157] *See Bureau of Special Investigations v. Coalition of Pub. Safety*, 430 Mass. 601, 603, 722 N.E.2d 441 (2000).

[158] *United Paperworkers Intl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) (case under Federal Arbitration Act).

[159] *See Plymouth-Carver Regional Sc. Dist. v. J. Farmer & Co.*, 407 Mass. at 1007, 553 N.E.2d 1284.

[160] [*Bureau of Special Investigations v. Coalition of Pub. Saf*ety, 430 Mass. 601, 604-605, 722 N.E.2d 441 (2000)], quoting from *Massachusetts Hy. Dept. v. American Fedn. of State, County and Mun. Employees, Council 93*, 420 Mass. 13, 16-17, 648 N.E.2d 430 (1995)." *Boston v. Boston Police Patrolmen's Assn., supra* at 921, 805 N.E.2d 527.

[161] *Id*. at 922, 805 N.E.2d 527. *Boston v. Boston Police Patrolmen's Assn.*, 60 Mass.App.Ct. 920, 921-922, 805 N.E.2d 527, further appellate review granted, 442 Mass. 1103, 810 N.E.2d 1229 (2004), we affirm the judgment.

CHAPTER 8 - GRIEVANCE ARBITRATION

§ 1 PUBLIC POLICY: ARBITRATION

In this country, there is a long-standing public policy favoring the submission of contractual labor disputes to arbitration through the grievance procedure. The United States Supreme Court requires that parties to a dispute over the terms of a labor contract must first attempt to resolve the problem through the contractual grievance procedure, prior to bringing an action in federal court to settle the issue.[1] The Labor-Management Relations Act provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.[2]

The National Labor Relations Board (NLRB) likewise favors deferring contract disputes to the contractual grievance procedure first.[3] In *Collyer Insulated Wire*, the NLRB enumerated three criteria for determining when deferral is appropriate: (1) the contract clearly provides for the grievance and arbitration of disputes; (2) the action taken by the employer was not designed to undermine the union and was based on a substantial claim of contractual privilege; and (3) it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the law.[4]

"The first principle is that 'arbitration is a matter of contract'" and cannot therefore be imposed if it is not a part of the bargained-for exchange.[5] Court's recognize, however, that "a collective bargaining agreement is not an ordinary contract."[6] A collective bargaining agreement governs an entire, evolving labor-management relationship. It is negotiated in a highly regulated environment that determines the certification and decertification of unions and establishes bargaining obligations of unions and employers. A collective bargaining agreement also promotes the equitable, efficient and peaceful resolution of workplace disputes. Arbitration provisions play an important part in the entire process, as they provide for the expeditious resolution of work place disputes by decision-makers with expert knowledge of the common law of the shop.[7]

For these reasons, where the collective bargaining agreement "contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the assert dispute. Doubts should be resolved in favor of coverage . . . particularly . . . where the clause is . . . *broad*' (emphasis added)."[8] In addition, when the arbitration provision being interpreted involves expiring contracts and changes in union representation, courts carefully consider the statutory context in which the agreements are negotiated.[9]

In Massachusetts, the Labor Relations Commission (LRC) has also indicated a preference for allowing a contract dispute to progress through arbitration before it considers the case.[10] Thus, in *City of Boston*, the LRC stated:

> The Commission has long recognized and applied a policy of pre-arbitral deferral in those cases involving alleged violations of Section 10(a)(5) which are capable of being resolved under contractual grievance and arbitration procedures.[11]

In the same case, the hearing officer cited the NLRB's *Collyer Insulated Wire* framework for determining when deferral is appropriate.[12] In addition to the LRC's general policy of deferral to arbitration, the Massachusetts General Laws also express a preference for arbitration in public employment by vesting the LRC with the authority to order arbitration in cases where the parties have not specifically provided for such a procedure in the contract.[13] Thus, public policy in this state favors the resolution of contract disputes through arbitration.

When parties request the Commission to defer to arbitration after an arbitration award has been issued, the Commission has applied the National Labor Relations Board policy articulated in *Spielberg Manufacturing Company*.[14] Deferral to the arbitration process is appropriate where an issue presented in a prohibited practice proceeding has previously been decided in an arbitration proceeding if those proceedings appear to have been fair and regular, if all parties had agreed to be bound by those proceedings, and the decision is not clearly repugnant to the purposes and policies of M.G.L. c. 150E.[15] In addition, the arbitration award must dispose of the substantially identical issue presented to the Commission.[16] The Commission will only defer where the issue posed by the prohibited practice is essentially a question of contract interpretation, the statutory issues raised by the case are well-established, and the resources of the Commission and the parties can be conserved

through deferral.[17] However, the Commission will decline to defer where the arbitrator failed to rule on an issue presented in the prohibited practice or representation proceeding.[18]

Arbitration results from a contractual agreement of the parties, and arbitration of an issue cannot be imposed on a party who has not agreed that that issue shall be so adjudicated.[19] Whether given parties have agreed to arbitrate a particular issue is a matter of contract interpretation, and thus is normally for the court to decide.[20] In construing arbitration clauses, courts proceed on the basis of a "presumption or arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage'…. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case."[21]

In *United Steelworkers v. Warrior Gulf & Nav. Co.,* the Supreme Court treated as "broad" a clause that called for the arbitration of any differences "as to the meaning and application of the …Agreement."[22] In a 2002 Appeals Court decision, this language was also interpreted as a "broad" clause, thus resulting in a referral to arbitration to decide procedural issues raised by the sheriff.[23]

§ 2 GRIEVANCE AND ARBITRATION PROCEDURES

Parties to a collective bargaining agreement can arrive at binding grievance arbitration in one of two ways. The first way is by inserting a provision in the collective bargaining agreement mandating arbitration as a means of settling disputes with respect to the application or interpretation of the contract. Section 8 of the Law specifically allows this type of provision in public employee collective bargaining agreements:

> The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be involved in the event of any dispute concerning the interpretation or application of such written agreement.[24]

The second way that parties to a labor contract can arrive at mandatory arbitration is by order of the Labor Relations Commission when there is no provision in the collective bargaining agreement dealing with grievance arbitration.[25] Section 8 of the Law authorizes the Commission to order final and binding arbitration where: (1) there is a written collective

bargaining agreement in effect at the time of the alleged event; (2) there is a dispute over the interpretation or application of the written agreement; and (3) the agreement does not provide for final and binding arbitration.[26]

In determining whether to order binding arbitration, the Commission performs only a limited review of the merits of a grievance to ensure that it is at least "arguably arbitrable."[27] Limiting that review to whether the contract arguably covers the dispute and leaving questions concerning whether arbitration on the subject is contrary to law or public policy to the court is the proper balance of the respective roles of the Commission and the Courts.[28] The Commission undertakes the review to ensure that its order does not compel the parties to perform a futile act.[29] Where an agreement provided for final and binding arbitration and specifically excluded a certain article from arbitration, and where an arbitrator previously ruled that a grievance alleging a violation of that article was not arbitrable, the Commission held that an arbitration order was not proper and denied the union's request.[30] It is not proper for the LRC to order arbitration if the parties have already provided for binding arbitration in the labor contract,[31] or if neither party requests arbitration in the absence of a contract provision.[32] Similarly, the LRC may not order the parties to arbitration over an issue not addressed in the collective bargaining agreement.[33] A claim by a town that the union did not exhaust all steps of the grievance process, which was denied by the union, should be presented to an arbitrator, according to a 1998 LRC decision in a case where no outside arbitration was included.[34]

When the collective bargaining agreement provides for a grievance procedure and arbitration, an employer may not unilaterally change the method by which the grievance is administered, by adding or eliminating steps in the process.[35] If a dispute arises between the parties as to whether arbitration is proper or necessary, the party seeking to enforce the arbitration provision should proceed in state court, rather than at the Labor Relations Commission, pursuant to the provisions G.L. c. 150E.[36]

A section 8 order of the LRC is proper as long as the conduct under dispute occurred during the term of the contract; the grievance need not be filed during the term of the collective bargaining agreement.[37] Likewise, a Section 8 order remains valid even when the collective bargaining agreement expires while the grievance is pending.[38] When the Commission receives a request from one of the parties for binding arbitration, it generally does not interpret the collective bargaining agreement itself,[39] but rather orders the parties to proceed to arbitration at the Massachusetts Board of Conciliation and Arbitration so long as the dispute is "arguably arbitrable".[40] The threshold issues of procedural and substantive arbitrability will be determined by the arbitrator,[41] though the LRC will not order futile arbitration where the petitioner's claim is completely without merit.[42]

Once the Commission receives a request for binding arbitration, it notifies all of the interested parties and provides the opposing party with a period of 10 days to set forth in writing any objections to the request. If the opposing part does file a timely objection, the LRC will determine on a case by case basis whether to issue an order for binding arbitration.[43]

A party may not refuse to participate in good faith in the grievance procedure once the Commission orders arbitration. Under Sections 10(a)(6) and 10(b)(3) of the Law, a party commits a prohibited practice if it refuses to participate in a grievance procedure ordered by the LRC or required by the terms of the labor contract.[44] A public employer may not unreasonably delay the arbitration proceedings in order to avoid participating.[45] Once an award is issued by the arbitrator, the employer likewise may not refuse to comply.[46]

A union may elect to waive its right to request binding arbitration under Section 8, but must do so clearly and unambiguously.[47] The failure to include an arbitration provision in a labor contract does not constitute a waiver of a union's Section 8 right to request arbitration from the LRC.[48] Similarly, the LRC has held that merely filing a prohibited practice charge does not preclude a party from thereafter requesting arbitration.[49]

Once an employee requests binding arbitration from the LRC to resolve a grievance involving suspension, dismissal, removal or termination, that employee has elected his/her remedy and is precluded from seeking a remedy under G.L. c. 31 (Civil Service).[50] The binding arbitration ordered by the LRC also supersedes "any otherwise applicable grievance procedure provided by law," i.e., Civil Service (c. 31), Retirement Board (c. 32), tenured teachers (c. 71) or any grievance procedures found in a municipality's ordinances or bylaws.[51]

§ 3 DEFERRAL TO ARBITRATION

Section 8 of the Law authorizes the Commission to order final and binding arbitration where: (1) there is a written collective bargaining agreement in effect at the time of the alleged event; (2) there is a dispute over the interpretation or application of the written agreement; and (3) the agreement does not provide for final and binding arbitration.[52] It has been the Commission's practice to order binding arbitration after an agreement has expired if the parties agree in writing to extend the expired contract's provisions pending successor negotiations.[53]

In a 2002 case involving the *Worcester Housing Authority*, the parties' duration clause did not specifically provide for the continuation of the contract pending successor negotiations.[54] Rather, Article 36 of the parties' agreement provided that the parties may mutually agree to extend the duration of the agreement. The parties did agree to one written

extension of the 1997-2000 agreement from April 1, 2000 through March 31, 2001. However, the parties did not agree to any further extensions of the agreement pending the negotiations for a successor agreement. Because the employer terminated the "aggrieved" employee on July 31, 2001, after the expiration of the contractual extension, the Commission ruled that it cannot order binding arbitration because there was no collective bargaining agreement in effect at the time of the alleged contractual violation.[55]

Because there was no collective bargaining agreement in effect at the time the employer terminated the "aggrieved" employee, the LRC concluded that final and binding arbitration under Section 8 of the Law was not appropriate in this case. Therefore, the Union's request for final and binding arbitration was denied.

Prohibited practice complaints that raise issues of contractual interpretation are well-suited for resolution through the parties' contractual grievance-arbitration process.[56] The Commission will defer to an arbitrator's award "where the arbitrator's proceedings have been fair and regular, all parties agreed to be bound by the proceedings, the decision of the arbitrator is not repugnant to the purpose and policies of the Law, and the arbitrator's award disposes of issues that are substantially identical to those presented to the Commission."[57]

In a 2002 decision involving the Westfield School Committee the Commission considered a Complaint that alleged that the School Committee violated Section 10(a)(3) of M.G.L. c. 150E (the Law) by prohibiting the guidance counselors from continuing a past practice of holding weekly department meetings during the school day in retaliation for the Association's filing a grievance on behalf of the guidance counselors.[58] Article XXXII(A) of the parties' collective bargaining agreement provided that "there will be no reprisals of any kind taken against any teacher by reason of his membership in the Association or participation in its activities". This contractual language mirrors the statutory prohibition contained in Section 10(a)(3) of the Law that prohibits a public employer from discriminating "in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization."

The LRC stated that the decision of the National Labor Relations Board in *Olin Corp.*, appears useful guidance in the *Westfield* case.[59] In *Olin*, the NLRB set forth the criteria under which it would defer the resolution of an unfair labor practice allegation, including Section 8(a)(3) allegations, to an arbitrator's award. The NLRB held that it would defer to an arbitrator's award where: 1) the proceedings appear to have been fair and regular, 2) all parties have agreed to be bound, 3) the decision of the arbitrator is not clearly repugnant to the Act, and 4) the arbitrator has adequately considered the unfair labor practice issue. In deciding the fourth criteria,

the NLRB stated that it would find that an arbitrator had adequately considered the unfair labor practice if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

In *Westfield*, the arbitrator found the School Committee had not violated Article XXXII (A) because there was insufficient evidence to conclude that the School Committee had retaliated against the guidance counselors because the Association filed a grievance on their behalf. Because the arbitrator based his decision on the anti-retaliation provision of Article XXXII (A), the issues before the arbitrator were substantially identical to the allegations in Count II of the Complaint alleging that the School Committee had violated Section 10(a)(3) of the Law by discriminating against the guidance counselors from holding weekly department meetings during the school day. Moreover, the Association did not allege, nor was there any evidence, that the arbitration proceedings were not fair and regular or that the arbitrator's decision was repugnant to the Law. In addition, all parties agreed to be bound by the arbitration proceedings.

Of the specific facts of this case, the LRC was satisfied that the arbitrator's ruling on specific findings about whether the School Committee had retaliated against the guidance counselors because the union filed a grievance was the same issue the Association asked the Commission to decide. Therefore, because the issue before the arbitrator was substantially identical to the one presented to the Commission, the LRC decided to defer to the arbitrator's award finding that the School Committee did not retaliate against the guidance counselors because the Association filed a grievance on their behalf.[60]

Accordingly, the Commission allowed the School Committee's Motion for Post-Arbitration Deferral and dismissed the Complaint of Prohibited Practice.

PRACTICE POINTERS

Steps in a Grievance Procedure

A grievance procedure typically involves the submission of an issue in dispute to several levels if not resolved to an employee's (or union's) satisfaction earlier. In private industry, the first step or level often involves an informal (oral) submission to one's immediate supervisor. In the public sector, where such supervisors are not excluded from belonging to a bargaining unit - and in fact often belong to the same unit as the aggrieved employee - this first level or step may be less appropriate. For example, it is unclear what recourse an employer would have if a police sergeant granted *a police officer's grievance, especially where the grievance involved a complaint over some action taken by the chief!*

There is a school of thought which contends that many grievances are simply misunderstandings, *which can be resolved at such an* oral submission *level. An alternative arrangement in some grievance procedures, especially where the chief is the only non-bargaining unit member of the department, involves an opportunity for oral submission to the chief before a written grievance is required. To the extent that such discussion clarifies the situation, no formal grievance need be filed.*

Generally, appeals from the chief's level proceed to the appointing authority (mayor, manager, selectmen, etc.). While some contend that there is some advantage to the employer to require as many steps as possible before a dispute may be submitted to an outside arbitrator, there is little commentary on this theory. Presumably, this theory rests on the premise that the grievant will get worn out and give up at some point in the process. This does not seem to be the experience in most departments.

Conduct of Hearings

There is no requirement (unless so specified in the contract) that the chief or the appointing authority meet with or provide a hearing to a grievant or the union. However, from a personnel practice point of view, affording an aggrieved employee and/or the union with the opportunity to address at least one responsible level of management is worthwhile. Generally, there are no rules for conducting such meetings or hearings. Since grievance hearings are part of the process of collective bargaining, they need not be held in open session.[61]

Management determines where the grievance proceeding will be held. In the absence of a contractual provision requiring it, an employer need not allow witnesses to attend, or alternatively need not allow cross-examination of those who are permitted to attend. This is certainly the case in matters of simple policy disputes or contract interpretation. It may even be true even in disciplinary cases, especially where an aggrieved employee will receive a "de novo" hearing before an arbitrator or the Civil Service Commission.

Time Limits

Grievance procedures usually contain two kinds of time limits. The first concerns how long an employee (or union) has to file a written grievance after the occurrence giving rise to the grievance. The second deals with the amount of time different levels of management are afforded to respond to a grievance at the various steps in the grievance procedure.

A specified time limit should be included in a collective bargaining agreement for the filing of a grievance. This should start to run from the first date of the occurrence giving rise to grievance, or the date on which

the employee or union knew or should have known of the occurrence. By making such a period too short, the filing of some needless grievances may result. This is because if the there is not sufficient time to investigate the complaint and discuss it with the union officials, all potential grievances will be filed so as to avoid missing a deadline. On the other hand, there is much to be said for requiring that grievances not be filed so long after the event that they are stale or that other actions or assignments have been put in place which it would be disruptive to undo. Typically, a period of up to ten (10) days is a reasonable time period. Under no circumstances should more than 30 days be considered reasonable.

The time limits between steps are aimed at two goals: requiring management to move the process of decision making along towards resolution or arbitration, and requiring that the union either appeal each denial or drop the grievance by inaction.

Unreasonably short time limits on rendering management decisions in the grievance process may have an effect similar to affording the union too little time to file a grievance in the first place, viz. denials may be issued before the matter is fully studied.

In deciding on appropriate time limits, the influence of weekends, holidays, vacations and the frequency of appointing authority meetings should be considered. Requiring a chief to answer a grievance within two to three days is impractical considering the possibility of a grievance filed on a Friday before a long weekend or the Chief's vacation. Similarly, for a Board of Selectmen which meets on a weekly or biweekly schedule, even a ten day limit is probably too short.

As regards the limit imposed on the grievant or union to appeal each step in the event of a denial (or management's failure to respond on time which operates as "the equivalent of a denial"), a relatively short span is all that is required. Certainly the union has decided (or can decide promptly) whether the grievance will be pushed to arbitration. Therefore, failure to appeal in a timely manner should be a waiver, thereby terminating the grievance process.

Management Acts / Unions Grieve

Traditionally the ability to file a grievance has been the exclusive prerogative of an employee or the union. Management, on the other hand, typically has no right or need to file grievances. Unless management contends that the union (or employee) is violating a specific provision of the agreement (e.g., the no strike clause), there is no need or basis for management to file a grievance. Even when the no strike clause is violated, resort to the LRC and the courts will be preferable (and far more

expeditious) than filing a grievance and awaiting an arbitrator's decision. Management has the right, hopefully confirmed in a strong management rights clause, to make rules, assign employees, or impose discipline to effectuate what it contends is appropriate or corrective action, rather than asking an arbitrator to do so some months later.

Arbitration Options

There are no statutory limits on the parties' ability to agree upon an arbitrator. While most municipal contracts in Massachusetts end with the submission to the Massachusetts Board of Conciliation and Arbitration (MBC&A) or the American Arbitration Association (AAA), many agreements call for either a specified arbitrator or an effort at agreeing upon some neutral third party, and in default thereof to the MBC&A or the AAA.

The Mass. Board is a state agency providing mediation and arbitration services. The Board's Interest Mediation Service is provided at no charge to the parties. Grievance Mediation Service is provided at a fee of $75 per party. The agency currently imposes a fee of $600 for arbitration ($300 per side). These figures are still lower when compared with typical AAA charges. Over the past decade, there have been some legislative efforts to abolish this agency. As long as it is available, municipalities may find its economical services very attractive. Appendix Forms 14 contain MBC&A Forms.

The AAA, which is an internationally recognized organization with an excellent reputation, uses lists of private arbitrators whose daily charges generally range from $500-$1,200 plus expenses. A total bill of $1,500 to $2,000 is not uncommon, even in routine cases, although an expedited arrangement is available. Complicated cases may cost much more.

The parties may specify how long an arbitrator will have to render a decision, or what criteria or limits will be imposed on the arbitrator's discretion. Time limits will probably require some flexibility and may be difficult to enforce. Inserting a contract provision limiting an arbitrator to interpreting the language of the contract is certainly in management's best interest.

Whenever time limits are waived, this should be done in writing and include a statement that such waiver will not create a past practice nor be admissible in evidence in any forum.

NOTE: *See Appendix Form 2 for sample grievance procedure.*

Definition of Grievance

An often overlooked but fundamental provision in the grievance procedure of the collective bargaining agreement is the definition of what constitutes a "grievance". A narrow *definition would limit grievances to allegations of a breach of the collective bargaining agreement. A broad definition would allow any complaint - whether or not a contract violation was alleged - to be processed as a grievance.*

From a management point of view, a narrow definition is more efficient and affords greater predictability of the outcome. By limiting grievances to allegations of contractual violations, the number of grievances will be fewer and the time and expense of processing them will be less. When the issues are narrowed to the meaning or application of the contract terms, management is better able to predict the results.

A broad definition often allows employees (or the union) to file a grievance over any dispute arising in the course of employment. Clearly, such a provision may result in a larger number of grievances being filed. For example, while a contract may be silent on the subject of assignments, an employee could file a grievance under the broad definition if the individual was unhappy *over: the partner, or vehicle assigned; the route or sector; the supervisor, or any other similar matters.*

A 2002 Appeals Court decision involving the Bristol County Sheriffs looked at the distinction between a broad and narrow arbitration clause much differently than what some had viewed as the traditional distinction.[62] There the grievance procedure applied to differences "as to the meaning and application of [the collective bargaining] agreement."[63] The court deemed this is a "broad" arbitration clause that covered procedural disputes. The Sheriff had contended that procedural issues concerning such things as late filings and improper filings should be handled by a court, not an arbitrator.

Those who favor a broad definition argue that it is good management practice to allow employees to vent any frustration as a kind of "open door policy." On the other hand, opponents question what standards should be used in deciding such grievances, especially if submission to arbitration is possible. A middle ground *is often favored according to one of two possible procedures. One involves a* narrow *grievance definition combined with a clearly enunciated* open door policy*. This conveys the message of employer concern and readiness to listen to all complaints. Another option involves allowing all matters to be filed as grievances, but limits the class of grievances that may be submitted for arbitration to those alleging a breach of a specific contractual provision.*

However a grievance is defined, an employer should clearly spell out the definition in the collective bargaining agreement. This avoids disputes about whether a particular matter is "grievable" or later whether it is "arbitrable". Defining what a grievance is in the collective bargaining agreement allows the employer (and the union) to determine what is arbitrable beforehand. Experience shows that rarely will an arbitrator rule that a grievance is not arbitrable.

§ 4 CONSTITUTIONAL CHALLENGES TO ARBITRATION

Statutes which provide for compulsory arbitration of disputes have been challenged as unconstitutional. Plaintiffs challenging an arbitration statute often allege that the legislature unconstitutionally delegated its authority to the administering agency, without providing adequate guidelines to the agency for the exercise of such authority. Simply put, our constitutional system requires that each branch of the government--legislative, executive (including administrative agencies), and judicial--have separate, distinct functions; this is termed the "separation of powers" doctrine. When a legislature creates a statute requiring arbitration without giving the agency some guidelines, it may unconstitutionally blur the line between legislative functions and executive functions in delegating too much of its authority to the executive branch. Thus, in *New Jersey v. Traffic Telephone Worker's Federation*, the Supreme Court of New Jersey found an arbitration statute unconstitutional which created an arbitration board to arbitrate "any and all disputes then existing between the public utility and the employees," because the legislature had impermissibly delegated its authority to the board without giving it sufficient standards.[64]

The arbitration provision in Section 8 of the Law has not been constitutionally challenged to date. Some cases have involved a challenge to the propriety of arbitration in certain circumstances, generally when arbitration would infringe on a managerial prerogative, but the statute and the arbitration scheme itself has never been attacked.[65] However, a collective bargaining agreement's contractual grievance procedure and binding arbitration provision could be challenged if sufficient guidelines are not given to the arbitrator, thereby infringing on management's non-delegable managerial prerogative, or impermissibly delegating to a non-governmental entity certain responsibilities of the legislative or executive branches of municipal government.

§ 5 CONFLICTS WITH CIVIL SERVICE LAW

When possible, court attempts to read the civil service law and the collective bargaining law, as well as the agreements that flow from the collective bargaining law, as a harmonious whole.[66] If the civil service law and the collective bargaining provisions conflict, then as matter of law, an arbitrator would act in excess of his powers in seeking to enforce those collective bargaining rights.[67] Although the courts may be informed by the arbitrator's interpretation of the meaning and reach of a collective bargaining agreement (CBA), the determination whether the provisions of a CBA conflict with the civil service law is ultimately for the courts.[68]

In the 2004 Appeals Court case of *City of Fall River v. AFSCME, Council 93, Local 3177, AFL-*CIO, the court considered whether there is a conflict between provisions of the civil service law, G.L. c. 31, and a collective bargaining agreement.

The Appeals Court held that there was no conflict between the collective bargaining agreement (CBA) and provisions of the civil service law relating to the discharge of employees with provisional appointments, and thus the arbitrator did not exceed his authority in determining that the dispute involving a former police dispatcher was arbitrable under the CBA. The CBA was focused on a provisional employee's right not to be discharged without justifiable cause until eligibility lists were prepared, but the civil service law was focused on name-clearing and future employment prospects of employees whose reputations had been stained by their discharge.[69]

The issues, as framed by the Superior Court judge, were(1) "whether an arbitrator's award finding that a ... 'provisional employee' may ... [arbitrate her discharge pursuant to the collective bargaining agreement] is final and binding or whether said arbitrability determination is a matter for the courts and [(2)] whether, as a matter of law, allowing a provisional employee to arbitrate [her] discharge is invalid for being in conflict with G.L. c. 31, § 41," of the civil service law, which provides for a name-clearing hearing. The question whether G.L. c. 31, § 41, conflicts with, and precludes the enforcement of, the collective bargaining agreement is ultimately a matter for the court and not the arbitrator to decide. This includes the issue of the arbitrability of the agreement. The court concluded that G.L. c. 31, § 41 does not conflict with provisions in the collective bargaining agreement governing the discharge of the provisional employee, so that the arbitrator did not exceed his authority in determining that the dispute was arbitrable under the agreement.

The civil service law is one of the statutes identified in G.L. c. 150E, § 7(d), which may be "superseded by a collective bargaining agreement."[70] The

question will be therefore whether the civil service law and the relevant CBA provisions conflict.

In the *City of Fall River*, before focusing its inquiry on G.L. c. 31, § 41, and the discharge and arbitration provisions of the CBA, the court needed to put provisional employment under the civil service law and this CBA in context. The civil service law provides for the provisional appointment to a civil service position if "no suitable eligible list exists" from which to make a permanent appointment.[71] In this case, no such list existed for the police dispatcher position. For municipal employees, a provisional appointment cannot be made without the approval of the administrator,[72] i.e., "the personnel administrator of the human resources division within the executive office for administration and finance."[73]

By statute, a provisional employment position shall not be "authorized, approved, or continued for more than thirty days" once a suitable list is established.[74] Furthermore, "[a] provisional appointment may be terminated by the administrator at any time ... whenever the administrator ... shall determine that the person appointed does not, in fact, possess the approved qualifications or satisfy the approved requirements for the position."[75] Finally, as provided in G.L. c. 31, § 41, "[i]f a person employed under a provisional appointment for not less than nine months is discharged as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled, upon his request in writing, to an informal hearing before his appointing authority.... If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed.... Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. The decision of the appointing authority shall be final."

The CBA at issue in the *City of Fall River* was drafted with the express intention of avoiding conflicts with the civil service law. Foremost, it excluded "matters regarding wages and suspensions, demotions and discharges under Chapter 31." Furthermore, it provides that the "employer and the Union shall recognize and adhere to all Civil Service and State Labor Laws, Rules and Regulations, relative to seniority, promotions, transfers, discharges.... Any employee not covered by any statute relative to the above matter shall have recourse to the grievance procedure contained herein or Civil Service route."

The CBA also explicitly covered provisional employees, which is not uncommon.[76] According to Article XXIV of the CBA, "[n]o temporary, provisional or intermittent employee shall be disciplined or discharged, except for justifiable cause, after having successfully served a probation period of six (6) months." The CBA also provided that "[a]ny grievance or dispute which may arise between the parties, including the application,

meaning or interpretation of this agreement, shall be settled" according to a five-step process ending in arbitration.

The appointing authority, the city, through collective bargaining, agreed to have a neutral third party determine whether a provisional employee's discharge was for "justifiable cause," rather than retaining the right provided in the civil service law, G.L. c. 31, § 41, to make the final decision whether the discharge was "justified." Also, unlike G.L. c. 31, § 41, the review of a decision to discharge a provisional employee is not contingent on the need for "name-clearing" for future employment; the loss of the employment itself is sufficient.[77] Finally, under the CBA, a provisional employee's rights took effect after six months of employment, rather than nine months as provided by statute. The city agreed to these additional protections for its provisional employees. It had no obligation to do so.

The difference between the statutory and the contractual standards for the discharge of a provisional employee (discharge must be "justified" pursuant to § 41; for "justifiable cause" under the CBA), was by no means clear. Given the uncertain status of provisional employees, who may be terminated at any time if eligible lists are prepared and a permanent employee is selected therefrom, neither the "justified" or "justifiable" standard establishes the traditional "just cause" or "for cause" dismissal requirement that creates a constitutional property interest.[78]

The CBA provisions negotiated by the parties in the *Fall River* case did not intrude on the core concerns of the civil service law. For example, if an eligibility list is established for a position held by a provisional employee, the right to the position is determined exclusively by the list, not by the provisional employee's collective bargaining rights.[79] The creation of these lists is under the exclusive control of the administrator, not the appointing authority or the union.[80] The administrator must also authorize the hiring of the provisional employee in the first place.[81] Furthermore, the administrator may terminate provisional employees if they do not "possess the approved qualifications or satisfy the approved requirements for the position."[82]

Focusing on "the fundamental purposes of the civil service system--to guard against political considerations, favoritism, and bias in governmental employment decisions ... and to protect efficient public employees from political control,"[83] we see no conflict with the contractual rights at issue. Allowing the appointing authority to agree to a neutral third party's determination whether a provisional employee's discharge was justified, rather than requiring the appointing authority to retain that unfettered right for itself, promotes these values. It also supports the "strong" public policies (1) "favoring collective bargaining between the public employers and employees over the conditions and terms of employment."[84]

Providing such a process, even without the opportunity for name-clearing, and after six months of provisional employment rather than nine also promotes these Civil Service values.

The importance of collective bargaining and arbitration distinguish the *Fall River* case from *Rafferty v. Commissioner of Pub. Welfare*,[85] where the court declined to "decide whether a State agency [on its own initiative outside of collective bargaining could] expand upon the rights of a provisional civil service employee." In contrast, collective bargaining and arbitration were present in *Commissioners of Middlesex County v. American Fedn. of State, County & Mun. Employees, AFL-CIO, Local 414*,[86] where the court allowed "non-tenured" civil service employees to arbitrate a just cause discharge provision. *Commissioners of Middlesex County*, however, predates the passage of that portion of G.L. c. 31, § 41 related to name-clearing hearings.

The CBA and G.L. c. 31, § 41, may also be read harmoniously because they are designed to address different issues. The CBA is focused on a provisional employee's right not to be discharged without justifiable cause until eligibility lists are prepared. Section 41, on the other hand, is focused on name-clearing and the future employment prospects of employees whose reputations have been stained by their discharge.[87] The focus of § 41 is reflected in the fact that its protections are triggered only when "the reason for [the provisional employee's] discharge is to become part of his employment record," and the reason is related to his "personal character or work performance."

Before concluding that the Civil Service statutory scheme precludes operation of a bargained-for contractual provision, court have required that the conflicts between the civil service law and the CBA be "material."[88] Such conflicts have been found where the "award by the arbitrator forces the city to violate the procedures outlined in G.L. c. 31 in regard to the appointment of qualified individuals to civil service vacancies," thereby producing an appointment compelled by collective bargaining that is prohibited by the civil service law.[89] Similarly, such a conflict has been found where a collective bargaining right "directly and substantially conflicts" with a policy choice reflected in the civil service law.[90]

Two cases that require individual consideration are *Fall River v. Teamsters Union, Local 526*,[91] and *Leominster.*[92] In *Fall River*,[93] the issue presented was whether a provisional appointment to a position covered by a CBA had to be made on the basis of a seniority clause in the agreement. An arbitrator determined it did, but a Superior Court judge vacated the award, concluding that the municipality's power of appointment was "non-delegable" under the civil service law.[94] The court reversed on the ground that the "provisional appointment provisions of the civil service law do not preclude the application of a seniority clause in a collective bargaining

agreement for purposes of choosing among qualified candidates for a position."[95] They also concluded that "[r]ecourse to seniority in filling a civil service job does not distort any policy of the civil service law or any other statute called to attention."[96]

In contrast, the court did identify conflicting provisions and a distortion of policy in *Leominster*, *supra.* There, an arbitrator determined that the discharge of a police officer serving her twelve-month probationary period, prior to attaining tenure and permanent status, required a showing of just cause as provided in the CBA.[97] The court focused on the substantive difference between the contract standard of "just cause" and the civil service standard of "not satisfactory to the appointing authority."[98] It concluded that the contract standard conflicted with the more subjective and prognostic evaluative process the civil service statute contemplated for probationary employees, transforming it from "an experimental testing of fitness" to a "proof of serious misconduct."[99] The court emphasized that it was necessary to "take care not to hobble the employer unduly in the process of selection for tenure because dislodgement thereafter is notoriously difficult."[100]

In the *Fall River* case, the court identified no material conflict between the Civil Service law and the collective bargaining provisions or any distortion of the civil service law. Unlike in *Leominster*, the additional protection of the CBA was provided to provisional employees, not to tenure-track probationary employees, so no transforming or hobbling of the selection process for tenured employees would result. Also, as discussed supra, allowing an independent third party to determine whether a decision to discharge was justifiable promotes rather than distorts certain core values of the civil service law. As in *Fall River*, the court did not see this decision as non-delegable.[101] The court was not, for example, dealing with the special concerns relating to the deployment of police officers.[102]

Finally, *Fall River* was not a case where the employee sought to use both the Civil Service and the collective bargaining process to challenge her discharge. She elected to use the collective bargaining grievance procedure. She did not exercise her right to a name-clearing hearing pursuant to G.L. c. 31, § 41. Consequently, the court noted that there was no danger of inconsistent decisions by the arbitrator and the appointing authority. Employees must, however, make a choice between the two procedures to avoid such a conflict.[103]

The *Fall River* case was remanded to the Superior Court for the entry of a judgment consistent with the Appeals Court's decision that there is no conflict between G.L. c. 31, § 41, and the collective bargaining agreement provisions, and that therefore the arbitrator did not exceed his authority in determining that the dispute was arbitrable under the agreement.

[1] *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 616-617, 13 L.Ed. 2d 580 (1965).
[2] 29 U.S.C. § 203(d).
[3] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).
[4] *Id.*
[5] *Local Union No. 1710, Intl. Assn. of Fire Fighters v. City of Chicopee*, 430 Mass. 417, 420-421, 721 N.E.2d 378 (1999), *quoting from AT&T Technologies, Inc. v. Communications Wkrs. of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).
[6] *John Wiley & Sons v. Livingston*, 378 U.S. 543, 550, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964).
[7] *United Steelworkers of America v. Warrior v. Gulf Nva. Co.*, 363 U.S. 574, 580-582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).
[8] *Local No. 1710, Intl. Assn. of Fire Fighters v. Chicopee, supra* at 421, 721 N.E.2d 378, quoting from *AT7T Technologies, Inc. v. Communications Wkrs. of America*, 475 U.S. at 649, 106 S.Ct. 1415.
[9] *See e.g., Nolde Bros. V. Local No. 358, Bakery & Confectionery Wkrs. Union*, 430 U.S. 243, 254, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977) (discussing how parties drafted their arbitration clause "against a backdrop of well-established federal labor policy favoring arbitration").
[10] *City of Boston and AFSCME*, 18 MLC 1088 (1991); *Town of South Hadley*, 6 MLC 2133 (1980); *City of Boston*, 5 MLC 1155 (1978); *Boston School Committee*, 1 MLC 1287 (1975).
[11] 18 MLC at 1089.
[12] *Id.*
[13] G.L. c. 150E § 8.
[14] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) *Boston School Committee*, 1 MLC 1287, 1291-1292 (1975).
[15] *City of Boston*, 5 MLC 1155 (1978); *Town of Brookline,* 20 MLC 1570, 1593 (1994).
[16] City *of Cambridge,* 7 MLC 2111, 2112 (1981).
[17] *See Whittier Regional School Committee,* 13 MLC 1325, 1331-32 (1986).
[18] *Boston School Committee*, 1 MLC at 1292.
[19] *AT&T Technologies, Inc. v. Communications Wkrs. Of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *Local No. 1710, Intl. Assn. of Fire Fighters v. Chicopee*, 430 Mass. 417, 420-421, 721 N.E.2d 378 (1999).
[20] *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-583, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). *Chicopee, supra* at 421, 721 N.E.2d 378.
[21] (Citations omitted.) *AT&T Technologies, Inc., supra*, at 650, 106 S.Ct. 1415, quoting from *United Steelworkers v. Warrior & Gulf Nav. Co., supra, Chicopee, supra.*

[22] *United Steelworkers v. Warrior Gulf & Nav. Co., supra* at 585, 80 S.Ct. 1347.
[23] *Massachusetts Correctional Officers Federated Union v. Sheriff of Bristol County*, 55 Mass. App. Ct. 285, 770 N.E.2d 528 (2002).
[24] *Id. See also*, *Old Rochester Regional Teacher's Club v. Old Rochester Regional School District Committee*, 398 Mass. 695, 500 N.E.2d 1315 (1986) (holding that arbitrators have the authority to take testimony, conduct hearings, and fashion remedies, and additionally that the collective bargaining agreement may allow grievances to be resolved through arbitration).
[25] *Id.*
[26] *Town of Sharon*, 22 MLC 1695 (1996); *Sturbridge School Committee*, 21 MLC 1233 (1994).
[27] *Town of Shrewsbury*, 4 MLC 1441, 1445 (1977).
[28] *Essex County Sheriffs*, 29 MLC 75 (2002).
[29] *Essex County Management Association*, 20 MLC 1519, 1521 (1994).
[30] *Board of Higher Education*, 29 MLC 91 (2002).
[31] *Town of East Longmeadow*, 3 MLC 1046 (1976).
[32] *Director of the Division of Employee Relations of the Department of Administration and Finance v. Labor Relations Commission*, 370 Mass. 162, 346 N.E.2d 852 (1976).
[33] *Essex County Management Association*, 20 MLC 1519 (1994).
[34] *Town of East Longmeadow*, 24 MLC 120 (1998).
[35] *Medford School Committee*, 16 MLC 1618 (1991); *Mass. Commissioner of Admin. and Fin.,* 12 MLC 1245 (1985).
[36] *Swampscott Fire Fighters*, Local 1459, 8 MLC 1354 (1981); *Framingham Fire Fighters Local 1652, IAFF*, 8 MLC 1343 (1981).
[37] *Worcester Housing Authority*, 15 MLC 1274 (1988).
[38] *Board of Trustees of State Colleges*, 1 MLC 1474 (1975).
[39] *City of Worcester*, 2 MLC 1155 (1975).
[40] *Town of Shrewsbury*, 4 MLC 1441 (1977).
[41] *Athol-Royalston School Committee*, 12 MLC 1349 (1985); *Town of Grafton*, 16 MLC 1090 (1989); *North Shore Regional Vocational School Dist.*, 12 MLC 1347 (1985); *University of Massachusetts Medical Center*, 25 MLC 93 (1998).
[42] *Sturbridge School Committee*, 1 MLC 1381 (1975); see also, *Town of Shrewsbury*, 4 MLC 1441 (1977) (holding that issue of whether arbitration has been foreclosed due to procedural deficiencies in the claim will be determined by the arbitrator).
[43] *Board of Trustees of State Colleges*, 2 MLC 1344 (1976).
[44] *City of Chelsea*, 3 MLC 1384 (1977).
[45] *Everett Housing Authority*, 8 MLC 1818 (1982).
[46] *Cf., City of Boston*, 2 MLC 1331 (1976) (holding that if the employer refuses to comply with the award, thereby forcing other employees to file

similar grievances, the employer may nonetheless argue in good faith that the second grievance is not covered by the award).
[47] *Swampscott Firefighters Local* 1459, 8 MLC 1354 (1981); *Worcester School Committee*, 2 MLC 1154 (1975).
[48] *Town of Athol*, 4 MLC 1137 (1977).
[49] *Town of Shrewsbury*, 4 MLC 1441 (1977).
[50] G.L. c. 150E § 8.
[51] *Id.*
[52] *University of Massachusetts Medical Center*, 25 MLC 93, 94 (1998), *citing Town of Grafton*, 23 MLC 221, 222 (1997).
[53] *Worcester Housing Authority*, 15 MLC 1274, 1276 (1988).
[54] *Worcester Housing Authority*, 28 MLC 279 (2002).
[55] *See North Middlesex School Committee*, 21 MLC 1330, 1332-1333 (1994).
[56] *North Middlesex Regional School District Committee*, 24 MLC 42, 43 (1997), *citing Plymouth County*, 12 MLC 1295 (1985).
[57] *City of Cambridge*, 7 MLC 2111 (1981).
[58] *Westfield School Committee*, 28 MLC 263 (2002).
[59] *National Labor Relations Board in Olin Corp.*, 268 NLRB 573, 115 LRRM 1056 (1984)
[60] *Cf. City of Gardner*, 26 MLC 189, 190 (2000), *citing City of Cambridge*, 7 MLC 2112-2113 (Commission determined that the legal basis of the arbitrator's award was not clear and declined to defer a Section 10(a)(3) allegation.)
[61] *Wachusett Regional School* Committee, 16 MLC 1618 (1990).
[62] *Massachusetts Correctional Officers Federated Union v. Sheriff of Bristol County*, 55 Mass. App. Ct. 285, 770 N.E.2d 528 (2002).
[63] Id.
[64] *New Jersey v. Traffic Telephone Worker's Federation*, 66 A.2d 616 (N.J. 1949).
[65] *See e.g., School Committee of Lynnfield v. Trachtman*, 384 Mass. 813, 429 N.E.2d 703 (1981*); Blue Hills Regional District School Committee v. Flight*, 383 Mass. 642, 421 N.E.2d 755 (1981); *Blackstone-Millville Regional School District v. Maroney*, 421 N.E.2d 1215 (1981). Non-delegable or exclusive managerial prerogatives will be discussed in some depth in Chapter 7, Management Rights.
[66] M.G.L.A. c. 31, § 1 et seq.
[67] M.G.L.A. c. 31, § 1 et seq.
[68] M.G.L.A. c. 31, § 1 et seq.
[69] M.G.L.A. c. 31, § 41.
[70] *Fall River v. Teamsters Union, Local 526*, 27 Mass.App.Ct. 649, 651, 541 N.E.2d 1015 (1989). *See Dedham v. Dedham Police Assn.*, 46 Mass.App.Ct. 418, 420, 706 N.E.2d 724 (1999).
[71] G.L. c. 31, § 12.
[72] *Ibid.*

[73] G.L. c. 31, § 1, as amended by St. 1998, c. 161, § 234.
[74] G.L. c. 31, § 14. *See McLaughlin v. Commissioner of Pub. Works*, 304 Mass. 27, 29, 22 N.E.2d 613 (1939).
[75] G.L. c. 31, § 14.
[76] *See School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. 557, 563, 447 N.E.2d 1201 (1983) ("[t]he fact that the janitors were provisional employees does not exclude them from the protection of G.L. c. 150E"). *See also Commissioners of Middlesex County v. American Fedn. of State, County & Mun. Employees, AFL-CIO, Local 414*, 372 Mass. 466, 362 N.E.2d 523 (1977) (in case predating passage of c. 31, § 41, court allows nontenured provisional employees to arbitrate just cause discharge provisions).
[77] *Fontana v. Commissioner of the Metropolitan Dist. Commn.*, 34 Mass.App.Ct. 63, 70, 606 N.E.2d 1343 (1993) (explaining name-clearing aspects of G.L. c. 31, § 41).

[78] *See Smith v. Commissioner of Mental Retardation*, 409 Mass. 545, 549, 567 N.E.2d 924 (1991) (G.L. c. 31, § 41, rights of provisional employee with nine months' seniority "merely conditions an employee's removal on compliance with certain specified procedures [and] does not establish a constitutionally protected property interest in position" [citation and quotation marks omitted]); *Rafferty v. Commissioner of Pub. Welfare*, 20 Mass.App.Ct. 718, 723, 482 N.E.2d 841 (1985) ("[t]here is no statutory requirement that a provisional employee cannot be removed without proof that the removal is for cause" under G.L. c. 31, § 41); *Bennett v. Boston*, 869 F.2d 19, 22 (1st Cir.1989) (Breyer, J.) ("for cause" contractual rights for provisional employees do not create constitutional property rights due to special status of provisional employees under civil service laws).
[79] *See* G.L. c. 31, § 14.
[80] *See* G.L. c. 31, § 12.
[81] *See ibid.*
[82] G.L. c. 31, § 14.
[83] *Cambridge v. Civil Serv. Commn.,* 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923 (1997)
[84] *Chief Justice for Admn. & Mgmt. of the Trial Ct. v. Office and Professional Employees Intl. Union, Local 6, AFL-CIO*, 441 Mass. 620, 630, 807 N.E.2d 814 (2004), quoting from *School Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 761-762, 784 N.E.2d 11 (2003), and (2) encouraging arbitration, *School Comm. of Pittsfield v. United Educators of Pittsfield,* 438 Mass. at 758, 784 N.E.2d 11.
[85] *Rafferty v. Commissioner of Pub. Welfare*, 20 Mass.App.Ct. 718, 725, 482 N.E.2d 841 (1985).
[86] *Commissioners of Middlesex County v. American Fedn. of State, County & Mun. Employees, AFL-CIO, Local 414*, 372 Mass. at 467, 362 N.E.2d 523.

[87] *See Fontana v. Commissioner of the Metropolitan Dist. Commn.*, 34 Mass.App.Ct. at 70, 606 N.E.2d 1343 ("A crucial purpose of the name-clearing hearing is to prevent unfair foreclosure of future employment").
[88] *Leominster v. International Bhd. of Police Officers, Local 338*, 33 Mass.App.Ct. 121, 125, 596 N.E.2d 1032 (1992) (Leominster).
[89] *Everett v. Teamsters, Local 380*, 18 Mass.App.Ct. at 140, 463 N.E.2d 1200. See *Massachusetts Org. of State Engrs. & Scientists v. Commissioner of Admn.,* 29 Mass.App.Ct. 916, 918, 557 N.E.2d 1170 (1990) (four-year experience requirement set by personnel administrator conflicts with six-year qualification set by appointing authority).
[90] *Leominster, supra* at 127, 596 N.E.2d 1032.
[91] *Fall River v. Teamsters Union, Local 526*, 27 Mass.App.Ct. at 649, 541 N.E.2d 1015.
[92] *Leominster, supra*. In Fall River, supra at 650, 541 N.E.2d 1015
[93] *Fall River*, supra at 650, 541 N.E.2d 1015.
[94] *Id.* at 651, 541 N.E.2d 1015.
[95] *Id.* at 653, 541 N.E.2d 1015.
[96] *Id.* at 654, 541 N.E.2d 1015.
[97] *Id.* at 122-123, 596 N.E.2d 1032.
[98] *Id.* at 125, 596 N.E.2d 1032.
[99] *Id.* at 126, 596 N.E.2d 1032. See *Costa v. Selectmen of Bi*llerica, 377 Mass. 853, 860, 388 N.E.2d 696 (1979).
[100] *Leominster, supra* at 127, 596 N.E.2d 1032, quoting from *Costa v. Selectmen of Billerica*, 377 Mass. at 860-861, 388 N.E.2d 696.
[101] See *Dedham v. Dedham Police Assn.,* 46 Mass.App.Ct. at 421, 706 N.E.2d 724 ("nothing in the [civil service] law constrained [the parties] choice. They were free to agree as they wished").

[102]*See e.g., Boston v. Boston Police Superior Officers Fedn.,* 52 Mass.App.Ct. 296, 299, 753 N.E.2d 154 (2001).
[103] *See generally* G.L. c. 150E, § 8 (any grievance procedure "culminating in final and binding arbitration .... shall, where such arbitration is elected by the employee ... be the exclusive procedure"); G.L. c. 31, § 42; *Canavan v. Civil Serv. Commn.,* 60 Mass.App.Ct. 910, 802 N.E.2d 126 (2004).

CHAPTER 9 - UNILATERAL CHANGES IN WORKING CONDITIONS

The existence of a past practice is often important in the labor relations context in two principal areas. The first arises during grievance arbitration. The second occurs when a union files a prohibited practice charge at the Labor Relations Commission. This chapter will discuss the role *past practice* plays first in grievance arbitrations and later the way that the Massachusetts Labor Relations Commission (LRC or Commission) deals with *past practice* in the context of a prohibited (unfair labor) practice charge.

PRACTICE POINTERS

The notion of "past practice" often is misunderstood by both labor and management. The former often sees this as the key to blocking any efforts at altering existing benefits. The latter often views assertions of a past practice as an insurmountable obstacle to change. Neither is correct. Unless a certain practice is incorporated in the collective bargaining agreement, or there is a "past practice clause" in the contract, management is free to propose a change. When the proposal is made outside regular contract negotiations, all that is required is that the union be provided with notice and the opportunity to bargain. If a request to bargain is made, good faith negotiations must follow. If the union fails to bargain in good faith, management can implement. Otherwise, it must continue good faith negotiations until either agreement or impasse is reached.

A common error by both chiefs and municipal employers is to wait until regular negotiations are scheduled to propose changes in matters not already fully covered by the contract. This is a tedious and frustrating approach as it means that a chief is not free to implement the proposal upon reaching impasse (since the Joint Labor Management Committee (JLMC) will then be involved.) It usually means that such change will also be costly and rarely will be implemented without significant compromise.

Whenever a chief is considering adding a proposal to regular contract negotiations, the key question should be whether this is a matter that may be handled on a mid-term basis. If so, this is usually the better approach. The only items a chief should propose at negotiations should be those that

enhance management rights or alter the language of the current agreement to the betterment of management.

See Chapter 10, Mid-Term Bargaining.

§ 1 ARBITRATORS' VIEWS

When an arbitrator attempts to interpret the meaning of a provision in the collective bargaining agreement (especially where such provision is ambiguous), the arbitrator will look to the course of conduct between the parties (i.e., past practice) to help determine what the parties had in mind when they included such a provision in the contract. In some cases, arbitrators may look to past practice even in the absence of an ambiguous contract clause, and some may use past practice even to contradict a contract term or establish new working conditions.

When a particular course of conduct is shown to have taken place over a protracted period of time and results not from the decision by management as to the way certain things are to be done but rather amounts to a mutually accepted practice by both management and labor, an arbitrator may determine that it constitutes a *past practice*.

A. DEFINITION

There is no statutory list of criteria and therefore arbitrators are free to adopt their own definition of what constitutes a *past practice*. Some arbitrators sum up the elements of a past practice in a single sentence while others opt for a multi-part "test". Several examples follow:

Single sentence definitions include:

> Past practice may be described as a pattern of conduct which has existed over an extended period of time and which has been known to the parties and has not been objected to.[1]
>
> and also:
>
> For a practice to develop into an established past practice, it must be followed with such consistency over a period of time that the employees may rely and reasonably expect such practice to continue as a permanent working condition, even though the condition is not specifically enunciated in the collective bargaining agreement.[2]

While each of the following "tests" contains a different number of components, there are many similarities, especially as regards repetition and mutual understanding.

Most arbitration decisions find that there is a major distinction between "the way things have been done" and a "past practice". The former is non-binding. In order for the latter to be binding, most arbitrators require proof of several components. The following four part "test" is used by many arbitrators and commentators:

1. That the past practice be "clear";
2. That the past practice be "consistently followed";
3. That the past practice has been "followed over a reasonably long period of time"; and
4. That the past practice be "shown by the record to be mutually accepted by the parties".[3]

A widely cited three-part definition of a past practice provides:

In the absence of written agreement, a "past practice", to be binding on both parties, must be:

1. Unequivocal;
2. Clearly enunciated and acted upon;
3. Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.[4]

Even when a two-part definition has been used, it contains many of the elements cited above. For example, another definition specifies:

(1) A prior course or pattern of behavior, consistently elicited by recurring fact situations; and

(2) some understanding that the conduct is the proper or required response to the particular circumstances.[5]

B. BURDEN OF PROOF

In the arbitration context, whichever party asserts the existence of a past practice must prove that *mutuality* exists by showing that there was some implied agreement by mutual conduct on the part of both labor and management. The party must show not only that the practice exists, but also must show the scope of such alleged past practice. In a widely cited arbitration decision on the topic of past practice, Arbitrator Harry Shulman stated:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding . . . a practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based.
>
> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation, or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things . . . .
>
> A contrary holding would place past practice on a par with written agreement [and would] create the anomaly that while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice . . . . [W]ould the long time use of a wheel-barrel become a practice not to be changed by the substitution of four-wheel buggies drawn by a tow tractor? . . . Yet such might be the restraint, if past practice were enshrined without carefully thought out and articulated limitations . . . .[6]

It appears that arbitrators generally examine the following five areas in determining whether or not there is a well established pattern of conduct representing a mutually agreed upon response to a particular set of circumstances:

- the frequency of the practice;
- the consistency of the practice;
- the longevity of the practice;

- the circumstances surrounding the creation of the practice; and
- whether the continuation of the practice has been discussed in negotiations or during the grievance and arbitration procedure.[7]

Some arbitrators are more likely to find a past practice when the topic involves a major term and condition of employment, whereas, minor terms and conditions would not be found to constitute such a past practice. Other arbitrators make a distinction between traditional management functions which need not be the subject of regular negotiations, and therefore would not come within the scope of a past practice, while more traditional "working conditions", which were customarily the subjects of collective bargaining agreements, might serve as the basis of a finding of a past practice. Lastly, some arbitrators make a distinction between what they consider to be an *employee benefit* where they would find a binding past practice, as opposed to *gratuities* which an employer provides to its workers but remains free to withdraw unilaterally at any time without violating any implied terms of the collective bargaining agreement.

Arbitrators will generally require much stronger evidence to establish a past practice which a Union asserts has independent enforceability as opposed to a lower level of proof which an arbitrator might be willing to accept as an offer in support of a particular interpretation where there exists some ambiguity over the meaning or application of an existing contract provision.

C. USE OF PAST PRACTICE

Arbitrators generally utilize the determination of a *past practice* in one of the following ways:

- to clarify any ambiguous language in a collective bargaining agreement;
- to enforce contract language which was intentionally left general in nature;
- to alter or amend the plain language of a collective bargaining agreement; or
- to establish new and independent working conditions.

D. CONTRACT INTERPRETATION

1) Clarifying Ambiguities

Courts and arbitrators alike will look to past practice when attempting to determine which interpretation of ambiguous contract language is appropriate. For example, the Seventh Circuit Court of Appeals vacated and remanded an arbitration award which required an employer to pay holiday premium rates for a Tuesday, December 26.[8] The arbitrator found that since the "day before Christmas", which was a contractual holiday and fell on a Sunday, moved by a virtue of a contractual provision to Monday, which was December 25, "Christmas Day" must similarly move to the following day, Tuesday, December 26. The arbitrator refused to treat the "day before Christmas" and "Christmas Day" as occurring on the same day.

The Court held that if the arbitrator based the decision on past practice, the award was defective since the agreement had a zipper clause which precluded the arbitrator from relying on past practice. (The zipper clause provided "the parties past understandings form no part of the new contract.") If, however, the award was based upon one of the purposes of the holidays, that is, i.e., to provide leisure time, the Court believed that the award would be enforceable.

In a 1993 decision involving the Peabody Police Department, the Massachusetts Appeals Court upheld an arbitrator's use of evidence of a *past practice* to interpret the ambiguous language of the collective bargaining agreement.[9] The court ruled that because the language concerning lunch breaks was not clear, the arbitrator was able to look to evidence of a *past practice* to help clarify an ambiguous contract provision.

Where the provisions of a contract are sufficiently ambiguous that an arbitrator will accept oral testimony (parole evidence), the existence of a past practice will often times be admitted into evidence. Arbitrators are inclined to believe that where the parties have, by mutual agreement, interpreted ambiguous contract provisions in a particular way over a long period of time, there is some merit to relying upon such interpretation in the future. This is especially so where contracts are drafted by non-lawyers and where the interpretation given to ambiguous contract provisions is shown to be the result of the intention of the parties who actually drafted the document.[10]

2) Enforcing Contract Language

Negotiators occasionally leave certain contract terms unspecific intentionally. They thereby expect to be able to cover all foreseeable circumstances. While this is *non-lawyerly*, it is a fact of life recognized by arbitrators. The general language is often followed by examples along with a phrase similar to "including but not limited to . . .". For example, a personal leave article might state: "Employers may take up to two (2) shifts per year as personal days for compelling personal reasons (including, but not limited to, dental or medical check-ups, children's graduations, caring for sick relatives, etc.)". It is clear that the parties intended some flexibility and left the definition intentionally general. In many ways this resembles the area of *ambiguity* discussed above. In any event, an arbitrator will look to past practice to help decide the types of "compelling personal reasons" the article has come to include. Especially where there have been numerous mutually agreed upon reasons for which personal days have been used, this is seen as a reasonable tool of interpretation of the parties' intention.

3) Amending Contract Language

While there is some minor disagreement among arbitrators, the prevailing view is that where a conflict exists between the language of a collective bargaining agreement and past practice, the language of the agreement will control. Even in those cases involving the overriding of a contract provision by past practice, arbitrators generally require extremely clear proof of a mutually agreed upon past practice.

In only the rarest of cases will a court uphold an arbitration award which completely contradicts the unambiguous language of the collective bargaining agreement in favor of an established past practice. However, since determining the intent of the parties is one of the objectives of both arbitrators and courts, where the evidence clearly indicates that a result different than that expressed by the language of the contract was intended, the past practice may be found to supersede the specific provision of the agreement.[11] The Eleventh Circuit Court of Appeals, in upholding an arbitration award involving a claim for retirement benefits, stated the following:

> In construing any contract, including a collective bargaining agreement, determining the intent of the parties is the essential inquiry. Although that intent will generally be discernible from the express words of a collective bargaining

> agreement, we cannot always be certain that this is so . . .[12]

Courts will be reluctant to uphold arbitration decisions involving an alleged waiver of rights contained in the contract by a past practice of employer inaction. For example, although an arbitrator found that an employer had waived the right to contest the untimely appeal of the grievance arbitration based on the fact that on two prior occasions the time limitations in the earlier stages of the grievance procedure had not been strictly enforced, the Sixth Circuit Court of Appeals reversed the arbitrator's award. It based its decision on the fact that the contractual language was "clear and unambiguous," and that the arbitrator's finding of a waiver was not supported by the record, and that, therefore, the arbitration award failed to draw its essence from the agreement.[13]

The prevailing view among arbitrators is that where the language of a collective bargaining agreement is clear and unambiguous, an arbitrator is without power to alter or amend the terms of such contract. Arbitrator James O'Reilly's comment is typical of such views:

> If the arbitrator would allow a past practice to modify or amend what he/she has determined to be a seemingly clear and unambiguous contract provision, then the Arbitrator would have extended his/her authority beyond that which the parties have granted.[14]

The Massachusetts Appeals Court has ruled in both a private and public sector case that an arbitrator has broad authority in awarding relief as long as the relief does not offend public policy, require a result contrary to statute or transcend the limits of the contract of which the agreement to arbitrate is but a part.[15]

Some arbitrators have used a past practice to contravene the express provisions of a collective bargaining agreement. However, this generally occurs when the practice has been so consistently followed that the arbitrator is convinced that the parties have agreed to a new practice, in spite of the contract's language. The lack of a large number of such decisions makes any generalized rule hard to formulate. It appears that such decisions are addressed on a case-by-case basis, and only when the evidence is very strong that the parties intend to be bound by something other than the words of the contract on a particular topic.[16]

One example involved a contract clause which called for the employer to pay the total cost of safety shoes. Over the years, however, the clear past practice was that the employer would put a limit on the amount.[17] The arbitrator ruled:

> There is no doubt the union was aware of this policy and acquiesced in the Company's departure from the contractual obligation to pay the total. A frequent practice not in compliance with the contractual language was established and was not grieved.

PRACTICE POINTERS

An employer not wanting to be bound by a past practice which might not be in conformity with a contract provision could take one or more of the following steps. It might propose a clause expressly providing that the terms of the agreement will supersede any past practice, regardless of how long-standing or clear, to the contrary. It could also propose a clause limiting the authority of an arbitrator to interpreting the contract's terms and restricting the arbitrator from taking evidence of a past practice except in cases where the language of the contract was ambiguous.

Some contracts contain a clause providing that where a conflict exists between the agreement and past practice, the agreement will govern. This would effectively limit the scope of an arbitrator's ability to supersede the terms of the collective bargaining agreement by even a clearly established past practice. Such clauses are often placed in private employment agreements where a national contract is negotiated covering numerous local plants.[18]

In the *City of Peabody v. Peabody Police Benevolent Association*, the contract contained a clause which prohibited an arbitrator from issuing an award that would "alter, amend, add to or subtract from the express provisions of the agreement."[19] It was only because the court found that the language of the contract was unclear, that the arbitrator was entitled to look to *past practice* in an effort to clarify such ambiguity. The court did not find the limitation placed on the arbitrator's power in the contract was meant to deprive an arbitrator from being able to *interpret* ambiguous provisions.

4) Creating New Working Conditions

Some arbitrators use past practice to interpret or to fill-in gaps which are found to exist in the provisions of the collective

bargaining agreement. The most common types of past practice used to prove additional employer obligations which are not specified in the contract involve some type of supplemental employee benefits. While arbitrators have shown some willingness to add relatively minor *new terms* to an agreement, especially in private sector contract situations, there is a reluctance to do so in the public sector (especially in light of shrinking finances). For example, in the 1980 arbitration case involving the Tampa Police Department, Arbitrator Wahl ruled that an employer could unilaterally eliminate the past practice of allowing officers to take home police cars where there had been no provision in the agreement protecting such a practice. The arbitrator found that there was economic justification for the City's actions, and that an oral promise to continue the practice, although made in good faith, could not be viewed as binding pursuant to a City ordinance.

As noted in a leading compilation of works on arbitration:

> The reduced authority possessed by certain management officials in the public sector arguably may affect the inference that an arbitrator may place on past practices that are used to establish free-standing terms and conditions of employment on either an estoppel or an implied agreement theory.[20]

E. CHANGING PAST PRACTICES

In the private sector, a rule often followed by some arbitrators is that once a past practice has come into existence, so long as no contractual provision provides otherwise, an employer may not unilaterally eliminate such past practice during the term of the collective bargaining agreement.[21] On the other hand, arbitrators are more inclined to allow an employer to discontinue a past practice during the term of a collective bargaining agreement where such past practices were not clearly derived from ambiguous or general contract language when it was shown that there was an abuse of the past practice[22] or a change in the circumstances upon which the past practice was founded[23].

PRACTICE POINTERS

In the public sector in Massachusetts, the LRC has a clear policy of allowing an employer to change a past practice which is not incorporated in a collective bargaining agreement. The only requirement is to provide

the union with notice and the opportunity to bargain. If such bargaining takes place, it must be done in good faith to the point of either agreement or impasse (whereupon the proposed change may be implemented).

It is important to look at a past practice in light of the circumstances which led to its creation. For example, while an employer may have provided free parking to employees at their rural plant, it would be free to discontinue this practice when it relocated to a downtown building where free parking was no longer available.[24] Similarly, an employer was authorized to eliminate the past practice of allowing employees to take unpaid leaves of absence to extend their vacation time when it was determined that an increased number of employees had begun taking extended vacations, thereby making it difficult to schedule work.[25] It is fair to assume, however, that an arbitrator may be reluctant to approve a unilateral discontinuance of a past practice if the employer does not institute that change within a reasonable period of time after the change in circumstances, at least in the private sector.

F. ESTABLISHING NEW WORKING CONDITIONS

In the arbitration context, benefits which have consistently been granted and yet are not incorporated in the collective bargaining agreement are sometimes given the same legal effect as contract benefit clauses. This is often referred to as the *silent contract*. There is certainly a disagreement among arbitrators as to the enforceability of such provisions. Tim Bornstein, a well-known arbitrator, wrote:

> . . . the prevailing view today is . . . that a past practice that has *no basis whatever* in the contract is not enforceable.[26]

A contrary view was expressed by an arbitrator as follows:

> When a contract is silent on a particular matter a past practice may develop which, in legal effect, becomes part of the collective bargaining agreement as though specifically set forth therein.[27]

G. PAST PRACTICE CLAUSES

Some of the best known maintenance of benefits (past practice) clauses are contained in Section 2B of the basic steel agreement as well as those

involving the coal industry. Noted Arbitrator Saul Wallen, in his address to the National Academy of Arbitrators, discussed the impact of such clauses in the areas of wash-up time and paid lunch periods, subcontracting, and crew sizes. He concluded that even with such a clause, there was very little difference between the way arbitrators treated claims involving wash-up time and paid lunch periods in the steel industry and in other industries. He observed that arbitrators were likely to apply the same definitional concepts of what constitutes a past practice, as distinct from a *gratuity* or mere *present way of doing things*, and reach similar results. As regards the area of subcontracting, he also found little significant difference. He observed that arbitrators are likely to sanction managerial action involving contracting out work which is viewed as a fundamental management right, unless the contracting out is shown to frustrate one of the basic aims of the agreement. Arbitrator Wallen found little reliance by arbitrators upon a history of particular work being performed by the bargaining unit. As regards crew sizes, he did find a significant difference in the results. Outside the steel industry, he noted that arbitrators generally viewed the determination of staffing levels as a management prerogative, with prior conduct being considered merely a present way of doing things rather than a mutually accepted past practice. In the steel industry, however, crew sizes were found to be local working conditions which arbitrators felt were immune from unilateral employer change absent some material change in circumstances (e.g., changes in equipment, process, or operation that would affect the level of staffing).

PRACTICE POINTERS

The principal distinction between a contract with a past practice clause and one without such a clause is the impact of the clause on management's attempt to terminate a past practice simply by delivering a notice to the union during negotiations. Where a maintenance of benefits clause exists, it is likely that a well-established past practice must remain in full force and effect during the succeeding collective bargaining agreement unless affirmative mutual action is taken which indicates an agreement to abandon the past practice. On the other hand, where a collective bargaining agreement is silent concerning past practices, most arbitrators and courts treat unilateral statements made during negotiations of an employer's intention to abandon a past practice as sufficient to terminate the past practice. In addition, Arbitrator Harry H. Platt, when commenting on Arbitrator Wallen's presentation, noted that it appeared that arbitrators may be slightly more inclined to infer "mutuality" from a repeated course of conduct when a collective bargaining contract contains a past practice clause rather than when it does not.

H. ARBITRABILITY OF PAST PRACTICE GRIEVANCES

While there have been different trends among arbitrators over the years, a unanimous 1986 decision of the U.S. Supreme Court ruled that in the absence of specific language in a contract leaving arbitrability issues to arbitrators, substantial arbitrability is a judicial question and that parties may not be required to arbitrate disputes that they have not agreed to arbitrate.[28]

PRACTICE POINTERS

Collective bargaining agreements which narrowly define grievance procedures may assist an employer in avoiding grievances based solely on claims of past practice rather than on violations of specific provisions of the collective bargaining agreement.

§ 2 THE L.R.C.'S VIEW

When a past practice involves a mandatory subject of bargaining, an employer commits a prohibited practice (in violation of Section 10(a)(5) of the Law) when it unilaterally changes such a past practice without providing the union with notice and an opportunity to bargain to the point of agreement or impasse. Even where employer action is authorized unilaterally (e.g., where a management right is involved), an employer must bargain upon request with the union over the *impact* of such change upon mandatory subjects of bargaining. The duty to bargain extends to both conditions of employment that are established through past practice as well as those established through a collective bargaining agreement.[29]

A municipal employer, in the absence of a valid contract provision to the contrary, may make changes in (or which impact upon) mandatory subjects of bargaining, but only after providing the union with notice and an opportunity to bargain before such changes are implemented.[30] In its 1983 decision entitled *School Committee of Newton v. Labor Relations* Commission, the Supreme Judicial Court stated, "In the absence of impasse, the unilateral action by an employer concerning mandatory subjects of bargaining violates the duty to bargain in good faith."[31] The Labor Relations Commission uses a *balancing test* to determine whether a matter is a mandatory subject of bargaining. In its 1977 decision in *Town of* Danvers, it stated:

> [T]he Commission balances the interest of the public employer in maintaining the managerial prerogatives . . . We will consider such factors as the degree to which the topic has direct impact

> on terms and conditions of employment; whether the issue concerns a core governmental decision or whether it is far removed from terms and conditions of employment.[32]

To establish a violation, a union 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.[33]

As regards non-mandatory subjects of bargaining (e.g., where a managerial prerogative is involved), the municipal employer must provide the same type of notice, but its bargaining obligation is limited to negotiations over the impact of the change, if any, on mandatory subjects of bargaining.[34] Where bargaining is requested, the parties are required to negotiate in good faith to the point of either agreement or impasse. Upon reaching impasse, an employer is authorized to implement its pre-impasse position.

PRACTICE POINTERS

While management should never agree to such a proposal, where a restriction against mid-term changes is included in a collective bargaining agreement, an employer may not legally insist that the union enter into mid-term negotiations concerning the modification of existing provisions of the contract (unless a managerial prerogative is involved).

The Labor Relations Commission requires a union to prove the existence of a condition of employment in order to sustain a charge of prohibited practice which alleges a unilateral change.[35] It is not enough to show that there was simply a change in the way a municipal employer *administered* a pre-existing condition of employment.[36] In order to establish a violation of Sections 10(a)(5) and (1) of G.L. c. 150E, the union must show:

- the municipality has changed an existing practice or instituted a new one;
- the change affected the employees' wages, hours or working conditions, and thus impacted a mandatory subject of bargaining; and
- the change was implemented without prior notice or an opportunity to bargain.[37]

In its 1993 decision in *City of Lynn*, the Commission explained that:

> The definition of "practice" necessarily involves the Commission's policy judgment as to what combination of circumstances establishes the contours of a past practice for purposes of applying the law prohibiting unilateral changes.[38]

In *Lynn*, the Commission concluded that the fire chief's action in filing an involuntary superannuation retirement application changed the *practice* which the Commission defined as "those instances where an employee had his own application pending."[39] The Commission's definition was even broader than that utilized by the Hearing Officer who had "viewed it as the filing of an involuntary superannuation retirement application for an employee who had an accidental disability retirement application pending."[40] The Commission found some *mutuality* - over the City's objections -- that the present and former chiefs had refrained from pursuing involuntary applications, or allowed an employee to continue receiving 111F or sick leave benefits, while such employee had his or her own retirement application pending.

NOTE: While the LRC's decision was overturned by the Appeals Court, the Commission's rationale concerning past practices appears to remain intact.[41]

The following matters have been found to be unilateral changes in past practices:

- requiring a psychiatric exam as a condition of returning to duty after a disciplinary suspension;[42]
- requiring a break in service as a condition precedent to paying police officers their four hour minimum under the "call back" clause of the collective bargaining agreement;[43]
- increasing kindergarten teachers' hours and pay;[44]
- no longer allowing union materials to be in the fire station, and no longer allowing the holding of union meetings at the fire station;[45] and
- no longer allowing the union to address new recruits during their orientation program.[46]

While certain Hearing Officers/Administrative Law Judges (ALJ's) and even the Commission itself occasionally use the term *past practice*, the focus is primarily on establishing a *pre-existing condition of employment*. The distinction may be significant. For example, while the traditional view of a past practice, at least in the arbitration context, requires some

mutuality (i.e., agreement between the parties), the Commission appears to downplay this aspect of the definition. Instead, the LRC focuses more on such items as the length of time, number of times and consistency of the practice.

The Commission's lack of a required showing of *mutuality* is offset by its rule allowing management to implement a change not only when agreement with the union is reached, but also when good faith negotiations reach *impasse*.[47] In a 1992 decision, the LRC clarified the roles of the Commission and the Joint Labor-Management Committee when *mid-term* or *impact* bargaining in police or fire cases is involved.[48] It will be the LRC which decides whether good faith bargaining has taken place and whether the parties are at impasse, thus authorizing management to implement a unilateral change in a working condition.

PRACTICE POINTERS

It is clear that both arbitrators and courts will resolve issues involving past practices often on a case-by-case basis. Employers will claim that a particular pattern of conduct is simply a present way of doing business and not a binding past practice where there is no clear indication that there was a mutual agreement between the parties concerning such conduct. There appear to be different approaches to handling past practice issues depending upon whether the parties are before an arbitrator, the Labor Relations Commission, or the courts. There does appear to be some uniformity concerning when a past practice will be found to be binding. This will depend upon the following:

- *strength of the evidence regarding a mutual understanding of the parties;*
- *whether or not there is language in the agreement concerning the alleged past practice; and*
- *the purpose for which the past practice is asserted (i.e., to support an interpretation of ambiguous or general contractual language, to create an independent term or condition of employment, or to modify or amend the clear language of the agreement).*

In the absence of a valid contract provision to the contrary, a municipal employer is free to notify the union of its intention to modify or eliminate a condition of employment and, upon request, bargain in good faith to the point of either agreement or impasse. Where the proposal involves a change in a mandatory subject of bargaining, negotiations over the decision itself are required. Where a non-mandatory subject (e.g.,

management rights) is concerned, bargaining upon request over the impact of any change on a mandatory subject is required.

Where a contract provision allows management the right to do a particular thing (e.g. require employees to give 48 hours' notice before a personal day is taken), and the rule has not been enforced, management may start doing so even without bargaining. All that is required is notice to the union and ample time for employees to conform.

