COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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In the Matter of:	*	
	*	Case Number: MUP-19-7133
CITY OF EVERETT	*	
	*	Date Issued: August 27, 2021
and	*	
	*	
EVERETT FIREFIGHTERS, IAFF, LOCAL 143	*	

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CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Albert Mason, Esq. - Representing City of Everett

Patrick N. Bryant, Esq. - Representing Everett Firefighters, IAFF, Local 143

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

The issue in this case of first impression is whether the City of Everett (City) had any duty to bargain with its firefighters union over the impacts, or the means and methods of implementing its decision to use an assessment center to determine who among its ranks would be promoted to Fire Chief. Relying on Town of Arlington, 42 MLC 97, MUP-14-3750 (September 30, 2015) for the proposition that all standards and procedures for promotion to managerial positions outside of a bargaining unit are not mandatory subjects of bargaining, the Hearing Officer held that the City had no duty to bargain over the impacts or the means of implementing this decision.[1] The Everett Firefighters, IAFF, Local 143 (Union) seeks review of this determination and we reverse. We clarify that the dicta in

[1] The Hearing Officer's decision is reported at 47 MLC 51.

Town of Arlington was not intended to establish a per se rule regarding the scope of bargaining in all cases involving promotions to non-bargaining unit managerial positions. Rather, for the reasons set forth below, we hold that an employer has a statutory duty to bargain over aspects of the promotional process affecting bargaining unit members' participation in that process that do not implicate the employer's managerial right (subject to Civil Service law and procedures) to select the assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief, the exercises used in the assessment center, the weight given for education or experience, the criteria or standards measured, how the assessment center is scored or who the City ultimately selects. In such circumstances, which must be determined on a case-by-case basis, the employees' interest in bargaining over aspects of the promotional process affecting bargaining unit members' participation in the process will likely outweigh the employer's interest in maintaining its managerial prerogatives, rendering these topics mandatory subjects of bargaining. Because we find that such circumstances exist in this case, we hold that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) as alleged.

Background[2]

Everett Fire Department, Generally

There are approximately ninety-five firefighters who work for the Everett Fire Department (Department). The Union is the exclusive representative of all the firefighters, except for the Fire Chief,

[2] The parties stipulated to certain facts and the Hearing Officer made additional findings of fact based on the testimony and documents received during the single day of hearing held in this matter. The Union challenged the Hearing Officer's finding that Acting Fire Chief Anthony Carli (Carli) selected the Sole Assessment Center process with In-Title experience. For reasons stated below, that finding is irrelevant to our decision, so we do not resolve it. The Union also sought to include twenty-three additional findings. Our findings are based on the stipulated facts, the Hearing Officer's uncontested findings, and, as noted below, some additional relevant information contained in the record.

whose status as a managerial employee within the meaning of Section 1 of the Law is not in in dispute. More specifically, the bargaining unit is comprised of firefighters in the rank of Private, Lieutenant, Captain and Deputy Chief. At the time of hearing, there were seven Deputy Chiefs.

Promotions, Generally

The City appoints and promotes firefighters from the ranks in accordance with Civil Service law, M.G.L c. 31, et. seq. Article 5 of the parties' 2006-2009 collective bargaining agreement (CBA), "Appointment and Promotion," states in pertinent part:

> 5.1 The City agrees to appoint and promote in accordance with Civil Service Law and rules.
> 5.2 All appointments and promotions shall be made from the ranks, provided the employee appointed or promoted is qualified to fill the open positions . .
> 5.3 Upon. . . request the City will give the Union an opportunity to state its views with respect to the existence of an alleged vacancy and how it should be filled.
> 5.4 When the authorized authority requests Civil Service to prepare an examination for appointment or promotion, the Union shall be notified immediately by the authority that such a request has been submitted to Civil Service.
>
> * * *

Fire Chief Vacancy

In 2016, the City's then permanent Fire Chief resigned. At that time, there was no Civil Service eligibility list from which a permanent Fire Chief could be promoted. The City promoted then-Deputy Chief Carli to serve as Provisional or Acting Chief. Carli began working for the City as a firefighter in 2000 and the City promoted him to Deputy Fire Chief in 2015. At a City Council meeting in June 2016, the Mayor of Everett stated that, "Carli is definitely my pick" to become permanent chief once an eligibility list was established.[3]

When Carli was promoted to Acting Chief in 2016, there were several other Deputy Chiefs who had more seniority than Carli, including Deputy Chief Michael Ragucci (Ragucci). As of the hearing,

[3] The Union contends that the Hearing Officer's finding, that the mayor merely "expressed his desire" that Carli become the next permanent chief, should have been stronger. Specifically, the Union argues that the record, including a video of the event where the mayor made the statement, "reveals [it] to be an unambiguous pledge." Because our decision does not turn on the City's intention to promote Carli, but on the scope of the bargaining duty associated with the assessment center process, we need not resolve this dispute.

Ragucci had worked for the Department for thirty-one years and served as a Deputy Chief for fifteen years. The educational background of the Deputy Chiefs also varied. For example, Carli had some college education, but Ragucci did not.

Promotional Exams

Prior to 2019, the promotional process for the position of Chief did not include an assessment center. Rather, the City utilized the "80/20" scoring method to establish eligible lists for Department promotion, in which a written examination comprised 80% of a candidate's score and education and experience comprised 20%. Written Civil Service examinations require extensive preparation. Preparation can include preparatory readings, sample or previous examinations or exam prep courses. The Human Resources Division (HRD), which handles the administrative aspects of Civil Service examinations, posts the reading list for such examinations six months ahead of time. Ragucci testified that he typically studied more than between four and six hours a day one year in advance to prepare for this process.[4] Carli also testified that he usually studied for such examinations in advance of the formal announcement of the reading list.[5]

2018-2019

At some point prior to January 2018, the City decided to use an assessment center to select its next permanent chief. The process that it selected required it to select a third-party vendor to conduct the assessment center. It also required the City to enter into a Delegation Agreement with HRD, in which HRD delegated to the City's Human Resources Department certain authority pertaining to the selection process.

[4] The Union requested an additional finding that Ragucci studied over forty hours a week a year in advance of written exams. We have supplemented the findings to reflect that Ragucci studied a year in advance but modified the time he spent studying to comport with Ragucci's testimony.

[5] At the Union's request, we have made some additional findings regarding studying for exams. These findings are supported by Carli's and Ragucci's testimony.

A series of emails between Carli, City Solicitor Colleen Mejia (Mejia) and Human Resources Director Michael Vetrano (Vetrano) in January and February 2018 reflects that by January 2018, the City, through Carli, was working with an assessment center consultant to start the process. Both the emails, and the first draft of a Delegation Agreement between the City and HRD that was transmitted with these emails reflect that the City intended the assessment center to be the sole evaluative method for scoring and ranking applicants, with the exception of credit for employment or experience(In-title experience) in the Fire Chief title.

