COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

MIDDLESEX, SS **Civil Action No. MICV2013-05101-F**

CITY OF MEDFORD, Plaintiff/Defendant in Contempt Action and CHIEF FRANK A. GILIBERTI Defendant in Contempt Action v. MEDFORD FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1032, Defendant/Plaintiff in Contempt Action	))))))))))))))

COMPLAINT FOR CIVIL CONTEMPT

Introduction

1. Medford Firefighters, International Association of Firefighters, Local 1032 ("the Union"), Defendant in the underlying civil action and Plaintiff in these civil contempt proceedings, bring this action pursuant to Rule 65.3 of the Massachusetts Rules of Civil Procedure and G.L. c. 150C, § 13. In the underling civil action (MICV2013-0501-F), this Court confirmed a labor arbitration award ("the Award"). The Massachusetts Appeals Court affirmed this Court's Order confirming the Award. However, in the time since the rescript of the Appeal Court Order was sent to this Court, the City of Medford ("the City") and Fire Chief Frank A. Giliberti have failed to comply with the award. By failing to comply with the confirmed Award, the City's actions constitute contempt of court.

Parties

2. The City of Medford ("the City") is a political subdivision of the Commonwealth of Massachusetts. It is the employer of the City's firefighters and is party to a collective bargaining agreement with Medford Firefighters, International Association of Firefighters, Local 1032.

3. Frank A. Giliberti is the Chief of the Medford Fire Department.

4. Medford Firefighters, International Association of Firefighters, Local 1032 ("the Union") is an employee organization which represents certain employees of the Medford Fire Department.

Facts

5. On December 30, 2011, the Union filed a grievance alleging that the City violated the past practice provision of the parties' collective bargaining agreement when it changed the manner in which out-of-grade pay was distributed among members of the bargaining unit. Specifically, the Union grieved the City's decision to offer all out-of-grade pay arising as a result of the absence of a deputy chief to a single captain, rather than offering such pay to the most senior captain in the work group where the absence arose, as had been the prior practice.

6. The City denied the grievance and, accordingly, the Union demanded arbitration on or about May 21, 2012.

7. On February 3, 2014, an arbitrator issued an award in which he found that the City had violated the past practice provision of the parties' collective bargaining agreement. [Award attached hereto as Exhibit 1].

8. The arbitrator found that: "The City violated Article Ten, Section 2 of the Agreement by failing to offer the senior Captain in a work group the opportunity to work out of grade in the absence of that work group's Deputy Chief." [Ex. 1 at 10].

9. The arbitrator ordered that: "As a remedy, the City shall cease and desist from further such violations of the Agreement." [Ex. 1 at 10].

10. The City pursued a claim in Superior Court alleging that the arbitration should be stayed, even though the Award had already been issued. The Union filed a counterclaim requesting that the Award be confirmed.

11. On or about April 1, 2014, the Superior Court, in Civil Action MICV2013-05101-F, confirmed the Award. [Order of Superior Court attached hereto as Exhibit 2].

12. The City appealed the Superior Court's Order.

13. On March 2, 2015, the Appeals Court affirmed the Order of the Superior Court. [Order to the Appeals Court attached hereto as Exhibit 3].

14. The Order of the Appeals Court was sent to the Superior Court on or about April 1, 2015. [Notice of Rescript attached hereto as Exhibit 4].

15. Subsequent communications from the attorney who handled the underlying case indicated that the City had no intention of complying with the Award. [Mason Letter, attached hereto as Exhibit 5].

16. Later, on or about May 9, 2015, the City Solicitor for Medford indicated to the Union that the City would comply with the Arbitration Award. [Affidavit of William O'Brien, attached hereto as Exhibit 6].

17. However, the City subsequently failed to take any steps to comply with the Award. Rather, since the issuance of the Appeals Court's Order, the City has engaged in acts which directly violate the cease and desist order contained within the Award. For example, on or about May 10, 2015 a deputy chief was absent on vacation. The out-of-grade-pay for filling in for the

absent deputy chief was not offered to any of the captains in the applicable work group, as required by the Award. [Affidavit of William O'Brien (Ex. 6)].

18. On or about May 11, 2015, the President of the Union, William O'Brien, spoke with the Chief of the Medford Fire Department, Frank A. Giliberti, about compliance with the Award. Rather than indicating that he would comply with the Award going forward, Chief Giliberti stated only that he was trying to get approval from the Mayor to hire an additional deputy chief, an act not required by the Award. [Affidavit of William O'Brien (Ex. 6)].

19. The City, through Chief Giliberti, has not acted to comply with the Award. Chief Giliberti, who is responsible for scheduling and disbursement of out-of-grade pay, has not indicated to the Union that he will comply with the Award going forward and has not taken any actions to comply with the Award. [Affidavit of William O'Brien (Ex. 6)].

COUNT I
CIVIL CONTEMPT

The Union hereby incorporates and restates paragraphs 1-19. By refusing to comply with the confirmed Award, the City and Chief Giliberti's actions constitute contempt of Court.

WHEREFORE, the Union requests that this Court enter the following relief:

1. Issue a summons as specified in Rule 65.3(d) of the Massachusetts Rules of Civil Procedure directing the parties to appear before the Court and describing the matters to be discussed;

2. Payment of a civil penalty by the parties in contempt;

3. An order that the parties in contempt cease and desist from failing to comply with the confirmed award;

4. An order that the parties in contempt make whole all members of the Union impacted by the City's actions;

5. Attorneys' fees and costs;

6. Any other relief to which the plaintiffs and similarly situated employees may be entitled.

Respectfully submitted,

MEDFORD FIREFIGHTERS,
INTERNATIONALASSOCIATION OF FIREFIGHTERS,
LOCAL 1032,

By its attorneys,

Leah M. Barrault, BBO# 661626
Ian Russell, BBO# 673387
Pyle Rome Ehrenberg PC
2 Liberty Square, 10th Floor
Boston, MA 02109
(617) 367-7200

Dated: May 20, 2015

EXHIBIT 1

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

MEDFORD FIRE FIGHTERS UNION,
LOCAL 1032 IAFF

And **OPINION**

CITY OF MEDFORD

No. 11 390 00887 12
(Out-of-Grade-McCourt)

APPEARANCES

For the Union:
Leah M. Barrault, Esq.

For the City:
Albert Mason, Esq.