[1] *American St. Gobain Corp.*, 46 LA 920, 921 (Duff).
[2] *Bemis Co., Inc.*, 80 LA 1110 (Epstein).
[3] Dobbelaere, Leahy, and Reardon, *The Effect of Past Practice on the Arbitration of Labor Disputes*, 40 ARB.J 27, 29 (1985).
[4] *Celanese Corp. of America*, 24 L.A. 168, 172 (Justin 1954).
[5] Treece, *Past Practice and Its Relationship to Specific Contract Language in the Arbitration of Grievance Disputes*, 40 U. Colo. L. Rev. 358, 362 (1968).
[6] *Ford Motor Co.*, 19 L.A. 237, 241-42 (Shulman 1952).
[7] Ira F. Jaffe, *Past Practice, Maintenance of Benefits, and Zipper Clauses*, § 18.02[2] Labor and Employment Arbitration (Bornstein and Gosline, Editors).
[8] *Burkart, Randall v. International Association of Machinists, Lodge 1076*, 648 F.2d 462, 107 LRRM 2836, 2840 (7th Cir. 1981).
[9] *City of Peabody v. Peabody Police Benevolent Association*, 34 Mass. App. Ct. 113, 606 N.E.2d 1348 (1993).
[10] Jerome S. Rubenstein, "Some Thoughts on Labor Arbitration", *Marguette Law Review*, 49 (1966): 704-705.
[11] *See e.g., Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 111 LRRM 2011 (11th Cir. 1982).
[12] 681 F.2d at 1280.
[13] *Detroit Coyle v. Machinists, Union, Lodge 82*, 594 F.2d 575, 100 LRRM 3138 (6th Cir.), *cert. den'd*, 44 U.S. 840 (1979).
[14] *Associated Wholesale Grocers, Inc.*, (Bumping) 81 LA 1126, 1128.
[15] *Painters Dist. Council No. 35 v. J.A.L. Painting, Inc.* 11 Mass. App. Ct. 698, 419 N.E.2d 298 (1981); see also, *School Committee of New Bedford v. New Bedford Educators Ass'n*, 9 Mass. App. Ct. 793, 405 N.E.2d 162 (1980).
[16] *Louisiana Pacific Corp.*, 79 LA 658 at 644 (Eaton).
[17] *White Manufacturing Co., 74 LA 1191 (LeBaron).*
[18] *See e.g.,* Article XXVI, Section (b) of the BCOA-UNWA 1984 National Wage Agreement; Article II, Section 3(e) 1980 Agreement between Bethlehem Steel Corporation and the United Steel Workers of America (providing that no local working condition may change or modify the National Agreement "except as it is approved in writing by an International Officer of the Union and the Manager of Labor Relations of the Company").
[19] *City of Peabody v. Peabody Police Benevolent Association*, 34 Mass. App. Ct. 113, 606 N.E.2d 1348 (1993).
[20] *Past Practice, Maintenance of Benefits, and Zipper Clauses* by Ira F. Jaffe, p. 18-22, n. 2, Labor and Employment Arbitration, Tim Bornstein and Ann Gosline, General Editors (1990).

[21] *See e.g., South Central Bell Telephone Company*, 72 L.A. 333 (Morris 1979) (In that case, the employer reimbursement for the cost of obtaining a commercial drivers' license was required to be continued into the next agreement where neither party raised the issue during the contract negotiations that intervened between the filing of the grievance protesting the cessation of the past practice and the rendering of the arbitration award). *See also, Pacific & Arctic Railway*, 77 L.A. 1017 (Council 1981) (Where a past practice of paying one hour of daily overtime whether or not overtime was worked was required to be maintained.).
[22] *See e.g.*, *C.F. Industries, Inc.*, 80-2 ARB Section 8423 (Boyer 1980) (In this case permitting a limitation on the past practice of providing free gasoline to employees in response to increased gasoline usage. There was evidence of abuse, increases in the cost of gasoline which were held to constitute changed circumstances, and the origins of the past practice. The arbitrator required employer to provide as an "employee benefit" twenty gallons of gasoline for each two week period through the expiration date of the applicable collective bargaining agreement).
[23] Changed circumstances generally present a valid basis for failing to apply a past practice to the changed situation even if the applicable collective bargaining agreement contains a "past practice" or maintenance of benefits clause. See, e.g., *Hoboken Board of Education*, 75 L.A. 988 (Silver 1980).
[24] *National Broadcasting Co.*, 67 L.A. 989 (Bloch 1976).
[25] *Hillboro Newspaper Printing Co.*, 48 L.A. 1166 (Roberts 1967).
[26] *Moore Co.,*, 72 LA 1079, 1088 (Bornstein).
[27] *Lamb Electric*, 46 LA 450, 451.
[28] *A.T. & T. Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 121 LRRM 3329 (1986)
[29] *City of Boston*, 16 MLC 1429 (1989); *Town of Wilmington*, 9 MLC 1694 (1983); *Commonwealth of Massachusetts*, 27 MLC 1 (2000).
[30] *School Committee of Newton v. Labor Relations* Commission 388 Mass. 557, 447 N.E.2d 1201 (1983); *Town of Randolph*, 8 MLC 2044 (1982).
[31] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983) citing *NLRB v. Katz*, 369 U.S. 736, 741-742, 82 S.Ct. 1107, 1110-1111, 8 L.Ed.230 (1962); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64 (2d Cir. 1979); *C.F. Hanson School Committee*, 5 MLC 1671, 1676 (1979).
[32] *Town of Danvers*, 3 MLC 1559, 1577 (1977); see also *Wakefield School Committee*, 19 MLC 1355, 1358 (1992) citing *City of Haverhill*, 8 MLC 1690, 1695-96 (1981); *Boston Housing Authority, Marblehead*, 1 MLC 1140, 1145 (1974).
[33] *Commonwealth of Massachusetts*, 20 MLC 1545 (1994); *City of Boston*, 20 MLC 1603; *Commonwealth of Massachusetts*, 27 MLC 1 (2000).

[34] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983); *City of Boston v. Boston Police Superior Officers Federation*, 29 Mass. App. Ct. 907, 556 N.E.2d 1053 (1990).
[35] *City of Peabody*, 9 MLC 1447 (1982).
[36] *City of Boston*, 8 MLC 1007 (1981).
[37] *Town of North Andover*, 1 MLC 1103, 1106 (1974); *City of Haverhill*, 16 MLC 1079 (1989); *Town of Dennis*, 18 MLC 1015 (1991).
[38] *City of Lynn*, 19 MLC 1599, 1602 (1993).
[39] *Id.* at 1599.
[40] *Id.* at 1599.
[41] *City of Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 172, 681 N.E. 2d 1234 (1997).
[42] *City of Boston*, 19 MLC 1369 (1992) (H.O.).
[43] *Town of Dennis*. 18 MLC 1015 (1991) (H.O.).
[44] *Nahant School Committee*, 19 MLC 1666 (1993) (H.O.).
[45] *Town of Marblehead*, 1 MLC 1140 (1974).
[46] *City of Boston*, 19 MLC 1613 (1993).
[47] *Hanson School Committee*, 5 MLC 1671 (1979).
[48] *Town of Stoughton*, 19 MLC 1149 (1992).

CHAPTER 10 - MID-TERM BARGAINING

The requirements of managing a public safety department require chiefs to make changes in operations, rules and regulations, policy and a variety of procedures during the life of a collective bargaining agreement.

Unless specifically prevented from doing so by the provisions of a collective bargaining agreement, a municipal employer is free to institute changes during the life of a contract. Where the proposed change involves an exclusive managerial prerogative or a permissive subject of bargaining, negotiations are required upon request only over the impact of the change on mandatory subjects of bargaining. Prior to implementing a change in a mandatory subject of bargaining, the union is entitled to notice and the opportunity to request bargaining over both the decision and the impact. In either case, as long as the negotiations proceed in good faith, in the absence of agreement between the parties, upon reaching impasse management may implement its pre-impasse position. It may also so implement whenever the union stops bargaining in good faith.

There is no obligation to engage in collective bargaining as to matters controlled entirely by statute.[1] Therefore, 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.[2] 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 by "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.[3] However, in *North Attleboro*, where the "dues" deductions were a guise for circumventing M.G.L. c.180, §17J, and the town knew it, the town had a right to refuse to participate.[4]

The Union's interest in bargaining can be outweighed by evidence that an employer has a management interest that is central to its mission as a governmental entity.[5] As the Commission recognized in *Town of Danvers*, a 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 only have a marginal impact on employees' terms and conditions of employment… Those management decision which do not have a 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.[6]

§ 1 UNILATERAL CHANGES

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of 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 giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse.[7] The duty to bargain extends to both conditions of employment that are established through past practices as well as conditions of employment that are established through a collective bargaining agreement.[8] 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.[9]

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.[10] The Commission has found a past practice to exist where the action has been repeated over a number of years.[11] However, the Commission has found a past practice to exist despite a sporadic or infrequent action if "a consistent practice that applies to rare circumstances… is followed each time the circumstances precipitating the practice recur."[12] For example, since the Lynn School Committee's actions in involuntarily transferring employees was not altered, no notice or bargaining was required.[13]

A public employer need not bargain decisions outside of its control. However, the impacts of those decisions on mandatory subjects of bargaining must be bargained.[14] When, for example, the state Comptroller applied IRS and DOR regulations mandating withholding tax for the non-cash parking benefits, the Commonwealth was required to bargain upon request over the impact of that action.[15]

To determine whether impasse has been reached, the Commission considers the following factors: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations.[16] The Commission will determine that the parties have reached impasse in negotiations only where both parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked.[17] An analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise.[18] If one party to the negotiations indicates a desire to continue bargaining, it often demonstrates that the parties have not exhausted all possibilities of compromise and precludes a finding of impasse.[19] However, where the bargaining history shows that additional meetings would be pointless, the LRC will not require them even where one party desires to keep meeting.[20]

In a 2002 case involving computerization at various correctional facilities, the Commission ruled that the Department of Corrections did not violate the Law since it met with the union on numerous occasions over a number of years in on-going labor/management meetings aimed at addressing concerns and facilitating the transition to computerization.[21]

The City of Lowell violated the Law by failing to provide the police union with notice and opportunity to bargain before a supervisor approached the School Resource Officers, requested that they change their work schedules, and gave them a form to execute.[22]

§ 2 SUBJECTS OF BARGAINING

Subjects of collective bargaining typically fall into one of three categories: mandatory, permissive/nonmandatory, and illegal.[23] Mandatory subjects of bargaining are those over which negotiations are required. An employer is not required to bargain over the *decision* to implement a change which is outside the scope of mandatory bargaining, yet must bargain over the *impact* such a decision has on mandatory subjects of bargaining.[24] If a management decision does not impact the employees' terms and conditions of employment, then no impact bargaining is required.

Even if an established practice was originally a permissive subject of bargaining, an employer has a duty to bargain over the impact of a decision to change such past practice. When faced with a previously unclassified bargaining issue, the Labor Relations Commission (LRC or Commission) will determine whether the issue is mandatorily bargainable by striking a balance between the interest of the public employer in

maintaining its managerial prerogatives to manage the enterprise, and the interests of employees in bargaining over terms and conditions of employment.[25]

The LRC has declared the following law enforcement related subjects to be outside the scope of mandatory bargaining:

- abolition of positions,[26]
- level of service decisions,[27]
- minimum manning per shift,[28]
- polygraph examinations for police officers,[29]
- decisions concerning the assignment of prosecutorial duties,[30]
- reappointment of police officers,[31]
- loss of unscheduled or ad hoc overtime opportunities,[32] and
- decision to reorganize.[33]

Usually even though a proposed change is not classified as a mandatory subject of bargaining, management still has an obligation to bargain upon request over the impact of such decisions.[34] However, there are a few cases in which the LRC determined that the public employer was *not* required to engage in *any* type of bargaining. In general, an employer is not required to bargain over a decision that does not impact the employees' terms and conditions of employment. For example, in *City of Boston*, an Administrative Law Judge (ALJ) found that the City was not required to bargain over the decision or impact of the creation of a Community Appeals Board (CAB).[35] The ALJ determined that since the ultimate authority to run internal investigations of police officers remained with the Police Commissioner even after the creation of the CAB, there was no impact on bargaining unit members, and no duty to bargain.[36]

In *Town of Halifax*, the Commission considered whether the town was obligated to bargain over its decision to change the weekend shift complement because the change affected the safety and workload of the firefighters. The Commission found that the union failed to demonstrate that the change so directly or significantly affected the safety and workload of the firefighters as to compel the Town to bargain over its decision to change the weekend shift complement. [37]

Changes involving workload, even without a modification of a job description, may require notice and bargaining.[38]

§ 3 IMPACT BARGAINING

Under Massachusetts law, a public employer is required to give to employee bargaining representatives (unions) both notice and an opportunity to request bargaining before unilaterally establishing or changing policies which impact mandatory subjects of bargaining.[39] Only when such bargaining duty is fulfilled, or when the union indicates that it does not want to bargain by either explicitly indicating so or by inaction (waiver), is the employer free to implement its proposed change.[40] The bargaining obligation is satisfied when the matter in dispute is negotiated to the point of resolution or impasse.[41]

PRACTICE POINTERS

Impact bargaining is often accomplished by the municipal employer (or one of its representatives such as the police chief) and one or more union representatives, without involving attorneys or outside negotiators. Where the decision is a managerial prerogative, discussion is limited to the impact of the decision on mandatory subjects of bargaining. In fact, the union would be guilty of bargaining in bad faith were it to insist on discussing the decision itself, rather than accepting that the decision has been made and focusing on the impact of the decision.[42] Should such bad faith bargaining take place, the employer is free to implement the decision without being required to discuss the matter any further.

The LRC adjudicates a large number of disputes each year involving impact bargaining. For example, in *Dracut School Committee*, an ALJ found that the School Committee had a non-bargainable managerial right to implement a rule prohibiting sexual harassment, but also had a duty to bargain with the union over the standards and method of imposing the rule.[43] The LRC has determined that even in cases where the decision was not made by the municipal employer, e.g. by some other governmental agency or branch, the employer still has a duty to bargain over the impact of the decision.[44] Similarly, the duty to bargain over the impact of a decision extends to past practices. This was the case in *City of Everett*, where the ALJ found that the new police chief's decision to alter the practice of reducing the staff on major holidays was a "level of services" decision, and thus the City was required to bargain only over the impact of the change in the past practice.[45] An employer likewise fails to bargain in good faith if it refuses to negotiate over the impact of a reduction in work hours.[46] Further, where the collective bargaining agreement contains a provision waiving the union's right to bargain over a particular issue, this may be construed as a waiver of the right to bargain over the decision, but not necessarily the impact.[47] Finally, the *City of Fall River* case indicates that changes which result in an increase in work for employees can create

a duty on the part of the employer to bargain over the impact of the change.[48]

§ 4 DECISIONAL BARGAINING

Prior to making a change in a mandatory subject of bargaining (which is not specifically addressed in the terms of the collective bargaining agreement), a municipal employer must provide the union with notice and an opportunity to request bargaining over the decision itself. If requested, good faith negotiations must proceed to the point of agreement or impasse.

PRACTICE POINTERS

There are several differences between impact bargaining and decisional bargaining. Decisional bargaining involves a mandatory subject of bargaining, not an inherent managerial prerogative. Therefore, the union is free to propose not only alternative means of accomplishing the stated goal of management's proposal, but also to recommend that the proposal be dropped entirely or even agreed to in exchange for accepting a proposal by the union (possibly on an entirely different topic).

§ 5 NOTICE AND *FAIT ACCOMPLI*

The exclusive bargaining representative (union) is entitled to reasonable notice of the proposed change and sufficient time to determine whether bargaining should be requested.[49] Notice in writing is preferred, and, whichever the method of delivery, should be provided to a union officer or representative.[50] Rumors or notice to members of the bargaining unit are not sufficient.[51]

When management presents the union with a *fait accompli*,[52] i.e., a done deal, without providing reasonable notice and an opportunity to bargain, the employer violates the Law.[53]

PRACTICE POINTERS

*A chief should avoid posting notices or issuing orders containing the words "effective immediately". Rarely will the LRC find that a change is so small (called "*de minimus*") that no notice or bargaining is required. Unless the chief is certain that the matter neither involves nor impacts on mandatory subjects of bargaining, it is better to list a future date when the change will become effective. This will afford the union the opportunity to review the matter and request bargaining if it is so inclined.*

If bargaining is requested, the chief should postpone the implementation of the change until good faith negotiations result either in agreement or impasse. An exception may be made when an externally imposed deadline is involved or where exigent circumstances are present.

NOTE: *See Appendix Forms 4 and 5 for sample notice form.*

§ 6 IMPASSE AND UNILATERAL ACTION BY EMPLOYER

As discussed earlier, impasse is a word of art in labor negotiations, referring to the situation where the parties are deadlocked and collective bargaining is no longer proceeding forward. Impasse in negotiations occurs only when "both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked."[54] To determine whether impasse has been reached, the LRC considers the following factors: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations.[55] In a 2002 case involving the Boston Police Department, the Commission, while acknowledging the Commissioner's managerial authority to decide not to fund 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.[56] 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.

While regular contract negotiations are subject to the JLMC's jurisdiction and impasse resolution procedures, mid-term bargaining is not. Thus, at impasse during mid-term bargaining, management is free to implement its proposal (pre-impasse position) without being required to participate in mediation, fact-finding or arbitration.[57]

Two LRC decisions in 2002 resulted in a dismissal of union charges that the employer had not engaged in good faith negotiations to the point of impasse. In one, the Union alleged the Commonwealth had unilaterally altered job duties and workload.[58] The Commission found that there were a sufficient number of mid-term bargaining sessions and, for all practical purposes, there was no need to continue. The second case, involving the Boston Police Department, similarly concluded that further negotiations would be pointless and upheld the assignment of additional job duties to sergeant detectives.[59]

PRACTICE POINTERS

Despite the absence of any statutory authority granting jurisdiction to the Joint Labor Management Committee (JLMC) in impact bargaining cases, a number of requests have been filed by unions with the Committee in what are alleged to be impact bargaining cases. Without formally voting to take jurisdiction in these cases, reportedly the Committee has assigned staff and attempted to assist the parties in resolving their disagreements. While there is no prohibition against voluntarily agreeing to participate in such a process, a public employer is free to refuse to participate. So long as the good faith negotiations over the decision, or the impact of a management decision, on a mandatory subject of bargaining, have resulted in impasse, the public employer is free to implement its impasse position.

This conclusion is consistent with the Appeals Court's ruling in a 1990 firefighter decision. The court ruled that so long as the Town of Ludlow complied in good faith with the LRC's order to bargain over a health care plan, once impasse was reached the Town would be free to implement the change unilaterally.[60] The Ludlow decision is consistent with the position of the LRC in a number of "unilateral change" cases.[61] However, where the LRC has found that impasse had not yet occurred prior to the employer implementing its proposed changes, the employer is found to have made an unlawful unilateral change.[62]

Rarely will impasse be found unless at least several sessions have been held.

§ 7 REMEDY FOR UNILATERAL ACTION

In general, where a public employer has been found guilty of unlawfully and unilaterally changing terms and conditions of employment, the LRC orders a return to the *status quo ante* (i.e., position the parties were in prior to the improper action) with a "make whole" order for any employee who has suffered any monetary or other loss directly attributable to the unlawful action.[63]

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct.[64] The Commission has consistently recognized that remedies for violations of the Law should be fashioned to place charging parties in the position they would have been in but for the unfair labor practice.[65] The traditional "make whole remedy" in unilateral change cases includes an order that the *status quo ante* be restored until the employer has fulfilled its bargaining obligation, and that employees who have sustained any economic loss of wages or benefits as a direct result of the unlawful unilateral change be reimbursed for those

losses.[66] The Commission leaves it to the parties, and barring agreement, to compliance proceedings, to determine the exact amount of back pay, if any, owed in a particular matter.[67]

The Commission has also fashioned remedies that reflect the distinction between an employer's failure to bargain over a decision and its failure to bargain over the impact of a decision. For example, although later overturned by the courts on other grounds, a town's failure to bargain over the impact of the decision to reassign prosecutorial duties was remedied by the issuance of a prospective bargaining order and a monetary award.[68] Similarly, a prospective bargaining order and monetary award were issued to remedy a city's failure to bargain over the impact of its decision to lay off certain employees.[69]

Where a public employer made an unlawful unilateral change in a mandatory subject of bargaining, i.e., lowering contribution rates for health insurance premiums, the Administrative Law Judge (ALJ) ordered the Town to: (1) cease and desist from altering the contribution rate, (2) bargain in good faith upon request, (3) reimburse employees for sums withheld from their pay as a result of the Town's implementation of a lower contribution rate, and (4) sign and post the order in a conspicuous place where employees generally congregate.[70]

Any dispute about what would constitute restoring the *status quo* or about which employees suffered economic harm because of an employer's unlawful unilateral change, is typically left to the parties to resolve, and, if not, through a compliance proceeding at the LRC.[71]

§ 8 CHANGES NOT REQUIRING BARGAINING

In a very limited class of situations, the employer may be altogether exempt from bargaining over a change or new proposal not covered by the collective bargaining agreement. The obligation to refrain from unilateral action applies only to mandatory subjects of bargaining.[72] If the issue is not a mandatory subject of bargaining, there still may be an obligation to bargain over the impact of the change on bargaining unit members' terms and conditions of employment.[73] Where the proposed change is not covered in the collective bargaining agreement, is not a mandatory subject of bargaining, and does not affect the terms and conditions of unit members' employment, the public employer is not required to bargain with the union over the change. Thus, as noted earlier in *City of Boston*, an ALJ determined that the creation of a Community Appeals Board was not a mandatory subject of bargaining and did not affect the police officers' terms and conditions of employment, so that the City was not required to bargain with the union over the decision or impact of the change.[74] Also, if the change is so small as to be *de minimus*, i.e., no substantial

detriment to bargaining unit members, the Commission will not find an employee guilty of a prohibited practice.[75]

Occasionally an employer may set a deadline for implementation of a certain change in working conditions. Where circumstances beyond an employer's control require it to implement a change by a particular date, the employer may set a reasonable deadline to complete bargaining prior to implementation.[76] If, after good faith negotiations, the parties are unable to reach agreement by that date, an employer may implement changes that are in keeping with the most recent bargaining proposals. Thereafter, however, the employer must continue to negotiate in good faith, if the union so requests, until reaching agreement or impasse.[77]

In a 1998 decision involving the Town of Westborough and both its police and fire unions, the LRC acknowledged that the town acted lawfully when it set a date for implementing a change in its health insurance carriers.[78] That was because one of the carriers decided to stop offering coverage as of a particular date. The Commission ruled, however, that the town could not implement other changes on that date such as dropping other insurance carriers or changing the town's percentage share of premiums.

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.[79]

§ 9 TIMING MID-TERM BARGAINING

Typically, mid-term bargaining results from an employer's proposal made while a collective bargaining agreement is in effect which involves a change in or affects a mandatory subject of bargaining. Once negotiations for a successor (or initial) collective bargaining agreement are underway, an employer is not free unilaterally to implement its proposal made as part of the regular contract negotiations, even if negotiations on that subject have reached impasse, unless the entire negotiations have reached impasse and no petition has been filed with the JLMC.

In *Town of Arlington*, the LRC found the employer unlawfully implemented its proposal regarding defibrillator training while regular contract negotiations were still in progress.[80] In *Arlington*, the parties had agreed to discuss the Fire Chief's proposal separate from on-going contract negotiations. However, it was the union's testimony that if such separate negotiations failed to produce an agreement on the defibrillator issue, the matter would be incorporated into the regular contract negotiations which were then in process.

The Law does not prohibit either party from proposing to bargain over terms and conditions of employment separate from successor contract

negotiations.[81] However, either parties' insistence on bargaining over terms and conditions of employment apart from on-going successor contract negotiations constitutes a refusal to bargain in good faith, precluding a finding of impasse.[82]

In a 2002 Boston Police Department case, after its attempts to persuade the Union to bargain the issue apart from the successor negotiations failed, the City elected to not implement the proposed new performance evaluation system.[83] Further, the LRC noted that there was no evidence that the Union pursued its April 1998 proposal about patrol officers' evaluations during any successor contract bargaining session or that the City refused to bargain over the Union's proposal. Therefore, the Commission concluded that the City had not failed to bargain in good faith with the Union by insisting on negotiating over the City's proposal to implement a new performance evaluation system negotiated between the City and the Patrolmen's Association apart from the parties' on-going contract negotiations, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

PRACTICE POINTERS

Chiefs who are interested in making changes during the life a contract are likely to find unions using delaying tactics. This is in an effort to avoid reaching impasse before regular contract negotiations set started. These union efforts are based on an incorrect interpretation of Town of Arlington. *If no regular contract negotiations are taking place at the time a chief proposes a change, mid-term bargaining may proceed until agreement or impasse is reached on that proposal.*

The lack of additional decisions on the topic makes all comments speculative. However, it is reasonable to assume that the LRC would allow such separate negotiations to continue, so long as both sides were negotiating in good faith. To allow the union to extend the duration of such mid-term negotiations until regular contract negotiations got started, only to then preclude the chief from implementing the proposal for an extended period of time, would be neither logical nor fair.

This is not to say that the union is precluded from making a proposal during regular negotiations relative to the same subject. For example, where a chief's proposal impacts on a mandatory subject, and the union is limited during mid-term negotiations to discussing the impact, the union may make a proposal during regular negotiations for extra compensation, time off or other benefit to compensate its members for the effects of the change.

Where the proposed change is in a mandatory subject of bargaining, it is likely that the Commission would still allow the union (or management) to

make a proposal on the subject during regular contract negotiations. Even if agreement or impasse was reached on the mid-term negotiations, it would be subject to being modified or superseded by a subsequent agreement reached during regular negotiations voluntarily or through arbitration.

A typical union reply to a chief's notice of a proposed mid-term charge is the insistence on waiting until regular negotiations start. There is no obligation to do so. If the union is not willing to start mid-term negotiations in a timely manner, management is free to inform the union that this will be treated as a waiver (and/or a failure to negotiate in good faith), which will authorize the employer to implement its proposal.

Because the existence of impasse will be a crucial issue if the LRC is confronted with a unilateral change case, the employer should maintain a "paper trail" documenting its efforts and the existence of impasse or a waiver.

***NOTE:** Sample letters for notifying the union of a proposed change, and offering to negotiate is included in the Appendix (Forms 3, 4 and 5).*

[1] *Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 183, 681 N.E.2d 1234 (1997).
[2] *Town of North Attleboro v. Labor Relations Commission*, 56 Mass. App. Ct. 635, 779 N.E.2d 654 (2002).
[3] *Town of North Attleboro v. Labor Relations Commission*, supra.
[4] Id.
[5] *Town of Lexington*, 22 MLC 1676, 1684 (1996).
[6] *Town of Danvers*, 3 MLC 1559 (1977).
[7] *Commonwealth of Massachusetts v. Labor Relations Commission,* 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission,* 388 Mass. 557 (1983); *City of Boston,* 16 MLC 1429 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Town of South Hadley*, 161, 162 (2001); *City of Boston*, 26 MLC 177, 181 (2000); *Massachusetts Port Authority*, 26 MLC 100, 101 (2000).
[8] *Commonwealth of Massachusetts*, 27 MLC 1 (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); *City of Lowell* 29 MLC 100 (2002).
[9] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Town of South Hadley*, 161, 162 (2001); *City of Boston*, 26 MLC 177, 181 (2000); *Massachusetts Port Authority*, 26 MLC 100, 101 (2000); *Commonwealth of Massachusetts,* 27 MLC 70, 72 (2000), citing *City of Boston*, 26 MLC at 181; *Massachusetts Port Authority*, 26 MLC at 101; *Town of South Hadley*, 161, 162 (2001); *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), citing *City of Boston*, 26 MLC at 181; *Massachusetts Port Authority*, 26 MLC at 101. *City of Haverhill*, 16 MLC 1077, 1079 (1989).
[10] *City of Newton*, 27 MLC 74, 81 (2000); citing *Commonwealth of Massachusetts*, 23 MLC 171, 172 (1997); *Town of Chatham*, 21 MLC 1526, 1531 (1995); *Swansea Water District*, 28 MLC 244, 245 (2000).
[11] *See e.g., Ware School Committee*, 22 MLC 1502 (1996); *City of Boston*, 19 MLC 1613 (1992).
[12] *Commonwealth of Massachusetts*, 23 MLC 171, 172 (1997).
[13] *Lynn School Committee*, 29 MLC 139 (2003).
[14] *City of Worcester,* 25 MLC 169, 170 (1999), *citing School Committee of Newton v. Labor Relations Commission,* 388 Mass. at 557.
[15] *Commonwealth of Massachusetts*, 30 MLC 63 (2003).
[16] *Town of Hudson,* 25 MLC 143, 147 (1999), *citing Town of Weymouth,* 23 MLC 70,71 (1996); *Town of Westborough,* 25 MLC 81, 88 (1997), *citing Commonwealth of Massachusetts,* 8 MLC 1499 (1981).
[17] *Commonwealth of Massachusetts,* 25 MLC 201, 205 (1999); *Town of Brookline,* 20 MLC 1570, 1594 (1994).

[18] *Commonwealth of Massachusetts,* 25 MLC at 205; Woods *Hole, Martha's Vineyard and Nantucket Steamship Authority,* 14 MLC 1518, 1529-1530 (1988).
[19] *Commonwealth of Massachusetts,* 25 MLC at 205, *citing City of Boston,* 21 MLC 1350 (1994).
[20] *City of Boston*, 29 MLC 6 (2002); *Commonwealth of Massachusetts*, 29 MLC 1 (2002).
[21] *Commonwealth of Massachusetts, Commissioner of Administration*, 29 MLC 1 (2002).
[22] *City of Lowell*, 29 MCL 100 (2002).
[23] Chapter 3 also discussed the SJC's slightly different "proper" vs. "improper" classification scheme for subjects of bargaining. Please see that chapter for a full discussion. When the Commission speaks of the *two* categories of subjects of bargaining, it appears either to include illegal subjects under the heading of permissive subjects or to mean that since they are *illegal* they are not a subject of bargaining at all.
[24] *Newton School Committee*, 5 MLC 1016 (1978), *aff'd sub. nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[25] *City of Boston*, 21 MLC 1725, 1731 (1995), *citing Town of Danvers*, 3 MLC 1559 (1977).
[26] *School Comm. of Braintree v. Raymond*, 369 Mass. 686, 343 N.E.2d 145 (1970); *South Shore Regional School District Committee*, 18 MLC 1103 (1991).
[27] *Town of Dennis*, 12 MLC 1027 (1985), *but c.f., North Adams*, 21 MLC 1646 (1995) (holding that change in detectives' schedules did not involve a managerial right because there was no evidence that the change affected the level or quality of services provided).
[28] *Town of Halifax*, 20 MLC 1320(1993) (holding that reduction in work shift coverage was a permissive subject of bargaining); *Town of Danvers*, 3 MLC 1559 (1977).
[29] *Local 346, Int'l Brotherhood of Police Officers v. Labor Relations Commission*, 391 Mass. 429, 462 N.E.2d 96 (1984).
[30] *Town of Burlington v. Labor Relations Commission*, 390 Mass. 157, 459 N.E.2d 465 (1983).
[31] *Board of Selectmen of Ayer v. Sullivan*, 29 Mass. App. Ct. 931; *Mass. Coalition of Police v. Town of Northborough*, 558 N.E.2d 1 (1990).
[32] *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).
[33] *Cambridge School Committee*, 7 MLC 1026 (1980).
[34] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[35] *City of Boston*, 21 MLC 1725, 1731 (1995).
[36] *Id.*

[37] *Town of Halifax*, 20 MLC 1320 (1993), *aff'd.* 38 Mass. App. Ct. 1121 (1995).
[38] *Commonwealth of Massachusetts*, 27 MLC 70 (2000).
[39] *City of Boston School Committee*, 4 MLC 1912 (1972).
[40] *Id.*
[41] *Newton School Committee*, 5 MLC 1016 (1978).
[42] *See City of Worcester*, 4 MLC 1378 (1977), where union was found to have violated c. 150E by submitting a non-mandatory subject of bargaining to a factfinder.
[43] *Dracut School Committee,* 22 MLC 1013 (1995).
[44] *City of Malden*, 20 MLC 1400 (1994).
[45] *City of Everett,* 22 MLC 1275 (1995).
[46] *R.E.A.D.S. Collaborative*, 21 MLC 1251 (1994).
[47] *Weymouth Housing Authority*, 14 MLC 1098 (1987) (collective bargaining agreement containing provision allowing employer to lay off employees for lack of work or funds constituted a waiver of right to bargain over alternatives to layoffs, but not waiver of right to bargain over impact.)
[48] *City of Fall River*, 19 MLC 1114 (1992).
[49] *City of Haverhill*, 11 MLC 1289 (1984); *City of Taunton*, 11 MLC 1334 (1985); *City of Boston*, 3 MLC 1421, 1425 (1977); *City of Chicopee*, 2 MLC 1071, 1075 (1975).
[50] *Town of South Hadley*, 8 MLC 1609, 1611 (1981).
[51] *Whitman-Hanson Regional Educational Association*, 9 MLC 1179, 1183 (1982); *Boston School Committee*, 4 MLC 1912, 1915 (1978).
[52] The term *fait accompli* is a word of art in collective bargaining. The literal meaning of the term is "accomplished deed"; in the context of bargaining it means that management has already made the decision to make a change in or affecting a mandatory subject of bargaining, and/or has already implemented the new policy.
[53] G.L. c. 150E, § 10(a)(1) and 10(a)(5); *Ware School Committee*, 19 MLC 1107 (1992).
[54] *Town of Plymouth*, 26 MLC 222, 223 (2000); *Commonwealth of Massachusetts,* 25 MLC 201, 205 (1999); *see also School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 574 (1983) (impasse is a question of fact requiring a consideration of the totality of circumstances to decide whether, despite their good faith, the parties are simply deadlocked).
[55] *Id.*
[56] *City of Boston*, 29 MLC 6 (2002).
[57] *Commonwealth of Massachusetts, Commissioner of Administration and Finance*, 20 MLC 1545 (1994).
[58] *Commonwealth of Massachusetts*, 29 MLC 1 (2002).
[59] *City of Boston*, 29 MLC 6 (2002).

[60] *Uniformed Firefighters of Ludlow, Local 1840 v. Board of Selectmen*, 29 Mass. App. 901, 556 N.E.2d 66 (1990).
[61] *Commonwealth of Massachusetts*, 20 MLC 1545 (1994)(holding that where union issued an ultimatum, the parties had reached impasse and the employer was free to implement the new policy).
[62] *Town of Bellingham*, 21 MLC 1441 (1994); *Suffolk County House of Correction*, 22 MLC 1001 (1995).
[63] *City of Newton*, 16 MLC 1036 (1989); *City of Holyoke*, 13 MLC 1336 (1987); *City of Gardner*, 10 MLC 1223 (1983); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 447 N.E.2d 1201 (1983).
[64] *Labor Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826, 391 N.E.2d 694 (1979); *Millis School Committee*, 23 MLC 99 (1996); *Commonwealth of Massachusetts*, 27 MLC 1 (2000).
[65] *Natick School Committee,* 11 MLC 1387, 1400 (1985).
[66] *City of Newton*, 16 MLC 1036, 1044 (1989); *Newton School Committee,* 5 MLC 1016, 1027 (1982); *enf'd sub nom., School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Gardner*, 10 MLC 1218, 1223 (1983); *Commonwealth of Massachusetts*, 27 MLC 1,5 (2000).
[67] *Commonwealth of Massachusetts*, 21 MLC 1637, 1643 (1995).
[68] *Town of Burlington*, 10 MLC 1387 (1984).
[69] *City of Quincy*, 8 MLC 1217 (1981).
[70] *Town of Bellingham*, 21 MLC 1441, 1483-4 (1984).
[71] *City of Gardner*, 10 MLC 1218 (1983); *Commonwealth of Massachusetts*, 27 MLC 1 (2000).
[72] *Town of Danvers*, 3 MLC 1559 (1977).
[73] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[74] 21 MLC 1725 (1995).
[75] *See, South Shore Regional School District Committee*, 22 MLC 1414 (1996); *Town of Natick*, 11 MLC 1434 (1985); *City of Quincy*, 13 MLC 1436 (1987).
[76] *Bedford School Committee*, 8 MLC 1472 (1981).
[77] *New Bedford School Committee*, 8 MLC 1472 (1981); *Boston School Committee*, 4 MLC 1912 (1978).
[78] *Town of Westborough*, 25 MLC 81 (1998).
[79] *City of Cambridge* 29 134 (2003).
[80]*Town of Arlington*, 21 MLC 1125 (1994).
[81] *Town of Westborough*, 25 MLC 81, 88 (1997).
[82] See, *City of Leominster*, 23 MLC 62, 65-66 (1996).
[83] *City of Boston*, 28 MLC 276 (2002).

CHAPTER 11 - FURNISHING INFORMATION

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request.[1] The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining, including contract negotiations and contract administration.[2]

Under the Massachusetts public sector labor laws, M.G.L. c. 150E, §§ 10 (a)(5) & (1), a city or town must deal with its municipal employees' exclusive bargaining representative in good faith. Interpreting the nature and extent of the general phrase "good faith bargaining," the Massachusetts Labor Relations Commission (LRC) has held that a public employer has an obligation to furnish relevant information in its possession which is requested by the union -- so long as the requested information is relevant and reasonably necessary to the union's duties as collective bargaining representative.[3] The obligation to provide such information arises both in the context of contract negotiations and of contract administration.[4] An employer may not unreasonably delay furnishing requested information that is relevant and reasonably necessary to the union's function as the exclusive bargaining representative.[5]

The Commission's standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings.[6]

Information about terms and conditions of employment is presumptively relevant and necessary for a union to perform its statutory duties.[7] The Union has a duty to investigate and make reasoned judgments about the relative merits of employees' grievances.[8] Moreover, the Union's statutory right to information is integral to its duty to police and enforce the terms of the collective bargaining agreement including Management's compliance with the contractual overtime selection procedure of the agreement.[9]

Where a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive bargaining representative, the employer is generally obligated to provide the information upon the union's request.[10] Certainly the employer is only required to supply such information as it has.[11]

The relevance of requested information must be determined by the circumstances that exist at the time the union makes the request, not by the circumstances that exist at the time an agency or court, or an arbitrator finally vindicates the union's right to the requested information.[12]

Once a union establishes that the requested information is relevant and reasonably necessary to its duties as exclusive bargaining representative, the burden shifts to the employer to demonstrate that: 1) its concerns about disclosing the information are legitimate and substantial; and 2) it has made reasonable efforts to provide the union with as much of the requested information as possible consistent with its expressed concerns.[13] A refusal to provide information will be excused where the employer's concerns are found to outweigh the needs of the union.[14] Absent a showing of great likelihood of harm flowing from a disclosure, the requirement that a bargaining representative be furnished relevant information necessary to carry out its duties overcomes any claim of confidentiality.[15]

It is well established that the Commission is not required to decide whether an issue is arbitrable when determining whether an employer has an obligation to turn over requested information.[16] Moreover, an employee organization is entitled to information that permits it to determine whether or not to pursue a grievance.[17]

In a 2002 decision involving the Greater Lawrence Sanitary District, the employer argued that because a requested letter probably contained information about an employee's medical condition, it is exempted from disclosure under M.G.L. c.4, §7 (26)(c).[18] However, the LRC noted that the employer merely speculated about the contents of the letter and failed to demonstrate that it qualifies for exemption under this statute. It stated that even if the exemption in Section 7 (26)(c) applied, the employer was not entitled to withhold all of the information sought and was required to make a partial disclosure.[19]

The employer next asserted in *Lawrence* that the union should have requested the information from the doctor or from the employer with express consent because the letter was privileged and confidential. However, the availability of information from another source is not a defense to an unfair labor practice charge.[20] Moreover, the LRC noted, the employer failed to establish that the letter contained any information of a highly personal or intimate nature. Thus, the Commission stated that it cannot conclude that there is any likelihood of harm flowing from disclosing the letter that would excuse the employer's failure to provide that information.[21]

Based on the record, the LRC found that the employer violated the Law by failing to provide the union with information that was relevant and reasonably necessary to its role as exclusive bargaining representative.[22]

In *Lawrence*, at the time of the union's request, the City did not raise any concerns that the information sought was overly broad[4] or confidential. Rather, the City flatly refused to provide the information, without any explanation or attempted justification for its action.

A public employer may not unreasonably delay furnishing the requested information. A delay is unreasonable if it diminishes a union's ability to fulfill its role as the exclusive representative.[23] Compelling an exclusive bargaining representative to obtain information to which it is legally entitled does not effectuate the purposes of the Law or enhance the spirit of labor relations.[24] A union's ability to function effectively without information is not a valid defense to an employer's failure to respond to an information request.[25]

In a 2002 Boston Police Department case, the City waited approximately six months after the union requested the information and the IAD investigation concluded before it sent some of the IAD witness transcripts and forms which the union requested.[26] At this point, the union had already filed a charge of prohibited practice. Approximately one year elapsed from the date that the union requested the information and the IAD investigation concluded until the City sent the remaining IAD witness transcripts to the union. This information arrived about three weeks prior to the scheduled disciplinary hearing. Accordingly, the LRC ruled that the City unreasonably delayed in providing the union with the requested information because: 1) the City's actions compelled the union to file a charge; and 2) the union's role as exclusive representative was diminished by the short amount of time it had to review the majority of the IAD witness transcripts before the employee's disciplinary hearing.

Based on the record before it, the LRC decided that the City violated the Law by failing to provide the union with information that was relevant and reasonably necessary to its role as exclusive collective bargaining representative.

This was different than the 2002 case of *City of Holyoke*.[27] There the contract required the Police Chief to inform officers within 15 days of the outcome of a citizen’s complaint. Although the employer failed to do so, it did promptly reply to the union’s request to provide it with the outcome of six (6) pending investigations. Therefore, although the City was found to have repudiated the contract for repeated failures to comply with the 15-day rule, the Commission concluded that the city fulfilled its statutory obligation to bargain in good faith by providing the union with the requested information.

The National Labor Relations Board has stated that information concerning bargaining-unit employees is considered to be presumptively relevant. However, when the information sought concerns matters outside the bargaining unit, the union bears the burden of establishing that the information is relevant and reasonably necessary to the performance of its representational responsibilities.[28] Similarly, the Commission has held that when employees outside of the bargaining unit are involved, the standard for the union's initial showing of relevance is slightly higher; its demonstration of relevance must be more precise.[29] The union does not meet its burden of proof by demonstrating only an abstract, potential relevance in order to determine whether the employer has committed some unknown contract violations. The inevitable result would be to give the union access to any and all information the employer has.

It is not necessary for a union to show that information it seeks is otherwise unavailable in order to establish its threshold burden that the information is relevant and reasonably necessary to performing its representational responsibilities. It is well established that it is not a sufficient defense to a public employer's failure to provide information that the information is available from another source.[30] Accordingly, the availability of bargaining unit members to testify about an employee's performance did not affect the LRC's conclusion that the requested Memorandum was otherwise relevant to the processing of a grievance. The Commission therefore found that an employee evaluation was relevant to the Union's evaluation of the merits of the grievance, and, as such, reasonably necessary to the union's ability to process that grievance and fulfill its obligations as the exclusive collective bargaining representative.[31]

A delay is unreasonable when it diminishes the union's ability to fulfill its duties. An employer commits a prohibited practice by compelling a union to file a charge at the Labor Relations Commission (LRC) to obtain information that the law requires it be furnished.[32]

The Commission applies a balancing test to determine when an employer must provide information requested by a union. The union's need for information must be weighed against the employer's legitimate and substantial interests in non-disclosure.[33] Once a union has established that the requested information is relevant and reasonably necessary to its duties as the employees' exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns.[34] If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the case is examined on the facts contained in the record.[35] The employer's concerns are then balanced against the union's need for the information.[36] Absent a showing of great likelihood of harm flowing from disclosure, however, the

requirements that a bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality.[37]

Employer objections often involve claims of confidentiality, expense of production, or potential intimidation of employees. Absent a showing of great likelihood of harm flowing from a disclosure, the requirement that a bargaining representative be furnished with relevant information necessary to carry out is duties overcomes any claim of confidentiality.[38] However, if the employer is unable to show why the requested information is not relevant or is otherwise protected, it must then make reasonable efforts to provide the union with as much of the requested information as possible.[39] A refusal to provide information will be excused, however, where the employer's concerns are found to outweigh the needs of the union.[40] An employer is required to negotiate alternative methods of affording the union access to the requested information.[41]

An employer may not refuse to provide the requested information simply because it is otherwise available to the union through the same source, e.g. public records request.[42] Under certain circumstances, the National Labor Relations Board (NLRB) has ordered employers to provide a union with work-related information regarding non-unit personnel, including supervisors, because the union required the information to protect the erosion of bargaining unit work and to negotiate over wages.[43] While not appearing to reject the principle in general, based on the facts in the case before it, the LRC declined to order the City of Boston to produce a copy of a supervisor's evaluation which the union requested while processing a grievance.[44] The information was not presumptively relevant and the union bore the burden of proving that the evaluation was both relevant and reasonably necessary to the processing of the grievance.[45]

In cases where an employer raises the provisions of the Fair Information Practices Act (FIPA) as a defense to releasing requested information, the LRC is called upon to construe both the Collective Bargaining Law and the FIPA in a way which preserves the interests of both statutes. An employer's obligations under M.G.L. c. 150E must be enforced by the Commission in a way that is consistent with the proposes of FIPA. For example, a non-grievant's privacy interest in his/her job was outweighed by the public interest that the union receive information it needed to process a grievance.[46]

In the 2003 case of *City of Boston*, the Commission found the Police Commissioner acted in bad faith by failing to turn over records or to supply the union with information concerning how the City determined staffing levels and assignments.[47] The department's Legal Advisor sent a letter assuring the union that the Commissioner had applied with the applicable Civil Service Law and Article XII of the union's contract. The Commission has held that an employee organization need not rely on an

employer's assurances, but rather has the right to make its own assessment whether or not the employer has adhered to the collective bargaining agreement.[48] Furthermore, because the City failed to explain why it did not comply with the information request, the union could not tailor its request to respond to the City's good faith concerns. When an employee organization has requested relevant and reasonably necessary information, even if the employer invokes concerns about confidentiality, expense of production, the form of the request or any other concern, the employer must demonstrate that its interest in non-disclosure are legitimate and substantial and that is has made an effort to otherwise accommodate the union's request.[49] However, here the City simply elected not to provide the information and made no effort to fulfill its obligation to initiate a discussion to explore alternative ways to give the Federation access to the information.

Where employees outside of the bargaining unit are involved, the standard for the union's initial showing of relevance is slightly higher. Its demonstration of relevance must be more precise.[50]

§ 1 INTERNAL AFFAIRS RECORDS

The Worcester County Sheriff's office wrongfully withheld certain materials that the union needed to prepare for a disciplinary hearing. In a previous Worcester County Jail and House of Correction case the Commission considered similar issues between the same parties. The Commission concluded that investigatory materials sought by the Union were relevant and reasonably necessary to represent a member of its bargaining unit.[51] The Commission also previously determined that a union defending its member in disciplinary proceedings has a right to have access to witness statements, transcripts or notes of witness statements, documents, evidence, drawings, medical evidence, internal logs, prior disciplinary history of the officer, prior history of complaints filed against the officer, prior history of complaints filed by the complainants, and investigative reports that contain witness statements or any other relevant evidence, not included in any other document provided to the Union.[52] Therefore, the requested documents were relevant and reasonably necessary for the Union to represent its bargaining unit member.

Once the union has shown that requested information is relevant and reasonably necessary to its duties as bargaining agent, the employer has the burden of demonstrating that its concerns about disclosure of the information are legitimate and substantial.[53] Where the employer has a good faith concern involving confidentiality, the employer has an obligation to initiate a discussion to explore acceptable alternative ways to permit the union access to the necessary information.[54] As noted above, the Commission has previously determined that the sheriff had an

obligation to provide the union with the requested investigatory materials. In the 2002 case, the sheriff withheld many of the documents requested by the union and, furthermore, did not offer to explore acceptable alternative ways to permit the union access to the information. The Employer's argument that the union could have interviewed the witnesses themselves because they were all bargaining unit members is without merit. The union need not rely on the employer's assessment that the requested information would be redundant.[55] The union should have the opportunity to review the witness statements given in the course of the Employer's investigation because the questions posed by the investigating officers may be different than those the union asks its bargaining unit members in preparation for the disciplinary hearing.

Furthermore, the Commission previously determined that the sheriff did not have a past practice of refusing to disclose witness statements from internal affairs investigations.[56] The Commission also concluded that *Commonwealth v. Wanis*,[57] had no precedential value in a case involving a union's request for internal affairs documents because *Wanis* addresses the production of witness statements from an internal affairs investigation in the context of a criminal defendant's motion under the Massachusetts Rules of Criminal Procedure.[58]

The only new issue raised by the sheriff in the more recent case is that M.G.L. Chapter 35, Section 51 does not grant the union the right to discovery of the investigatory materials. However, the Commission noted that M.G.L. Chapter 35, Section 51 does not govern the collective bargaining relationship between the employer and the union. A union's right to receive relevant and reasonably necessary information is derived from the statutory obligation under Chapter 150E to engage in good faith collective bargaining including contract negotiations and contract administration.[59]

In a 2001 case involving a request for IA records from the Worcester County Sheriff's Department in a discipline case, the employer raised several arguments on appeal.[60]

In that case, the Sheriff first argued that the investigatory materials sought by the union were not necessary for the union to process the employee's grievance because it had access to sworn accounts from the testimony of witnesses to the incident at the disciplinary hearing, the investigatory report, the hearing transcript, and a physical inspection of the scene. The witness reports, the employer maintained, only duplicated the information that the union had already obtained, and it could obtain the information it was seeking from another source.

In City *of Boston,* in response to a request by the union to disclose an entire internal affairs division (IAD) file, the City refused to turn over the information to the union, arguing that it was irrelevant because it did not

contain exculpatory information.[61] In finding that the information was relevant to the union's role as exclusive bargaining agent, the Commission stated that:

> in the absence of any other evidence, the City's assertion that the non-disclosed information does not contain exculpatory evidence does not render the information irrelevant. It is possible for the Union to review the same information and reach a different conclusion. The mere allegation by the City that the information sought does not contain exculpatory evidence is insufficient to conclude that the information is not relevant and reasonably necessary to the Union in fulfilling its duties as bargaining agent. Therefore, we conclude that the information sought by the Union is relevant and reasonably necessary to its role as bargaining agent.

The Commission further recognized the union's need for information from the employer in the context of a case involving employee discipline:

> [t]he Union represents its bargaining unit members in disciplinary proceedings. The Union must have access to the information surrounding the disciplinary proceedings to properly fulfill its role to bargaining unit members. The police disciplinary proceedings are analogous to a disciplinary matter brought pursuant to a contractual grievance/arbitration clause. The Commission has held that a Union has a right to have access to documents that are relevant to a particular grievance in order to evaluate the issue and to improperly represent its bargaining unit member.[62]

In that case, the hearing officer considered the employer's argument that the requested information was not necessary to the union. The LRC ruled that the union need not rely on the Employer's assessment that the requested information would be of no use to the union or that the information was redundant.[63] As the employee's exclusive bargaining representative, it is the union, and not the Employer, who has the responsibility of representing the employee in the grievance-arbitration procedure. The union should have the opportunity to review the

information and to reach its own conclusions, including determining whether any of the requested information contains exculpatory evidence.[64] Merely alleging that the information sought is redundant is insufficient to conclude that the information is not relevant and reasonably necessary to the union in fulfilling its duties as bargaining agent.[65]

The employer also asserted that the hearing officer failed to consider its legitimate and substantial interest in not disclosing witness statements and reports, arguing that for the facility to function capably, the SSD must be able to conduct effective and thorough investigations and keep confidential the methods it uses and information it gathers. The Employer further argued that a correctional facility is unique and different than the normal labor relations setting, asserting that knowledge by a correctional officer that a fellow officer participated in an internal investigation could jeopardize the teamwork needed among correctional officers to operate the facility effectively and to ensure the safety of inmates and themselves.

In *Globe Newspaper Company v. Police Commissioner of Boston,* the Supreme Judicial Court considered the Boston Police Department's argument that it would not turn over IAD documents to the press because the records were excluded from disclosure under various statutory exemptions, including the investigatory exemption of G.L. c. 4 Section 7, Twenty-sixth (f) to the Public Records Law, G.L. c. 66, Section 10.[66] In deciding whether the particular documents should be disclosed, the Court framed the relevant inquiry as follows:

> [t]he question under the investigatory exemption therefore becomes whether the disclosure ordered would be so prejudicial to effective law enforcement that it is in the public interest to maintain secrecy. In deciding that question, we keep in mind that the exemption aims at the "prevention of the disclosure of confidential investigative techniques, procedures, or sources of information . . . and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses, and interim conclusions."[67] We also keep in mind that "[t]here is no blanket exemption provided for records kept by police departments" solely because they are involved in investigatory work[68], and that the potential prejudicial effect of disclosure on effective law enforcement is to be considered on a case-by-case basis.[69]

Although the Sheriff did not allege that the requested information was statutorily exempt from disclosure under the Public Records Law, the Sheriff argued that the Court's analysis in *Globe Newspaper* was relevant to the instant case because, like the Boston police department, the employer argues that it is necessary to not disclose to the union any IAD witness statements to keep the practices and methods of its internal investigations unit confidential. The LRC noted, however, that the potential prejudicial effect of disclosure on effective law enforcement is minimal, because the union was not seeking confidential methods, tactics or law enforcement practices used by the SSD that would impede its ability to investigate internal affairs. The union only sought written statements of witnesses involved in the incident involving the employee to fulfill its duty to represent him at a grievance arbitration proceeding. Therefore, the Commission had concluded that the employer had not shown any likelihood that the disclosure of witness statements would prejudice the confidential nature of SSD's operations. Further, in a case where the identity of a witness is known, as in the present case, the LRC stated that the employer had not demonstrated that the disclosure of a witness statement would increase retaliation or conflicts amongst correctional officers. Thus, the employer's interest in keeping the requested witness statements confidential did not outweigh the union's need for witness statements in representing a union member in a disciplinary proceeding.

The employer also argued on appeal that the hearing officer failed to consider the employer's past practice of not releasing witness statements despite her finding that the employer routinely denied requests for investigatory files of internal affairs investigations, and her finding that the collective bargaining agreement is silent on this issue. The employer asserted that, because it has shown that it has consistently refused to disclose investigatory files, withholding those documents in the present case was consistent with the employer's past practice and the parameters of the parties' collective bargaining agreement.

However, the Commission ruled that the hearing officer did not err in finding that there was no past practice in which the employer consistently refused to disclose witness statements. The hearing officer's finding concerning the disclosure of IAD files was limited to a statement of fact, that "[i]f SSD receives a request from the subject of an internal affairs investigation to review the investigative files, the request would be denied." (Emphasis added). Thus, this finding does not warrant a conclusion that the employer had a past practice of refusing to disclose witness statements from IAD investigations to the union.

The Sheriff additionally argued that *Boston Police Superior Officers Federation v. City of Boston* relied upon by the hearing officer in ordering the employer to turn over the witness statements, was distinguishable from the facts of the instant case because the information sought by the union in

Boston was not confidential witness statements and because the union could not easily obtain the requested information in any other fashion.[70] In contrast, the employer argued that the information sought in the present matter could be readily ascertained by subpoenaing the witnesses named in the investigatory report to appear at employee's arbitration, and questioning them to determine what they reported to the SSD. Additionally, the Employer argues that the *Boston* court appeared to avoid requiring the production of anything beyond summary sheets of open internal affairs files, and thus the hearing officer erred by ordering anything more than that ordered to be disclosed by the *Boston* court.[71]

The LRC pointed out that the *Boston* case arose in the context of a Commission proceeding in which the union subpoenaed logs, cards, and files of IAD of the Boston Police Department of officers promoted to lieutenant during a particular time period. After the Commission hearing officer modified the union's subpoenas, the union filed an action in Superior Court to have the documents produced pursuant to its subpoenas *duces tecum.* A Superior Court judge ordered the production of the information with certain safeguards to protect persons referenced or identified in the IAD logs, and to comply with the requirements of the criminal offender record information act and the rape shield law. Although the case did not specifically address concerns over the disclosure of witness statements in an internal affairs investigation, the Commission stated that this distinction does not render the case irrelevant to the instant matter. First, the information sought by the union was confidential in nature because it consisted of internal affairs files, cards, and logs of the police department. Likewise, the confidential character of the information was evident from the City's argument that the information was exempt from disclosure under the public records law, G.L. c. 4 § 7, Twenty-sixth (f)[72], and further, that the safeguards imposed by the judge as to the IAD logs, cards and files were insufficient to protect the privacy and confidentiality interests at stake.[73] Moreover, although the employer argued that the information requested by the union was obtainable from other sources, like the investigative report and transcript, the LRC disagreed that the information in the witness statements can be substituted. Without the actual witness statements, the union cannot effectively ascertain the context of the statements or whether the witnesses' live testimony is consistent with their previous statement to the SSD. The witness statements may also divulge other information necessary to employee's defense at arbitration, including any exculpatory information, or motive, bias, or conflict on the part of the witnesses. Lastly, the LRC noted that although the *Boston* court ordered the City to turn over IAD files of closed investigations and summary sheets of any open IAD investigations, it also ordered the City to produce IAD files of officers promoted to sergeant from January 1986 and March 22, 1998 without specifying whether those files were open or closed.[74] The record

in the Sheriff's case did not indicate whether the SSD file from which the witness statements are sought is open or closed. Moreover, the union in the present case was seeking witness statements from an IAD file, and not an entire IAD file. Therefore, the Commission declared that whether the relevant file is currently open or closed should not affect the disclosure of the witness statements.

The union argued on appeal that the hearing officer erred in ordering the employer to turn over redacted reports generated by witnesses relating to the March 17, 1996 incident involving employee and the ensuing investigation. The union argued that allowing the employer to redact the witness reports undermined its ability to review the information and reach its own conclusions. The union additionally asserted that *Boston Police Superior Officers Federation v. Boston*[75], relied upon by the hearing officer in support of her decision to order the employer to turn over the documents in question, did not provide for redaction as a safeguard when the City of Boston was ordered to turn over information contained in internal investigation files. However, according to the LRC, the *Boston* case does not stand for the general proposition of which safeguards would be appropriate in a case in which a law enforcement agency is required to disclose information from an internal investigation file to a union. The safeguards that were deemed appropriate in *Boston* may not necessarily be appropriate in the present case due to the nature of the information requested. Therefore, the Commission noted that merely because *Boston* did not specifically order the redacting of any witness reports from IAD files does not translate into a finding that redaction is not appropriate in a particular case where, as here, information unrelated to the March 17, 1996 incident involving Employee may be revealed if not redacted.

The union further argued that in *Commonwealth v. Wanis*[76], the Court did not order witness statements to be redacted when they were turned over to criminal defendants, and supported this argument by a reference to a statement by the Court that "[a]s to a percipient witness, whose statements are plainly relevant and may be exculpatory (at least for impeachment), we see no reason generally to protect their statements from disclosure."[77] The employer also relied on *Wanis,* although for different reasons. The employer asserted that the hearing officer erroneously discounted *Wanis'* applicability to the present case despite the fact that the case involved a request for witness statements resulting from an alleged claim of police misconduct.[78] However, the LRC stated that the guidelines for producing information related to IAD files under *Wanis* are inapplicable to the present case. First, in addressing the union's contention that *Wanis* did not order witness statements to be produced in redacted form, a reading of *Wanis* reveals no mention of the appropriateness of redacting witness statements from an IAD investigation. Moreover, the Commission was not persuaded that *Wanis* is of any precedential value to the instant case because it addresses the

production of witness statements from an internal affairs investigation in the context of a criminal defendant's motion under the Massachusetts Rules of Criminal Procedure. Therefore, the Commission ruled that the hearing officer did not err in finding W*anis* inapplicable to the instant case.

The union additionally argued that redacting all information unrelated to the March 17, 1996 incident undermines its ability to review the information and determine for itself what information is relevant and necessary. Specifically, the union points to the hearing officer's decision wherein she states:

> It is the Union, and not the Employer, who has the responsibility of representing Employee in the grievance-arbitration procedure. The Union need not rely on the Employer's assessment that the requested information would be of no use to the Union or that the information is redundant. The Union should have the opportunity to review the information and to reach its own conclusions, including determining the existence of any exculpatory evidence.[79]

The Commission pointed out that the union, however, overlooked the fact that the hearing officer's Order is clear that the employer redact only information *unrelated* to the March 17, 1996 incident involving employee. The LRC stated that redaction may be an appropriate safeguard used in protecting privileged, private, or irrelevant material.[80] Therefore, the Commission did not find that the hearing officer erred in ordering the Employer to turn over reports in redacted form.

For all of the above reasons, the LRC concluded that the employer violated Sections 10(a)(5) and derivatively, 10(a)(1) of the Law by failing and refusing to provide relevant and reasonably necessary information to the union.

It stated that to violate the duty to supply information, the employer need not have made an outright refusal. It is enough to fail to respond in a reasonably prompt manner once a request has been made.[81]

An integral part of the union’s role in contract administration is the processing of grievances. Therefore, the union’s right to information includes that which assists the union in determining whether a grievance should be filed or pursued.[82]

To determine that the requested information is relevant to the union’s duty to administer the contract, it is not necessary for the LRC to decide

the relative merits of a grievance or that it is arbitrable. It is enough that the grievance is *arguably arbitrable*.[83]

A union could waive its right in a collective bargaining agreement to certain information. However, the LRC will require that such waiver be clear and unmistakable.[84]

Even if a grievance is settled, a layoff has occurred, or other matter giving rise to the request for information has gone by, the Commission may still entertain a charge of prohibited practice. This is the case where there is a possibility that the challenged conduct will reoccur in substantially the same form.[85] Even when the employer corrects a violation, there is no assurance that the violation will not recur when the respondent fails to acknowledge the wrongfulness of its conduct.[86] The voluntary cessation of allegedly illegal conduct does not necessarily moot a controversy since, absent formal adjudication, the transgressor remains "free to return to its old ways".[87]

PRACTICE POINTERS

In a majority of grievances, the union will not make a request for information from the chief. Often the union will compile the evidence it needs by having its own members review records from the department or the city or town. However, despite how past grievances have been handled, the union always has the right to request relevant information from the chief or the municipality.

A problem may arise when a records request is made after a grievance is filed. Since the time between steps are usually short, it may be unrealistic to expect that requested records can be produced in a timely fashion. No case has decided whether a request for a delay in moving from one step to another is required by "good faith." Until that happens, a chief should be able to insist on the deadlines in the grievance procedure, especially if there is no intentional delay in processing information requests.

A 2001 unpublished Appeals Court decision upheld an LRC order that notes prepared by a City of Boston attorney regarding interviews he conducted with firefighters while investigating a hostile work environment claim of a female firefighter must be furnished to the union to help it during the grievance process.[88]

§ 2 DISCIPLINARY RECORD

The Commission in the 2003 case of *Board of Higher Education*, ordered Salem State officials to turn over to the union's lawyer (with access restrictions) a copy of a disciplinary letter given to a non-bargaining unit

member.[89] In this case, the Board contended it had legitimate and substantial concerns about turning over a disciplinary note to the union. First, the Board maintains that disclosure of the disciplinary note would have a chilling effect on its current supervisors and could negatively impact its ability to recruit supervisors in the future because the union would have the means to intimidate supervisors by examining documents in their personnel files. However, because the record contained no information corroborating the Board's claims, the LRC found that argument speculative. Moreover, the mere possibility of a chilling effect does not override an employee organization's right to information.[90]

Next, the Board argued that it had legitimate and substantial concerns about turning over the information because of the confidential nature of the disciplinary note and because the employer had an interest in preventing unreasonable intrusions into the privacy *of* its employees. The Board contended that pursuant to M.G.L. c.4, Section 7(26)(c), the document would not be subject to disclosure under M.G.L. c.66, Section 10, the Public Records Law. When an employer raises statutory defenses to its failure to provide a union with requested relevant information, the Commission reviews the cited statutory provisions in light of the employer's obligation under the Law. If the requested information is not exempt from disclosure under the cited statute, it must be furnished to the union unless there exist other legitimate and substantial concerns that outweigh the union's need for the information.[91] Resolution of statutory concerns raised by an employer may require harmonizing statutory schemes, each of which protects a significant public interest.

The Supreme Judicial Court has determined that the term "personnel files or information" as used in M.G.L. c.4, Section 7(26)(c) refers to core categories of personnel information that are useful in making employment decisions regarding an employee, including employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion or termination information pertaining to a particular employee.[92] Therefore, under *Wakefield,* the Commission concluded that it would be reasonable to conclude that a disciplinary note is exempt from disclosure under the Public Records Law.

However, even though a document may be exempt from disclosure under the Public Records Law, the Commission has held that an employer's obligation to bargain under Chapter 150E can be fulfilled in a manner consistent with the purposes of the Public Records Law.[93] In *City of Boston,* the Commission examined the employer's obligation under M.G.L. c. I 50E to provide relevant and reasonably necessary information in light of M.G.L. c.4, Section 7(26)(f), which exempts certain investigatory materials from disclosure under the Public Records Law.[*94*] The Commission concluded that the employer acted unlawfully by refusing to take steps to provide and/or accommodate the Union's

request for relevant and reasonably necessary information, including information compiled by a police department's internal affairs division in its investigation of employees, and ordered that the information be released but with certain safeguards. The LRC reached the same conclusion in *City of Boston,* as the record was devoid of any evidence that the Board initiated a discussion with the Union or endeavored to find acceptable alternative methods to convey the requested information to the union, as required by the Law.[95]

In *Boston Police Superior Officers Federation v. City of Boston,* the Supreme Judicial Court affirmed a Superior Court order enforcing subpoenas that the Commission had issued for records from a police department's internal affairs division.[96] The Superior Court ordered certain safeguards on the release of the information that protected the moving party's right to subpoena materials but acknowledged that certain investigatory documents could be exempt from disclosure under the Public Records Law pursuant to M.G.L.c.4, Section 7 (26)(f). The Commission later adopted similar safeguards in *City of Boston*, when ordering the release of relevant and reasonably necessary information from the files of the police department's internal affairs division.[97] Using those cases as models, we order the following safeguards on the release of Wolkowitz's disciplinary note to the union:

1. union counsel shall not disclose the contents of Wolkowitz's disciplinary letter to anyone but his/her client except with the consent of the Board;
2. union counsel, the union and all its representatives are not to use Wolkowitz's disciplinary letter for any purpose other than to pursue B.T.'s grievances at the various contractual steps, at arbitration or at other directly related proceedings such as appeals or compliance proceedings.

In the *Board of Education* case, because Salem State already had revealed Wolkowitz's name to the union, the Commission determined that it need not reach the issue of under what circumstances, if any, an employee's name should be redacted and a code substituted for that name when a document falls under the exemption to the Public Records Law for personnel and medical files.

§ 3 PERSONNEL FILES

A police chief must provide the union with certain parts of personnel files of candidates for promotion and certain information about the decision making process if the union makes a timely request. This was the holding in the 2003 Labor Relations Commission case involving the Sheriff of Middlesex County.[98] In that case, the Commission found that the employer refused to bargain in good faith with the union by failing to

provide the union with certain requested information that is not statutorily exempt from public disorder and certain other information in a manner consistent with its statutory confidentiality claims.

EMPLOYER'S DUTY

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request.[99] The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration.[100] This right extends to information that is relevant to a party's evaluation of whether to file and pursue a grievance. [101]

The Commission's standard in determining whether the information requested by the union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings.[102] Information about terms and conditions of employment is presumptively relevant and necessary for a union to perform its statutory duties.[103] As the exclusive collective bargaining representative, the union has a duty to investigate and make reasoned judgments about the relative merits of employees' grievances.[104] Moreover, the union's statutory right to information is integral to its duty to police and enforce the terms of the collective bargaining agreement.[105]

It is well established that a union is entitled to relevant information that is reasonably necessary to its determination whether or not to pursue a grievance to arbitration.[106] The relevance of the information is determined by the circumstances that exist at the time the union makes the request, not at the time an arbitrator vindicates the union's right to the information.[107] In *Sheriff's Office of Middlesex County*, the union requested information on March *5, 1999,* after it had filed for arbitration, but in advance of the scheduled arbitration date. The Commission concluded that some of the requested information was relevant and reasonably necessary for the union to perform its duties as the exclusive representative of correction officers. The LRC explained that when the employer provides the information in a manner consistent with this decision, the union will be in a better position to evaluate the merits of an employee's grievance and may decide not to proceed with the arbitration. As the Supreme Court stated in *NLRB v. Acme Industrial Co.,* "arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims."[108]

RELEVANCY STANDARD RESULTS

Applying the Commission's relevancy standard to the facts *Sheriff's Office of Middlesex County* the LRC first found that the union's request for a copy of the successful candidate's complete personnel file was overly broad. Although personnel files do contain information that is relevant to the grievance at issue, personnel files also usually contain information that is not relevant and reasonably necessary to the union's assessment of the merits of the grievance, like payroll deductions, an employee's choice of health plans, and the like. However, the Commission did find that information about the successful candidate's employment history, education, qualifications, job performance and information like evaluations and merit awards, disciplinary records, promotions, transfers, training ratings, the application and resume for the position of classification supervisor posted in or about December 1997, and disability records, documents also usually found in an employee's personnel file, are relevant and reasonably necessary for the union to compare the successful candidate's qualifications for the position with the grievant's qualifications, and to compare the successful candidate's work record with the grievant's work record.

The union also requested the same or substantively similar information for each applicant for the classification supervisor position that it has requested for the successful candidate. The union argued that all candidates for the position, including the successful candidate and Waldron, are an appropriate grouping of similarly situated employees for comparison to assess the merits of the grievance. The LRC reviewed carefully the union's stated rationale, but it was not persuaded that all the requested information for each applicant was relevant and reasonably necessary for the union to evaluate the merits of the pending grievance. However, it did find that each applicant's job application and resume for the classification supervisor position posted in or about December 1997, and documents relating to the disability of each applicant fall within the Commission's standard. This information may demonstrate that other applicants had either weaker or stronger credentials for the classification supervisor position than the grievant and/or the selected candidate. After reviewing this information, the union may be in a better position to show the relevancy and reasonable necessity of further information about other applicants' employment history and work record.

The union's request for information about the decision to select the successful candidate and the decision not to select the grievant, including the date of the decision, the method of notification, the identity of the person who notified the individuals, the identity of the persons involved in the decision and a description of each person's role, the identity of the person(s) who made the final decision, and all documents reflecting this information are also relevant and reasonably necessary to the union's

assessment of the employer's conformance with its own published procedures and policies regarding the filling of positions, as well as the integrity of the evaluation process of the qualifications and work record of the successful candidate and the grievant. Finally, the LRC ruled that all the employer's polices, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals in effect prior to and during the period from December 1997 through February 1998, and all documents relating to the employer's policies and procedures regarding the employment of individuals with disabilities are relevant and reasonably necessary for the union to assess if the employer's employment decision here conforms with the employer's published policies.

EMPLOYER DEFENSES

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the employees' exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns.[109] If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the case is examined on the facts contained in the record.[110] The employer's concerns are then balanced against the union's need for the information.[111] Absent a showing of great likelihood of harm flowing from a disclosure, however, the requirement that a public employer provide an exclusive bargaining representative with relevant information necessary for it to perform its duties overcomes any claim of confidentiality.[112]

Citing M.G.L. c. 66 s. 10, M.G.L. c. 4, s. 7 (26)(c), the Fair Information Practices Law, and the holding in *Wakefield Teachers Association v. School Committee of Wakefield,* the employer in *Middlesex County Sheriff*,[113] argued that it has a legal duty to safeguard certain documents and information that would, if released, violate the privacy interests of its employees.[114] The union argued that the employer waived its right to assert confidentiality objections because the employer did not assert those objections in a timely manner.[115] The rationale for requiring a party to raise confidentiality claims in a timely manner is to enable the parties to enter into discussions to accommodate those concerns.[116] If an employer raises statutory defenses to its failure' to provide a union with requested relevant information, the Commission reviews the cited statutory provisions in light of the employer's obligation under the Law. If the requested information is not exempt from disclosure under the cited statutes, it must be furnished to the union unless there exist other legitimate and substantial concerns that outweigh the union's need for the information.[117] The resolution of statutory concerns raised by an employer may require harmonizing statutory schemes, each of which

protects a significant public interest.[118] Like *Board of Trustees, University (Amherst),* resolution of this issue involves harmonizing M.G.L. c. 66, Section 10 (the Public Records Law), which protects the public interest in disclosure of materials maintained by government that are of public concern, M.G.L. c. 66A, the Fair Information Practices Act (FIPA), which safeguards individuals against unwarranted invasions of their personal privacy, and M.G.L. c. 4, Section 7 Twenty-sixth (c) (the Personnel Files Exemption) with the Law.

In *Middlesex County Sheriff*, the LRC determined that all of the information sought by the union is a public record subject to disclosure under the Public Records Law unless the records fall within the Personnel Files Exemption to the Public Records Law.[119] There are two categories of records exempt from disclosure under the personnel files exemption, "personnel and medical files or information" and "other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy."[120] The phrase "relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy" modifies only the second category of records.[121]

In *Wakefield,* the Supreme Judicial Court determined that:

> While the precise contours of the legislative term `personnel [file] or information' may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personal information that are "useful in making employment decisions regarding an employee."[122] It would distort the plain statutory language to conclude that disciplinary reports are anything but "personnel [file] or information."[123]

In contrast, information like an employee's name, home address, date of birth, social security number, base pay, and overtime pay, even though they are "personal" to a particular individual, are not useful in making employment decisions regarding an employee. Therefore, these documents fall within the "other materials or data relating to a specifically named individual" category of the personnel files exemption.[124] Applying the Supreme Judicial Court's holding in *Wakefield,* to the facts in the *Middlesex County Sheriff* case, the Commission concluded that all the employer's polices, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals in effect

prior to and during the period from December 1997 through February 1998, and all documents relating to the employer's policies and procedures regarding the employment of individuals with disabilities are not exempt from disclosure under the Personnel Files Exemption. These policies and procedures are not core categories of personal information that are useful in making employment decisions, nor are they personal to a particular employee. They are public records incorporating the employer's policies in these areas. Therefore, the commission held that the employer's stated statutory confidentiality claims were without merit, and it was unnecessary for the Commission to harmonize the Personnel Files Exemption with the Law.