Specifically, on January 25, 2018, Carli forwarded to Vetrano the first of several delegation agreements between HRD and the City. The first agreement stated in pertinent part:

> In accordance with the provisions of M.G.L. c. 31, section 5(l), this agreement between [HRD] and the [Department] is for the purpose of delineating the responsibilities of the parties in the delegation of certain duties and powers of HRD to the Everett Human Resources Department pertaining to the selection process for Fire Chief.
>
> The [Department] has agreed to hire a consultant to develop, construct, validate, administer and score a Fire Chief assessment center . . .With the exception of additional points as required by statute or rule, including credit for employment or experience in the Fire Chief title, this delegated selection process for Fire Chief will be used as the sole basis for scoring and ranking candidates on an eligible list. The Everett Human Resources may forego the use of any written test administered by HRD . . .

Mejia authorized Vetrano to sign the Delegation Agreement on February 7, 2018. However, on February 8, 2018, William Brice (Brice), from the "Test Development Team – Civil Service Unit," notified Carli that the Delegation Agreement could not move forward until the City submitted "an official requisition to the Civil Service department for the rank of Fire Chief." Carli asked Vetrano to handle this and Vetrano notified Carli on February 14, 2018 that he had.

On February 21, 2018, Brianna Novak (Novak) from "HRD Test Development" sent an email to Vetrano that asked which of the following four types of "open competitive exams" the City was requesting:

> 1. HRD's written exam and Education and Experience.
> 2. HRD's written exam, vendor created Assessment Center, and Education and Experience;

> 3. Vendor created Assessment Center (sole Assessment Center) and Education and Experience; or
> 4 Vendor created Assessment Center (sole Assessment Center and In-title experience.

Later that day, Vetrano forwarded Novak's email to Carli, with the message "Per our conversation." Carli replied, "Thanks [M]ike[.] [I]t will be option 4 – Vendor created Assessment Center (sole Assessment Center) and in-Title Experience."[6]

On May 14, 2018, Union Secretary-Treasurer Sean Hogan (Hogan) sent a memo to all of its members notifying them that:

> President Hardy was notified today by the PFFM[7] President Rich MacKinnon, who received notification from Civil Service that there will be a written Chief's Exam to be held in March 2019.
>
> ***
>
> We believe that this exam is only open to the rank of Deputy Chief and have 7 members eligible to take this exam, but we need 4 Deputies to sign up for it or it will be opened up to the next lowest rank the following year.

Both Carli and Mejia received this notice. Mejia forwarded this notice to Vetrano, Carli, the Mayor and the Mayor's Chief of Staff with a cover email that stated, in part, "I'm not sure how reliable the information is, but I wanted to let this group know in light of the City's contemplation of using an assessment center to hire a new chief." Carli responded to this email stating in part:

> I feel strongly we should still move forward with the assessment center as I have been temporary for 2 years, and this is the current accepted process for the Chief's position. That's fine that civil service is bringing the written exam back in the future, but we have the vacancy now. . .I don't see why we should have to wait because the union feels it's best for the city. Have they contacted you about the impact of the assessment center?
> Thanks, Chief Carli

A short while later, Mejia sent an email to Carli, the Mayor, the Mayor's Chief of Staff and Vetrano stating:

> If the mayor's office approves, I will send the letter to the union. I drafted it April 30 (attached). We may want to add some language in the letter in light of this new

[6] On February 22, 2018, HRD sent a second Delegation Agreement to Vetrano to sign and return to HRD, which he did on March 5, 2018. This Delegation Agreement is not in the record, but there is no indication that HRD ever signed it.

[7] PFFM stands for "Professional Firefighters of Massachusetts." The Union is affiliated with the PFFM.

> information although we are aware that in the future civil service may bring the Chief's exam back, the City wants to move forward with appointing a chief now.

Mejia attached to this email a document titled "Fire Union Contemplated Notice of Use of Assessment Centers for Hiring Fire Chief." Carli responded that, "We should definitely send the letter soon." The Mayor's Chief of Staff responded, "The letter looks good, let's just get it out there."

Later that day, the City, through Mejia, sent the following letter to the Union:

> Please be advised that the City is contemplating following the lead of civil service of using an assessment center to hire a non-union chief.
>
> The City is willing to meet to discuss any thoughts, concerns, or proposals that the union may have. As such please provide me with your questions, comments, thoughts, concerns and/or proposals by May 31, 2018 and we will set up a time to meet.

As evident from the correspondence between Mejia and the City's other representatives, this was the first notice from the City to the Union regarding using an assessment center to select a permanent Chief. The letter did not mention that the City had already signed two Delegation Agreements with HRD for this purpose.[8]

In an email dated May 31, 2018, Union counsel Leah Barreault (Barreault) responded to the notice. Barreault reiterated the Union's understanding that HRD would be offering both a written exam and assessment center early next year, and "strongly" suggested that the City "contact HRD before contemplating a decision to use assessment centers." The Union concluded that, "if after contacting HRD and receiving the same information regarding the plan to administer a written exam early next year you still want to administer an assessment center. . . you can contact Local 143 and at that time we can evaluate your request to meet."

The Union and the City had no further communications regarding the assessment center after May 31, 2019. On January 9, 2019, the City, through Human Resources Director Lara Wehbe

[8] On May 30, 2018, HRD forwarded another Delegation Agreement for the City to sign due to changes in the Assessment Center process that appear to be unrelated to any issues raised in this case.

(Wehbe),[9] signed a fourth and final delegation agreement (Final Delegation Agreement).[10] On January 15, 2019, Brice sent a fully-executed version to Vetrano that Ronald J. Arigo, the Commonwealth's Chief Human Resources Officer, signed and dated on January 14, 2019. In the cover email, Brice stated that the "next steps and time frames" included the City informing HRD of the planned date of the assessment center, and that the vendor will be required to email a completed "Vendor Assessment Center Details Form" at least six weeks before the assessment date. The letter further indicated that notice would be posted on the website four weeks before the assessment center date and would remain posted for three weeks.

The Final Delegation Agreement stated in pertinent part:

> The Everett Fire Department has chosen to utilize a delegated Assessment Center for the selection process for Fire Chief. With the exception of additional points as required by statute or rule, this delegated selection process for Fire Chief will be used as the sole basis for scoring and ranking candidates on an eligible list.
>
> I. It is agreed that
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> * * *
>
> 1) Primary responsibility for the administration of all delegated civil service functions, as described herein, for the Everett Fire Department will be assigned to Lara Wehbe, who will serve as Delegation Administrator. They, or their designee, will be responsible for all matters relative to this delegation agreement.
>
> * * *
>
> 8) The cost of all services, forms and materials provided directly by HRD shall be assumed by HRD unless otherwise agreed to by the parties. All other costs involved in the delegation of the functions set forth herein will be the responsibility of the Everett Fire Department.
>
> 9) The Everett Fire Department may elect to charge a reasonable fee, as authorized by HRD (currently $250 per application), to offset the administrative costs of the selection process. Any processing fees collected through the delegation of these functions are the property of the Everett Fire Department.
>
> 10) In-Title Experience will be added to the Assessment Center score to determine the final score. HRD will score the In-Title Experience credit.
>
> * * *
>
> II. The Everett Fire Department shall:

[9] It is not clear whether Wehbe replaced Vetrano as the City's Human Resources Director.