INTRODUCTION

On December 30, 2011, Medford Firefighters Union, Local 1032 IAFF, ("the Union") filed a grievance on behalf of Captain David McCourt ("the grievant") and all similarly situated Captains of the City of Medford's ("the City") Fire Department ("the Department"). The grievance alleged that the City violated the parties' collective bargaining agreement ("the Agreement") by denying the grievant the opportunity to work out of grade in the absence of a Deputy Chief. When the grievance remained unresolved, the Union demanded arbitration and the undersigned was selected as arbitrator.

The grievance was heard by the undersigned on December 16, 2013. At that hearing, both parties were present and represented by counsel. The grievant was also in attendance. Following presentation of the evidence, both parties sought leave to submit post-hearing briefs. Upon their receipt by the American Arbitration Association the matter was ripe for resolution.

THE ISSUES

The City claims that the grievance is not substantively arbitrable as a matter of law. To that end, it filed, but as of the date of the hearing, had not served the Union with a civil action seeking to stay this arbitration. Its agreement to permit this hearing to go forward was expressly predicated upon its having reserved its right to present its legal arguments in the Superior Court. It did not agree to have the substantive arbitrability issue resolved by the arbitrator on a binding or advisory basis.

Even with that understanding, the parties were unable to agree upon the phrasing of the issue presented for arbitral resolution and agreed to permit the arbitrator to frame the issue after having reviewed the record and the parties' briefs. Having made that review, the arbitrator thus frames the issues as follows:

1. What shall be the disposition of the grievance?
2. If the grievance is sustained in whole or in part, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE FOUR
Management Rights

The City shall not be deemed limited in any way by this Agreement in the performance of the regular and customary function of municipal management, including assignments of personnel, and reserves and retains all powers, authority and prerogatives including the exclusive right to issue reasonable departmental rules and regulations, General and Special Orders governing the conduct of the various fire department operations, provided said rules, regulation and General and Special orders are not inconsistent with the express provisions of this Agreement.

ARTICLE TEN
Saving Clause

Section 2. Excluding the subjects of shift manning and total complement, all job benefits presently enjoyed by members which are not specifically provided for or abridged by this contract shall continue under the conditions upon which they had previously been granted.

ARTICLE 15
Working out of grade

Effective July 1, 1978 members covered by this Agreement who serve temporarily in a next higher rank by assignment shall be compensated at the rate of the second step of the rank in which they are temporarily served as appearing in Article sixteen (16).

FACTUAL BACKGROUND

The Department's suppression personnel complement is divided into four working groups, each one of which is assigned a Deputy Chief. In addition to the four Deputy Chiefs devoted to suppression responsibilities, there is currently a Deputy Chief for fire prevention. The Department's various pieces of apparatus are divided among six fire stations. Each apparatus is generally crewed by two firefighters and one officer.

If an officer is absent, because of vacation or sickness, that vacancy is filled by the senior firefighter assigned to that piece of apparatus and that firefighter receives out of grade pay under the relevant provision of the Agreement. If, however, the officer's absence result in the City's having less than twenty three firefighters on a shift, the vacancy is filled by another employee working overtime.

Prior to 2000, a similar process was followed when a Deputy Chief in a given group was on vacation or absent because of illness. Absent the availability of another Deputy Chief, the senior Captain assigned to a particular group was designated to fill in if that group's Deputy Chief was absent or on vacation. The Captain filling in for the Deputy Chief received out of grade pay. That practice is embodied in General Order #26, issued on both March 17, 1980 and June 11, 1980, General Order #17, issued on November 6, 1985, and General Order #24, issued in October 1992. There appear to have been occasions where Captains declined the out of pay opportunity.

In early 2000 the Department created another Deputy Chief's position, known as the Administrative Deputy Chief. When one of the suppression Deputy Chief was absent because of vacation or illness, the Administrative Deputy Chief would fill the vacancy. In 2011, the incumbent Administrative Deputy Chief retired and the City decided not to fill that vacancy. Initially, the Department's Chief filled short term vacancies by calling in one of the remaining Deputy Chiefs on an overtime basis.

In December 2011, the Department's Chief designated one of its Captains as Administrative Captain. The full contours of the Administrative Captain's duties remain unclear. One fact, however, is not disputed. The Chief's appointment included a directive that all vacancies in Deputy Chief positions should be filled by the Administrative Captain who would receive out of grade pay. Thus, the other Captains assigned to the Department's various groups were ineligible to fill in for an absent Deputy Chief and were thus unable to receive out of grade pay for doing so. This facet of the /Administrative Captain's appointment prompted the filing of this grievance.

OPINION

I.

The parties' briefs both address the question whether this grievance is not arbitrable as a matter of law. Because the arbitrator does not understand that issue being before him for a ruling on either a binding or advisory basis, those arguments will not be recounted in this portion of the Opinion. Instead, this section will review the parties' positions on the question of the City's claimed violation of the Agreement.

The Union contends that the City violated Article Ten, Section 2 of the Agreement by having the Administrative Captain fill in for an absent Deputy Chief and

get out of grade pay a resulting. This change, it claims, abrogated the established past practice of having the most senior Captain in a working group replace an absent Deputy Chief in that group and receive out of grade pay. That practice, it contends, is a "benefit" protected from unilateral abrogation by the Agreement. .

Arbitral precedent under the Agreement, the Union avers, hold that Article Ten safe harbors such past practices. The record, the Union claims, more than demonstrates that the practice at issue meets every criterion for establishing a past practice. The evidence demonstrates, it says, that the practice dates back to the 1980's and is fully consistent with Department practice in filing other vacancies created by an officer's absence. The Union acknowledges that the practice of having a senior Captain fill in for a Deputy Chief did not occur when there was an Administrative Deputy Chief. It contends, however, the having the Administrative Chief fill in for another absent Deputy Chief simply reflected the practice of selecting the most senior officer to fill the vacancy without the City's having to pay a Captain out of grade pay.

For these reasons, Union requests that the grievance be sustained and the grievant and the other Captains made whole in all respects.

The City has a different view of the contractual landscape. It first contends that Article Ten is inapplicable because the Union's grievance concerns the assignment of personnel and because Article Ten exempts matters pertaining to shift manning and total compliment from its reach. It also argues that Article Ten does not provide a the contractual safe harbor claimed by the Union because the matter grieved resulted from changed circumstances resulting from the City's decision not to appoint a new Administrative Deputy Chief upon the incumbent's 2011 retirement.

Because the Agreement explicitly addresses the filling of vacancies, the City continues, there is no contractual foundation for the Union's grievance. The Agreement, the City says, requires vacancies to be filled by the procedures contained in the Civil Service laws. Those requirements, it contends, would be effectively nullified if the Union's grievance was sustained.