The union's request for information about the decision to select the successful candidate and the decision not to select the grievant, including the date of the decision, the method of notification, the identity of the person who notified the individuals, the identity of the persons involved in the decision and a description of each person's role, the identity of the person(s) who made the final decision, and all documents reflecting this information were found to be not core categories of personal information that are useful in making employment decisions. Although this information may arguably fall within the second category of the personnel files exemption, applying the case law developed in this area, the Commission concluded that the release of this information is not exempt from public disclosure because it would not publicize "intimate details" of a "highly personal" nature. Therefore, the employer's stated statutory confidentiality claims relating to this information were also found to be without merit, and there was no need for the Commission to harmonize the Personnel Files Exemption with the Law. The remainder of the requested information about the successful candidate and each applicant for the classification supervisor position, which the Commission found to be relevant and reasonably necessary for the union to evaluate the merits of the nondiscrimination grievance, is statutorily exempt from public disclosure. However, even though documents may be exempt from public disclosure, an employer's obligation to provide a union with relevant and reasonably necessary information for the union to perform its duties as employees' exclusive bargaining representative can be met in a manner consistent with the purposes of the Public Records Law and the Personnel Files Exemption.[125] If the employer provides the information subject to the safeguards below, the union's need for the information that falls within the Personnel Files Exemption outweighs the statutory confidentiality claims raised by the employer on behalf of the employees. Further, the release of the information to the union subject to the safeguards below harmonizes all applicable statutory schemes by enforcing the employer's obligation to bargain in good faith under the Law while protecting public employees against the public disclosure of documents that fall under the Personnel Files Exemption of the Public Records Law.[126]

REDACTING INFORMATION

In *Board of Higher Education,* the Commission ordered safeguards on the release of an employee's disciplinary note to a union in response to a request for information to process and pursue grievances.[127] In crafting those safeguards, the Commission used as models two cases that ordered safeguards on the release of information that would otherwise be exempt from disclosure under the Public Records Law pursuant to M.G.L. c. 4, Section 7 (26)(f).[128] Following these models, in *Middlesex County Sheriff,* it ordered the following safeguards on the release of the information exempt from public disclosure under the Public Records Law.

The Employer shall:

1. Redact the social security number and all medical information, including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, from the information kept in the successful candidate's personnel file about the successful candidate's employment history, education, qualifications, job performance information like evaluations and merit awards, disciplinary records, promotions, transfers, training ratings, disability records, and the application and resume for the position of classification supervisor posted in or about December 1997, and provide this redacted information to the union's counsel.

2. Redact the employee's name and substitute a code for that name on each applicant's job application and resume for the position of classification supervisor posted in or about December 1997 and on each such applicant's disability records, except for those of the successful candidate, and further redact from those records the employee's social security number and all medical information including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, and provide this redacted information to the union's counsel.

The Union's counsel shall:

1. Take all reasonable measures to insure that the redacted documents are used solely to evaluate the merits and to pursue, if appropriate, the grievance except with the consent of the employer. Reasonable measures shall include, but not be restricted to:

a) confining access to the documents to those persons whose access is necessary to evaluate and to pursue, if appropriate, the grievance;
b) producing only those copies essential to obtain the participation of persons necessary to evaluate and to pursue, if appropriate, the grievance;

c) numbering any copies that are made and tracking the access of necessary persons to the documents;
d) obtaining certifications from all persons with access to the documents that they have not and will not discuss or otherwise disclose the contents of the documents to anyone who has not also certified that they acknowledge and adhere to these restrictions; and,
e) obtaining and returning all numbered copies at the conclusion of the case to the employer's counsel, unless an agreement is reached on alternative reasonable document-handling procedures.

Information subject to disclosure under the Public Records Law is not subject to the above safeguards.

§ 4 RELEVANT AND REASONABLY NECESSARY

To determine whether information is relevant and reasonably necessary to the union, the Massachusetts Labor Relations Commission applies the same relevancy standard that is utilized by the National Labor Relations Board (NLRB) and federal courts when interpreting cases under the private sector's National Labor Relations Act (NLRA).[129] The standard employed by the NLRB and federal courts is very liberal, virtually identical to the standard used in determining relevancy in discovery proceedings in civil suits.[130] In its decision in *Westinghouse Electric Corporation*, the NLRB stated:

> The test of the union's need for such information is simply a showing of probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.[131]

Given the very liberal standard for determining whether requested material is or is not relevant, both the courts and the Commission rarely find that a union's request for information is not sufficiently relevant. However, a request for information can become moot if there is a significant change in events between the time the request is made and the time when the Commission decides the issue.

Such was the scenario in the case of *Comm. of Mass., Commissioner of Administration and Finance.*[132] There, the union requested information concerning the identity of those employees who were likely to be laid off -- after the employer indicated that layoffs would be necessary. The

employer never promised the requested information. At the prohibited practice hearing, the Commission found that information concerning which employees might be laid off was relevant since the union had a legitimate interest in monitoring the retention of employees and bargaining unit work. Nevertheless, the Commission held that information concerning the actual identities of the employees likely to be laid off was not relevant and necessary once the employer decided that layoffs would not be pursued. Similarly, the Commission also found that the union's request for the minutes of a meeting were neither relevant nor necessary -- given that the contents of the minutes were already provided.

In a 1996 decision involving layoffs, the Commission found that the Lottery Commission violated the Law by failing to furnish postings, names of applicants, and awarded positions since 1991.[133] In reaching its decision, the Commission rejected the employer's claim that the union's request for information was not legally sufficient since it was directed to a member of the bargaining unit and not "the employer." It found that the employee was the "acting director of personnel" and was held out by the Commission as the person responsible for dealing with personnel matters. The union, therefore, was reasonable in its belief that this person was an authorized "agent" of the employer.

The Saugus Police Chief was not required to furnish the union with a copy of an investigative report done by a sergeant on a police officer who failed to report for numerous DARE assignments when she was "having a bad year."[134] The Chief had spoken with the officer, accepted her explanation and was not planning to take disciplinary action, nor was any reference placed in her personnel file. At the time the union made its request, the matter had been resolved and the information was not relevant and reasonably necessary in order for the union to fulfill its statutory duties.

§ 5 CONTRACT NEGOTIATIONS

A public employer must provide its employees' union representative with all non-protected information that the union believes is necessary for it to bargain in an informed manner, so long as that information is probably relevant and would be of use to the union in preparing for or conducting negotiations. The Commission has found the following negotiation requests to be relevant and reasonably necessary: a list of the seniority and start-dates of all bargaining unit members for purposes of negotiating shift bid language and longevity pay provisions; minimum wage rates specified in the municipality's bid solicitation proposal for privatizing union membership work;[135] and information relating to the job tasks and job assignments of athletic coaches within the bargaining unit.[136]

PRACTICE POINTERS

As discussed above concerning information requests during the grievance process, no cases address how a chief or employer must handle scheduling of negotiations after an information request is made. However, the lack of rigid time constraints makes it more likely that the LRC will expect greater flexibility in the context of contract negotiations. While it may not be necessary to reschedule or delay bargaining sessions, certainly putting off discussions on a particular subject until the requested information is available is easy to do.

§ 6 CONTRACT ADMINISTRATION

By far the most frequent category of information requests made by unions relate to their responsibilities relative to administering a contract which is in existence at the time of the request.[137] Specifically, such requests generally are made to gather information to be used in preparing for a grievance proceeding.[138]

A public employer is obligated to furnish a union with information that is relevant and reasonably necessary for the union to process grievances to arbitration and administer collective bargaining agreements.[139] The relevance of the requested information must be determined by the circumstances that exist at the time the union makes the request, not by the circumstances that exist at the time the arbitrator finally vindicates the union's right to the requested information.[140]

The commission has found relevant and reasonably necessary those requests pertaining to: how the municipality has disciplined a particular offense in the past;[141] information pertaining to health and safety issues associated with a renovation of the physical plant;[142] employee evaluations of other bargaining unit members within the same department;[143] information related to promotions[144], layoffs[145], reassignments[146], job classifications[147], attendance[148], vacancies within the department[149]; and information contained in a settlement agreement reached with another union on the same matter.[150] In addition, where an employer is planning to contract for services currently or previously performed by bargaining unit employees, a request for information contained in bid solicitation or reply documents must be honored.[151]

In the 2003 case of *City of Somerville*, the Commission found that the city violated Sections 10(a)(5) and (1) of the Law when it failed to provide the union with documents in preparations for seven pending grievance arbitration hearings.[152] By the time the Commission issued its decision two years later, all the arbitration cases were presumably concluded. The LRC's remedy was limited to an order to cease and desist from failing and

refusing to provide information relevant and reasonably necessary to process grievances to arbitration.[153]

§ 7 BALANCING TEST

Just because a union has demonstrated that requested information is relevant and reasonably necessary does not necessarily require the municipality to supply all the information in the precise form and manner requested by the union. Any duty to supply information, along with the extent of any such disclosure, will be decided on a case by case basis.[154]

In formulating an exception to the general duty to furnish information, the U.S. Supreme Court, in its 1979 decision in *Detroit Edison Co. v. NLRB*, adopted a balancing test approach. [155] Under this balancing test, the union's need for relevant information must be weighed against the employer's legitimate and substantial interests in non-disclosure.[156] In *Detroit Edison*, the Supreme Court held that the employer was not in violation of its statutory duty to bargain in good faith when it refused to disclose individual employee aptitude test scores -- given the sensitive nature of the testing material.[157] The court went on to state that its decision was based in part on the minimal burden that a requirement of employee consent before disclosure would impose on the union, and the absence of evidence that the employer had fabricated its concern for employee confidentiality in order to frustrate the union.

Similarly, the Massachusetts Labor Relations Commission adopted the balancing test articulated in *Detroit Edison* in its decision of *Board of Trustees, U-Mass Amherst.*[158] Once a union has sufficiently shown that requested information is relevant and reasonably necessary to its duties as bargaining agent, the burden of production shifts to the public employer to show that its concerns about disclosure are "legitimate and substantial."[159] Additionally, the municipality bears the burden of showing the Commission that it has made all reasonable efforts to provide the union with as much of the requested information as possible that does not implicate its expressed concerns.[160]

The Appeals Court, in a 2004 case, upheld the LRC's decision which ordered the Sheriff of Bristol County to produce information pertaining to the investigation of a corrections officer which would be sufficient for the union to determine whether restrictions on the officer's duties that impacted her overtime opportunities were warranted.

Although in its appellate brief the Bristol County Sheriff challenged the Commission's finding as to the union's need for the sought-after information, according to the Appeals Court the record amply supported the Commission's finding that without information as to the investigation, the union could no determine whether the employee's restrictions, which

affected her overtime, were violations of the collective bargaining agreement. Moreover, the sheriff did not challenge before the commission the relevancy of the material.[161]

The court in *Globe, Newspaper Co.*, specifically held that, unlike the privacy exemption in the statute (G.L. c. 4, § 7, Twenty-sixth [b]), which requires a balancing between any claimed invasion of privacy and the interest of the public in disclosure, "[a]pplication of the investigatory exemption [Twenty-sixth (f)] ... does not contemplate [such a] test" in determining whether a record is public and hence subject to disclosure. However, whether the material is a public record or not does not answer the question of the union's right of access to information in the hands of the sheriff's internal affairs division (IAD). This was made clear in *Boston Police Superior Officers Fedn. v. Boston*, a case charging the city with a prohibited practice for denying promotion to the police officer who was president of the union in retaliation for his union activities.[162] The city, as does the sheriff here, claimed that the IAD logs and cards should not be produced because the information is exempted from disclosure under G.L. c. 4, § 7, Twenty-sixth (f).[163] In *Town of Weymouth,* the commission held that the public records question was irrelevant to the power of the commission to subpoena documents. The "[c]ommission's subpoena power does not request the release of information pursuant to G.L. c. 66, § 10, and therefore the Town's reliance upon the definitions contained in G.L. c. 4, § 7 is inapposite."[164]

While *Boston Police Superior Officers Fedn. v. Boston,* dealt with the power of the Commission to issue subpoenas, the court could see no reason why a different rule should apply to the disclosure of similar material under a remedial order issued after a litigated prohibited practice case. Thus, whether documents are public records as determined under G.L. c. 4, § 7, Twenty-sixth (f), does not control whether the union is entitled to the material, although the section provides guidance as to public policy considerations.

The Court concluded that the Commission weighed those policies in balancing the union's need with the considerations put forth by the Sheriff, and was not in error in using its traditional balancing test which adopted the approach of *Detroit Edison Co. v. National Labor Relations Bd.*[165]

§ 8 LEGITIMATE AND SUBSTANTIAL

Once the union has shown that requested information is relevant and reasonably necessary to its duties as bargaining agent, the employer has the burden of demonstrating that its concerns about disclosure of the information are legitimate and substantial.[166] Moreover, a public

employer may not unreasonably delay furnishing the requested information. A delay is unreasonably if it diminishes the union's ability to fulfill its role as the exclusive representative.[167] Compelling an exclusive bargaining representative to file charges to obtain information to which it is legally entitled does not effectuate the purpose of the law or enhance the spirit of labor relations.[168]

A public employer may lawfully refuse to furnish a union with information it has requested if it has met its burden of demonstrating that its concerns about non-disclosure are legitimate and substantial when weighed against the union's need for the information.[169] Examining the Labor Relations Commission decisions and related cases, the most commonly asserted "legitimate and substantial" defenses for denying access to requested information are based upon an assertion that the requested information, while a public record, is protected under an exemption to the public records law.

> Under M.G.L. c. 66, § 10, "every person having custody of any public record, as defined in clause twenty-sixth of section seven of chapter four, shall at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his/her supervision, and shall furnish one copy thereof upon payment of a reasonable fee."[170]

A public record is defined as:

> all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth or of any political subdivision thereof, or of any authority established . . . to serve a public purpose, unless such materials or data fall within [one or more of the exceptions permitting nondisclosure].[171]

In the 2004 Appeals Court case of *City of Boston v. Labor Relations Commission and Service Employees International Union, Local 285, AFL-CIO,*[172] the union filed an unfair labor practice charge, stemming from the city's failure to disclose the evaluation of a deputy director of the homebuyer assistance unit of the city's public facilities department. The Labor Relations Commission ruled that the requested information was relevant and reasonably necessary to enable the union to pursue its grievance, and an appeal was taken.

The Appeals Court held that the city made a sufficient showing of confidentiality to require the Labor Relations Commission to examine the evaluation of the city deputy director *in camera* before the Commission could conclude that the withholding of the document was an unfair labor (prohibited) practice and require its production to the union in connection with union's grievance.

According to the court, disclosure of information likely to be contained in the employee's evaluation could well harm the city and its employee in its efforts to counsel and improve the employee's job performance. Disclosure of such a document should be preceded by a thoughtful review in order to balance these harms against the relevance of the information in the document to the claims of the union.[173] "An assurance of confidentiality to those who voluntarily participate in such investigations likely produces candor".[174] The Commission is not, of course, limited to the evidence provided to the hearing officer.[175]

Thus, the court held that the Commission abused its discretion when it decided, without viewing the evaluation or remanding the matter for an in *camera* review of the document by the hearing officer, that the city had failed to demonstrate a legitimate and substantial interest in nondisclosure of the evaluation and that it must be disclosed without any determination of the limits of its use.

PRACTICE POINTERS

In the context of public safety contracts, the most frequently asserted grounds proffered in support of the municipality's decision not to furnish requested information are that the information 1) is protected under the personal privacy exception, or 2) that is protected under the law enforcement investigatory exemption, or similar provision.[176]

Personal Privacy Exemption

Pursuant to M.G.L. c.4 §7, clause 26 (c), a public employer need not disclose any:

> *personnel and medical files or information, nor any other materials or data relating to a*

> *specifically named individual, if the disclosure of which may constitute an unwarranted invasion of personal privacy.*[177]

In the 1985 Supreme Judicial Court (SJC) case of the Massachusetts Federation of Teachers union sought the disclosure of the names, job classifications, and the home addresses of all employees of the Braintree public schools from the Braintree Superintendent of Schools.[178] *The superintendent refused the request, claiming that the information was protected under the personal privacy exemption. The superior court judge held that the superintendent must disclose all information requested except the employees' home addresses. The union appealed the decision to the higher court, claiming that home addresses were not protected.*

Speaking on the applicability of the personal privacy exemption in the context of public sector labor relations, the court held that the superintendent was required to provide the union with the home addresses of all its teachers. In support of its holding, the court began its analysis by stating that there will always be a clear statutory presumption in favor of disclosing information which is sought as part of a public record, and that public employees -- by virtue of their public employment -- have diminished expectations of privacy.[179] *It went on to state that the only material that will be exempted under this provision will be information which constitutes "intimate details of a highly personal nature."*[180] *As to what constitutes "intimate information of a highly personal nature," the Labor Relations Commission has held that information about the particulars of an alleged rape as provided by the victim were protected from use by the union in grieving the employees' dismissals from employment.*

In Boston School Committee, two brothers were terminated from their jobs as security guards at South Boston High School after they were charged with raping a female student at the school.[181] *During the criminal investigation, the victim was promised that her statements would not be made public and would remain confidential -- given the highly personal and intimate nature of rapes and other sexual offenses. At trial, the girl refused to testify and did not appear in court. As such, the criminal charges were dismissed. Soon thereafter, the security guards requested their jobs back at the school. Due to the rape allegation, they were denied reinstatement and sought the schools' records and reports made by the alleged victim in order to prepare their arbitration case. The school refused. In finding for the public employer, the Commission found that the school committee's desire to ensure safety and open communication channels for the students, along with its concerns for potential criminal liability for disclosure of rape victims reports under M.G.L. c. 41 § 97, justified the non-disclosure.*

Investigative Exemption

A second possible basis for public employers, and police departments or arson investigators in particular, to refuse to provide information might be justified on the investigatory exemption to the public records law.

Under M.G.L. c. 4 § 7 (26) (f), the following public records are exempted:

> *investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.*[182]

Rarely, however, will the Labor Relations Commission or the courts conclude that such information is protected. This is likely due to the fact that courts have historically defined "investigatory material" very narrowly. Moreover, even if the Commission or court does find that some of the requested material is excludable, it will nonetheless insist that the employer furnish the requested documents after they have been sanitized to remove any protected investigatory material.

§ 9 WAIVER

A union can contractually waive all or part of its right to information.[183] The Labor Relations Commission, however, will not find a waiver unless the employer establishes that the union and the employer agreed specifically to limit the union's statutory right to certain information.[184] The mere inference of a waiver, no matter how strong, will not justify the denial of the union's statutory right.[185] Rather, the evidence must demonstrate that the union clearly and unmistakably waived its right to receive information.

§ 10 EVALUATIONS

A union may be entitled to copies of evaluations of employees both within and outside of the bargaining unit. The Commission has required the release of employee evaluations when they have been demonstrated to be relevant and necessary for collective bargaining purposes.[186] However, it has recognized that certain data of a highly personal or intimate nature may be withheld.[187]

In ruling that portions of certain police department records must be disclosed as public records, the Massachusetts Supreme Judicial Court

(SJC) noted with approval a line of federal cases where partial disclosure of employee evaluations was allowed.[188]

An employer will be expected to make an effort to produce as much information as reasonably possible without violating employee confidentiality. For example, approaching employees for their permission or offering evaluations from which all personal information had been deleted may be appropriate. In a 1995 decision involving a request for copies of evaluations performed by a certain evaluator, the Commission ordered the State Welfare Department to make such evaluations available to assist the union in prosecuting a grievance.[189] This was in spite of numerous employer objections, including the fact that the matter was not grievable since the contract provided that only employees with *unsatisfactory evaluations* could file a grievance. Since part of the employee's grievance alleged discrimination in the evaluation, the LRC assumed that the matter was grievable. Citing its 1986 decision in *Adrian Advertising*, the Commission noted that it is "well settled" that a public employer is obligated to furnish a union with information that is relevant and reasonably necessary to grievance processing and contract administration.[190]

In another case involving a request for documents during the processing of a grievance, a Commission Hearing Officer (Administrative Law Judge) in 1996 ordered the Higher Education Coordinating Council to provide teacher evaluations/observation reports for the four finalists for a recent bargaining unit position.[191] However, the ALJ declined to order the employer to supply signed copies of the recommendations from each screening committee member. The employer was permitted to provide copies with the signatures "whited out". The union had threatened suit against members of the screening committee who allegedly defamed certain applicants. The employer was able to demonstrate its legitimate interest in assuring that its selection committee members would be able to continue to perform their function in the future free from the fear of personal liability.

PRACTICE POINTERS

There is a growing trend in Massachusetts towards requiring the disclosure of personnel records, citizen complaints, internal affairs files and performance evaluations. Chiefs should consult with counsel concerning any requests for such information. In the labor relations area, a union is free to make a request that is broader than that covered by the state's Public Records Law.[192]

Chiefs should be aware that most of the contents of an employee's personnel file, especially disciplinary records, are likely to be discoverable

by the union. Therefore, it is important not to make promises to witnesses or disciplined employees that cannot be kept.

§ 11 SEXUAL HARASSMENT FILES

A Commission Hearing Officer (Administrative Law Judge) sought to balance the Commonwealth's interest in eliminating sexual harassment with the union's need to represent its members in a 1993 case.[193] There the employer refused to provide a copy of the Sexual Harassment Officer's report which, pursuant to the Department of Correction's Policy, was not placed in an officer's personnel file but maintained separately. The matter had been handled without discipline when a verbal admonition appeared to resolve the matter. After balancing the parties' conflicting interests, the ALJ ruled that disclosure *in this case* was required. She declined to issue the broad remedy the union requested, however. She suggested that the parties could cooperate in working out a procedure for handling similar requests in the future. The employer was allowed to maintain separate sexual harassment files as well.

In a 1998 decision, the LRC upheld an ALJ's order that the city turn over notes taken by its special attorney who was investigating sexual harassment claims in the Boston Fire Department.[194] The Commission found that the City waived whatever attorney-client or work-product privilege may have attached to the attorney's notes. It also ruled that the City failed to show that its legitimate interest in refusing to furnish the information outweighs the union's right to information.

§ 12 REMEDIES

The following is a typical order issued by the Labor Relations Commission where it finds the employer violated M.G.L. c.150 E, §§ 10 (a) (5) and 10 (a) (1):

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the union by failing and refusing to provide information relevant and necessary to the administration of its contract (or filing grievance, etc.)

   b. In any like or similar manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Law.

2. The City/Town of _____ shall take the affirmative action which it is found will effectuate the policies of the Law:

a. Immediately upon request of the Union provide it with copies of _____.

b. Post the enclosed Notice to Employees immediately and conspicuously at _____ and maintain said notices for a period of thirty (30) days.

c. Notify the Commission in writing, within ten (10) days of receipt of this Decision and Order of the steps taken to comply therewith.

In a 2003 case, the Bristol County Sheriff's office refused to furnish the union with information on OC Training for 10 months, and then only after a charge was filed with the LRC and a hearing officer convinced them to do so.[195]

Although the union admitted that the employer ultimately provided the union with the requested information, the union requested that the Commission find that the employer violated the Law because the delay in doing so was unreasonable. A public employer may not unreasonably delay furnishing the requested information. A delay is unreasonable if it diminishes the union's ability to fulfill its role as the exclusive representative.[196] In the Bristol County case, the union requested the information in January of 2002 and did not receive the information until November 2002. The employer conceded that it provided the information only at the request of the hearing officer but did not admit that it violated the Law by refusing to provide the information at the time the union requested it. Compelling an exclusive bargaining representative to file charges to obtain information to which it is legally entitled does not effectuate the purposes of the Law or enhance the spirit of labor relations.[197] The employer's ten-month delay in producing the documents regarding the OC spray training program diminished the union's ability to address the health and safety concerns of its bargaining unit members and delayed an earlier resolution to the issues raised by the training program.

Furthermore, the delayed production of the documents did not render this case moot. Although a wrongdoer may render a case moot by correcting its action, it must establish that there is no reasonable expectation that the wrong will not be repeated.[198] In this case, the employer provided no assurance that its conduct would not recur by admitting that it had an obligation to timely provide the union with relevant and reasonably necessary information. Therefore, the LRC found that the case was not moot.

A similar conclusion was reached in a 2003 Boston Police Department case where the City relevantly turned over IA files, in a piecemeal fashion, over a long period of time.[199]

COMMONWEALTH OF MASSACHUSETTS

LABOR RELATIONS COMMISSION

_____, CHAIRMAN

_____, COMMISSIONER

_____, COMMISSIONER

NOTICE TO EMPLOYEES

POSTED BY ORDER OF

THE MASSACHUSETTS LABOR RELATIONS COMMISSION

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Labor Relations Commission has determined that the City/Town of _____ has violated Sections 10(a)(1) and (5) of M.G.L. c.150E by failing to provide _____, (the union) with certain information which is necessary and relevant for the administration of their bargaining agreement (Processing a grievance, etc.)

We hereby assure our employees that:

WE WILL NOT fail and refuse to bargain collectively in good faith with said Union by failing and refusing to provide information relevant and necessary for the administration their collective bargaining agreement (or processing grievances, etc.)

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

WE WILL provide _____, (the union) with _____ (the requested information).

City/Town of _____

By: _____

[1] *Worcester County Jail and House of Correction*, 28 MLC 189, 190 (2001); *City of Lynn,* 27 MLC 60, 61 (2000); *citing Trustees of the University of Massachusetts Medical Center*, 26 MLC 149, 156 (2000); *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148 (1981). *City of Holyoke*, 28 MLC 393 (2002).

[2] *Boston School Committee*, 24 MLC 8 (1998); *citing Boston School Committee*, 10 MLC 1501 (1984); *Boston School Committee,* 25 MLC 181, 186 (1999); *Boston School Committee,* 24 MLC 8,11 (1998), citing *Boston School Committee, 10* MLC 1501, 1513 (1984).

[3] *Worcester School Committee*, 13 MLC 1061 (1986); *aff'd*, 14 MLC 1682 (1988); and *Boston School Committee,* 10 MLC 1501 (1984); *Boston School Committee*, 22 MLC 1383 (1996) ; *Whittier Regional School Committee*, 19 MLC 1183 (1992); *Adrian Advertising*, 13 MLC 1233 (1986). *See also*, 29 U.S.C. § 158 (a) (5) (the National Labor Relations Act) and *NLRB v. Acme Industries*, 385 U.S. 432, 87 S. Ct. 565 (1967); *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court,* 11 MLC 1440 (1985); *Board of Trustees, University of Massachusetts*, 8 MLC 1139(1981); *Whittier Regional School Committee*, 19 MLC 1183, 1185(1992); *City of Boston/Boston Public Library*, 24 MLC 39 (1997); *Board of Higher Education*, 26 MLC 91 (2000); *Trustees of the University of Massachusetts Medical Center*, 28 MLC 102 (2001); *Greater Lawrence Sanitary District*, 28 MLC 317 (2002).

[4] *Boston School Committee*, 19 MLC 1501 (1984). See also, *Comm. of Mass.*, 21 MLC 1499 (1994); *Worcester School Committee*, 14 MLC 1682 (1988); *Boston School Committee,* 10 MLC 1501(1984); *Boston School Committee*, 13 MLC 1290, 1294(1984).

[5] *Massachusetts State Lottery Commission*, 22 MLC 1468 (1996); *City of Boston*, 8 MLC 1419 (1981).

[6] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1139, 1141 (1981); *Board of Higher Education*, 29 MLC 91, 92 (2000). *Boston School Committee,* 25 MLC 181, 186 (1999), citing *Board of Trustees, University of Massachusetts,* 8 MLC 1139, 1141 (1981).

[7] *City of Lynn*, 27 MLC 60 (2000), citing*, Higher Education Coordinating Council,* 23 MLC 266,268 (1997); See also *City of Holyoke*, 2 MLC 393 (2002).

[8] *Quincy City Employees Union, H.L.P.E.,* 15 MLC 1340, 1355-56 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission,* 30 Mass. App. Ct. 9 (1991), fur rev den. 409 Mass. 1104 (1991).

[9] *Worcester School Committee*, 14 MLC 1682, 1685 (1988).

[10] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1148, 1149 (1981); *City of Lawrence,* 21 MLC 1584 (1995); *Higher Education Coordinating Council*, 25 MLC 37 (1998).

[11] *Town of Westborough*, 25 MLC 81 (1998); *City of Lynn*, 27 MLC 60, 61 (2000); *Trustees of the University of Massachusetts Medical Center*, 26 MLC 149,156 (2000), citing *Boston School Committee,* 25 MLC 181, 186 (1999); *City of Boston,* 25 MLC 55, 57 (1998); *Higher Education Coordinating Council,* 23 MLC 266,268 (1997).
[12] *See Providence and Mercy Hospitals v. NLRB,* 93 F3d 1012, 1020 (1st Cir. 1996), 153 LRRM 2097, 2103 (1996).
[13] *Board of Higher Education*, 26 MLC 91, 93 (2000); *citing Boston School Committee*, 13 MLC 1290, 1294-1295 (1986); *Adrian Advertising aka Advanced Advertising*, 13 MLC 1233, 1263 (1986); *Aff'd sub. nom. Depres v. Labor Relations Commission*, 25 Mass. App. Ct. 430 (1988).
[14] *Board of Higher* Education, 26 MLC 91 (2000); Board *of Trustees*, *University of Massachusetts (Amherst)*, 8 MLC 1139, 1143-1144 (1981).
[15] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1139, 1143-1144 (1981).
[16] *See Commonwealth of Massachusetts*, 21 MLC 1720, 1721 n.2 (1995); *Commonwealth of Massachusetts*, 21 MLC 1499, 1504 (1994).
[17] *Commonwealth of Massachusetts*, 21 MLC at 1504; *Worcester School Committee*, 14 MLC 1682, 1684-1685 (1978).
[18] *Greater Lawrence Sanitary District*, 28 MLC 317 (2002).
[19] *See, Board of Trustees*, *University of Massachusetts (Amherst)*, 8 MLC 1148 (1981).
[20] *Board of Trustees*, *University of Massachusetts (Amherst)*, 8 MLC at 1143-1144.
[21] *Id.*
[22] *Id.*
[23] *See, e.g., Trustees of the University Massachusetts/Medical* Center, 28 MLC at 108 (seven-month delay unreasonable); *City of* Lynn, 27 MLC at 61 (delay of more than one year unreasonable); *Board of Higher Education,* 26 MLC 93 (one year and eight month delay unreasonable); *Higher Education Coordinating Council*, 25 MLC 37, 40-41 (1998) (one to five month delay unreasonable); *Boston Public School Committee*, 24 MLC 8, 10-11 (1997) (five month delay unreasonable).
[24] *Id.*
[25] *Higher Education Coordinating Council*, 25 MLC at 40.
[26] *City of Boston*, 28 MLC 369 (2002).
[27] *City of Holyoke*, 28 MLC 393 (2002).
[28] Shoppers Food Warehouse, 315 NLRB 258, 147 LRRM 1170 (1994).
[29] Commonwealth of Massachusetts, 21 MLC 1499 (1994).
[30] *Commonwealth* of *Massachusetts,* 12 MLC 1590, 1598 (1986).
[31] *Higher Education Coordinating Council,* 23 MLC 266, 268 (1997).
[32] *Boston Public School Committee*, 24 MLC 8 (1998).
[33] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1139, 1143-44 (1981).

[34] *Board of Higher Education*, 26 MLC 91, 93 (2000), *citing, Boston School Committee,* 13 MLC 1290, 12941295 (1986); *Adrian Advertising a/k/a Advanced Advertising,* 13 MLC 1233,1263 (1986), *a,* ff *d sub nom. Despres v. Labor Relations Commission,* 25 Mass. App. Ct. 430 (1988). *Bd. of Trustees*, UMass. Amherst, 8 MLC 1139 (1981); *Commonwealth of Massachusetts (Amherst)*, 11 MLC 1440(1985); *Boston School Committee*, 13 MLC at 1294; *City of Boston*, 21 MLC 1113(1994).
[35] *Boston School Committee,* 13 MLC at 1295.
[36] *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court, 11* MLC 1440, 1443-44 (1985), *citing, Board* of *Trustees, University* of *Massachusetts (Amherst),* 8 MLC 1139 (1981) (Commission adopted the balancing test approach used by the United States Supreme Court in *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 100 LRRM 2728 (1979)).
[37] *Greater Lawrence Sanitary District*, 28 MLC 317, 318-319 (2002); *citing Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1143-1144 (1981).
[38] *Board* of *Trustees,* 8 MLC 1139,1143-44(1981).
[39] *Mass. Lottery Commission*, 22 MLC 1468 (1996); *Boston School Committee*, 22 MLC 1383 (1996).
[40] *Boston School Committee*, 13 MLC 1290, 1298 (1986); *Boston School Committee* 13 MLC 1290, 1298 (1986); *Commonwealth of Massachusetts*, 11 MLC 1440 (1985).
[41] *Worcester School Committee,* 14 MLC 1682 (1988); *Boston School Committee*, 13 MLC 1290 (1986); *Board of Trustees, University of Massachusetts*, 8 MLC 1139 (1981).
[42] *Commonwealth of Massachusetts*, 12 MLC 1590 (1986).
[43] *Globe Stores*, 227 NLRB 1251, 94 LRRM 1336 (1977); *Northwest Publications*, 211 NLRB 464, 86 LRRM 1345 (1974).
[44] *City of Boston*, 25 MLC 11 (1998).
[45] *Id.*
[46] *Board of Trustees*, *University of Massachusetts*, 8 MLC 1148 (1981).
[47] *City of Boston*, 29 MLC 165 (2003).
[48] *City of Lynn*, 27 MLC at 61; *City of Boston*, 22 MLC 1698, 1707 (1996).
[49] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC at 1143-1144.
[50] *Commonwealth of Massachusetts*, 6 MLC 1682, 1684 (1979); *Commonwealth of Massachusetts,* 21 MLC 1503, (1995).
[51] *Worcester County Jail and House of Correction*, 28 MLC at 190 (2002).
[52] *City of Boston*, 22 MLC 1698, 1710 (1996).
[53] *City of Somerville*, 29 MLC at 202, *citing Trustees of the University of Massachusetts Medical Center*, 26 MLC at 158.
[54] *Id., citing City of Boston*, 22 MLC 1689, 1709 (1996).
[55] *Board of Trustees, University of Massachusetts*, 8 MLC 1139, 1143 (1981).

[56] *Worcester County Jail and House of Correction*, 28 MLC at 191.
[57] *Commonwealth v. Wanis*, 426 Mass. 639 (1998).
[58] *Worcester County Jail and House of Correction*, 28 MLC at 192.
[59] *City of Lynn*, 27 MLC at 61, *citing Boston School Committee*, 25 MLC 181, 186 (1999).
[60] *Worcester County Jail and House of Correction*, 28 MLC 189 (2001).
[61] In City *of Boston,* 22 MLC 1698, 1707 (1996),
[62] *See Commonwealth of Massachusetts*, 21 MLC at 1504 (1994).
[63] *Board* or *Trustees* 8 MLC at 1143.
[64] *City of Boston,* 22 MLC at 1707.
[65] *Id.*
[66] *Globe Newspaper Company v. Police Commissioner of Boston,* 419 Mass. 852 (1995).
[67] *Bougas v. Chief of Police of Lexington, 371* Mass. *59, 62 (1976).*
[68] *Id.* at *65.*
[69] *Reinstein v. Police Commissioner of Boston, supra* at *290.*
[70] *Boston Police Superior Officers Federation v. City of Boston* 414 Mass. 458 (1993).
[71] *Id.* at 461, n.5.
[72] *Id.* at 465.
[73] *Id.* at 467.
[74] *Id.* at 461 n.5.
[75] *Boston Police Superior Officers Federation v. Boston,* 414 Mass. 458, 461, fn.5 (1993).
[76] *Commonwealth v. Wanis,* 426 Mass. 639 (1998).
[77] *Id.* at 644.
[78] *Id.* at 641.
[79] 25 MLC at 179.
[80] *See, e.g., Globe Newspaper Co. v. Police Commissioner of Boston,* 419 Mass. 852 (1995).
[81] *NLRB v. John S. Swift, Co., 277 F 2d 641, 46 LRRM 2090 (7th Cir. 1966); B.F. Diamond Construction Co.*, 163 NLRB 161 (1967); *Boston School Committee*, 22 MLC 1383, 1390 (1996).
[82] *Commonwealth of Massachusetts*, 21 MLC 1499, 1504 (1994); *Worcester School Committee*, 14 MLC 1682, 1684-5 (1988).
[83] *Boston School Committee,* 8 MLC 1380, 1382 (1981); *Boston School Committee*, 22 MLC 1383, 1390 (1996).
[84] *Board of Regents*, 9 MLC 1799 (1983).
[85] *Massachusetts Board of Representatives of Higher Education*, 10 MLC 1196, 1203 (1983).
[86] *Boston School Committee*, 15 MLC 1541, 1546 (1989).
[87] *Boston School Committee*, 22 MLC 1383, 1390 (1996) citing *V.S. v. W.T. Grant*, 345 V.S. 629, 632 (1953); *City of Boston*, 7 MLC 1707, 1708 (1980).

[88] *City of Boston v. Labor Relations Commission*, 51 Mass. App. Ct. 1115, 749 N.E.2d 722 (2001).
[89] *Board of Higher Education*, 29 MLC 169 (2003).
[90] *See Commonwealth of Massachusetts*, 15 MLC 1406, 1416 (1989).
[91] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1148, 1149-1152 (1981).
[92] *Wakefield Teachers Association v. School Committee of Wakefield, (Wakefield),* 431 Mass. 792, 798 (2000).
[93] *Commonwealth of Massachusetts, 21* MLC at 1505-1506, *citing, Board of Trustees,* 8 MLC at 1152.
[94] *City of Boston, 22* MLC 1698 (1996).
[95] *See City of Boston*, 22 MLC at 1709; see generally, *Commonwealth of Massachusetts*, 21 MLC at 1506; *Worcester School Committee*, 14 MLC at 1684.
[96] *Boston Police Superior Officers Federation,* 414 Mass. 458, 461, n.5 (1993).
[97] *City of Boston,* 22 MLC at 1698.
[98] *Sheriff's Office of Middlesex County*, 30 MLC 91 (2003).
[99] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1148, 1149 (1981).
[100] *Boston School Committee,* 24 MLC 8,11 (1998); *citing Boston School Committee,* 10 MLC 1501, 1513 (1984).
[101] *Boston School Committee,* 8 MLC 1380,1382 (1981).
[102] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC at 1141.
[103] *City of Lynn,* 27 MLC 60 (2000); *citing Higher Education Coordinating Council,* 23 MLC 266, 268 (1997).
[104] *Quincy City Employees Union, H.L.P.E.,* 15 MLC 1340, 1355-56 (1989); *aJJ'd sub nom. Pattison v. Labor Relations Commission,* 30 Mass. App. Ct. 9 (1991); *fur rev den.* 409 Mass. 1104 (1991).
[105] *Worcester School Committee*, 14 MLC 1682, 1685 (1988).
[106] *Board of Higher Education, 29* MLC *169, 171 (2003)* and cases cited.
[107] *Id.; City of Somerville, 29* MLC *1999 (2003)* and cases cited.
[108] *NLRB v. Acme Industrial Co., 385 U.S. 432, 438, 64* LRRM *2069, 2071(1967).*
[109] *Board of Higher Education, 26* MLC *91, 93 (2000); citing, Boston School Committee, 13* MLC *1290, 1294-1295 (1986); Adrian Advertising a/k/a Advanced Advertising,* 13 MLC 1233, 1263 (1986); *affd sub nom. Despres v. Labor Relations Commission,* 25 Mass. App. Ct. 430 (1988).
[110] *Boston School Committee,* 13 MLC at 1295.
[111] *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court,* 11 MLC 1440, 1443-44 (1985); *citing, Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1139 (1981) (Commission adopted the balancing test approach used by the United States Supreme

Court in *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 100 LRRM 2728 (1979)).

[112] Greater Lawrence Sanitary District, 28 MLC 317, 318-319 (2002); citing, Board of Trustees, University of Massachusetts (Amherst), 8 MLC at 1143-1144 (1981).
[113] *Middlesex County Sheriff*, 30 LRC 91 (2003).
[114] *Wakefield Teachers Association v. School Committee of Wakefield,* 431 Mass. 792 (2000).
[115] *See Commonwealth of Massachusetts,* 12 MLC 1590, 1598 (1986) (employer failed to timely object to furnishing budgetary information); *See also, Detroit Newspaper Agency*, 317 NLRB 1071, 1072-1074 (1995) (employer must timely raise confidentiality claims to trigger a balancing test).

[116] *Id., citing,* Tritac Corp., 286 NLRB 522 (1987).
[117] *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1148, 1149-1152 (1981).
[118] *Id.*
[119] *See Wakefield Teachers Association v. School Committee of Wakefield,* 431 Mass. 792, 796 (2000); *quoting, Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609,614 (1993).
[120] *Wakefield Teachers Association v. School Committee of Wakefield,* 431 Mass at 796-797; *citing, Globe Newspaper Co. v. Boston Retirement Bd.,* 388 Mass. 427, 434 (1983).

[121] *Id.*
[122] *Oregonian Publ. Co. v. Portland Sc. Dist. No IJ, 329* Or. *393, 401 (1999).*
[123] *See Globe Newspaper Co. v. Chief Med. Examiner, supra.*

[124] *Id.* at 799-800, and cases cited. *See e.g., Pottle v. School Comm. of Braintree,* 395 Mass. 861, 865 (1985) (names, home addresses, and job classifications of all school employees are not exempt from public disclosure because it would not publicize "intimate details" of a "highly personal" nature); *Hastings & Sons Publ. Co. v. City Treasurer of Lynn,* 374 Mass. 812, 817-818 (base salaries and overtime payments of employees released); *Reinstein v. Police Comm's of Boston,* 378 Mass. 281, 284, 293 (1979) (disclosure of reports of discharge of weapons by police officers not exempt from disclosure).
[125] *Board of Higher Education*, 29 MLC 169 (2003) (employee's disciplinary note given to union subject to certain conditions to decide whether to continue to process an employee's grievance) and cases cited.

[126] *Id.* at 171-172. *See, City of Boston, 22* MLC 1698 (1996) (employee's internal affairs division file provided to Union counsel with certain safeguards to defend employee in a disciplinary proceeding).

[127] *Board of Higher Education,* 29 MLC 169 (2003).
[128] *Boston Police Superior Officers Federation v. Boston, 414* Mass. *458 (1993)* and *City of Boston, 22* MLC *1698 (1993).*
[129] *National Labor Relations Act (NLRA)*, 29 U.S.C. § 141 et. seg. Sec, e.g., *Teleprompter Corp. v. NLRB*, 570 F. 2d 4 (1st Cir. 1977); *Bd. of Trustees, UMass Amherst*, 8 MLC 1139 (1981).
[130] *Board of Trustees, University of Massachusetts*, 8 MLC at 1441 n.5 (1981); *Boston School Committee*, 8 MLC 1380, 1382(1981).
[131] *Westinghouse Electric Corporation*, 239 NLRB 106, 107 (1978).
[132]*Mass. Comm. of Admin. & Finance,* 15 MLC 1625 (1989).
[133] *Massachusetts State Lottery Commission*, 22 MLC 1468 (1996).
[134] *Town of Saugus,* 30 MLC 9 (2003).
[135] *Higher Education Coordinating Council*, 21 MLC 1679 (1995); see also *Worcester School Commission*, 13 MLC 1061, 1063 (1986); *Dracut School Committee,* 13 MLC 1281, 1284-86 (1986); *City of Boston*, 8 MLC 1419, 1437 (1981); *Commission of Administration (DPH),* 8 MLC 1730, 1735-36 (1982).
[136] *Lowell School Committee*, 23 MLC 216 (1957).
[137] *Id.*
[138] *Id.*
[139] *Worcester County Jail and House of Correction*, 28 MLC 189, 190 (2001); See also, *City of Boston*, 22 MLC 1698, 1707 (1996); *Board of Trustee, University of Massachusetts*, 8 MLC 1139, 1143 (1981).
[140] *City of Lynn*, 27 MLC 60, 61; Citing *Providence and Mercy Hospitals v. NLRB*, 93 f. 3d 1012, 1020 (1st Cir. 1996) 159 LRRM 2097, 2103 (1996).
[141] *Mass. Comm. of Admin. & Finance*, 20 MLC 1145 (1993); *Holyoke*, 18 MLC 1398 (1992).
[142] *City of Boston*, 21 MLC 1113 (1994); *Mass. Dept. of Public Welfare*, 19 MLC 1340 (1992).
[143] *Commonwealth of Massachusetts,* 11 MLC 1440 (1985); *Board of Trustees, University of Massachusetts (Amherst),* 8 MLC 1139 (1981); *Commonwealth of Massachusetts,* 21 MLC 1506 (1995). *Mass. Community College Council*, 23 MLC 41 (1997); *Mass. Dept. of Public Welfare*, 21 MLC 1499 (1994); *Worcester School Committee*, 13 MLC 1061 (1986); *Adrian Advertising*, 13 MLC 1233 (1986).
[144] Mass. *Lottery Commission*, 22 MLC 1468 (1996); *Mass. Comm. of Admin. & Finance*, 14 MLC 1280 (1987); *Town of Wilmington*, 11 MLC 1534 (1984); Bd. of Trustees, *UMass. Amherst*, 8 MLC 1139 (1981).
[145] *Mass. Comm. of Admin. & Finance*, 16 MLC 1489 (1990); *Whittier Regional School Committee,* 17 MLC 1463 (1991); *aff'd* 19 MLC 1183 (1992).
[146] *Mass. Comm. of Admin. & Finance,* 14 MLC 1477 (1988); *Higher Education Coordinating Council,* 23 MLC 266 (1997).
[147] *City of Boston,* 12 MLC 1454 (1985).

[148] *Mass. Commissioner of Admin. & Finance,* 15 MLC 1625 (1989).
[149] *City of Lawrence,* 7 MLC 1531 (1980).
[150] *City of Boston,* 19 MLC 1327 (1992).
[151] *City of Lawrence*, (H.O.), 21 MLC 1584 (1995).
[152] *City of Somerville*, 29 MLC 199 (2003).
[153] *Id.*
[154] *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 90 S. Ct. 1123 (1979); *Bd. of Trustees, UMass. Amherst,* 8 MLC 1380 (1981).
[155] *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 90 S. Ct. 1123 (1979).
[156] *Id. See, e.g., Emeryville Research Center v. NLRB,* 441 F. 2d 880 (9B Cir. 1971) (refusal to supply relevant salary information in precise form demanded did not constitute a violation of the NLRA's information furnishing requirements, since the company's proposed alternatives were sufficiently responsive to the union's needs); *Shell Oil Co. v. NLRB,* 475 F. 2d 615 (9th Cir. 1975) (refusal to supply employee names without employee consent was not unlawful when company had well-founded fear that non-striking employees would be harassed); *United Aircraft Co. v. Machinists Union,* 534 F. 2d 422 (2nd Cir. 1975) (employer acted reasonably in refusing to honor generalized request for employee medical records without the employee's permission).
[157] *Id.* In what is commonly referred to as Section 8(a)(5) of the National Labor Relations Act, 29 USCA § 158 (a)(5), federal law requires that all private sector employers bargain in good faith with their unionized employees, which includes furnishing needed information that has been requested. *Sec.,* K. Dolin, Effective Bargaining: *A Survey of the Rights and Obligations of Employers and Employees Representatives,* 10 The Labor Lawyer, 269 (1994).
[158] *Bd. of Trustees, UMass. Amherst,* 8 MLC 1382 (1981); *See also, Mass Lottery Commission,* 22 MLC 1237 (1995); *City of Boston,* 22 MLC 1698 (1996); *Boston School Committee,* 13 MLC 1290 (1986).
[159] *Comm. of Mass.,* 11 MLC 1440 (1985).
[160] The NLRB has also created a second basis for employers to refuse to provide relevant information where such requests encompass statements of witnesses, gathered by the employer as part an investigation of employee misconduct. *Anheuser - Busch,* 237 NLRB 982 (1978); *AT & T*, 250 NLRB 47 (1981). The Labor Relations Commission, however, does not recognize such a *per sé* exclusion under Massachusetts laws. *See, Boston School Comm.,* 13 MLC 1290 (1986).
[161] Citing to *Globe Newspaper Co. v. Police Commr. of Boston*, 419 Mass. at 858, 648 N.E.2d 419, the sheriff claims that the commission improperly used a balancing test in determining whether the union was entitled to the material.
[162] *Boston Police Superior Officers Fedn. v. Boston*, 414 Mass. at 459, 466-467, 608 N.E.2d 1023.

[163] *Id.* at 465, 608 N.E.2d 1023. The Supreme Judicial Court, *id.* at 465-466, 608 N.E.2d 1023, rejected that argument and quoted from Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 691, 282 N.E.2d 379 (1972) ("All police records ... whether or not they are public records, are subject to being summoned before a proper tribunal in accordance with established rules of law"). The court, *id.* at 466, 282 N.E.2d 379, also cited to *Town of Weymouth*, 16 M.L.C. 1168, 1171 (1989). See *Commonwealth v. Wanis*, 426 Mass. 639, 643, 690 N.E.2d 407 (1998).
[164] *Id.* at n. 6.
[165] *Detroit Edison Co. v. National Labor Relations Bd.,* 440 U.S. 301, 317-320, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). See *Board of Trustees, Univ. of Mass. (Amherst*), 8 M.L.C. at 1144.
[166] *Trustees of the University of Massachusetts Medical Center*, 26 MLC at 158, citing *Board of Trustees*, 8 MLC at 1144.
[167] *City of Lynn*, 27 MLC 60, 61 (2000), *citing Board of Higher Education*, 26 MLC 91, 93 (2000).
[168] *City of Lynn*, 27 MLC at 61, *citing Board of Higher Education*, 26 MLC 91, 93 (2000); *Boston School Committee*, 24 MLC 8, 11 (1997).
[169] *City of Boston,* 12 MLC 1454 (1985).
[170] M.G.L. c. 66 § 10.
[171] M.G.L. c. 4 § 7 (26).
[172] *City of Boston v. Labor Relations Commission and Service Employees International Union, Local 285, AFL-CIO,* 61 Mass.App.Ct. 397, 810 N.E2.d 856 (2004).
[173] *Cf. Wakefield Teachers Assn. v. School Comm. of Wakefield*, 431 Mass. 792, 802, 731 N.E.2d 63 (2000) (discussing public policy of public records' exemption for disciplinary report and quoting lower court judge: "It would not be unreasonable to conclude that disclosure of this sensitive and careful investigation and analysis would make the same kind of investigation and analysis difficult, if not impossible, in the future.")
[174] *Connolly v. Bromery*, 15 Mass.App.Ct. 661, 664, 447 N.E.2d 1265 (1983) ("Raw data appraising the job performance of individuals--which is what we are dealing with here--is particularly personal and volatile.")
[175] 456 Code Mass. Regs. § 13.15(6) (1993).
[176]*Boston School Committee,* MLC 1290 (1986).
[177] M.G.L. c. 4 § 7 (26)(c).
[178] *Pottle v. School Committee of Braintree,* 395 Mass. 861, 482 NE 2d 813 (1985).
[179] *Id.* at 816. *See, Hastings & Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 375 NE 2d 299 (1978) (burden is on public employer to prove with specificity the exemption which applies).
[180] *Pottle v. School Committee of Braintree,* 395 Mass. 861, 482 NE 2d 813 (1985), *quoting Getman v. NLRB,* 450 F. 2d 670, 675 (D.C. Cir.

1971); *See also, Attorney General v. Tax Collector of Lynn,* 377 Mass. 151, 385 NE 2d 505 (1979).
[181] M.G.L. c. 41 § 970 prohibits police officers from disclosing particular information relative to rapes and sexual assaults.
[182] M.G.L. c. 4 § 7 (26)(f).
[183] *Board of Regents of Higher Education (North Adams State College)*, 9 MLC 1799, 1807, (1983).
[184] *Id.;* see also *Communication Workers, Local 1051 v NLRB,* 664 F 2d 923, 106 LRRM 2960 (1st Cir. 1981); *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court,* 11 MLC 1440 (1985).
[185] *Communications Workers*, 106 LRRM at 2964.
[186] *Worcester School Committee*, 14 MLC 1682 (1988); *Commonwealth of Massachusetts*, 11 MLC 1440 (1985); *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1139 (1981).
[187] *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1152 (1981).
[188] *Reinstein v. Police Commissioner of Boston*, 378 Mass. 281, 293, 391, NE 2d 881 (1979).
[189] *Commonwealth of Massachusetts*, 21 MLC 1499, 1506 (1995).
[190] *Adrian Advertising*, 13 MLC 1233, 1263 (1986) *Aff'd sub nom Despres v. Labor Relations Commissioner*, 25 Mass. Appellate Court 430 (1988).
[191] *Higher Education Coordinating Council*, 23 MLC 41 (1996).
[192] M.G.L. c. 4, §7 (26).
[193] *Commonwealth of Massachusetts, Commission of Administration,* 20 MLC 1145 (1993).
[194] *City of Boston*, 25 MLC 55 (1998).
[195] *Bristol County Sheriff's Department*, 30 MLC 47 (2003).
[196] *City of Somerville*, 29 MLC at 202; *City of Lynn*, 27 MLC at 61, citing *Board of Higher Education*, 26 MLC 91, 93 (2000).
[197] *City of Lynn*, 27 MLC at 61, citing *Board of Higher Education*, 26 MLC 91, 93 (2000); *Boston School Committee*, 24 MLC 8, 11 (1997).
[198] *Worcester County Sheriff's Department*, 28 MLC 1, 5 (2001), citing *Boston School Committee*, 15 MLC 1541, 1546 (1989).
[199] *City of Boston*, 30 MLC 50 (2003).

CHAPTER 12 - PROHIBITED PRACTICES

When the union seeks to enforce its statutory rights against the chief or public employer, it files a charge with the state's Labor Relations Commission (LRC or Commission). Section 10 of Chapter 150E creates several categories of "prohibited practices" (called Unfair Labor Practices on the federal level). Those six applying to the employer fall under subsection (a) while the three which apply to the union are listed under subsection (b). The latter are not dealt with in this chapter.

Under Section 10 (a) it is a prohibited practice for an employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against any employee because he/she has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because he/she has informed, joined, or chosen to be represented by an employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine.

NOTE: Prejudgment interest on LRC awards is to be at a floating rate (compounded quarterly), not the flat 12% rate applied to tort claims.[1]

Once the commission determines that a prohibited practice under G.L. c. 150E, § 10, has been committed by the employer, the commission is afforded "broad authority [under G.L. c. 150E, § 11) to fashion appropriate orders to remedy unlawful conduct."[2] "We [have] construe[d] the language 'further affirmative action' [contained in G.L. c. 150E, § 11] as contemplating remedial measures to be determined by the commission including, but not limited to, those specified in the statute . . ."[3]

Ordinarily only *public employees* are protected by c.150E. However, the Commission has determined that the purpose of the Law is served by prohibiting intimidation of those who present information to the LRC regardless of whether they are public employees as defined in the statute.[4] Thus, in a 1998 case involving parking clerks in Boston that were independent contractors rather than public employees, the Commission denied the City's motion to dismiss alleged violations of §§10(a)(4) and (i).

Broad latitude is afforded to the Commission with regard to dismissal of a charge of prohibited practice if it finds no probable cause to believe that a violation has taken place, or if it determines that further proceedings would not effectuate the purposes of the statute.[5] A court will affirm the decision of the Commission unless it concluded that it was either arbitrary, capricious or erroneous as a matter of law.[6] A charge is also subject to dismissal for failure to name the proper employer.[7] Where the union files a court complaint within 6 months of an alleged violation, its action is in error as it should have been filed at the LRC. When it later files the change at the Commission, it is too late.[8]

A court's review is governed, "insofar as applicable," by the provisions of G.L. c. 30A, § 14(7). G.L. c. 150E, § 11, as amended by St.1981, c. 351, § 245.[9] A court will look to see if the substantial rights of any party have been prejudiced for any one or more of the reasons set forth in section 14(7) of the statute.[10] Any challenge to the Commission's decision must demonstrate that the Commission's action was invalid, that is, either arbitrary and capricious or because of an error of law.[11]

The Commission may dismiss a complaint without a hearing if it finds no probable cause to believe that a violation of the statute has occurred, or if it determines that further proceedings would not effectuate the purposes of the statute, G.L. c. 150E, § 11, and it may do so either on the filing of the complaint and response or after an investigation.[12]

The statute, G.L. c. 150E, § 11, and the relevant administrative regulation, 456 Code Mass. Regs. § 15.04 (1999), seem facially at odds. While the statute speaks of "a complaint" being made to the Commission, the regulation characterizes the initiating action as "a charge" being filed. The statute then offers three possible alternative actions for the Commission: the Commission may dismiss the complaint, order a further investigation, or order a hearing on the complaint.[13] The regulation suggests that when a charge has been filed, an investigation may be conducted by the Commission or its agents.[14] The statute authorizes the Commission to dismiss a complaint without a hearing "if it finds no probable cause to believe that a violation of this chapter has occurred or if it otherwise determines that further proceedings would not effectuate the purposes of this chapter."[15]

The regulation states that "[a]fter such investigation, if it appears to the Commission that a hearing is required, it shall cause to be served upon the parties a complaint and a notice of the hearing."[16] To the extent that the regulation and the statute are in conflict, the statutory procedure and language must govern.[17]

The Commission has substantial discretion in its disposition of prohibited practice charges and is granted wide latitude in resolving complaints.[18]

As with agency reviews generally, courts accord considerable deference to the Commission's disposition of a charge.[19] A court may not disturb the commission's decision unless "the substantial rights of any party may have been prejudiced" for one of the reasons set forth in G.L. c. 30A, § 14(7), as appearing in St.1973, c. 1114, § 3. The Commission's role may be both investigatory and adjudicatory.[20]

There are certain personal, statutory rights that can be enforced judicially even though they are incorporated into a collective bargaining agreement, and the mere fact that those rights may be created both by contract and by statute and may be violated by the same factual occurrence does not vitiate their distinct and separate nature.

In a 2004 Appeals Court case, two Department of Youth Services (DYS) employees' right to timely payment of wages was an independent, nonwaivable, statutory right that could be enforced judicially, even though the subject matter of overtime, call-back, and stand-by pay was incorporated in their collective bargaining agreement, and thus, employees were not required to pursue administrative remedies before commencing their actions in court to recover overtime and the other wages claimed.[21]

Note: The statute prohibiting an employer from discriminating against an employee because such employee has complained of an overtime pay violation does not apply to Commonwealth employees.[22]

PRACTICE POINTERS

When a charge is filed at the Labor Relations Commission, it is necessary to specify which provision(s) of Section 10 allegedly were violated. While it is possible to amend the charge at a later date (even during the hearing in some cases), filing a charge under the wrong section(s) could result in a dismissal. The subsections each cover a different type of misconduct and it is not usually difficult to determine which should be alleged as the basis for a charge.

§ 1 STATUTE OF LIMITATIONS

Section 15.03 of the Commission's regulations, provides: "Except for good cause shown, no charge shall be entertained by the Commission

based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Commission."[23] A charge of prohibited practice must be filed with the Commission within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party, except for good cause shown.[24] The six month limitations period begins to run when the party adversely affected receives actual or constructive notice of the conduct alleged to be a prohibited practice.[25]

An allegation that a charge is untimely is an affirmative defense.[26] An employer, for example, must show when a union knew or should have known about a change.[27] The defense is raised by a motion to dismiss filed prior to a hearing on the Commissions complaint.[28] Simply because an employee receives a letter or is notified in person of a change does not prove that the union either knew or should have known. The Town of Hull's motions for dismissal were rejected (without prejudice) where (1) an employee received a letter stating there were no light duty positions available and (2) the School Committee changed employees' work schedule.[29] More was required to show union knowledge or that the union should have known.[30] Similarly, the failure of the City of Boston to show that the union knew of a detective's assignment prior to the date when he was assigned to a case supervisor position in a district court meant that the charge was not filed too late.[31]

In the 2002 case involving the Suffolk County Sheriff, despite the union's knowledge of an overtime calculation problem in December, 1999 or January, 2000 and its subsequent attempts to fix that problem, the union waited to file a charge until January 29, 2001.[32] Because the union filed its charge approximately six months beyond the Commission's period of limitations, the LRC ruled it was untimely.[33] The LRC will look at whether there is evidence showing that the union had good cause to file the charge late,[34] (decision to pursue remedy through final stage of contractual grievance procedure before filing unfair labor practice charge did not establish good cause to toll limitations period), or that the employer's actions constituted a continuing violation.[35] (employer's actions constituted a continuing violation because those actions had the effect of punishing a bargaining unit member on a day-to-day basis for engaging in concerted, protected activity).

In *Town of Middleborough*[36], the police chief issued an order to all police officers on July 6, 1990 changing the time they had to report to court from 8:45 a.m. to 11:00 a.m. On July 17, 1990, the board of selectmen sent a letter to the police chief directing him to rescind the order and mailed a copy of that letter to the union president.[37] After meeting with the police chief on July 30, 1990, the board of selectmen notified the police chief in writing on August 1, 1990 that the board had rescinded its July 17, 1990 directive and sent a copy of that letter to the union president.[38]

The union argued in the *Town of Middleborough* case that the Commission's period of limitations began to run on August 1, 1990 when the board of selectmen rescinded its earlier directive.[39] However, the Commission found that the limitations period began to run on July 6, 1990 because police officers began to report to court at 11:00 a.m. on that date and continued to do so, even after the board directed the police chief on July 17, 1990 to rescind his order.[40] The clear implication of the Commission's decision is that the period of limitations begins to run when a union knew or should have known that a change in working conditions occurred and not when an employer ultimately decides to adopt that change.

Similar to the union in the *Town of Middleborough* case, the union in *Suffolk County Sheriff's Department* claimed that it "was lulled into complacency" by the employer's repeated assurances that the employer was trying to correct the overtime calculation problem.[41] However, the employer's assurances, although undoubtedly made in good faith, did not alter the fact that employees' working conditions changed after PeopleSoft no longer included differentials in the overtime calculation as of November 1999. The LRC concluded, therefore, that the period of limitations began to run in December, 1999 or January, 2000 when the union learned about that change. According to the Commission, to find otherwise would contravene Section 15.03's intended purpose of preventing the litigation of stale claims.[42]

In a 2002 unpublished opinion, the Massachusetts Appeals Court affirmed the Labor Relations Commission's dismissal of a Charge of Prohibited Practice filed too late by some Brookline Firefighters against their union.[43] After the union refused, in 1991, to represent certain firefighters in a Civil Service case, the firefighters proceeded – on their own – to win the case. In 1998 the union failed to take an appeal from a Superior Court decision affirming the Civil Service Commission's decision in the firefighter's favor. In near disbelief, the Appeals Court pondered why the union's failure to appeal a decision favorable to the firefighters would be a breach of the union's duty of fair representation! It upheld the LRC's dismissal of the charge as untimely. If the disgruntled firefighters had a gripe, they should have brought the action in 1991, under the 6-month LRC "statute of limitations." The Appeals Court cited favorably the 1992 case of *Felton v. Labor Relations Commission* and recited the applicable Commission regulation.[44]

The LRC allowed the “motion to dismiss” in the 2002 case of *Town of Lenox* where the Town sent a letter to all insurance participants on May 8, 2001 that announced and clearly outlined a proposed change in the prescription drug co-payments. The union knew or should have known on that date of the alleged violation, and the 6-month limitation period began to run.

§ 2 SECTION 10 (a) (1)

Employer conduct which interferes with employees in the free exercise of their rights under the Law violates Section 10 (a)(1).[45] Often, when an employer is charged with violating other provisions of Section 10 (a), the union will also list §10(a)(1). This is because such other conduct *derivatively* interferes with, restricts or coerces employees in the free exercise of their rights under the Law. For example, reneging on an agreement to pay police officers educational incentive[46] or to pay a differential for firefighters assigned to the Fire Prevention/Training section[47] were both violations.

Section 2 of the Law guarantees employees, among other things, "the right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." A public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to restrain, coerce or interfere with its employees in their free exercise of rights guaranteed under Section 2 of the Law.[48]

A finding of illegal motivation is not generally required in a Section 10(a)(1) case.[49] Rather, the focus of the Commission's inquiry is the effect of the employer's conduct on a reasonable employee.[50]

In determining whether an employer has violated Section 10(a)(1) of the Law, the Commission applies an objective test that focuses on the impact that the employer's conduct would have on a reasonable employee rather than the subjective impact of the employer's conduct on the actual employee involved.[51] Under this test, expressions of employer anger, criticism, and ridicule directed at an employee's protected activities have been found sufficient to constitute interference, restraint, and coercion of the employee. It is not necessary that the employer's conduct actually restrain or coerce an employee in the exercise of the employee's rights.[52] For this reason, proof of illegal employer motivation is not necessary to find a violation of Section 10(a)(1) of the Law.[53]

It is well-settled that an employer violates Section 10(a)(1) of the Law if it engages in conduct that would reasonably tend to interfere with employees in free exercise of rights under Section 2 of the Law.[54] Even without a direct threat of adverse consequences, the Commission has found a violation when an employer makes disparaging remarks toward a union or the exercise of protected activities.[55] To determine whether an employer's conduct violates the Law, the Commission does not consider the employer's motivation[56], or whether the employer's conduct actually impacted the employee or employees involved.[57] Rather, the inquiry focuses on the objective impact that the employer's conduct would have on a reasonable employee.[58]

However, when analyzing the impact of the employer's conduct on reasonable employees, the Commission considers the impact on a reasonable employee under the circumstances. For example, in *City of Fitchburg*, two probationary employees became unwitting participants in a grievance concerning compensation for certain training which they had attended. [59] The employer denied the grievance, stating, in part:

> I feel very strongly that if they truly wanted to be Fitchburg Firefighters that they certainly should expend some time and effort on their own towards this goal.
>
> If they are not interested, there are a lot of other candidates on the Civil Service list that are…[60]

In concluding that the employer unlawfully interfered with, restrained and coerced the employees in the exercise of their rights guaranteed under the Law, the Commission stated:

> Those same words used in the course of every day conversation would arguably not be the same source of great concern. However, in the context of a grievance, filed on behalf of two unwilling probationary employees, they assume a more threatening essence. We view the effect, not merely from the perspective of the reasonable employee, but from the perspective of the reasonable probationary employee lacking Civil Service protection.[61]

A 2002 case involved the Lowell Police Chief's letter to all officers sent to their homes.[62] In *City of Lowell*, the union argued that Chief Davis' letter threatened and intimidated unit members from participating in union activity because it asserts that Flynn, Fuller, and the union do not represent the members' interests. However, the LRC found that, in the context of the tension then on-going in the Lowell Police Department, Davis's letter, when considered as a whole, would not tend to interfere with a reasonable employee in that situation.

In both *Groton-Dunstable* and in *Town of Plainville*, there was an initial determination that the employees were engaged in protected concerted activity.[63] (When [the grievant] moved his grievance through the contractual grievance procedure, he was engaged in protected activity.")[64]; (hearing officer considered the activities criticized by the chief and found that each was protected under Section 2 of the Law.) In *Lowell*, most of Davis's letter refers to matters that are outside or beyond the protections of Section 2 of the Law. However, the LRC stated that the prohibition against making statements that would tend to interfere with employees in

the exercise of their rights under the Law does not impose a broad "gag rule," that prohibits employers from publicly expressing their opinion about matter of public concern.[65] The ultimate test remains whether the employer's statements would tend to chill a reasonable employee's right to engage in activity protected by Section 2 of the Law.[66]

The Commission noted that it did not suggest that an employer may generally criticize a union's choice of which of two competing interests to represent. However, here, even if the union had chosen to represent the interests of the officers whom Dixon had accused over Dixon, that choice was inextricably intertwined with other conduct both during and after the bus incident that was beyond the protection of Section 2 of the Law. Therefore, in the context the Commission found that Davis's letter would not tend to interfere with a reasonable employee in the exercise of rights guaranteed under Section 2 of the Law and concluded that the City did not violate Section 10(a)(1) of the Law. Accordingly, the complaint was dismissed.

It is well-established that the filing and processing of grievances constitutes protected activity under Section 2 of the Law.[67] Moreover, even a statement to an employer that an employee intended to protest the employer's actions either by seeking the union's assistance or by filing a charge with the Commission is sufficient to bring that employee within the parameters of Section 2 of the Law.[68]

The Appeals Court, in a 2004 case, [69] upheld a determination by the LRC that the Board of Higher Education (employer) had not violated its obligation to bargain in good faith, under c. 150E, §§ 10(a)(1) and (5). The union charged that the employer, purportedly relying on claimed past practice, in November, 1997, and September, 1999, unilaterally determined the terms and conditions of participation for faculty members who voluntarily accepted certain educational technology grant programs offered to them by the employer at Northern Essex Community College.

The LRC recognized that the employer would have violated the law if it had unilaterally altered a preexisting condition of employment or had implemented a new condition of employment affecting a mandatory subject of collective bargaining without providing the union with prior notice and an opportunity to bargain. However, the LRC agreed with the employer that for several years the employer had offered grant programs to bargaining unit members on a voluntary participation basis with similar criteria governing awards and grant conditions, so that the terms of the November, 1997, and September, 1999, grants were consistent with past practice, even though the manner and amount of compensation for those faculty members who chose to participate may have differed somewhat from grant to grant.

The union contends that the LRC erred as matter of law in concluding that the employer's complained-of grant programs were comparable to and consistent with earlier grant programs; the union asserts that they were, rather, "altered," "expanded" and "unique," i.e., that the employer unilaterally changed established past practice. The union argues that "there is not substantial evidence to support the [LRC's] conclusion that the [employer] had a 'past practice' of 'determining the criteria for awarding and receiving grants, including the manner and amount of compensation" ' which "was not changed by the 1997 and 1999 technology grant programs."

REPUDIATION OF CONTRACT

To establish repudiation of a collective bargaining agreement in violation of Sections 10(a)(5) and (1) of the Law, the union must show that the employer deliberately refused to abide by the terms of an unambiguous agreement.[70] If the language at issue is ambiguous, the Commission will consider the bargaining history to determine whether there was any agreement between the parties.[71] Additionally, if the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the agreement, no repudiation has occurred.[72]

In a case involving the Belchertown Police Department, the Commission dismissed a complaint that alleged a violation of a Memorandum of Understanding in which the Lieutenant's position was to be removed from the bargaining unit, yet the town allowed him to work bargaining unit overtime pending funding of the contract by the Town Meeting.[73] The Commission concluded that the agreement was ambiguous. When language in an agreement is ambiguous, the Commission may look at the underlying bargaining history to determine the parties' intent.[74] Since there was no such history, and the agreement was ambiguous, the LRC could not find that the town repudiated the agreement.

In the 2002 LRC case of City of Holyoke, the Commission found that the city violated Section 10(a)(5) and, derivatively, Section 10(2)(1) of the Law by repeatedly failing to comply with a contractually-incorporated policy of either completing an internal affairs investigation and disposing of a complaint, or by filing a progress report within 15 days of the filing of five (5) complaints over a six (6) month period of time.[75]

Some employer actions of an intentionally threatening nature have been found to violate Section 10 (a)(1). A police chief's threatening remarks to union members following a vote of no confidence, as well as the conducting of an administrative inquiry, violated this section of the Law.[76] Similarly, violations were found for:

- conducting union surveillance[77];
- relocating for having filed grievances[78];
- threatening jobs if certain grievances get filed[79];
- criticizing an innocent employee's conduct while he/she engaged in protected activity, regardless of whether the employer had proper motives or was simply mistaken[80];
- threatening layoffs unless the union supported the Town Manager's budget at Town Meeting[81];
- making disparaging remarks critical of a person's performance as union steward[82]; and
- declining to grant professional teacher status in retaliation for filing grievances.[83]

Section 2 of the Law guarantees employees, among other things, the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." A public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to interfere with its employees in their free exercise of rights guaranteed under Section 2 of the Law.[84] The focus of a Section 10(a)(1) analysis is the effect the employer's conduct would have on a reasonable employee's exercise of Section 2 rights, not the motivation behind the employer's conduct.[85]

In determining whether a violation has occurred under Section 10(a)(1) of the Law, the Commission applies an objective test that focuses on the impact that the employer's conduct would have on a reasonable employee rather than the subjective impact of the employer's conduct on the actual employee involved.[86] Under this test, expressions of employer anger, criticism, and ridicule directed at an employee's protected activities have been found sufficient to constitute interference, restraint, and coercion of the employee, although to constitute a violation of the Law it is not necessary that the employer's conduct actually restrain or coerce an employee in the exercise of the employee's rights.[87] For this reason, proof of illegal employer motivation is not necessary to find a violation of Section 10(a)(1) of the Law.

Even where the employer claims that there was no improper motivation, a finding of a violation of this section is possible. So long as the employer's language reasonably could be construed as threatening, it violates this section.[88] In fact, the Commission requires no proof that the employer's motivation was illegal to sustain a charge under § 10(a)(1).[89] An Example of a violation which was found, regardless of motive, involved removing items from union bulletin board based solely on their contents[90].

The Commission has ruled that it is not a violation of this section where an employer grants its witnesses time off with pay to attend a Commission hearing but does not do the same for the union's witnesses.[91]

§ 3 SECTION 10 (a)(2)

It is a violation of this subsection to dominate, interfere or assist in the formation, existence or administration of any employee organization (union).

Charges under this provision may result where an employer tries to dictate the amount of an agency service fee or refuses to enforce such provision when it was agreed to in a contract.[92] However, not every instance where an employer refuses to enforce an agency service fee will be found to be a *per se* (i.e., automatic) violation of Section 10 (a)(2).

To establish a violation of Section 10(a)(2) of the Law, the evidence must demonstrate that the employer's conduct significantly interfered with the existence and administration of the union.[93]

In analyzing claims under Section 10 (a)(2), the Commission follows a two step process. First, the LRC looks at whether the organization fits within Section 1's definition of an "employee organization". Next, it looks at whether the employer violated the Law by having had a role in the formation of the organization, having dictated its form or structure, or having selected its representatives.[94]

Filing a grievance constitutes concerted, protected activity protected by Section 2.[95]

An employer commits a *per se* violation of Sections 10(a)(1) and 10(a)(2) of the Law if it bargains with an incumbent after a question of representation has been raised by a rival union.[96] The obligation of strict employer neutrality arises at the point when the employer has notice that the Commission has made its initial determination that the rival union's petition and showing of interest are adequate to raise a question of representation.[97] In determining when employer neutrality arises, the Commission recognized two competing factors. First, requiring the cessation of bargaining between an employer and an incumbent on the basis of an unsupported challenge by a rival undermines labor stability and deprives employees of the benefits of their union's efforts.[98] Second, employer neutrality has to arise at a meaningful point in the organizing process to permit employees to select or replace their bargaining representative without interfering with employee free choice, assisting a rival union, or impeding the Commission's election process.[99]

PRACTICE POINTERS

Once an exclusive bargaining representative is in place, employers are required to maintain a "hands off" policy regarding unions. Employers should resist the temptation to encourage or assist employees who are unhappy with the union to form or join an alternative union. In fact, once the employer becomes aware that a rival union has collected the required number of signatures and it has filed a petition at the LRC, it must adopt a policy of strict neutrality, including not bargaining with the incumbent union until the matter is resolved.[100]

§ 4 SECTION 10 (a)(3)

An employer violates this subsection if it discriminates as regards hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization. Cases filed under this provision require strict adherence by both sides to the Commission's requirement for burdens of proof and the presentation of evidence. It is not important whether the employer's comments or actions were improperly motivated. The test is whether such comments or actions would have a "chilling" effect on a reasonable employee engaging in protected concerted activity.[101] Disparaging remarks made by an employer, even without direct threats of adverse consequences, constitute a violation of Section 10(a)(1).[102] A three-step process is used to analyze 10 (a)(3) cases.[103]

Evidence was sufficient in the 2005 SJC case of *Town of Brookfield v. Labor Relations Com'n*, to support finding of anti-union animus in town's refusal to reappoint police officer Fowler who was involved in organizing union.[104] There was evidence that the acting police chief had told officer Fowler that the town selectmen know about the union, and there was evidence that the selectman told officer Fowler that it was not wise to start a union, and that unions, were trouble, Fowler was trouble, and Fowler would not be around to enjoy a union.