[10] It is unclear why the parties needed to execute a fourth Delegation Agreement.

* * *

2) Ensure proper posting of the examination announcement in all Department Stations

3) Be responsible for issuing notice to all candidates of any training materials that will be distributed to, or study sessions conducted for, applicants prior to the administration of the assessment center in order to familiarize them with assessment center procedures.

* * *

IV. HRD delegates responsibility in the following areas to the Delegation Administrator Lara Wehbe and the Assessment Center Vendor:

1) Determination of the knowledges, skills, abilities, and personal characteristics (KSAPs) that will be evaluated during the assessment center exercises as supported by job analysis data.

2) The review and approval of the rating schedules to be used.
3) The determination of a passing point for the assessment center;

4) Develop the job simulated, content valid, exercises that will be used during the assessment center for which validation evidence has been gather[ed] in accordance with professional accepted guidelines;

5) Develop a security plan that will be utilized to ensure the integrity of the assessment center.

* * *

V. The Delegation Administrator shall be responsible for:

1) Notifying all eligible candidates of: security of the administration and scoring of the Assessment Center which results in the establishment of an eligible list for Fire Chief.

* * *

5) Ensuring that the examination referenced herein is administered within 18 months of the issuance of this Delegation Agreement. An extension of a maximum of six additional months may be approved by HRD upon review of a written request from the Delegation Administrator detailing extenuating circumstances necessitating such extension.

Other than Paragraph V(5) above, which required the Delegation Administrator to schedule the examination within eighteen months of the issuance of the Delegation Agreement, the agreement did not mandate or provide any details regarding the date of the examination or training sessions, the content or format of training sessions, the exact amount of fee to be charged, paid time off for employees to study for the test or on the test day, or how to ensure exam security.

HRD notified Carli about one week before January 31, 2019 that the assessment center was moving forward. On January 31, 2019, the City posted a notice[11] inviting applications for the "Everett Fire Chief Sole Assessment Center" that indicated that the exam would be 100% of the final score and that the only eligible title was Deputy Fire Chief. The posting also set forth the date of the exam – March 14, 2019; the deadline for applications – March 7, 2019; location of exam – "TBD;" and examples of "essential" Fire Chief duties and a list of exam subjects. Under the "Typical Qualifications" heading, there was a sub-heading "Credit for In-Title Experience" that stated:

> Pursuant to the provisions of M.G.L. Ch. 31, Section 22, [i]ndividuals may apply to receive credit for employment or experience in the position title Fire Chief. Credit will only be accepted if time worked is in a permanent, provisional, or temporary after certification status. If you believe you are eligible for this credit, you must claim this credit in the application. . . . Please note, credit for employment or experience is applicable only to individuals who achieve a passing score on the Assessment Center, and cannot be added to a failing examination score . . .

The parties stipulated that the City signed the Final Delegation Agreement and issued the January 31, 2019 notice, "without bargaining to impasse or resolution over the impacts of the decision to use an assessment center as the sole basis for scoring and ranking of candidates on an eligible list for promotion to Fire Chief on bargaining unit members' terms and conditions of employment."

As stated above, the parties had no further communications about the assessment center after May 31, 2018. Further, there is no dispute that the City signed the updated delegation agreement and posted the notice without bargaining to impasse or resolution over the impacts of its decision to use the assessment center. Thus, until the City posted this notice, the Union was not aware that the assessment center would take place on March 14, 2019. The City also did not give the Union notice or an opportunity to bargain before scheduling the vendor's orientation session, which was held a few weeks prior to the assessment center to generally explain the types of exercises that might appear in the exam. Ragucci had conflicts with both dates – the March 14 assessment center conflicted with a family vacation that

[11] The Notice was dated January 29, 2019.

he had scheduled the previous November.[12] Ragucci also could not attend the orientation session because his wife was undergoing a medical procedure.[13]

On February 8, 2019, the Union, on behalf of three Deputy Fire Chiefs, including Ragucci, sent a letter to the Civil Service Commission asking it to "investigate the newly-announced promotional procedures for Everett Fire Chief." The Union expressed its concern that by limiting credit for education and experience to In-title experience in the Chief title alone, the "City and/or HRD are improperly setting criteria to favor or disfavor known or suspected promotional applicants." The letter did not mention Carli by name but stated that the named petitioners were Deputy Chiefs eligible to participate for the Fire Chief Promotional process, who lacked experience in the chief title, "unlike another Deputy Chief eligible to participate."

On March 14, 2019, Carli and three other Deputy Chiefs, but not Ragucci, participated in the assessment center. Carli was ultimately the highest scoring candidate.

On June 20, 2019, the Civil Service Commission denied the Union's request to open an investigation.[14] The letter stated in pertinent part:

> Four EFD Deputy Fire Chiefs completed and passed the Assessment Center. The Acting Fire Chief received an over-all score of 86 (which included 2 points for veterans' preference and .66 credit for his "in-title" service as a provisionally appointed Acting Fire Chief). The scores of the other three Deputy Fire Chiefs were 79, 75 and 70. At my request, HRD made several hypothetical calculations which suggest that, whether an "In-Title only" or a more traditional E&E component were used, the spread in the score of the Acting Fire Chief would still be ranked at the top of any eligible list.[15]

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[12] Vacations are scheduled in advance and picked in November of each year. Ragucci typically chose school vacation weeks or college Spring Break to spend time off with his family. We have added this finding, which is supported by the record, at the Union's request.

[13] We have added this finding at the Union's request as it is supported by Ragucci's unrebutted testimony.

[14] The ruling is published as Hickey v. Everett Fire Department, 32 MSCR 241 (2019).