The out of grade pay provision of the Agreement, the City continues, do not support granting relief. That provision, it argues, only defines how out of grade pay should be computed and is devoid of any procedural constraints on the City's ability to fill position for which out of pay grade may be required. Nor, it continues, does any provision of the Agreement expressly limit the manner in which the City fills such vacancies. It thus requests that the grievance be denied.

II.

The arbitrator must first define the scope of this Opinion. The record reflects the City's specifically reserving its right to present its claim that the grievance is not arbitrable, as matter of law, in a judicial forum. The record thus reflects that the issue was not submitted to the arbitrator for either a binding or non-binding ruling. The parties' briefs, particularly the Union's, present arguments on that very issue. Although this joint discussion can be construed as inviting the arbitrator to issue an advisory ruling, his understanding of the record precludes doing so. As reflected in the statement of The Issues, the analysis will proceed directly to the Union's claim that it has demonstrated the City's violation of the Agreement, reserving to a judicial forum that question whether the issue is within the City's inherent management prerogative.

The controlling issue in this case is whether the claimed practice of having the senior Captain in a working group replace an absent Deputy Chief in that group, is governed by Article Ten, Section 2. It provides, in part, that "all job benefits currently enjoyed b y members which are not specifically provided for or abridged by this contract shall continue under the conditions upon which they had previously been granted."

The parties likely intended the practice at issue in this proceeding to be deemed a "benefit." While the City has attempted to characterize this grievance as implicating a right of "assignment" there is an alternative lens through which it may be viewed. Quite simply, the claimed practice is a method for distributing the opportunity to earn out of grade pay to the Captains in the various groups. So viewed, the claimed practice fits squarely within the core meaning of the term "benefit."

As to whether the benefit is "presently enjoyed" by members of the bargaining unit, much of the interpretive legwork has been done by other arbitrators resolving disputes under this Agreement and its predecessors. See.e.g, *City of Medford*, No. 11 390 01679 02 (Boulanger 2003); *City of Medford*, No. 11 390 00347 05 (Garraty 2005), *City of Medford* No. 11 390 00347 05 (Altman 2005). Those arbitrators have recognized that the term "presently enjoyed" describes what are traditionally known as past practices. The practice at issue here fits within the traditional definition of that term.

The evidence demonstrates that the practice has been followed since at least the 1980's. There was no doubt about its having been unequivocal and readily ascertainable since it was embodied in General Orders issued by various Department Chiefs.

The one potential weakness in the case is the period of time between 2000 and 2011 during which there was an Administrative Deputy Chief who filled in for absent

suppression Deputy Chiefs. Rather than being weakness, however, events during that time period and thereafter actually strengthen the Union's case.

During the period there was an Administrative Deputy Chief, there would have been no reason, practical or contractual, for the City to have a Captain work and receive out of grade pay since a more senior officer was available. The Administrative Deputy Chief was able to fill any open billets without the City's incurring additional expense. Since the senior officer was offered the work opportunity, the City's practice during this time period is fully consistent with the practice central to the Union's grievance.

Even if the practice was in suspended animation while there was an Administrative Deputy Chief, Article Ten compels upholding the grievance. It provides that the protected benefits "shall continue under the conditions under which they had previously been granted." The "benefit" at issue arose when there was no Administrative Deputy Chief available to fill in for an absent Deputy Chief. The abolition of the Administrative Deputy Chief position effectively returned the circumstances on the ground to the *status quo ante*. Thus, absent an Administrative Deputy Chief, the conditions under which the practice created were once again present. Article Ten thus compelled the City to afford the senior Captain in a working group the opportunity to fill in for and receive out of grade pay in the absence of that group's Deputy Chief.

The City's reservation of all the out of grade opportunities to the Administrative Captain thus deviated from what had been the established past practice. The City effectively abrogated a practice safe harbored from such unilateral action by Article Ten, Section 2 of the Agreement.

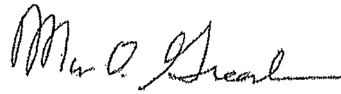
The City's attempts to counter the Union's contractual claims are not persuasive. Because the "benefit" was preserved by an explicit provision of the Agreement, its Management Rights provisions did not authorize the City to act as it did. Similarly, because this practice does not implicate the staffing levels present on any given shift, it does not fit within the exception to Article Ten, Section 2. Finally, there is no conflict between the relief sought by the Union and the Civil Service laws since the statute does not regulate the singular, isolated, instances of having lower ranking officers fill in for absent superiors, so long as it is not equivalent to a permanent promotion. There is no evidence on this record that the practice has such an impact.

On this record, therefore, the grievance must be sustained. As a remedy, the Union is entitled to declaratory relief and a cease and desist order. Its request for make whole relief is more troublesome. Remedies awarding pay for time not worked are rarely imposed. The preferred remedy is to require the City to afford employees adversely affected by a violation of the Agreement make up overtime opportunities. This would be difficult since the senior Captains in working groups would effectively be given preference over themselves in the absence of that group's Deputy Chief. Such a remedy would also no account for the possibility that individual Captains might have declined declining the opportunity to perform the out of grade assignments. Thus, formulating a make whole remedy in these circumstances is difficult and requires too much speculation to reach the necessary level of certainty. Thus, the remedy shall be limited to a cease and desist order. An appropriate Award shall enter.

AWARD

1. The grievance is sustained. The City violated Article Ten, Section 2 of the Agreement by failing to offer the senior Captain in a work group the opportunity to work out of grade in the absence of that work group's Deputy Chief.

2. As a remedy, the City shall cease and desist from further such violations of the Agreement.



Marc D. Greenbaum, Arbitrator
Dated: February 3, 2014

EXHIBIT 2

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APR -3 2014

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT

MIDDLESEX, ss. DOCKET No.: 13-CV-5101-F

THE CITY OF MEDFORD

v.

LOCAL UNION NO. 1032, MEDFORD FIRE FIGHTERS UNION

MEMORANDUM OF DECISION AND ORDER

The city of Medford has sued Local Union No. 1032, Medford Fire Fighters Union seeking to stay an arbitration and for the Court to declare that the dispute between the parties is not arbitrable. The Union has counterclaimed to confirm an arbitration award. Presently, the parties have cross-moved for summary judgment on all claims.

BACKGROUND

The city of Medford Fire Department's suppression personnel complement is divided into four work groups, each of which is assigned a Deputy Chief, and a number of captains, officers, and fire fighters.