There was evidence sufficient to support the Labor Relations Commission's conclusion that police officers' non-reappointments were improperly motivated by anti-union animus rather than by fact that officers lived outside 15-mile radius from town. There was also evidence that another officer was given the option of having 30 days to relocate within the radius or to resign but that the subject officers were not afforded that opinion.

To establish *a prima facie* case of discrimination, the charging party must prove that: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against

the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity.[105] Here, it is not disputed that the police officer Fowler was involved in protected activities and that the Employer took adverse action against him. The Court re-examined the evidence regarding the Employer's knowledge of Fowler's union organizing activities and its asserted reasons for terminating him.

EMPLOYER'S KNOWLEDGE

Knowledge of an employee's union activities may be proved by direct or circumstantial evidence.[106] In the case of *Town of Brookfield*, the LRC found that there was direct evidence that three selectmen, Crossen, Porter, and Mannering were aware of union organizing activity generally because Crossen received union organizing information in June 1996, and immediately shared it with Porter, who, in turn relayed it to Mannering. In addition, Mannering's administrative assistant was one of the individuals sent information about the organizing drive and a union authorization card. However, there is no dispute that there was no direct evidence that Crossen, Porter, or Mannering knew specifically of officer Fowler's involvement in the union organizing campaign.[107]

In determining whether circumstantial evidence of knowledge exists, an inference of knowledge may be drawn from the timing of the alleged discriminatory actions; the employer's general knowledge of its employees' union activities; the employer's animus against the union; and the pretextual reasons given for the adverse personnel actions.[108] Here, the facts reflect that: 1) Mannering had requested his friend Crossen to relay his observations about the employer's operations directly to Mannering; 2) as noted above, Crossen, Porter, Mannering's administrative assistant, and Mannering knew that there was a union organizing drive underway; 3) after July 1, 1996, Crossen closely supervised Fowler by meeting with him on a weekly basis; and 4) Fowler met with employees individually and in small groups on the employer's property, including the building where Mannering had his office, and 5) Fowler distributed authorization cards on behalf of Local 25. These facts combined with the pretextual reasons advanced by the employer for Fowler's termination, supported an inference that the employer was aware of Fowler's union organizing activities.[109]

EMPLOYERS REASONS FOR TERMINATING FOWLER

In discrimination cases arising under Section 10(a)(3) of the Law where the charging party has proffered direct evidence of discrimination, the Commission applies the two-step analysis articulated in *Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination*.[110] Direct evidence

is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace."[111] Here, as described in greater detail above, and in the Commission's original decision, Fowler has not proved by direct evidence that the employer unlawfully retaliated against him for his union organizing activities.[112]

Absent direct evidence of improper employer motivation, the Commission applies the three-step analysis articulated in *Trustees of Forbes Library v. Labor Relations Commission.*[113] First, the Commission determines whether the charging party has established a *prima facie* case, as described above. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Once the employer produces lawful reasons for its actions, the employee must prove that "but for" the protected activity, the employer would not have taken the adverse action.[114] Having already concluded that Fowler was engaged in concerted, protected activities, that the employer had knowledge of those activities, and that the employer took adverse action against Fowler, we next consider whether the employer was improperly motivated when it terminated Fowler.

Unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence.[115] Circumstantial factors may include: the timing of the adverse action in relation to the protected activity, the insubstantiality of the reasons given for the adverse action, or inconsistent and shifting reasons advanced by the employer to justify its actions.[116]

A public employer that violates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(2)(3).[117] To establish a *prima facie* case, a charging party must show that: (1) an employee was engaged in activity protected by Section 2 of the Law; (2) the employer knew of that conduct; (3) the employer took adverse actions against the employee; and (4) the employer took the adverse action to discourage the protected activity.[118] The Town of Dennis violated Section 3 when a DPW supervisor told a union steward that the supervisors gave him a low evaluation because he filed grievances the supervisor believed should not have been filed.[119] The employee met all four elements of the *prima facie* test.[120]

The Supreme Judicial Court articulated the analytical framework to be applied in discrimination cases arising under M.G.L. c.151B when an employment decision results from a mixture of legitimate and illegitimate motives and there is direct evidence of discriminatory basis.[121] Under the court's two-step analysis, the employee must first prove a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer "who may avoid a finding of liability only by proving that it

would have made the same decision even without the illegitimate motive."[122] In contrast, under *Trustees of Forbes Library*, the burden of persuasion remains with the charging party at every stage.[123]

In two decisions issued after *Wynn & Wynn*, the Commission found it unnecessary to decide whether to adopt the two-step analysis articulated in those cases because the charging parties had met the higher burden of proof articulated in *Trustees of Forbes Library*.[124] Immediately after the LRC issued its decision in *Suffolk County Sheriff's Department*, however, the Supreme Judicial Court further clarified its position in *Lipchitz v. Raytheon Co.,* 434 Mass. 493 (2001), concerning the appropriate allocation of burdens of proof in discrimination cases involving direct and circumstantial evidence. In that case, the Court specifically noted that its holding in *Wynn & Wynn* overruled that portion of *Trustees of Forbes Library* that held that the burden of proof in a direct evidence case remained with the plaintiff.[125] The *Town of Brookfield* case presented the Commission with its first opportunity, since *Lipchitz*, to address which analysis it should apply in mixed-motive cases involving direct evidence arising under M.G.L. c. 150E. Because the Court explicitly overruled that portion of *Trustees of Forbes Library* allocating the burden of proof to the charging party at all stages in cases where there is direct evidence of discrimination, the LRC decided to apply the two-step analysis articulated in *Wynn & Wynn* to cases arising under c. 150E where the charging party has proffered direct evidence of discrimination. Accordingly, the LRC will first determine whether the charging parties have proffered direct evidence of discrimination.

According to the first step in the *Wynn & Wynn* analysis, a charging party meets is initial burden by proffering direct evidence that proscribed criteria played a motivating part in a respondent's adverse action.[126] Direct evidence is evidence, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace."[127] Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself do not suffice to satisfy a charging party's threshold burden.[128]

Once a charging party meets it initial burden under the two-step mixed-motive analysis set forth in *Wynn & Wynn*, the burden shifts to the respondent to "show that its legitimate reason, standing alone, would have induced it to make the same decision."[129] The appropriate question in a mixed-motive case is whether the respondent's proffered legitimate reason also motivated the adverse action, and if so, to what extent.[130]

Under the test articulated in *Trustees of Forbes Library*, it is undisputed that two officers in *Brookfield* were engaged in concerted, protected activity, and that the Town rook adverse action by not re-appointing them. Although the Town argued that the charging parties failed to establish the

second element of their *prima facie* case that it knew of the charging parties' protected activity, the Hearing Officer credited Ackerman's October 9, 1999 statement that the selectmen knew about the union. Accordingly, the only remaining element of the charging parties' *prima facie* that they must prove is that the Town's conduct was motivated by a desire to penalize or discourage their protected activity.

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Circumstantial factors may include the time of the adverse action in relation to the protected activity and disparate treatment.[131]

According to the *Trustees of Forbes Library* test, once a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action. The employer must state a lawful reason for its decision and "produce supporting facts indicating this reason was actually a motive in the decision."[132]

In *Brookfield*, the Town alleged that two officers were not re-appointed because they did not live within fifteen (15) miles of the Town. Additionally, the Town contended that one was not re-appointed because he was insubordinate toward another officer when he directed profanity at him. The Town also argued that one was not re-appointed because a citizen complaint was filed against him, and he had engaged in inappropriate conduct with a female dispatcher in another town. Consequently, the Town has met its burden of proffering legitimate, non-discriminatory reasons for not re-appointing the two.

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case become one of "mixed motives" and, under the *Trustees of Forbes Library* analysis, the Commission considers whether the employer would have taken the adverse action but for the employee's protected activities.[133]

Despite the Town's assertion that the two offices were not re-appointed, in part, because they did not live within fifteen (15) miles of the Town, their residency did not become an issue until late October 1999, several weeks after the union organizing drive.

Thus, the preponderance of the record evidence showed that the Town would not have refused to re-appoint the officers but for their union activities. Accordingly, the LRC concluded that the Town violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by failing to re-appoint the two.

Absent direct evidence of improper employer motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Several factors may

suggest unlawful employer motivation including timing of the alleged discriminatory act, triviality of reasons given by employer, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity.[134]

It is well established that serving as a union officer, filing and processing grievances on an employee's own behalf and on behalf of others, and filing charges of prohibited practices with the Commission constitutes concerted activity protected by Section 2 of the law.[135]

Adverse personnel actions that negatively affect a person's employment, like a suspension discharge, and an involuntary transfer, are common examples of adverse action sufficient to satisfy the third element of the charging party's *prima facie* case.[136] Further, the Commission has decided that an employer's action that is punitive may fall within the parameters of adverse action.[137]

In a 2002 Peabody Police Department case, the City, through its agent, Police Chief Champagne, counseled the union president about duties and responsibilities as an officer of rank under the police department's rules and regulations.[138] A letter that counsels employees about their job duties and responsibilities, without more, does not constitute an adverse action sufficient to satisfy the requisite element of a *prima facie* case of unlawful discrimination.[139] Absent evidence that Peabody Police Chief Champagne's letter was punitive in any way, warned the union president of future adverse action, or negatively impacted his wages, hours, or other terms or conditions of employment, the LRC was not persuaded that the letter, standing alone, constituted adverse action. Therefore, the Commission concluded that the Union had failed to satisfy its burden of producing credible evidence to satisfy the adverse action element of its *prima facie* case of unlawful discrimination and the complaint of prohibited practice was dismissed.

Under the *Forbes Library* test, once a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action. The employer must state a lawful reason for its decision and "produce supporting facts indicating this reason was actually a motive in the decision."[140]

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of mixed motives and, under the *Forbes Library* analysis, the Commission considers whether the employer would have taken the adverse action but for the employee's protected activities.[141] Under this analysis, the charging party bears the burden of proving that, but for the protected activity, the employer would not have taken the adverse action.[142]

Where more than one individual participated in the decision-making process, the Commission examines carefully the process to determine

whose motives are relevant.[143] Where the decision-maker does not make an independent review of the facts, and bases the decision to act on the evaluations and recommendations of other supervisors, the motives of such supervisors in a discrimination case will be imputed to the decision-maker.[144]

Simply questioning a sheriff about his budget was not protected concerted activity.[145]

A. PROTECTED, CONCERTED ACTIVITY

Only concerted activity is protected under Section 2. This requires a showing that the employee was acting with other employees or on their authority.[146]

B. KNOWLEDGE

Usually direct evidence that the employer or its agent was aware of the protected activity will be shown. However, circumstantial evidence is sufficient to create an inference of knowledge. An inference of knowledge will not result simply because the timing of a person's union activities and the adverse action are coincidental in time.[147] Similar to the "small plant" doctrine in the private sector, the LRC will infer knowledge if the small size of the work force and single location of the workplace are such that any employer can be presumed to have known of the protected activity.[148] However, if all the protected activities took place away from the employer's premises, such knowledge will not be inferred.[149] This exception will be important in fire cases where the chief is located at headquarters and the protected activity takes place at another station house. Similar results may flow from police activity taking place outside of the station itself.

In a 2002 Appeals Court case involving an appeal from an LRC decision dismissing an employee's claim of retaliation for engaging in union organizing activities, the court held that the Commission could consider circumstantial evidence of employer knowledge and motivation.[150] The court noted than an inference of employer knowledge of an employee's protected union activities may be based on such circumstantial evidence as the timing of the alleged discriminatory actions, the employer's general knowledge of its employees' union activities, the employer's animus against the union, and the pretextual reasons given for adverse personnel actions.

C. ADVERSE ACTION

Any action which deprives an employee of pay, promotional opportunity, desirable assignment, or is regarded as punitive will be considered adverse.[151]

The failure to consider an employee for an assignment constitutes adverse action.[152] The decision to close town hall which negatively impacted certain employees by depriving them of a benefit received by other employees constitutes adverse action.[153]

However, the Commission found no evidence of adverse action where a supervisor spoke with an employee about violations of work rules but did not issue an official reprimand.[154]

D. IMPROPER MOTIVATION

It is customary to have to show improper motivation through circumstantial evidence.[155] Rarely will a municipal employer state publicly that the reason was to retaliate against an employee for engaging in protected union activity. However, this is not always the case.[156] A school committee superintendent violated the Law when she said that she was "sick and tired of grievances being filed."[157] Her motivation was not determinative; rather, it was the effect such comments might have on a reasonable employee engaging in protected activity.[158] The LRC has considered the following factors when deciding whether to infer improper motivation:

- how visible the employee was in support of the union;[159]
- not following established disciplinary procedures;[160]
- disparity in treatment;[161]
- suddenly bringing up "stale" charges for apparently forgiven prior violations;[162]
- expressions of animus or hostility towards union or projected activity;[163]
- anti-union comments coupled with changing reasons being given for the disciplinary action;[164] (e.g., stating that anyone that had been involved in a Commission procedure should not be interviewed for a certain position.[165])
- employer's expressed general anti-union sentiment along with abrupt discharge;[166]
- the insubstantiality of the reason given;[167]
- discharge at the same time as the protected activity;[168] and

- an employee's threats when told he/she would be disciplined.[169]

E. ABUSIVE CONDUCT NOT PROTECTED

Where the Chief Union Steward at MCI-Concord crossed the line between robust union advocacy and abusive, disrespectful conduct towards his superiors in violation of the Department of Corrections Rule Governing Employees, the Superior Court, in an unpublished opinion, upheld his disciplinary transfer to MCI-Cedar Junction.[170]

The court explained that union representatives need to be given a substantial degree of latitude when discussing union matters with management. Swears, temper displays and the like, within reason, are permitted. In this case the union steward's conduct was so abusive and disrespectful that it crossed the line of permitted union advocacy.

First, he called Captain Tarantino "a fucking no good management boy". Officer Grocki was free to disagree with Captain Tarantino and to call his position senseless, even stupid, but it went well beyond permissible "robust" discussion to call him "a fucking no good management boy." If the roles were reversed and Captain Tarantino had called Officer Grocki "a fucking no good union boy," that, too, would run afoul of the Rules Governing Employees. The court explained that it was not the foul language alone that rendered this abusive; calling an adult Captain a "boy" was actually the most abusive and disrespectful part of the offensive phrase.

Second, he threatened illegal union action if Captain Tarantino did not change his decision regarding the assignment of Lieutenant Jaworski to spend a majority of his time in the booking area. There was no dispute that MCOFU was not permitted to "close this fucking place down" or to "close down the fucking trap," and it crossed the line for Officer Grocki to threaten to do so.

§ 5 SECTION 10 (a)(4)

Although arguably encompassed by the protections of §10 (a)(3), this sub-section is aimed at preventing adverse action from being taken against an employee who signs or files an affidavit, petition or complaint, gives testimony under the Law, or has formed, joined or chosen to be represented by an employee organization.[171] In a 1977 decision, the Commission revealed how critical it felt was its need to investigate complaints and receive information that it even extended § 10 (a)(4) protection to employees not covered by the Law's §1.[172]

The following activities have been found to be protected by Section 10 (a)(4):

- stating one's intention to pursue redress of his/her grievances;[173]
- giving testimony at the LRC;[174] and
- attending a Commission hearing.[175]

The 2005 SJC case involving the Town of Brookfield upheld the decision of the Labor Relations Commission which found that the Town committed a prohibited practice by refusing to reappoint three police officers in retaliation for their efforts to organize a union.[176]

§ 6 SECTION 10 (a)(5)

In what is the most "catch all" prohibition under § 10 (a), this subsection prohibits an employer from failing to bargain in good faith with the union as required by Section 6 of the Law. Often a charge will cite another subsection and include 10 (a)(5) "derivatively". While individual employees may file charges under certain parts of Section 10 (a), only an employee organization can file a prohibited practice charge under § 10 (a)(5).[177]

A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing its employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse.[178] The duty to bargain extends to both conditions of employment that are established through past practice as well as those conditions of employment that are established through a collective bargaining agreement.[179] To establish a violation, the union 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.[180]

The failure of a public employer to submit a contract for funding within the required time frame (30 days for voluntarily negotiated agreements – next to town meeting, etc. for JLMC awards) is a violation of Section 10(a)(5); however, the remedy is an order to do so, not a financial award and no interest is involved.[181]

For the Commission to find that a public employer repudiated an agreement, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law, a union must show that the employer has deliberately refused to abide by an agreement with the union.[182] However, if the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, then the Commission

will not find that a repudiation had occurred because the parties did not achieve a meeting of the minds.[183]

The City of Holyoke failed to bargain in good faith by repudiating the parties' collective bargaining agreement through its repeated failure either to complete an investigation and dispose of a complaint against an officer or to file a progress report of the investigation within fifteen (15) days of the filing date of a complaint, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.[184]

When language in an agreement is ambiguous, the Commission may look at the underlying bargaining history to determine the parties' intent.[185]

The obligation to bargain in good faith includes an obligation to implement the unambiguous terms of an agreement.[186] Further, an agreement need not be in writing to give rise to the obligation.[187] However, if there is no agreement, or if the parties have a good faith dispute over the meaning of their agreement, there is no repudiation.[188]

To establish a repudiation, the union must show that the employee deliberately refused to abide by the agreement.[189]

The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively-bargained agreement.[190] A public employer's deliberate refusal to abide by an unambiguous collectively-bargained agreement constitutes a repudiation of that agreement, in violation of the Law.[191] To determine whether the parties reached an agreement, the Commission considers whether there has been a meeting of the minds on actual terms of the agreement.[192] If the evidence is insufficient to find an agreement, or if the parties hold differing good faith interpretations of the language at issue, the Commission will conclude that no repudiation has occurred.[193] If the language is ambiguous, the Commission examines applicable bargaining history to determine whether the parties reached an agreement.[194] There is no repudiation of an agreement if the language of the agreement is ambiguous and there is no evidence of bargaining history to resolve the ambiguity.[195]

Section 6 of the Law obligates a public employer to "negotiate in good faith with respect to wages, hours, standards of productivity and performance and any other terms and conditions of employment" with the exclusive bargaining representative of its employees, and failing to do so is a prohibited practice under Section 10(a)(5) of the Law. The Commission has consistently found that the statutory duty to bargain in good faith encompasses both negotiations for a collective bargaining agreements and the parties' conduct in administering and enforcing an agreement after it is negotiated.[196] The bargaining obligation includes the duty to comply with collectively bargained agreements,[197] and to implement settlement agreements reached in the process of resolving grievances that arise over the interpretation and application of the agreement.[198] The duty to

bargain in good faith requires that parties engage in the bargaining process with an open mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences.[199] The parties' conduct must always be calculated to move the negotiations forward toward agreement, and conduct that is designed, or can be reasonably expected, to move the negotiations backward is regressive and constitutes a refusal to bargain in good faith.[200] Therefore, withdrawing a wage offer made in an earlier bargaining session and substituting a less favorable one constitutes regressive bargaining.[201]

The issue presented in a 2002 case involving the Board of Higher Education was whether the employer failed to comply with the arbitrator's award when it filled the vacant position with two part-time employees rather than with a full-time employee.[202] A public employer's refusal to comply with an arbitration award violates the duty to bargain in good faith under Section 10(a)(5) of the Law.[203]

In that case the union alleged that the employer failed to comply with the arbitration award by not filling the position with a full-time employee by the fall semester of 1999. However, the arbitration award did not require the employer to fill the position with a full-time employee. Rather, the award specified that the employer had to vacate the position effective on the last day of the 1998-1999 academic year and to re-post the position utilizing a timetable that allowed the selection process to finish prior to the start of the 1999-2000 academic year. The record reflected that the employer complied with these directives. Because the employer found no qualified applicants, the employer appointed two part-time faculty members to fill the vacant position for the fall semester. Therefore, the preponderance of the evidence demonstrated that the employer complied with the arbitration award.

Based on the record, the LRC concluded that the employer did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law because the employer complied with the arbitrator's award accordingly, and dismissed the complaint of prohibited practice.

If the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, the Commission will not find a repudiation because the parties did not achieve a meeting of the minds.[204] The parties must manifest an assent to the terms of the agreement.[205]

Unilaterally granting a wage increase also violates the Law. This was the case even where the matter was approved at a Town meeting with union members present.[206] The remedy was an order rescinding the pay increase and an order to bargain before changing any bargaining union member’s pay.

§ 7 SECTION 10 (a)(6)

Section 6 of the Law requires public employers and unions that represent their employees to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargaining agreement,[207] and to implement settlement agreements reached in the process of resolving grievances that arise over the interpretation and application of the agreement.[208] A public employer's deliberate refusal to abide by unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of the Law.[209] To determine whether the parties reached an agreement, the Commission considers whether there has been a meeting of the minds on the actual terms of the agreement.[210] If the evidence is insufficient to find an agreement, or if the parties hold differing good faith interpretations of the language at issue, the Commission will conclude that no repudiation has occurred.[211] If the language is ambiguous, the Commission examines applicable bargaining history to determine whether the parties reached an agreement.[212] There is no repudiation of an agreement if the language of the agreement is ambiguous, and there is no evidence of bargaining history to resolve the ambiguity.[213]

This subsection applies to alleged refusals to participate in good faith in the mediation, fact-finding and arbitration procedures of Sections 8 and 9 of the Law. Where a city or town's failure to bargain in good faith (such as failure to submit a timely request for funding an arbitration award) arose out of an arbitration proceeding at the JLMC, that conduct violates §10(a)(6).[214]

The obligation to bargain in good faith under Section 6 of the Law requires the parties to exercise good faith in processing and adjusting grievances arising under their collective bargaining agreement.[215] While the good faith obligation to process and to adjust grievances does not compel either party to settle a dispute, unreasonable conduct in handling grievances through the contractually agreed upon mechanism may, in the totality of the circumstances, constitute a breach of an employer's continuing bargaining obligation under the Law.[216]

In *City of Peabody*, the union alleges that the City failed to comply with the parties' contractual grievance-arbitration procedure. In particular, the union contends that the City remained closed-minded throughout the grievance process, as evidenced by the City repeatedly insisting in its grievance responses that provisional promotions were within the Mayor's exclusive managerial prerogative. Further, the union asserts that the City was unwilling to engage in a meaningful dialog to resolve the grievances. However, the mere fact that the City refused to recant its position on the

provisional promotion issue is not indicative of bad faith because the City's duty to bargain in good faith does not compel it to settle the dispute underlying the grievance.[217] Moreover, the record does not reflect that the City either refused to process the union's grievances or failed to participate in the arbitration process.[218] Although the City refused the union's request to send the June 25, 1999 grievance immediately to arbitration, nothing in Article XXVII of the Agreement requires the City to bypass steps 1 and 2 of the grievance process once the union requests to proceed directly to step 3. Further, there is no evidence that the City unreasonably delayed the grievance process by refusing to do so.[219] Consequently, the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to comply with the parties' contractual grievance-arbitration procedure.

Section 6 of the Law requires public employers and unions to "meet at reasonable times ... [to] negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment..." A party that refuses to bargain in good faith violates Section 10(a)(5) and, derivatively, (a)(1) of the Law. Although there is no precise formula for determining the level of participation in the bargaining process required to meet the requirement of Section 6 of the Law, the Commission has long recognized that refusing to meet is a *per se* violation of Section 10(a)(1) and (5).[220] Refusing to meet and bargain on demand over mandatory subjects of bargaining is a violation of Section 10(a)(5) of the Law.[221]

The duty to bargain in good faith includes the duty to comply with collective bargaining agreements and to implement settlement agreements reached during the process of resolving grievances.[222] The MDC violated Section 6 when it failed to place employees at step 12 as it agreed to do in a grievance settlement agreement.[223]

Where an employer repudiates a collectively-bargained agreement, by deliberately refusing to abide by the agreement's unambiguous terms, it violates the duty to bargain in good faith.[224]

Section 6 of the Law imposes upon public employers the obligation to negotiate in good faith with the exclusive bargaining unit representatives of their employees concerning wages, hours, standards or productivity and performance, and any other terms and conditions of employment. The duty to bargain collectively with the employee's exclusive collective bargaining representative prohibits the employer from negotiating directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative.[225] Direct dealing is impermissible for at least two related reasons. First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative.[226]

Second, direct dealing undermines employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it.[227]

PRACTICE POINTERS

With the enactment of the Joint Labor Management Committee (JLMC) statute, there is little call for § 10 (a)(6) in public safety cases. Section 8 allows parties to include a grievance procedure calumniating in final and binding arbitration in their collective bargaining agreement. Where no such provision is included, the Commission may order arbitration of a grievance. Since the overwhelming majority of all public safety contracts have arbitration provisions in their grievance procedures, this aspect of the subsection is rarely used. As regards Section 9, this sets forth an impasse resolution procedure when contract negotiations stall. In virtually all public safety cases, resort will be to the JLMC when impasse is reached during negotiations.

[1] *See Secretary of Administration and Finance*, 434 Mass. 340, 749 N.E.2d 137 (2001); see M.G.L. c.231, §6I.
[2] *Commonwealth of Massachusetts*, 26 MLC at 164, citing *Labor Relations Commn. V. Everett*, 7 Mass.App.Ct. 826, 829-830, 391 N.E.2d 694 (1979). *See also School Comm. of Newton v. Labor Relations Commn.*, 388 Mass. at 580, 447 N.E.2d 1201.
[3] *Labor Relations Commn. V. Everett*, 7 Mass.App.Ct. at 829, 391 N.E.2d 694.
[4] *Michael J. Corley*, 4 MLC 1124 (1977).
[5] *See* G.L. c. 150E, § 11; *Quincy City Hosp. v. Labor Relations Commn.,* 400 Mass. 745, 748 (1987); *Plymouth Police Bhd. v. Labor Relations Commn.,* 417 Mass. 436, 440 (1994).
[6] *Massachusetts Correction Officers Federated Union v. Labor Relations Commission*, 54 Mass. App. Ct. 1114, 767 N.E.2d 114 (2002) (unpublished decision).
[7] *National Association of Government Employees v. Labor Relations Commission*, 59 Mass.App.Ct. 471, 796 N.E.2dc 856 (2003)
[8] *International Association of Firefighters, Local 866 v. Labor Relations Commission*, 58 Mass.App.Ct. 1112, 793 N.E.2d 403 (Table) (2003) (unpublished opinion).
[9] *See Plymouth Police Bhd. v. Labor Relations Commn., supra* at 440.
[10] *Ibid.*
[11] *Quincy City Hosp. v. Labor Relations Commn., supra* at 750. *Alexander v. Labor Relations Commn.,* 404 Mass. 1005, 1006, *cert. denied*, 493 U.S. 955 (1989).
[12] *Id.*
[13] G.L. c. 150E, § 11.
[14] 456 Code Mass. Regs. § 15 .04(1) (1999).
[15] G.L. c. 150E, § 11, *as amended by* St.1981, c. 351, § 244.
[16] 456 Code Mass. Regs. § 15.04(1) (1999).
[17] See *Telles v. Commissioner of Ins.,* 410 Mass. 560, 564-565 (1991).
[18] *Quincy City Hosp. v. Labor Relations Commn.,* 400 Mass. at 748.
[19] *Boston Police Superior Officers Fedn. v. Labor Relations Commn.,* 410 Mass. 890, 892 (1991). *See Plymouth Police Bhd. v. Labor Relations Commn.,* 417 Mass. at 440.
[20] *Quincy City Hosp. v. Labor Relations Commn., supra* at 748.
[21] M.G.L.A. c. 149, § 148.
[22] M.G.L.A. c. 151, §§ 1A, 19.
[23] 456 CMR 15.03 (1999).
[24] *Felton v. Labor Relations Commission*, 33 Mass. App. Ct. 926 (1992); *Town of Dennis,* 26 MLC 203 (2000); *Couture v. Labor Relations Commission*, 63 Mass.App.Ct. 1114, 826 N.E.2d 794 (Table), 2005 WL 10828888 (Mass.App.Ct.).

[25] *Wakefield School Committee*, 27 MLC 9 (2000); *City of Boston*, 10 MLC 1120 (1983).
[26] *See City of Boston*, 26 MLC 177, 181 (2000); *Town of Wayland*, 5 MLC 1738, 1741 (1979).
[27] *See Felton v. Labor Relations Commission*, 33 Mass. App. Ct. 926, 927-928 (1992); *see also Commonwealth of Massachusetts*, 29 MLC 43 (2002).
[28] See e.g., *Town of Marlborough*, 19 MLC 1200 (1992).
[29] *Town of Hull*, 29 MLC 113 (2002).
[30] *Id. See also City of Peabody*, 29 MLC 115 (2002).
[31] *City of Boston*, 29 MLC 122 (2003).
[32] *Suffolk County Sheriff's Department*, 29 MLC 21 (2002).
[33] *See, e.g., Town of Stoneham*, 28 MLC 171 (2001); *New Bedford Housing Authority*, 27 MLC 21 (2000); *Town of Dennis*, 26 MLC 203 (2000).
[34] *See, Wakefield School Committee*, 27 MLC 9 (2000).
[35] *Compare, Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001).
[36] *Town of Middleborough*, 18 MLC 1409 (H.O. 1992), *aff'd* 19 MLC 1200 (1992).
[37] 19 MLC at 1201.
[38] *Id.*
[39] *Id.* at 1202.
[40] *Id.*
[41] 18 MLC at 1411.
[42] *Miller v. Labor Relations Commission*, 33 Mass. App. Ct. 404 (1992), *citing Town of Wayland*, 3 MLC 1724, 1728 (H.O. 1977), *aff'd* 5 MLC 1738 (1979).
[43] *Sullivan v. Labor Relations Commission*, 56 Mass. App. Ct. 1112, 779 N.E.2d 166 (2002) unpublished opinion.
[44] 456 CMR 15.03 (1986); *See also Wrong v. Labor Relations Commission,* 51 Mass. App. Ct. 1107, 746 N.E.2d 595 (2001) unpublished opinion; *Miller v. Labor Relations Commission*, 33 Mass. App. Ct. 404, 600 N.E.2d 605 (1992).
[45] *City of Boston*, 8 MLC 1281 (1981); *Lenox School Committee*, 7 MLC 1761 (1980); *Board of Regents*, 13 MLC 1697 (1987); *Metropolitan District Commission*, 14 MLC 1001 (1987); *Board of Regents*, 14 MLC 1397 (1987).
[46] *Town of Framingham*, 20 MLC 1563 (1994).
[47] *City of Waltham*, 25 MLC 59 (1998).
[48] *Town of Athol,* 25 MLC 208, 212 (1999), *citing Groton-Dunstable Regional School Committee,* 15 MLC 1551, 1555 (1989); City *of Boston,* 8 MLC 1281, 1284 (1981)); *Quincy School Committee*, 27 MLC 83 (2000); *Quincy School Committee*, 27 MLC 83, 91 (2000).
[49] *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000); *Commonwealth of Massachusetts*, 26 MLC 218, 219 (2000).

[50] *City of Boston*, 26 MLC 80, 83 (2000); *City of Boston,* 26 MLC 80, 83 (2000).
[51] *City of Peabody,* 25 MLC 191, 193 (1999).
[52] *Athol-Royalston Regional School District,* 26 MLC 55, 56 (1999); *City of Peabody,* 25 MLC at 193.
[53] *City of Boston,* 8 MLC 1281, 1284 (1981).
[54] *Town of Chelmsford*, 8 MLC 1913 (1982), *aff'd sub nom. Town of Chelmsford v. Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983); *Commonwealth of Massachusetts,* 28 MLC 250 (2002), *citing Quincy School Committee*, 27 MLC 83, 91 (2000).
[55] *See Groton-Dunstable Regional School Committee*, 19 MLC 1194, 1197 (1992), *citing Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1557 (1989).
[56] *See Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989).
[57] *See Town of Tewksbury*, 19 MLC 1808 (1993).
[58] *See Town of Winchester,* 19 MLC 1591, 1596 (1992).
[59] *City of Fitchburg*, 22 MLC 1286 (1995)
[60] *Id.* at 1290, n.5.
[61] *Id.* at 1293.
[62] *City of Lowell*, 29 MLC 30 (2002).
[63] *See Groton-Dunstable*, 15 MLC at 1555.
[64] *Town of Plainville,* 20 MLC at 1225.
[65] *See Town of Winchester*, 19 MLC 1591, 1597 (1992).
[66] *Id.* at 1557-8.
[67] *City of Somerville,* 23 MLC 11,14 (1996); *Massasoit Greyhound Association,* 23 MLC 142, 146 (1996); *Town of Clinton,* 12 MLC 1361 (1985); *Boston* City *Hospital, 11* MLC 1065 (1984); *Town of Halifax, 1* MLC 1486 (1975).
[68] *Town of Wareham,* 3 MLC 1334, 1336 (1976).
[69] *Massachusetts Community College Council v. Labor Relations Commission*, 62 Mass.App.Ct.1102, 815 N.E.2d 654 (Table), 2004 WL 2151059 (Mass.App.Ct.) Unpublished Disposition.
[70] *Boston School Committee*, 22 MLC 1365, 1375 (1998); *South Shore Regional School District Committee*, 22 MLC 1414, 1425 (1995); *City of Quincy*, 17 MLC 1603, 1608 (1991); *Board of Higher Education*, 28 MLC 235 (2002).
[71] *Id.*
[72] *Boston Water and Sewer Commission*, 15 MLC 1319 (1989).
[73] *Town of Belchertown*, 27 MLC 23 (2000).
[74] *City of Lawrence*, 23 MLC 213, 215 (1997).
[75] *City of Holyoke*, 28 MLC 393 (2002).
[76] *Board of Regents*, 14 MLC 1397 (1987).
[77] *Bristol County House of Correction and Jail*, 6 MLC 1582 (1979).

[78] *City of Lawrence*, 15 MLC 1162 (1988); see also, *Town of Winchester*, 19 MLC 1597 (1992).
[79] *Plymouth County House of Correction*, 4 MLC 1555 (1977).
[80] *City of Worcester*, 5 MLC 1397 (1978).
[81] *Town of Chelmsford*, 8 MLC 1913 (1982).
[82] *Sheriff of Suffolk County*, 26 MLC 5 (1999).
[83] *Quincy School Committee*, 27 MLC 83 (2000).
[84] *Town of* Athol, 25 MCR 208, 212 (1999)(citing *Groton-Dunstable Regional School Committee,* 15 MLC 1551, 1555 (1989); *City of Boston,* 8 MLC 1281, 1284 (1981).
[85] *Id.* (*citing Town of Chelmsford,* 8 MLC 1913, 1916 (1982)).
[86] *City of Peabody,* 25 MLC 191, 193 (1999).
[87] *City of Peabody,* 25 MLC at 193.
[88] *Board of Regents*, 13 MLC 1697 (1987).
[89] *Town of Tewksbury*, 19 MLC 1808 (1983).
[90] *Board of Regents*, 13 MLC 1697 (1987).
[91] *Board of Regents*, 11 MLC 1532 (1985).
[92] *Whittier Regional School Committee*, 13 MLC 1325 (1987).
[93] See *Town of North Attleboro*, 26 MLC 84 (2000), *citing City of Boston*, 14 MLC 1606 (1988); *see also*, *Blue Hills Regional Technical School District*, 9 MLC 1271 (1982); *Springfield School Committee*, 27 MLC 15 (2000).
[94] *Blue Hills Regional Technical School District*, 9 MLC 1271 (1982).
[95] *Town of Chelmsford,* 8 MLC 1913, 1917 (1982); Aff'd Sub. Nom. *Town of Chelmsford v. Labor Relations Commission,* 15 Mass. App. Ct. 1107 (1983).
[96] *Commonwealth of Massachusetts*, 7 MLC 1228, 1235 (1980); *Town of Wakefield*, 10 MLC 1016, 1018 (1983).
[97] *Id.*
[98] *Commonwealth of Massachusetts*, 7 MLC at 1236-1237.
[99] *Id.* at 1237
[100] *Commonwealth of Massachusetts (Unit 1*), 7 MLC 1228 (1980)
[101] *Athol-Royalston Regional School District*, 25 MLC 28 (1998).
[102] *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (1989).
[103] *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982); *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981); *Town of Clinton*, 12 MLC 1361 (1985); *Boston City Hospital*, 11 MLC 1065 (1984); *Higher Education Coordinating Council*, 23 MLC 101 (1996); *Town of Belmont*, 25 MLC 95 (1998).
[104] *Town of Brookfield v. Labor Relations Com'n.* 821 N.E.2d 51, 443 Mass. 315.
[105] *School Comm. of Boston v. Labor Relations Commission,* 40 Mass. App. Ct. 327, 328-329 (1996).

[106] *Richard Fowler v. Labor Relations Commission et al.,* 56 Mass. App. Ct. 96, 100-103 (2002); *Bristol County*, 26 MLC 105, 109 (2000), *citing William S. Carroll, Inc.*, 5 MLC 1562, 1569 (1978).
[107] 26 MLC 61, 63-65 (1991).
[108] *Richard Fowler v. Labor Relations Commission, et al.*, 56 Mass. App. Ct. at 100-103; *citing Regional Home Care, Inc.,* 329 NLRB 85, 85-85 (1999).

[109] *See Richard Fowler v. Labor Relations Commission,* 56 Mass. App. Ct. at 102-103, *citing, National Labor Relations Board v. Joseph Antell, Inc.,* 358 F2d. 880, 883 (1966) (Commission entitled to consider whether the reasons advanced by the Boston Water & Sewer Commission for demoting and terminating Fowler were a pretext and if so, to take that into account as an additional factor in deciding whether to infer employer knowledge).
[110] *Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655, 667 (2000). *See Town of Dennis*, 29 MLC 79,83 (2002); *Town of Brookfield*, 28 MLC 320,328 (2002).
[111] *Wynn & Wynn* at 667, *citing Johansen v. NCR Comten, Inc.,* 30 Mass. App. Ct. 294, 300 (1991).
[112] *See* 26 MLC at 63-65.
[113] *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981).
[114] 384 Mass. at 565-566.
[115] *Town of Brookfield* at 328.
[116] *Quincy School Committee*, 27 MLC 83, 92 (2000), *citing Bristol County*, 26 MLC 105, 110 (2000); *Town of Dracut*, 25 MLC 131, 133-134 (1999), citing *Commonwealth of Massachusetts*, 14 MLC 1743, 1749 (1988); *Commonwealth of Massachusetts*, 14 MLC at 1747; *Boston City Hospital*, 11 MLC 1065, 1072-1073 (1984).
[117] *Southern Worcester Reg. Voc. School District v. Labor Relations Commission*, 386 Mass. 414 (1982); *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996).
[118] *Town of Clinton*, 12 MLC 1361, 1365 (1985); *Boston City Hospital*, 11 MLC 1361, 1365 (1985); *Town of Athol*, 25 MLC 208, 211 (1999) and cases cited therein.
[119] *Town of Dennis*, 29 MLC 79 (2002).
[120] *Id.*
[121] *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000).
[122] *Id.* at 669-670, *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-245 (1989).
[123] *Id.* at 669.
[124] *See Quincy School Committee*, 27 MLC 83, 92 (2000); *Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001).
[125] *Id.* at 505, n.18.

[126] *Wynn & Wynn v. Massachusetts Commission Against Discrimination*, 431 Mass. at 667.
[127] *Id., citing Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991).
[128] *Id., citing Price Waterhouse v. Hopkins*, 490 U.s. at 277.
[129] *Id.* at 666, *citing Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. at 301.
[130] *Id.*
[131] *Suffolk County Sheriff's Department*, 27 MLC at 159; *Bristol County*, 26 MLC at 109-110.
[132] *Quincy School Committee*, 27 MLC at 92; *Suffolk County Sheriff's Department*, 27 MLC at 160.
[133] *See Quincy School Committee*, 27 MLC at 92; *Suffolk County Sheriff's Department*, 27 MLC at 160.
[134] *Bristol County,* 26 MLC at 109.
[135] *South Middlesex Regional Vocational Technical School District*, 26 MLC 51, 53 (1999), citations omitted; *Town of Wareham, 3 MLC 1334, 1336 (1976).*
[136] *Town of Dracut*, 25 MLC 131, 133 (1999) and cases cited.
[137] *Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001) and cases cited.
[138] *City of Peabody*, 28 MLC 281 (2002).
[139] *Id.*
[140] *Quincy School Committee,* 27 MLC 83,92 (2000).
[141] *Town of Athol,* 25 MLC at 211; Town *of Belmont,* 25 MLC at 97; *Commonwealth of Massachusetts,* 24 MLC at 118.
[142] Id.
[143] *Higher Education Coordinating Council*, 24 MLC 97 (1998).
[144] *Board of Regents of Higher Education*, 12 MLC 1315 (1985).
[145] *Sheriff of Essex County*, 27 MLC 97 (2001).
[146] *Town of Southborough*, 21 MLC 1242 (1994); *see, Myers Industries*, 268 NLRB 493, 115 LRRM 1025 (1984).
[147] *Lexington Taxi Corp.*, 4 MLC 1677 (1978).
[148] *Plymouth County House of Correction and Jail*, 4 MLC 1555 (1977).
[149] *Blue Hills Regional School District*, 9 MLC 1271 (1982).
[150] *Fowler v. Labor Relations Commission*, 56 Mass. App. Ct. 96, 775 N.E.2d 739 (2002).
[151] *Town of Holbrook*, 15 MLC 1221 (1988); *Athol-Royalston Regional School District* Committee, 12 MLC 1399 (1985); Town *of Weymouth*, 19 MLC 1126 (1992).
[152] *Suffolk County Sheriff's Department*, 27 MLC 155 (2001).
[153] *Town of Dracut*, 25 MLC 131 (1999).
[154] *Boston Housing Authority*, 15 MLC 101 (1999).

[155] *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414, 436 N.E. 2d 380 (1982); *Town of Northborough*, 22 MLC 1527 (1996).
[156] *Essex County Sheriff's Department*, 24 MLC 47 (1997).
[157] *Athol-Royalston Regional School District*, 25 MLC 28 (1998).
[158] *Id.*
[159] *Town of Wareham*, 3 MLC 1334 (1976).
[160] *Town of Natick*, 7 MLC 1048 (1980); *aff'd sub nom Board of Selectmen of Natick v. Labor Relations Commission*, 16 Mass. App. Ct. 972 (1983).
[161] *Boston City Hospital*, 11 MLC 1065 (1984).
[162] *Mt. Wachusett Community College*, 1 MLC 1496 (1975), *aff'd sub nom Massachusetts Board of Regional Community Colleges v. Labor Relations Commission*, 377 Mass. 847, 388 N.E. 2d 1185 (1979).
[163] *Town of Andover*, 17 MLC 1475 (1991).
[164] *Town of Hopkinton*, 4 MLC 1731 (1978).
[165] *Commonwealth of Massachusetts/Commissioner of Administration and Finance, Department of Social Services*, 25 MLC 44 (1998).
[166] *Town of Halifax*, 1 MLC 1486 (1975).
[167] *Town of West Springfield*, 8 MLC 1041 (1981).
[168] *Labor Relations Commission v. Blue Hills Spring Water*, 11 Mass. App. Ct. 50 (1980).
[169] *Commonwealth of Massachusetts*, 24 MLC 106 (1998).
[170] *Massachusetts Correction Officers Federation Union v. Dennehy*, 63 Mass.App.Div. 1119, 829 N.E.2d 264 (Table) (2005).
[171] *City of Boston*, 4 MLC 1033 (1977).
[172] *Michael J. Curly*, 4 MLC 1124 (1977).
[173] *Town of Wareham*, 3 MLC 1334 (1976).
[174] *Id.*
[175] *Metropolitan District Commission*, 14 MLC 1001 (1987).
[176] *Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315, 821 N.E.2d 51 (2005).
[177] *Quincy Street Employees Union, H.L.P.E.*, 15 MLC 1340 (1989), *aff'd sub nom Nina Patterson v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991).
[178] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[179] *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).
[180] *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994); *City of Boston*, 20 MLC 1603, 1607 (1994).
[181] *City of Melrose*, 28 MLC 24 (2001); *City of Melrose,* 28 MLC 53 (2001).
[182] *Town of Wellesley*, 23 MLC 86, 90 (1996).
[183] *See, e.g., Town of Ipswich*, 11 MLC at 1410.

[184] *City of Holyoke*, 28 MLC 393 (2002).
[185] *City of Lawrence*, 23 MLC 213 (1997).
[186] *See Higher Education Coordinating Council*, 25 MLC 37 (1998).
[187] *See Town of Falmouth*, 20 MLC 1555 (1994) *aff'd sub nom. Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. (1997).
[188] *See, e.g., Boston Water and Sewer Commission*, 15 MLC 1319, 1322-3 (1989); *Commonwealth of Massachusetts*, 26 MLC 212 (2000).
[189] *Boston School Committee*, 22 MLC 1365 (1996); *City of Quincy*, 17 MLC 1603 (1991); *City of Boston* (*Public Library*), 26 MLC 215 (2000); *Commonwealth of Massachusetts*, 26 MLC 87 (2000).
[190] *Commonwealth of Massachusetts*, 26 MLC 165, 168 (2000), *citing, City of Quincy*, 17 MLC 1603 (1991); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196 (1983).
[191] *Id., citing, Town of Falmouth*, 20 MLC 1555 (1984), *aff'd sub nom. Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997).
[192] *See Town of Ipswich*, 11 MLC 1403, 1410 (1985) *aff'd sub nom. Town of Ipswich v. Labor Relations Commission,* 21 Mass. App. Ct. 1113 (1986).
[193] *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1991).
[194] *Id., citing Commonwealth of Massachusetts*, 16 MLC 1143, 1159 (1989).
[195] *Commonwealth of Massachusetts*, 28 MLC 8, 11 (2001), *citing, Town of Belchertown*, 27 MLC 73 (2000).
[196] *City of Fall River Police Association*, 20 MLC 1359 (1994); *Ayer School Committee*, 4 MLC 1478 (1977).
[197] *City of Quincy*, 17 MLC 1603 (1991).
[198] *Essex County*, 22 MLC 1556, 1565 (1996); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196, 1205 (1985).
[199] *Town of Hudson*, 23 MLC 143, 147 (1999), *citing Commonwealth of Mass.* (Unit 6), 8 MLC 1499 (1981).
[200] *Springfield School Committee*, 24 MLC 7 (1997).
[201] Id.; *Town of Holliston*, 27 MLC 24 (2001).
[202] *Board of Higher Education*, 28 MLC 315 (2002).
[203] *City of Boston*, 16 MLC 1653 (1990), *aff'd* 17 MLC 1711 (1991) *City of Boston*, 2 MLC 1331 (1976).
[204] *City of Everett*, 26 MLC 25 (1999); *City of Boston (Public Library)*, 26 MLC 215 (2000).
[205] *Commonwealth of Massachusetts*, 26 MLC 212 (2000); *City of Everett*, 26 MLC 25 (1999).
[206] *Town of Middleton ,* 30 MLC 22 (2003).
[207] *Commonwealth of Massachusetts*, 26 MLC 165, 168 (2000) (citing, *City of Quincy*, 17 MLC 1603 (1991); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196 (1983).

[208] *Essex County*, 22 MLC 1556, 1565 (1996); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196, 1205 (1985).
[209] *Town of Falmouth*, 20 MLC 1555 (1984); *affi'd sub. nom., Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997).
[210] *See Town of Ipswich*, 11 MLC 1403, 1410 (1985); *aff'd sub. nom., Town of Ipswich v. Labor Relations Commission*, 21 Mass. App. Ct. 1113 (1986).
[211] *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1986).
[212] *Id; Commonwealth of Massachusetts,* 16 MLC 1143, 1159 (1989).
[213] *Commonwealth of Massachusetts*, 28 MLC 8, 11 (2001) *citing, Town of Belchertown*, 27 MLC 73 (2000).
[214] *City of Melrose*, 28 MLC 53 (2001).
[215] *City of Lynn*, 9 MLC 1049, 1051 (1982), *citing Ayer School Committee*, 4 MLC 1483 (1977).
[216] *Id., citing Everett Housing Authority*, 8 MLC 1818 (1982).
[217] See *City of Lynn*, 9 MLC at 1051, *citing Everett Housing Authority*, 8 MLC at 1822.
[218] *Compare, Upper Cape Cod Regional Vocational Technical School Committee*, 8 MLC 1366 (1981) (school committee unlawfully prevented union representative from presenting a grievance); *Commonwealth of Massachusetts*, 8 MLC 2080 (1982)(employer unlawfully refused to arbitrate grievance).
[219] *Compare Everett Housing Authority*, 8 MLC at 1818(employer unreasonably delayed grievance process for several months by refusing to agree to an arbitrator).
[220] *Boston School Committee,* 23 MLC 111 (1996), *citing* City of *Chelsea,* 3 MLC 1169 (H.O. 1976), affd. 3 MLC 1384 (1977).
[221] *See Everett School Committee,* 9 MLC 1308 (1984).
[222] *Essex* County, 22 MLC 1556, 1565 (1996), *citing* City *of Quincy,* 17 MLC 1603 (1991) and *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196 (1983); *City of Lawrence*, 26 MLC 29 (1999).
[223] *Commonwealth of Massachusetts*, 30 MLC 43 (2003).
[224] *Town of Falmouth*, 20 MLC 1555 (1994), *aff'd,* 42 Mass. App. Ct. 1113 (1997); *City of Everett*, 26 MLC 25 (1999); *Lowell School Committee*, 28 MLC 29 (2001); *City of Holyoke*, 28 MLC 217 (2002).
[225] *Trustees of the University of Massachusetts Medical Center*, 26 MLC 149, 160 (2000); *Millis School Committee*, 23 MLC 99, 100 (1996) citing *Blue Hills Regional School Committee*, 3 MLC 1613 (1977).
[226] *Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission*, 431 Mass. 710, 715 (2000).
[227] *Id.*

CHAPTER 13 - UNION RIGHTS AND RESPONSIBILITIES

Once a union acquires the right to act for and negotiate agreements on behalf of employees in a bargaining unit, the Law imposes on that union an obligation to represent all bargaining unit members without discrimination and without regard to employee organization membership.[1] A union breaches its statutory responsibility to bargaining unit members if its actions toward an employee, during the performance of its duties as the exclusive collective bargaining representative, are unlawfully motivated, arbitrary, perfunctory or reflective of inexcusable neglect.[2] If the facts support a finding that the union has breached its duty of fair representation, the Commission concludes that the union has violated Section 10(b)(1) of the Law.

Unions are permitted a wide range of reasonableness in fulfilling their statutory obligations, subject to good faith and honesty in the exercise of their discretion.[3] "Consequently, an aggrieved employee, notwithstanding the possible merits of his claim is subject to a union's discretionary power to pursue, settle, or abandon a grievance, so long as its [the union's] conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." [4]

If a union ignores a grievance, inexplicably fails to take some required step, or gives the grievance merely cursory attention, it has breached its duty of fair representation by its perfunctory handling of an employee's grievance.[5] Similarly, if a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it has breached its duty of fair representation by its gross or inexcusable negligence.[6] A finding of honest mistake or ordinary or simple negligence, standing alone, does not constitute a breach of the duty of fair representation.[7] However, the absence of a rational basis for a union's decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may amount to a denial of fair representation.[8] The Commission reviews the circumstances of each case to determine whether a union's investigation or inquiry was sufficient for it to make a reasoned judgment in deciding whether to pursue or abandon a grievance.[9]

The Commission assesses a union's conduct in handling a grievance in light of the facts known to it at the time it decides not to continue processing a grievance.[10] A good faith error in judgment does not constitute arbitrary conduct.[11] Further, although a union's contractual analysis may be inartful, unskilled, or mistaken, the Commission will not infer arbitrariness or bad faith in the union's decision-making process,

nor will the Commission substitute its judgment for that of the union.[12] In *Goncalves v. Labor Relations Commission,* the court ruled that a union's failure to follow its own policies governing its processing of grievances, coupled with its failure to inform a grievant of the status of their grievance especially in light of the time-sensitive nature of the grievance procedure, and its failure to respond to requests for information from a grievant's attorney, constituted grossly inattentive or grossly negligent conduct, mandating a finding that the union breached its duty of fair representation.[13] A union's failure to provide a grievant with information about their pending grievance does not, standing alone, constitute a breach of the union's statutory duty.[14]

Unions have a duty to process the grievances of bargaining unit members in a manner that is not arbitrary, perfunctory, improperly motivated or demonstrative of inexcusable neglect.[15] A union breaches its duty of fair representation in violation of Section 10(b)(1) of the Law when it ignores a grievance, inexplicably fails to take some required step, or treats a grievance in a cursory fashion.[16] If a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it breaches its duty of fair representation.[17] However, a union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration procedure.[18]

Generally a chief will not be concerned about whether a union is fulfilling its obligations to bargaining unit members. However, as discussed below, occasionally the union's failure may impact on disciplinary or other actions a chief may take. Therefore, it is important that chiefs gain at least some awareness of areas in which union lapses may result in some disruption of the way a chief manages or imposes discipline.

In some cases, damage awards may issue against the union and the employer jointly.

A second important area involves union conduct during negotiations. While it is less frequent, management is able to file a charge at the LRC against the union for bad faith bargaining.

Employees must bring a charge at the Labor Relations Commission alleging a breach of the duty of fair representation. It is the LRC that should resolve disputed facts before a case is filed in court.[19] The failure to exhaust administrative remedy of seeking a review before the Labor Relations Commission was fatal to an employee's claims in the Superior Court that the union failed in its duty of fair representation.[20]

§ 1 DUTY OF FAIR REPRESENTATION

A union has an obligation to represent its bargaining unit members in a manner that is not arbitrary, perfunctory, unlawfully motivated, or demonstrative of inexcusable neglect.[21] A union violates its duty of fair representation when it ignores a grievance, inexplicably fails to take some required step, treats a grievance in a cursory fashion[22], or fails either to investigate, evaluate, or pursue an arguably meritorious grievance without explanation.[23] Similarly, if a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it has breached is duty of fair representation.[24] However, a union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration breach procedure.[25]

Where a police officer waited beyond the contractual time deadline for filing a grievance before notifying the union of his claim for injured on duty leave, the union did not breach its duty of fair representation.[26] However, as the Commission ruled in the 2005 case of *United Steelworkers of America*, the union has a duty to properly notify bargaining unit members of the procedural interplay between the Civil Service law and the choice of remedy provisions of a collective bargaining agreement. The remedy in that case is typical of what parties can expect in such cases.[27] It included:

a) The United Steelworkers of America (Union) shall request in writing that the City of Springfield (City) offer Mark A. Muniak (Muniak) reinstatement to his former position, or, if that position no longer exists, to a substantively equivalent position, and make him whole for the loss of compensation that he suffered as direct result of his termination effective on March 20, 2000.

b) If the City declines to offer Muniak reinstatement with full back pay, the Union shall request in writing that the City waive any time limits that may bar further processing and arbitration of Muniak's termination grievance; and the Union shall offer to pay the cost of arbitration. If the City agrees to waive any applicable time limits and to arbitrate the merits of Muniak's grievance, the Union shall process the grievance to conclusion in good faith and with all due diligence and shall pay the cost of arbitration if the City accepts its offer to do so.

c) If the City does not agree to arbitrate or otherwise fully resolve Muniak's termination grievance, the Union shall make Muniak whole for the loss of compensation he suffered as a direct result of his termination from the City effective on March 20, 2000. The Union's liability to make Muniak whole for his loss of compensation

will cease upon the earlier of the following: (a) the date when he is offered reinstatement by the City to his former or a substantially equivalent job; or (b) the date when Muniak obtained, or obtains, other substantially equivalent employment. The Union's obligation to make Muniak whole includes the obligation to pay Muniak interest on all money due at the rate specified in M.G.L. c. 231, Section 6B.

d) Immediately post in conspicuous places where notices to bargaining unit employees are customarily posted, including all places at the City, copies of the attached Notice to Employees. The Notice to Employees shall be signed by a responsible elected Union officer and shall be maintained for at least thirty consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that the Notices are not altered, defaced, or covered by any other material. If the Union is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted at the City, the Union shall immediately notify the Executive Secretary of the Commission in writing, so that the Commission can request the City to permit the posting.

e) Notify the Commission in writing within thirty days from the date of this Order of the steps taken by the Union to comply with the Order.

In investigating a potential grievance, a union is required to gather sufficient information concerning the merits of a grievant's claim and to make a reasoned judgment in deciding whether to pursue or abandon a particular grievance.[28] The investigation must be sufficient to permit the union to make a reasoned judgment about the merits of the grievance rather than an arbitrary choice; however, the exact nature of the required investigation will vary according to the circumstances of each case.[29] A union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration procedure.[30] A union should not stop processing a grievance – without a waiver signed by the employee – simply because an employee retains a private lawyer.[31]

A union has a duty to represent fairly all of the employees who are in its bargaining unit, not just those who are union members.[32] It must do so without hostility or discrimination toward any, and must exercise its discretion in complete good faith and honesty.[33] The goal of this duty is to protect an individual's rights in a bargaining unit without undermining the collective interests.[34] As to what constitutes "fair representation", the most common area of disputes arise in the context of an employee who believes his union has breached its duty of fair representation when it failed to process his grievance and/or failed to arbitrate his grievance.[35]

A. BREACH OF DUTY

A union has a duty to represent its members fairly in connection with issues that arise under a collective bargaining agreement.[36] The duty of fair representation requires unions to represent employers and process their grievances in a manner which is not arbitrary, perfunctory, unlawfully motivated or the result of inexcusable negligence.[37] A union's action is arbitrary if it is without a rational basis, unfair and unrelated to legitimate union interests.[38] It is perfunctory if it is done without interest or zeal, as a matter of routine.[39]

Courts have recognized that conflict between employees represented by the same union is a recurring fact[40], and that the complete satisfaction of all who are represented is not to be expected.[41] The Commission has recognized that a bargaining unit includes different voices with varying needs, and that a union must, at times, choose from among those voices and act in a way that it believes is best for the union as a whole.[42] Therefore, unions are allowed a wide range of reasonableness in serving the units they represent, subject always to complete good faith and honesty of purpose in the exercise of their discretion.[43]

When the LRC reviews the actions and decisions of a union, it does not determine whether the action was sound or substitute its judgment for that union.[44] Rather, its role is to inquire into the union's motives and to review its decision-making procedures to ensure that it acted within the scope of its duty of fair representation.[45]

Unions must gather sufficient information concerning the merits of a grievant's claim care in order to make a reasoned judgment on a course of action.[46] The Commission has held that the nature of the required investigation will vary according to the issues involved in each case.[47]

Both the Commission and the National Labor Relations (NLRB) have held that a union is not necessarily required to interview affected employees when investigating a grievance.[48]

A union is not obligated to offer assistance to an aggrieved employee absent a request for assistance.[49]

In a 2002 decision involving the Leominster Police Department, an officer argued that the union violated its duty to represent him fairly because its investigation into his request for a vote on a contractual amendment to restore his departmental seniority was perfunctory and inadequate and because it acted in a manner that was arbitrary, invidious and inexcusably neglectful.[50] The union disputed this contention and maintained that it fulfilled its duty to him because its action was rational and fair under the circumstances. The Commission's review of the record evidence persuaded it that the union did not fail to represent the employee fairly.

In discharging the union's duty, there is room for discretion and consideration of the interests of the over-all union membership in relation to that of the individual aggrieved member.[51] In the *Leominster* case, the union officers discussed the member's request and considered his rights as well as the rights of bargaining unit members whose seniority would be adversely affected by the proposed amendment. They discussed various options and decided to allow the membership to vote on the request. They decided to require a unanimous vote to ensure that all officers who would be negatively affected by restoring the officer's seniority assented to the action. These facts demonstrated to the LRC that the Union properly balanced the officer's interests with the rights of members whose seniority might be adversely affected by his proposed contractual amendment and made a decision that was rationally related to the interests of the membership. It therefore dismissed the union member's complaint.

A union is said to have breached its duty to its bargaining unit members whenever its actions toward an employee, while in the performance of its duties as exclusive bargaining agent, are unlawfully motivated, arbitrary, perfunctory or reflective of inexcusable neglect. [52] Where a union breaches its duty of fair representation, it has committed an actionable prohibited unfair labor practice under M.G.L. c. 150 E.[53]

The Law requires a union to represent its bargaining unit members in a manner that is not arbitrary, perfunctory, unlawfully motivated, or demonstrative of inexcusable neglect.[54] If a union ignores a grievance, inexplicably fails to take some required step, or gives the grievance merely cursory attention, it has breached it duty of fair representation by its perfunctory handling of en employee's grievance.[55] Similarly, if a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it has breached its duty of fair representation by its gross or inexcusable negligence.[56]

A union's obligation to investigate an employee's claim to determine whether to pursue a grievance is incorporated in the duty of fair representation.[57] Unions are permitted a wide range of reasonableness when processing grievances,[58] and have considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration procedure.[59]

A union is required to gather sufficient information concerning the merits of a grievant's claim and to make a reasoned judgment in deciding whether to pursue or to abandon a particular grievance.[60] Although the exact nature of a union's required investigation will vary according to the facts of each case, [61] the union's investigation must be sufficient to permit the union to make a reasoned judgment about the merits of the grievance, rather than an arbitrary choice.[62]

While a union does have a duty to investigate, process and arbitrate grievances, that duty is not absolute.[63] In fact, a union has wide latitude in deciding whether to file a grievance and whether to pursue it through all levels of the contractual grievance - arbitration process.[64] Because the employee organization's obligations require that they represent conflicting interests, unions are allowed a wide range of reasonableness in processing grievances. They are "vested considerable discretion not to pursue a grievance as long as their actions are not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect."[65] The union's decisions must be made in good faith and not based on improper motives.[66] A good faith decision necessitates that the union gather sufficient information and analyze the facts of the proposed grievance before it formally decides whether to pursue, settle or abandon the particular dispute.[67] A union is required to investigate most grievances before deciding how to proceed.[68] The investigation must be sufficient to permit the union to make a reasoned judgment about the merits of the grievance.[69] Thereafter, a union will only be found to have breached its duty of fair representation if the aggrieved employee can show that the union's decision not to proceed was arbitrary, discriminatory or otherwise made in bad faith.[70] The Labor Relations Commission will examine the facts of each case to decide whether the union made a sufficient investigation in order to decide whether and how to proceed with a given grievance.[71] The failure to investigate certain grievances which an employee filed, and which would have prevented his/her layoff if they were successful, was a breach of the union's duty of fair representation.[72]

In the 2005 case of *Michael Silvia and Taunton Police Supervisory Personnel Association*, the Commission ruled that the Union was not guilty of failing to properly investigate or evaluate the officer's grievance.[73] He failed to keep appointments with the union attorneys.

Unless an employee's grievance is *arguably meritorious*, the union has no duty to process it.[74]

Unions have a duty to process the grievances of bargaining unit members in a manner that is not arbitrary, perfunctory, improperly motivated or demonstrative of inexcusable neglect.[75] This standard requires that a union must investigate a grievance before deciding not to proceed.[76] The investigation must be sufficient to permit the union to make a reasoned judgment about the merits of the grievance rather than an arbitrary choice; however, the exact nature of the required investigation will vary according to the circumstances of each case.[77] Courts, including the U.S. Supreme Court, have recognized that unions need broad latitude and discretion in acting in what they perceive to be their members' best interests.[78] Consequently, unions have a wide range of reasonableness in fulfilling their duties.[79]

The Commission and the courts have held consistently that a union that exercises poor judgment in handling a grievance does not violate the duty of fair representation, provided that there is a reasonable basis for the union's decision.[80] "Nor is it enough for an employee to complain that he disagrees with the union's assessment of his grievance or even that the union made a mistake in judgment which adversely affected his interests."[81] The courts need not decide whether the union's determination was sound. Absent evidence to establish that a union was unlawfully motivated, acting in bad faith or inexcusably negligent, a court will not substitute their judgment for that of a union when dealing with its members."[82]

In *Gable v. Labor Relations Commission,* the Union gave a member an opportunity to present his case to the grievance committee before deciding to forgo arbitration. The union complied with the collective bargaining agreement and its own procedures relating to the arbitration grievances, and it fully and accurately informed the plaintiff of the union's decision-making process.[83] "[N]otwithstanding the possible merits" of the plaintiff's claim, the evidence showed that the union's decision was reasonable and the result of "good faith and honesty".[84] Accordingly, the union's failure to take the plaintiff's case to arbitration did not breach its duty of fair representation under G.L. c. 150E, § 10(b)(1), and the Commission did not err in dismissing the plaintiff's charge.[85]

In a 2002 unpublished Appeals Court decision involving a claim by a laid-off Woburn teacher, the court dismissed the appeal since the employee failed to show that the Woburn Teachers' Association's representative's actions during the processing of his grievance were arbitrary, perfunctory, or demonstrative of excusable neglect.[86] A similar conclusion was reached in a 2001 unpublished Appeals Court case involving a state tax auditor.[87]

In its 1988 decision in *Baker v. AFSCME*, the Massachusetts Appeals Court stated that:

> Because the bargaining agents' obligations often require that they represent conflicting interests, the National Labor Relations Board and the courts allow them a wide range of reasonableness in fulfilling their statutory duties, subject to good faith and honesty in the exercise of their discretion. Consequently, an aggrieved employee, notwithstanding the possible merits of his/her claim, is subject to a union's discretionary power to pursue, settle or abandon a grievance, so long as its conduct is not improperly motivated.[88]

Using this standard, it is not enough for the employee to show that his grievance may have had merit, or that the union made a judgment error, or even that a union used reasoning which caused it arguably to interpret the collective bargaining agreement incorrectly. Instead, the aggrieved employee must show that the union's conduct was not based on an honest mistake, but rather a deliberate, severely hostile or irrational basis.[89] Such might be the case where the union simply ignores a grievance, consciously fails to take the necessary next step in the process for no apparent reason, or merely gives the grievance an exceedingly cursory investigation.[90] Where an employee believes that such a breach has occurred, he/she may bring a prohibited practice charge against the union at the Massachusetts Labor Relations Commission, or in some instances the trial court.[91] This must be done within six (6) months of the time that the alleged breach occurred, unless there is good cause shown.[92] A one hour grievance committee meeting was adequate, where all documents supplied by the employee were reviewed.[93]

A union is not required to provide notice to all employees who might be affected by the outcome of a contract interpretation grievance, where their individual qualifications were not involved.[94]

B. PRIMARY JURISDICTION

Assuming the aggrieved bargaining unit member believes that the union's decision not to pursue (or continue to pursue) his/her grievance was made in bad faith, he/she may bring a charge before the Labor Relations Commission. The Labor Relations Commission is said to have primary jurisdiction over labor disputes on the theory that a court will not hear a case when the issue in litigation is within the special competence of an agency.[95] By allowing the Commission to apply its expertise to the statutory scheme it is charged to enforce, courts preserve the integrity of the administrative law process while sparing the courts the burden of reviewing administrative proceedings in a piecemeal fashion.[96]

In a 2002 Superior Court case involving an Acushnet DPW worker's claim that the union breached its duty of fair representation, the union was entitled to win by summary judgment since the employee failed first to file a charge of prohibited practice before the Labor Relations Commission.[97]

PRACTICE POINTERS

An aggrieved employee should almost always bring a charge for breach of the duty of fair representation by the union to the Commission as a violation of G.L. c. 150E§ 10(b)(1). Where an employee chooses to bypass the Commission and file the complaint in court, the judge has the ability to dismiss the charges for failure to bring the action in the right forum.[98]

Such a dismissal could have a dire result where the six month statute of limitations for bringing unfair labor practice charges may have already lapsed at the time the case is dismissed by the court, thereby effectively precluding recovery by the employee.

Interestingly, the court may nonetheless choose to hear a case even though no action has been previously filed at the LRC. However, it will only do so when the dispute in question does not require agency expertise to resolve and there are very few facts in dispute.[99] *For example, in the 1987 Appeals Court case of* Leahy v. Local 1526, AFSCME,[100] *the court agreed to hear the dispute as a matter of first instance because the union conceded that it improperly failed to file for grievance arbitration in a seniority case where it had represented the employee at prior stages of the grievance procedure.*

Whereas the *Leahy* decision -- which held that the Labor Relations Commission has primary jurisdiction over public sector labor disputes -- was not decided until 1987, cases filed before that case were decided along with cases where there were few facts in dispute, were brought to the court rather than the Labor Relations Commission. Likewise, whenever the losing party chooses to appeal the decision, they may file their appeal with the Massachusetts Appeals Court for judicial review.[101]

C. ARBITRARY, DISCRIMINATORY, BAD FAITH

In the 1988 case of *Baker v. AFSCME*, an employee who was denied a promotion to the position of highway department foreman brought an action against his union when it refused to arbitrate his grievance.[102] The employee believed that he was unfairly passed over because he was more qualified than the individual who received the promotion. The employer conceded that the employee who received the promotion was less-qualified. Nonetheless, it justified its decision on the fact that the selected employee had twenty-four years of seniority while the aggrieved employee only had eight years of seniority.

In the collective bargaining agreement there was a specific clause which indicated that promotions were to be made first based largely on seniority with the department, and second based upon merit. The union, realizing the high unlikelihood of succeeding at arbitration, chose not to file for arbitration. Finding for the union, the court said a union only breaches its duty of fair representation when its decision not to pursue grievance arbitration is arbitrary, discriminatory, or done in bad faith. Here, there was no such misconduct by the union, since it was clear that seniority was to be the primary basis for making promotions, and the chosen employee had sixteen more years of experience than did the aggrieved employee.

While good faith decisions not to process grievances and honest mistakes do not constitute a breach of the duty of fair representation, outright refusals to process grievances as well as gross negligence have been found to constitute an actionable violation of the union's duties. In fact, the outright refusal to process a grievance constitutes improper "perfunctory" handling of a grievance.[103]

In *Lynn Branch of the Mass. Police Assn.*, a union employee filed a grievance because his union -- which was in charge of assigning overtime to its members -- was not assigning him any overtime even though he was on the overtime list and remained eligible to work overtime.[104] The union told the employee that it refused to process his grievance because, even though it was meritorious, the grievance could prompt the chief to stop all overtime if it was processed. Nonetheless, the officer insisted that the grievance be processed, yet the union did nothing. Finding for the officer, the Labor Relations Commission held that the union breached its duty of fair representation when it intentionally refused to process a meritorious grievance.

Similarly, a union breaches its duty of fair representation when it inexplicably neglects to pursue a grievance and lets the period of time for filing the grievance lapse. In *Local 137, AFSCME,* a mental health worker was terminated after he violated a departmental policy pertaining to the handling of mental health patients while they were away from the hospital on a field trip.[105] While the employee was taking the patients for a foliage trip through West Boylston, one of the patients insisted that the van stop and allow him to buy a hot-dog from a roadside vendor. Realizing that there was a policy prohibiting such stops, the employee nonetheless stopped because he was genuinely afraid of what the patient might do if his request was not met. The patient, who had a history of violent outbursts, had threatened everyone's safety if he did not get his hot dog.

Upon management's learning of the unauthorized food stop, the employee was terminated. Soon thereafter, he filed a grievance which the union did process. After losing the grievance, the employee was told by his employer that he had twenty days in which to file for arbitration. He immediately told his union to file the necessary appeals. Nonetheless, the union never filed the appeal until nineteen days after the twenty day window for filing the appeal had expired. The Commission held for the employee and found that the union's failure to perform the ministerial act of filing for arbitration did constitute a breach of its duty of fair representation.[106] In support of its finding, the court indicated that while the union's failure might have been an excusable good faith mistake in other situations, it was not excusable where the grievance concerned an employee's termination and such failure effectively cut off the employee's last resort.[107]

D. PERSONAL ANIMOSITY

A union will be found to have acted arbitrarily in violation of its duty to fairly represent an employee if the decision to abstain from processing the grievance, etc. is premised upon personal animosity against the employee by one or more of the union decision-makers.[108]

In *AFSCME Council 93* a mental health facility worker sought to have her union grieve a five-day suspension she received based upon unsubstantiated claims made by a disgruntled subordinate.[109] Given her own misgivings about the suspended employee, the union representative neglected to follow-up on a number of leads when investigating the veracity of the subordinate's statements. Then, without further notice, the union decided not to pursue the grievances. The Commission concluded that the union -- while having the right to decide (in good faith) not to process certain grievances -- failed to act in good faith when it based its decisions not to file for arbitration on the statements of a union representative who disliked the aggrieved employee and failed to investigate the veracity of her defense.

E. DISCRIMINATION

Another instance of improper conduct amounting to a breach of a union's duty of fair representation occurs when the union refuses to process a grievance because the bargaining unit member is not current on his/her union dues,[110] or because he/she is not an agency fee-paying union member.[111]

In *Pattison v. Labor Relations Commission*, the Director of Nurses at Quincy City Hospital was terminated for failing to recruit many new volunteers to the hospital and for not organizing a program to orient volunteers to the hospital. [112] She had been verbally warned on a number of instances to improve her performance. Under the disciplinary guidelines contained in the collective bargaining agreement, covered employees were to be disciplined under a system of progressive discipline beginning with a verbal warning, then a written warning, then a suspension, and finally, termination. Ms. Pattison had not received either a formal written warning or suspension before she was terminated.

Nonetheless, when she contacted the union to file a grievance on her behalf, the union said it would not represent her because she was not a formal member of the union and she did not pay dues. In response, the plaintiff pointed out that her predecessor was a union member and that she had never been contacted to pay any union dues. The Commission held for the employee, finding that the union violated its duty of fair representation, because it is discriminatory and illegal for a union to fail to

give equal representation in grievances and other matters to all members of the bargaining unit regardless of their union status.[113]

F. BURDENS OF PROOF

Once an aggrieved bargaining unit employee establishes that the union breached its duty of fair representation, they must then also show that their grievance was not clearly frivolous before they may recover. Not only must the union have breached its duty, but the employee also must have had some legitimate basis for filing the underlying grievance.[114] The employee is not required to show that his/her claim had merit or that he/she would have likely succeeded at arbitration, only that the claim was not frivolous and baseless.[115]

Assuming the aggrieved employee is able to show that the claim was not frivolous, they will recover damages unless the union is able to meet its burden of proof. To preclude recovery for its violation of its duty of fair representation, the union has the burden of showing that the grievance was clearly without merit and the employee could not have succeeded had the grievance proceeded through to arbitration.