[15] The record before us does not reflect whether the City ultimately promoted Carli to Fire Chief. However, based on how the Union referred to Carli in its post-hearing brief (Acting Chief) versus its

OPINION[16]

This case requires us to determine whether the City was obligated to bargain over the impacts and/or or the means and methods of implementing its decision to use an assessment center as the sole means of scoring and ranking bargaining unit members on an eligibility list for promotion to the managerial position of fire chief. Although this is a case of first impression, this is not the first time the CERB has addressed scope of bargaining issues concerning an employer's decision to use an assessment center for promotional purposes. In Town of Arlington, supra, the CERB addressed whether the use of an assessment center as part of the procedures for promoting an employee from one bargaining unit to a different bargaining unit was a mandatory subject of bargaining. Town of Arlington was also a case of first impression because it was the first time that the CERB had addressed in anything other than dicta the issue of the scope of bargaining over promotions to unionized positions in a different bargaining unit. Relying on the general principle articulated in Town of Danvers, 3 MLC 1559, MUP-2292, MUP-2299 (April 6, 1977), that "procedures for promotion affect employees' conditions of employment in a significant way," and the dicta in Boston School Committee, 3 MLC 1603, MUP-2523, MUP-2538, MUP-2521 (April 15, 1977) that promotional opportunities are "not less important merely because the promotional position is within a different bargaining unit," the CERB affirmed the Hearing Officer's conclusion that the type of test used to assess patrol officers for promotional purposes was important to bargaining unit members because it impacted their performance on the exam, which in turn affected their promotional opportunities. Town of Arlington, 42 MLC at 98-99. The CERB also agreed that these interests outweighed the Town's interests in the "criteria" for

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supplementary statement ("then-Acting Chief"), it appears that the City promoted Carli at some point between January 2020 and October 2020.

[16] In various motions filed after this charge was first filed, and in its supplementary statement, the City challenges the DLR's and the CERB's jurisdiction over this case. We address and reject this argument and related arguments regarding the Civil Service statute in the final section of our Opinion.

promoting a patrol officer to sergeant. Id. at 99. Rejecting the remainder of the Town's arguments, the CERB ultimately upheld the Hearing Officer's determination that the Town of Arlington's decision to use an assessment center and the impacts of that decision were mandatory subjects of bargaining. Id. at 100.

In so holding, the CERB briefly addressed those portions of Town of Danvers and Boston School Committee that discussed promotions to positions outside of the collective bargaining unit that have no collective bargaining rights, i.e., managerial or confidential positions, but concluded that the dicta in those cases did not foreclose bargaining in the situation before it, i.e., where the promotion was from one bargaining unit to another. Id. at 99-100. The CERB therefore did not address the issue of first impression squarely before us now: the scope of the bargaining obligation with respect to promotions within a bargaining unit member's career ladder to managerial positions that are outside of the bargaining unit. We must therefore consider whether the Hearing Officer correctly held that every aspect of the procedures for promotion to positions without collective bargaining rights under Chapter 150E are outside of the scope of mandatory bargaining. We hold that they are not for the reasons set forth below.

We begin by emphasizing that, contrary to many of the City's arguments, this case is not about whether the Union had the right to bargain over the City's decision to use an assessment center as its sole basis for scoring and ranking of candidates on an eligible list for promotion to Fire Chief. Although the Union alleged this in its charge of prohibited practice, the DLR Investigator dismissed this allegation, stating, accurately, that "[w]ith respect to a managerial or confidential position under the Law, the [CERB] has held that:

> If the promotional position is "managerial" or "confidential" within the meaning of the Law, however, the employer is not bound to bargain regarding the *standards* of promotion. An employer need not consider the views of a union in determining what *criteria* to consider in selecting individuals to fill such positions. Any other rule would unduly hinder the employer in the conduct of its labor relations affairs. The employer must be able to select individuals who the employer views as loyal to it, unfettered by the views of the

employees' collective bargaining agents. Boston School Committee, 3 MLC 1603, 1611, MUP-2541 (1977) (emphasis added).

The Union did not seek review of this partial dismissal, and thus, the Complaint's allegations were limited to the City's failure to bargain with the Union over the *impacts* of using the assessment center.[17]

Nor, contrary to the City's various arguments, does this case concern in any way a union's right to bargain over the duties or any other terms and conditions of employment of a managerial employee. The limited topics the Union seeks to bargain about have no effect on what the successful candidate's working conditions are after promotion. See Brockton School Committee, 23 MLC 43, 45, MUP-9131 (July 15, 1996) (the obligation to bargain extends only to the terms and conditions of employment of the employer's employees in the unit that the union represents).

Thus, confined to the allegation that the City unlawfully refused to bargain over the impacts of its decision to select an assessment center, the Union argued to the Hearing Officer, as it does in the instant appeal, that the City could have, without impinging on any core managerial prerogatives, bargained over such impact bargaining topics as: the scheduling or timing of the assessment center; the orientation or preparation process for the assessment center; distribution of materials related to promotion; leave or paid work time to prepare for the examination; the security of the assessment process, including the presence of a Union observer; the individual's cost to participate in the assessment center; and the rights of unsuccessful participant to receive feedback.[18]

[17] The Investigator also dismissed Section 10(a)(3) and Section 10(a)(4) allegations, and the Union did not seek review of the dismissal of these allegations.

[18] The Union's post-hearing brief also mentioned as a potential subject of bargaining the weight considered for education and experience as a potential impact topic but did not mention it in its supplementary statement on appeal. Whether or not the omission was deliberate, we disagree that bargaining over the weight considered for education and experience, including for "in-title experience," is a mandatory subject of bargaining, as it is properly characterized as a criterion for promotion to a managerial position.

The Hearing Officer disagreed, based on his reading of Town of Arlington as holding that "standards or procedures for promotion" to fire chief are not mandatory subjects of bargaining.[19] The Hearing Officer found that the potential bargaining topics that the Union had identified were "part and parcel of the standards and or procedures for promotion to the Fire Chief position and, as such, not mandatory subjects of bargaining." Alluding in a footnote to an employer's duty to bargain over the *means* of implementing an otherwise managerial decision, the Hearing Officer further found that the Union had not demonstrated, and he did not discern, "a meaningful distinction between the procedures to be used and the means of implementing the decision to use an assessment center." Rather, the Hearing Officer viewed the procedures as the "means of implementing the decision."

We disagree and write to clear up the apparent confusion resulting from the CERB's use of the term "procedures for promotion" in Town of Arlington. In the two quotes singled out by the Hearing Officer, the CERB echoed the terminology used in Town of Danvers, which addressed when and whether "procedures for promotion" were mandatory subjects of bargaining. Town of Danvers, 3 MLC at 1574. However, both the Hearing Officer's[20] and the CERB's Arlington decisions characterized the assessment center in other ways – not just as a "promotional procedure," but as "a criteria for promotion," 41 MLC at 272, 274, and as "a method the Town will use to assess patrol officers for promotional purposes." 42 MLC at 99. The parties' stipulations similarly and accurately characterized the assessment center as a "method of assessment." 41 MLC at 273 (Stipulation #13).

[19] The Hearing Officer based this conclusion on two extended quotes in Town of Arlington, where: (1) the CERB characterized the issue presented as "whether an employer is required to bargain over promotional procedures to supervisory positions outside of the bargaining unit that are not otherwise excluded from collective bargaining," 42 MLC at 99-100; and (2) which summarized the dicta in Boston School Committee as stating that the duty to bargain over "procedures for promotions to positions outside of a bargaining unit is limited to the procedures for promotions to positions that fall within the bargaining unit members' career ladder and extends only to positions that are entitled to collective bargaining rights." Id. at 100.