Beginning in the 1980s, Medford followed a specific practice when a Deputy Chief within a given work group was absent because of vacation or illness. Under this practice, the Deputy Chief's position was temporarily filled by the most senior captain in the work group. The captain who filled the Deputy Chief position received contractual "out of grade" pay. In essence, senior captains received a pay increase while filling in for an absent Deputy Chief.

In December 2011, the Chief of Medford's Fire Department designated one captain as Administrative Captain. While the full extent of his duties were not articulated, the Administrative Captain filled all vacancies in Deputy Chief positions across all of the work groups. Thus, the Administrative Captain received all of the "out of grade" pay arising from Deputy Chief absences. This effectively ended the practice of allowing the most senior captains to receive the benefit of out of grade pay.

On December 30, 2011, the Union filed a grievance on behalf of Captain Frank McCourt and all similarly-situated captains of Medford's Fire Department. The Union considered the grievance to be a challenge to the city's decision to abandon its past practice by unilaterally providing all out of grade pay arising during the absence of a Deputy Chief to a single captain rather than distributing such pay on the basis of seniority among the captains working within the appropriate work group. Under the terms of a collective bargaining agreement between the parties, the Union sought to arbitrate the grievance.

For its part, Medford viewed the grievance as a challenge to the Fire Chief's appointment of the Administrative Captain. As such, Medford filed the current complaint in this Court on November 25, 2013 seeking to stay the pending arbitration and also sought a declaratory judgment determining that the grievance was not arbitrable because it concerned an assignment issue, which is a non-delegable right of inherent managerial policy. Medford did not move to stay the arbitration.

After the complaint was filed, an arbitrator heard the grievance on December 16, 2013. Both parties were present and represented by counsel. Following presentation of the evidence, both parties sought leave to file post-hearing briefs. Throughout the arbitration process, Medford maintained that the grievance was not arbitrable and reserved its right to

challenge the arbitrability of the dispute in the Superior Court. Despite having filed the current lawsuit, Medford still failed to move to stay the arbitration.

On February 3, 2014, the arbitrator issued a written decision. The arbitrator declined to determine whether the grievance was arbitrable because he determined that the matter was not before him. Instead, the arbitrator addressed the merits of the grievance and found that Medford had violated the collective bargaining agreement, which protects past practices established between the parties. He wrote:

> While the City has attempted to characterize this grievance as implicating a right of "assignment" there is an alternative leans through which it may be viewed. Quite simply, the claimed practice is a method for distributing the opportunity to earn out of grade pay to the Captains in the various groups. So viewed, the claimed practice fits squarely within the core meaning of the term "benefit." Arbitration Award, at 7.

The arbitrator ordered:

> 1. The grievance is sustained. The City violated Articles Ten, Section 2 of the Agreement by failing to offer the senior Captain in a work group the opportunity to work out of grade in the absence of that work group's Deputy Chief.
>
> 2. As a remedy, the City shall cease and desist from further such violations of the Agreement. *Id.* at 10.

On March 17, 2014, the Union moved to amend its answer to Medford's complaint to add a counterclaim. That motion was allowed. On March 20, 2014, the Union filed an amended answer that included a counterclaim for confirmation of the arbitration award. On March 25, 2014, the parties filed cross motions for summary judgment. To this date, Medford has still not moved to vacate or modify the arbitration award.

A hearing was held on the parties' cross motions last Tuesday.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there are no genuine issues of material fact. *See* Mass. R. Civ. P. 56 (*c*). The burden is on the moving party to demonstrate the absence of a triable issue and that it is entitled to judgment as a matter of law. *Id.*; *Madsen v. Erwin*, 395 Mass. 715, 719 (1985). Where the burden of proof at trial rests with the non-moving party, the moving party may satisfy its summary judgment burden by either presenting "affirmative evidence negating an essential element" of the non-moving party's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991).

"Where a moving party properly asserts that there is no genuine issue of material fact, 'the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.'" *Id.*, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). All of the evidence must be viewed in the light most favorable to the non-moving party. *Foster v. Group Health Inc.*, 444 Mass. 668, 672 (2005).

II. CITY OF MEDFORD'S CLAIMS

A. Request for Stay

Under G. L. c. 150C, § 2 (*b*),

> Upon application, the superior court may *stay* an arbitration proceeding commenced or threatened *if it finds* (1) that there is no agreement to arbitrate, or (2) that the claim sought to be arbitrated does not state a controversy covered by the provision for arbitration and disputes concerning the interpretation or *application of the arbitration provision are not themselves made subject to arbitration.* Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined, and if the court finds for the applicant *it shall order a stay of arbitration, otherwise the court shall order the parties to proceed to arbitration*; provided that an order to stay arbitration shall not be

> granted on the ground that the claim in issue lacks merit or bona fides or because no fault or grounds for the claim sought to be arbitrated have been shown. [Emphasis added].

The term "stay" is defined as, "[t]he postponement or halting of a proceeding, judgment, or the like" or "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." Black's Law Dictionary 1453 (8th ed. 2004).

Here, the arbitration has already occurred and the arbitrator has issued a written decision. While the city could have brought a motion to stay after it filed its complaint and before the arbitration had taken place, but inexplicably failed to do so. This Court cannot stay, postpone, halt or suspend an arbitration that has already occurred. Simply put, there is nothing for this Court to stay; the claim is moot.

B. Declaratory Judgment

Under G. L. c. 231A, § 1, a court may "make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings." As such, for this Court to have the authority to grant the city's claim for declaratory relief, there must be "an actual controversy." *See District Attorney for the Suffolk District v. Watson*, 381 Mass. 648, 659 (1980). An actual controversy is "a 'real dispute' caused by the assertion by one party of a duty, right, or other legal relation in which he has a 'definite interest,' in circumstances indicating that failure to resolve the conflict will almost inevitably lead to litigation." *Id.*

Medford asks this Court to declare that the dispute between the parties is not arbitrable because it concerns an assignment issue, which is a non-delegable right of inherent

managerial policy that is not subject to arbitration.[1] Thus, the declaration sought concerns whether the specific grievance in question is arbitrable. However, the grievance has already proceeded through arbitration and the arbitrator has issued a binding award. Because the grievance has already been arbitrated, there would only be an actual controversy as to the arbitrability of the grievance if Medford challenged (or could challenge) the arbitration award. *See id.*

General Laws c. 150C, § 11 provides a mechanism for a party to challenge an arbitration award. "Upon application of a party, the superior court shall vacate an award if . . . "the arbitrators exceeded their powers . . . ." G. L. c. 150C, § 11 *(a)(3)*. "An application under this section shall be made within thirty days after delivery of a copy of the award to the applicant . . . ." G. L. c. 150C, § 11 *(b)*. Further, "[u]pon application made within thirty days after delivery of a copy of the award to the applicant, the superior court" may modify or correct an arbitration award. G. L. c. 150C, § 12.