G. DAMAGES

If the employee is able to show that the union did breach its duty of fair representation, the Commission or court will then order the union to make the employee whole. This usually means picking up where it improperly failed to act and to process the grievances up to and including arbitration, where appropriate. Assuming that the employee wins at arbitration, the issue then becomes who owes the plaintiff's damages, the union for its breach of duty of fair representation, or the employer for its breach of the contract. After all, it was the employer's conduct which prompted the grievance in the first place. Similarly, in the instance where the employee loses at the subsequently held arbitration, what, if any, financial obligations does the public employer owe to the aggrieved employee?

In response to these questions, the Massachusetts Appeals Court has held that in cases involving the breach of a union's duty of fair representation, damages determined in a subsequent arbitrator's award as being due from a public employer for its breach of the contract may be apportioned between the employer and the union according to the extent of the injuries to the employee caused by the union's failure to act.[116] Thus, damages attributable solely to the employer's breach of contract should not be borne by the union. Likewise, however, all increases in those damages, if any, which are caused by the union's refusal to bring the grievance will not be attributed to the employer.[117]

The apportionment of damages is an important concept for employers to understand. Were there not such a rule, an employer who arguably committed a breach of the contract, would then be eager to see the resulting grievance to go through the entire grievance procedure, including arbitration, just to ensure that it would not later be found liable after the union is found to have breached its duty of fair representation. Where an employer acts in good faith, it should not be financially responsible for any damages which are exacerbated or created by the union's misconduct.[118] Addressing the fairness of this rule, the U.S. Supreme Court said:

> There is no unfairness to the union in this approach. When the union waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee possessed the right to act on his/her own behalf and had done so. If the employer could not rely on the union's decision, the grievance procedure would not provide the uniform and exclusive method for the orderly settlement of union grievances essential to the national labor policy. This principle. . . reflects the allocation of responsibilities in the grievance procedure-a procedure that contemplates that both employer and union will perform their respective obligations. In the absence of damages apportionment where the fault of both parties contributes to the injuries, incentives to comply with the grievance procedure will be diminished. Indeed, imposing total liability solely on the employer could well affect the willingness of employers to agree to arbitration clauses as they are customarily written.[119]

In a 2002 case, the LRC concluded that the union violated Section 10(b)(1) of the Law by arbitrarily refusing to take an employee's grievance to arbitration.[120] In fashioning a remedy, the decision noted that the Commission traditionally orders unions that breach the duty of fair representation to take any and all steps necessary to have the grievance resolved or to make the charging party whole for the damage sustained as a result of the union's unlawful conduct.[121] Here, the union caused harm to the employee by arbitrarily refusing to pursue his grievance to arbitration. Therefore, the LRC first directed the Union to attempt to remedy the harm to the employee by taking all steps necessary to resolve the employee's termination grievance. These steps include, at a

minimum, the union submitting a written request to the School Committee either to arbitrate the employee's grievance, including an *offer* by the union to pay the full costs of the arbitration, or to provide the employee the grievance remedy that would have been sought from an arbitrator (i.e., reinstatement to his former, or substantially equivalent, position with full back pay).

In this case the LRC noted that if the employee's grievance is arbitrated, it is unrealistic to expect the union to represent him because the union vehemently opposed arbitrating the grievance. The Commission stated that this opposition is best demonstrated by the union's override of Local R1-162A's decision to process the grievance to arbitration. Thus, the LRC ruled that the union will be liable for the full reasonable and necessary costs incurred by the employees to secure independent legal representation in connection with arbitrating the termination grievance.[122] If the School Committee does not agree to arbitrate or otherwise fully resolve the employee's grievance, the Commission ruled that the union shall be liable for the wages and contractual benefits the employee lost because the union failed to pursue his grievance to arbitration, plus interest, from the date of his termination until he is reinstated by the School Committee or obtains substantially equivalent employment.

There is an exception to this rule, however. According to the procedure described in *Quincy City Employees Union, H.L.P.E.,* however, the Union here explicitly elected at the hearing on the prohibited practice complaint to postpone introducing evidence designed to rebut the employee's case concerning the merits of the termination grievance.[123] Therefore, if the union is unable to resolve the grievance with the School Committee, the union may return to the Commission for a compliance hearing to limit its liability by proving that the employee's termination grievance would have been lost for reasons not attributable to the union's misconduct.

PRACTICE POINTERS

An employer who is not a party to an employee's charge against the union for failure to process a grievance to arbitration cannot be ordered by the Commission to proceed to arbitration. As a remedy, the union will be ordered to do whatever it can to ask the employer to waive the time limits of the grievance and arbitration procedure. However, management is free to decline to do so. If the union is unsuccessful in getting the employer to process the grievance to arbitration, the union is liable for all the employee's damages flowing from the union's failure to process the grievance.

H. AMOUNT APPORTIONED

The above-quoted language from *Bowen v. U.S. Postal Service*,[124] leaves wide latitude to the manner in which an apportionment between an employer and a union is calculated by the trier of fact. Nonetheless, the triers of fact will have considered, among other things, the following in making their apportionment allocations: a) whether the union's original determination not to proceed (or proceed further) with the employee's grievance was at all justified and what were the union's motives, if any, for not doing so;[125] b) the extent to which the long delay between the occurrence of the employer's conduct prompting the grievance and the union's subsequent proceeding much later impaired the employer's ability (e.g. through the loss of witnesses, etc.) to prove that its conduct was not unreasonable or otherwise done in violation of the bargaining agreement;[126] and c) the damages which would have likely been recovered had the grievance been timely processed up to and including arbitration as well as damages which continued thereafter and/or arose thereafter.[127]

I. INTEREST AND ATTORNEYS FEES

As a general rule, a trier of fact will not usually grant pre-judgment interest or counsel fees in addition to his/her or her award.[128] With regard to post-judgment interest on an arbitrator's award, the Massachusetts Supreme Judicial Court (SJC) has held that post-judgment interest on an arbitrator's award should commence on the date that the award becomes final.[129]

§ 2 UNION'S REFUSAL TO BARGAIN IN GOOD FAITH

One of the more complicated legal issues in labor relations law is good faith bargaining and the determination of when a party has refused to bargain in good faith. Under section 6 of Chapter 150E, employer and employee bargaining representatives must bargain in good faith. Good faith bargaining requires that:

> 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 of productivity and performance, and any other terms and conditions of employment, . . . but such obligation shall not compel either party to agree to a proposal or make a concession.[130]

Prohibited practice violations which come within the purview of "bad faith bargaining" or a "refusal to bargain" fall primarily into two categories for remedial purposes: 1) those which pertain to the union's lack of interest to reach an agreement through "surface bargaining"[131]; and 2) those based on overt acts.[132] Where a union is found to have refused to bargain or has bargained in bad faith, its conduct violates M.G.L. c. 150E § 10(b)(2), which provides: "It shall be a prohibited practice for an employee organization or its designated agent to refuse to bargain collectively in good faith with a public employer."

In assessing whether an employer and an employee organization have bargained in good faith, the Commission will look to the totality of the parties' conduct, including acts away from the bargaining table.[133] In one case, where the LRC concluded that a union's conduct during mediation did not evince a lack of good faith, the record revealed that the union attended seven mediation sessions and that the union submitted proposals and counterproposals throughout the mediation process. The Commission has previously found a willingness to listen to the other party's arguments and to at least consider compromise to be an indicia of good faith bargaining.[134] In the above case, the employer acknowledged that the union attended mediation sessions, submitted proposals and rendered counterproposals, but they contended that the union's conduct was only a facade and that the union instead violated Section 10(b)(2), and, derivatively, Section 10(b)(1) of the Law by attempting to foreshorten bargaining and to proceed directly to fact-finding, which included frustrating the scheduling of mediation sessions. However, although the union expressed frustration with the mediation process on at least two occasions, the LRC found that the record did not demonstrate that the union's sentiments affected its conduct during the process. Finally, the employer failed to establish by a preponderance of the evidence that the union engaged in dilatory conduct during the mediation sessions or that the mediation sessions were delayed because of the purported conduct.[135]

It is well established that a party violates its duty to bargain in good faith when it breaches an agreed upon ground rule.[136] Further, the Commission has specifically noted in the past that a party may negotiate a ground rule permitting the parties to communicate their bargaining positions to the media and to the public.[137]

Where the union notified the Sheriff's Department of a picket 48 hours in advance, as required by their negotiations ground rules, statements made to the press during the picket did not violate another ground rule that requested 48 hours notice before making statements to the press.[138]

A union's negotiating team must support the ratification of any tentative agreement reached by the parties.[139]

A city or town is not likely to be successful in bringing a "bad faith" bargaining charge against a union for publicizing its dispute with the municipal employer. The *North Middlesex Regional School District Committee* decision in 2001 found that the public disclosure of a "no confidence" vote was not a violation of Section 10 (b)(2) and (1) of the Law.[140]

In that case, the Committee relied on the Commission's decision in *Falmouth School Committee,* in which the Commission extended to grievance hearings the *per se* rule that an employer violates the Law by insisting upon open collective bargaining sessions.[141] The Committee further relied on the Commission's decision in *Wakefield School Committee,* in which the Commission gave an advisory opinion concerning a party's proposal to disclose the substance of negotiations.[142]

In *Falmouth,* the Commission held that a party violates the law by insisting that grievance sessions be held in public, based on the rationale previously articulated with respect to collective bargaining negotiations:

> Successful negotiations are based on compromise. They require that each side be free to test out a variety of proposals on the other; withdrawing some, giving up others in order to gain a better advantage in a different area. The presence of third parties necessarily inhibits such compromises and reduces the flexibility management and unions have to reach agreement. Positions taken in public tend to harden and battle lines are drawn in spite of the mutual desire of the parties to meet in an acceptable middle ground.[143]

The Commission noted a similar concern in *Wakefield School Committee,* where the disclosure of collective bargaining minutes could be the equivalent of holding sessions in public:

> [D]isclosure of the substance of negotiations, after the parties have agreed not to disclose, could not only violate the duty to bargain in good faith by breaching the ground rule, but also could interfere with the frank and open conduct of negotiations by creating a chilling effect on the negotiators.[144]

Nothing in *Falmouth* or *Wakefield,* however, prohibits the discussion of grievance issues outside the grievance proceedings. In fact, the Commission has specifically noted in the past that, although a party may not insist on holding collective bargaining negotiations in open session, a party may negotiate a ground rule permitting the parties to communicate their bargaining positions to the media and the public.[145] More importantly, the Commission has repeatedly held that activities designed to involve or persuade non-parties for the purpose of favorably resolving a dispute or a grievance are concerted and protected, provided the activities are not unlawful, violent, in breach of contract, disruptive or indefensibly

disloyal to the employer.[146] The Committee in the *North Middlesex* case conceded that the decision to conduct the no-confidence vote and to publicize the details of the vote were protected, concerted activities. It is only the Association's publicizing of the subject matter of pending grievances that the Committee claimed constitutes the violation. However, the LRC noted that the Law is clear that, even if the Association had included information about the substance of the grievances in its statement, that conduct would not come within the narrow prohibition against insisting on open grievance proceedings under Commission case law.

A. TOTALITY OF CIRCUMSTANCES

Whereas most of a union's alleged improper bargaining conduct will likely fall within the surface bargaining category -- where the union is willing to go through the motions of bargaining, but it has no intention of agreeing on a compromise contract -- the Massachusetts Labor Relations Commission (Commission) will have to examine the totality of the union's conduct both at the bargaining table and in other aspects of the labor-management relationship.[147] That said, many bad-faith bargaining cases tend to hinge on circumstantial evidence. Although the Law does not require that the parties reach a settlement, they are required to maintain an open mind and a desire to reach an agreement.[148] Interpreting the private sector's analogous National Labor Relations Act (NLRA), the U.S. Supreme Court said:

> The object of this Act [the NLRA] was to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, hopefully, to mutual agreement.[149]

In determining whether the union's actions at the bargaining table are constructive and open usually hinges on examining the total conduct of the parties, rather than merely focusing on specific incidents that may be misinterpreted when examined in isolation.[150]

B. SURFACE BARGAINING

Surface bargaining occurs when a party to a negotiation goes through the motions of negotiating without really making a sincere effort to negotiate a settled agreement.[151] When a party engages in surface bargaining, it usually does so for the purpose of maintaining status quo in the contract.[152] For example, where a town has consistently agreed to most of the union's demands during former negotiations, the union may be very adamant when the employer decides to propose a number of new contract provisions to tighten up the contract language. This is especially true when the employer is only able to offer the union a wage increase commensurate with past contracts -- where no significant changes were proposed. Other examples of surface bargaining might include reneging on previously agreed proposals from prior sessions,[153] maintaining an inflexible attitude at the bargaining table,[154] and using filibustering tactics to drag out negotiations and cost the other party additional expenses.[155]

Another way a union may refuse to bargain in good faith occurs when it refuses to meet at a time and place which was mutually-agreeable to both parties.[156] Instead, the union may insist impermissibly on meeting only during regular business day-time hours so that their negotiating team can bargain while on duty.[157] Similarly, it may wrongly only agree to conduct the sessions at the police station or firehouse, and not at the town hall or other location. It is not, however, a refusal to bargain merely because the few dates proposed by the other side were not acceptable.[158]

Where an employer is able to show that the union refused to bargain in good faith by not having an intent to reach an agreement, the Commission will issue an order requiring the union to cease and desist its improper conduct, and will order it to bargain in good faith.[159] However, where the union's improper conduct consisted of circumstantial evidence based on the totality of the union's conduct, enforcing the Commission's compliance order may be difficult to measure and monitor.[160] To the extent that the union's improper conduct was based upon specific actions or inactions, they will likely be ordered specifically discontinued in the Commission's order. It is important to note that while the Commission can order the union to cease and desist, it is without authority to impose an agreement on the parties.[161] As such, if the parties subsequently fail to reach an agreement, that does not, in and of itself, indicate the union has violated the Commission's remedial order.[162]

C. SPECIFIC INFRACTIONS

1) Work Stoppages

Examining the conduct of a union to determine if it has unlawfully refused to bargain in good faith, the Commission will look for evidence to indicate that the union's improper actions were done for the primary purpose of unfairly influencing the bargaining process which rise to the level of an actionable refusal to bargain.[163]

The use of illegal or other inappropriate work delays or stoppages as part of the negotiation process constitutes a refusal to bargain in good faith where it is used as a tactic to obtain concessions at the bargaining table, because it evidences an unwillingness to bargain in good faith and is inconsistent with the Commission's interpretation of M.G.L. c. 150E.[164] Whether a work stoppage or delay is undertaken for the purpose of unlawfully affecting negotiations, the key factors to be considered are: 1) whether negotiations are on-going at the time of the work stoppage,[165] 2) whether the union indicated that its actions were related to the on-going negotiations,[166] and 3) whether there may have been another reason for the union's conduct -- unrelated to the negotiations.[167]

In *Holbrook Education Association*, the issue was whether the Holbrook teacher's union refused to bargain in good faith when its bargaining unit members refused to participate in an in-service program required by the Holbrook School Committee.[168] Attendance at in-service training was required of all teachers within the bargaining unit pursuant to the current bargaining agreement. When asked where the absent teachers were, the teacher who served as the union negotiator told administrators that the teachers were boycotting the in-service program because of the poor attitude of the school committee during negotiations. At no time did the union members give any other reason for refusing to attend the required in-service training. As such, the Commission held for the school committee by finding that the bargaining unit members refused to bargain in good faith when they brought about the work stoppage in an effort to diminish the school committee's bargaining position.

However, no refusal to bargain will be found where the union can show that the work stoppage or other alleged misconduct was not intended to in any way affect the negotiations.[169] In *AFSCME, Council 93*, one hundred of the one hundred and nineteen Boston police officers boycotted role call at the beginning of their shift on one particular day -- in direct violation of the bargaining

agreement.[170] This role-call boycott was held on the same day that those officers' bargaining unit was to begin negotiating a successor agreement. Although the union may have condoned the unanticipated role-call boycott, the only evidence that the Commission heard with regard to why the boycott occurred were the comments made by the union-local president who commented to the *Boston Globe* that the boycott was intended to send a message of discontent to the Police Commissioner over the recent firings of a number of officers and his extreme disciplinary practices. The Commission found that there was insufficient evidence to indicate that the withholding of services was intended to impact or influence negotiations. Therefore, the complaint was dismissed.

Similarly, where the Boston Teacher's Union was preparing for a strike, and notifying its membership of a strike vote, but not *inducing, encouraging* or *condoning* a work stoppage, there was no violation of Section 9A(a) of the Law.[171]

D. INFLEXIBILITY

A second area where union refusal to bargain cases arise occurs where the union has a highly inflexible attitude toward the employer's proposals.[172] While the union is not obligated to accept each of the employer's proposals, it must nonetheless participate in the negotiations with an open and fair mind, with a sincere purpose to reach an agreement and with a willingness to make reasonable efforts to compromise differences.[173] Briefly discussing the proposals in broad, general terms for short periods of time, without explaining one's position and without indicating a willingness to consider compromise, amounts to a refusal to bargain.[174]

Moreover, the Commission has found that the failure to make counter proposals may be indicative of bad faith.[175] The failure to advance counterproposals, however, is not a *per sé* refusal to bargain.[176] Neither party is required to make a concession during bargaining or to compromise a strongly-felt position.[177] Nevertheless, even in those areas where a party may have established a set position, it must still approach the subject with an open mind by allowing the other side to enumerate its reasons for its demands and explaining the particular reasons for its rejections.[178]

In *Town of Braintree*, the Town and the utility workers union met several times over a several month period to negotiate a successor bargaining agreement.[179] After receiving the Town's proposals at the third bargaining session, the union's chief negotiator said that he would review the Town's proposals and any which the union considered to be "take aways" would be rejected. Thereafter, at each of subsequent negotiation sessions, the

union indicated that it believed all of the Town's proposals to be "take aways" and it refused to discuss them further or to give any further thought to counter-proposals. The union then indicated that there would be no further movement by the union until all of the take-aways were withdrawn. When the Town indicated that it would not withdraw its proposals, the union representative declared that negotiations were at an impasse and that he had "mediation papers" in his pocket.

The Commission held that the union's insistence of conditioning further negotiations on the Town's withdrawal of proposals that were never fully discussed along with its unwillingness to compromise constituted a bad faith refusal to bargain.[180] However, if each of the subjects that the union had refused to talk about had been permissive (rather than mandatory), their refusal to negotiate over these subjects would not have constituted a prohibited practice.[181] Both the union and the employer are only required to bargain in good faith over mandatory subjects of bargaining.[182]

E. AGENCY

In cases where the union's refusal to bargain is based upon events which occurred outside negotiations, such as work stoppages and other similar occurrences, the union might argue that it did not refuse to bargain since it had no prior knowledge of the work stoppage, nor did it condone or encourage the actions of its members. Nonetheless, the Commission has held that a union is generally responsible for the actions of its officers and members according to ordinary doctrines of agency.[183]

To determine whether an employee's or several employee's actions are to be imputed to the union, the Commission will consider the number of persons who participated in the illegal action[184] what percentage of the total bargaining unit participated in the misconduct,[185] and whether any of the participants were involved in the management of the union.[186] In *Holbrook Education Assn.*,[187] it was the union's bargaining team spokesman who told administrators that a number of teachers were refusing to attend a teachers' workshop. At no time did he indicate that he had tried to stop it. Moreover, there was no evidence that the Association had suggested to the school committee that its negotiating team spokesman had only limited authority to act on its behalf. Finally, the Commission found that the Association took no steps publicly to disclaim the acts of the spokesman or of the teachers who participated in the work stoppage in the days and weeks thereafter. As such, the union was found to have refused to bargain in good faith by engaging in an illegal withholding of services with the intent of obtaining concessions at the bargaining table.

F. MOOTNESS

Prohibited practice charges that are filed are often not heard and decided by the Commission for many months after the charges are brought. Therefore, where the parties have negotiated a contract in the interim (while a prohibited practice charge is still pending at the Commission), the union may argue that the charge is moot.[188] Pursuant to its interpretation of M.G.L. c. 150E § 11, the Commission has consistently held that it is required to adjudicate unfair labor practices even where the offending party's actions have ceased.[189]

The only time when the Commission is likely to find that a case is moot occurs where the moving party can show that there is no reasonable expectation that the wrong will be repeated.[190] Since it is always possible that the illegal union conduct could recur in mid-term or future contract bargaining sessions, the Commission rarely finds that a refusal to bargain is moot.[191]

§ 3 ORGANIZING EFFORTS

Section 2 of the Law protects employee rights to organize and to join or assist any employee organization for collective bargaining purposes, free from interference, restraint or coercion. A public employer violates Section 10(a)(1) of the Law if it engages in conduct that may reasonably be said tends to interfere with employees in the free exercise of their rights under Section 2 of the Law.[192] An employers' rule that conflicts with employees' Section 2 rights must be supported by a legitimate and substantial business justification. Any diminution of employee rights occasioned by application of the employer's rule must be balanced against the employee's interest.[193]

It is well established that under Section 2 of the Law, employees have the right to distribute union literature and the right to observe and read that material.[194] The LRC has consistently held an employer's discriminatory restriction on the use of its facilities to be unlawful.[195] Thus, although an employer may promulgate rules regulating the distribution of union literature, the employer's rules must be neutral and non-discriminatory so that employee access to union information is not unduly restricted.[196] A rule that is enforced only against union literature or access demonstrates the lack of any legitimate purpose for the rule.[197] Moreover an employer's enforcement of a rule or policy that prevents or discourages employees from discussing statutorily protected subjects during their nonworking time violates Section 10(a)(1) of the Law.[198]

In a case involving the Worcester County Jail and House of Corrections, the LRC ruled that the Sheriff's refusal to allow an off-duty correctional

officer to distribute union campaign literature in the facility's parking lot was discriminatory and in violation of Section 10(a)(1) of the Law.[199]

§ 4 COMPETING UNIONS

Should a rival union file a representation petition at the Labor Relations Commission, and the Commission, after an investigation which includes a determination of whether the petition is supported by the requisite showing of interest (30%), and issues a Notice of Hearing, the employer must remain strictly neutral.[200] An employer that refuses to bargain with an incumbent union after learning that a decertification petition has been filed with the LRC, but before the Commission issues a Notice of Hearing, violates Section 10(a)(1) and (2).

[1] G.L. c. 150E, s. 5.
[2] *Quincy City Employees Union, H.L.P.E.,* 15 MLC 1340, 1355 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission,* 30 Mass. App. Ct. 9 (1991), *further rev. den 'd,* 409 Mass. 1104 (1991); *Boston Teachers Union,* 12 MLC 1577, 1584 (1986); *Robert W. Kreps and AFSCME,* 7 MLC 2145, 2147-2148 (1981).
[3] *Trinique v. Mount Wachusett Community College Faculty Association,* 14 Mass. App. Ct. 191, 199 (1982), *quoting, Ford Motor Co. v. Huffman,* 345 Mass. 330, 338 (1953); *Local 285, SEIU,* 9 MLC 1760, 1764 (1983).

[4] *Baker v. Local 2977, State Council 93, Am. Fedn. Of State, County & Municipal Employees*, 25 Mass. App. Ct. 439, 441 (1988) quoting, Local 285, SEIU at 1764. *See also, National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995) (a union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration procedure).
[5] *Independent Public Employees Association, Local 195,*12 MLC 1558, 1565 (1986), *quoting Harris v. Schwerman Trucking Co.,* 668 F.2d 1204 (11th Cir. 1982), 109 LRRM 3135, 3137, 3137 n.3.
[6] *NAGE,* 20 MLC 1105, 1113 (1993), *aff'd, National Association of Government Employees v. Labor Relations Commission,* 38 Mass. App. Ct. 611 (1995).
[7] *Pattison v. Labor Relations Commission,* 30 Mass. App. Ct. 9, 16 (1991), (citations omitted); *Teamsters Local 692 (Great Western),* 209 NLRB 446, 448, 85 LRRM 1385, 1387 (1974).
[8] *Graham v. Quincy Food Serv. Employees Assn. & Hosp., Library & Pub. Employees Union*, 407 Mass. 601, 606, (1990), quoting, *Trinique v. Mount Wachusett Community College Faculty Association,* 14 Mass. App. Ct. at 199*; Goncalves v. Labor Relations Commission*, 43 Mass. App. Ct. 289,294 (1997).
[9] *Local 285, SEIU*, 9 MLC at 1765, *citing, Local 509, SEIU*, 8 MLC 1173 (1981).
[10] *Goncalves v. Labor Relations Commission*, 43 Mass. App. Ct. at 295; *Quincy City Employees Union, H.L.P.E.,* 15 MLC at 1363.
[11] *Somerville Fire Fighters Association*, 27 MLC 45, 47 (2000).
[12] *Teamsters, Local 437,* 10 MLC 1467, 1477 (1984); *International Brotherhood of Police Officers, Local 338*, 28 MLC 285, 288 (2002), citing, *NA GE*, 26 MLC 57, 58 (1999).
[13] Goncalves *v. Labor Relations Commission*, 43 Mass. App. Ct. 289 (1997).
[14] *AFSCME, Council 93*, 28 MLC 196,199 (2002), *citing, Robert W. Kreps and AFSCME, Council 93*, 7 MLC 2146, 2148 (1981).

[15] *University of Massachusetts*, 25 MLC 194,199 (1999); *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355 (1989) *affd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991) further rev. den 'd 409 Mass. 1104 (1991).
[16] *Graham v. Quincy Food Service Employees Association & Hospital. Library and Public Employees Union,* 407 Mass. 601, 606 (1990); *Independent Public Employees Association, Local 195,* 12 MLC 1558, 1565 (1986).
[17] *AFSCME*, 23 MLC 279, 281 (1997).
[18] *See National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995); *AFSCME, Council 93*, 28 MLC 196 (2002).
[19] *Brienzo v. Massachusetts Laborers' District Council Public Employees' Local Union*, 60 Mass.App.Ct. 1116, 803 N.E.2d 360 (Table) (2004) unpublished.
[20] *Johnston v. School Comm. of Watertown*, 404 Mass. 23, 26-27 (1989).
[21] *AFSCME, Council* 93, 28 MLC 196 (2002); *Somerville Fire Fighters Association,* 27 MLC 45, 46 (2000); *National Association of Government Employees*, 26 MLC 57, 58 (1999); *University of Massachusetts Faculty Federation*, 25 MLC 194, 1999 (1999); *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355 (1989), *aff'd sub. nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 91991), *further rev. den'd*, 409 Mass. 1104 (1991); *Robert W. Kaeps*, 7 MLC 2145, 2147-2148 (1981).
[22] *Graham v. Quincy Food Serve. Employees Assn. & Hosp. Library & Pub. Employees Union*, 407 Mass. 601, 606 (1990); *Independent Public Employees Association Local 195*, 12 MLC 1558, 1565 (1986).
[23] *AFSCME,* 23 MLC 279, 281 (1997); *NAGE*, 20 MLC 1105, 1113 (1993), *aff'd, National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995), *AFSCME Council 93 and Patrick Palmer*, 29 MLC 127 (2003).
[24] *Id. Citing NAGE and Herbert* Moshkovitz, 20 MLC 1105 (1993), *aff'd NAGE v. Labor Relations Commission*, 38 Mass.App.Ct. 611 (1995). *AFSCME, Council 93,* 23 MLC 279, 281 (1997); *National Association of Government Employees*, 20 MLC 1105, 1113 (1993); *aff'd National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611 (1995).
[25] *See NAGE v. Labor Relations Commission,* 38 Mass. App. Ct. at 613.
[26] *International Brotherhood of Police Officers and Daniel M. Masky*, 29 MLC 220 (2003).
[27] *United Steelworkers of America*, 31 MLC 122 (2005).
[28] *American Federation of State, County, and Municipal Employees*, 27 MLC 113, 115 (2001), *citing Local 509, SEIU*, 8 MLC 1173 (1981); *Local 285, SEIU*, 9 MLC 1760, 1764 (1983); *See NAGE v. Labor Relations Commission,* 38 Mass.App.Ct. at 613.

[29] *American Federation of State, County, and Municipal Employees*, 27 MLC at 115, citing *Teamsters, Local 437*, 10 MLC 1467, 1474 (1984).
[30] *See, National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995).
[31] *Goncalves v. Labor Relations Commission*, 43 Mass.App.Ct. 289 (1997).
[32] M.G.L. c. 150E § 5. It provides that: "The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." *See also, Vaca v. Sipes,* 386 U.S. 171, 875. Ct. 903 (1967); *Amalgamated Assn. of Railway Employees v. Lockridge*, 403 U.S. 274, 91 Sct. 1909 (1971); *Berman v. Drake Motor Lines*, 6 Mass. App. Ct. 438, 376 NE 2d 889 (1978); *Norton v. MBTA*, 369 Mass.1, 336 NE 2d 854 (1975); *Quincy City Employees Union*, 15 MLC 1340 (1991), *aff'd Pattison v. L.R.C.* 30 Mass. App. Ct. 9, 565 NE 2d 801 (1991).
[33] *Massachusetts State College Association*, 24 MLC 1 (1998); *Local 285, SGIU*, 9 MLC 1760, 1764 (1983).
[34] *Id.*; (*Citing Tedford v. Peabody Coal Co.,* 533 F. 2d 952, 92 LRRM 2990, 2994 (5th Cir. 1976).
[35]*See, e.g.*, *NAGE v. LRC*, 38 Mass. App. Ct. 611, 650 NE 2d 101 (1995)
[36] *National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611 (1995).
[37] *Quincy City Employees, H.L.P.E.,* 15 MLC 1340, 1355 (1989); *aff'd sub nom., Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *further rev. den'd* 409 Mass. 1104 (1991).
[38] *Peterson v. Kennedy*, 771 F.2d. 1244, 1254 (1985), *cert. denied*, 475 U.S. 1122 (1986); *Somerville Firefighters Association, Local 1240*, 27 MLC 45, 46 (2000).
[39] *Somerville Firefighters Association*, 27 MLC at 47.
[40] *See Humprey v. Moore*, 375 U.S. 335, 350, 55 LRRM 2031, 2037 (1964).
[41] *See Ford Motor Company v. Huffman*, 345 U.S. 330, 338, 31 LRRM 2548, 2551 (1953).
[42] *Fitchburg School Committee*, 9 MLC 1399, 1414 (1982).
[43] *Baker v. Local 2977 AFSCME*, 25 Mass. App. Ct. 439, 441 (1988).
[44] *NAGE*, 26 MLC 57, 58 (1999).
[45] *Fitchburg School Committee*, 9 MLC at 1415.
[46] *Local 285, SEIU and Vicki Stultz,* 9 MLC 1760, 1764 (1983).
[47] *Teamsters, Local 437,* 10 MLC 1467, 1474 (1984).
[48] *Local 285, SEIU and Vicki Stultz*, 9 MLC at 1764; *Printing and Graphics Commissions, Local 4,* 104 LRRM 1050 (1980).g
[49] *See generally, New England Water Resource Professionals*, 25 MLC 135, 136 (1999).

[50] *IBPO, Local 288*, 28 MLC 285 (2002).
[51] *NAGE,* 38 Mass. App. Ct. 613.
[52]*See Graham v. Quincy Food Service Employees Assn.*, 407 Mass. 601, 555 NE 2d 543 (1990); *Leahy v. Local 1526, AFSCME*, 399 Mass. 341, 504 NE 2d 602 (1987).
[53]*See* M.G.L. c.150E § 10(b)(2) Section 10(b) of c. 150E, provides, in pertinent part: "It shall be a prohibited practice for an employee organization or its designated agent to: (1) interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter. . ."
[54] *Quincy City Employees Union, H.L.P.E.,* 15 MLC 1340, 1355 (1989), *Aff'd sub. nom., Pattison v. Labor Relations Commission*, 30 Mass.App.Ct. 9 (1991), *further rev. den'd.*, 404 Mass. 1104 (1991).
[55] *AFSCME, Council 93 and Patrick Palmer*, 29 MLC 127, 130 (2003) (citations omitted).
[56] *Id., citing, NAGE and Herbert Moshkovitz*, 20 MLC 1105, 1113 (1993), *aff'd National Association of Government Employees (NAGE) v. Labor Relations Commission*, 38 Mass.App.Ct. 611 (1995).
[57] *Local 509, SEIU and Charles deLlano*, 8 MLC 1173, 1176 (1981).
[58] *Graham v. Quincy Food Services Employees Association and Hospital, Library and Public Employees Union*, 407 Mass. 601 (1990).
[59] *See NAGE v. Labor Relations Commission*, 38 Mass.App.Ct. at 613.
[60] *Local 285, SEIU and Vicki Stultz*, 9 MLC 1760, 1764 (1983).
[61] *Id.*
[62] *Teamsters, Local 437 and James L. Serratore*, 10 MLC 1467 (1984).
[63] *See Trinque v. Mount Wachusett Community College Faculty Association,* 14 Mass. App. Ct. 191, 437 NE 2d 564 (1982); *Baker v. AFSCME*, 25 Mass. App. Ct. 439, 579 NE 2d 1352 (1988).
[64] *See NAGE v. LRC*, 38 Mass. App. Ct. 611, 650 NE 2d 101 (1995)
[65] *Graham v. Quincy Food Services Employees Association*, 407 Mass. 601, 555 N.E. 2d 543, (1990).
[66]*See, Ford Motor Co. v. Hoffman*, 345 U.S. 330 (1953).
[67]*Local 285, SEIU*, 9 MLC, 1760 (1983).
[68] *Local 509, SEIU,* 8 MLC 1173 (1981).
[69] *Teamsters, Local 437*, 10 MLC 1467, 1477 (1984).
[70]*Baker v. AFSCME*, 25 Mass. App. Ct 439, 519 NE 2d 1352 (1988).
[71] *Local 509, SEIU*, 8 MLC 1173 (1981); *Local 285, SEIU*, 9 MLC 1760 (1983); *Teamsters, Local 437*, 10 MLC 1467 (1984).
[72] *National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611 (1995).
[73] *Michael Silvia and Taunton Police Supervisory Personnel Association,* 31 MLC 153 (2005).
[74] *AFSCME, Council 93,* 27 MLC 129 (2001).
[75] *NAGS*, 26 MLC 57,58 (1999).

[76] Local 509, SEIU, 8 MLC 1173 (1981).
[77] *Teamsters, Local 437*, 10 MLC 1467, 1475 (1984).
[78] *Gin v. S.B. Thomas, Inc.*, 122 LRRM 2820,2824 (1985); *see generally, National Association of Government Employees v. Labor Relations Commission,* 38 Mass. App. Ct. 611 (1995) (In the discharge of a union's duty there is room for discretion and consideration of the interests of the over-all union membership in relation to that of the individual aggrieved member.).
[79] *Goncalves v. Labor Relations Commission,* 43 Mass. App. Ct. 289 293 (1997); *see also, Massachusetts State College Association*, 24 MLC 1, 4 (1997).
[80] *See Local* 285, *SEIU,* 9 MLC 1760 (1980); *Baker v. Local* 2977, *AFSCME Council* 93, *AFL-CIO,* 25 Mass. App. Ct. 439 (1988)(It is not enough for the employee to show that the union made a judgmental error).
[81] *Gin v. S.B. Thomas, Inc.* 122 LRRM at 2824.
[82] *N.A.G.E.,* 26 MLC at 58.
[83] *Gable v. Labor Relations Commission*, 59 Mass.App.Ct. 1101, 793 N.E.2d 1286 (Table) (2003). Contract *Goncalves v. Labor Relations Commn.,* 43 Mass.App.Ct. 289, 295-298 (1997).
[84] *Baker v. Local 2977, State Council 93, Am. Fedn. Of State, County & Mun. Employees*, 25 Mass.App.Ct. 439, 441 (1988).
[85] See *Gonsalves v. Labor Relations Commn., supra* at 293.
[86] *Wilson v. Labor Relations Commission*, 54 Mass. App. Ct. 1109, 765 N.E.2d 826 (2002); *see also Jordan v. Labor Relations Commission*, 54 Mass. App. Ct. 1104, 763 N.E.2d 1140 (2002) unpublished opinion; *Lyons v. Labor Relations Commission*, 397 Mass. 498, 492 N.E.2d 343, (1986); *Forsyth School for Dental Hygienists v. Board of Registration in Dentistry*, 404 Mass. 211, 534 N.E.2d 773 (1989).
[87] *Branco v. Labor Relations Commission*, 51 Mass. App. Ct. 1113, 748 N.E.2d 1057 (2001).
[88] *Id.*
[89] Id. *See also, Pattison v. LRC,* 30 Mass. App. Ct. 9, *565* NE 2d *801* (1991); *Teamsters, Local 692*, 209 NLRB 446, 85 LRRM 1385 (1974); *Bristol-Plymouth Teachers Assn.*, 13 MLC 1049 (1985) (union did not breach its duty of fair representation simply because it pursued a grievance of one employee to the detriment of another).
[90] *See e.g., Indep. Public Employees Assn., Local 195*, 12 MLC 1558 (1986); *NAGE*, 20 MLC 1105 (1993); *Harris v. Schwerman Trucking Co.*, 668 F. 2d 1204 (11th Cir. 1982)
[91] *East Chop Tennis Club v. MCAD*, 364 Mass. 444, 305 NE 2d 507 (1973); *Leahy v. Local 1526, AFSCME*, 399 Mass. 341, 504 NE 2d 602 (1987).
[92] *Saugus Education Committee*, 26 MLC 39 (1999).
[93] *Mass. State College Association*, 24 MLC 1 (1998).

[94] *Merrimack Valley Employees Association*, 12 MLC 1298 (1985).
[95] *See East Chop Tennis Club v. MCAD*, 364 Mass. 444, 305 NE 2d 507 (1973); *Leahy v. Local 1526, AFSCME*, 399 Mass. 341, 504 NE 2d 602 (1987); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 451 NE 2d 180 (1982).
[96] *See Murphy v. Administrator of the Div. of Personnel Administration*, 377 Mass. 217, 386 NE 2d 211 (1979); *San Diego Bldg. Trades Council v. Garman*, 359 U.S. 236, 795 Ct. 773 (1959) (labor relations in the private sector are to be dealt with by the National Labor Relations Board as a matter of first instance.)
[97] *Brienzo v. Town of Acushnet*, 2002 WL 1972138 (Mass. Super.), citing *Johnston v. School Committee of Watertown*, 404 Mass. 23, 533 N.E.2d 1310 (1989); *Leahy v. Local 1526, American Federation of State, County & Municipal Employees*, 399 Mass. 341, 504 N.E.2d 602 (1987).
[98] *Graham v. Quincy Food Service Employees Association,* 407 Mass. 601, 555 NE 2d 543 (1990).
[99] *Leahy v. Local 1526 , AFSCME*, 399 Mass. 358, 504 NE 2d 602 (1987); *Lyons v. Labor Relations Commission,* 397 Mass. 498, 492 NE 2d 343 (1986). *See also, Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066 (1986); *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967); *International Brotherhood of Teamsters v. Balsavich*, 371 Mass. 283, 356 NE 2d 1217 (1976).
[100] *Leahy v. Local 1526, AFSCME*, 359 Mass. 358, 504 NE 2d 602 (1987).
[101] *Id.*
[102] *Baker v. AFSCME*, 25 Mass. App. Ct. 439, 519 NE 2d 1352 (1988).
[103] *See, Indep. Employees Assn., Local 195*, 12 MLC 1558 (1986).
[104] *Lynn Branch of the Mass. Police Assn.*
[105] *Id.*
[106] *Id. See also, Dutrisac v. Caterpillar Tractor Co.,* 749 F. 2d 1270, 1274 (1983).
[107] *See also,* AFSCME, Local 1526, 399 Mass. 341, 504 NE 2d 602 (1987). *But see, AFSCME, Council 93*, 22 MLC 1097 (1996) (union's mistaken failure to continue to process grievance was excused where it had good faith belief that it was relieved of its representation responsibilities once the employee retained the services of a lawyer).
[108] *AFSCME, Council*, 93, 18 MLC 1125 (1991).
[109] *Id.*
[110] *Merrimack Valley Employees Assn.,* 16 MLC 1343 (1989);*Berkley Employees Assn.*, 19 MLC 1647 (1989).
[111] *Quincy City Employees Union H.L.P.E.,* 15 MLC 1340 (1989), *aff'd Quincy City Employees Union v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *further rev. den'd.,* 409 Mass. 1104 (1981); SEIU Local 254, 17 MLC 1107 (1990); *Bellingham Teachers Association*, 9 MLC 1636 (1982).

[112] *Pattison v. LRC*, 30 Mass. App. Ct. 9, 565 NE 2d 801 (1991).
[113] *See*, M.G.L.C. 150 E § 5, which reads: "The exclusive bargaining representative shall be responsible for representing the interests of all such employees in [the unit] without discrimination and without regard to employee organization membership." *See e.g., Carbone v. Milford School Committee*, 12 Mass. App. Ct. 948, 426 NE 2d 452 (1981).
[114] *Pattison v. LRC*, 30 Mass. App. Ct. 9, 565 NE 2d 801 (1991).
[115] *Graham v. Quincy Food Service Employees,* 407 Mass. 601, 555 NE 2d 543 (1990); *AFSCME*, 22 MLC 1329 (1996).
[116] *Reilly v. Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 495 NE 2d 856 (1986); *Reilly v. MBTA*, 31 Mass. App. Ct. 633, 582 NE 2d 554 (1991); *aff'd* 32 Mass. App. Ct. 410, 590 NE 2d 196 (1992); *Vaca v. Sipes*, 385 U.S. 171, 875 Ct. 903 (1967); *Bowen v. U.S. Postal Service*, 459 U.S. 212, 103 S. Ct. 588 (1983).
[117] *Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct. 770 (1970).
[118] *Reilly v. MBTA*, 32 Mass. App. Ct. 410, 590 NE 2d 196 (1992).
[119] *Bowen v. U.S. Postal Service*, 459 U.S. 212, 103 S. Ct. 588 (1983). *See also, Del Costello v. IBPO*, 462 U.S. 151, 103 S. Ct. 2281 (1983).
[120] *National Association of Government Workers*, 28 MLC 218 (2002).
[121] *See,* NAGS, 20 MLC at 1114-1115.
[122]Id. at 1115.
[123] 15 MLC at 1376 n. 67.
[124]*Id.*
[125] *Reilly v. Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 495 NE 2d 856 (1986).
[126] *Id.*
[127] *Id.*
[128] *Blue Hills Regional School District v. Flight*, 10 Mass. App. Ct. 459, 409 NE 2d 226 (1980). *See also, Griefen v. Treasurer and Receiver General*, 390 Mass. 674, 459 NE 2d 451 (1983).
[129] *Marlborough Fire Fighters Local 1714 v. Marlborough*, 375 Mass. 593, 378 NE 2d 437 (1978); *Watertown Firefighters, Local 1347 v. Watertown*, 376 Mass. 706, 383 NE 2d 494 (1978).
[130] M.G.L. c. 150E, § 6.
[131] *Everett*, 22 MLC 1275 (1995).
[132] *Local 285, SEIU, AFL-CIO*, 17 MLC 1432 (1991).
[133] *Melrose Police Association,* 27 MLC 136, 137 *(2001); Town of Hudson,* 25 MLC 143, 146 (1999); *King Philip Regional School, 2* MLC 1393,1397 (1976). *See Harwich School Committee, 10* MLC 1364, 1367 (1984) (totality of the employer's conduct during negotiations does not support a bad faith bargaining allegation).
[134] *See Town of Braintree,* 8 MLC at 1197 (union engaged in bad faith bargaining when it refused to even listen to or consider certain of the

employer's proposals because those proposals would allegedly curtail certain employee benefits).
[135] *See generally City of Westfield, 25* MLC 163, 165 (1999) (charging party had an obligation to prove by a preponderance of the evidence that a unilateral change had taken place).
[136] *North Middlesex School Committee*, 28 MLC 160, 162 (2001); *Boston School Committee,* 15 MLC 1541,1546-1547 (1989).
[137] *See North Middlesex Regional School District Teachers Association, 28* MLC at 162; *citing, Holbrook School Committee, 5* MLC 1491, 1494 (1978).
[138] *Bristol County Sheriff's Department*, 31 MLC 1 (2004).
[139] *Melrose Police Association*, 27 MLC 136 (2001).
[140] *North Middlesex Regional School District Committee*, 28 MLC 162 (2001).
[141] *Falmouth School Committee,* 12 MLC 1383 (1985).
[142] *Wakefield School Committee,* 18 MLC 1114 (1991).
[143] *Falmouth School Committee, supra* at 1386, *citing Town of Marion,* 2 MLC 1256,1258 n.3 (1975), *aff'd sub nom., Board of Selectmen of Marion v. Labor Relations Commission,* 7 Mass. App. Ct. 360 (1979).
[144] *Wakefield School Committee, supra* at 1115.
[145] *Holbrook School Committee,* 5 MLC 1491, 1494 (1978).
[146] *City of Lawrence,* 15 MLC 1162, 1165 (1988) and cases cited therein.
[147] *Employees of Toll Roads, Bridges & Tunnels,* 15 MLC 1065 (1988); *Woods Hole*, 14 MLC 1501 (1987)
[148] *Utility Workers Union*, 8 MLC 1193 (1983); *NAGE, Unit 6,* 8 MLC 1484 (1983); *Somerville Municipal Employees Association*, 10 MLC 1527 (1985).
[149] *H.K. Porter, Inc. v. NLRB*, 397 U.S. 99, 90 S.Ct. 821 (1970)
[150] *King Phillip Regional Sec. Dist.*, 4 MLC 1958 (1977); *Town of Braintree*, 7 MLC 1813 (1981).
[151] *Town of Braintree*, 7 MLC 1813 (1981).
[152] *Id.*
[153] *Id.*
[154] *NAGE, Unit 6*, 8 MLC 1484 (1982).
[155] *See generally*, *Somerville Municipal Employees Association*, 10 MLC 1527 (1984).
[156] *Somerville Municipal Employees Association*, 10 MLC 1527 (1984).
[157] *Id.*
[158] *Id.*
[159] *City of Newton*, 5 MLC 1939 (1978); *Town of Belmont*, 7 MLC 1614 (1980).
[160] *See generally, Town of Bellingham*, 21 MLC 1441 (1994).
[161] *Id.*
[162] *AFSCME*, 20 MLC 1019 (1993).

[163] *Id. See also*, *Fairhaven*, 20 MLC 1343 (1992) (union cannot refuse to bargain over a town's drug screening proposal by claiming -- incorrectly -- that it is not a mandatory subject of bargaining).
[164] *City of Fitchburg*, 2 MLC 1126 (1975); *Local 285*, *SEIU*, 17 MLC 1610 (1991); *Woods Hole*, 14 MLC 1501 (1987) (union's providing false information concerning the operation of the employee pension plan was a bad faith refusal to bargain).
[165] *Local 285, SEIU*, 17 MLC 1432 (1991); *Holbrook Education Assn.,* 14 MLC 1737 (1988).
[166] *AFSCME, Council 93*, 20 MLC 1019 (1993).
[167] *AFSCME, Council 93*, 20 MLC 1023 (1993).
[168] *Holbrook Education Assn.*, 13 MLC 1388 (1987)
[169] *AFSCME, Council 93*, 20 MLC 1021 (1993)
[170] *Id.*
[171] *Boston School Committee*, 27 MLC 32 (2000).
[172] *Town of Braintree*, 8 MLC 1139 (1981).
[173] *King Phillip Regional School Committee*, 3 MLC 1700 (1977); *City of Chicopee*, 2 MLC 1071 (1975); *Town of Saugus*, 2 MLC 1480 (1976).
[174] *Town of Braintree*, 8 MLC 1197 (1981).
[175] *See City of Chelsea*, 3 MLC 1048 (1977); *Town of Rockland*, 6 MLC 1496 (1979).
[176] *Town of Braintree*, 8 MLC 1197 (1981).
[177] *NLRB v. Arkansas Rice Growers Assn.*, 400 F. 2d 565 (8th Cir: 1968).
[178] *Id.*
[179] *Town of Braintree*, 8 MLC 1197 (1981).
[180] *See, e.g.*, *NAGE*, 8 MLC 1484 (1981) (union's actions constituted a refusal to bargain when it insisted on only bargaining over non-economic issues). *But see, City of Everett*, 22 MLC 1275 (1996) (just because union has a negative view toward making a change in the contract is not tantamount to a refusal to bargain).
[181] *IAFF, Local 1820*, 8 MLC 1398 (1981) (union's refusal to bargain over minimum staffing was not illegal because it involved a permissine, rather than mandatory, subject of bargaining).
[182] *Town of Fairhaven*, 20 MLC 1343 (1992) (union cannot refuse to bargain over town's drug screening proposal by claiming incorrectly that it is a mandatory subject of bargaining).
[183] *Holbrook Education Assn*, 13 MLC 1388 (1987). *See generally, United Mine Workers v. 6. bbs*, 383 U.S. 715 86 S. Ct. 1130 (1966). In determining whether an employee's (or general employees') actions are to be imputed to the union, the Commission will consider the number of people who participated in the illegal action.
[184] *City of Leominster*, 8 MLC 1592 (1981).
[185] *Belmont School Committee*, 4 MLC 1189 (1977), *aff'd* 4 MLC 1707 (1978); *Town of Ipswich*, 9 MLC 1153 (1982).

[186] *Wagner Electrical Corp. v. Local 1104*, 496 F. 2d 954 (8th Cir. 1974); *Vulcan Materials Co. v. United Steelworkers of America*, 430 F. 2d 446 (5th Cir. 1970), *cert. den.* U.S. 963, 91 S. Ct. 974 (1971) (local unions are responsible for the actions of stewards who participated in or actively encouraged members to participate in the work stoppage, etc.).
[187] *Holbrook Education Assn.*, 13 MLC 1388 (1987).
[188] *City of Boston*, 7 MLC 1707 (1980); *Mass. Bd. of Regents*, 10 MLC 1196 (1983).
[189] *Holbrook Education Assn.*, 13 MLC 1388 (1987).
[190] *Town of Andover*, 4 MLC 1086 (1977) (the obligation to bargain in good faith does not cease with the negotiation of an agreement, but continues during the life of the contract).
[191] *Mass. Board of Regents*, 10 MLC 1196 (1983); *Holbrook Education Assn.*, 13 MLC 1388 (1987).
[192] City *of Quinsy/Quinsy Hospital (Quinsy Hospital),* 23 MLC 201, 202 (1997); *Quincy School Committee,* 19 MLC 1476, 1480 (1992); City *of Boston,* 8 MLC 1281, 1284 (1981).
[193] *Quincy School Committee,* 19 MLC at 1480.
[194] *Quincy Hospital,* 23 MLC at 202, citing *Massachusetts Board of Regents of Higher Education,* 13 MLC 1697, 1701 (1987); *Clinton Services Corporation d/b/a Greater Expectations, Inc.,* 9 MLC 1494, 1498 (1982).
[195] *City of Quincy,* 23 MLC 201 (1997) (discriminatory denial of use of table outside cafeteria held unlaw*ful); Quincy School Committee* 19 MLC 1476 (1992) (blanket policy prohibiting union solicitation held unlawful); *Commonwealth of Massachusetts,* 9 MLC 1842 (1983) (employer unlaw*fully* permitted employee use of workplace bulletin board for personal and not union matters).
[196] *Quincy Hospital,* 23 MLC at 203.
[197] *Id.*
[198] *Quincy School Committee,* 19 MLC at 1481. *See also, Republic Aviation Corp v. NLRB,* 324 U.S. 793, 803 n.10 (1945) (upholding NLRB's presumption that a rule prohibiting union solicitation by employees outside working time is unlawful in the absence of evidence that special circumstances make the rule necessary for maintaining production and discipline).
[199] *Worcester County Jail and House of Corrections)*, 28 MLC 76 (2001).
[200] *Commonwealth of Massachusetts*, 7 MLC 1228 (1980).

CHAPTER 14 - DRUG TESTING

Drug testing among governmental workers has increased in recent years. However, in Massachusetts public safety unions have resisted most efforts at testing employees. Although permitted by the U.S. Constitution, the random testing of tenured public safety employees without their consent violates the Massachusetts Constitution. Probable cause testing, on the other hand, may be conducted without a warrant.

Drug testing is a mandatory subject of bargaining.[1] As such, an employer is required to provide the union with notice and opportunity to bargain before implementing a new drug testing policy or changing an existing one.

Pre-employment testing of applicants, as well as random testing of probationary employees and those attending a basic academy, are lawful.

§ 1 CONSTITUTIONAL ISSUES

In the area of drug testing, the most significant federal constitutional issue is the Fourth Amendment's restriction on unreasonable searches and seizures. In the leading cases of *Railway Labor Executives Association v. Skinner*,[2] and *National Treasury Employees Union v. Von Raab*,[3] the United States Supreme Court has clarified many of the constitutional issues relative to drug testing. However, the Massachusetts Supreme Judicial Court has ruled that Article 14 of this State's Declaration of Rights precludes drug testing unless based on probable cause.[4]

A. U.S. CONSTITUTION

In *Skinner*, the union representing railroad employees sued numerous railroads and the Department of Transportation relative to Federal Railroad Administration Regulations which required railroads to test employees for drugs for reasonable cause, after certain accidents, and in cases of certain rule violations. The union argued that these regulations violated the employees' Fourth Amendment rights to be free from unreasonable searches and seizures.

The United States Supreme Court held that the taking of urine and blood samples for drug testing is a "search and seizure" under the federal constitution. However, the Court held that in order for a governmental agency to administer such a test, "individualized suspicion" is not

required. Rather, the Court held that the government's interest in the public policy at stake must be balanced against individual privacy interests and expectations. In *Skinner*, the Supreme Court found that the employees' privacy expectations were diminished. The Court noted that the testing was conducted, per the regulations, in a clinical setting, by someone other than the employer. Further, in the case of urine sampling (which for some creates a concern for privacy), the employees were permitted to provide a sample in a closed compartment, even though direct observation would certainly have been more effective in protecting against adulteration or substitution of samples. Lastly, the Court ruled that employees who work in a highly regulated industry have a diminished expectation of privacy.

The Court found the drug testing regulations were necessary to serve the compelling interest of preventing deaths, injuries, and damage caused by employees while operating or controlling trains while under the influence of alcohol and/or drugs. Consequently, the Court upheld the regulations, concluding that the employees' diminished privacy rights were outweighed by the government's compelling interest in railway safety and the regulations were necessary to serve these compelling interests.

In *Von Raab*, decided on the same day as *Skinner*, the Supreme Court reviewed the drug testing regulations implemented by the Customs Service, a division of the U.S. Treasury Department. These regulations provided that any customer who is employed with a job that required direct involvement with drug interdiction or required the carrying of a firearm, or involved the handling of classified materials of use to drug smugglers, would be required to submit to drug testing. The union representing Custom Service employees sued, claiming these regulations violated the employees' Fourth Amendment Rights. In a five to four decision, the Court upheld these regulations, applying the principles that it had just announced in *Skinner*. The Court found, as it had in *Skinner*, that the employees had a diminished expectation of privacy. The Court noted that Customs Employees and law enforcement officers are subject to numerous "intrusive" policies and requirements.

The Court concluded that the regulations were necessary to serve a compelling interest in preserving the integrity of the Service's drug interdiction program. Further, the Court found the government has a compelling interest in ensuring that customs agents directly involved in fighting drug trade do not have their integrity or judgment clouded by drug use. Lastly, the Court noted that the regulations couldn't be used for criminal prosecution purposes. Consequently, the Court upheld these regulations, concluding the balance tipped in favor of the government's compelling interest in requiring drug testing of employees directly involved in drug investigations or interdictions or who are required to carry firearms. The Court was uncertain as to what evidence, if any, justified

testing employees with access to classified materials and remanded that issue to the lower courts for further hearing.

Since the *Von Raab* and *Skinner* decisions, Courts have upheld random drug testing for employees in job classifications where impairment poses a threat of physical harm to others, such as those who carry weapons, but have been less willing to allow such tests relative to office workers based upon their access to sensitive information.[5] The Boston Police Department's regulation authorizing random drug testing without suspecting any particular individual of drug use does not violate the Fourth Amendment, at least insofar as it applies only to police officers carrying firearms or participating in drug interdiction.

B. MASSACHUSETTS CONSTITUTION

The Massachusetts Constitution imposes even more stringent regulations in the area of drug testing. For example, in *Horseman's Benevolent and Protective Assn. v. State Racing Commission*, the Supreme Judicial Court ruled that the Massachusetts Declaration of Rights, Article 14, protects employees against unreasonable searches and seizures and precludes employers from testing employees for drugs on a random basis, or on a "reasonable suspicion" basis unless the standard for reasonable suspicion is clearly defined and would satisfy a probable cause standard. [6]

In *Horsemans*, the State Racing Commission issued a regulation authorizing random drug testing or testing on the basis of reasonable suspicion of licensees, including owners, trainers, veterinarians, blacksmiths, stable employees, jockeys, jockeys apprentices or agents for the express purpose of promoting safety of racing participants and to protect the integrity of the industry. The Court noted that these regulations did not fall within the administrative search exception to the warrant requirement of the Massachusetts Constitution. The Court expressly rejected *Shoemaker v. Handel*, in which the U.S. Court of Appeals held that an administrative search exception to the warrant requirement, as applied to random drug testing of jockeys, exists.[7] The Court ruled that these regulations were unconstitutional pursuant to Article 14 of the Massachusetts Declaration of Rights. The Supreme Judicial Court stated, "Article 14, in some circumstances, affords more substantive protection to individuals than prevails under the Fourth Amendment."[8]

It is important to note, however, that the *Horsemans* decision did not apply to police officers, where public safety considerations are involved.[9]

The Massachusetts Supreme Judicial Court (SJC) ruled in *Guiney v. Roach* that Rule 111 of the Boston Police Department concerning drug testing, at least as far as it called for random urinalysis without the

consent of the police officer involved, was an unreasonable search and seizure which violates Article 14 of the Massachusetts Declaration of Rights. [10]

The SJC recognized that the Federal Court determined that random testing of those police officers who carry firearms or participate in drug interdiction does not prescribe any search or seizure in violation of a police officer's Fourth Amendment (U.S. Constitution) rights.[11] However, the SJC concluded that Article 14 requires that in order to justify a random drug testing program, the police administration would have to "show at least a concrete, substantial governmental interest that will be well served by imposing random urinalysis on unconsenting citizens." In short, the SJC concluded that the Boston Police Commissioner did not present any evidence to justify imposing the random drug testing rule. The Court stated, "the justification for body searches, if there ever can be one, cannot rest on some generalized sense that there is a drug problem in this country, in Boston, or in the Boston Police Department and that random urinalysis of police officers will solve, or at least help to solve, the problem or its consequences. We reject the view of the majority of the Justices of the Supreme Court that such proof is not required because "it is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context."

PRACTICE POINTERS

The earlier SJC decision concerning Rule 111 involved drug testing of police cadets (recruits) who had consented to the search as a condition of appointment and admission to the police academy. The Court in the Guiney *case used that consent to show that such cadets had "little or no reasonable expectation of privacy." While the dissenting opinions of both Justices Lynch and O'Connor indicated that the present case effectively overturns the earlier cadet/recruit decision, this does not appear to be the view of the majority. Therefore, so long as written consent is obtained from applicants, the use of random drug testing during probation or attendance at an academy is probably not in violation of Article 14 of the Massachusetts Declaration of Rights. The Appendix (Form 8) has a form which departments could review and modify for use as appropriate.*

The drug testing contemplated by Rule 111 was via urinalysis. Earlier challenges to the invasion of privacy aspects of such testing were not involved in the Guiney *case since the Boston rule eliminated the requirement of having an observer present during the actual submission of the sample. Despite this, the court still referred to urinalysis as "an intrusive testing process." It is difficult to predict whether hair testing would be greeted more favorably by the court.*

Departments should explore the advantages of utilizing hair analysis for certain types of drug testing. While neither urinalysis, hair testing or blood testing will be determinative of "present impairment", each form is helpful in documenting drug use in both the near and not-so-near past. In general, urinalysis and blood testing will detect only very recent drug use. Hair analysis, on the other hand, reveals drug usage over an extended period of time, depending upon the length of hair samples submitted. Since hair grows at approximately 1/2" per month, testing can reveal drug use over several months from a typical 3"- 4" sample taken from any part of the body.

It is possible that a state statute requiring random, nonconsensual drug testing of police officers might not be ruled unconstitutional. However, in order to meet a constitutional challenge, such a statute would have to be based upon a factual showing which was absent in the Boston case. If the SJC were presented with concrete evidence (via "legislative findings") of the existence of a public safety personnel drug problem which documented a substantial governmental interest that would be well served by imposing drug testing, perhaps it might approve a drug testing statute.

A statute (as well as a departmental rule) mandating preeployment testing, probationary testing or as a condition to academy participation, especially where individuals were aware of (and consented to) such testing, would presumably be constitutional.

§ 2 DRUG TESTING AND STATE LAWS

Even assuming that drug testing under certain circumstances is permissible under the Massachusetts Constitution, an employer must still consider the possibility that drug testing may lead to a violation of the Massachusetts Privacy Act (G.L. c. 214, s. 1B (1986 ed.)) or the Massachusetts Civil Rights Act (G.L. c. 12, s. 11 (1986 ed.)). In a nonemployment case, the Supreme Judicial Court ruled that drug testing, absent an unauthorized disclosure of results, does not violate the Massachusetts Privacy Act.[12] In *Bally*, a student athlete challenged Northeastern University's compliance with an N.C.A.A. rule which required drug testing of athletes in certain sports. The Supreme Judicial Court concluded that the Privacy Act protects against the unauthorized publication of private facts, not against invasions of privacy such as the type involved in drug testing.

Additionally, in *Bally*, the Plaintiff argued that drug testing is a violation of the Massachusetts Civil Rights Act. The Court stated that in order to establish a claim under the Civil Rights Act, a Plaintiff must prove that "(1) his/her exercise or enjoyment of rights secured by the Constitution or laws of either the United States or the Commonwealth; (2) has been

interfered with, or attempted to be interfered with; and (3) that the interference or attempted interference was by 'threats, intimidation or coercion'." The Court concluded that *Bally* did not receive an individualized threat nor the threat of serious harm. Consequently, the Court held that the requirement that a student athlete submit to a drug test as a condition of playing sports does not violate the Massachusetts Civil Rights Act. Whether such a requirement, in an employment context, would give rise to a Civil Rights claim was at that time not yet resolved. The Appeals Court in the First Circuit had predicted correctly that Massachusetts Courts would rule that a drug testing plan would not violate the Massachusetts Civil Rights Act.[13]

A. PROBATIONARY EMPLOYERS

The National Labor Relations Board (NLRB) has ruled that an employer may unilaterally implement a drug and/or alcohol testing program with respect to applicants.[14] The Board noted that applicants are in the same position as retirees - they are not employees covered by the National Labor Relations Act. The Board noted that although drug testing of applicants may have an indirect effect on the ultimate composition of the unit, this effect is too remote to require bargaining. The Board concluded that applicant testing is not a mandatory subject of bargaining. The Board said, "to rule otherwise, would require the employer to bargain over every qualification and standard to judge applicants."

The Massachusetts Labor Relations Commission (LRC or Commission) has not been presented with a drug-testing case involving applicants. However, it has decided one concerning probationary employees. In the case of *City of Boston*,[15] the LRC ruled that an employer cannot unilaterally implement random urinalysis for probationary correctional officers without bargaining to impasse over the impacts of such a requirement.

Two Supreme Judicial Court opinions have clarified a municipality's right to use drug testing relative to police cadets. Cadets may be subjected to unannounced, warrantless and suspicionless drug testing. Further, it is permissible for a police department to directly supervise a cadet's act of urination.

In *O'Connor Jr. v. Police Commissioner of Boston,* the plaintiff was a police officer on probationary status with the Boston Police Department.[16] He was assigned to the Boston Police Academy. During this training, the plaintiff was dismissed from the Department after the Department was notified by the company it had retained to conduct drug screening tests that the plaintiff's urinalysis test had revealed traces of cocaine. The cadet denied using cocaine. He requested permission to submit another urine sample. This request was refused. On the day following the

dismissal, a Captain from the Department informed other cadets that the plaintiff had been discharged "because he had tested positive for drug use."

The plaintiff brought an action alleging that the defendants (Police Commissioner of Boston and City of Boston) had violated his rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States and by articles 12 and 14 of the Declaration of Rights of the Massachusetts Constitution. Further, the plaintiff argued that the defendants violated the provisions of General Laws, Chapter 12, §§ 11H and 11I (1988 ed.) (Mass. Civil Rights Acts), and General Laws, Chapter 214, § 1B (1988 ed.) (Right of Privacy Statute).

The plaintiff moved for summary judgment as to liability. The judge ordered summary judgment for the defendants on all counts. The plaintiff appealed.

The Supreme Judicial Court noted that drug testing constitutes a search and seizure within the meaning of both the state and federal constitutions. The Court was faced with the issue as to whether drug testing is "reasonable." The Court noted that to determine a search's reasonableness and, therefore, validity, the Court must balance the governmental need for the search against the search's intrusiveness into a person's reasonably expected privacy. Applying this standard in the *O'Connor* case, the Court stated:

> We do not take lightly the intrusiveness of collecting a urine sample and subjecting it to chemical analysis, including the fact that such testing may be capable of revealing not only illicit drug use but other personal information, such as pregnancy, as well. We accept as true, too, that the intrusiveness is increased by cadets being monitored in the act of urinating (a practice which helps to ensure the integrity of the urine sample). However, we also take into account, as a factor that diminishes the degree of intrusiveness, that the cadets agreed to urinalysis testing before accepting employment.
>
> We are satisfied that the public interest in discovering and deterring drug use by police cadets who have agreed in advance to urinalysis testing is of sufficient weight that such testing is reasonable within the meaning of article fourteen. 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.

The Court further held that the City of Boston and the Police Commissioner had a compelling interest in determining whether cadets were using drugs and in deterring such use. Those interests outweighed the plaintiff's privacy interest, not only under article fourteen, but under General Laws, Chapter 214, s. 1B as well.

In *Gauthier v. Police Commissioner of Boston*, decided on the same day as *O'Connor*, the plaintiff was a cadet at the Boston Police Academy and was discharged after the Boston Police Department received notice that the monitored urinalysis test to which he and all other cadets had been required to submit had revealed traces of cocaine.[17] Similarly to *O'Connor*, the plaintiff brought an action alleging that the unannounced, warrantless, suspicionless urinalysis test in which supervisory personnel watched the cadet urinating, violated the plaintiff's rights secured by various articles of the Declaration of Rights of the Massachusetts Constitution. In addition to those arguments made in *O'Connor*, cadet Gauthier argued that the defendants violated his privacy interests under General Laws, Chapter 214, s. 1B by informing his fellow cadets of his test results.

General Laws, Chapter 214, s. 1B provides in relevant part: "A person shall have a right against unreasonable, substantial or serious interference with his privacy." In the employment context, "in determining whether there is a violation of s. 1B, it is necessary to balance the employer's legitimate business interests in obtaining *and publishing* the information against the substantiality of the intrusion on the employee's privacy resulting from the disclosure" (emphasis added).[18] In *Gauthier*, the Supreme Judicial Court concluded that the City of Boston and the Police Commissioner had a legitimate interest in deterring drug use by police cadets. Furthermore, the Court held that deterrence is clearly served by prompt disclosure to those who passed the test that those who did not had been dismissed. The Court stated, "In view of the public interest served by such limited publication, together with the diminution

of the cadets' reasonable expectation of privacy due to the obvious physical and ethical demand of their employment . . . . the balance of interest as a matter of law weighs in favor of the defendant."

PRACTICE POINTERS

It should be noted that in the Gauthier and O'Connor decisions, neither plaintiff had argued that the drug test was legally deficient from a reliability standpoint. It appears that the confirmatory tests currently in use are virtually 100% reliable. Employees, however, should be certain to comply with all requirements of their drug testing policy or face a union challenge. While chain of custody, for example, need not be as strict as in criminal cases, callous handling of evidence could jeopardize disciplinary cases.

B. BARGAINING OBLIGATIONS

Regardless of whether a drug test is "permissible" on constitutional grounds, unionized employees have collective bargaining interests which may require an employer to bargain over certain aspects of any proposed drug testing program. Drug testing falls under the category of a "condition of employment."[19] As a mandatory subject of bargaining, management is not free unilaterally to implement a change without affording the exclusive bargaining representative (union) an opportunity to bargain. While a municipality might believe that the goals of drug testing are so compelling that it is a management prerogative, the Labor Relations Commission rejected that contention. In doing so it followed a series of NLRB decisions on the subject.[20]

1) LRC Cases

The following are a series of LRC and court decisions on the subject of drug testing.

(a) Town of Fairhaven, 20 MLC 1343 (1994)

The Labor Relations Commission, at the union's request, rendered an advisory opinion that a drug screening proposal submitted by the Town during negotiations for a successor collective bargaining agreement covering a bargaining unit of employees in the Town's Department of Public Works was a mandatory subject of bargaining. The union had contended that although the drug screening proposal focused only upon "probable cause", it would somehow permit the Town to subject highway department employees to random drug testing, which the union contended would infringe on individual

constitutional rights. Accordingly, the union argued that it should not be required to bargain about the proposal because it lacked authority to waive the constitutional rights of the employees whom it represented. On the other hand, the Town contended that its proposal involved a valid condition of employment which the union must negotiate in good faith. According to the Town, the proposal concerned drug testing based solely on probable cause and therefore would satisfy the constitutional requirements of both the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.

The Commission concluded that drug testing for public works employees directly affects the working conditions of those employees. Drug testing, like other physical examinations, is a device used by employers to determine whether employees are fit to continue in their current employment status. Therefore, the Commission noted, the results of a drug test may affect directly an employee's job security, the kind of work to which an employee is assigned, and the conditions attached to continue employment, each of which is a condition of employment subject to bargaining. The Commission pointed to its *Town of Dedham*[21] decision which ruled that requiring employees returning from disciplinary suspensions to submit to medical clearance and requiring examination by a three member panel of physicians rather than an employee's own physician were mandatory subjects of bargaining.

Next the Commission went on to balance the impact of drug testing on public works employees' working conditions against any managerial interest of their employer to determine whether the decision to impose drug testing is a core governmental decision reserved to the discretion of the governmental employer.[22] The Commission did not perceive any overriding managerial prerogative that a public employer had in this area that would outweigh the interests of the affected employees in bargaining about the effects on their working conditions. It noted that although it is reasonable for a public employer to strive for a work force of public works employees unimpaired by drug use, its interest in attaining that goal is no more compelling than a public employer's interest in maintaining a physically fit work force, which the Commission has found does not override the obligation to bargain before requiring employees to undergo physical examinations.[23] Accordingly, the Commission concluded that under the balancing test set forth in *Town of Danvers,*[24] the subject of drug testing for public works employees is a mandatory subject of bargaining.

(b) City of Fall River *20 MLC 1352 (1994)*

The Labor Relations Commission affirmed the hearing officer's conclusion that the City's unilateral implementation of a "zero tolerance" policy violated section 10(a)(5) of the Law. They concluded as well that this conduct derivatively violated section 10(a)(1) of the Law. Citing its decisions in *Town of Fairhaven*[25] and the balancing test from *Town of Danvers*,[26] the Commission concluded that the conditions under which bargaining unit employees will be disciplined, the disciplinary penalty, and a drug testing provision, are mandatory subjects of bargaining. It distinguished this case from its ruling in *Town of Ayer* [27], which held that a public employer was not obligated to bargain with the union before requiring police officers suspected of criminal activity to submit to a polygraph as part of an ongoing criminal investigation. In this case they were persuaded that the zero tolerance policy was not implemented as part of the police department's criminal investigation of this individual but was rather a term and condition of his/her continued employment in the department of public works.

In the *City of Fall River* case, the parties had entered into a settlement agreement that incorporated and reaffirmed a provision of the parties' collective bargaining agreement that required prior notice to the union of a new departmental work order. The City did not dispute the fact that the new policy was implemented without giving the union prior notice, nor did it contend that the terms of the agreement were ambiguous. In fact, the record revealed that the City complied with that agreement on prior occasions.

The City attempted to have its dismissal of the DPW worker upheld by alleging that the dismissal was not based upon the City's zero tolerance policy but rather on their independent probable cause testing of him. The Commission was not persuaded. In fact, they noted that the record indicated that the individual's dismissal was based in great part upon alleged violations of the zero tolerance policy.

Even though the individual had been ordered reinstated by an arbitrator following a grievance, the arbitrator did not award back pay for the period during which the individual was terminated pending the outcome of the arbitration case. The Commission noted that it was not bound by the arbitrator's determination in this case since the arbitration case focused solely on whether there was just cause for the dismissal. The case before the Commission centered on whether the city failed to provide notice and opportunity to bargain to the union prior to implementing the zero tolerance

drug testing policy. In an effort to make the individual whole, the Commission ordered him reinstated with back pay.

(c) Peabody Municipal Light Department, 21 MLC 1779 (1995)

An administrative law judge dismissed the union's complaint of prohibited practice which alleged that the Light Department had unilaterally implemented a change in working conditions by implementing a "post-accident" drug testing policy.

The union had refused to bargain over the Light Department's proposed drug testing policy. The union's contention was that the Light Department's request or offer to bargain over the proposed guidelines for implementing and agreeing upon post-accident drug testing policy constituted a repudiation of the parties' agreement which included a requirement to "drop its demand through impact bargaining for drug-testing as a result of probable cause". Because the Light Department's proposed guidelines did not contain any proposal for probable cause drug testing, the administrative law judge ruled that the Light Department did not repudiate the agreement in proposing these guidelines. She concluded that the agreement did not preclude the Light Department from proposing post-accident drug testing methods. Nor did she find that the Light Department was precluded from proposing procedures by which to implement a post-accident drug testing policy. She noted that the implementation of a drug testing policy necessarily involves procedures by which to administer the policy, and the union was obligated to bargain over any such procedures.

PRACTICE POINTERS

A copy of a sample drug testing article is contained in the Appendix. Chiefs should review the same for possible adoption or modification for use in their respective departments, consistent with the need to afford the local union the opportunity to bargain as discussed above. If a union agrees to random testing, a waiver or consent should be secured from each individual as well. (Appendix Form 8)

Employee Assistance Programs (EAP's) are not discussed in this chapter. EAP's are largely a product of private industry efforts at employee counseling and referral. While originally (over 40 years ago) aimed primarily at alcohol related problems, EAP's now encompass drug and a host of family difficulties. When combined with the developing area of handicap discrimination law, EAP's appear to be gaining prominence in the public sector. Chiefs should encourage their municipality to establish an EAP or make contractual arrangements with a local EAP provider.

2) Court Cases

The following court decisions have addressed various labor relations as well as constitutional issues involving drug testing.