[20] The Hearing Officer's decision in Town of Arlington is reported at 41 MLC 272 (March 18, 2015).

Regardless of the terminology, however, both the Hearing Officer's and CERB's Arlington decisions ultimately concerned whether the employer's decision to use an assessment center was a mandatory subject of bargaining. The CERB held that they were, finding that the "*type of test*" (yet another characterization) used to assess patrol officers for promotional purposes had a "concrete, direct and significant impact on how they would perform [on the test]" thereby impacting their future career, growth, prestige, pay and other factors mentioned in the Boston School Committee decision." 42 MLC at 99. Although the complaint in Arlington and the CERB's order also referenced the refusal to bargain over the *impacts* of the decision to use the assessment center, nothing in that decision, or in the Town of Danvers or Boston School Committee decisions that the CERB relied upon, addressed, even in dicta, whether the types of discrete and narrow aspects of the assessment center at issue here were mandatory subjects of bargaining.[21] Rather, in Boston School Committee, the CERB stated only that the employer was "not bound to bargain over the "*standards* of promotion," or the "criteria" to consider in selecting individuals to fill managerial positions. 3 MLC at 1611.

The issues over which the Union seeks to bargain here do not implicate these factors, as it is well-established that even if a management decision (here the decision to use an assessment center)

[21] In Town of Danvers, the CERB considered the issue of "procedures for promotion" in the context of two union bargaining proposals over which the employer had refused to bargain. The first was:

> The establishment of a new position within the bargaining unit, the establishment of a pay rate for such position, the procedure for soliciting and selecting incumbents for such position, and the duties to be performed by such incumbents shall be the subject of negotiations. . .

The second proposal related to Civil Service's "Ranking by Categories on Promotional Examinations" and stated in part:

> Permanent promotions shall be made pursuant to the following procedure: Employees falling within the first ranking, 100-90, shall be appointed by examination mark and, if two (2) or more receive the identical mark, seniority in grade shall govern, and, if employee have identical seniority in grade, then departmental seniority govern . . .

The proposal then set forth the procedure if there were no employees that scored within the first ranking, second ranking, etc.

itself is a matter of nondelegable authority, the employer may nonetheless be required to bargain over the means of implementing that decision and the impact of the decision on employees' terms and conditions of employment. Board of Higher Education v. Commonwealth Employment Relations Board, 483 Mass. 310, 319, n. 21 (2019) (citing School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 563-564, n. 5 (1983) and cases cited therein, and further citing Lynn v. Labor Relations Commission, 43 Mass App. Ct. 172, 179-180 (1997)); Chief Justice for Administration and Management of the Trial Court v. OPEIU, Local 6, 441 Mass. 620, 629 (2004) (quoting School Committee of Danvers v. Tyman, 372 Mass. 106, 113 (1977)) (although the CJAM may not surrender its authority to transfer employees, "there is no reason why [the CJAM] cannot bind [itself] to follow certain procedures precedent to making any such decision"). Thus, other than the broad and arguably imprecise characterization of the assessment center as a "promotional procedure" rather than as a standard, criteria, or method of assessment or factor to consider in deciding whom to promote, nothing in the dicta in the Town of Arlington should be construed as holding, or was intended to suggest, that the impacts and ancillary procedural subjects at issue in this case would be an exception to this longstanding principle.

We therefore disagree with the grounds on which the Hearing Officer dismissed this matter and turn to analyze whether the bargaining topics that the Union identified are mandatory subjects. To do so, we must balance the City's interest in maintaining its managerial prerogative to govern effectively against the impact the subject has on bargaining unit members' terms and conditions of employment. Town of Danvers, 3 MLC at 1577. When conducting this analysis, the CERB considers factors like the degree to which the subject has a direct impact on terms and conditions of employment or whether it is far removed from terms and conditions of employment. Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999). The ultimate question in such cases is whether the "ingredient of public policy inherent" in a particular action "is so comparatively heavy that collective bargaining . . . is, as a matter of law, to be denied effect." Town of Burlington v. Labor Relations Commission, 390 Mass.

157, 164 (1983) (citing School Committee of Boston v. Boston Teachers Local 66, 378 Mass. 65, 71 (1979)).

Turning first to whether the issues have a direct impact on terms and conditions of employment, we reiterate the general principle that issues relating to promotions are a "most important condition of employment for those employees who aspire to the promotional position because of the relationship between promotions and increased pay, benefits and prestige and movement on a career ladder." Boston School Committee, 3 MLC at 1610. Even though the Union is precluded from bargaining over whether to use the assessment center, or the decision to credit only In-title experience, issues such as the scheduling and timing of the assessment center, the timing of orientation sessions, the format and adequacy of training materials, the availability of paid leave to prepare for the examination, the cost to participate, the right of unsuccessful participants to receive feedback, and the security of the assessment process nevertheless directly impact bargaining unit members' ability to prepare for and participate in the assessment center, potentially improve their performance on future assessment centers, and with respect to security-related subjects, help ensure the fairness of the assessment center and the validity of the results.[22] Where all of the potential promotees were bargaining unit members, and where participating in the assessment center was the only way that eligible Deputy Chiefs could avail themselves of this singular promotional opportunity, we likewise believe that these issues are most important to bargaining unit members and affect their terms and conditions of employment.

Moreover, bargaining over these issues is in harmony with the fundamental purposes of the merit-based civil service system, to help "guard against political considerations, favoritism and bias in governmental decisions . . . and protect efficient public employees from political control." Cambridge

[22] Although this list is not intended to be exhaustive, we expressly exclude the weight considered for education and experience. As stated in footnote 18, we find this topic to be a standard or criteria for promotion and thus outside the scope of mandatory bargaining with respect to managerial promotions. To the extent a union has any concerns that this criterion or a similar criterion is being utilized in a biased manner, its remedy lies with the Civil Service Commission and not through alleging an unlawful failure to bargain under Chapter 150E.

v. Civil Service Commission, 43 Mass. App. Ct. 300, 34 (1997). Thus, although we do not and need not decide in this case whether the City's decision to use an assessment center as the sole basis for selecting a permanent fire chief other than giving credit for in-service training was an effort on its part to ensure Carli's selection, bargaining over the narrow issues here potentially could have avoided the scheduling conflicts that Ragucci experienced and evened the playing field a bit, by giving the union input into preparation time and the provision, adequacy and format of study materials.

Turning to the City's comparative interests, we find no basis in the record to conclude that bargaining over these issues would interfere in any way with the City's undisputed right to select the assessment center, the exercises used in the assessment center, the criteria or standards measured, how the assessment center is scored or who the City ultimately selects. Nor would bargaining over these issues run afoul of any of the concerns expressed in Town of Danvers or Boston School Committee.