To the present date, the city of Medford has not moved to vacate or modify the arbitration award under either G. L. c. 150C, §§ 11 or 12. In addition, more than thirty days have passed since the award was delivered to the parties, thus barring the city from challenging the award in the future. *See Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth.*, 397 Mass. 426, 431 (1986) ("to ensure the stability and finality of the arbitration process, we hold that all challenges to an arbitrator's award must be brought within the time frame specified by the statute"); *Fall River v. Fall River Fire Fighters, Local 1314, I.A.F.F.*, 50 Mass. App. Ct. 1108, 2000 WL 1745157 at *3-*4 (Mass. App. Ct. Nov. 20, 2000) (Rule 1:28 decision) (affirming confirmation of arbitration award where city failed to timely

[1] This Court is keenly sensitive to the principle that city and town decision-makers have the right – and indeed, obligation – to act in the best interests of their citizens to properly manage their departments and personnel. But the city's litigational course in this case precluded this Court from reaching the merits of its argument.

amend its complaint to state a claim for vacating the arbitration award or file a motion to vacate under G. L. c. 150C, § 11). Therefore, because the grievance has been arbitrated and Medford cannot challenge the arbitration award, there is no actual controversy and declaratory relief cannot be granted.[2] *See District Attorney for the Suffolk District*, 381 Mass. at 659.

Contrary to Medford's argument, the arbitration award was not "subject to" a determination by this Court as to the arbitrability of the matter. Here, Medford reserved its right to challenge the arbitrability of the dispute and then the arbitrator proceeded to issue a binding award on the merits.[3] A reservation of rights does not make a decision "subject to" further review in the way Medford urges. By way of example, when a party objects in a trial proceeding, the objection may preserve or reserve the party's rights on appeal. However, the party must then follow the proper appellate procedure to potentially realize the benefit of the reserved right. Medford had the opportunity to properly exercise its reservation of rights and challenge the arbitrability of the dispute. It could have filed a motion to vacate or modify the arbitration award or moved to amend its complaint to state a claim for vacating the arbitration award. It did neither.

Instead, the city urges that the fact that the matter was arbitrated does not preclude judicial review. If Medford had proceeded in accordance with G. L. c. 150C, this Court could have reviewed the arbitrability of the dispute and decided whether the arbitrator acted within his authority.[4] *See School Comm. of Agawam v. Agawam Educ. Ass'n*, 371 Mass. 845, n.4 (1977) ("The basic contest is over the arbitrability of the particular grievance. In such a

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[2] As will be discussed in Section III (*A*), *infra*, this Court has confirmed the arbitration award.

[3] It is clear from the arbitrator's decision that he did not address the arbitrability issue because the issue was not submitted for arbitration for either a binding or non-binding ruling.

situation, the *issue may be raised* again in the Superior Court *on a motion to vacate* an arbitrator's award, even if that issue was involved in an earlier unsuccessful attempt under [G. L. c. 150C,] Section 2 (b) to stay the arbitration proceeding." [Emphasis added]). However, the fact that Medford did not challenge the arbitration award by amending its complaint or filing a motion to vacate or modify the award does preclude judicial review of the award. *See Fall River v. Fall River Fire Fighters, Local 1314, I.A.F.F.*, 50 Mass. App. Ct. 1108, 2000 WL 1745157 at *3-*4.

Moreover, the city's argument that its complaint seeking a stay and declaratory relief is the same as a motion to vacate an arbitration award is without legal support. Medford has cited no case law, and none was found, where a court ignored the requirements of Chapter 150C because a party filed a pre-arbitration complaint to stay an arbitration and for declaratory relief. Chapter 150C is clear that a party must move to vacate or modify an arbitration award under sections 11 and 12, or the award shall be confirmed. *See* G. L. c. 150C, § 10.

Finally, the Court notes that even if it were to grant the declaratory relief that Medford seeks, the declaration would have no legal affect unless the arbitration award was also vacated. As discussed, Medford has not attempted to vacate the arbitration award. This court cannot unilaterally vacate an arbitration award.

III. THE UNION'S CLAIMS

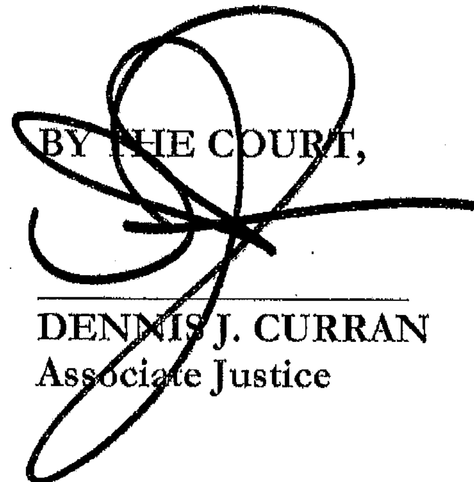
A. Confirmation of Arbitration Award

"Upon application of a party, the superior court *shall confirm* an award, unless within the time limits, hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in sections eleven and twelve." G. L. c. 150C, § 10 (emphasis added). Because Medford did not move to vacate, modify, or

correct the arbitration award under G. L. c. 150C, §§ 11 or 12, this Court has no choice but to confirm the award. In so doing, this Court must stress that Medford voluntarily chose to proceed in this manner. Chapter 150C provides a procedure for challenging the arbitrability of a dispute. Again, after filing its complaint but before the arbitration occurred, Medford could have moved to stay the arbitration and sought a declaration that the dispute was not arbitrable, or it could have filed a motion to vacate or modify the arbitration award after it was issued. Instead, its decision to ignore clear statutory directives compels the present result.

ORDER

For these reasons, plaintiff city of Medford's motion for summary judgment is **DENIED,** and defendant Local Union No. 103, Medford Fire Fighters Union's motion for summary judgment is **ALLOWED.**



BY THE COURT,

DENNIS J. CURRAN
Associate Justice

April 1, 2014

EXHIBIT 3

13-5101-F

APR 03 2015

16

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 14-P-862

CITY OF MEDFORD

vs.

LOCAL 1032, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment affirmed.