(a) Teamsters Union Local No. 59 v. Barnstable County, Superior Court (12/15/94)

Superior Court Judge Tierney issued a decision and order on cross motions for summary judgment. This case arose from a dispute between the Barnstable County Sheriff and the Teamsters Local which represented two bargaining units. Unit A consisted of approximately 14 technicians, radio technicians, dispatchers and radio operators. Unit B consisted of seven criminal investigators and narcotics officers. While the parties were negotiating their collective bargaining agreement, the sheriff proposed a drug testing rule. The rule would permit both random drug testing and testing due to reasonable suspicion. It only applied to personnel who carried or might be asked to carry a firearm or might be called upon to interdict drugs. At the time the case was heard, only the employees of Unit B fit that description and were affected by the rule. However, the sheriff pointed out that he could change the job description of Unit A employees at any time and that they could thus become eligible for random drug testing.

A majority of the members of the collective bargaining unit approved the collective bargaining agreement, including the drug testing rule. The votes of Unit A were co-mingled with the votes of Unit B for the purpose of approving the agreement. Following the random testing of at least two individuals, who apparently took the test under protest, a grievance was filed by the union. The sheriff responded by suspending the random drug testing program. However, he sent a letter to the union advising them that he intended to resume the random drug testing program unless the union brought an action to clarify the rights of its members. The union filed a complaint in Superior Court and the sheriff continued to refrain from implementing the drug testing policy pending the outcome of that case. No disciplinary proceedings involving drug use were brought against any bargaining unit members pursuant to that rule.

The Superior Court reviewed various cases involving drug testing both on a national and state level. In *Guiney v. Commissioner of Boston*, the Boston Police Commissioner promulgated a rule permitting random drug testing of police officers.[28] The rule in *Guiney* was the same rule promulgated by the sheriff in this case. The SJC struck down the rule in *Guiney* stating that it constituted an unreasonable search and seizure under Article 14 of the

Declaration of Rights of the Massachusetts Constitution. The Court based its decision on the fact that there was nothing in the record that showed that members of the Boston Police Department had a problem with illicit drug use, on or off duty. Furthermore, there was no public perception of such a problem. The court set out the following standard for determining whether a mandated random drug testing policy complies with Article 14:

> The reasonableness of a mandated urinalysis cannot fairly be supported by unsubstantiated possibilities. If the government is to meet the requirements of Article 14, it must show at least a concrete, substantial government interest that will be well served by imposing random urinalysis on unconsenting citizens. . . [T]he justification for body searches, if they ever can be done, cannot rest on some generalized sense that there is a drug problem in this country, in Boston, or in the Boston Police Department.

The Superior Court concluded that this case was virtually identical to the facts of those in *Guiney*. It also ruled that the members of Local 59 did not consent to random urinalysis drug testing when they ratified the contract.

The Court distinguished this case from two previous SJC decisions, *O'Connor v. Police Commissioner of Boston*,[29] and *Gauthier v. Police Commissioner of Boston*.[30] in both of these cases, the SJC upheld the Police Commissioner's right to randomly test police cadets in training. These cases predate *Guiney* and are distinguishable from the present case in two respects according to the Superior Court. First, the criminal investigators in the sheriff's department are not cadets. Second, the cadets in *O'Connor* and *Gauthier* individually signed consent forms which stated:

> In consideration of my appointment as a police officer in the Boston Police Department, I agree and consent to submit to certain tests. . . when requested to do so for the purpose of determining whether I have unlawfully used. . . drugs. This agreement shall remain in full force and effect for the period of time during which I remain in a probationary status. . .[31]

In the Superior Court case, the criminal investigators gave no such unqualified consent. First, the Court noted that the investigators did not individually consent to the rule. The majority of the members of the bargaining unit ratified it as part of the contract. Second, the contract was subject to the severability clause which was discussed during bargaining and was intended to be invoked in the event of a court challenge which the union promised to file concerning the policy. The court concluded that it was clear that the criminal investigators would not have agreed to the drug testing rule if they thought they were giving unequivocal consent that would render their challenge to the rule forceless.

The Court concluded that the members of Local 59 did not consent to mandated random urinalysis drug testing. The Court also ruled that the sheriff and the County did not produce evidence of a government interest in randomly testing members of Local 59 for illegal drug use substantial enough to warrant interference with the union members' rights under Article 14 of the Massachusetts Declaration of Rights. Therefore, the Court ordered that the Defendants permanently refrain from taking any actions to impose the drug testing rule upon affected members of Local 59.

(b) Johnson v. Massachusetts Bay Transportation Authority, 418 Mass 783, 641 NE 2d 1308 (1994)

The Massachusetts Supreme Judicial Court held that:

(1) evidence supported a finding that the driver was operating a bus under the influence of cocaine;

(2) the authority had probable cause to conduct a drug test of the driver;

(3) the authority was not required to obtain a warrant to conduct the test;

(4) the driver's consent to the test was valid;

(5) the test results were admissible in a disciplinary hearing; and

(6) the results of prior breathalyzer tests were admissible.

Johnson was a bus driver for the Massachusetts Bay Transportation Authority (MBTA). He appeared to be under the influence of alcohol on the job, failed the breathalyzer test which he took voluntarily, and was suspended indefinitely for violation of MBTA rules. Thereafter they reinstated him, subject to a one year probationary period during which any rule violation would result in his discharge. Approximately two months later an MBTA passenger,

who identified himself, reported by phone to the MBTA police that he smelled alcohol on the breath of the driver. Two supervisors met with Johnson and concluded that his eyes had a very heavy look and that he appeared to be under the influence of something. Asked if he would submit to a breathalyzer examination which it was his right to refuse, Johnson said that he would not. He was suspended for the rest of the evening. Neither supervisor smelled alcohol on Johnson's breath, nor did Johnson walk irregularly.

He reported as ordered the next morning for a physical examination, which would include urine and blood tests, and for an interview. He gave oral permission to a MBTA physician for a drug and urine test. The drug test was a condition of Johnson's continued employment. The lab test indicated the urine samples were positive for the use of cocaine. The MBTA fired Johnson.

The SJC noted that the judge was correct in ruling that the warrantless search and seizure were lawful. The MBTA had probable cause to conduct the test for drug use, and no warrant was needed in the circumstances. The evidence warranted the conclusion of the MBTA supervisors that more probably than not Johnson had operated an MBTA bus while under the influence of alcohol or some other drug. In such circumstances, the Court noted, an employer is entitled to require an employee to submit to blood and urine testing for drugs and alcohol. The Court went on to say that the MBTA was not obliged to obtain a warrant. An employer providing public transportation has a duty to assure that its drivers are not impaired by alcohol or some other drug, the Court stated. It went on to say that such a driver is not unfairly or unreasonably treated by a requirement that he/she promptly submit to tests for drugs when there is probable cause to believe that he/she has operated a vehicle under the influence of some drug. In any event, Johnson' s challenge to the admission of the test results failed because the Judge was warranted in finding that he/she consented to these tests. While a written consent would have strengthened the MBTA' s position on the consent issue, according to the SJC, the Judge was warranted in ruling that requiring testing as a condition of continued employment of a probationary employee would not be impermissible coercion in this case involving the operator of a public conveyance.

The Court ruled that the Judge was not in error in admitting the laboratory report that showed that Johnson's urine tested positive for cocaine. The chain of custody, although less than perfectly shown, was sufficiently established to justify admission of the evidence. The results of the laboratory tests were properly admitted as a business record.[32]

In a footnote, after affirming the judgment, the Court stated:

> Because there was probable cause, we need not decide whether in some situations the responsibilities of an employee are so important to the public safety that, in the absence of consent, a public employer may nevertheless require testing for drugs on the basis of something less than probable cause.

(c) *Boston Police Department v. Campbell*, Massachusetts Superior Court, (July 23, 1997) 1997 WL 426973*1

This case arose on an appeal from a bypass hearing in which the results of a drug test were found sufficient to enable the Boston Police Commissioner to bypass a police officer applicant on the Civil Service List.

Mr. Campbell submitted to a urine test as part of his application to the Boston Police Department. An enzyme-multiplied immunoassay technique drug test reported the presence of marijuana in Mr. Campbell's urine on December 14, 1994. A subsequent gas chromatography/mass spectrometry test confirmed the presence of marijuana in Mr. Campbell's urine sample.

The Court ruled that the police department acted within its discretion when it rejected Mr. Campbell's candidacy upon receipt of the drug test results, and when the Personnel Administrator properly accepted the police department's reasons for the bypass. No party to the case disputed Mr. Campbell's failure to pass the drug test. The Commission itself recognized the police department's "right and obligation" to perform medical and fitness examinations of applicants. The Court noted that marijuana abuse is a legitimate and nondiscriminatory reason to reject an applicant for employment as a police officer.

*(d) National Association of Government Employees, Local 495 v. City of Worcester, Worcester Superior Court Decision (January 9, 1995) 1995 WL 808965*1*

In response to the 1994 U.S. Department of Transportation rules regarding motor equipment operators, the City of Worcester sent a copy of a new proposed policy to the union. The city's policy was patterned on the policy of the DOT rule. However, in several areas, the city's policy was more stringent than the DOT rule. First, whereas the DOT rule provided for the testing of only commercial

motor vehicle operators, the Defendant's policy provided for the testing of any employee involved in an "activity preparatory to operating a commercial motor vehicle." Second, an employee violates the DOT rule when he/she has a blood alcohol content of 0.02 or greater. An employee violates the city's policy however, when he/she has a blood alcohol content greater than 0.00 ("zero tolerance").

Following receipt of the policy from the City, both parties engaged in impact bargaining that resolved some areas of disagreement concerning the proposed policy. One month after the policy was submitted to the union, and after impact bargaining had taken place, the City made its final proposal to the union. The union did not respond, and therefore, the City notified the union that an impasse existed. Several weeks later the City implemented the policy. A few days later the union filed a charge of prohibited practice with the Massachusetts Labor Relations Commission. Several days thereafter the union also filed a complaint in Superior Court alleging that the Defendant had violated M.G.L. c. 150E § 10(a)(5), requesting an injunction to prevent the enforcement of the policy.

With the exception of that provision of the policy which extended random testing to individuals who were not motor equipment operators, the Court refused to issue an injunction on any other aspect of the policy. The Court found that the DOT rule provided no basis for the City's application of a random testing to anyone other than a "driver".

The Court dismissed each of the other bases set forth in the union's complaint. The Court rejected the union's assertion that the adoption of a "zero tolerance" policy for blood alcohol content was bad faith bargaining which in turn constituted an irreparable harm to the Plaintiff. They also asserted that the DOT's preference for a .04 blood alcohol content trigger precluded the City from adopting a zero tolerance policy. The Court was not persuaded. It found nothing in the DOT rule which precluded the City from adopting a policy of zero tolerance. In fact, the Court noted that the City's policy of zero tolerance is wholly consistent with the purpose of the DOT rule. It went on to indicate that in light of the public's interest in safe highways and the substantial risk of accidents and injuries that would accompany the granting of an injunction, the Plaintiffs' failure to explain how the policy of zero tolerance constituted irreparable harm was fatal to their case. The Court also rejected the union's claim that the use of foremen would harm the morale of employees by making them unmanageable. Likewise it dismissed the union's claim that there was significance to the DOT rule' s

silence on what level of supervisor is to initiate reasonable suspicion testing. The DOT rule provides that a "supervisor" will determine reasonable suspicion to test an employee. Determination of who is a supervisor is left to the discretion of the employer according to the Court.

*(e) O'Brian v. Massachusetts Bay Transportation Authority, Superior Court (April 6, 1995) 1995 WL 808707*1*

In a decision before Appellate Division Justices Sullivan, Dorcey and Walsh the Court upheld a Superior Court decision which granted a preliminary injunction against the MBTA from implementing its new drug and alcohol testing program as applied to MBTA patrol officers and sergeants.

The MBTA notified the union that it intended to revise its drug and alcohol testing policy to incorporate the new Federal Transit Administration drug and alcohol testing regulations which became effective on January 1, 1995. That program was mandated by Congress and the implementing regulations were issued by the U.S. Department of Transportation and the Federal Transit Administration. Eligibility for funds administered by the FTA and the U.S. Department of Transportation were conditioned upon compliance with those regulations. The FTA regulations provide for the involuntary random testing of "safety sensitive" employees for drug and alcohol without probable cause or reasonable suspicion.

By letter dated January 4, 1995, the MBTA notified its employees, including its police patrol officers and sergeants, that it planned to implement the new FTA regulations approximately 30 days from the date of the letter. By later dated February 1, 1995, the Plaintiff protested the unilateral implementation of the FTA regulations. It alleged the MBTA had violated M.G.L. c. 161A, §19, which required the MBTA bargain over working conditions. By memorandum of February 10, 1995, the MBTA advised the Plaintiffs that, as of April 1, 1995, they would be included in the random pool for drug and alcohol testing.

The Plaintiffs contended that the 1995 drug testing program, as applied to members of the MBTA Police Department, violated Article 14 of the Massachusetts Declaration of Rights as set forth in the *Guiney* case. They also contended that the MBTA had an obligation to bargain over terms and conditions of employment.

The Court found that on its face, the 1995 program contravened the holding in *Guiney* because the MBTA had presented no evidence that either the MBTA Police patrol officers or sergeants have had any problems with illicit drug use, on or off duty. The Court decided

not to base its decision on whether or not the federal act superseded or preempted any local rule or regulation to the contrary. The Court concluded that the Plaintiffs demonstrated a likelihood of prevailing on their claim that the constitutional rights of MBTA Police patrol officers and sergeants would be violated by the 1995 program. The Court noted that when an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary.[33] Because the Plaintiffs made a preliminary showing that the 1995 program was unconstitutional as applied to the MBTA police patrol officers and sergeants, the Court did not reach or address the collective bargaining issues raised under M.G.L. c. 161A §19.

(f) Jones v. City of Boston, 63 Mass.App. Ct. 1119, 829 N.E.2d 264 (2005)

Ronnie C. Jones, a Boston police officer, was discharged after testing positive for cocaine during an annual drug test administered by the Boston police department (department). After his discharge, Jones filed an unemployment benefits claim with the division of employment and training (DET) at its local office. A claims representative determined that he was disqualified from receiving such benefits. Jones appealed that determination to the DET's hearings department, and after a hearing, a review examiner also concluded that he was not entitled to benefits. We affirm.

Under the terms of a collective bargaining agreement, officers of the department are screened annually within thirty days of their birthday using a hair follicle test. An earlier version of Boston police department rule 111 providing for random urine testing did not pass muster under art.[34]

Pursuant to department policy, all positive test results reported by the testing laboratory are reviewed by a medical review officer (MRO). The MRO is a medical doctor hired by the department whose duties are to review and interpret confirmed, positive test results and to consider possible medical explanations for them. This may include conducting a medical interview of the police officer and reviewing the officer's medical history. The MRO contacted Jones to discuss his positive test result and any possible medical reasons for it prior to reporting it to the department. Jones informed the MRO that he was taking liquid cough medicine and using an inhaler for flu-like symptoms. The MRO conclude that the medication Jones was taking would not explain the positive test results.

Under rule 111, Jones was offered the choice of entering into a settlement and rehabilitation agreement with the department, which mandated a 45-day suspension without pay, successful completion of a drug rehabilitation program, and follow-up random urine testing for a period of three years. Jones, who denied using cocaine, declined the offer and instead elected to have a "safety-net" test, in which, under the procedure outlined in rule 111, another hair sample is taken, and the laboratory again conducts the test using lower cut-off levels. The cutoff level for the safety-net test is 0.2 nanograms of cocaine per 10 milligrams of hair. Jone's additional hair sample tested under the safety-net procedure resulted in a level of 2.4 nanograms of cocaine per 10 milligrams of hair.

This rule was the product of negotiations between the Boston police department and the Boston Patrolman's Association. It provides that a police officer's possession, use, manufacture, or sale of illegal drugs or controlled substances while off duty is prohibited and may lead to termination.

The safety-net test is not a complete retest, but rather a test to confirm the presence of an illegal drug.

§ 3 DRUG TESTING PROCEDURES

Massachusetts has no laws which regulate the procedures of drug testing of employees. Consequently, it may be beneficial to look to other jurisdictions which have enacted laws which set out procedures to be following in drug testing. As a starting point, a model of procedural safeguards worthy of review are those entitled Health and Human Services (HHS) Federal Testing Guidelines issued in April of 1988. These guidelines are a result of Executive Order #12564, issued by President Reagan in 1986, calling for drug testing programs in almost every executive agency of the Federal government. Congress subsequently passed a Supplemental Appropriations Act for Fiscal Year 1987 requiring HHS to issue mandatory guidelines to govern the implementation of drug testing. These guidelines cover all drug testing programs in the federal government as applied to civilian employees.

Drug tests generally involve screening urine, blood or hair. With the exception of phencydidine, which may result in side effects lasting up to seven days or even longer, most urinalysis and blood tests are not designed to measure present impairment but rather prior (and only very recent) drug use. Hair testing, while not able to detect present impairment, is able to record prior drug use over an extended period of time. Hair generally grows at a rate of 1/2 inch per month, so results are based upon the length of hair sample provided. Hair testing offers promise as a method of testing which may avoid many of the challenges to

urine testing especially as regards privacy, sample security/contamination and ease of replication of sample.

Initial screening tests of urine samples, while relatively inexpensive, are not sufficiently accurate to serve as the sole basis of disciplinary action. Confirmatory tests, preferably the gas chromatography/mass spectrometry (GC/MS) technique, reportedly with a 100% accuracy rate, should be used to follow-up on samples testing positive on initial screenings.

Procedural safeguards surrounding the collection and analysis of urine or other samples are required. These include: sample collection; sample identification; chain-of-custody; the tests themselves; who performs the tests; employee's right to retest; interpreting test results; and reporting results and record keeping.

A. INITIAL SCREENING TESTS

Because of their ease of use and relatively low cost, initial screening of urine samples through the use of one of several immunoassay tests is often utilized. This may take the form of what is commonly referred to as to the EMIT test (enzyme-multiplied immunoassay technique), the ELSA (enzyme-linked immunoabsorbant assay), the RIA test (radio immunoassay), and the Thin-Layered Chromatography Technique. These tests generally have a reliability factor between 95% and 99%. However, when job security is involved, 5% can be considered a considerable margin for error. Several courts have questioned the use of immunoassay test results in and of themselves serving as the basis for employee discipline. Should a public sector employer decide to rely solely on such tests, its decision would be subject to being challenged on the basis of being arbitrary and capricious, violating the employee's right to due process because of the likelihood of error. In general, these tests should be used only as a first screening, with positive tests being followed up by confirmatory tests prior to taking any disciplinary action.

B. CONFIRMATORY TESTS

A variety of more sophisticated tests may be used to analyze not only urine but also blood plasma and hair for past drug use. Examples are gas-liquid chromatography, high-performance liquid chromatography and gas chromatography/mass spectrometry (GC/MS). The GC/MS technique is reportedly the most accurate analytical method currently used for detecting drugs in body fluids. Virtually all courts considering the issue of accuracy have accepted that a screen test followed by a GC/MS confirmation is virtually 100% accurate.

C. DRUG TEST PLAN PROCEDURES

Testing procedures can be broken down into several categories, including: sample collections; sample identification; chain-of-custody; the test themselves; who performs the test; employees' right to retest; interpreting test results; and report results and record-keeping.

1) Sample Collections

Few collection problems result when blood tests or hair samples are taken. However, a variety of collection issues arise when urine samples are utilized. Adulteration or substitution are two continuing problems. While attempting to assure an individual's urine is actually being supplied, an employer may face a claim of violating an employee's privacy rights. Short of direct observation of urination, employers have tried a variety of techniques aimed at assuring accurate securing of urine. These include requiring an employee to strip and wear a hospital-type garment into a toilet stall, adding bluing to the toilet water, and testing urine for temperature and acidity. While the federal Department of Health and Human Services has opted for not collecting two samples of urine due to the cost and administrative problems, the Nuclear Regulatory Commission has insisted on use of split samples.

2) Sample Identification

The identity of an individual should be verified, and the sample should be properly labeled, possibly including a requirement that the collector and the employee both sign a label which is affixed to the sample bottle. A photo could be taken to assure the party is the correct one.

3) Chain of Custody

In much the same way as police departments handle evidence in a criminal case, specimen bottles should be carefully treated. This might include tamper resistant evidence tape being applied in the presence of the employee and attaching a chain of custody form requiring each individual in that chain to sign or initial the form.

4) Whom Performs the Test

Outside licensed laboratories should be used. The Federal Department of Health and Human Services developed a document entitled "Scientific and Technical Guidelines for Drug Testing Programs" published on February 13, 1987 addressing a variety of collection and laboratory analysis procedural requirements. While these guidelines consist of thirty two pages of printed text, and therefore might arguably be considered "over kill" as regards an individual police or fire department, the possibility exists that this may become the standard against which drug testing procedures are measured and therefore a review of the same is warranted.

5) The Actual Test

As discussed above, every program should involve both a screening test and, when such screening test yields a positive result, a more sophisticated confirmatory test, preferably a gas chromatography/mass spectrometry test. Confirmatory tests aimed specifically at the substance initially detected in the screening are generally in order, rather than running confirmatory tests for all possible controlled substances.

6) Employees' Right to Retest

Since urine specimens may be stored frozen for long periods of time, laboratories should be instructed to store the specimens that showed positive results for a designated period of time to allow the employee the option of a retest by an independent lab.

7) Analyzing Test Results

Employees who test positive in both initial and confirmatory tests should be afforded the opportunity to explain tile presence of a substance in the specimen before any adverse or disciplinary action is taken.

8) Reporting Result and Record Keeping

Records should be maintained concerning the initial basis for conducting the test such as pre-employment screening, random testing, rule violation, or reasonable suspicion. In addition, where appropriate, supporting information concerning the particular individual to be tested should also

be maintained. Documentation regarding the test procedure should be collected and maintained. In addition, the laboratory report should be kept on file. Drug test records and reports should be treated similar to medical reports where confidentiality is maintained.

§ 4 EFFECTS OF DRUG USE

While there are several hundred drugs listed as "controlled substances" in the Federal Controlled Substances Act[35], most drug testing programs concentrate on attempting to detect five substances which have been deemed to be exceptionally hazardous in the work place. These are: marijuana, cocaine, opiates, phencyclidine, and amphetamines.

The following information concerning drugs and testing procedures is derived from an article entitled "What you need to know about workplace drug testing" contained in the Prentice Hall Information Services Bulletin, Section 2, Bulletin 10. Termination of Employment - Employer and Employee Rights by Gary T. Tulazz, J.D. and Michael P. O'Toole, J.D. dated October 2, 1989.

A. MARIJUANA

As the country's most pervasively used illegal drug, marijuana has long been the subject of debate and research. Its use reportedly impairs mental, psychomotor, and perceptual skills. Motor vehicle driving and divided-attention tasks reportedly suffer. Symptoms include fatigue and lethargy, chronic dry irritating cough, chronic sore throat, and red eyes or dilated pupils. Since the active ingredient in marijuana and hashish, THC, enters the blood stream in a matter of minutes when smoked (or longer when ingested) and remains in the blood stream for only a few hours, blood tests are reportedly relatively accurate measuring devices for current impairment. After leaving the blood stream the THC is stored in the body's fatty tissue and is eventually excreted in the urine. Urine samples of a casual user will yield positive results for 1-3 days after use, while samples from a long term heavy user may yield a positive result for as long as one month after the individual stops using, according a study published by the National Institute on Drug Abuse (P.L. Hawks and C.N. Chiang, NID Monograph No. 73).

B. COCAINE

Cocaine is a central nervous system stimulant that produces a feeling of euphoria in the user. Studies reveal that cocaine use heightens certain moods, such as anxiety, confusion, friendliness and aggressiveness.

Reportedly it can increase irritability, hyper-excitability and startle responses. It impairs vision, causing light sensitivity, halos, and difficulty in focusing. Withdrawal can cause depression, lethargy and lapses in attention. In addition to the psychological symptoms, physical symptoms include increased blood pressure and heart rate, blurred vision, muscle tension and tremors, slurred speech, thirst, sweating, dizziness, headaches, nausea, and diarrhea. According to the Hawks and Chiang study, cocaine metabolites detectable by immunoassay urine tests (most commonly used for initial drug screening purposes) generally leave the body within forty eight hours while metabolites detectable by gas-liquid chromatography urine tests (usually used to confirm the initial drug screening) generally leave the body within twenty-four hours. Therefore, only recent cocaine use is detectable by urine tests.

C. OPIATES

Opiates are narcotics derived from the opium poppy or synthetically produced. Generally used as pain killers, they produce mental clouding, reduce the ability to concentrate and produce apathy and drowsiness. Unlike marijuana and cocaine, however, opiates can be used legally under prescription in their natural forms such as Codeine or Morphine, and in synthetic forms under a variety of pharmaceutical names such as Deluded, Percodane, Darvon, and Demerol. Primary side effects of opiate use include drowsiness, constipation, nausea and vomiting, constricted pupils, depression, apathy and lethargy. Withdrawal symptoms reportedly are similar to severe influenza, including watery eyes, nausea, vomiting, muscle cramps and loss of appetite. The Hawks and Chiang study for NIDA reports that active ingredients in opiates disappear from the blood within a few hours. Immunoassay urine tests may detect free morphine from heroin up to 2-4 days after use. However, Hawks and Chiang caution that immunoassay tests are unable to detect with precision the type of opiate used, making it necessary for the urine sample to be subjected to acid or enzyme hydrolysis and submitted for a chromatography confirmatory test. In addition, eating a large quantity of poppy seeds could result in a positive immunoassay result, therefore requiring specialized chromatography confirmatory tests.

D. PHENCYCLIDINE

Also known as PCP or "angel dust," phencyclidine is a recently developed hallucinogenic drug with extremely dangerous side-effects, such as psychotic reactions and nerve and heart damage. Effects are reportedly extremely unpredictable and variable. While PCP intoxication generally lasts about eight hours, its side effects in a casual user may continue for up to 72 hours and, in a chronic user, up to seven days or longer. Severe

cases can result in schizophrenic episodes of a month or longer and permanent physical or psychological damage can occur. It use is marked by a lack of coordination, confusion, agitation, severe mood swings and erratic and violent behavior. Since Hawks and Chiang indicate that PCP can be detected for up to a week after use, drug tests can in this case be an indicator of impairment. However, they caution that immunoassay tests cannot always distinguish between PCP use and the use of certain prescription drugs, thus making a confirmatory test necessary.

E. AMPHETAMINES

Amphetamine is a generic term describing a variety of central nervous system stimulants. Over the short run they can be used to improve psychomotor functions, enhancing the ability to perform repetitive tasks that generally cause fatigue or boredom. Long term use or abuse, however, can lead to "runs" or cycles of abuse and abstinence, interfering with psychomotor or recognitional skills. Other side effects include drug hangovers, "crashing," "rebound" depressions, and insomnia, which can interfere with physical and mental stability. Symptoms include hyper-excitability, recklessness, talkativeness, insomnia and violence. Physical symptoms can include nausea, vomiting, diarrhea, cramping, headache, hypertension, pallor, and palpitations. Hawks and Chiang indicate that amphetamines leave the system within 24-48 hours after use. However, they caution that an immunoassay screen test may not be able to distinguish amphetamines from certain chemicals found in common dietary aids and cold remedies. Thus, they recommend that a positive immunoassay should be confirmed by a chromatography test.

[1] *Town of Fairhaven*, 20 MLC 1343 (1994).
[2] *Railway Labor Executives Association v. Skinner*, 109 Sup. Ct. 1402 (1989).
[3] *National Treasury Employees Union v. Von Raab,* 109 S. Ct. 1384 (1989).
[4] *Guiney v. Police Commissioner of Boston*, 44 Mass. 328, 582 N.E. 2d 523 (1991).
[5] *See Harman v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), in which the Court ruled that random drug testing is only permissible for Department of Justice employees with top secret security clearances; *American Federation of Government Employees v. Cavazos*, No. 89-0775 (D.DC 7-26-89); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), cert. denied by U.S. Supreme Court (11/13/89).
[6] *Horseman's Benevolent and Protective Assn. v. State Racing Commission,* 403 Mass. 692, 532 N.E.2d 644 (1989).
[7] *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), cert. denied, 479 U.S. 986 (1986).
[8] *Horsemans* at 523 N.E. 650.
[9] *See Horsemans* page 650-651, footnote #3.
[10] *Guiney v. Police Commissioner of Boston*, 411 Mass. 328, 582 N.E. 2d 523 (1991).
[11] *Guiney v. Roache*, 873 F. 2d 1557 (1st Cir.) cert. denied, 493 U.S. 963 (1989).
[12] *Bally v. Northeastern University*, 532 N.E.2d 49 (1989).
[13] *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988).
[14] *Star Tribune, Division of Cowles Media Company*, 295 NLRB No. 63 (1989).
[15] *City of Boston*, 13 MLRR 1177, 13 MLC 1706 (1987).
[16] *O'Connor Jr. v. Police Commissioner of Boston,* 408 Mass. 324, 557 N.E.2d 1146 (1990).
[17] *Gauthier v. Police Commissioner of Boston*, 408 Mass. 335, N.E.2d (1990).
[18] *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 520 (1984).
[19] *Town of Fairhaven,* 20 MLC 1343 (1994).
[20] *See Johnson-Bateman Company*, 295 NLRB No. 26 (1989) which held *that mandatory drug testing is a mandatory subject of bargaining. Compare Star Tribune, Division of Cowles Media Company*, 295 NLRB 63 (1989) in which the NLRB concluded that applicant testing is not a mandatory subject of bargaining. *Further, see American Postal Workers Union, AFL-CIO, Boston Metro Area v. Frank, et al*, Civil Action No. 87-1264 - MC (April 20, 1990) in which the Federal District Court denied a union injunctive relief against urinalysis testing of applicants for

positions in the Postal Service. The Court held that such testing is a condition of employment. However, the government has a legitimate objective of "seeking a drug free workplace," and thus, the Court denied the union's motion for a preliminary injunction, concluding the union did not have a reasonable likelihood of prevailing on the merits.

[21] *Town of Dedham*, 10 MLC 1252 (1983).

[22] *Boston School Committee* 3 MLC 1603 (1977).

[23] *Town of Dedham*, 10 MLC 1252 (1983).

[24] *Town of* Danvers, 3 MLC 1559 (1977).

[25] *Town of Fairhaven* 20 MLC 1344 (1994).

[26] *Town of Danvers* 3 MLC 1559 (1977).

[27] *Town of Ayer, 9* MLC 1376 (1982), aff'd sub nom. *Local 346, National Brotherhood of Police Officers v. Labor Relations Commission*, 391 Mass 429 (1984).

[28] *Guiney v. Commissioner of Boston,* 411 Mass 328 (1991).

[29] Guiney v. Commissioner of Boston, 408 Mass 324 (1990).

[30] *Gauthier v. Police Commissioner of Boston,* 408 Mass 335 (1990).

[31] *O'Connor*, 408 Mass at 333, fN.1.

[32] *See* M.G.L. c. 233, § 78.

[33] *Wright & Miller*, Federal Practice and Procedure § 4928.

[34] 14 of the Massachusetts Declaration of Rights. *See Guiney v. Police Commr. of Boston*, 411 Mass. 328, 333-334 (1991).

[35] *See* 21 CFR 1308.

CHAPTER 15 - REPRESENTATION AND THE BARGAINING UNIT

The public employer in Massachusetts will face a number of issues pertaining the composition of the bargaining unit. These issues include: the proper place for supervisory personnel (including, in some cases, managers such as the fire or police chief), challenges to the existing bargaining unit, representation proceedings and elections, unit membership of part-time or casual employees, etc. Unit composition issues have an effect on the entire bargaining relationship, and often influence the tenor and progress of individual negotiation sessions.

M.G.L. c. 150E (The Law) grants the Labor Relations Commission (LRC or Commission) the power to establish regulations for representation elections and criteria for appropriate bargaining units. The LRC is required to take into account the following criteria for bargaining units in particular: community of interest, efficiency of operations and effective dealings, and safeguarding the rights of employees to effective representation.

Certain municipal employees may be exempt from the provisions of c.150E. For example, in a 2001 Appeals Court decision involving City of Somerville, the city clerk and assistant city clerk were found to be "judicial employees" and thus exempt from the collective bargaining statute. It is unlikely that any police department employees would be similarly excluded.[1]

PRACTICE POINTERS

It is important for management to understand the difference between the "bargaining unit" and the "union" or "association". The former is a group of positions or job titles. The latter two are membership organizations that may represent a bargaining unit for contract negotiations and for other mutual-aid labor relations purposes. For example, in a police department there might be one bargaining unit comprised of police officers, e.g. and sergeants, and another for superior officers -- lieutenants and captains. When a majority of the members of a bargaining unit vote for a certain exclusive bargaining representative, that union or association will represent all the members in that unit for collective bargaining purposes. It is possible that one or more members of a bargaining unit will not be members of a union or association.

§ 1 SELECTING AN EMPLOYEE REPRESENTATIVE[2]

There are two main procedures for establishing a bargaining representative. First, the Law allows a public employer to voluntarily recognize an employee organization designated by a majority of employees in the bargaining unit as the exclusive bargaining representative.[3] Second, the LRC is empowered with the authority to conduct hearings and elections.[4]

A. VOLUNTARY RECOGNITION

The procedures of the LRC provide:

> [N]o petition for an election will be processed by the Commission . . . in any represented bargaining unit or any subdivision thereof with respect to which a recognition agreement has been executed in accordance with the provisions of this subsection in the preceding twelve-month period.[5]

Note: A sample form is included in the Appendix (Form 1).

In addition to barring any elections for the year subsequent to the employer's voluntary recognition, the procedures also specify several preconditions to voluntary recognition:

- The employer must believe in good faith that the employee organization was freely selected by a majority of the unit employees;
- The employer must have posted a notice on the employee bulletin board for a period of twenty (20) consecutive days advising the unit members of the employer's intent to grant voluntary recognition without an election;
- The employer must not grant voluntary recognition if another union seeks to represent the employees and files a petition for certification with the LRC; and
- The recognition must be in writing and describe specifically the bargaining unit involved.

Should the employer choose to voluntarily recognize a union even though it has not followed the foregoing procedures, the voluntary recognition will not operate as a bar to a subsequent election.[6]

PRACTICE POINTERS

When a union or association is interested in representing a new bargaining unit (a rare situation in public safety departments today), the employer has an opportunity to influence the composition of the unit more than may be the case if the matter proceeds to the LRC for certification and election. In an effort to avoid the cost and uncertainty of a certification and election, the union may be inclined to grant some concessions. Excluding certain positions from the unit is worth discussing. Likewise, the creation of a separate superior officers unit may be appropriate. Also, even though regular part-time employees (reserves, specials, etc.) are eligible for inclusion (and probably will be if the LRC is involved), an agreement may be reached to leave them out in exchange for voluntary recognition.

B. REPRESENTATION PETITION PROCEDURES AND HEARINGS

In the event that multiple employee organizations petition to represent the employees of the bargaining unit, or the employer decides not to grant voluntary recognition for any reason, then the Law establishes a second method of selecting the bargaining representative. Section 4 of the Law specifies that the Commission, upon receipt of an employer's petition alleging that one or more employee organizations claims to represent a substantial number of employees in a bargaining unit, or . . . an employee organization's petition that a substantial number of the employees in a bargaining unit wish to be represented by the petitioner, or . . . a petition filed by or on behalf of a substantial number of employees in a unit alleging that the exclusive representative therefore no longer represents a majority of the employees therein, shall investigate, and if it has reasonable cause to believe that a substantial question of representation exists, shall provide for an appropriate hearing upon due notice.[7]

Thus, the Law provides that an employer may initiate representation proceedings, and that the employees themselves may petition for decertification of an existing representative, in addition to allowing any interested employee organizations to petition for certification.[8] The Commission requires that both the employer and the petitioning employee organizations inform the Commission of any other organizations which may have an interest in representing the employees. Specifically, the Commission's regulations require:

- the employer to provide the names and addresses of all employee organizations known to have claimed recognition as representatives of a substantial number of employees [in the proposed bargaining unit], giving the date of each claim;[9] and

- the employee organizations to provide the names and addresses of all employee organizations known to represent or known to claim to represent any of the employees in the bargaining unit claimed to be appropriate.[10]

The failure to inform an interested union of the representation proceedings may temporarily delay the process until that union has the opportunity to participate. In *Fall River School Committee*, the Commission went as far as staying the election and re-opening the hearing because a union which represented the teachers was not notified of the representation proceedings involving employees of the Title 1 program.[11]

In addition to the notice requirement, the Commission's Rules also require that the employee organization demonstrate sufficient interest by the employees, specifically that 30% of the unit employees designate the employee organization as the preferred exclusive bargaining representative.[12] In presenting the showing of interest, the employee organization may rely on an employer-supplied list of employees that none of the parties may challenge unless it is shown not to correlate reasonably with the size of the unit.[13]

During the proceedings, the employer is under a duty to remain absolutely neutral and not favor any union petitioning for certification. This duty extends to refraining from engaging in collective bargaining during the proceedings.[14] The Commission adopted this policy in *Commonwealth of Massachusetts*, in which it cited to the National Labor Relations Board decision *Midwest Piping and Supply Co.*[15] In *Midwest Piping*, the NLRB reasoned that engaging in collective bargaining during representation proceedings interfered with employee free choice and constituted impermissible assistance to one of the unions vying for selection.[16]

Both the parties involved in the representation proceedings and the petition itself may be altered in a limited fashion during the proceedings. The Commission permits amendments to the original petition (as long as the amendment does not seek a substantially larger unit),[17] and permits a labor organization to intervene in the representation proceedings with a 10% showing of interest.[18] Similarly, the Commission allows an incumbent union to disclaim further interest in representing the unit, and to have its name removed from the ballot, as long as the request does not cause additional expense to the LRC, cause confusion among voters, prejudice any party, or interfere with the fair conduct of the election.

The next stage in the proceedings involves the determination of the bargaining unit.[19] If a substantial question of representation exists, the Commission may order an evidentiary hearing to examine the issues raised in the petition.[20] The parties may bypass the hearing by stipulating to an appropriate bargaining unit through a Consent Election

Agreement,[21] but the LRC is under no obligation to accept the stipulation by the parties if it believes that unit may not be appropriate.[22]

PRACTICE POINTERS

An employer may be able to influence the makeup of a bargaining unit at the certification petition stage, but to a lesser degree than during the voluntary recognition process. The suggestion that a supervisors' unit be created is appropriate at this time. Also, if some positions are filled with confidential employees (deputy, the chief's aide, chief's secretary, etc.) this should be made known to the Commission's representative as well.

C. BARS TO PROCESSING THE CERTIFICATION PETITION

Section 14.06(1)(b) of the Commission's regulations, 456 CMR 14.06(1)(b), states:

> Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of an existing valid collective bargaining agreement, unless such petition is filed no more than 180 days and no fewer and 150 days prior to the termination date of said agreement, provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

The purpose of the contract bar rule in this context is to establish and promote the stability of labor relations and to avoid instability of labor agreements, in part, by ensuring that both labor and management know which positions are included in the bargaining unit covered by their collective bargaining agreement.[23]

A petitioner overcomes the contract bar rule by establishing that: 1) the disputed position is newly created; or 2) the job duties of the disputed position have changed significantly since the effective date of the collective bargaining agreement.[24]

Several factors may operate as a bar to the processing of a certification petition. The first is the *certification bar*, which prohibits the processing of

a petition in the one-year period following the certification of a union.[25] The second is the *contract bar*, which bars the processing of a petition during the term of the collective bargaining contract. Commission Rule 14.06(1) provides that a petition must be filed during the "open period" of 180 to 150 days prior to the expiration of a contract. Finally, a pending prohibited practice charge may *block* the processing of a petition pursuant to Commission Rule 15.12. A party seeking to "block" the election must make a motion to that effect and show that the alleged unlawful conduct would interfere with the conduct of a valid election.[26] Upon receiving evidence of a pending prohibited practice charge, the Commission will postpone the representation case until the charge is resolved, in order to ensure that certain employee rights are not violated and that the litigation does not interfere with the election proceedings or results.[27]

For a collective bargaining agreement to bar the processing of a representation petition, the evidence must establish the existence of a complete and final agreement signed by all parties prior to the filing date of the rival petition. To be complete, an agreement must contain substantial terms and conditions of employment and may not be conditioned upon further negotiations. If an agreement is contingent upon ratification, it must be ratified before the rival petition is filed for the Commission to determine that the agreement is final.[28]

Although the Commission has discretion to waive the contract bar rule, exceptions to that rule are rarely found.[29] Generally, exceptions must be based on evidence of substantial disruption in bargaining relationships and threats to labor stability.[30]

The *contract bar doctrine* has been litigated the most frequently of the various bars to processing a petition, given the rather narrow window of opportunity. A petition must be actually received at the Commission's office within the 180 to 150 day period,[31] but a petition filed on the 150th day is timely[32]. The LRC will not consider a petition "filed", however, until the petition is accompanied by a showing of interest.[33] In order for the contract bar rule to become operative, the parties must have a "complete and final agreement" to which all parties have acquiesced by means of a signing.[34] To be "final", an agreement which is subject to ratification (by the union membership or by the employer) must be ratified prior to the filing of the petition,[35] but need not necessarily have been funded.[36] To be considered "complete", an agreement must embody the substantial terms and conditions of employment.[37]

The application of the contract bar doctrine is discretionary, so that the LRC will decide whether or not it is appropriate based on considerations of fairness and stability of the collective bargaining process.[38] A party may waive the doctrine, but the LRC has not allowed waiver of the doctrine if the employees are merely dissatisfied with their representation or if the motivation for the petition implicates internal union politics.[39]

Further, the existence of an automatic renewal clause in the contract (an "evergreen" clause) will not operate as a bar to the processing of a petition where one of the parties has indicated a desire to reopen negotiations,[40] even though the contract terms remain operative during the negotiations.[41] In *City of Somerville*, the Commission decided that an incumbent employee organization's expressed desire to negotiate changes and revisions in the existing contract that was received by the public employer immediately preceding the automatic renewal date provided for in the contract prevented that contract's renewal for contract bar purposes, despite any provision or agreement for its continuation during negotiations, and regardless of the form of notice.[42]

D. ELECTION PROCEDURES

The Commission may determine the proper procedures governing the representation election, including the type of balloting (on-site or mail in),[43] and the manner in which each union's name appears on the ballot[44]. When the Commission issues an order directing an election, it will specify the voter eligibility cut-off date; an employee who has a reasonable expectation of continued employment on that date and on election day is eligible to vote in the election.[45]

In the event of a dispute over voter eligibility, the Commission has adopted the NLRB's test of examining the regularity of the employee's work history for the 13 weeks prior to the eligibility cut-off date.[46] Part-time employees can be considered "regular" employees for the purpose of voter eligibility depending on the number of hours worked, the frequency of the assignments, and the method of establishing the employee's work schedule.[47] A "regular" part-time employee is deemed to have sufficient community of interest with the other members of the bargaining unit to justify his or her inclusion in the unit.[48] Further, the employer's inclusion of a particular employee on an eligibility list does not preclude the employer from later challenging that employee's eligibility.[49] Commission Rule 14.02 allows any party to challenge voter eligibility, but the Commission will refuse to certify the election pending an investigation only if the number of challenged ballots will affect the outcome of the election.[50]

As a general matter, the Commission has established procedures for a party to challenge the conduct of an election. Commission Rule 14.12(3) requires that a party file objections to the election within seven days of the tally of the ballot; only a party in interest may object to the election. [51] The Commission will hold a hearing on the objections only if the objecting party satisfies its initial burden of providing evidence of material factual issues which would warrant the setting aside of the election.[52] If no timely objections are filed (and the number of challenged ballots is insufficient to

affect the outcome of the election), the Commission will certify the results of the election.[53]

There are several particular objections commonly made by parties regarding an election. One category of objections involves factual misrepresentations made by a petitioning union; however, the Commission will not set aside an election because of a misrepresentation unless "a party has substantially misrepresented a highly material fact, the truth of which lies in the special knowledge of the party making the representation."[54] In *Boston Water and Sewer Commission*, the LRC found that one union's letter to unit employees, disparaging a rival union's tactics in obtaining signature cards, was not sufficient grounds for overturning the election based on misrepresentation.[55] The Commission held that where there was no evidence that the statements were false, or that the employees did not have other information by which to evaluate the truth of the letter, the misrepresentation was not significant enough to taint the election process and warrant a new election.[56] In this case and others, the Commission has refused to overturn an election merely because of "campaign puffery" or exaggerated union propaganda.[57]

Another possible challenge to the election process involves access to campaign literature. In *Mass. Board of Regents*, the LRC observed that employees have the right to organize a union at work and to distribute union literature; employees also have an associated right to observe and read such literature.[58] While an employer may regulate the posting of *all* non work-related literature on employer bulletin boards, it must do so in a content-neutral fashion, and may not target, prohibit, or regulate only union literature while allowing other personal postings.[59] Similarly, an employer may not prohibit distribution of *union* literature during work time while allowing other types of literature to be distributed; moreover, an employer may not prohibit such activity outside of work areas or on breaks.[60] The Commission does not allow, however, any campaigning in the actual election polling areas.[61]

A party to an election may also challenge the form and substance of the ballots themselves. Upon receipt of a challenge, the Commission will examine the reproduced sample ballot to determine whether it could have misled employees to believe that the Commission appeared to favor one of the unions listed.[62] The LRC will consider such factors as the appearance of the marked ballot and the manner in which it was disseminated.[63] The number of persons who in fact viewed the altered ballot is also relevant.[64]

Inaccuracies in the voter eligibility list can also be grounds for an election challenge, but only where the errors were sufficiently numerous or prejudicial.[65] The LRC has held that leaving 14% of the eligible voters' names off of the eligibility list is sufficiently numerous to warrant a new election.[66]

A public employer must avoid any involvement in or interference with either the election process or in the employees' exercise of their rights to form and join a union.[67] A public employer violates § 10(a)(1) of the Law and commits a prohibited practice if it interferes with the employees in the free exercise of their rights under Section 2 of the Law.[68]

PRACTICE POINTERS

A municipal employer is not required to sit idly by while one or more unions campaign for employees' votes in an upcoming election. Efforts at persuading employees not to vote for any bargaining representative are lawful and very appropriate. This can be done on or off-duty at employee meetings on an individual or group basis. Mailings, posters and brochures, similar to a political campaign, are allowed.

Often, the motivating force behind a move towards unionization was some action (or inaction) by a municipal board or legislative (funding) body. By asking employees "why", the employer may be able to rectify the situation and avoid having a majority of the employees vote to select a bargaining representative.

NOTE: *One of the boxes on all election ballots is "NO UNION"!*

§ 2 ESTABLISHING THE BARGAINING UNIT

The second part of the representation issue involves defining the "appropriate" bargaining unit. While the parties may stipulate to an appropriate bargaining unit, the Commission retains the authority to make a final determination based on statutory and public policy considerations.[69] The Commission also has established precedents for dealing with certain types or groups of employees (supervisors, managers, professionals, etc.). Though these bargaining unit composition issues first arise when the unit is formed, compositional challenges may also arise later in the parties' bargaining relationship if conditions have changed since the unit was certified or voluntarily recognized.

Section 3 of the Law requires the Commission to determine appropriate bargaining units consistent with the fundamental purpose of providing for stable and continuing labor relations, while giving due regard to the following tripartite statutory criteria: 1) community of interest; 2) efficiency of operations and effective dealings; and, 3) safeguarding the rights of employees to effective representation. To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and similarity of training and experience.[70] No single factor is outcome determinative.[71]

Under the second and third statutory criteria, the Commission considers the impact of the proposed bargaining unit structure upon the employer's ability to effectively and efficiently deliver public services, while safeguarding the rights of employees to effective representation. The Commission complies with these directives by placing employees with common interests in the same bargaining unit, thus avoiding the proliferation of units that place an unnecessary burden on the employer, while maximizing the collective strength of employees in the bargaining relationship.[72]

The Commission has broad discretion in determining appropriate bargaining units. If a petition describes an appropriate unit, the Commission will not reject it because it is not the most appropriate unit, or because there is an alternative unit that is more appropriate.[73] Here, however, the petitioned-for bargaining unit must be rejected because it conflicts with the Commission's well-established policy of including all regular part-time employees in the same bargaining unit as full-time employees with whom they share a community of interest.[74]

The Commission has long acknowledged the importance of establishing the largest unit of employees who share a community of interest and concomitantly avoiding small fragmented units.[75]

In the 2002 case of *Lynn School Committee*, the Petitioner sought to establish a bargaining unit consisting solely of unrepresented, non-confidential secretaries employed by the School Committee.[76] However, the LRC found that the Petitioner's proposed unit was inappropriate because it was under inclusive. Even if the Commission were to accept the parties' stipulations that the secretaries at issue are not confidential employees under the Law, the LRC noted that the petitioner was attempting to establish a bargaining unit of clerical employees when AFSCME already represented a bargaining unit of clerical employees employed by the School Committee. The Commission has declined to approve the creation of small separate units where there are existing units whose members share a community of interest with the employees seeking the separate unit.[77] Further, the Commission has declined to establish two separate units for employees who perform similar functions under similar working conditions, finding that the creation of a dual unit structure was incompatible with its statutory goal of structuring units to provide for stable labor relations.[78]

Moreover, the Commission pointed out that a residual unit of unrepresented, non-confidential secretaries is likewise an inappropriate unit. A residual bargaining unit is generally composed of all of an employer's unrepresented employees who are not easily classified into a particular group.[79] However, the Commission will not include employees in a residual unit where there are other units in which the employees more appropriately belong.[80] In a residual unit of

unrepresented secretaries would be an inappropriate unit when another union already represents a group of clerical employees with whom the secretaries share a community of interest. Furthermore, the commission found there was no evidence that the unrepresented, non-confidential secretaries are the only remaining unrepresented employees of the School Committee.[81]

Finally, the LRC noted that the petition would not operate to place the unrepresented secretaries into the bargaining unit of clerical employees represented by AFSCME. AFSCME's role with respect to the petition was that of an intervenor. AFSCME did not file a petition to represent the secretaries, and thus an add-on election would not be procedurally appropriate in the case.[82] Therefore, although the LRC recognized that the unrepresented secretaries, assuming they are non-confidential, may be entitled to collective bargaining rights under the Law, an election in a small unit of secretaries would not effectuate the purpose of the Law.

Two petitions by the Mashpee Police Association to represent one unit comprised of police officers and one of sergeants in Mashpee was deemed proper over the objection of the IBPO that had been representing a unit composed of both ranks.[83] Similarly, the Natick Police Officers Association was successful in having an election scheduled for a unit of only patrol officers over IBPO's objection, where the latter had been representing such officers.[84]

A. STATUTORY CRITERIA FOR BARGAINING UNITS

Section 3 of the Law provides:

> The commission shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining units which shall be consistent with the purposes of providing for stable and continuing labor relations, giving due regard to such criteria as community of interest, efficiency of operations and effective dealings, and to safeguarding the rights of employees to effective representation.[85]

The Commission, in determining the appropriate bargaining unit, must take into account these statutory criteria, not merely the views of the parties.[86] In this respect, Massachusetts public employee labor law differs from the law governing private employers pursuant to the National Labor Relations Act. Once a private employer and an employee organization enter into an agreement stipulating to the composition of the bargaining

unit, the [National Labor Relations] Board may not alter the unit; its function is limited to construing the agreement according to contract principles, and its discretion to fix the appropriate bargaining unit is gone.[87]

The difference between federal private employer labor law and Massachusetts public sector labor law apparently stems from the language of the relevant statutes: the Massachusetts statute specifically empowers the LRC to determine the appropriate units, and requires due regard for the enumerated criteria in all cases.[88]

Section 3 of the Law requires the Commission to determine appropriate bargaining units that are consistent with the purposes of providing for stable and continuing labor relations while giving due regard to the following statutory considerations: 1) community of interest; *2)* efficiency of operation and effective dealings; and *3)* safeguarding the rights of employees to effective representation.[89] To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and similarity of training and experience.[90] No single factor is outcome determinative.[91]

Under the second and third statutory criteria, the Commission considers the impact of the proposed bargaining unit structure upon the employer's ability to effectively and efficiently deliver public services, while safeguarding the rights of employees to effective representation. The Commission applies these factors by placing employees with common interests in the same bargaining unit, thus avoiding the proliferation of units that places an unnecessary burden on the employer, while maximizing the collective strength of employees in the bargaining relationship.[92] The Commission has broad discretion in determining appropriate bargaining units. If a petition describes an appropriate unit, the Commission will not reject it because it is not the most appropriate unit, or because there is an alternative unit that is more appropriate.[93] The proposed unit must only be an appropriate unit, not the most appropriate unit.[94] The Commission's consideration of efficiency of operations and effective dealings has created a policy of historically favoring broad, comprehensive units over small, fragmented units.[95]

1) Community of Interest[96]

The first criterion required under Section 3 of the Law for determining the appropriate bargaining unit is community of interest. The National Labor Relations Board (NLRB) early recognized this principle as essential to a proper bargaining unit in the private sector, and many of its decisions hinge on this factor.[97] The Board arrives at a determination that the employees share a

community of interest if they satisfy a number of other, more specific considerations. Thus, in *NLRB v. Saint Francis College*, the Third Circuit traced the NLRB's more particular criteria under the community of interest heading:

(1) the similarity in the scale and manner of determining earnings;

(2) similarity in employment benefits, hours of work, and other terms and conditions of employment;

(3) similarity in the kind of work performed;

(4) similarity in the qualifications, skills and training of the employees;

(5) frequency of contact or interchange among employees;

(6) geographic proximity;

(7) continuity or integration of production processes;

(8) common supervision and determination of labor-relations policy;

(9) relationship to the administrative organization of the employer;

(10) history of collective bargaining;

(11) desires of the affected employees;

(12) extent of union organization.[98]

To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision, work contract and similarity of training and experience.[99] No single factor is outcome determinative.[100] Further, members of a bargaining unit need share only a community of interest rather than an identity of interest.[101] The Commission places employees with common interests in the same bargaining unit to avoid a proliferation of units that would place an unnecessary burden on the employer and to maximize the collective strength of employees in the bargaining relationship.[102] The Commission's preference for broad comprehensive units is balanced by the Commission's concern that

a unit should not include employees so diverse as to produce inevitable conflicts in the collective bargaining process.[103] Only significant differences that would result in inevitable conflicts constitute a basis for excluding employees from a bargaining unit on the grounds that the employees lack a community of interest with other bargaining unit members.[104]

Section 3 of the Law requires the Commission to determine appropriate bargaining units consistent with the fundamental purpose of providing for stable and continuing labor relations, while giving due regard to the following statutory criteria: 1) community of interest; 2) efficiency of operations and effective dealings; and 3) safeguarding the rights of employees to effective representation. To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, work contact and similarity of pay and working conditions, common supervision, work contact and similarity of training and experience.[105] Where applicable, the Commission also examines prior bargaining history, the centralization of management, particularly labor relations, and the geographic location of the employer's facilities in relation to one another.[106] No single factor is outcome determinative.[107]

Under the second and third statutory criteria, the Commission considers the impact of the proposed bargaining unit structure upon the employer's ability to effectively and efficiently deliver public services, while safeguarding the rights of employees to effective representation. The Commission complies with these directives by placing employees with common interests in the same bargaining unit, thus avoiding the proliferation of units that place an unnecessary burden on the employer, while maximizing the collective strength of employees in the bargaining relationship.[108]

In determining whether employees share a community of interest, the Commission examines whether the petitioned-for employees comprise a coherent group with employee interests sufficiently distinct from those of excluded employees to warrant separate representation.[109]

To satisfy the second and third statutory considerations, the Commission considers the impact of the proposed unit structure upon the public employer's ability to effectively and efficiently deliver public services, while safeguarding the rights of the public employees to effective representation.[110] The Commission satisfies these obligations by placing employees who share a community of interest in the same bargaining unit.[111] This avoids placing unnecessary burdens on the employer while maximizing the strength of public employees in the bargaining relationship.[112]

Where a community of interest exists among employees, differences in funding sources are insufficient to preclude placing the employees in a single bargaining unit.[113]

Similarly, concerns over seniority rights are not sufficient to destroy an existing community of interest among employees.[114]

In making its determination, the Board is not required to "choose the most appropriate unit but only to choose *an* appropriate unit within the range of several appropriate units in a given factual situation."[115] The Law requires that members of a bargaining unit share only a community of interest, not an identity of interest.[116] In weighing the various factors listed above, the Board has not followed a precise formula, but rather considers the full range of factors in the context of each particular case.[117] The guiding principle behind the community of interest doctrine is that all members of the bargaining unit will have essentially the same relationship with management as all the other members.

Examination of the Board's approach to the community of interest factor in the private sector assists in understanding the Labor Relations Commission's approach in Massachusetts. Employees share community of interest if they share common working conditions and interests which would be involved in collective bargaining, though complete identity of interests is not required.[118] Where more than one unit is created under the same employer, the party seeking a separate unit must show that the employees comprise a coherent group with interests sufficiently distinct from those of excluded employees to warrant separate representation.[119] In the *Boston School Committee* case, the LRC established several factors to be considered in evaluating the proper bargaining unit, including (1) common supervision, (2) similarity of work environments, (3) job requirements, (4) education, (5) training and experience, (6) job interchangeability, and (7) work contact between employees.[120] Failing to satisfy one or more of the above factors will not necessarily destroy diversity.[121]

Minimal differences do not mandate separate bargaining units where employees perform similar job duties under similar working conditions and share common interests amenable to the collective bargaining process.[122] Also, differences in funding sources for payrolls do not destroy an existing community of interest.[123]

Under the second and third criteria of the Law, the LRC considers the impact of the proposed bargaining unit structure upon the employer's ability to effectively and efficiently deliver public services while safeguarding the rights of employees to effective representation. The Commission complies by placing employees

with common interests in the same bargaining unit. This avoids the proliferation of units that place an unnecessary burden on the employer, while maximizing the bargaining strength of the employees.[124]

While a stipulation by the parties as to the appropriate bargaining unit is not dispositive,[125] the parties may stipulate to a particular job description for the purpose of providing evidence of community of interest.[126] Job descriptions alone, however, are not sufficient to determine placement in a particular unit where there has been no stipulation by the parties. Thus, in *Upper Cape Cod Regional Vocational-Technical School Committee*, the Commission determined that the position of Coordinator of Special Needs, a newly created position, could not yet be placed in the existing bargaining unit.[127] The LRC reasoned that the job description for the new position could not accurately reflect the actual duties to be performed on the job where the position had not yet been performed.[128] In a number of other cases, the LRC has required actual evidence of job duties in determining community of interest.[129]

The *Eastham School Committee* case provides a good example of the kind of analysis engaged in by the LRC in determining community of interest.[130] The School Committee had argued to the Commission that a unit comprised of both custodians and cafeteria employees was inappropriate based on a lack of community of interest.[131] In evaluating the various factors involved in a community of interest inquiry, the Commission found that the custodians and cafeteria workers shared common work locations, had frequent interchange, and shared common duties.[132] Further, none had ever been represented for collective bargaining purposes, and they were all treated the same with respect to wages, benefits, and performance evaluations. Thus, these similarities were sufficient to warrant placing the custodians and cafeteria employees in the same bargaining unit.[133]

Neither lawful recognition nor stipulations by the parties regarding an appropriate unit bind the LRC.[134] The Commission has modified previously-determined units which are no longer appropriate.[135] It does likewise when another unit is more appropriate.[136]

Although there are exceptions, the LRC does not favor placing maintenance and clerical employees in the same unit because of the differences in duties, interests and conditions of employment.[137]

2) Efficiency of Operations and Effective Dealings

The Commission favors broad, comprehensive units to facilitate the employer's efficiency of operations and to avoid the need to bargain

with too many distinct employee groups.[138] The efficiency of operations criterion also protects employees against excessive fragmentation of the work force and a corresponding dilution of employee power.[139] To determine the composition of the most efficient unit (taking into account the other criteria of community of interest and effective representation), the LRC will evaluate the employer's organizational structure, the method of delivering services, and fiscal administration.[140] Even where the employer fails to raise an objection to a proposed unit on the basis of efficiency, a hearing officer may independently determine that sufficient community of interest exists to mitigate against creating multiple units.[141] Thus, the community of interest criterion tends to merge with the efficiency criterion in situations where the employer's structure and the similarities of employees' jobs both favor larger units.[142]

3) Safeguarding Employee Rights to Effective Representation

This criterion was intended to limit conflicts of interest between bargaining unit members in negotiating and administering the collective bargaining agreement.[143] The Commission will examine the bargaining history of the parties[144], the desires of the affected employees[145], the current extent of organization[146], and the characteristics of the particular work force[147]. Again, the Commission also tends to examine the community of interest factor in conjunction with the effective representation criterion, in recognition of the fact that employees who have disparate interests cannot be effectively represented within the same unit.

B. POLICY CONSIDERATIONS

The Commission, in addition to following the statutory criteria, has adopted several general policy considerations in determining the appropriate bargaining unit.

1) Commission Discretion

The Commission has broad authority and discretion to determine appropriate bargaining units.[148] The proposed unit need only be *an* appropriate unit, not *the most* appropriate unit.[149] For this reason, the courts generally respect the LRC's determination of an appropriate bargaining unit, and review of such a determination by a state court is extremely limited.[150] The Commission's finding of an appropriate unit will not be questioned by the courts unless: (1)

the Commission has exceeded its authority, (2) there was an extraordinary reason for varying the usual procedure for judicial review, or (3) there was risk of special injury to the public interest or inconvenience to the employer.[151]

2) Broad, Comprehensive Units

As noted earlier, the Commission favors broad comprehensive units over smaller, fragmented ones.[152] As long as the employees share a community of interest, the Commission will generally chose a large unit over multiple smaller ones when deciding between various unit structure proposals.[153] As a result of this policy, the Commission will only allow a one-person unit where no other solution is possible.[154] Even where the Commission saw a sergeant as being better suited for a supervisory bargaining unit, it added the position to a new unit including police officers, since there was only one sergeant in the small police department.[155] Similarly, when presented with a petition involving four dispatchers and a supervisor at the Devens Dispatch Center, the Commission reached a similar result.[156] The Commission reiterated that it does not favor one-person supervisory bargaining units, citing several decisions since 1998.[157]

3) Part-Time Employees

The Commission has consistently held that employees other than regular full-time employees are entitled to coverage under the Law.[158] Further, the existence of rights under the Law is not conditioned on an arbitrary number of hours worked.[159] Rather, the Commission examines factors like continuity of employment, regularity of work, the relationship of the work performed to the needs of the employer, and the amount of work performed by the employees in determining whether a part-time employee's relationship to their employer is too casual to warrant their inclusion in a bargaining unit.[160] No one factor is dispositive. [161]

Applying this analysis on a case-by-case basis, the Commission has accorded collective bargaining rights to part-time employees who work infrequently, but regularly, and included them in a bargaining unit of full-time employees with whom they shared a community of interest. Generally, the number of hours a part-time employee must work to be treated as a regular, part-time employee varies from industry to industry, and from workplace to workplace.[162] For example, the Commission has extended collective bargaining rights to clerks who attend and compile the official record of one monthly municipal board meeting;[163] dispatchers who work one eight (8) hour

shift every twelve (12) days;[164] reserve police officers who work an average of two (2) or more shifts per month;[165] substitute teachers who work sixty (60) days or more during the course of a school year;[166] police patrol officers who work between eight (8) and twenty (20) hours each week;[167] library pages who work nine (9), ten (10), fourteen (14), and sixteen (16) hours per week;[168] and, matrons who work one and one-half days per week.[169]

In a 2003 case involving the Sturbridge Fire Department, the Commission rejected the parties' recommendations and established a unit compressed of regular fire fighters as well as part-time fire fighters/EMT's, regardless of rank, who regularly perform weekend shift duty, respond to calls, and attend the department's monthly drills.[170]

4) Regional Units

A residual unit is generally composed of all of an employer's unrepresented employees who are not easily classified into a particular group.[171] Usually the Commission does not include employees in a residual unit where there are other units in which such employees more appropriately belong.[172]

The Commission agreed to a residual unit of a small town's clerical employees and civilian dispatchers.[173]

5) Unit Stipulation and Employee Preference

When the issues raised by a representation petition are resolved by the parties' stipulation, the Commission will adopt the stipulation, if it does not conflict with either the Law or established Commission policy.[174] Here, the parties' stipulation to exclude regular part-time patrol officers and sergeants on the ground that they do not exist conflicts with the Commission's well-established case law and policy to include in the same bargaining unit regular part-time employees who share a community of interest with full-time employees.

Even though the parties stipulated that there are no current part-time sergeants or patrol officers the LRC in a 2002 case involving the Grafton Police Department found that this did not warrant the exclusion of "regular part-time" language from the bargaining unit description.[175] Therefore, it declined to adopt the parties' stipulation that would arbitrarily exclude regular part-time employees.

As noted above, the parties' stipulation to the composition of the bargaining unit is never dispositive, but the Commission may elect to approve the stipulation as long as it satisfies the statutory

criteria, and does not conflict with established Commission policy or practice.[176] The Commission generally will not reject the stipulation merely because there exists an equally or more appropriate unit, as long as the stipulation itself reflects an appropriate unit.[177]

Other factors such as employee wishes and prior bargaining history may inform the inquiry into an appropriate unit, but do not have controlling weight.[178] The Commission will take notice of employee preference where the position at issue is professional.[179] Similarly, the LRC will look at the parties' established practice with respect to a particular position. Thus, in *City of Boston*, the Commission found that EMT's should be placed in a unit separate from the city-wide bargaining unit, given that at the time the original unit was formed, the City had not employed EMT's.[180] Further, from the time the City began employing the EMT's, those employees had petitioned successfully for a separate local and thus had not established a bargaining history with the City. This lack of bargaining history, coupled with the uniqueness of the EMT position, warranted a separate unit.[181]

C. POSITIONS REQUIRING SPECIAL CONSIDERATION

1) Excluded Employees

Certain classes of employees are excluded from protection under the Law and thus are excluded from membership in a bargaining unit.[182] Rarely will positions be excluded based on a determination that they are not employees at all. However, this was the case in the 1998 LRC case of *City of Boston*.[183] There the City's parking clerks were found to be independent contractors. They had employment contracts, received no benefits and, after some initial training, received little supervision. The Law specifically excludes the following employees from coverage:

> elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees. . . .[184]

Thus, the classification of a position as confidential or managerial can have serious implications on the affected employees with respect to statutory labor protections, and the LRC consequently

has been extremely cautious in defining and classifying positions as managerial or confidential. In its 1997 decision, the SJC upheld the role of the LRC in determining whether positions should be excluded from coverage under the Law.[185] In that case the MBTA alleged that by placing certain superior officers on its "executive payroll", this precluded the Commission from looking at their actual job functions.

PRACTICE POINTERS

While the statute appears to exclude from bargaining unit eligibility all department heads, this is not how the Commission interprets the language. It is not uncommon for the heads of smaller water, sewer, highway or similar positions to be included in a bargaining unit composed of Department of Public Works (DPW) employees. A growing trend seems to be the creation of a department heads' bargaining unit. Some include the heads of the library, health department, DPW, accountant, treasure/collector, and, in certain cases, the police and/or fire chief. It is possible that such units could be objected to by municipal employers. Where, however, voluntary recognition had been granted, the Commission declined to remove a police chief while a contract was in effect.

Except in the smallest police departments where the chief functions more like a patrol officer, it is unlikely that the Commission would place a police chief in a bargaining unit over the objections of the municipal employer. However, if voluntary recognition could be secured, the Commission would not be compelled to undo the arrangements, especially while a contract was in effect.

1. Managerial

Section 1 of M.G.L. c.150E, sets forth the criteria for determining whether an employee is a managerial employee:

> Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

Under Section 3 of the Law, an employee must be excluded from an appropriate bargaining unit if the employee's actual duties and responsibilities satisfy any one of the three statutory criteria.[186]

To be considered a managerial employee, the scope of the employee's discretion in formulating policy must be significant in relation to the mission of the public entity or the employee's decisions must have an impact on a significant aspect of the public entity.[187] To participate to a substantial degree in formulating policy includes not only the authority to select and implement a policy alternative but also regularly participating in the policy decision-making process.[188] Thus, it does not include employees who merely provide some input necessary for the development of policy, but who do not otherwise participate meaningfully in the decision-making process.[189] Merely consulting in formulating policy or periodic discussions with higher administrators on policy matters is not enough to make one a managerial employee.[190]

Under the second part of the statutory definition, a person must participate to a substantial degree in preparing for or conducting collective bargaining. Identifying problem areas to be discussed during bargaining, or merely consulting about bargaining proposals is insufficient to satisfy this second criterion. Rather, the employee must either participate in actual negotiations, or be otherwise involved directly in the collective bargaining process by preparing bargaining proposals, determining bargaining objectives or strategy, or having a voice in the terms of settlement. [191]

Under the third criterion, the Commission has determined that the words "independent judgment" require that the employee exercise discretion without consultation or approval.[192] A coincidence of recommending and acceptance by a higher authority is insufficient.[193] To be "substantial," the responsibility must not be perfunctory or routine, it must have some impact and significance.[194] Finally, the appellate authority must be exercised beyond the first step in a grievance-arbitration procedure.[195] The exercise of supervisory authority to insure compliance with the provisions of a collective bargaining agreement is insufficient, standing alone, to satisfy this third criterion. [196]

In interpreting and applying these statutory criteria in *School Committee of Wellesley v. Labor Relations Commission*, the Supreme Judicial Court upheld the LRC's conclusion that certain administrative personnel (including principals, assistant principals, directors, coordinators, department heads and others) were not managerial within the meaning of the Law.[197] First, the Supreme Judicial Court (SJC) held, a managerial employee must have substantial participation in formulating policy.[198] The Court in *Wellesley* stressed that such policy decisions "must impact a significant part of the public enterprise" and have a close relation to the primary objective of the public enterprise.[199] Participation which is only

"advisory" in nature was held to be insufficient for classifying an employee as managerial. Second, the managerial employee must substantially assist in conducting collective bargaining, and be directly involved in preparing and formulating the employer's proposals.[200] Finally, the managerial employee must exercise substantial responsibility in administering the collective bargaining agreement.[201] The Supreme Judicial Court in Wellesley cited the LRC's interpretation of the requirement:

> If the judgment is considered to be "independent" it must lie within the discretion of the employee to make. . . .[202] It is clear that an individual who functions for management at the first step in a grievance procedure may not be considered to be exercising "appellate" authority. . . . [W]e must bear in mind the substantiality requirement. The responsibility of an individual must be important. There must be some impact and significance to the judgment. If it is perfunctory, clerical, routine, or automatic, it may not be considered a "substantial responsibility".[203]

Based on the disputed employees' failure to meet any of these criteria in a substantial fashion, the SJC held that the Commission had rightly decided that these employees were not managerial.[204]

The Commission has only required that an employee meet one of the three criteria to a substantial degree to warrant classification as managerial.[205] A job title alone is not sufficient to determine whether or not an employee is managerial.[206] A job description or list of duties which may be assigned to an employee in the future will not suffice since the LRC examines only the employee's actual duties and responsibilities.[207] Simply exercising supervisory authority alone does not qualify an employee as managerial.[208]

Only the DPW superintendent in *Town of Dartmouth* was considered managerial,[209] as was the case in other LRC cases with DPW directors or superintendents.[210] In *Dartmouth*, the Commission refused to find other DPW supervisory positions were excludable as "managerial". (Asst. Superintendents of DPW; Highway Supervisor; Water and Sewer Supervisor; Water Pollution Control Manager.)[211]

Since they actively participated in formulating bargaining proposals, and were part of the employer's bargaining teams during negotiations, the Human Resources Administrator, the Transmission and Distribution Manager, the Manager of Customer Care, and the Power Production

Manager were excluded from the bargaining unit at the Taunton Municipal Light Plant by fitting the second part of the definition as managerial employees.[212]

Other Light Plant supervisors were also excluded under different sections of the definition.[213] The Energy Supply and Planning Manager had a substantial role in determining the employer's energy supply policy, thus satisfying the first criterion. The Manager of Special Services had a substantial role in developing strategy that has a significant impact on the employer's mission, again satisfying the first criterion. He assists the General Manager in developing corporate strategy plans and he executes and tracks these plans to maintain the employer's competitive edge in the marketplace. He also serves as the designated representative under the Clean Air Act, certifying complaints and legally binding the employer.

PRACTICE POINTERS

Public officials who are familiar with the practice in the private sector of excluding virtually all supervisors from bargaining units often are surprised to learn how few public employees fall within this managerial exclusion. In most police and fire departments, only the chiefs will qualify as "managerial" as defined in the law.

When it is pointed out that deputy chiefs in some of the largest cities are eligible for bargaining unit membership, it is apparent that spending the town's money trying to remove or exclude, for example, lieutenants from a police unit, or captains from a fire unit is not likely to be productive.

One way to exclude a single high ranking member of the department would be to place the individual on the employer's negotiating team. Similarly, even if that person was not on the negotiating team, they are excludable if they assist to a substantial degree in the preparation for bargaining. This might include helping prepare proposals, analyzing union demands, and similar "behind the scenes" efforts which would give them access to the employer's strategy or proposals.

2. Confidential

A second class of employees exempt from the Law's coverage are confidential employees.

Section 1 of Chapter 150E defines a "confidential" employee as follows:

> Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

The Commission has construed this statutory language to exclude those persons who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings.[214] Employees who have significant access or exposure to confidential information concerning labor relations matters, management's position on personnel matters, or advance knowledge of the employer's collective bargaining proposals are excluded as confidential.[215] The Commission applies the confidential exclusion narrowly and balances the broad extension of collective bargaining rights against the potential danger of disrupting the employer's operations.[216] None of the disputed positions in the 2003 case of *Town of Dartmouth* were found to satisfy the Commission's test for determining the confidential status of employees. Although they may have been asked for their input prior to and during negotiations, it is the Town's executive administrator who negotiates on behalf of the Town.[217]

Employees are considered confidential if they "directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter."[218] To be regarded as confidential, employees must have a continuing and substantial relationship with a managerial employee so there is a legitimate expectation of confidentiality in their routine and recurring dealings.[219] The Commission applies the confidential exclusion narrowly and balances the broad extension of collective bargaining rights against the potential danger of disrupting the employer's operations.[220] Employees who have significant access or exposure to confidential information concerning labor relations matters, management's position on personnel matters, or advance knowledge of the employer's collective bargaining proposals are excluded as confidential.[221]

The LRC has construed this statutory language to exclude those persons who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings.[222] This exclusion has been narrowly interpreted to exclude as few employees as possible, while not unduly hindering the employer's operations.[223] Regular exposure to confidential material directly related to labor relations policy or other equally sensitive policy information while directly assisting a person excluded from the Law's coverage is grounds for fording an employee confidential.[224]

In the 2004 case of *Hanover School Committee*, the Commission found that the personnel/payroll coordinator's substantial exposure to labor relations matters and advance knowledge of collective bargaining proposals rendered the position confidential.[225]

The Commission has held that persons such as attorneys who have dealings with the employer's labor relations work are confidential.[226] Similarly, in *Millis School Committee*, the Commission granted the School Committee's petition to exclude the position of Computer Systems

Managers from a bargaining unit of school employees, finding that that employee had access to information allowing him/her to predict the Committee's collective bargaining proposals.[227] The newly-created position of payroll administrator in Chelmsford was accepted into a bargaining unit despite the Town's claims that is should be excluded as a confidential employee, since in practice, very little excludable activity had yet occurred.[228] Traditionally, secretaries or administrative assistants to excluded employees (e.g., chiefs) have also been excluded as confidential.[229] This was also the conclusion reached by the LRC concerning the Secretaries to the School Committee, the Superintendent, and the Assistant Superintendent in Fall River.[230]

PRACTICE POINTERS

It is possible to exclude key assistants to the police or fire chief from a bargaining unit if they act in a confidential capacity to the chief. Certainly their personal secretaries would fall into this category. So would their administrative aides, regardless of rank. It is not uncommon to have a chief's secretary in a town-wide clerical unit. However, this could be objected to and the commission would remove such position. The law prohibits membership of confidential employees in any bargaining unit, not just the one that represents the officers.