Nevertheless, citing the need for "swift and flexible action" in all matters relating to the appointment, employment and assignment of public safety personnel, the City asserts that these matters "'should not await or be delayed by the complications of prior negotiations."[23] However, the City has not presented any evidence showing exigent circumstances that would warrant suspending the City's obligation to bargain over the limited impact/implementation bargaining subjects here. At all relevant times, Carli was serving as the Acting Chief and there is nothing in the record other than Carli's own expressions of impatience at having to wait for HRD to hold a written Chief's exam to establish a list that demonstrates that there was any urgent need to appoint a permanent Chief. Further, even without bargaining, over a year elapsed from the time the City first started the delegation process with HRD around January 2018 until the Final Delegation agreement was signed in January 2019. We can

[23] Although the City provided no citation for the quoted portions of this argument, this appears to be a quote from Chief Justice for Administration and Management of the Trial Court v. CERB (CJAM), 79 Mass. App. Ct. 374, 386 (2011).

discern no reason why the City and the Union could not have been engaged in bargaining over at least some of the mandatory subjects of bargaining we have identified during that year. The only time limit that HRD imposed on the assessment center process was a requirement that the City administer the test within eighteen months of entering into the Final Delegation agreement. That HRD would have permitted another year and a half to elapse before the City was required to administer the assessment center further belies that City's assertion that the public interest in acting swiftly when promoting managerial personnel outweighed the union's interests in bargaining as described above. For all these reasons, we find no basis to conclude that the "ingredient of public policy inherent" in bargaining over these issues in this case "is so comparatively heavy that collective bargaining . . . is, as a matter of law, to be denied effect." Town of Burlington v. Labor Relations Commission, 390 Mass. at 164.

None of the City's remaining arguments persuade us otherwise. From what we can discern from its supplementary statement and the various motions to dismiss that the City filed throughout this proceeding,[24] the City makes two main arguments: 1) that promotion to a non-bargaining unit managerial position is not a working condition subject to bargaining under Chapter 150E; and 2) the promotion is "not a jurisdictional matter for DLR review or consideration" because it was made in accordance with Civil Service law, a statute that is not listed in Section 7(d) as being superseded by the terms of a collective bargaining agreement.

We have already concluded that the impact and implementation issues here affect bargaining unit members' terms and conditions of employment. We therefore reject the City's first argument for the reasons explained above.

[24] On February 13, 2019, the City filed a motion to dismiss the charge for lack of subject matter jurisdiction, or in the alternative for judgment on the pleadings or for summary judgment. The DLR denied the Motion on February 14, 2019 but indicated that the City could re-raise its motions to the Investigator at the in-person investigation. The City renewed its motion on April 17, 2019. In the Complaint and Partial Dismissal, the Investigator declined, "in light of [his] decision," to rule on the motion. On May 30, 2019, the City renewed this motion for a third time in the answer to the complaint. The Hearing Officer deferred ruling on the motion. In the decision, he noted that he had "considered the City's arguments in issuing this decision."

The jurisdictional arguments and related arguments concerning the Civil Service law also lack merit. Regarding jurisdiction, M.G.L. c. 150E, §11 authorizes the DLR and the CERB to hear complaints of practice prohibited under Section 10 of the Law, and, if the CERB finds a prohibited practice, it is authorized to issue affirmative orders. Bristol County Sheriff's Department, 32 MLC 111, MUP-01-3149 (December 7, 2005). Where it is uncontested that the City is an employer and the Union is an employee organization within the meaning of Section 1 of the Law, nothing in the Law or Chapter 31 limits the CERB's jurisdiction to consider the legal issues arising under Chapter 150E and to issue an appropriate order. See generally Dedham v. Labor Relations Commission, 365 Mass. 392 (1974) (distinguishing and reconciling the jurisdiction of the former Labor Relations Commission and the Civil Service Commission). As the CERB stated in a different Dedham decision when faced with a similar argument, "to accept the city's argument to that effect would require us to ignore our responsibility under the Law to adjudicate alleged violations of public employee labor law, an action that we are both unwilling and unable to take." Town of Dedham, 21 MLC 10145, 1020-2021, MUP 8091(June 15, 1994). None of the City's arguments regarding the jurisdictional issue persuade us otherwise.[25]

[25] To support its contention that the DLR exceeded its jurisdiction by merely alleging that the City violated the Law by not negotiating over the impacts of its decision to use an assessment center, the City relied on an extended quotation contained in a footnote in Local 1652, IAFF v. Town of Framingham (Local 1652), 442 Mass. 463 (2004). In the footnote, the SJC described National Association of Government Employees, Local R1-162 v. Labor Relations Commission (NAGE), 17 Mass. App. Ct. 542 (1984), as holding that town officials did not have to bargain over the "*impact* of a referendum [that the Town had caused to be placed on a ballot to rescind its acceptance of civil service coverage for certain future employees] because although the civil service statute affected terms and conditions of employment, it was not listed in GL c. 150E, §7(d). . . as a statute that was superseded by a collective bargaining agreement." Local 1652, 442 Mass. 473-474, n. 12 (citing NAGE, 17 Mass. App. Ct. at 545)). This description of NAGE's holding is inaccurate. NAGE was an appeal of the CERB's decision in Weymouth School Committee, 9 MLC 1091 (1982), which held that the Town had no obligation to bargain over the decision to place the referendum before voters, but that there was still an impact bargaining obligation. Only the union appealed, and thus, the sole issue on appeal was whether the CERB had correctly held that the Town was not obligated to bargain over the *decision* to place the referendum before the voters. NAGE, 17 Mass. App. Ct. at 1742-1743. The Appeals Court affirmed the CERB's dismissal of the decision bargaining allegation, specifically noting that it thus had no need to address whether the CERB had correctly decided that the employer remained obligated to engage in impact bargaining. Id. at n. 1. Accordingly, NAGE does not support for the City's assertion that the DLR lacks jurisdiction to even consider impact bargaining claims arising from any matter concerning

We therefore consider the City's related argument to the effect that because the parties agreed in the CBA that the City would promote in accordance with Civil Service procedure and law, and because the Civil Service law is not listed in Section 7(d) of the Law as being superseded by the terms of a CBA, there are no aspects of the promotions process that are subject to collective bargaining. As the courts have indicated, however, and the CERB has repeatedly held, the fact that the Civil Service law is not listed in Section 7(d) does not end the inquiry under Chapter 150E. Rather, bargaining over a topic addressed in the Civil Service statute, including procedures for promotions, is precluded only where such bargaining would materially conflict with that statute. City of Fall River, 61 Mass. App. Ct. 404, 406, 411 (2004) (additional citations omitted). Otherwise, the statutes should be read together "so as to constitute a harmonious whole." Dedham, 365 Mass. at 402.