FILED
IN THE OFFICE OF THE
CLERK OF COURTS
FOR THE COUNTY OF MIDDLESEX
APR 1 2015
CLERK

By the Court,

Joseph F. Stanton, Clerk

Date March 2, 2015.

to present its legal arguments [i.e., challenging the arbitrability of the issue] in the Superior Court." The arbitrator ruled in favor of the union; however, the city never sought to vacate the award. Instead, it proceeded with this suit, seeking a stay of arbitration and a declaratory judgment. After both parties moved for summary judgment, the judge determined that the city had waived its claims by failing to move to stay the arbitration or failing to move to vacate the arbitration award. Additionally, he determined that the "city's argument that its complaint seeking a stay and declaratory relief is the same as a motion to vacate an arbitration award is without legal support."

Discussion. The judge correctly determined that the provisions of G. L. c. 150C, inserted by St. 1959, c. 546, § 1, govern the arbitrability of the issue between these two parties. Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Authy., 397 Mass. 426, 429 (1986). Under G. L. c. 150C, § 2(b)(2), the Superior Court may, upon application, "stay an arbitration proceeding commenced or threatened if it finds" that the claim is not subject to arbitration. "Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined" by a Superior Court judge. Ibid.

Here, the city filed suit for a stay and for declaratory judgment, but took no further action. Instead, it proceeded

with the arbitration while "reserving its right" to litigate the arbitrability of the issue in Superior Court. The city fully participated in the arbitration process to its conclusion, and did not move to stay the arbitration before an award issued. General Laws c. 150C does not provide for a stay of arbitration that already has occurred, and we agree with the judge that the city's failure to file under G. L. c. 150C, § 2(b), for a stay, combined with its participation in arbitration, meant that there was nothing for the judge to stay in this case.

While the city's failure to seek a stay may not have been fatal, see Sheahan v. School Comm. of Worcester, 359 Mass. 702, 709-710 (1971) (noting that question whether arbitrator is empowered to hear and determine matter is "always open"), its failure to move to vacate the award is. General Laws c. 150C, § 10, requires the Superior Court, upon application, to confirm an arbitration award "unless within the time limits . . . grounds are urged for vacating, modifying or correcting the award." The "time limits" to which § 10 refers is "within thirty days after delivery of a copy of the award to the applicant." G. L. c. 150C, § 11(b). It is undisputed that the city never moved to vacate the award, which precludes judicial

review both of the award and of the issue's arbitrability. Local 589, Amalgamated Transit Union, supra at 431.[1]

Because the city did not avail itself of any of the remedies open to it pursuant to G. L. c. 150C, it would have us conclude that simply filing an action for declaratory judgment preserves for judicial review a claim that the controversy is not arbitrable, despite the mandates of G. L. c. 150C. We find no basis for this claim. Nor are we aware of a legal basis for the claim that the city preserved the issue because it "reserved its right" during arbitration. "The issue of arbitrability under the terms of an agreement may be preserved and raised subsequently in a proceeding seeking to vacate the arbitrator's award." School Comm. of Agawam v. Agawam Educ. Assn., 371 Mass. 845, 847 (1977). Allowing the city to obtain review by "reserving its right" during arbitration instead of adhering to the mandates of G. L. c. 150C "would defeat the important policy goals embodied in [G. L. c. 150C,] § 11(b)[,] by creating 'an exception capable of swallowing the rule.'" Local 589, Amalgamated Transit Union, supra at 431, quoting from Massachusetts Bay Transp. Authy. v. Local 589, Amalgamated

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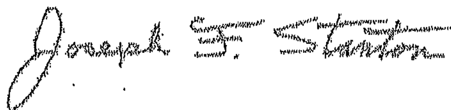
[1] While "[t]here is language in the cases that jurisdictional defects in arbitration proceedings are 'always open,' . . . the exceptions set forth in [G. L. c. 150C,] § 11(b)[,] for late filing do not include an exception for jurisdictional questions." Massachusetts Bay Transp. Authy. v. Local 589, Amalgamated Transit Union, 20 Mass. App. Ct. 418, 424 n.6 (1985).

Transit Union, 20 Mass. App. Ct. 418, 424 n.6 (1985). The city was required, within thirty days of receipt of the award, to take action to vacate it. It did not do so, and its claim is waived.[2]

Judgment affirmed.

By the Court (Cypher, Kantrowitz & Carhart, JJ.[3]),



Clerk

Entered: March 2, 2015.

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[2] We decline to order costs and attorney's fees as requested by the union.

[3] The panelists are listed in order of seniority.

13-5101-F

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
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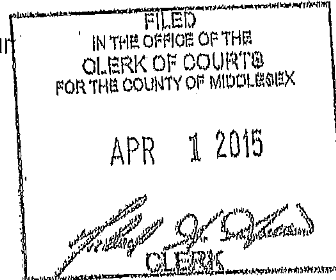

Middlesex Superior Court Dept.
Clerk for Civil Business
200 TradeCenter
Woburn, MA 01801

RE: No. 2014-P-0862

CITY OF MEDFORD
vs.
LOCAL UNION NO 1032 MEDFORD FIRE FIGHTERS UNION

Lower Court Docket number: MICV2013-05101

NOTICE OF RESCRIPT

In accordance with Massachusetts Rule of Appellate Procedure 23, please note that rescript in the above-referenced case has been entered on the Appeals Court docket and is enclosed.

Very truly yours,

The Clerk's Office

Dated: March 30, 2015

EXHIBIT 4

CITY OF **MEDFORD** vs. LOCAL 1032, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS.

14-P-862

APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. Unpub. LEXIS 148

March 2, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4 (2008).

JUDGES: Cypher, Kantrowitz & Carhart, JJ.[3]

[3] The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The city of **Medford** (city) appeals from a Superior Court judgment denying its motion for summary judgment and allowing the motion for summary judgment filed by Local 1032, International Association of Firefighters (union). We affirm.

Background. We briefly summarize the facts. The city and the union disagreed over the city's **fire** chief's decision to assign an administrative chief to take over the duties of absent deputy chiefs. Previously, captains were allowed to substitute for absent deputy chiefs and thus to earn out-of-grade pay. The union sought to arbitrate the issue. The city responded by filing an action in Superior Court, seeking to stay the arbitration and a declaration that the issue was not arbitrable. The city never separately moved to stay the arbitration. Instead, it proceeded to arbitration while "reserving its right to present its legal arguments [i.e., challenging the arbitrability of the issue] in the Superior Court." The arbitrator ruled in favor of the union; however, the city never sought to vacate the award. Instead, it proceeded with this suit, seeking a stay of arbitration and a declaratory judgment. After both parties moved for summary judgment, the judge determined that the city had waived its claims by failing to move to stay the arbitration or failing to move to vacate the arbitration award. Additionally, he determined that the "city's argument that its complaint seeking a stay and declaratory relief is the same as a motion to vacate an arbitration award is without legal support."