2) Professional Employees

As discussed above, professionals are placed in a bargaining unit separate from other, non-professional, employees.[231] Unless classified as managerial or confidential, a professional employee is covered under the Law. In the labor law context in Massachusetts, "professional" is a term of art, not necessarily coinciding with popular meaning and usage.[232] Section 1 of the Law establishes four requirements for an employee to be considered a professional, defining the work as:

1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work,

2) involving the consistent exercise of discretion and judgment in its performance;

3) of such a character that the output produced or result accomplished cannot be standardized in relation to a given period of time; and

> 4) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a generic academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.[233]

All four (4) statutory criteria must be met to satisfy the definition.[234] Typically, the first three criteria are easily met but the fourth criterion often presents a stumbling block to classifying a position as "professional" since all four criteria must be satisfied.[235] In *Commonwealth of Mass, Chief Administrative Justice*, the LRC determined that the position of court reporter was not professional, despite the two-year junior college training required, because it did not require advanced knowledge "acquired by a prolonged course of specialized intellectual instruction" as described in the Law.[236] While accountants[237], librarians[238], physical therapists[239] and certain positions involved in the Head Start school program have been considered professional[240], many medical[241] and administrative positions[242] have been classified as non-professional.

The Board of Health agent in Tisbury was not a professional employee.[243] The Commission also relies heavily on the job duties as actually, currently performed.

> "To determine professional status, the Commission must scrutinize actual duties and responsibilities of employees. For the purpose of unit determination and unit placement, job descriptions are useful evidence. Nevertheless, job descriptions, without any elucidating testimony are often insufficient to prove an employee's actual job duties."[244]

The distinction between professional and non-professional is crucial in determining the composition of the bargaining unit, given that Section 3 of the Law states, "No unit shall include both professional and non-professional employees unless a majority of such professional employees votes for inclusion in such unit."[245] The Law specifies that all police detectives engaged in primarily detective work are considered professional.[246] With respect to fire employees, the Law mandates that no uniformed member of the department be classified as professional.[247]

PRACTICE POINTERS

Police departments with only one detective will have little success arguing for a separate "professionals" bargaining unit for such individual. Those with a much larger detective force should be able to convince the Commission that the law favors segregating the detectives from the overall police officer unit. Even those with more than one detective, however, will be hard pressed to convince the LRC to remove them from an existing department-wide unit without some showing of discord or conflict of bargaining interest.

Once a position is classified as professional, the LRC generally will not include the position in the regular bargaining unit, but in some situations the LRC has determined that including the professional employees would not harm the interests of either professional or non-professional employees. Thus, in Boston School Committee*, the LRC accreted (i.e., added to an existing unit) certain professional positions into the main bargaining unit because the original recognition clause, which had been unchanged since 1969, had included professional employees.*[248]

On the other hand, the LRC on occasion has included non-professionals in a bargaining unit composed of professionals when the non-professional shares a greater community of interest with those professional employees.[249]

3) Supervisory Employees

Individuals who possess significant supervisory authority should not be included in the same bargaining unit with the employees they supervise.[250] In *City of Westfield*, the Commission explained this policy:

> This policy stems from our belief that supervisors must owe their allegiance to their employer, especially with respect to employee discipline and productivity. There are also sincere concerns for the rank-and-file employees and their union representative. A conflict over this issue will place the supervisors in the untenable position of having to discipline employees on whom they must rely for securing improvement in their own wages, hours and terms and conditions of employment. . . . The mere existence of this supervisory authority

> causes an inherent conflict between supervisors and rank-and-file employees.[251]

To determine whether an employee exercises significant supervisory authority, the Commission considers factors like the independent judgment and authority to assign and to direct the work of employees, the authority to initiate and to recommend discipline, the authority to adjust grievances, and the independent authority to make, or the power to recommend effectively, personnel decisions like hire, transfer, suspend, promote or discharge employees.[252] Supervisors and the employees they direct have different obligations to the employer in personnel and policy matters, therefore, to combine them in the same bargaining unit.[253] "It is the existence of supervisory authority, not the frequency of its use, that creates the likelihood of conflict between supervisors and subordinates."[254]

Therefore, rather than place supervisors in the untenable position of disciplining employees on whom they rely to secure improved terms and conditions of employment through the collective bargaining process, the Commission places supervisors in a separate bargaining unit.[255] Supervisors and the employees they direct have different obligations to the employer in personnel and policy matters, therefore, to combine them in the same bargaining unit would likely lead to a conflict of interest within the bargaining unit.[256] The Commission has stated that it will only evaluate whether the positions possessed sufficient supervisory authority, not whether there was any actual internal conflict within the bargaining unit, in determining the proper unit placement of an employee.[257]

In *Somerville School Committee*, the Commission explained that a line must be drawn between a true supervisor who possesses authority to effectively recommended personnel decisions and an employee with limited supervisory authority who instead acts as a conduit for the employer's personnel actions.[258] The Commission generally establishes separate bargaining units for supervisory employees and employees that they supervise.[259] This well established policy is rooted in the belief that individuals who possess significant supervisory authority owe their allegiance to their employer, particularly in the areas of discipline and productivity.[260]

In determining whether an employer is a supervisory employee, the Commission considers the following factors: whether the employer has the independent authority and judgment to assign and to direct the work of employees;[261] the authority to initiate and to recommend discipline;[262] the authority to adjust grievances;[263] and

the independent authority to make, or the power to recommend effectively, personnel decisions about whether to hire, to transfer, to suspend, to promote or to discharge employees.[264] Further, the Commission has determined that non-binding recommendatory authority in hiring decisions is indicative of supervisory status.[265]

In City of Westfield, the Commission noted that the Law contains no definition for "supervisor".[266] The Commission thus turned to federal law for guidance, quoting 29 U.S.C. § 152(11):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Commission later elaborated upon the federal definition, stating that employees are supervisory if they possess one of three criteria:

1) independent authority to make major personnel decisions like hiring, transfers, promotion, discipline and discharge;

2) effective ability to recommend such personnel decisions; or

3) independent authority to assign and direct the work of their subordinates.[267]

To determine whether employees exercise significant supervisory authority to warrant excluding them from a bargaining unit of employees they supervise, the Commission considers factors like the independent judgment and authority to assign and to direct the work of employees, *Worcester School Committee*[268]; the authority to initiate and to recommend discipline and the authority to adjust grievances[269]; and, the independent authority to make, or the power to effectively recommend, personnel decisions like hire, transfer, suspend, promote or discharge employees.[270]

In determining whether an employee is a supervisory employee, the Commission considers the following factors: whether the employee has the independent judgment and authority to assign and to direct the work of employees; the authority to initiate and to recommend discipline; the authority to adjust grievances; and, the independent authority to make, or

the power to recommend effectively, personnel decisions like hire, transfer, suspend, promote or discharge employees.[271] Additionally, the Commission has concluded that non-binding recommendatory authority in hiring decisions indicates supervisory status.[272] To be considered a supervisory employee, it is not necessary that all of the employee's job duties involve supervisory responsibilities.[273]

A maintenance supervisor in the Woburn Housing Authority was found to be supervisory and this excluded from membership in the unit composed of the five maintenance employees.[274]

These criteria are often applied differently depending on the type of position involved. In the case of fire department employees, separate units for supervisors will be established in the initial unit determination only if the employees possess the requisite indicia of supervisory authority.[275] Severing the supervisors from an existing unit has historically been more difficult in the fire department context, though a few cases have indicated that a separate unit for supervisors may be allowed where the resulting supervisor's unit is large enough to preserve the supervisors' bargaining rights.[276] A major stumbling block to the creation of supervisors units in fire departments had been § 3 of the Law, which prohibited the classifying of any fire department employee below the rank of chief as *managerial* for the purpose of disqualifying them from the bargaining unit.[277] In the *International Association of Fire Fighters* case, the Appeals Court finally announced that § 3 did not prohibit the classification of employees as *supervisory* (as opposed to managerial) for the purpose of placing them in a separate unit--not completely disqualifying them for membership in any unit.[278] A few cases have allowed the creation of a unit composed of deputy fire chiefs.[279]

As the Commission established in the *City of Everett* case, police departments are treated somewhat differently.[280] The Commission tends to favor creating a separate unit for supervisors once the department reaches a "critical mass".[281] In the *Everett* case, the Commission stated that "size alone will create an inference that conflict exists and even absent evidence of conflict, the inference survives."[282] Further, the Commission indicated in *Cambridge Police Department* that creating a separate unit for supervisors is required "in nearly all cases where evidence of supervisory authority is introduced."[283] The inquiry in police departments thus becomes not *whether* to create a separate unit for superior officers, but *at what rank* to make the division between the rank-and-file unit and the superior officers unit.[284]

The LRC concluded that sergeants in Provincetown are supervisory employees and should be excluded from the existing bargaining unit.[285] However, when faced with a request from the Town of North Reading that sergeants be severed from a long-standing unit composed of police officers, sergeants and detectives, the LRC declined.[286] The Commission

found that the sergeants were not "supervisors". In the absence of evidence of a history of conflict between police officers and sergeants during collective bargaining, the Commission saw no need to remove sergeants from the existing bargaining unit.

The Commission is not inclined to place supervisory personnel from the DPW in their own bargaining unit. In *Town of Dartmouth*, the LRC explained that it must decide whether a bargaining unit composed of supervisory positions at the DPW constitutes an appropriate bargaining unit. Bargaining units limited to departments or other administrative divisions are too narrow to be appropriate if there exists a community of interest among a larger group of employees sufficient to create a broad, comprehensive bargaining unit.[287] In *Dartmouth*, the Union sought a bargaining unit composed of DPW supervisory employees. Although the record did not reflect the titles of the other supervisory positions in the Town, in cases where the Commission has considered Town-wide supervisory units, the positions usually include heads of departments, such as town accountant, town treasurer, town assessor, town planner, director of the council on aging, director of parks and recreation, highway superintendent, water/sewer superintendent.[288] Based on Commission precedent, the LRC ruled that the petitioned-for bargaining unit was under inclusive because it sought only the supervisors in one department and did not include other Town department heads and supervisory employees.[289]

The Town of Wareham unsuccessfully tried to prevent its two lieutenants and one captain (who were not members of the unit composed of sergeants and police officers) from forming a "superior officers" unit.[290] The Commission rejected the Town's claims that positions were managerial, confidential and that the petitioned-for unit was inappropriate as under the state's Collective Bargaining Law. The Commission's discussion of each of the Town's arguments should make it clear that, with few exceptions, superior officers are eligible for bargaining unit membership.

In a 2005 LRC decision, the Commission ruled that the position of assistant assessor/office manager should be excluded from a clerical bargaining unit since, while performing some clerical duties, her primary responsibility was to coordinate and supervise the operation of the day-to-day activities of the Assessor's Office.[291]

PRACTICE POINTERS

The Commission treats the matter of a separate unit for supervisors more like a management right or presumption in medium and large size police departments. There is no strict size cut-off line. However, small

departments with only one or two sergeants are not likely to succeed in this effort.

The timing of an employer initiated request (called a CAS Petition) is crucial. While a "contract" is in effect, Commission rules favor leaving the existing unit in place. A request filed during the "window period" (180-150 days before a contract expires) or following the contract's expiration is appropriate.

It is also possible to propose the creation of two units to the union. If they are convinced that the LRC will grant the employer's request, they may be willing to make a deal if the employer offers some incentive to do so.

4) Chiefs

In municipalities with small or part-time departments, it is possible that the chief may be included in the bargaining unit with rank-and-file employees.[292] Often, this is accomplished by the employer's voluntary recognition of the bargaining representative for a unit including the chief; once the employer confers this recognition, it is precluded from seeking to sever any positions (such as the chief) from the unit during the life of the contract.[293]

Absent voluntary recognition by the employer, the chief's other option, if he/she seeks to be part of the bargaining unit, is to affirmatively demonstrate that he/she lacks the characteristics of a *managerial* employee as defined in the Law.[294] Also, the position of chief needs to satisfy the other criteria for determining an appropriate bargaining unit, i.e., community of interest, efficiency, and safeguarding employee rights to effective representation.[295] The Commission found the Agawam police and fire chiefs to be managerial employees and excluded them from a bargaining unit.[296] A similar result was reached in Amesbury.[297] The LRC adopted a stipulation of the parties that the positions of police chief and fire chief were appropriately excluded from a bargaining unit of administrators and department heads in its 1998 decision in *Town of Manchester-By-The-Sea.*[298] In doing so, the Commission found that such stipulation in this case did not violate either the collective bargaining law nor established Commission policy.

For police chiefs, being included in a bargaining unit with other rank-and-file police officers may be particularly difficult given the presumption in favor of severing supervisors in larger departments.[299] If, however, the position of chief were to be included in a general police department unit in a small town, the chief may satisfy the criteria:

- *Community of Interest*: The chief shares the same physical work environment, job requirements, education and training. There is frequent job interchange between the members of the department, and also significant contact between the positions.
- *Efficiency of Operations & Effective Dealing*: The policy favoring larger units would not be violated by including the chief in a unit of other police department employees.
- *Safeguarding Employee Rights to Effective Representation*: If it becomes apparent that there is such a diversity of employment interests that the other employees will not be adequately represented if the chief is included, then the LRC would not approve a unit including the chief. This stumbling block can be overcome if the town is especially small, or if all of the employees, including the chief, are part-time.

PRACTICE POINTERS

A chief may sign an employment contract with the city or town, without the need to become involved in either voluntary recognition or LRC certification. M.G.L. c. 41, § 108O authorizes such employment contracts for police chiefs. A sample chief's contract is included in the Appendix (Form 11).

A better solution than including the chief in a comprehensive unit could be placing the chief in a unit composed of supervisors, or in a town-wide "administrators" unit. A single person unit, composed only of the chief, would not normally be favored but may be allowed under certain circumstances, [300] e.g., if there is no other viable alternative and the chief is not classified as managerial.

5) Part-time, Seasonal, Casual Employees

The Commission has traditionally placed regularly scheduled part-time employees who share a community of interest with full-time employees in the same unit as their full-time counterparts.[301]

If an employee is not a full-time, regular employee, he/she may nonetheless be included in a bargaining unit with full-time employees as long as he/she meets the other statutory criteria for bargaining unit membership.[302] A non-regular employee excluded from the bargaining unit for lack of community of interest with other employees, however, is still protected by the Law.

In the case of part-time employees, the Commission has included them in units with full-time employees where they have sufficient

community of interest with respect to wages, hours and working conditions, and have a regular work schedule.[303] Part-time employees are considered regular if they, for example, work the same hours each week and have similar duties to regular full-time employees.[304] Where the community of interest factor is lacking, the Commission has occasionally allowed the creation of a separate unit for the part-time employees.[305] In the *City of Gloucester* case, the Commission took a similar approach to seasonal employees, indicating that seasonal employees would be included in the full-timers unit if they had a stable history of working year after year, or would be given their own unit if the work was not regular, and would be excluded from any unit if the public employer's budgetary process would prohibit effective bargaining.[306]

There is no minimum numbers of hours per week, either in the Law or adopted by the Commission, in order to be eligible for bargaining unit membership.[307] In fact, while "voluntary recognition" agreements often include minimum weekly thresholds (e.g. 20 hours), the Commission usually will not include a cutoff in a certification, even if the parties include one in a joint stipulation. The Commission is willing to define "regular part-time employees" as those working a specified number of hours per week provided it takes into consideration the employees in question, includes those who share a community of interest with the full-time employees, and excludes those employees whose relationship with employer is so casual as to warrant exclusion. It is a requirement of the LRC that in order to establish such a minimum, there must actually be some employees who fail to meet the standard, for only then can the Commission conclude that they do not share a community of interest with the other employees.[308]

In the 2002 LRC case of *Town of Grafton*, the Commission declined to adopt the parties' stipulation that would exclude regular part-time police officers and sergeants from the bargaining unit description.[309] There were no part-time officers or sergeants at the time, so the Commission had no way of determining whether, once hired, they would share a community of interest with the regulars. The following language was adopted by the LRC:

> All full-time and regular part-time patrol officers and sergeants employed by the Town of Grafton, excluding the Police Chief, the police lieutenants, and all managerial, confidential casual reserve and all other employees of the town.

Casual employees, who do not have regular or consistent work schedules and have no reasonable expectation of rehire, present a different situation. The Commission applies a two-step analysis with respect to temporary or non-regular employees: (1) whether the employees are casual and thus have no collective bargaining rights, and (2) if they are not casual, whether the employees share sufficient community of interest with other unit employees to warrant their inclusion in the unit.[310] Thus, in *Worcester County*, summer temporary employees at a correctional facility were excluded from a bargaining unit of non-supervisory personnel as casual, though other temporary employees who had been renewed twice were included.[311]

6) DISPATCHERS

The inclusion of dispatchers in a firefighters unit has been approved by the LRC.[312] While a similar arrangement may have been reached with police officer and dispatchers being placed in the same bargaining unit, no reported LRC decision addresses the matter.

PRACTICE POINTERS

The fact that non-police or non-fire personnel are included in a police or firefighter unit may present some legal difficulties should contract negotiations result in JLMC involvement. That agency's impasse resolution procedures, and especially arbitration, are limited to police officers and firefighters.

Municipal employers should refuse to submit contract disputes involving dispatchers to the JLMC process. Presumably the Mass. Board of Conciliation and Arbitration would be available to assist for such employees.

§ 3 ADDING OR SEVERING POSITIONS FROM THE BARGAINING UNIT

After a bargaining unit has been certified, issues regarding the "appropriateness" of the bargaining unit may continue to arise.[313] Either party in the collective bargaining relationship (either employer or employee organization) may petition for clarification or amendment of the bargaining unit, a procedure called a CAS petition by the Labor Relations Commission.[314] Section 14.06(1)(b) of the Commission's regulations, 456 CMR 14.06(1)(b), states that:

> Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of an existing valid collective bargaining agreement, unless such petition is filed no more than 180 days and no fewer than 150 days prior to the termination date of said agreement, provided that a petition to alter the composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

The purpose of the contract bar rule is to establish and promote the stability of labor relations and to avoid instability of labor agreements, in part, by ensuring that both labor and management know which positions are included in the bargaining unit covered by their collective bargaining agreement.[315] The Commission's application of the contract bar rule is discretionary.[316] According to the contract bar rule, a CAS petition may not be filed during the term of the collective bargaining agreement, unless: (1) all parties agree to process the petition, or (2) the positions have changed materially since the negotiation of the contract.[317] Additionally, the Commission may refuse to process a CAS petition if issues raised therein could have been raised during a representation proceeding.[318] The policy behind this rule involves efficiency and stability in the labor relations process: if the parties were permitted at any point to challenge the structure of the bargaining unit, this could extend the litigation involving representation indefinitely, causing uncertainty as to the composition of the unit.[319] In *Chief Justice for Administration and Management of the Trial Court*, the Commission found that good cause existed to waive the contract bar rule where one party had never raised the issue of timeliness, another party did not raise the timeliness of the petition until after the Commission had conducted a full hearing, and the petitions had been pending during the terms of the contracts covering the bargaining units that would be affected by the outcome of the resolution of the unit placement issue.[320] Under these unique circumstances, the Commission decided the merits of the unit placement issues to avoid further uncertainty or disruption to the bargaining units affected by the petitions.[321] However, exceptions to the contract bar rule are rarely found and generally require evidence of substantial disruption in bargaining relationships and threats to labor stability.[322]

A CAS petition is a procedural vehicle that permits the Commission to clarify or to amend the scope of an existing bargaining unit. In analyzing whether a position should be accreted into an existing bargaining unit,

the Commission considers: 1) whether the position was included in or excluded from the unit at the time it was originally recognized or certified; 2) whether the parties subsequent conduct, including bargaining history, discloses that the parties considered the position in the bargaining unit; and 3) whether the position shares a community of interest with other positions in the existing bargaining unit.[323] Absent a material change in job duties and responsibilities, the Commission will not accrete a position into a bargaining unit if it existed at the time of the original certification or recognition.[324]

Section 3 of the Law requires the Commission to determine appropriate bargaining units consistent with the fundamental purpose of providing for stable and continuing labor relations, while giving due regard to the following tripartite statutory criteria: 1) community of interest; 2) efficiency of operations and effective dealings; and, 3) safeguarding the rights of employees to effective representation. To determine whether employees share a community of interest, the Commission considers factors like similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and similarity of training and experience.[325] Minimal differences do not mandate separate bargaining units where employees perform similar job duties under similar working conditions and share common interests amenable to the collective bargaining process.[326]

Where applicable, the Commission also examines prior bargaining history, the centralization of management, particularly labor relations, and the geographic location of the employer's facilities in relation to one another.[327] Further, differences in funding sources for employees' compensation does not destroy an existing community of interest.[328]

Under the second and third statutory criteria, the Commission considers the impact of the proposed bargaining unit structure upon the employer's ability to effectively and efficiently deliver public services, while safeguarding the rights of employees to effective representation. The Commission complies with these directives by placing employees with common interests in the same bargaining unit, thus avoiding the proliferation of units that place an unnecessary burden on the employer, while maximizing the collective strength of employees in the bargaining relationship.[329]

The Commission has broad discretion in determining appropriate bargaining units. If a petition describes an appropriate unit, the Commission will not reject it because it is not the most appropriate unit, or because there is an alternative unit that is more appropriate.[330]

A unit clarification petition is the appropriate vehicle to determine whether newly-created positions should be included or excluded from a bargaining unit and to determine whether substantial changes in the

job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit.[331] Further, a unit clarification petition is appropriate if the outcome sought by the petition is "... clearly supported by an apparent deficiency in the scope of the existing unit and must be, at least arguably, within the realm of what the ... parties intended when the unit was first formulated."[332] A unit clarification petition is not the appropriate vehicle to change the composition of an existing bargaining unit by severing positions thereby creating a new bargaining unit. Severance petitions inherently involve questions of representation that are not properly resolved in a unit clarification petition.[333]

There are rare exceptions to these general rules. In *Silver Lake Regional School District*, the Commission acknowledged that a severance question was improperly raised in a unit clarification petition, but decided to address the issue because the parties had fully litigated the issue and a severance petition would have been timely filed during the pendency of the unit clarification petition.[334] In *City of Quincy,* the Commission declined to treat the public employer's petition to sever hospital employees from a city-wide bargaining unit as a severance petition, but examined the continued appropriateness of the unit in light of the substantial changes in the hospital's operation since the most recent certification.[335]

The Commission has also reinvestigated and amended its certifications under certain, appropriate circumstances. For example, in *Town of Burlington,* upon the timely protest and petition of the affected employee, the Commission amended its certification to include the position of dog officer, which had been excluded previously from a residual bargaining unit that was intended to include all non-managerial employees not represented for the purposes of collective bargaining.[336] Similarly, in *City of Boston,* the Commission found it unnecessary to address the employer's argument that police officers in the special investigative unit are either confidential or managerial employees, but rather used its general authority under the Law to address unit problems arising post-certification to exclude those employees from the police officers' bargaining unit rather than to "preserve a potentially divisive situation."[337]

A. SEVERANCE

The Commission does not favor severance petitions and has declined to use them to fix imperfectly-constructed bargaining units.[338] In City *of Boston,* the Commission articulated the criteria a petitioner must satisfy to wan-ant severing positions from an existing bargaining unit: [339]

> [t]he petitioner must demonstrate that the petitioned-for employees constitute a functionally distinct appropriate unit with

> special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit.
>
> Absent evidence of serious divisions and conflicts within the bargaining unit, we have consistently applied this standard in deciding to maintain historical bargaining unit structures, even if they do not reflect all of the general criteria we look for when making initial bargaining unit determinations.[340]

Under the first prong of the LRC's severance analysis, the petitioner must demonstrate that the proposed bargaining unit consists of employees who comprise a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of the existing unit of employees.[341] The Commission considers many factors in determining whether the petitioned-for employees constitute a functionally distinct unit from the existing bargaining unit, including whether the petitioned-for unit of employees: 1) have specialized skills that are acquired through a required course of study; 2) maintain and enhance their skills through continuing education; 3) perform significantly different job functions compared with the existing unit of employees; 4) share work locations or common supervision with other employees in the existing unit; and 5) interact with or share duties with any other bargaining unit member.[342]

The Commission has previously held that certain employees' inability to achieve their bargaining goals within a larger unit or employees, dissatisfaction with their bargaining representative's accomplishments is insufficient to establish the irreconcilable conflict necessary to warrant severance.[343]

Traditionally, the Commission has not looked favorably upon severance petitions and has declined to use them to fix imperfectly constructed bargaining units.[344] To successfully sever a group of employees from an existing bargaining unit, the petitioner "must demonstrate that the petitioned-for employees constitute a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit."[345] Absent evidence of serious divisions and conflicts within the bargaining unit, the Commission has consistently applied this standard in deciding to maintain historical bargaining unit structures.[346]

Under the first prong of the severance analysis, the petitioner must demonstrate that the proposed bargaining unit consists of employees who comprise a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of the existing unit of employees. The Commission considers many factors in determining whether the petitioned-for employees constitute a functionally distinct unit from the existing bargaining unit, including whether the petitioned-for unit of employees: 1) have specialized skills that are acquired through a required course of study; *2)* maintain and enhance their skills through continuing education; *3)* perform significantly different job functions compared with the existing unit of employees; *4)* share work locations or common supervision with the existing unit of employees; and *5)* either interact with or share duties with any other bargaining unit member.[347]

The Commission generally favors larger units and discourages the severance of positions from an existing bargaining unit unless the employees at issue have distinct interests apart from other unit employees.[348] In determining whether the disputed employees have such functionally distinct interests, the Commission may look to industry practice.[349] The party seeking to sever the positions at issue may also need to affirm that the stability of the collective bargaining relationship would not be compromised by the change.[350] Severance of certain positions has been allowed where there are serious divisions and conflicts within the unit.[351] As discussed above, the Commission will also allow severance if the position entails sufficient indicia of supervisory authority.[352] The Commission declined to sever sergeants from a unit consisting of police officers, sergeants and detectives in North Reading.[353] The sergeants were not true "supervisors" and there was no evidence of bargaining conflicts.

The LRC recently articulated the Commission's traditional severance standard, in a case involving nurses seeking to sever from Somerville's Unit B:

> [t]he petitioner must demonstrate that the petitioned-for employees constitute a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts with divisions within the bargaining unit.[354]

Absent evidence of serious divisions and conflicts within the bargaining unit, the Commission has consistently applied this standard in deciding to

maintain historical bargaining unit structures that are not fully consonant with the general principles of initial bargaining unit determinations.[355]

In order to sever a group of employees from one existing bargaining unit, the petitioner must demonstrate that the petitioned-for employees constitute a functionally distinct appropriate unit with special interests sufficiently distinguishable from those of other unit employees, and that special negotiating concerns resulting from those differences have caused or are likely to cause conflicts and divisions within the bargaining unit.[356]

To satisfy the first part of the LRC's two-pronged severance analysis a petitioner must demonstrate that the petitioned-for employees make up a functionally-distinct appropriate unit. To do so, the Commission considers whether the petitioned-for unit of employees:

- Have specialized skills that are acquired through a required course of study;
- Maintain and enhance their skills through continuing education;
- Perform significantly different job functions compared with the existing unit of employees;
- Share work locations or common supervision with the existing group of employees; and
- Either interact with or share duties with any other bargaining unit member.[357]

While recognizing difficulties, the LRC declined to sever 60-day substitute teachers from an existing unit, finding that a community of interest still existed.[358] An identity of interest is not required.[359]

To satisfy the second prong, it must be shown that there are special negotiating concerns that have caused or are likely to cause conflicts within the bargaining unit that will significantly interfere with collective bargaining.[360] The LRC in 2001, declined to sever the Police Clericals from an existing town-wide unit of non-uniformed workers.[361]

Courts will not review LRC hearings on a labor organization's representation petition since those are not "adjudicatory proceedings" subject to judicial review.[362]

B. STIPULATION

The Commission generally adopts an agreement or stipulation of the parties concerning exclusion of a position from an existing unit unless the stipulation violates the Commission's rules and /or its practices.

C. ACCRETION

The Commission also has the authority to accrete (add) a new position (or a previously unrepresented position) to an existing bargaining unit--without holding a representation proceeding--as long as the accreted employees share a community of interest with the rest of the bargaining unit.[363] In *City of Worcester*, the Commission emphasized caution in accreting a previously unrepresented unit, given that the employees would not have the opportunity to vote their choice of bargaining representative.[364] Generally, the Commission will not place supervisors and the employees they direct in the same bargaining unit.[365] This policy is rooted in the belief that individuals who possess significant supervisory authority owe their allegiance to their employer, particularly in the areas of employee discipline and productivity.[366] Therefore, rather than place supervisors in the untenable position of disciplining employees on whom they rely to secure improved terms and conditions of employment through the collective bargaining process, the Commission places supervisors in a separate bargaining unit.[367] Supervisors and the employees they direct have different obligations to the employer in personnel and policy matters, therefore, to combine them in the same bargaining unit would likely lead to a conflict of interest within the bargaining unit.[368]

If there is a community of interest, the position will be accreted to the bargaining unit.[369]

A CAS petition is a procedural vehicle that permits the Commission to clarify or to amend the scope of an existing bargaining unit, the Commission considers: 1) whether the position was included in the unit at the time it was originally recognized or certified; 2) whether the parties' subsequent conduct, including bargaining history, discloses that the parties considered the position in the bargaining unit; and 3) whether the position shares a community interest with other positions in the existing bargaining unit.[370] If the Commission determines that the requisite community of interest exists, it will accrete the petitioned-for employee into the existing bargaining unit.[371]

The Commission, however, will not accrete a position into an existing bargaining unit, if the petitioned-for position was in existence at the time of certification or recognition or if the parties have executed a collective bargaining agreement demonstrating an intent to exclude the petitioned-for position, unless the job duties of the position have changed materially.[372] The accretion doctrine is restricted to cases where it will give effect to the parties' intent and may not be invoked to frustrate the parties' clearly expressed unit placement of a disputed position. [373]

For example, in the 2002 case of *Plymouth County Sheriff's Department*, the LRC noted that under the first part of the accretion test, the record

established that the Sheriff's Department created the DIT position on July 22, 1999.[374] Accordingly, the position was not in existence when the Commission certified NAGE as the exclusive bargaining representative for a unit of clerical, technical and administrative employees at the Sheriff's Department on February 20, 1997 or MCOFU as the exclusive bargaining representative Unit A. Accordingly the first prong of the three-part test was inconclusive.

Turning to the second part of the accretion test, it was undisputed that the parties never discussed the appropriate unit placement of the DIT position at successor contract negotiation, and the record is devoid of any evidence showing that the parties had otherwise treated the position as in or out of the bargaining units. Therefore, the Commission ruled that the second prong of the accretion analysis was also inconclusive.

If the Commission determines that the requisite community of interest exists, it will accrete the petitioned-for employee into the existing bargaining unit.[375] The Commission will not accrete a position that existed at the time of original certification, unless the position's job duties have changed since the certification.[376]

If a position was not in existence at the time of the creation of a bargaining unit, the Commission's inquiry under the first prong will be inconclusive. It will then turn to an examination of the parties' conduct, including a bargaining history. Without any history to indicate that the parties addressed and resolved the unit placement of a contested position, the LRC will find that it is unable to determine whether the parties explicitly agreed to exclude the contested position from the bargaining unit.[377]

In order to determine whether a position shares a community of interest with a bargaining unit, the Commission considers such factors as: similarity of skills and functions; similarity of working conditions and compensation; common supervision; work contact; and similarity of training and experience.[378] Community of interest does not require an identity of interest so long as no inherent conflict exists.[379]

It is the Commission's practice to separate supervisory and non-supervisory employees because of the inherent conflict between such categories of employees.[380] Supervisors are generally those that have independent authority or who have effective power to make recommendations in major personnel decisions such as hiring, transfer, suspension, promotion and discharge.[381]

The Commission included a sergeant (who it found to be a supervisor) in a patrol officer's unit since there was only one sergeant in Bolton.[382] However, where there was at least one other foreman's position in the Somerset Highway Department, the LRC excluded a motor vehicle maintenance foreman from a unit of highway department and rubbish collection employees.[383]

The Commission accreted a Wenham Captain in the call Fire Department, even though the position was in existence and the job duties had not changed since the original certification.[384] There the Captain originally also served on the Board of Fire Engineers. His exclusion was based on that service. When the Board's composition changed, and it was clear that the Captain's position was really one of company rank, the accretion was allowed.

The Commission dismissed a petition of a union that represented voluntarily recognized unit to include a food services secretary since neither the union nor the employer filed a clarification petition seeking to accrete the position; therefore, the option of doing so was available to the LRC.[385]

PRACTICE POINTERS

If, during the term of a collective bargaining agreement, certain positions are accreted, (i.e., added to the unit) persons in those newly added positions may not be covered by the contract's grievance and arbitration procedure. In a 2002 SJC decision involving Hanover, the court ruled that the arbitrator exceeded his authority in finding to be arbitrable a union's grievance by nurses that were newly accreted into the unit where the agreement's recognition clause unambiguously excluded nurses from coverage, and there was no language in the agreement providing for inclusion of newly accreted persons.[386]

§ 4 AGENCY SERVICE FEES AND UNION DUES

A union violates Section 10(b)(1) of the Law when it violates Section 12 of the Law or the rules implementing Section 12 of the Law.[387] Section 12 of the Law states, in part:

> No employee organization shall receive a service fee as provided herein unless it has established a rebate procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for [impermissible purposes].

Section 17.05 of the Commission's Rules states, in part:

> (1) A bargaining agent seeking the payment of a service fee shall serve a written demand for the fee upon the employee from whom the fee is

> sought. The written demand shall include the amount of the service fee, the period for which the fee is assessed, the method by which payment is to be made, the person to whom payment should be made, and the consequences of a failure to pay the fee.
>
> (2) A bargaining agent making a written demand pursuant to 456 CMR 17.05(1) shall attach to the demand a copy of the entire text of these Rules relating to agency service fee (456 CMR 17.00).

456 CMR 17.07(1) requires an employee who contests the amount of an agency service fee to jointly establish and administer an escrow account with his/her bargaining agent. 456 CMR 17.07(2) further requires the employee to deposit in the escrow account an amount "equal to the full amount of the service fee for the disputed period of time, or equal to whatever amount remains in dispute after partial settlement between the employee and the bargaining agent seeking the fee." The purpose of the escrow account is to both ensure that the union will receive that portion of the demanded fee to which it is entitled and to minimize the impact on the constitutional rights of the employee by preventing any compulsory subsidization of objectionable activities.[388]

In a 2001 case, the Union argued that, because the information was available generally, the Charging Parties were not prejudiced by the Union's failure to provide the information specifically to each employee at the time the demands for payment were made.[389] However, the constitutional implications arising out of an agency service fee demand require unions to strictly adhere to the safeguards set forth in Section 12 of the Law and 456 CMR 17.05.[390]

In *Malden Education Association,* the Commission held that Section 12 of the Law required unions seeking to collect an agency service fee to provide fee payers with an adequate explanation of the basis for the fee to permit them to make an informed judgment about whether to pay or challenge the fee.[391] The information in the *AFSCME* case, like the financial information at issue in *Malden School Committee,* was necessary for potential agency fee challengers to gauge the propriety of the fees being demanded of them. Therefore, the LRC found that Section 12 of the Law and Section 17.05 of the Commission's rules require that a demand for the payment of an agency service fee must include, *inter alia:* 1) a copy of the Commission's agency fee regulations; 2) a statement about the Union's rebate procedure; or 3) a statement about the consequences for failing to pay the fee and the other information required by 456 CMR 17.05. Accordingly the LRC

found that the Union violated Section 10(b)(1) of the Law by failing to include that information when it demanded that the Charging Parties pay an agency service fee.

One of the many prerequisites for collecting an agency service fee is that the union must provide each affected employee with an audit from an independent auditor along with the fee service demand, regardless of the size of the union or the cost involved.[392] The LRC left for another case the issue of whether a limited audit or a special auditor's report is permissible under Chapter 150E.

PRACTICE POINTERS

When a new bargaining unit is being formed, be sure to review all positions. If one or more is either managerial or confidential, refuse to voluntarily recognize the requesting union, association or similar exclusive bargaining representative unless it agrees to exclude those positions. Some leeway exists at this juncture to exclude even marginally managerial or confidential employees in exchange for the employer's voluntary recognition.

When a petition is filed with the LRC seeking certification of a new bargaining unit, an employer may raise the same objections concerning the inclusion of managerial or confidential employees. While there is less room for "horse trading" than during the voluntary recognition process, some discretion is available over questionable *positions. A reasonable compromise is likely to be approved by the Commission if the parties agree to it and thereby expedite the process.*

A more difficult situation arises when an employer seeks to remove a position from an existing unit. Some effort should be made to negotiate with the union or association. Local conditions may dictate under what circumstances the union will agree to remove a covered position. Such compromises can be reached both during regular contract negotiations or during the term of the contract. The proper route to follow is the filing of a CAS petition if the LRC had included the position in an earlier certification. If the unit was voluntarily recognized, a simple agreement between the parties should suffice. As a practical matter, even where certification was used initially, voluntary modification is often used to eliminate the time and expense of a CAS petition. There does not appear to be a pressing policy reason why the latter would be objectionable to the Commission if challenged.

Where a new position is to be funded, careful attention should be paid to the job description (and the underlying job task analysis.) While the latter is not controlling on the LRC, it is the first place the Commission will look to determine whether a position is excludable from an existing bargaining

unit. While it is most unlikely that anyone but the chief would qualify as managerial in most departments, one or more aides or high ranking officers could satisfy the confidential employee tests. For example, participation in negotiations on the employer's side of the table might be sufficient all by itself.

Initially, an employer should attempt to reach agreement with the union or association over excluding a new position. As discussed above, such talks can take place at any time. While there is no requirement that they happen before a position is filled, an employer is more likely to prevail if it does some "horse trading" before rather than after an employee is hired. Some agreement concerning job duties, or some other trade (money, hiring more employees etc.), may result in agreement with the union or association that a position be excluded.

Remember that -- at least in police units -- the LRC favors separate supervisors' units where there is sufficient evidence of supervisory authority.

Single person units are not favored by the LRC, and also high ranking officers may not prefer to give up bargaining unit protection and return to coverage under the personnel by-laws or ordinances. Since employment contract provisions of G.L. c. 41, § 1080 cover only police chiefs, there is some risk for the deputy, captain or lieutenant who is not in the bargaining unit. A voluntary recognition of a unit composed of only one high ranking officer, coupled with an agreement with the union representing the overall unit, might be the appropriate avenue.

The 2000 SJC decision in Belhumeur v. Labor Relations Commission, contains a comprehensive discussion of many aspects of how agency fees are computed.[393] *Public school teachers, who were represented by union for collective bargaining purposes but who were not members of the union, and the union appealed from decision of the Labor Relations Commission, concluding that union had demanded an excessive agency fee from nonmembers. After granting parties' joint application for direct appellate review, the Supreme Judicial Court, held that: (1) Commission provided reasonably prompt decision; (2) Commission used proper formula to compute agency fee; (3) union's accounting expenses were chargeable; (4) costs of union's president and vice-president were chargeable in proportion to union's overall chargeable expenditures; (5) expenses related to statewide strike were not chargeable; (6) expenses associated with article in union publication were chargeable; (7) expenses related to two-day job action were not chargeable; and (8) costs of override campaign were chargeable.*

Public employees who are not union members may be required, as a condition of their employment, to pay an agency fee to their collective bargaining representative to support the costs of the bargaining process, contract administration and grievance adjustment.

Public employees have a right, based in the First Amendment, to prevent union from spending part of the agency fee to support ideological causes not germane to the union's duties as collective bargaining representative.[394]

The constitutional requirements for a union's collection of agency fees from public employees who are nonmembers include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.[395]

If a nonmember objects to the amount of the agency fee demanded by a public employees' union on the basis that the fee includes expenditures for ideological activities unrelated to collective bargaining, the nonmember has an obligation affirmatively to raise that objection; once a nonmember has raised an objection, the union bears the burden of proving, by a preponderance of the evidence, the accuracy of the agency fee.

The determination of the Labor Relations Commission as to whether particular union expenditures were chargeable, for purposes of deciding whether agency fee demanded from public school teachers who were nonmembers was excessive, involved both question of law, which the Supreme Judicial Court reviewed de novo, as well as questions of fact, which were for the Commission in the first instance.[396]

The Supreme Judicial Court's review of a decision of the Labor Relations Commission is governed by the judicial review provision of the state administrative procedure statutes.[397]

To the extent the Labor Relations Commission's decision involves issues of law, the Supreme Judicial Court reviews the decision de novo.[398] The SJC found that the Labor Relations Commission provided reasonably prompt decision in dispute concerning amount of agency fee charged by union to public school teachers who were nonmembers, despite fact that there was a nearly eight-year interval between time original challenge to amount of agency fee was filed and issuance of Commission's final decision, where some of delay was attributable to nonmembers' requests to stay proceedings until certain judicial decision was issued, and case involved substantial number of factual and legal issues, and required the Commission to receive and examine a great deal of evidence.

The Court also found that the Labor Relations Commission properly computed the agency fee to be charged by union against public school teachers who were nonmembers, by totaling the expenses it concluded

were chargeable and then dividing that number by the number of bargaining unit members, even if use of alternative formula would result in lower fee; formula used by Commission calculated nonmember's actual per capita share of chargeable costs, and thus nonmember was not required to contribute to non-chargeable activities in violation of First Amendment.[399]

When chargeable and non-chargeable activities are combined at a union event, the union is not automatically required to prove that each individual expense was incurred in furtherance of an exclusively chargeable activity, in order for event expenses to be included in the calculation of an agency fee charged to public employees who are not union members; rather, amount and detail of the evidence a union is required to produce depends on variety of factors.

The fact that chargeable and non-chargeable activities were combined at a union event should not automatically invalidate all the expenses of the event, nor should it necessarily impose a greater burden on the union, for purposes of determining the proper amount of agency fee charged to public employees who are nonmembers; the amount and detail of evidence a union is required to produce, as matter of law, in order to meet its burden of persuasion, depends on a variety of factors, including nature and purpose of event, types of attendees at event and their level of participation, as well as the nature and extent of political activity at the meeting.

The amount and detail of the evidence necessary for the union to meet its burden of persuasion, as to whether particular expense is chargeable for purposes of calculating agency fee charged to public employees who are nonmembers, will depend on the evidence offered by the charging parties to rebut the union's claim that an expense is chargeable.

The SJC ruled that the Labor Relations Commission's application of presumption that union's management meetings and board of directors' expenses were fully chargeable, for purposes of calculating agency fee to be charged against public school teachers who were nonmembers, unless an expense was proved to be exclusively non-chargeable, did not impermissibly shift the burden of persuasion to the nonmembers who challenged the agency fee; the presumption affected only the nonmembers' burden of production.

To qualify as a chargeable expense that may be included in the calculation of agency fee for public employees who are nonmembers, the union expenditure must (1) be germane to collective-bargaining activity, (2) be justified by the government's vital policy interest in labor peace and avoiding free riders, and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

According to the SJC, the union's accounting expenses were chargeable, for purposes of calculating agency fee to be charged to public school teachers who were nonmembers, but Labor Relations Commission was required to deduct from chargeable costs the number of hours it identified as non-chargeable accounting time.

For the Labor Relations Commission to apply the presumption that overhead expenditures necessary to maintain union's organizational existence are fully chargeable, for purposes of calculating an agency fee to be charged public employees who are nonmembers, the union must first produce some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent.

The costs of a union's president and vice-president, such as their salaries, were chargeable in proportion to the union's overall chargeable expenditures, for purposes of calculating agency fee to be charged public school teachers who were nonmembers; such officers had primary roles in management of the union and functioning of it as an organization, many of the officers' costs would be incurred regardless of amount of nonchargeable activity, and the union provided corroboration that the officers' general levels of chargeable activity were consistent with the union's overall level of chargeable activity.

Union expenses related to a statewide strike of public educators were not chargeable, for the purposes of calculating the agency fee that union could demand from public school teachers who were nonmembers, where the objective of the statewide strike was to raise the profile of the issue of public education funding, and advocating for funding of public education in general was the type of political speech for which union could not charge.[400]

Expenses associated with an article that appeared in a union publication and that offered communication points to use during "a strike or some other unusual event" were chargeable, for purposes of calculating the agency fee to be charged public school teachers who were nonmembers. The article was in the nature of informational support services that were not political and were intended to benefit all members of bargaining unit.

A union's expenses associated with two-day job action, in which the university faculty withheld expected services, were not chargeable, for the purposes of calculating an agency fee to be charged public school teachers who were nonmembers. Withholding of services by faculty members was a strike by public employees, which was prohibited by statute.[401]

Expenses associated with a union's distribution of flyers at a university commencement exercises were not chargeable, for purposes of calculating an agency fee to be charged public school teachers who were nonmembers, where distribution of flyers was public relations activity not germane to the union's collective bargaining functions.

For public relations, lobbying or other political activity of a union to be chargeable, for purposes of calculating an agency fee to be charged to public employees who are nonmembers, the activity must not merely advocate for the general support of the employees, their profession, or public employees, but instead must be in the limited context of contract ratification or implementation.

Funds that a union reimbursed a teachers' association for expenses incurred in connection with a local proposition override campaign were chargeable, for purposes of calculating an agency fee to be charged public school teachers who were nonmembers, where the override campaign activity was directed at implementing the teachers' collective bargaining agreement.

A 2000 SJC decision involved a nonunion employee of local school committee who filed prohibited labor practice charge after she was notified by committee that she would be suspended based on her failure to pay required agency service fee.[402] After initially dismissing charge, the Labor Relations Commission affirmed dismissal on first request for reconsideration, and after granting second reconsideration, affirmed dismissal as modified. After granting application for direct appellate review, the Supreme Judicial Court held that a public employer has no obligation to ensure that a union has made a proper agency service fee demand before it proposes to suspend an employee for failing to pay the fee, and does not commit a prohibited labor practice when it takes such action after a union used improper procedures to collect the fee.

The following principles are taken from the court's decision.

Where an administrative agency's decision is based on a question of law, judicial review of the agency's interpretation is *de novo*.[403]

When a union issues a demand for payment of a service fee, it must follow constitutional requirements outlined in case law and certain administrative rules, and a union which fails to abide by these procedural requirements commits a prohibited labor practice.[404]

A public employer does not issue a service fee demand, and thus, is not required to follow procedural safeguards for such demands which are applicable to unions.

No requirement exists that a public employer must ensure that a union has made a proper agency service fee demand before the employer proposes to suspend an nonunion employee, pursuant to the collective bargaining agreement, for nonpayment of an agency service fee.

After a collective bargaining agreement requiring payment of an agency fee by nonunion employees has been properly ratified by a union, an public employer is statutorily obliged to have nonunion employees pay the

service fee as a condition of employment, and an employer who does not fulfill this requirement commits a prohibited labor practice.

A public employer does not commit a prohibited labor practice when it proposes to suspend an employee for nonpayment of an agency service fee after union used improper procedures in collecting that fee.

A 2005 case involved an action by a public employee union against a former member to enforce disciplinary penalties imposed by the union, to collect unpaid dues and to recover attorney's fees as provided by the union bylaws.[405] This action arose from Shoreman's personal conduct on one occasion while he was a union member and the union's response to the same. On November 15, 2001, Shoreman was distraught about the way a union grievance had been settled and stated that union officials had better watch where they parked their cars because there would be a lot of broken glass and flat tires. Article XIII, § 2of the union's by-laws sets forth a list of offenses for which a union member can be charged, brought before the union's executive board and disciplined.

It is well settled that a union has "the rights to make appropriate by-laws of its internal management, and for the regulation of the conduct of its members toward each other in matters affecting the general interests of the body; and they may enforce obedience to such by-laws and regulations by fines or other suitable penalties.[406]

"As an incident of membership [the union member] consented to be suspended or expelled in accordance with the constitution and the rules of the union by its appropriate officers acting in good faith and in conformity to natural justice. Courts do not sit in review of decisions thus made by such officers, even though it may appear that there has been an honest error of judgment, an innocent mistake in drawing inference or making observations, or a failure to secure all information available by a more acute and searching investigation."[407]

Further, "it is clear that a union can seek external enforcement of its internal rules at least to the extent of utilizing the courts to collect fines."[408] The relationship between union and employee in connection with fines is a contractual matter governed by local law.[409] While there is no claim in this case that the $100.00 fine imposed by the executive board was excessive, we note that state courts do not seem to have hesitated to act in cases where the fines were excessive.[410]

§ 5 DECERTIFICATION

The Commission has adopted the National Labor Relations Board's rule that the appropriate unit in cases involving employee petitions to decertify an existing bargaining unit must be coextensive with either the unit

previously certified by the Commission or the one recognized by the parties.[411]

[1] *City of Somerville v. Labor Relations Commission*, 53 Mass. App. Ct. 410, 759 N.E.2d 737 (2001).
[2] Section 1 of c. 150E has a very broad definition of "employee organization", so that any organization willing to represent public employees with the intention of improving the employees' working conditions may petition to represent employees. *See, e.g., Boston Water and Sewer Commission*, 7 MLC 1439, 1441-42 (1980) (holding that a "liberal construction" of employee organization exists under c. 150E).
[3] G.L. c. 150E, § 4.
[4] *See* generally, 456 CMR § 14.
[5] 456 CMR § 14.06(3).
[6] *Town of East Longmeadow*, 14 MLC 1555, 1556 n. 2 (1988).
[7] G.L. c. 150E, § 4.
[8] *Id.*
[9] 456 CMR § 14.02(6).
[10] 456 CMR § 14.03(4).
[11] *Fall River School Committee*, 8 MLC 1028, 1029 (1981).
[12] 456 CMR § 14.05. The Commission makes an "administrative determination" as to the sufficiency of the showing of interest; the parties may not litigate the issue. *See Commonwealth of Massachusetts*, (Unit 6), 10 MLC 1557 (1984).
[13] *See Commonwealth of Massachusetts* (Unit 1), 6 MLC 2123, 2125 (1980).
[14] *Commonwealth of Massachusetts (Commissioner of Administration)*, 7 MLC 1228 (1980).
[15] *Id.* at 1232, *citing Midwest Piping*, 63 NLRB 1060, 17 LRRM 40 (1945).
[16] *Midwest Piping*, 63 NLRB 1060, 17 LRRM 40. *See also, Shea Chemical Corporation*, 121 NLRB 1027, 42 LRRM 1486 (1958).
[17] *Northeast Met. Reg. Voc. School District*, 7 MLC 1372, 1382 (H.O. 1980).
[18] 456 CMR § 14.05. An employee organization may intervene without that showing of interest (see 456 CMR § 14.05), but needs the 10% interest to appear on the ballot.
[19] The issue of determining the proper bargaining unit will be developed later in this chapter.
[20] 456 CMR § 14.08.
[21] 456 CMR § 14.11. A stipulation waiving a hearing and allowing a consent election should include "a description of the appropriate unit, the time and place for holding an election, and the payroll or personnel list to be used in determining which employees within the appropriate unit shall be eligible to vote." *Id.*

[22] *See Fall River, supra*, 8 MLC 1028, 1029-30 (1981) (holding that the units stipulated to by the parties raised substantial questions regarding the community of interest criteria).
[23] *Springfield School Committee*, 29 MLC 106, 111 (2002), citing *Massachusetts Water Resources Authority*, 19 MLC 1778, 1779 (1993).
[24] 456 CMR 14.06(1)(b).
[25] 456 CMR § 14.06(2).
[26] 456 CMR § 15.12.
[27] *Commonwealth of Massachusetts*, 17 MLC 1650, 1652 (1991).
[28] *See, Town of North Reading*, Case No. MCR-04-5076 (slip op February 13, 2004); *Town of Westminster*, 23 MLC 153, 155 (1996).
[29] *Town of Saugus*, 28 MLC 80 (2001); *Boston Water and Sewer Commission*, 6 MLC at 1603; *City of Worcester,* 1 MLC 1069 (1974).
[30] See, *Town of Saugus*, 28 MLC at 83; *Quincy School Committee*, 23 MLC 173 (1997).
[31] *City of Springfield*, 1 MLC 1446 (1975).
[32] *Town of North Reading*, 5 MLC 1209 (1978).
[33] *Chief Administrative Justice of the Trial Court*, 6 MLC 1195, 1202 n.8 (1979).
[34] *Town of Burlington*, 14 MLC 1632, 1635 (1988).
[35] Commonwealth of Massachusetts (Unit 7), 7 MLC 1825, 1829-30 (1981).
[36] *Town of Burlington*, 14 MLC 1632, 1636 n.11 (1988).
[37] *Id.* at 1635 n.10.
[38] *Easton School Committee*, 2 MLC 1111 (1975).
[39] *See, e.g., City of Salem*, 1 MLC 1172 (1974).
[40] *City of Somerville*, 1 MLC 1312, 1314-15 (1975).
[41] *University of Massachusetts, Boston*, 2 MLC 1001, 1004 (1975).
[42] *City of Somerville*, 1 MLC 1312, 1314-1316 (1975); citing *Town of Billerica School Committee*, MCR-595, slip op (June 5, 1970).
[43] *Commonwealth of Massachusetts*, 1 MLC 1127 (1974).
[44] *Department of Public Welfare*, 1 MLC 1127, 1133-34 (1974).
[45] *Town of Tisbury*, 6 MLC 1673, 1674 (1979) (holding that an employee who was out of work on the cut off date and awaiting approval of his/her retirement application was not eligible).
[46] *See Town of Millville*, 11 MLC 1641, 1645 (1985), citing *Davidson-Paxon Company*, 185 NLRB 21 (1970).
[47] *Town of Millville*, 11 MLC at 1644. The Commission also held that the number of hours necessary to be a regular employee will vary from "industry to industry and workplace to workplace." *Id.*
[48] *Id.* at 1645.
[49] *Id.* at 1644.
[50] 456 CMR
[51] *Boston School Committee*, 3 MLC 1043 (1976).

[52] 456 CMR § 14.12(3); *see also, Lowell School Committee*, 10 MLC 1553, 1555-56 (1984) (dismissing the objecting party's claim of incorrect tallying of the ballots based on its failure to allege sufficient facts to support the existence of an error).
[53] Occasionally, a run-off election is required when none of the unions receives a majority of the votes, so the LRC will not certify the election until the run-off is held. *See* 456 CMR §14.13.
[54] *Commonwealth of Massachusetts (Unit 5),* 3 MLC 1067, 1071 (1976).
[55] *Boston Water and Sewer Commission,* 13 MLC 1071, 1073.
[56] *Id.*
[57] *Id.*
[58] 13 MLC 1697, 1701 (1987). *See also, Clinton Services Corporation d/b/a Great Expectations, Inc.*, 9 MLC 1494 (1982).
[59] 13 MLC at 1701.
[60] *Comm. of Mass.* (Unit 7), 9 MLC 1842, 1848 (1983).
[61] *City of Boston*, 2 MLC 1275, 1280 (1976).
[62] *City of Lawrence*, 5 MLC 1301 (1978) (upholding the election results despite one union's use of a posted copy of the ballot for campaign purposes where few voters in fact saw the sample); *Comm. of Mass. (Unit 4),* 2 MLC 1261 (1975) (invalidating an election where the prevailing union had distributed ballots with an "X" marked in that union's box);
[63] *Town of Barnstable*, 15 MLC 1069, 1072 (1988).
[64] *See City of Lawrence, supra.*.
[65] *City of Quincy*, 1 MLC 1161, 1164 (1974).
[66] *City of Springfield*, 14 MLC 1010, 1013 (1987).
[67] The public employee's right to organize and bargain collectively is secured by § 2 of G.L. c. 150E.
[68] *Mass. Board of Regents of Higher Education*, 13 MLC 1697, 1701. *See also, City of Boston*, 8 MLC 1281, 1284 (1981).
[69] G.L. c. 150E § 3. *See Fall River School Committee*, 8 MLC 1028, 1029 (1981) (refusing to agree to the parties' stipulation regarding composition of the bargaining unit and questioning why employees traditionally in separate units were placed in the same unit while other similar employees were placed in separate units).
[70] *Town of Bolton,* 25 MLC 62, 65 (1998), *citing, Boston School Committee,* 12 MLC 1175, 1196 (1985) (citations omitted).
[71] *City of Worcester*, 5 MLC 1108, 1111 (1978).
[72] *City of Springl7eld*, 24 MLC 50, 54 (1998), citing, *Mass. Board of Regional Community Colleges*, I MLC 1426, 1440 (1975).
[73] *City of Somerville,* 24 MLC 69,71 (1998*); City of Boston,* 18 MLC 1036, 1043 (1991), *citing, Lynn Hospital,* 1 MLC 1046, 1050 (1974).

[74] *See, Town of Grafton,* 28 MLC 399, 400 (2002), and cases cited therein. *See also, Town of Ipswich*, 23 MLC 209 (1997) (Affirming Commission's policy of rejecting a dual unit structure, consisting of one unit of part-time

employees and one unit of full-time employees, where both units performed similar functions under similar working conditions).
[75] *City of Boston,* 8 MLC 1835, 1837 (1982) *citing Town of Dartmouth,* continually reaffirmed its policy of finding the largest unit practicable, provided there is a sufficient community of interest among the employees included, *citing Pittsfield School Committee,* 3 MLC 1490 (1977).
[76] *Lynn School* Committee, 29 MLC 88-89 (2002)
[77] *Worcester School Committee,* 17 MLC 1762, 1765 (1996).
[78] *Town of Ipswich,* 23 MLC 209, 210 (1997).
[79] *City of Worcester,* 12 MLC 1342, 1345 (1985).
[80] Id., citing Town of Scituate, 7 MLC 2120, 2122 (1981).
[81] See City of Worcester, 12 MLC at 1345.
[82] *See e.g., Plymouth County Sheriff's Department,* 23 MLC 148, 150 n. 2 (1996).
[83] Town of Mashpee, 27 MLC 133 (2001).
[84] Town of Natick, 27 MLC 135 (2001).
[85] G.L. c. 150E, §3.
[86] *City of Worcester*, 5 MLC 1332 (1978).
[87] *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 365 (2d Cir. 1966).
[88] *See* G.L. c. 150E, § 3.
[89] *Town of Bolton*, 25 MLC 62, 65 (1998).
[90] *Town of Bolton*, 25 MLC 62, 65 (1998), citing, *Boston School Committee*, 12 MLC 1175, 1196 (1985) (citations omitted).

[91] *The City of Worcester*, 5 MLC 1108, 1111 (1978).
[92] *City of Springfield*, 24 MLC 50, 54 (1998); *citing, Mass. Board of Regional Community Colleges*, 1 MLC 1426, 1440 (1975).
[93] *City of Somerville*, 24 MLC 69, 71 (1998); *City of Boston*, 18 MLC 1036, 1043 (1991), citing, *Lynn Hospital,* 1 MLC 1046, 1050 (1974).
[94] *City of Boston*, 18 MLC 1036, 1043 (1991).
[95] *Higher Education Coordinating Council,* 23 MLC 194, 199 (1997); *City of Boston,* 18 MLC at 1043; *see also, City of Everett*, 27 MLC 147 (2001).
[96] One critical component of the "community of interest" requirement involves establishing that the employee is in fact a "public employee" as defined by the Law. A public employee is defined as any person employed by a "public employer". Public employers include the commonwealth, counties, cities, towns, districts, other political subdivisions, and their instrumentalities. G.L. c. 150E § 1. For an analysis of whether an employee is a "public employee," see *City of Malden*, 9 MLC 1073 (1982).
[97] *See* Fifteenth Annual Report of the NLRB, 39 (1950); *New Fern Restorium Co.*, 175 NLRB 142, 71 LRRM 1093 (1969); *Freuhauff Corp.,*

Hobbs Trailer Division, 157 NLRB 28, 61 LRRM 1319 (1966); *Federal Electric Corp.*, 157 NLRB 89, 61 LRRM 1500 (1966).
[98] 562 F.2d 246, 249 (3d Cir. 1977).
[99] *Town of Granby* at 141; *Boston School Committee*, 12 MLC 1175, 1196 (1985).
[100] *City of Springfield*, 24 MLC 50, 54 (1998); *City of Worcester*, 5 MLC 1108, 111 (1978).
[101] *County of Dukes County/Martha's Vineyard Airport Commission*, 25 MLC 153, 155 (1999); *Springfield Water and Sewer Commission*, 24 MLC 55, 59 (1998).
[102] *Town of Ludlow*, 27 MLC 34, 36 (2000); *Mass. Board of Regional Community Colleges*, 1 MLC 1426, 1440 (1975).
[103] *University of Massachusetts*, 4 MLC 1384, 1392 (1977).
[104] *West Boylston Water District*, 25 MLC 150, 151 (1999); *Franklin Institute of Boston*, 12 MLC at 1093.
[105] *Town of Bolton*, 25 MLC 62, 65 (1998), *citing Boston School Committee*, 12 MLC 1175, 1196 (1985) (citations omitted).
[106] *Springfield Water and Sewer Commission*, 24 MLC 55, 59 (1998), *citing, Mass. Board of Regional Community Colleges*, 1 MLC 1426, 1435 (1975) (citations omitted).
[107] *City of Worcester*, 5 MLC 1108, 1111 (1978).
[108] *City of Springfield*, 24 MLC 50, 54 (1998), *citing, Mass. Board of Regional Community Colleges*, 1 MLC at 1440.
[109] *City of Boston*, 18 MLC at 1043.
[110] *Town of Bolton*, 25 MLC at 66.
[111] *Id.*
[112] *Id.*
[113] *Framingham School Committee*, 18 MLC 1214 (1991); *Walpole School Committee*, 12 MLC 1015 (1985); *City of Springfield*, 2 MLC 1233 (1975); *Dracut School Committee*, 26 MLC 36 (1999).
[114] *Framingham School Committee*, 18 MLC 1214 (1991).
[115] *Wil-Kil Pest Control*, 440 F.2d 371, 375 (7th Cir. 1971).
[116] *City of Worcester*, 5 MLC 1108 (1978).
[117] *Mock Road Super Duper, Inc.*, 156 NLRB 82, 61 LRRM 1173 (1966). The Board has given great weight in particular to the "interchangeability of employees" factor: where employees do the same work interchangeably the Board avoids the "awkwardness" of placing such similar employees in different units. *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497 (1st Cir. 1967).
[118] *City of Malden*, 9 MLC 1073, 1080 (1982).
[119] *Mass. Board of Regional Community Colleges*, 1 MLC 1426 (1975).
[120] 2 MLC 1557 (1976); *see also*, *Massachusetts Bay Transportation Authority*, 6 MLC 1419, 1438 (1979). Note that many of these factors are derived from the National Labor Relations Board factors for community of

interest. Also, the evaluation of these factors is an inherently fact-based inquiry which varies from case to case.

[121] *City of Worcester*, 11 MLC 1091 (1985); *Town of Harwich*, 1 MLC 1376 (1975).

[122] *Higher Education Coordinating Council*, 23 MLC 194 (1997).

[123] *Id.*; *Framingham School Committee*, 18 MLC 1212 (1991); *Commonwealth of Massachusetts*, 23 MLC 117 (1996).

[124] *Mass. Board of Regional Community Colleges*, 1 MLC 1426 (1975).

[125] *City of Worcester*, 5 MLC 1332 (1978). The Commission is free, however, to adopt the parties' stipulation if it satisfies the statutory criteria. *Town of Hopedale*, 20 MLC 1059 (1993).

[126] *Univ. of Massachusetts Board of Trustees*, 20 MLC 1453 (1994) (establishing a unit of graduate teaching and research assistants after parties stipulated to the work conditions of the affected employees). The LRC will rely on the job description stipulated to by the parties.

[127] *Upper Cape Cod Regional Vocational-Technical School Committee*, 9 MLC 1503, 1506-1508 (1983).

[128] *Id.* at 1508. In particular, the Commission was concerned with the managerial and teaching aspects of the new job which would affect unit placement.

[129] *Town of Agawam*, 13 MLC 1364 (1986); *Boston School Committee*, 10 MLC 1410 (1984).

[130] *Eastham School Committee*, 22 MLC 1190 (1995).

[131] *Id.* at 1197.

[132] *Id.* at 1198.

[133] *Id.*

[134] *City of Worcester*, 5 MLC 1332 (1978) *citing Town of Braintree*, 5 MLC 1133 (1978).

[135] *State Bargaining Unit Rules*, 1 MLC 1318 (1975).

[136] *Boston School Committee*, 2 MLC 1557 (1975); *City of Springfield*, 24 MLC 50 (1998).

[137] *Town of Milford*, 22 MLC 1624 (1996); *Marblehead Municipal Light Dept.*, 9 MLC 1323 (1982); *Boston Water and Sewer Commission*, 7 MLC 1439 (1980); *City of Springfield*, 2 MLC 1022 (1975); *Springfield Water and Sewer Commission*, 24 MLC 55 (1998).

[138] *Mass. Bay Transportation Authority*, 14 MLC 1734 (1988); *Lowell School Committee*, 8 MLC 1010 (1981); *Boston School Committee*, 2 MLC 1557 (1976); *Mass. Board of Regional Community Colleges*, 1 MLC 1426 (1975).

[139] *See, e.g., Town of Harwich*, 1 MLC 1376 (1975) ("excessive fragmentation of blue collar employees does not serve the purposes of the Law"). This justification ties in with the third criterion under the Law of safeguarding employee rights to effective representation.

[140] *University of Massachusetts*, 3 MLC 1179 (1976).

[141] *City of Boston*, 19 MLC 1039 (1992).

[142] *MBTA*, 22 MLC 1111 (1995);*City of Boston*, 17 MLC 1088 (H.O. 1990), aff'd 18 MLC 1036 (1991); *Town of Mansfield*, 14 MLC 1565 (1988).
[143] *University of Massachusetts, Union of Student Employees*, 4 MLC 1384 (1977).
[144] *Town of Wellesley*, 14 MLC 1232 (1987).
[145] In particular, the Commission will take professional employees' wishes into account when there is a proposal or a practice of including them in a non-professional unit. *See, e.g., Trustees of Health & Hospitals of the City of Boston*, 20 MLC 1509 (1994).
[146] It should be noted that even if the labor union has in fact organized employees, the LRC does not necessarily give that fact "conclusive or controlling weight." *Palmer*, 12 MLC 1413 (1986).
[147] The Commission often takes a different approach in determining the appropriate unit depending on the type of work involved. This practice will be discussed later in the chapter in reference to police and fire departments.
[148] *City of Quincy*, 10 MLC 1027 (1983).
[149] *Lynn Hospital*, 1 MLC 1046, 1050 (1974).
[150] *Sullivan v. Labor Relations Commission*, 5 Mass. App. Ct. 532 (1977).
[151] *City Manager of Medford v. Labor Relations Commission*, 353 Mass. 519 (1968) (refusing to overturn LRC's inclusion of all firefighters except for chief in bargaining unit and articulating three conditions to judicial review noted above).
[152] *City of Boston*, 17 MLC 1088, 1102 (1990); *Mass. Bay Transportation Authority*, 14 MLC 1172 (H.O. 1988).
[153] *Board of Regents of Higher Education*, 12 MLC 1643, 1648; *University of Massachusetts*, 3 MLC 1179, 1186 (1976); *Barnstable County*, 3 MLRR 1048 (1976). Single, large units are generally selected wherever possible, see *Town of Newbury*, 14 MLC 1660 (1988); *City of Worcester*, 12 MLC 1342 (1985).
[154] *Town of Sturbridge*, 17 MLC 1523 (1991) (finding single-person supervisory unit for fire captain impermissible); *Chatham School Committee*, 6 MLC 1042 (1975). Occasionally, the LRC will approve one-person units, see *West Barnstable Fire District*, 17 MLC 1076 (1990) (approving unit of part- and full-time firefighters, though the actual unit only consisted of a single firefighter). The issue of single-person units can also arise in reference to police and fire chiefs, see *infra*.
[155] *Town of Bolton*, 25 MLC 62 (1998).
[156] *Massachusetts Development Finance Agency*, 26 MLC 31 (1999).
[157] *Town of Bolton*, 25 MLC 62 (1998); *West Boylston Water District*, 25 MLC 150 (1999); and *County of Dukes County*, 25 MLC 153 (1999).
[158] *City of Malden,* 28 MLC 130, 134 (2001); *Boston School Committee,* 7 MLC 1947, 1949 (1981) (additional citations omitted).
[159] *Town of Dartmouth,* 22 MLC 1618, 1622 (1996), *citing, Town of Leicester,* 9 MLC 1014, 1018 (1982); *Town of Saugus,* 4 MLC 1361, 1362 (1977).

[160] *See, Town of Wenham,* 22 MLC 1237, 1244-1245 (1995), *aff'd. Town of Wenham v. Labor Relations Commission,* 44 Mass. App. Ct. 195 (1998), and cases cited therein.
[161] *Worcester County*, 17 MLC at 1358.
[162] *Town of Millville,* 11 MLC 1642, 1644 (1985).
[163] *City of Malden,* 28 MLC at 134-135.
[164] *Town of Dartmouth,* 22 MLC at 1622-1623.
[165] *Town of Newbury,* 13 MLC 1676,1680-1681 (H.O. 1987), *affd,* 14 MLC 1660, 1662 (1988).
[166] *Boston School Committee,* 7 MLC 1947 (1981).
[167] *Town of Sterling,* 4 MLC 1473, 1475-1476 (H.O. 1977), *affd,* 4 MLC 1704 (1978).
[168] *City of Woburn,* 22 MLC 1073, 1076-1077 (1995); *Town of Milford,* 22 MLC 1624, 1630 (1996); *Town of Braintree,* 5 MLC 1133, 1136 (1978); *City of Quincy Library Department, 3* MLC 1327, 1329 (1976).
[169] *County of Plymouth*, 2 MLC 1106 (1979).
[170] *Town of Sturbridge*, 29 MLC 156 (2003).
[171] *City of Worcester*, 12 MLC 1342 (1985).
[172] *Town of Scituate*, 7 MLC 2120 (1981).
[173] *Town of Templeton*, 24 MLC 94 (1998).
[174] *Town of Manchester-by-the-Sea*, 24 MLC 76, 80 (1998); *Town of Hopedale*, 20 MLC 1059, 1067 (1993), *citing Board of Trustees, State Colleges*, 4 MLC 1427, 1428 (1977).
[175] *Town of Grafton*, 28 MLC 399 (2002).
[176] *City of Woburn*, 22 MLC 1073 (1995); *Town of Hopedale*, 20 MLC 1059 (1993).
[177] *Board of Trustees, State Colleges*, 4 MLC 1428 (1977). This is in keeping with the LRC's general policy of selecting *an* appropriate unit, not necessarily the *most* appropriate unit.
[178] *Pittsfield School Committee*, 12 MLC 1487, 1493 (1985).
[179] *Trustees of Health & Hospitals of Boston*, 20 MLC 1509 (1994) (ordering an election to allow nurses to determine whether they want to be in a separate unit for professional employees); *but cf., Town of Canton*, 17 MLC 1127 (1990) (finding that administrative unit was not professional, and rejecting employee's wish to be in a separate unit).
[180] *City of Boston,* 20 MLC 1431 (1994).
[181] *Id.*
[182] While the Collective Bargaining Law does not protect these excluded employees, such employees can, of course, receive protection under civil service and other statutes, as well as through private contractual agreements.
[183] *City of Boston*, 24 MLC 73 (1998).
[184] G.L. c. 150E, § 1.

[185] *Massachusetts Bay Transportation Authority v. Labor Relations Commission*, 425 Mass 253, 680 N.E. 2d 556 (1997).

[186] *Town of Manchester-by-the-Sea*, 24 MLC 76, 81 (1998).
[187] *City of Amesbury*, 25 MLC 7,9 (1998); *Town of Manchester-by-the-Sea* at 81; *Higher Education Coordinating Council,* 23 MLC 194, 197 (1997).
[188] *City of Amesbury* at 9*; Town of Plainville,* 18 MLC 1001, 1009 (1991); *Town of Agawam,* 13 MLC 1363, 1368 (1986).
[189] *City of Amesbury* at 9; *Higher Education Coordinating Council* at 197; *Town of Wellfleet*, 11 MLC 1238, 1241 (1984).
[190] *City of Amesbury* at 9; *Higher Education Coordinating Council* at 197; *City of Quincy*, 13 MLC 1436, 1440 (1987).
[191] *Town of Manchester-by-the Sea* at 81, *citing Town of Medway,* 22 MLC 1261, 1269 (1995).
[192] *Town of Manchester-by-the Sea* at 81, *citing Wellesley School Committee*, 1 MLC 1399, 1408 (1975).
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Town of Manchester-by-the Sea* at 81, *citing Town of Agawam* at 1369.
[197] *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112, 379 N.E.2d 1077 (1978).
[198] 379 N.E.2d at 1079.
[199] *Id. See also, City of Quincy*, 13 MLC 1436 (1987); *Worcester School Committee*, 3 MLC 1653 (1977).
[200] 379 N.E.2d at 1082; *see also, Town of Agawam*, 13 MLC 1364, 1368-69 (1986) (holding that simply being consulted about the implications or feasibility of proposals does not make an employee managerial); *Town of Holbrook*, 1 MLC 1468 (1975) (finding that school administrators who reviewed contract proposals concerning teachers' bargaining unit in order to prevent a possible adverse impact on their own employment were not managerial).
[201] 379 N.E.2d at 1082.
[202] *See also, Town of Agawam*, 13 MLC 1364, 1369 (1986) (holding that managerial employee's judgment is independent if there is no need to consult with a higher authority).
[203] 379 N.E.2d at 1082. *See also, Eastham School Committee*, 22 MLC 1190 (1995) (holding that positions of head custodian and cafeteria manager are managerial in nature but should not be exempt from coverage under the Law based on merely hearing level 1 grievances); *City of Quincy*, 13 MLC 1054 (1976). Note that an employee may be classified as managerial as grounds for exclusion from a particular bargaining unit (i.e., lacking community of interest with other employees), but may not be considered *exempt* unless the employee meets the statutory criteria.