The City points to no specific sections of the Civil Service statute or regulations that either prohibit bargaining over the subjects at issue here or that entirely control the City's conduct such that bargaining over the issue would effectively negate the legislative purpose in entrusting the matter to the City. See generally, Lynn, 43 Mass. App. Ct. at182 (no bargaining required where a government employer acts pursuant to a narrow and specific statutory mandate not listed in Section 7(d)).[26]

Contrary to the City's assertion, the fact that HRD may have delegated certain administrative responsibilities to the City does not change this result because there is no evidence that the delegated

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Civil Service promotions. Rather, as we explain below, and as the SJC ultimately held, bargaining is precluded only when an actual conflict exists between the terms of a collective bargaining agreement and a statute that is not listed in Section 7(d) of the Law. Local 1652, 442 Mass. at 476 (citing School Committee of Natick v. Education Association of Natick, 423 Mass. 34, 39 (1996) (additional citations omitted)).

[26] The Hearing Officer noted that in Lynn, the Court stated that it was "in doubt as to the relevance of the impact bargaining in the range of cases where the employer's authority derives from a specific, narrow statute." Id. at 183. Based on his reading of the Town of Arlington decision as precluding all bargaining, including impact bargaining, over "procedures for promotion" to managerial positions, the Hearing Officer opined that in this case, "Chapter 150E itself removed the decision from collective bargaining." Even assuming that CERB decisions interpreting the scope of the duty to bargain could be viewed as narrow statutory mandates akin to those discussed in Lynn, because we disagree with the Hearing Officer's interpretation of Town of Arlington, we also disagree with this footnote.

tasks had to be performed in accordance with a strict or narrow statutory mandate. In any event, neither HRD nor the Final Delegation Agreement mandated any particular outcome with respect to the actual date of the exam, the fees to be charged, training materials or study sessions, security or paid time off to study for or take the exam. Rather, as Brice's January 15, 2019 email to Vetrano and the Final Delegation Agreement reflect, HRD either left it to the City to determine details regarding these issues, or in the case of paid leave, is entirely silent. Moreover, as explained above, while these topics affect bargaining unit members' participation in the promotion process, none of these topics implicate the City's managerial prerogatives regarding the standards criteria, or method for selecting managerial employees. Accordingly, even assuming that the Final Delegation Agreement had the force and effect of a statute or regulation, which it does not, where HRD vested discretion and control over these topics with the City, the Law required the City to give the Union notice and an opportunity to bargain over these topics prior to implementation. Compare City of Somerville v. Somerville Municipal Employees Association, 451 Mass. 493 (2008) (arbitrator exceeded authority by enforcing CBA provision that required mayor to give preference to a union member where provision materially conflicted with statutory power vested in mayor to appoint director of veterans' services) with City of Boston v. Commonwealth Employment Relations Board, 453 Mass. 389 (2009) (finding a duty to bargain over decision to adopt partial public safety exemption for overtime compensation under the Fair Labor Standard Act, where the statute provided the employer with the option of using the exemption and, if it chose to do so, with a wide range of choices to select from). Moreover, for the reasons stated above, the imposition of a bargaining obligation as to these issues is in harmony with the purpose of the merit principles underlying the Civil Service laws. See, e.g., Sholock v. Civil Service Commission, 348 Mass. 96, 99 (1964) (purpose of the Civil Service law is to "'secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete'") (additional citations omitted).

Conclusion

For all the foregoing reasons, we reverse the Hearing Officer's decision and conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith by implementing its decision to use an assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to resolution or impasse with the Union over the impacts of the decision and the means and methods of implementing it.

Remedy

Section 11 of the Law commits the design of appropriate remedies to the CERB's discretion and expertise. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315, 325 (2005) (citing School Committee of Newton v. Labor Relations Commission, 388 Mass at 580); Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979)). In fashioning appropriate remedies, the CERB's goal is to attempt, in compliance with the provisions of Section 11 of the Law, to restore the situation as nearly as possible to that which would have existed but for the unfair labor practice. School Committee of Newton, 388 Mass. at 576 (citing School Committee of Boston v. Boston Teachers Local 66, 378 Mass. 65, 73 (1979)); City of Gardner, 26 MLC 72,78, MUP-1949, 1966, 1967 (January 5, 2000). Ultimately, any appropriate remedy must strike a balance between the right of management to carry out its lawful decision and the right of an employee organization to have meaningful input on impacts or implementation issues while some aspects of the status quo are maintained. Town of Burlington, 10 MLC 1388, MUP-3519 (February 1, 1984).

Preliminarily, there is no evidence, and the Union does not contend, that any bargaining unit members lost wages or benefits as a result of the City's unlawful conduct. Therefore, the propriety of any type of economic remedy is not at issue. Rather, in its post-hearing brief, the Union requested an order that the City post a notice, restore the status quo ante, and rescind any reliance on the promotional process that resulted in the current list, unless and until the City provides notice and an opportunity to bargain about the impacts of its decision to use the sole assessment center and all other appropriate relief.

In cases like this one, which concern a failure to bargain over the impacts and the means and methods of implementing a managerial decision, the CERB traditionally orders restoration of the status quo ante only to affected mandatory subjects and not to the decision itself. Commonwealth of Massachusetts, 26 MLC 116, 121-122, SUP-4158 (February 15, 2000). Further, in cases where the effects of an employer's managerial decision are certain and impact bargaining cannot substantially change but can only ameliorate the effects, the CERB, guided by the NLRB's decision in Transmarine Navigation Corp., 170 NLRB 389 (1968), does not restore the full status quo ante. Rather, it issues a bargaining order and, if employees have suffered economic losses, orders restoration of the economic equivalent of the status quo ante for a period of time sufficient to permit good faith bargaining to take place. City of Somerville, 42 MLC 170, 172, MUP-13-2977 (December 30, 2015) (citing Town of Burlington, 10 MLC at 1388-1389 (amending order on remand from SJC to reflect impacts-only bargaining obligation); City of Boston, 31 MLC 25, MUP-1758 (August 2, 2004)).

Accordingly, when considering whether to adopt the Union's remedy by restoring the status quo ante and rescinding reliance on the assessment center, we must first determine whether the issues that we have found to be proper subjects of bargaining in this matter were the inevitable result of the City's managerial decision to use an assessment center. We conclude that they were not. As we have found above, nothing in Civil Service law or the Final Delegation Agreement dictated the date of the examination or training sessions, the adequacy or format of training sessions or materials, the amount of fee to be charged, paid time off for employees to study for the test or on the test day, how to ensure exam security, or feedback regarding exam performance. And, critically, bargaining over these issues, particularly the date of the assessment center and the date, adequacy, and format of training sessions or materials could have resulted in a different eligibility list if, for example, the parties had negotiated an assessment center date that did not conflict with Ragucci's vacation, or due to additional study time or materials, some applicants achieved a higher score.