Discussion. The judge correctly determined that the provisions of G. L. c. 150C, inserted by St. 1959, c. 546, § 1, govern the arbitrability of the issue between these two parties. *Local 589, Amalgamated Transit Union* v. *Massachusetts Bay Transp. Authy.*, 397 Mass. 426, 429 (1986). Under G. L. c. 150C, § 2(*b*)(2), the Superior Court may, upon application, "stay an arbitration proceeding commenced or threatened if it finds" that the claim is not subject to arbitration. "Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined" by a Superior Court judge. *Ibid*.

Here, the city filed suit for a stay and for declaratory judgment, but took no further action. Instead, it proceeded with the arbitration while "reserving its right" to litigate the arbitrability of the issue in Superior Court. The city fully participated in the arbitration process to its conclusion, and did not move to stay the arbitration before an award issued. General Laws c. 150C does not provide for a stay of arbitration that already has occurred, and we agree with the judge that the city's failure to file under

G. L. c. 150C, § 2(*b*), for a stay, combined with its participation in arbitration, meant that there was nothing for the judge to stay in this case.

While the city's failure to seek a stay may not have been fatal, see *Sheahan* v. *School Comm. of Worcester*, 359 Mass. 702, 709-710 (1971) (noting that question whether arbitrator is empowered to hear and determine matter is "always open"), its failure to move to vacate the award is. General Laws c. 150C, § 10, requires the Superior Court, upon application, to confirm an arbitration award "unless within the time limits . . . grounds are urged for vacating, modifying or correcting the award." The "time limits" to which § 10 refers is "within thirty days after delivery of a copy of the award to the applicant." G. L. c. 150C, § 11(*b*). It is undisputed that the city never moved to vacate the award, which precludes judicial review both of the award and of the issue's arbitrability. *Local 589, Amalgamated Transit Union, supra* at 431.[1]

FOOTNOTES

1 While "[t]here is language in the cases that jurisdictional defects in arbitration proceedings are 'always open,' . . . the exceptions set forth in [G. L. c. 150C,] § 11(*b*)[,] for late filing do not include an exception for jurisdictional questions." *Massachusetts Bay Transp. Authy.* v. *Local 589, Amalgamated Transit Union*, 20 Mass. App. Ct. 418, 424 n.6 (1985).

Because the city did not avail itself of any of the remedies open to it pursuant to G. L. c. 150C, it would have us conclude that simply filing an action for declaratory judgment preserves for judicial review a claim that the controversy is not arbitrable, despite the mandates of G. L. c. 150C. We find no basis for this claim. Nor are we aware of a legal basis for the claim that the city preserved the issue because it "reserved its right" during arbitration. "The issue of arbitrability under the terms of an agreement may be preserved and raised subsequently in a proceeding seeking to vacate the arbitrator's award." *School Comm. of Agawam* v. *Agawam Educ. Assn.*, 371 Mass. 845, 847 (1977). Allowing the city to obtain review by "reserving its right" during arbitration instead of adhering to the mandates of G. L. c. 150C "would defeat the important policy goals embodied in [G. L. c. 150C,] § 11(*b*)[,] by creating 'an exception capable of swallowing the rule.'" *Local 589, Amalgamated Transit Union, supra* at 431, quoting from *Massachusetts Bay Transp. Authy.* v. *Local 589, Amalgamated Transit Union*, 20 Mass. App. Ct. 418, 424 n.6 (1985). The city was required, within thirty days of receipt of the award, to take action to vacate it. It did not do so, and its claim is waived.[2]

FOOTNOTES

2 We decline to order costs and attorney's fees as requested by the union.

Judgment affirmed.

By the Court (Cypher, Kantrowitz & Carhart, JJ.[3]),

FOOTNOTES

3 The panelists are listed in order of seniority.

Entered: March 2, 2015.

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EXHIBIT 5

MAY 06 2015

LAW OFFICE OF

ALBERT R. MASON
145 SPRINGFIELD STREET
CHICOPEE, MASSACHUSETT 01013
Phone: 413-592-1475
Fax: 413-592-0027

Attorney Ian O. Russel
2 Liberty Square, 10th Floor
Boston, Ma. 0209

May 4, 2015

Dear Attorney Russel:

Re: Your letter of April 30, 2015

I regard to your letter of April 30, 2015, it is our understanding that the confirming of the arbitration award by Arbitrator Marc Greenbaum did not confirm, finalize or in any way address or clarify the substantive jurisdictional issue that the city raised that "the grievance is not substantively arbitrable as a matter of law."

The arbitrator's award specifically documented that the substantive arbitrability question was not being addressed in his award. Please see:

> "The City claims that the grievance is not substantively arbitrable as a matter of law. To that end, it filed, but as of the date of the hearing, had not served the Union with a civil action seeking to stay this arbitration. Its agreement to permit this hearing to go forward was expressly predicated upon its having reserved its right to present its legal arguments in the Superior Court. **It did not agree to have the substantive arbitrability issue resolved by the arbitrator on a binding or advisory basis...."**

> "...The City has a different view of the contractual landscape. It first contends that Article Ten is inapplicable **because the Union's grievance concerns the assignment of personnel** and because Article Ten exempts matters pertaining to **shift manning and total compliment** from its reach. It also argues that Article Ten does not provide a the contractual safe harbor claimed by the Union because the matter grieved resulted from **changed circumstances** resulting from the City's decision not to appoint a new Administrative Deputy Chief upon the incumbent's 20 11 retirement."

> **"The arbitrator must first define the scope of this Opinion. The record reflects the City's specifically reserving its right to present its claim that the grievance is not arbitrable, as matter of law, in a judicial forum.** The record thus reflects that the issue was not submitted to the arbitrator for either a binding or non-binding ruling. The parties' briefs, particularly the Union's, present arguments on that very issue. **Although this**

joint discussion can be construed as inviting the arbitrator to issue an advisory ruling, his understanding of the record precludes doing so. As reflected in the statement of The Issues, the analysis will proceed directly to the Union's claim that it has demonstrated the City's violation of the Agreement, **reserving to a judicial forum that question whether the issue is within the City's inherent management prerogative**."