[204] *Id.* at 1084.
[205] *Lee School Committee*, 3 MLC 1496 (1977); *Taunton School Committee*, 1 MLC 1480 (1975).
[206] *Masconomet Regional School District*, 3 MLC 1001 (1988).
[207] *Town of Bridgewater*, 15 MLC 1001 (1988).
[208] Worcester School Committee, 3 MLC 1653 (1977).
[209] *Town of Dartmouth*, 29 MLC 204 (2003).
[210] *See, e.g., City of Amesbury*, 25 MLC 7, 9 (1998); *Town of Agawam*, 13 MLC 1363, 1369 (1986).
[211] *Id.*
[212] *Taunton Municipal Lighting Plant*, 30 MLC 16 (2003).
[213] *Id.*
[214] *Fall River School Committee*, 27 MLC 37, 39 (2000); *City of Lawrence,* 25 MLC 167, 168 (1999); *Town of Medway,* 22 MLC 1261, 1269 (1995); *Millis School Committee*, 22 MLC 1801 (1995).
[215] *City of Everett,* 27 MLC 147,150 (2001); *Fall River School Committee,* 27 MLC at 39, *citing Framingham Public Schools,* 17 MLC 1233 (1990).
[216] *SilverLake Regional School Committee*, 1 MLC 1240 (1975).
[217] *Town of Dartmouth*, 29 MLC 204 (2003).
[218] G.L. c. 150E, § 1.
[219] *Millis School Committee*, 22 MLC 1081, 1085 (1995); *Framingham Public School*, 17 MLC 1233, 1236 (1990); *citing Littleton School Committee*, 4 MLC 1405, 1414 (1977).
[220] *Id., citing Silver Lake Regional School Committee, 1* MLC 1240, 1243 (1975).
[221] *City of Everett,* 27 MLC 147, 150 (2001); F*all River School Committee*, 27 MLC 39 (2001); *Framingham Public Schools,* 17 MLC 1233 (1990).
[222] *Town of Medway,* 22 MLC at 1269 *citing, Littleton School Committee,* 4 MLC 1405, 1414 (1977); *Town of Plainville, 18* MLC at 1010.
[223] *Silver Lake Regional School Committee, 1* MLC 1240, 1243 (1975); *Framingham Public Schools*, 17 MLC 1233, 1236 (1990).
[224] *Town of Medway,* 22 MLC at 1269, *citing Framingham School Committee,* 17 MLC 1233 (1990); *Pittsfield School Committee,* 17 MLC 1369 (1990).
[225] *Hanover School Committee*, 31 MLC 85 (2004); *citing Brookline School Committee*, 30 MLC 71 (2003); *Fall River School Committee*, 27 MLC 37 (2000), and *Framingham Public Schools*, 17 MLC 1233(1990).
[226] *MBTA*, 22 MLC 1111 (1995).
[227] *Millis School Committee*, 22 MLC 1081 (1995).
[228] *Town of Chelmsford*, 27 MLC 41 (2000).
[229] *Pittsfield School Committee*, 17 MLC 1369 (1991) (holding that positions of Secretary to the Budget Officer and to the Asst. Superintendent of Operations were confidential and excluding them from

the bargaining unit); *but cf., Plainville School Committee*, 18 MLC 1031 (1991) (refusing to exclude Secretary to Superintendent of Schools as confidential); *See, Brookline School Committee*, 30 MLC 71 (2003).

[230] *Fall River School Committee*, 27 MLC 37 (2000); *See City of Lawrence*, 25 MLC 167 (1999), (budget analyst who costed out various collective bargaining proposals, had access to confidential data relating to what funds were available for bargaining and attended meeting where collective bargaining issues were discussed was confidential employee). See also *Framingham Public Schools*, 17 MLC 1233 (1990)(secretary to school superintendent deemed confidential employee where she preformed administrative work in advance of grievance hearings and had access to memoranda prepared by superintendent regarding negotiations).

[231] See discussion of employee preference, *supra*.

[232] *See Commonwealth of Massachusetts, Chief Admin. Justice*, 10 MLC 1162, 1167 (1983), which stated that the term "professional" in the labor law context holds none of the layman's typical positive or negative connotations.

[233] G.L. c. 150E, § 1.

[234] *Boston School Committee,* 25 MLC 160, 161 (1999), *citing Commonwealth of Massachusetts*, 10 MLC 1162 (1983); *Old Colony Elderly Services*, 6 MLC 1893, 1898 (1980).

[235] *Commonwealth of Mass., Chief Admin. Justice*, 10 MLC at 1168.

[236] *Id.* at 1168.

[237] *City of Springfield*, 5 MLC 1170 (1978).

[238] *Town of Braintree*, 5 MLC 1133 (1978).

[239] *City of Worcester*, 6 MLC 1104 (1979).

[240] *Worcester School Committee*, 13 MLC 1471 (1987).

[241] *City of Worcester*, 6 MLC 1104 (1979) (respiratory therapists); *Plymouth County Hospital*, 1 MLC 1255 (1975) (practical nurses).

[242] *Commonwealth of Mass.*, 10 MLC 1162 (1982) (court reporters); *Wellesley Child Care Center*, 1 MLC 11098 (1974) (teachers at child care center).

[243] *Town of Tisbury*, 30 MLC 77 (2003).

[244] *Boston Water & Sewer Commission*, 7 MLC 1439 (1980).

[245] G.L. c. 150E, § 3. During a vote to ascertain whether professional employees wish to be included in a unit composed of non-professionals, the professional employees are presented with a *Globe* ballot where they can indicate their preference.

[246] *Id.*

[247] *Id.* The Law also prohibits fire employees from being classified as confidential, executive, administrative or managerial.

[248] *Boston School Committee*, 21 MLC 1260 (1994).

[249] *Mass. Commissioner of Admin.*, 19 MLC 1101 (1992), *aff'd* 19 MLC 1733 (1993) (placing non-professional Residential Supervisor I in same

unit as professional Residential Supervisor II and III positions given the greater community of interest).

[250] *City of Pittsfield*, 15 MLC 1034 (1988), *aff'd* 15 MLC 1723 (1989); *Town of Needham*, 10 MLC 1312, 1315-16 (1983); *City of Westfield*, 7 MLC 1245 (1980);*Town of Greenfield*, 5 MLC 1036, 140 (1978); *City of Everett*, 3 MLC 1372 (1977; *Chicopee School Committee*, 1 MLC 1195 (1974).

[251] *City of Westfield*, 7 MLC at 1250.

[252] *Town of Bolton*, 25 MLC at 67. (Citations omitted.)

[253] *City of Chicopee*, 1 MLC 1195, 1197-1198 (1974).

[254] *Town of Bolton*, 25 MLC at 67.

[255] *Id.*

[256] *City of Chicopee*, 1 MLC at 1197-1198; see e.g. *Town of Eastham*, 22 MLC 1190, 1197 (1995)(Head custodian and cafeteria manager posses a degree of supervisory authority sufficient to defeat a community of interest between them and the employees they direct.); *Town of Greenfield*, 5 MLC 1036, 1039 (1978)(Deputy fire chiefs posses a degree of supervisory authority sufficient in magnitude to destroy their community of interest with firefighters).

[257] *Town of Greenfield*, 5 MLC at 1040.

[258] *See Somerville School Committee*, 6 MLC 2092 (1980).

[259] *City of Chicopee*, 1 MLC 1195, 1196 (1974).

[260] *City of Westfield*, 7 MLC 1245, 1250 (1980).

[261] *Worcester School Committee*, 22 MLC 1762, 1766 (1996); *City of Westfield*, 7 MLC at 1252;

[262] *Id.*

[263] *Eastham School Committee*, 22 MLC 1190, 1197 (1995); *Town of Newbury,* 14 MLC 1660, 1662 (1988).

[264] *Town of Sturbridge*, 18 MLC 1416, 1421 (1992); *Town of Hadley*, 11 MLC 1457, 1460 (1985).

[265] *Eastham School Committee*, 22 MLC at 1197.

[266] 7 MLC at 1251.

[267] *Worcester School Committee*, 22 MLC 1762, 1766 (1966); *see also, Town of Shrewsbury*, 11 MLC 1588, 1591 (1985); *Town of Needham*, 10 MLC 1312 (1983); *University of Massachusetts*, 3 MLC 1179 (1976).

[268] *Worcester School Committee,* 22 MLC 1762, 1766 (1996).

[269] *Eastham School Committee,* 22 MLC 1190, 1197 (1995).

[270] Town *of Sturbridge,* 18 MLC 1416, 1421 (1992).

[271] *Town of Bolton,* 25 MLC 62, 67 (1998) (citations omitted).

[272] *Eastham School Committee,* 22 MLC 1190, 1197 (1995).

[273] *Town of Bolton,* 25 MLC at 67; City *of Westfield,* 7 MLC 1245, 1252 (1980).

[274] *Woburn Housing Authority*, 27 MLC 109 (2001).

[275] *Town of Needham*, 10 MLC 1312 (1983).

[276] *International Assoc. of Fire Fighters, AFL-CIO v. LRC*, 14 Mass. App. Ct. 236, 437 N.E.2d 1079 (1982); *City of Westfield*, 7 MLC 1245 (1980). CAS petitions and severance will be discussed later in the chapter.
[277] G.L. c. 150E, § 3.
[278] *International Assoc. of Fire Fighters v. LRC*, 14 Mass. App. Ct. 236, 437 N.E.2d 1079.
[279] *International Assoc. of Fire Fighters v. LRC*, 14 Mass. App. Ct. 267, 437 N.E.2d 1079; *Town of Needham*, 10 MLC 1312; *City of Pittsfield*, 7 MLC 1256.
[280] *City of Everett*, 3 MLC 1372 (1977).
[281] *Id.*
[282] *Id.*
[283] *Cambridge Police Department*, 2 MLC 1027 (1975). Note that both *Cambridge* and *Everett* were cases involving severance of the superior officers as opposed to initial creation of the bargaining unit, but the analysis applied would be the same in either situation.
[284] *City of Everett*, 3 MLC 1372. *See also*, *Town of Winchester*, 12 MLC 1427 (1986) (severing sergeants and lieutenants); *Town of Charlton*, 11 MLC 1528 (1985) (severing sergeants); *Town of Tewksbury*, 11 MLC 1573 (1985) (severing sergeants and lieutenants); *Town of Shrewsbury*, 11 MLC 1588 (1985) (severing sergeants).
[285] *Town of Provincetown*, 31 MLC 55 (2004).
[286] *Town of North Reading*, 24 MLC 20 (1997).
[287] *Lower Pioneer Valley Educational Collaborative,* 28 MLC 147 (2001), citing *City of Springfield*, 24 MLC 50,54 (1998).
[288] *See, e.g., City of Amesbury* at 9-10; *Town of Plainville,* 18 MLC 1001, 1013-1014 (1991); *Town of Agawam* at 1369.
[289] *See* 29 MLC 204, 208 (2003).
[290] *Town of Wareham*, 26 MLC 206 (2000).
[291] *City of Everett*, 31 MLC 117 (2005).
[292] In this situation, the chief is not classified as "managerial". *Cf., Town of Agawam*, 13 MLC 1364 (1986) (classifying chief as managerial).
[293] See the discussion, *infra*, regarding severing positions from the bargaining unit.
[294] G.L. c. 150E, § 1 (defining "employee"). See section discussing managerial employees, *supra*.
[295] See discussion of appropriate units, *infra*.
[296] *Town of Agawam*, 13 MLC 1364 (1986).
[297] *City of Amesbury*, 25 MLC 7 (1988).
[298] *Town of Manchester-By-The-Sea*, 24 MLC 76 (1998).
[299] *City of Everett*, 3 MLC 1372 (1977).
[300] *See Chatham School Committee*, 6 MLC 1042 (1979) (Commission stated it was unwilling to say that single-person units are inappropriate as a matter of law).

[301] *Worcester County*, 17 MLC 1352, 1362 (1990), *citing City of Worcester*, 8 MLC 1350A, 1352 (1981); *Town of Newbury*, 13 MLC 1676, 1680, (H.O. 1987), Aff'd 14 MLC 1660, 1663 (1988); *Board of Regents (DCE)*, 13 MLC 1173 (1986); *Board of Regents (SMU),* 11 MLC 1486 (1985); *Boston School Committee*, 7 MLC 1947 (1981); *Town of Sterling*, 4 MLC 1704 (1978); *Town of Grafton*, 28 MLC 399 (2002).

[302] *Pittsfield School Committee*, 2 MLC 1523 (1976); *City of Worcester*, 8 MLC 1350 (1981).

[303] *Board of Regents*, 11 MLC 1486 (1985) (including part-time personnel in unit); *University of Massachusetts*, 3 MLC 1179 (1976) (same); *but cf., Town of Lincoln*, 1 MLC 1422 (1975) (part time employees lack community of interest with full timers).

[304] *City of Woburn*, 22 MLC 1073 (1995); *Massachusetts Bay Transportation Authority*, CR-3270, Slip Op. (Jan. 18, 1973).

[305] *Pittsfield School Committee*, 2 MLC 1523 (1976).

[306] *City of Gloucester*, 1 MLC 1014 (1982).

[307] *Town of Newbury*, Supra; *Board of Regents (DCE),* Supra; *Town of Leicester*, 9 MLC1014, 1018 (1982); *Town of Saugus*, 4 MLC 1361, 1362 (1977); *Town of Grafton*, Supra.

[308] *Town of Grafton*, Supra.

[309] *Town of Grafton*, 28 MLC 399 (2002).

[310] *Mass. Board of Regents (PCE)*, 13 MLC 1347 (1986); *Mass. Board of Regents (DCE*), 13 MLC 1173 (1986); *Mass. Board of Regents (SMU)*, 11 MLC 1486 (1985). The issue of seasonal or temporary employees often arises in the higher education context because of the large number of employees who only work during the regular school year.

[311] *Worcester County,* 17 MLC 1352 (1990).

[312] *Town of Falmouth*, 27 MLC 27 (2000).

[313] Issues related to whether a position is managerial or professional may be raised at virtually any time.

[314] An individual employee has no standing to file a CAS petition. *See* 456 CMR § 14.15.

[315] *Springfield School Committee,* 29 MLC 106, 111 (2002), *citing Massachusetts Water Resources Authority*, 19 MLC 1778, 1779 (1993).

[316] *Chief Justice for Administration and Management of the Trial Court, 29*MLC 10, 13 (2002), *citing, Boston Water and Sewer Commission,* 6 MLC 1601, 1604 (1979)

[317] The employer must show "changed circumstances" to effectively challenge the composition of the bargaining unit. *See Needham School Committee*, 4 MLC 1120 (1977).

[318] *City of Lawrence*, 13 MLC 1632 (1987).

[319] *City of Lawrence*, 13 MLC 1632 (1987); *City of Worcester*, 6 MLC 1902 (1980).

[320] *Chief Justice for Administration and Management of the Trial Court*, 29 MLC 10 (2003).
[321] *Chief Justice for Administration and Management of the Trial Court, supra.*
[322] *Town of Saugus*, 28 MLC 80, 83 (2001), *citing Boston Water and Sewer Commission*, 6 MLC at 1603.
[323] *Town of Granby,* 28 MLC 139, 141 (2001); *Board of Trustees of the University of Massachusetts, 28* MLC 144, 146 (2001); *Worcester School Committee,* 15 MLC 1178, 1180 (1988).
[324] *Massachusetts Port Authority,* 28 MLC 34, 35 (2001); *Hanover School Committee,* 24 MLC 83, 87 (1998); *Whittier Regional School Committee*, 6 MLC 1182, 1184 (1979).
[325] *Town of Bolton,* 25 MLC 62, 65 (1998), *citing Boston School Committee,* 12 MLC 1175, 1196 (1985) (citations omitted). No single factor is outcome determinative. *City of Worcester,* 5 MLC 1108, 1111 (1978).
[326] Town of *Bolton,* 25 MLC at 66, *citing Higher Education Coordinating Council,* 23 MLC 194, 197 (1997).
[327] *Springfield Water and Sewer Commission,* 24 MLC 55,59 (1998), *citing, Mass. Board of Regional Community Colleges, 1* MLC 1426, 1435 (1975) (citations omitted).
[328] *Springfield Water and Sewer Commission,* 24 MLC at 59, *citing Framingham School Committee,* 18 MLC 1212, 1214 (1991).
[329] *City of Springfield,* 24 MLC 50, 54 (1998), citing, Mass. Board of Regional Community Colleges, 1 MLC 1426, 1440 (1975).
[330] *City of Somerville*, 24 MLC 69,71 (1998); *City of Boston*, 18 MLC 1036 1043 (1991), citing, Lynn Hospital, 1 MLC 1046, 1050 (1974).
[331] *North Andover School Committee*, 10 MLC 1226, 1230 (1983).
[332] *City of Somerville,* 1 MLC 1234,1236 (1975), *quoting, Goslee, Clarification of Bargaining Units and Amendments to Certifications,* 1968 Wisconsin Law Review 988, 993.
[333] *City of Quincy,* 10 MLC 1027, 1031 (1983).
[334] *Silver Lake Regional School District*, 1 MLC 1240 (1975).
[335] *City of Quincy,* 10 MLC 1027 (1983).
[336] *Town of Burlington,* 5 MLC 1234 (1978).
[337] *City of Boston,* 2 MLC 1353 (1976); *City of Boston,* 2 MLC at 1356; *See Sheriff of Worcester County*, 30 MLC 132 (2004).
[338] *City of Somerville,* 27 MLC 62 (2000); City *of Fall River,* 26 MLC 13, 17 (1999); *Lowell School Committee,* 8 MLC 1010 (1981).
[339] City *of Boston,* 20 MLC 1431, 1448 (1994).
[340] City *of Fall River,* 26 MLC at 17; *New Bedford School Committee,* 12 MLC 1058 (1985); *City of Quincy*, 26 MLC 19 (1999); *see also City of Springfield*, 27 MLC 138 (2001); *see also Town of Marblehead*, 27 MLC 142 (2001).

[341] *City of Lawrence,* 25 MLC 1, 5 (1998) (citing City *of Boston,* 20 MLC 1431, 1448 (1994)).
[342] *City of Lawrence,* 25 MLC at 5; City *of Boston,* 20 MLC at 1449-50.
[343] *See City of Lawrence,* severance not justified even though employees who sought to sever from existing unit were outnumbered and believed the Union failed to address their bargaining concerns, (evidence insufficient to demonstrate that the petitioners' interests have been routinely ignored or unfairly subordinated to those of the other unit employees, even where the union intervened in a situation to promote the interests of one group over another); (evidence of conflict limited to the question of whether the petitioners are represented as they wish to be and no evidence of conflict arising from the union's inability to represent functionally distinct groups does not warrant severance).
[344] *Town of Marblehead*, 27 MLC 142, 145 (2001); *City of Fall River,* 26 MLC 13, 17 (1999); *Lowell School Committee,* 8 MLC 1010, 1013 (1981).
[345] *City of Boston,* 25 MLC 105,119 (1999).
[346] *Town of Marblehead*, 27 MLC at 145; *City of Fall River*, 26 MLC at 17; *New Bedford School Committee* 12 MLC 1058, 1060 (1985).
[347] *Town of Barnstable*, 28 MLC 165,169-170 (2001); *City of Lawrence*, 25 MLC 1, 5 (1998).
[348] *City of New Bedford*, 12 MLC 1058 (1985); *Northeast Metropolitan Regional School District,* 7 MLC 1743 (1981); *Massachusetts Port Authority*, 2 MLC 1408 (1976).
[349] *Id.*
[350] *City of New Bedford*, 12 MLC at 1060.
[351] *Town of Saugus School Committee*, 2 MLC 1412 (1976) (determining that interests of clerical employees were significantly distinct from those of custodial workers, and creating a separate unit for the clericals).
[352] *Chicopee School Committee*, 1 MLC 1195 (1974). Evidence of actual internal conflict is not required for severance of a supervisory position, as long as there are sufficient indicia of supervisory authority. *Id.*
[353] *Town of North Reading*, 24 MLC 20 (1997).
[354] *City of Somerville,* 27 MLC 62, 65 (2000), *quoting City of Boston,* 20 MLC 1431, 1448 (1994).
[355] *Id.* (citations omitted.); see *City of Somerville*, 28 MLC 60 (2001).
[356] *City of Boston*, 20 MLC 1431 (1994); *Northeast Regional Metropolitan Regional Vocational School District*, 7 MLC 1743 (1981); *New Bedford School Committee*, 12 MLC 1058 (1985); *City of Springfield,* 19 MLC 1533 (1992); *City of Lawrence*, 25 MLC 1 (1998).
[357] *City of Boston*, 20 MLC 1431 (1994); *City of Lawrence*, 25 MLC 1 (1998).
[358] *Boston School Committee*, 24 MLC 17 (1998).
[359] *Franklin Institute of Boston,* 12 MLC 1091 (1985); *Massachusetts Port Authority*, 28 MLC 34 (2001).

[360] *Town of East Longmeadow*, 14 MLC 1555 (1988).
[361] *Town of Barnstable*, 28 MLC 165 (2001).
[362] *Collective Bargaining Reform Association v. Labor Relations Commission*, 436 Mass. 197, 763 N.E.2d 1036 (2002).
[363] *Worcester School Committee*, 15 MLC 1178 (1988).
[364] *City of Worcester,* 11 MLC 1364, 1366 (1985).
[365] *Town of Bolton, 25* MLC *62, 67 (1998), citing, City of Chicopee,* l MLC 1195, 1196 (1974).
[366] *Id., citing, City of Westfield,* 7 MLC 1245, 1250 (1980).
[367] *Id.*
[368] *City of Chicopee, 1* MLC at *1197-1198.*
[369] *Worcester School Committee*, 15 MLC at 1178 (1988); *Town of Dartmouth*, 22 MLC 1618 (1996); *Town of Granby*, 28 MLC 139 (2001); *Board of Trustees of the University of Massachusetts*, 28 MLC 144 (2001).
[370] *Town of Granby,* 28 MLC 139, 141 (2001); *Board of Trustees of the University of Massachusetts*, 28 MLC 144, 146 (2001), *Worcester School Committee*, 15 MLC 1178, 1180 (1988); *Town of Dartmouth*, 22 MLC 1618 (1996); *Worcester School Committee*, 15 MLC 1178 (1988); *Randolph School Committee*; 27 MLC 25 (2000); *City of Peabody*, 20 MLC 142 (1994); *Chief Justice for Administration and Management of the Trial Court*, 26 MLC 1 (1999); see also, *Westport Federation of Teachers*, 27 MLC 147 (2001).
[371] *Town of Granby, 28* MLC 139, 141 (2001); *Town of Dartmouth, 22* MLC 1618, 1621 (1996); *Worcester School Committee, 15* MLC 1178, 1180 (1988).
[372] *Board of Trustees, University of Massachusetts,* 8 MLC 1385, 1389 (1981); *Whittier Regional School Committee,* 6 MLC 1182, 1184 (1979); *City of Somerville,* 1 MLC 1234, 1236 (1975).
[373] *Plymouth School Committee,* Case No. CAS-03-3551 (slip op. April 27, 2004); *City of Somerville,* 1 MLC at 1236.
[374] *Plymouth County Sheriff's Department*, 29 MLC 39 (2002).
[375] *Town of Dartmouth*, 22 MLC 1618 (1996); *Worcester School Committee*, 15 MLC 1178 (1988).
[376] *City of Worcester*, 11 MLC 1363 (1985).
[377] *See City of Peabody*, 23 MLC 84 (1996); *Town of Dartmouth*, 22 MLC 1618 (1996).
[378] *Boston School Committee*, 12 MLC 1175 (1985).
[379] *Franklin Institute of Boston*, 12 MLC 1091 (1985).
[380] *City of Pittsfield*, 15 MLC 1723 (1989).
[381] *Greater New Bedford Regional Vocational School Committee*, 15 MLC 1040 (1988); *Board of Trustees, University of Massachusetts*, 3 MLC 1179 (1976).
[382] *Town of Bolton*, 25 MLC 62 (1998).
[383] *Town of Somerset*, 25 MLC 98 (1999).

[384] *Town of Wenham*, 26 MLC 41 (1999).
[385] *Winchendon School Committee*, 27 MLC 101 (2001).
[386] *School Committee of Hanover v. Hanover Teachers Association*, 435 Mass. 736, 761 N.E.2d 918 (2002).
[387] *Malden Education Association,* 15 MLC 1429, 1436 (1989).
[388] *School Committee of Greenfield v. Labor Relations Commission*, 385 Mass. 70, 84-85 (1982).
[389] *AFSCME, Council 93*, 28 MLC 22 (2001).
[390] *Harrison v. Massachusetts Society of Professors/Faculty Staff Union/MTA/NEA,* 405 Mass. 56,62-64 (1989). See *also, Wareham Education Association, et al.,* 24 MLC 23 (1997), *affd sub nom., Wareham Education Association v. Labor Relations Commission,* 430 Mass. 1999)(despite potential onerous financial implications, union was required to furnish independent auditor's report with demand).
[391] *Malden Education Association,* 5 MLC 1429 (1989).
[392] *Wareham, Bridgewater and Fairhaven Education Associations* (Joined cases), 24 MLC 23 (1997).
[393] *Belhumeur v. Labor Relations Commission,* 432 Mass. 458, 735 N.E.2d 860 (2000).
[394] U.S.C.A. Const.Amend. 1; M.G.L.A. c. 150E, § 12.
[395] U.S.C.A. Const.Amend. 1.
[396] M.G.L.A. c. 30A, § 14; c. 150E, § 11.
[397] M.G.L.A. c. 30A, § 14.
[398] M.G.L.A. c. 30A, § 14(7)(a).
[399] U.S.C.A. Const.Amend. 1.
[400] U.S.C.A. Const.Amend. 1.
[401] M.G.L.A. c. 150E, § 9A.
[402] *Hogan v. Labor Relations Commission*, 430 Mass. 611, 722 N.E.2d 446 (2000).
[403] M.G.L.A. c. 30A, § 14(7).
[404] M.G.L.A. c. 150E, §§ 10(b)(1), 12; Mass. Regs. Code title 456, § 17.00 et seq.
[405] *Essex County Correctional Officers Association v. Shoreman*, 2004 Mass.App.Div. 30, 2005 WL 477845 (Mass.App.Div.)
[406] *L.D. Willcutt & Sons Co. v. Bircklayers' Benevolent & Protective Union No. 3*, 200 Mass. 110, 118, 85 N.E. 897 (1908).
[407] *Snay v. Lovley*, 276 Mass. 159, 163-164, 176 N.E. 791 (1931).
[408] *National Cash Register Co. v. NLRB*, 466 F.2d 945, 958 (6th Cir. 1792).
[409] *National Labor Relations Board v. Boeing Co.*, 412 U.S. 67, 74-77, 93 S.Ct. 1952, 36 L.Ed.2d 752 (1973).
[410] *Id.* At 76 n. 12, 93 S.Ct. 1952.
[411] *City of Lynn*, 2 MLC 1541, 1545 (1976); *Geriatric Authority of Holyoke*, 15 MLC 1139, 1140 (1988); *Town of Templeton*, 26 MLC 1999 (2000).

Appendix

SAMPLE FORM 1

[Retype on City/Town Letterhead]

M E M O R A N D U M

DATE:

TO: _____ (Union President)

FROM: _____ (Mayor, Manager, Selectmen, etc.)

RE: Voluntary Recognition Agreement

This will confirm that the city (or town) voluntarily recognizes _____ _____*(name of union or association)* as the exclusive bargaining representative for those positions in the police department comprising the following bargaining unit:

> all full-time and regular part-time police officers and sergeants in the police department, excluding lieutenants, captains, the chief and all others.

This recognition followed the posting on the employee bulletin board for a period of at least twenty (20) consecutive days advising the unit members of our intent to grant voluntary recognition without an election.

To the best of our knowledge, no other union or association seeks to represent this bargaining unit and has filed a petition for certification with the Massachusetts Labor Relations Commission. We believe in good faith that the above-named employee organization was freely selected by a majority of the unit employees.

SAMPLE FORM 2

SAMPLE GRIEVANCE PROCEDURE

Definition

A grievance is defined as an allegation by an employee or the union that the employer (city/town) has violated a specific provision of this agreement.

Step 1

A grievance - in writing - must be filed with the chief no later than ten (10) calendar days after the first occurrence of the action or event giving rise to the grievance, or after the employee or union reasonably should have known of the first occurrence of such action or event.

The chief will respond to the grievance in writing within ten (10) calendars days of receipt of the grievance. In the event the chief is on vacation, at training, out sick or on other authorized absence during part or all of the ten (10) day period, the time limit for answering will be extended for the duration of such absence.

Step 2

If the grievance is not settled at Step 1, the employee or the union, within five (5) calendar days of the chief's response, or the date on which such response was due, whichever is earlier, may file a written appeal to the [Mayor/Manager/Board of Selectmen].

The [Mayor/Manager/Board of Selectmen] may decide to meet with the employee or union before rendering a response, If so, the meeting must be scheduled no later than twenty (20) calendar days after receipt of the appeal. In the event such a meeting is scheduled, the reply will be due within ten (10) calendar days after such meeting is concluded. In the event no meeting is scheduled, a reply is due within twenty (20) calendar days after the [Mayor/Manager] receives the appeal [or ten (10) calendar days after the next regularly scheduled meeting of the Board of Selectmen following receipt of the appeal].

Step 3

The decision of the [Mayor/Manager/Board of Selectmen] will be final unless it is appealed by the union to arbitration in writing within ten (10) calendar days of receipt of such decision or the date by which such decision was due.

Arbitration will be provided by the Massachusetts Board of Conciliation and Arbitration according to said agency's rules.

The arbitrator shall confine his/her award exclusively to the interpretation or application of the express terms of the agreement. The award may not add to, detract from, alter, amend or modify any term or provision of this

agreement. It shall neither establish nor alter any pay rate or wage structure.

The arbitrator's award, so long as it is made on the merits of the grievance and is not arbitrary, capricious or in contravention of any applicable statute, case law, ordinance/by-law, rule or regulation, will be final and binding on the parties.

Contents of Grievance

All grievances must be in writing, specifying the provision of the agreement allegedly violated and the exact remedy sought.

Time Limits

Time is of the essence. Failure to reply shall be deemed the equivalent of a denial, affording the grievant the opportunity to appeal to the next step. Failure to appeal in a timely manner will be deemed a waiver of the grievance.

SAMPLE FORM 3

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 4

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 5

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 6

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 7

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 8

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: _____

(County)

Then personally appeared the above-named _____ who signed the foregoing and stated it was his/her free act and deed, before me.

_____

Notary Public
My Commission Expires:_____

SAMPLE FORM 9

LAW ENFORCEMENT CODE OF ETHICS

As a law enforcement officer, my fundamental duty is to serve the community; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality and justice. I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service. I will never engage in acts of corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession ... law enforcement.

NATIONAL ASSOCIATION OF CHIEFS OF POLICE

SAMPLE FORM 10

POLICE CODE OF CONDUCT

All law enforcement officers must be aware of the ethical responsibilities of their position and must strive constantly to live up to the highest possible standards of professional policing.

The International Association of Chiefs of Police believes it important that police officer have clear advice and counsel available to assist them in performing their duties consistent with these standards, and has adopted the following ethical mandates as guidelines to meet these ends.

Primary Responsibilities of a Police Officer

A police officer acts as an official representative of government who is required and trusted to work within the law. The officer's powers and duties are conferred by statute. The fundamental duties of a police officer include serving the community, safeguarding lives and property, protecting the innocent, keeping the peace and ensuring the rights of all to liberty, equality and justice.

Performance of the Duties of a Police Officer

A police officer shall perform all duties impartially, without favor or affection or ill will and without regard to status, sex, race, religion, political belief or aspiration. All citizens will be treated equally with courtesy, consideration and dignity.

Officers will never allow personal feelings, animosities or friendships to influence official conduct. Laws will be enforced appropriately and courteously and, in carrying out their responsibilities, officers will strive to obtain maximum cooperation from the public. They will conduct themselves in appearance and deportment in such a manner as to inspire confidence and respect for the position of public trust they hold.

Discretion

A police officer will use responsibly the discretion vested in his/her position and exercise it within the law. The principle of reasonableness will guide the officer's determinations, and the officer will consider all surrounding circumstances in determining whether any legal action shall be taken.

Consistent and wise use of discretion, based on professional policing competence, will do much to preserve good relationships and retain the confidence of the public. There can be difficulty in choosing between conflicting courses of action. It is important to remember that a timely word of advice rather than arrest -- which may be correct in appropriate circumstances -- can be a more effective means of achieving a desired end.

Use of Force

A police officer will never employ unnecessary force or violence and will use only such force in the discharge of duty as is reasonable in all circumstances.

The use of force should be used only with the greatest restraint and only after discussion, negotiation and persuasion have been found to be inappropriate or ineffective. While the use of force is occasionally unavoidable, every police officer will refrain from unnecessary infliction of pain or suffering and will never engage in cruel, degrading or inhuman treatment of any person.

Confidentiality

Whatever a police officer sees, hears or learns of that is of a confidential nature will be kept secret unless the performance of duty or legal provision requires otherwise.

Members of the public have a right to security and privacy, and information obtained about them must not be improperly divulged.

Integrity

A police officer will not engage in acts of corruption or bribery, nor will an officer condone such acts by other police officers.

The public demands that the integrity of police officers be above reproach. Police officers must, therefore, avoid any conduct that might compromise integrity and thus undercut the public confidence in a law enforcement agency. Officers will refuse to accept any gifts, presents, subscriptions, favors, gratuities or promises that could be interpreted as seeking to cause the officer to refrain from performing official responsibilities honestly and within the law. Police officers must not receive private or special advantage from their official status. Respect from the public cannot be bought; it can only be earned and cultivated.

Cooperation with Other Police Officers and Agencies

Police officers will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

An officer or agency may be one among many organizations that may provide law enforcement services to a jurisdiction. It is imperative that a police officer assist colleagues fully and completely with respect and consideration at all times.

Personal-Professional Capabilities

Police officers will be responsible for their own standard of professional performance and will take every reasonable opportunity to enhance and improve their level of knowledge and competence.

Through study and experience, a police officer can acquire the high level of knowledge and competence that is essential for the efficient and effective

performance of duty. The acquisition of knowledge is a never-ending process of personal and professional development that should be pursued constantly.

Private Life

Police officers will behave in a manner that does not bring discredit to their agencies or themselves.

A police officer's character and conduct while off duty must always be exemplary, thus maintaining a position of respect in the community in which he/she or she lives and serves. The officer's personal behavior must be beyond reproach.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Sample Form 11

Sample Police Chief's Employment Contract

Agreement made this ___ day of _____, 200___, by and between the TOWN/CITY of _____ (hereinafter the "TOWN/CITY") and _____ Of_____ _____, Massachusetts (hereinafter the "CHIEF" or "CHIEF OF POLICE").

WHEREAS, the TOWN/CITY is desirous of securing the services of the CHIEF in the administration of the Police Department; and

WHEREAS, the TOWN/CITY has or hereby does recognize voluntarily, pursuant to the applicable regulations of the Massachusetts Labor Relations Commission, the position of CHIEF OF POLICE as a supervisory bargaining unit, separate and distinct from all other units in the Police Department; and

WHEREAS, the CHIEF is willing to perform the duties of the position of CHIEF OF POLICE according to the terms and conditions of this Contract;

NOW, THEREFORE, the TOWN/CITY and the CHIEF hereby agree that the following terms and conditions shall govern the salary and fringe benefits payable under this contract to which said CHIEF shall be entitled as CHIEF OF POLICE.

1. **DUTIES**

The administrative control of the Police Department for the TOWN/CITY shall be the responsibility of the CHIEF OF POLICE.

His duties shall include but not be limited to the following:

A. Supervision of the daily operation of the Police Department.

B. Supervision of all departmental personnel.

C. Preparation and submission of the Police Department

budget.

D. Submission of reports to the TOWN/CITY either orally or in writing when requested or required in order to ensure the proper communication between the TOWN/CITY and the Police Department.

E. Being responsible for all departmental expenditures, as well as the receipt of funds and property in the custody of the Department.

F. Supervision and control of all Department equipment and motor vehicles belonging to or used by the Police Department.

G. Establishing weapons, ammunition, uniforms, equipment and vehicle specifications for the Police Department.

H. Being in charge of all special, auxiliary and/or reserve police officers.

I. Supervision and control of all training programs for department personnel and the assignment of personnel to such programs.

J. Maintaining the discipline of department personnel; the issuing of orders, rules, regulations, policies and procedures; and the assignment to shifts and duties of all departmental personnel.

K. Being available for hearings before any Board of the TOWN/CITY at which the Police Department is required to appear and before the TOWN/CITY Meeting when necessary.

L. Being responsible for planning, organizing, directing, staffing and coordinating police operations.

M. Being responsible for communications with the public, including the media, on matters related to crime, police operations and department policy.

2. **HOURS OF WORK**

A. The CHIEF agrees to devote that amount of time and energy which is reasonably necessary for the CHIEF to faithfully perform the duties of CHIEF OF POLICE under this Contract.

B. It is recognized that the CHIEF OF POLICE must devote a great deal of time outside the normal office hours to the business of the TOWN/CITY, and to that end, the CHIEF OF POLICE shall be allowed to take compensatory time off as he/she shall deem appropriate during said normal office hours at such time which the CHIEF reasonably determines will adversely impact Department operations least.

3. **INDEMNIFICATION**

The TOWN/CITY agrees that the TOWN/CITY shall defend, save harmless and indemnify the CHIEF OF POLICE against any tort, professional liability claim or demand or other civil or criminal legal action, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of the CHIEF'S duties as Police Chief of the TOWN/CITY.

4. **INSURANCE**

A. ***Professional Liability***

The TOWN/CITY agrees to furnish at is expense professional liability insurance for the CHIEF OF POLICE with liability limits of One Million ($1,000,000.00) Dollars.

B. ***Disability***

The TOWN/CITY agrees to procure a disability insurance plan for the CHIEF providing salary continuation and medical expense coverage in such amounts as it reasonably determines appropriate, or, alternatively, to continue the CHIEF'S pay and benefits for any period of

total or partial non-work-related disability (but not to exceed three (3) years).

C. ***Miscellaneous***

The CHIEF OF POLICE shall be eligible for all health and life insurance benefits for which other non-bargaining unit, general government employees are eligible. The TOWN/CITY agrees to contribute towards the cost of such insurance programs an amount or percentage not less than the highest applicable amount or percentage available to officers of any rank of the Police Department.

D. ***Injured on Duty***

As a sworn police officer, the CHIEF OF POLICE shall be entitled to injured-on-duty benefits as provided in Chapter 41, Section 111F of the Massachusetts General Laws.

5. **DUES AND SUBSCRIPTIONS**

The TOWN/CITY agrees to budget and to pay an appropriate amount for the professional dues and subscriptions of the CHIEF OF POLICE for his/her continuation and full participation in national, regional, state and local associations and organizations necessary and desirable for his/her continued professional growth and advancement, and for the good of the TOWN/CITY, including but not limited to the International Association of Chiefs of Police, the Police Executive Research Forum, the New England Police Chiefs Association, the Massachusetts Police Chiefs Association, and the Central Massachusetts Police Chiefs Association.

6. **AUTOMOBILE**

The CHIEF OF POLICE may, upon mutual agreement of both parties, use his/her own private automobile for his/her duties as CHIEF OF POLICE. In the event such agreement is reached, the TOWN/CITY

shall pay for all maintenance expenses and insurance of such vehicle. The TOWN/CITY shall reimburse the CHIEF OF POLICE at the IRS rate in effect when such vehicle is used by the CHIEF OF POLICE in connection with the performance of his/her duties as CHIEF OF POLICE and for his/her professional growth and development.

7. **PROFESSIONAL DEVELOPMENT**

The TOWN/CITY recognizes its obligations to the professional development of the CHIEF OF POLICE, and agrees that the CHIEF OF POLICE shall be given adequate opportunities to develop his/her skills and abilities as a law enforcement administrator; accordingly, the CHIEF OF POLICE will be allowed to attend the New England Chiefs of Police Conference and the International Association of Chiefs of Police Conference each year without loss of vacation or other leave, and will be reimbursed by the TOWN/CITY for all expenses (including travel expenses) incurred while attending or traveling to the aforementioned conferences. The TOWN/CITY also agrees to budget and pay for travel and subsistence expense of the CHIEF OF POLICE for short courses, institutes, and seminars that, in his/her reasonable judgment, are necessary for his/her professional development.

The Town/City shall reimburse the POLICE CHIEF for reasonable expenses incurred in connection with his/her attendance at professional management development courses and/or seminars, including, but not limited to, tuition for one college level course per semester at a college of the CHIEF's choice in his/her pursuit and attainment of an undergraduate degree in criminal justice, subject to the prior approval of the Board and subject to appropriation.

8. **DEATH DURING TERM OF EMPLOYMENT**

If the CHIEF OF POLICE dies during the term of his/her employment, the TOWN shall pay to the CHIEF'S estate all the compensation which would otherwise be payable to the CHIEF OF POLICE up to the date of the CHIEF'S death, including, but not limited to, unused vacation, holidays, personal days and sick days.

9. **DISCIPLINE OR DISCHARGE**

A. It is agreed that the CHIEF OF POLICE can be disciplined or discharged only for just cause, upon proper notice and only after hearing at which the CHIEF OF POLICE shall have the right to be represented by counsel. The CHIEF OF POLICE shall have the option of choosing whether or not any such hearing shall be closed to the public or be held as an open or public hearing. The principle of progressive discipline will apply and the TOWN/CITY recognizes its obligation to provide the CHIEF with periodic performance evaluations.

B. The CHIEF OF POLICE may appeal any discipline or discharge to a committee of arbitrators consisting of three (3) persons. The three persons shall be chosen as follows: one by the TOWN/CITY, one by the CHIEF OF POLICE, and one by the two so chosen. A majority of the three (3) member committee shall be sufficient to uphold a discharge or to reverse the discharge decision.

C. The CHIEF OF POLICE may appeal any discipline or discharge upheld by the committee of arbitrators to the municipal court of the City of Boston, to the district court wherein the CHIEF OF POLICE resides or to any superior court having jurisdiction, each of which shall have jurisdiction of any petition for a writ of mandamus for the reinstatement of the CHIEF OF POLICE if he/she alleges he/she has been improperly suspended or discharged.

D. In the event of the suspension or discharge of the CHIEF OF POLICE, if the committee of arbitrators, or the municipal court of the City of Boston, or the District Court for the judicial district wherein the CHIEF OF POLICE resides, or the Superior Court shall reverse a suspension or discharge and order that the CHIEF OF POLICE be reinstated to duty, the CHIEF OF POLICE shall be entitled to back pay, benefits and counsel fees.

10. **COMPENSATION**

The CHIEF OF POLICE shall receive the sum of _____ ($_____) Dollars as salary in the first year of this Contract, and shall receive at least the same number of sick days, personal days, bereavement days, holiday pay, longevity pay, educational pay, uniform and cleaning allowance, health and life insurance, and all other benefits as do any of the regular police officers of any rank of the TOWN/CITY.

The TOWN/CITY shall provide a police vehicle for use by the CHIEF OF POLICE and pay for all attendant operating and maintenance expenses and insurance. Said vehicle is to be used by the CHIEF OF POLICE in connection with the performance of his/her duties as CHIEF OF POLICE, for personal use, and for his/her professional growth and development. The "lease value" of said vehicle shall be included in calculating the chief's compensation for retirement contributions.

The POLICE CHIEF shall be entitled to five (5) weeks vacation leave in each twelve (12) month period from July 1 through June 30. A week shall be defined as five (5) working days. No more than two weeks of unused vacation may be carried over from one year to another. Vacation leave shall be scheduled by the POLICE CHIEF so as not be conflict with the needs of the Town. In each succeeding year of this Contract, the

CHIEF OF POLICE shall receive the same salary as stated above plus at least any increases in the same percentage received by any of the regular police officers of any rank for the TOWN in each of said years, as well as any increase in other benefits.

11. **NO REDUCTION OF BENEFITS**

The TOWN/CITY agrees that the TOWN/CITY shall not at any time during this Contract reduce the salary, compensation or other benefits of the CHIEF OF POLICE, except to the extent that such reduction is evenly applied across-the-board for all employees of the TOWN/CITY.

12. **MODIFICATION**

No change or modification of this Contract shall be valid unless it shall be in writing and signed by both of the parties.

13. **LAW GOVERNING**

This contract shall be construed and governed by the Laws of the Commonwealth of Massachusetts.

14. **SEVERABILITY OF PROVISIONS**

If any clause or provision of this contract shall be determined to be illegal by a court of competent jurisdiction, the remainder of this contract shall not be affected thereby.

15. **LENGTH OF CONTRACT**

A. The initial term of this Contract shall be for a period commencing _____ and ending _____. However, this Contract may be extended as provided by its terms.

B. Unless either party provides written notice to the other of its intention to renegotiate and/or not to renew this contract no less than six (6) months prior to the end of its initial or any extended terms, this Contract shall automatically be extended on the then applicable terms and conditions for an additional one (1) year period.

C. In the event the CHIEF OF POLICE is not reappointed or is otherwise terminated by the TOWN/CITY for any reason other than for just cause, or in the event the CHIEF OF POLICE resigns following a formal suggestion by the TOWN/CITY that he/she resign before the expiration of the then applicable term of employment, the TOWN/CITY agrees to pay the CHIEF OF POLICE a lump sum severance payment equal to the balance of any term of appointment but in no event less than twelve (12) months' salary and benefits.

D. In the event the CHIEF OF POLICE intends to resign voluntarily before the natural expiration of any term of employment, then the CHIEF OF POLICE shall give the TOWN/CITY thirty (30) days written notice in advance, unless the parties otherwise agree in writing. Provided such notice is given, the CHIEF will be entitled to receive pay for any unused vacation, sick, holiday and personal leave.

IN WITNESS WHEREOF, the parties hereunto have set their hands and seals to this instrument the date and year first above written.

FOR THE TOWN/CITY

_____

_____

_____

FOR THE CHIEF OF POLICE

_____

APPROVED AS TO FORM:

_____

TOWN/CITY COUNSEL

Sample Form 12

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.

Sample Form 13

The Commonwealth of Massachusetts Joint Labor Management Committee
Petition For Exercise of Jurisdiction

INSTRUCTIONS: Submit the original of this Petition to the Joint Labor-Management Committee, 199 State Street, Fifth Floor, Boston, Massachusetts 02109. Petition must be filled out completely in order to be processed.

Please Print or Type

Name and Address of Labor Organization

Affiliation (if any) To National State or Labor Organization

Name and Address of President of Local Labor Organization — Phone # Home / Phone # Work

Name and Address of Collective Bargaining Agent — Phone # Home / Phone # Work

Name and Address of Municipality

Name and Address of Chief Executive Officer — Phone # Home / Phone # Work

Name and Address of Collective Bargaining Agent — Phone # Home / Phone # Work

INFORMATION ON DISPUTE

Date of Expiration of Current or Most Recent Collective Bargaining Agreement

Number of Bargaining Sessions Held to Date and Date of Last Session

Statement of Issues in Dispute (use another page if necessary)

Description of any Prohibited Practice Charges Pending Between the Parties

OTHER INFORMATION

Size and Composition of Units

NAMES AND TITLES OF MEMBERS OF BARGAINING COMMITTEES

Manner of Settlement in Last Two Contract Negotiations (*Mediation, Fact Finding, etc.)*

Petition Submitted By: LABOR ORGANIZATION □ MUNICIPALITY □ JOINTLY □

Signature and Title of Principal Representative of Petitioning Party
Date

Signature and Title of Principal Representative of Other Party if Joint Petition
Date

If Petition is brought individually, I hereby state that I have caused a copy of this Petition to be served on the Principal Representative of the other Party.

Signature of Principal Representative of Petitioning Party

Commonwealth of Massachusetts

Sample Form 14

JANE SWIFT
GOVERNOR

The Commonwealth of Massachusetts

BOARD OF CONCILIATION AND ARBITRATION

399 WASHINGTON STREET, 5th FLOOR
BOSTON, MASSACHUSETTS 02108
TELEPHONE: (617) 727-3466
FAX: (617) 727-4961

WESTERN REGIONAL OFFICE
SPRINGFIELD STATE OFFICE BUILDING
436 DWIGHT STREET, ROOM 206
SPRINGFIELD, MASSACHUSETTS 01 1 03
TELEPHONE: (413) 784-1230
FAX: (413) 784-1251

TO: Parties of the Board of Conciliation & Arbitration

FROM: James F. Kelley, Acting Chairman

DATE: August 8, 2002

RE: **FILING FEE INCREASE**

On August 01, 2002, the Massachusetts General Court increased the Board of Conciliation and Arbitration filing fees. The General Appropriation Act of 2002 amended Section 6, of Chapter 150, Massachusetts General Laws. Filing Fees were increased to **$1,200.00 for Private Sector Grievance Arbitration, Public Sector Grievance Arbitration, $150.00 for Grievance Mediation** to be paid in equal shares by the parties.

In the future when filing petitions please use enclosed updated forms.

lompo.

Commonwealth of Massachusetts
BOARD OF CONCILIATION AND ARBITRATION
REQUEST FOR GRIEVANCE MEDIATION

PLEASE TYPE OR PRINT

1. Labor Organization _____ *FEIN Number* _____
Address _____ Phone ( ) _____
_____ Zip Code_____
Labor Relations Representative _____ Phone ( ) _____
Address_____
_____ Zip Code_____
2. Employer _____*FEIN Number*_____
Address _____ Phone ( )_____
_____ Zip Code_____
Labor Relations Representative _____ Phone ( ) _____
Address_____
_____ Zip Code _____
3. Nature of Employer's Business_____
Description of Unit_____
Brief Statement of Issue in Dispute and Name of Grievant
_____
_____
_____
Has Arbitration been Requested? Yes_____ No_____ At Board: Yes_____ No_____
Date of Arbitration Hearing_____
This request Brought: Individually _____ Jointly _____

_____ Date _____
Signature of Employer's Representative

_____ Date _____
Signature of Employee's Representative
Initial to Indicate both parties have received copies of this request:_____
Initial to Indicate a Collective Bargaining Agreement copy is attached_____

_____

Do not write in This Space

Case Number_____

Date Filed_____

Mediator Assigned_____

Telephone Number : 617-727-3466
Fax Number: 617-727-4961

Effective 8/1/02
Instructions: Submit the original and one copy of this petition, ***a fee of seventy-five dollars ($75.00)*** per Party and a copy of the Collective Bargaining Agreement to:
Board of Conciliation & Arbitration
399 Washington Street, Fifth Floor
Boston, MA 02108

Revised August, 2002

COMMONWEALTH OF MASSACHUSETTS
THE BOARD OF CONCILIATION AND ARBITRATION
PETITION FOR MEDIATION AND FACT-FINDING IN PUBLIC EMPLOYMENT

Please Type or Print:
LABOR ORGANIZATION
1. Name_____
Address_____Phone ( )_____
_____Zip Code_____
*Labor Relations Representative*_____
Address_____Phone ( )_____
_____Zip Code_____
EMPLOYER
2. Name_____
Address_____Phone ( )_____
_____Zip Code_____
*Labor Relations Representative*_____
Address_____Phone ( )_____
_____Zip Code_____
3. Description of Collective Bargaining Unit Involved:_____
_____# of Employees In Unit_____
4. Indicate: (a) Contract Expiration Date (b) Date Negotiations Commenced (c) # of Negotiation Sessions To Date (d) Brief Statement of Issue Over Which Impasse Exists:
(a) _____ (b) _____ (c) _____
(d)_____
_____

If **JOINT** Petition:

_____
Signature & Title of Labor Organization's Representative

_____
Signature & Title of Employer's Representative

If Petition Brought by **ONE PARTY:**
I hereby state that I have caused a copy of this petition to be served on the Representative of the other party.

_____
Signature & Title of Petitioning Party's Representative

DATE SIGNED_____

Instructions: Submit the original and one copy of this petition and a copy of the Collective Bargaining Agreement to:

Board of Conciliation & Arbitration
399 Washington Street, Fifth Floor
Boston, MA 02108
Fax: (617) 727-4961

DO NOT WRITE IN THIS SPACE

CASE NO: _____
DATE FILED:_____
DATE MEDIATOR APPTED:_____

Revised December, 1999

Commonwealth of Massachusetts
BEFORE THE BOARD OF CONCILIATION AND ARBITRATION
PETITION TO INITIATE GRIEVANCE ARBITRATION

PLEASE TYPE OR PRINT

1. Labor Organization _____ *FEIN Number* _____
Address _____ Phone ( ) _____
_____ Zip Code _____
Labor Relations Representative _____ Phone ( ) _____
Address _____
_____ Zip Code _____
2. Employer _____ *FEIN Number* _____
Address _____ Phone ( ) _____
_____ Zip Code _____
Labor Relations Representative _____ Phone ( ) _____
Address _____
_____ Zip Code _____
NATURE OF EMPLOYER'S BUSINESS _____
NAME OF GRIEVANT _____
3. A.) Brief statement of the nature of this dispute: _____
_____
B.) Statement of the remedy sought: _____
_____

If Joint Petition:

_____
Signature & Title of Labor Organization's Representative

_____
Signature & Title of Employer's Representative

If Petition Brought by One Party:
I hereby certify that I have caused a copy of this petition to be served on the Representative of the other party.

_____
Signature & Title of Petitioning Party's Representative

_____
Date Signed

Instructions: (1) **Submit the original and one copy of this petition and a copy of the Collective Bargaining Agreement, to:**

Board of Conciliation & Arbitration
399 Washington Street, Fifth Floor
Boston, MA 02108
Telephone: (617) 727-3466
Fax Number: (617) 727-4961

Effective 8/1/02

(2) Include fee of $1,200.00 for private sector and $600.00 for public sector. Fee shall be paid in equal shares by the parties --M.G.L. Ch 150, Sec. 6.

(3) Indicate whether this grievance has ever been mediated by the Board prior to the filing of this petition: Yes_____ No_____

DO NOT WRITE IN THIS SPACE

Case No. _____

Date Filed _____

Revised August, 2002

MASSACHUSETTS BOARD OF CONCILIATION AND ARBITRATION
REQUEST FOR COLLABORATIVE BARGAINING TRAINING/FACILITATION
399 Washington Street, 5th Floor, Boston, Massachusetts 02108
Telephone (617) 727-3466 Fax (617) 727-4961

LABOR ORGANIZATION
Name: _____
Address: _____
_____

Telephone: _____
Fax: _____

Labor Representative

Name: _____
Title: _____
Address: _____
_____

Telephone: _____
Fax: _____

EMPLOYER
Name: _____
Address: _____
_____

Telephone: _____
Fax: _____

Employer Representative

Name: _____
Title: _____
Address: _____
_____

Telephone: _____
Fax: _____

Number of Participants in training:
_____

Current Bargaining Status: _____
_____

Specify training or facilitation request:
_____
_____

SIGNATURES:

_____ _____
Labor Representative Employer Representative

Date: _____ Date: _____

NOTE: Training requests must be jointly filed. Specific questions can be directed either to the Boston Office at (617) 727-3466 or to the Western Regional Office (413) 784-1230. Parties seeking training will be provided the training materials in advance of the training and are responsible for providing copies to the participants. Please contact the Board Staff for information on the facilities and materials needed for training.

CBT # _____ Trainers Assigned: _____

M.G.L. c. 150E

§ 1. Definitions1

The following words and phrases as used in this chapter shall have the following meaning unless the context clearly requires otherwise:--

"Board", the board of conciliation and arbitration established under section seven of chapter twenty-three.

"Commission", the labor relations commission established under section nine O of chapter twenty-three.

"Cost items", the provisions of a collective bargaining agreement which require an appropriation by a legislative body.

"Employee" or "public employee", any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees, and members of the militia or national guard and employees of the commission, and officers and employees within the departments of the state secretary, state treasurer, state auditor and attorney general. Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration. Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

"Employee organization", any lawful association, organization, federation, council, or labor union, the membership of which includes public employees, and assists its members to improve their wages, hours, and conditions of employment.

"Employer" or "public employer", the commonwealth acting through the commissioner of administration, or any county, city, town, district, or other political subdivision acting through its chief executive officer, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees, but excluding authorities created pursuant to chapter one hundred and sixty-one A and those authorities included under the provisions of

chapter seven hundred and sixty of the acts of nineteen hundred and sixty-two. In the case of school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives. For this purpose, the chief executive officer of a city or town or his/her designee shall participate and vote as a member of the city or town school committee; provided, however, that if there is no town manager or town administrator in a town, the chairman of the board of selectmen or his/her designee shall so participate and vote. In the case of a regional school district, said chief executive officers or chairmen of boards of selectmen, as the case may be, of the member cities and towns shall, in accordance with regulations to be promulgated by the board of education, elect one of their number to represent them pursuant to the requirements of this section. In the case of employees of the system of public institutions of higher education, the employer shall mean the board of higher education or any individual who is designated to represent it and act in its interest in dealing with employees, except that the employer of employees of the University of Massachusetts shall be the board of trustees of the university or any individual who is designated to represent it and act in its interest in dealing with employees. In the case of judicial employees, the employer shall be the chief administrative justice of the trial court or any individual who is designated by him/her to represent him/her or act in his/her interest in dealing with judicial employees. In the case of employees of the state lottery commission, employer shall mean the state lottery commission or its designee. In the case of employees of the Massachusetts Water Resources Authority, the employer shall mean the Massachusetts Water Resources Authority. In the case of employees of the Suffolk county sheriff's department, employer shall mean the sheriff of Suffolk county or any individual who is designated by him/her to represent him/her or act in his/her interest in dealing with such employees.

"Incremental cost items", the provisions of a collective bargaining agreement that require, in respect of any fiscal year, an appropriation by a legislative body that is greater than the appropriation so required in the preceding fiscal year; provided, however, that in respect of the first fiscal year or portion thereof during which an agreement has effect, "incremental cost items" shall mean the provisions of a collective agreement that require an appropriation by a legislative body of monies that are newly required by the employer to discharge the obligations arising under the terms of such agreement.

"Legislative body", the general court in the case of the commonwealth or a county, the city council or town meeting in the case of a city, town or district, or any body which has the power of appropriation with respect to an employer as defined in this chapter.

"Professional employee", any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes. Professional employee shall include a detective, member of a detective bureau or police officer who is primarily engaged in investigative work in any city or town police department which employs more than four hundred people.

"Strike", a public employee's refusal, in concerted action with others, to report for duty, or his/her willful absence from his/her position, or his/her stoppage of work, or his/her abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment.

§ 2. Collective bargaining; self organization

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section twelve.

§ 3. Bargaining units; rules and regulations; procedures; officers excepted

The commission shall prescribe rules and regulations and establish procedures for the determination of appropriate bargaining units which shall be consistent with the purposes of providing for stable

and continuing labor relations, giving due regard to such criteria as community of interest, efficiency of operations and effective dealings, and to safeguarding the rights of employees to effective representation. No unit shall include both professional and nonprofessional employees unless a majority of such professional employees votes for inclusion in such unit; provided, however, that in any fire department, or any department in whole or in part engaging in, or having the responsibility of, fire fighting, no uniformed member of the department subordinate to a fire commission, fire commissioner, public safety director, board of engineers or chief of department shall be classified as a professional, confidential, executive, administrative or other managerial employee for the purpose of this chapter.

No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director or chief of a department or agency of the commonwealth or any political subdivision thereof, or clerk, temporary clerk or assistant clerk of any court, or chief probation officer or acting chief probation officer of any court or region, including, without limitation within the term, any division or department of the trial court or any other managerial or confidential employee shall be included in an appropriate bargaining unit or entitled to coverage under this chapter.

The appropriate bargaining unit in the case of the uniformed members of the state police shall be all such uniformed members in titles below the rank of lieutenant. The appropriate bargaining units for judicial employees within the provisions of this chapter shall be a public safety professional unit composed of all probation officers and court officers, and a unit composed of all non-managerial or nonconfidential staff and clerical personnel employed by the judiciary; provided that court officers in the superior court department for Suffolk and Middlesex counties shall be represented by such other bargaining units as they may elect.

§ 4. Exclusive representative; hearing; election; stipulation; certification; review

Public employers may recognize an employee organization designated by the majority of the employees in an appropriate bargaining unit as the exclusive representative of all the employees in such unit for the purpose of collective bargaining. All notices relative to a representation petition and all elections shall be posted at the request of the commission ten days prior to a hearing in a conspicuous place where the affected employees are employed.

The commission, upon receipt of an employer's petition alleging that one or more employee organizations claims to represent a

substantial number of the employees in a bargaining unit, or upon receipt of an employee organization's petition that a substantial number of the employees in a bargaining unit wish to be represented by the petitioner, or upon receipt of a petition filed by or on behalf of a substantial number of the employees in a unit alleging that the exclusive representative therefore no longer represents a majority of the employees therein, shall investigate, and if it has reasonable cause to believe that a substantial question of representation exists, shall provide for an appropriate hearing upon due notice. If, after hearing, the commission finds that there is a controversy concerning the representation of employees, it shall direct an election by secret ballot or shall use any other suitable method to determine whether, or by which employee organization the employees in an appropriate unit desire to be represented, and shall certify any employee organization which received a majority of the votes in such election as the exclusive representative of such employees.

Except for good cause no election shall be directed by the commission in an appropriate bargaining unit within which a valid election has been held in the preceding twelve months, or a valid collective bargaining agreement is in effect. The commission shall by its rules provide an appropriate period prior to the expiration of such agreements when certification or decertification petitions may be filed.

Nothing in this section shall be construed to prohibit a stipulation, in accordance with regulations of the commission, by an employer and an employee organization for the waiving of hearing and the conducting of a consent election by the commission for the purpose of determining a controversy concerning the representation of employees.

Any hearing under this section may be, when so determined by the commission, conducted by a member or agent of the commission. The decisions and determinations of such member or agent shall be final and binding unless, within ten days after notice thereof, any party requests a review by the full commission. If a review is requested, the member or agent shall file with the commission and with the parties a written statement of the case. In addition any party may, within ten days from the receipt of such statement, file a supplementary statement with the commission. A review by the commission shall be made upon such statement of the case by the member or agent and upon such supplementary statements filed by the parties, if any, together with such other evidence as the commission may require.

§ 5. Exclusive representative; powers and duties; grievances

The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be

responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

An employee may present a grievance to his/her employer and have such grievance heard without intervention by the exclusive representative of the employee organization representing said employee, provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

§ 6. Negotiations; meetings

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.

§ 7. Collective bargaining agreements; term; appropriation requests; provisions; legal conflicts, priority of agreement

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the commission and with the house and senate committees on ways and means forthwith by the employer.

(b) The employer, other than the board of higher education or the board of trustees of the University of Massachusetts, a county sheriff or the state lottery commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

(c) The provisions of this paragraph shall apply to the board of higher education, the board of trustees of the University of Massachusetts, a county sheriff and the state lottery commission.

Every such employer shall submit to the governor, within thirty days after the date on which a collective bargaining agreement is executed by the parties, a request for an appropriation necessary to fund such incremental cost items contained therein as are required to be funded in the then current fiscal year, provided, however, that if such agreement first has effect in a subsequent fiscal year, such request shall be submitted pursuant to the provisions of this paragraph. Every such employer shall append to such request an estimate of the monies necessary to fund such incremental cost items contained therein as are required to be funded in each fiscal year, during the term of the agreement, subsequent to the fiscal year for which such request is made and shall submit to the general court within the aforesaid thirty days, a copy of such request and such appended estimate; provided, further, that every such employer shall append to such request copies of each said collective bargaining agreement, together with documentation and analyses of all changes to be made in the schedules of permanent and temporary positions required by said agreement. Whenever the governor shall have failed, within forty-five days from the date on which such request shall have been received by him, to recommend to the general court that the general court appropriate the monies so requested, the request shall be referred back to the parties for further bargaining.

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a 1/2) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(b 1/2) section seventeen I of chapter one hundred and eighty;

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight I, inclusive, and sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g 1/2) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section twenty-eight A of chapter seven;

(k) sections forty-five to fifty, inclusive, of chapter thirty;

(l) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;

(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;

(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;

(o) section fifty-three C of chapter two hundred and sixty-two;

(p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;

(q) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

§ 8. Grievance procedure; arbitration

The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided

that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one.

§ 9. Impasses in negotiations

After a reasonable period of negotiation over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse. Upon receipt of such petition, the board shall commence an investigation forthwith to determine if the parties have negotiated for a reasonable period of time and if an impasse exists, within ten days of the receipt of such petition, the board shall notify the parties of the results of its investigation. Failure to notify the parties within ten days shall be taken to mean that an impasse exists.

Within five days after such determination, the board shall appoint a mediator to assist the parties in the resolution of the impasse. In the alternative, the parties may agree upon a person to serve as a mediator and shall notify the board of such agreement and choice of mediator. Any such mediator shall be empowered to order the parties to provide specific representatives authorized to enter into a collective bargaining agreement to be present at meetings held for said purpose of resolving the impasse and negotiating such an agreement.

After a reasonable period of mediation from the date of appointment, said mediator shall issue to the board a report indicating the results of his/her services in resolving the impasse.

If the impasse continues after the conclusion of mediation, either party or the parties acting jointly may petition the board to initiate fact-finding proceedings. Upon receipt of such petition, the board shall appoint a fact-finder, representative of the public, from a list of qualified

persons maintained by the board. In the alternative, the parties may agree upon a person to serve as fact-finder and shall notify the board of such agreement and choice of fact-finder. No person shall be named as a fact-finder who has represented an employer or employee organization within the preceding twelve months. The fact-finder shall be subject to the rules of the board and shall, in addition to powers delegated to him/her by the board, have the power to mediate and to make recommendations for the resolution of the impasse. The fact-finder shall transmit his/her findings and any recommendations for the resolution of the impasse to the board and to both parties within thirty days after the record is closed. If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the board shall make them public.

The parties by their own agreement may mutually waive the fact-finding provisions contained herein and may petition the board for arbitration pursuant to sections four or four B of chapter one thousand and seventy-eight of the acts of nineteen hundred and seventy-three when applicable. Said waiver shall not constitute a bar to any arbitration award.

Any arbitration award in a proceeding voluntarily agreed to by the parties to resolve an impasse shall be binding on the parties and on the appropriate legislative body and made effective and enforceable pursuant to the provisions of chapter one hundred and fifty C, provided that said arbitration proceeding has been authorized by the appropriate legislative body or in the case of school employees, by the appropriate school committee.

If the impasse continues after the publication of the fact-finder's report, the issues in dispute shall be returned to the parties for further bargaining.

Any time limitations prescribed in this section may be extended by mutual agreement of the parties and the board.

Upon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding or arbitration, if applicable, shall have been completed and the terms and conditions of employment shall continue in effect until the collective bargaining process, including mediation, fact finding or arbitration, if applicable, shall have been completed; provided, however, that nothing contained herein shall prohibit the parties from extending the terms and conditions of such a collective bargaining agreement by mutual agreement for a period of time in excess of the aforementioned time. For

purposes of this paragraph, the board shall certify to the parties that the collective bargaining process, including mediation, fact finding or arbitration, if applicable, has been completed.

Any person acting as a mediator in a labor dispute, including any person acting as such pursuant to the provisions of this chapter, who receives information as a mediator relating to the labor dispute shall not be required to reveal such information received by him/her in the course of mediation in any administrative, civil or arbitration proceeding. Nothing herein contained shall apply to any criminal proceedings.

§ 9A. Strikes prohibited; investigation; enforcement proceedings

(a) No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

(b) Whenever a strike occurs or is about to occur, the employer shall petition the commission to make an investigation. If, after investigation, the commission determines that any provision of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court for the county wherein such violation has occurred or is about to occur for enforcement of such requirements.

§ 10. Prohibited practices

(a) It shall be a prohibited practice for a public employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because he/she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he/she has informed, joined, or chosen to be represented by an employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine;

(b) It shall be a prohibited practice for an employee organization or its designated agent to:

(1) Interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section six;

(3) Refuse to participate in good faith in the mediation, fact finding and arbitration procedures set forth in sections eight and nine.

§ 11. Complaints; investigation; hearing; orders; review

When a complaint is made to the commission that a practice prohibited by section ten has been committed, the commission may issue an order dismissing the complaint or may order a further investigation or a hearing thereon. The commission may dismiss a complaint without a hearing if it finds no probable cause to believe that a violation of this chapter has occurred or if it otherwise determines that further proceedings would not effectuate the purposes of this chapter. If a hearing is ordered, the commission shall set the time and place for the hearing, which time and place may be changed by the commission at the request of one of the parties for cause shown. Any complaint may be amended with the permission of the commission. The employer, the employee organization or the person so complained of shall have the right to file an answer to the original or amended complaint within five days after the service of such complaint or within such other time as the commission may limit. Such employer, such employee organization or such person shall have the right to appear in person or otherwise to defend against such complaint. At the discretion of the commission any person may be allowed to intervene in such proceeding. In any hearing the commission shall not be bound by the technical rules of evidence prevailing in the courts. While retaining jurisdiction the commission may refer to the board or a joint labor management committee any matter alleging a refusal to bargain in good faith as required by section ten.

Whenever it is alleged that a party has refused to bargain collectively in good faith with the exclusive representative as required in section ten and that such refusal is based upon a dispute involving the appropriateness of a bargaining unit, the commission shall, except for

good cause shown, issue an interim order requiring the parties to bargain pending its determination of the dispute. Where such interim order is issued the commission shall hold a hearing on the charge in a summary manner and shall speedily determine the issues raised and shall make an appropriate decision.

Upon any complaint made under this section the commission in its discretion may order that the hearing be conducted by a member or agent of the commission. At such hearing the employer, the employee organization or the person so complained of shall have the right to appear in person or otherwise to defend against such complaint. At the discretion of the commission, any person may be allowed to intervene in such proceeding. In any hearing the member or agent shall not be bound by the technical rules of evidence prevailing in the courts. At the conclusion of the hearing, the member or agent shall determine whether a practice prohibited under section ten has been committed and if so, he/she shall issue an order requiring it or him/her to cease and desist from such prohibited practice. If the member or agent determines that a practice prohibited under section ten has not been committed, he/she shall issue an order dismissing the complaint. Any order issued pursuant to this paragraph shall become final and binding unless, within ten days after notice thereof, any party requests a review by the full commission. A review may be made upon a written statement of the case by the member or agent agreed to by the parties, or upon written statements furnished by the parties, or upon such portions of the record of the hearing as the parties or commission may designate. The record in such cases shall consist of the pleadings, motions, rulings and the testimony taken at the hearing. The testimony may be preserved by a taped recording or by stenographic transcription, at the determination of the commission.

If, upon all the testimony, the commission determines that a prohibited practice has been committed, it shall state its findings of fact and shall issue and cause to be served on the party committing the prohibited practice an order requiring it or him/her to cease and desist from such prohibited practice, and shall take such further affirmative action as will comply with the provisions of this section, including but not limited to the withdrawal of certification of an employee organization established by or assisted in its establishment by any such prohibited practice. It shall order the reinstatement with or without back pay of an employee discharged or discriminated against in violation of the first paragraph of this section. If, upon all of the testimony, the commission determines that a prohibited practice has not been or is not being committed, it shall state its findings of fact and shall issue a final order dismissing the complaint. The commission may institute appropriate proceedings in the appeals court for enforcement of its final orders. Any party aggrieved by a final order of the commission may institute

proceedings for judicial review in the appeals court within thirty days after receipt of said order. The proceedings in the appeals court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A. The commencement of such proceedings shall not, unless specifically ordered by the court, operate as a stay of the commission's order.

§ 12. Service fee; imposition; amount; discrimination

The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or ideological causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

§ 13. List of employee organizations; required information; filing; compliance, enforcement

The commission shall maintain a list of employee organizations. To be recognized as such and to be included in the list an organization shall file with the commission a statement of its name, the name and address of its secretary or other officer to whom notices may be sent, the date of its organization, and its affiliations, if any, with other organizations. Every employee organization shall notify the commission promptly of any change of name or of the name and address of its secretary or other officer to whom notices may be sent, or of its affiliations.

The commission shall indicate on the list which employee organizations are exclusive representatives of appropriate bargaining units, the effective dates of their certification, and the effective date and expiration date of any agreement reached between the public employer and the exclusive representative. Copies of such list shall be made available to interested parties upon request.

In the event of failure of compliance with this section, the commission shall compel such compliance by appropriate order, said order to be enforceable in the superior court for the county wherein such violation has occurred in the same manner as other orders of the commission under this chapter.

§ 14. Information statement and financial report required of employee organizations; filing; enforcement

No person or association of persons shall operate or maintain an employee organization under this chapter unless and until there has been filed with the commission a written statement signed by the president and secretary of such employee organization setting forth the names and addresses of all of the officers of such organization, the aims and objectives of such organization, the scale of dues, initiation fees,

fines and assessments to be charged to the members, and the annual salaries to be paid to the officers.

Every employee organization shall keep an adequate record of its financial transactions and shall make annually available to its members and to non-member employees who are required to pay a service fee under section twelve of this act, within sixty days after the end of its fiscal year, a detailed written financial report in the form of a balance sheet and operating statement. Such report shall indicate the total of its receipts of any kind and the sources of such receipts, and disbursements made by it during its last fiscal year. A copy of such report shall be filed with the commission.

In the event of failure of compliance with this section, the commission shall compel such compliance by appropriate order, said order to be enforceable in the superior court for the county wherein such violation has occurred in the same manner as other orders of the commission under this chapter.

§ 15. Penalties

Whoever willfully assaults, physically resists, prevents, impedes, or interferes with a mediator, fact-finder, or arbitrator, or any member of the commission or any of the agents or employees of the commission in the performance of duties pursuant to this chapter shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

Whoever knowingly files a statement or report under section fourteen of this chapter, which report is false in any material representation, shall be punished by a fine of not more than five thousand dollars.

No compensation shall be paid by an employer to an employee with respect to any day or part thereof when such employee is engaged in a strike against said employer. No such employee shall be eligible for such compensation at a later date in the event that such employee is required to work additional days to fulfill the provisions of a collective bargaining agreement, except in the instance when a regional or local school district does not receive authorization for a shortened school year from the department of education, in which case such employee shall be eligible for compensation at his/her regular rate for such additional days worked.

Any employee who engages in a strike shall be subject to discipline and discharge proceedings by the employer.