Given the history and realities of this case the city has not, to date, been provided an opportunity, ***in a judicial forum,*** to have its substantive, jurisdictional, "matter of law" issue addressed. That issue being that assignments and manning in a public safety fire department are core managerial functions that are not subject to arbitration and, that the union's reasoning on past practice as well the past practice reasoning in the arbitration award is "...tantamount to reasoning that failure to exercise a power can work an estoppel on the public official in whom the power resides. ***For good reasons, however, we have almost uniformly held that estoppel does not apply to a public official's performance of statutory obligations or responsibilities***. See Gamache v. Mayor of N. Adams, 17 Mass. App. Ct. 291, 294 (1983); Municipal Light Co. of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 167, cert. denied, 510 U.S. 866 (1993). Sheriff of Worcester County vs. Labor Relations Commission & another. **60 Mass. App. Ct. 632 (2004). See:**

"The City's reservation of all the out of grade opportunities to the Administrative Captain thus **deviated from what had been the established past practice**. **The City effectively abrogated a practice** safe harbored from such unilateral action by A1ticle Ten, Section 2 of the Agreement."

"1. The grievance is sustained. The City violated Article Ten, Section 2 of the Agreement by failing to offer the senior Captain in a work group **the opportunity to work out of grade in the absence of that work group's Deputy Chief.**
2. As a remedy, the City shall cease and desist from further such violations of the Agreement."

"The City claims that the grievance is not substantively arbitrable as a matter of law. To that end, it filed, but as of the date of the hearing, had not served the Union with a civil action seeking to stay this arbitration. Its agreement to permit this hearing to go forward was expressly predicated upon its having reserved its right to present its legal arguments in the Superior Court. **It did not agree to have the substantive arbitrability issue resolved by the arbitrator on a binding or advisory basis...."**

"The arbitrator must first define the scope of this Opinion. The record reflects the City's specifically reserving its right to present its claim that the grievance is not arbitrable, as matter of law, in a judicial forum. The record thus reflects that the issue was not submitted to the arbitrator for either a binding or non-binding ruling. The pmiies' briefs, pmiicularly the Union's, present arguments on that very issue. **Although this joint discussion can be construed as inviting the arbitrator to issue an advisory ruling, his understanding of the record precludes doing so**. As reflected in the

statement of The Issues, the analysis will proceed directly to the Union's claim that it has demonstrated the City's violation of the Agreement, reserving to a judicial forum that question whether the issue is within the City's inherent management prerogative."

It is also the city's position that the arbitrator's award, as documented, documents that the city violated the contract "...by failing to offer the senior Captain in a work group **the opportunity to work out of grade in the absence of that work group's Deputy Chief."**

In this regard, it is the city's opinion and understanding that "opportunities" involving unscheduled matters do not constitute a term or condition of employment that would be subject to either bargaining or arbitration. See:

> "...Here, the Union maintains that this transfer of unit work deprived the unit members **of the opportunity to perform the work** on an overtime basis. This **loss of overtime opportunities is in the nature of unscheduled overtime** resulting directly from **the City's public safety deployment decision** and, therefore, does not constitute a term and condition of employment.
> In the Matter of CITY OF BOSTON and BOSTON POLICE PATROLMEN'S ASSOCIATION, Case No.: **MUP-2749, MUP-01-2892**

As your office is aware, in the Boston Police Superior Officers federation case, **466 Mass. 210, 216, (2013)** the court not only addressed the authority of the city of Boston under its own special legislation, it also addressed that inherent matters of managerial policy set forth by statute in " St. 1973, c. 1078, s. 4A (3) (a), as appearing in St. 1987, c. 589, s. 1." See:

> [8] Consent could have been relevant to the question whether the interest arbitrator exceeded his statutory authority when he inserted art. XVI, s. 6A, into the collective bargaining agreement. See St. 1973, c. 1078, s. 4A (1) (a) (i), (2) (a), as appearing in St. 1987, c. 589, s. 1 (creating joint labor-management committee to oversee collective bargaining processes for municipal police and firefighters). Pursuant to that statute, parties may be ordered to undertake arbitration to resolve outstanding issues; the scope of such arbitration, which is binding, "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** . . . ." St. 1973, c. 1078, s. 4A (3) (a), as appearing in St. 1987, c. 589, s. 1."
> **CITY OF BOSTON VS. BOSTON POLICE SUPERIOR OFFICERS FEDERATION 466 Mass. 210, 216, (2013)**

The remainder of the statutory paragraph documenting "matters of inherent managerial policy" that addresses firefighter matters in St. 1973, c. 1078, s. 4A (1) (a) (i), (2) (a), as appearing in St. 1987, c. 589, s. 1 documents the following:

> ".... 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……. ." St. 1973, c. 1078, s. 4A (3) (a), as appearing in St. 1987, c. 589, s. 1."

Accordingly, please be advised that the city does not intend to comply with an award that, ***by its very terms,*** has not yet been declared to involve a jurisdictionally arbitrable matter.

Should you choose to initiate contempt proceedings as stated in your letter, please be advised that the city's defense will be as set forth herein and, the city will be seeking a judicial determination as to whether the "assignment" and "past practice" issue involved is or was jurisdictionally arbitrable.

Please address any further correspondence on this matter to Chief Giliberti and our office.

Thank you.

/s/ Albert Mason

EXHIBIT 6

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

MIDDLESEX, SS **Civil Action No. MICV2013-05101-F**

CITY OF MEDFORD,
Plaintiff

v.

MEDFORD FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1032,
Defendant

AFFIDAVIT OF WILLIAM O'BRIEN

I, William O'Brien, do hereby depose and say:

1. I am the President of the Medford Firefighters Union, International Association of Firefighters, Local 1032.

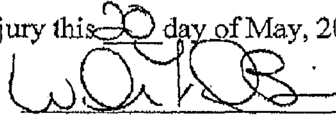
3. On or about May 9, 2015, the City Solicitor for the City of Medford, Mark Rumley, called me and told me that the City would comply with the February 3, 2014 Arbitration Award.

4. I am aware that on or about May 10, 2015, a deputy chief from the Medford Fire Department was absent on vacation. The out-of-grade-pay for filling in for the absent deputy chief was not offered to any of the captains in the applicable work group, as required by the Arbitration Award.

5. On or about May 11, 2015, I spoke with the Chief of the Medford Fire Department, Frank A. Giliberti, about compliance with the Award. Rather than indicating that he would comply with the Award going forward, Chief Giliberti stated only that he was trying to get approval from the Mayor to hire an additional deputy chief.

6. The City, through Chief Giliberti, has not acted to comply with the Award. Chief Gilberti, who is responsible for scheduling and the payment of out-of-grade pay, has not indicated to the Union that he will comply with the Award going forward.

Signed under the pains and penalties of perjury this 20 day of May, 2015.



William O'Brien