Under these circumstances, we agree with the Union that an order to restore the status quo ante that includes rescinding any reliance on the promotional process that resulted in the current list is appropriate here. See Newton School Committee, 588 Mass. at 575-578 (affirming CERB's decision to reinstate and provide full backpay to custodians who had been laid off pursuant to the employer's managerial decision to reduce its level of services on grounds that bargaining over the means and methods of accomplishing that decision could have resulted in fewer or different employees being laid off); School Committee of West Bridgewater v. West Bridgewater Teachers' Association, 372 Mass. 121 (1977) (where School Committee failed to follow collectively-bargained evaluation process, and where evaluation procedure could have, among other things, given teacher advance warning of possible non-reappointment and permitted the teacher to meet and correct improper or incorrect information, arbitration award that ordered reinstatement and backpay for non-tenured teacher for purposes of conducting proper evaluations did not intrude on nondelegable rights of school committee). While we recognize that it is not certain here that pre-assessment center bargaining could have changed the list, in analogous circumstances, the SJC has opined that such uncertainty "must be taxed against the wrongdoer" rather than the wronged employees. Newton School Committee, 388 Mass. at 577-578 (quoting National Family Opinion, Inc., 246 NLRB 521, 522 (1979)). Restoring the status quo ante here means that if Carli has since been promoted to Fire Chief, the promotion should be rescinded, and Carli should resume serving as Acting Chief. See Town of Randolph, 8 MLC 2044, MUP-4589 (April 23, 1982) (rescinding promotion of sergeant who was first on Civil Service list of officers eligible for promotion, where CERB determined that the City unlawfully failed to consider other officers eligible for promotion). Furthermore, should the City decide, and obtain the appropriate approvals from HRD, to conduct a second assessment center to establish an eligibility list, all applicants, including Carli, should be awarded whatever additional credit for in-title experience that they claimed or would have been entitled to claim in their application for the March 14, 2019 assessment center. See Massachusetts Department of Transportation, 43 MLC 67, SUP-14-3576, SUP-14-3640,

(H.O. September 8, 2016) *aff'd* 44 MLC 1 (July 31, 2017) (remedying employer's discriminatory failure to consider employee for a promotional position by ordering that interview and selection process be repeated and that selection be made "based on the circumstances that existed at the time of the original application deadline"); Town of Norwell, 16 MLC 1575, MUP-6962 (H.O. February 21, 1990) *aff'd* 18 MLC 1263 (January 22, 1992) (as part of remedy for employer's violation of past practice of considering all officers who were on the civil service list in selection process for acting sergeant, ordering town to refrain from rewarding officer for his service as acting sergeant made pursuant to the violation).

The fact that this case involves a promotion pursuant to Civil Service procedures to a managerial position does not affect this result. Absent a clear conflict with the Civil Service law, it is well-established that the Civil Service status of employees does not affect the remedial authority of the CERB. City of Boston and Michelle M. Mullin, 5 MLC 1557,1558, MUP-2814 (December 28, 1978) (citing Dedham v. Labor Relations Commission, 365 Mass. 392 (1974)). We are unaware of any Civil Service statute or regulation that prevents us from remedying the Chapter 150E violation in the manner set forth here. Notably, we do not order that anyone be appointed in lieu of Carli. Carli will maintain his position as Fire Chief, albeit in an acting capacity, pending bargaining over impacts and procedures for the assessment center and potentially redoing the assessment center. Cf. School Committee of New Bedford v. New Bedford Educators Association, 9 Mass. Ap. Ct. 793, 802 (1980) (arbitrator's decision finding that school committee violated provision of CBA in appointing guidance counselor did not exceed authority; however, remedy appointing rejected applicant to next vacancy for full period of nonappointment exceeded authority based on school committee's nondelegable authority to appoint; appropriate remedy could instead require that applicant's application "be considered in accordance with practice set forth in [the CBA]"). Moreover, as we noted above, this is not the first time that the CERB has rescinded a promotion made from a civil service list. See Town of Randolph, 8 MLC at 2055. Nor does the fact that the Civil Service Commission declined the Union's request for an investigation change

our Order. It is well established that the Civil Service Commission does not have exclusive jurisdiction over matters that may violate both Chapter 150E and Chapter 31. Dedham, 365 Mass. at 402.[27]

Order

WHEREFORE, IT IS HEREBY ORDERED that the City of Everett shall:

1. Cease and desist from:

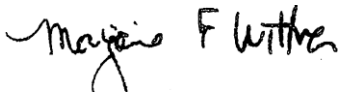
    a. Refusing to bargain in good faith by deciding to use an assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to impasse or resolution with the Union over the impacts of that decision or the means and methods of implementing that decision.
    b. In any like manner, interfering, restraining and coercing any employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:
    a. Rescind reliance on the eligibility list that resulted from the March 14, 2019 assessment center.
    b. If, as a result of this Decision and Order, the City holds a second assessment center for Fire Chief that awards additional credit for in-title experience, applicants should be awarded whatever additional credit that they claimed, or that they would have been entitled to claim, in their application for the March 14, 2019 assessment center.
    c. Upon request, bargain in good faith with the Union to resolution or impasse about the impacts and means and methods of implementing the City's decision to use an assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief.
    d. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the city customarily communicates with these unit members via intranet or email, and display for a period of thirty days thereafter signed copies of the attached Notice to Employees;
    e. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

SO ORDERED.

[27] We further note that in an unpublished Appeals Court decision issued pursuant to Rule 1:28, the panel upheld an arbitrator's award remedying a bypass for promotion to district fire chief that the arbitrator found violated procedures set forth in the parties' collective bargaining agreement by ordering the promotion of the bypassed individual, thereby supplanting the candidate that the city had appointed. In upholding the award, the panel considered, but rejected, the city's contention that the arbitrator's order conflicted with various provisions of Civil Service law. City of Worcester v. Local 1009, International Association of Firefighters, No. 91-P-1240, 32 Mass. App. Ct. 1122, slip. op. at 2 (June 29, 1992).

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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MARJORIE F. WITTNER, CHAIR

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JOAN ACKERSTEIN, CERB MEMBER

_____

KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that the City of Everett violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by refusing to bargain in good faith with the Everett Firefighters, IAFF, Local 143 (Union) by deciding to use an assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to resolution or impasse with the Union over the impacts or the means and methods of implementing that decision.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the City of Everett assures its employees that:

WE WILL NOT refuse to bargain in good faith by deciding to use an assessment center for scoring and ranking candidates on an eligible list for promotion to Fire Chief without bargaining to impasse or resolution with the Union over the impacts of that decision or the means and methods of implementing that decision.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

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

Rescind reliance on the eligibility list that resulted from the March 14, 2019 assessment center.

Upon request bargain in good faith with the Union to resolution or impasse about the impacts and means of implementing the City's decision to use an assessment center as the sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief.

If, as a result of this Decision and Order, the City holds a second assessment center for Fire Chief that awards additional credit for in-title experience, applicants should be awarded whatever credit that they claimed, or that they would have been entitled to claim, in their application for the March 14, 2019 assessment center.

Notify the DLR within thirty days after the date of service of this Decision and Order of the steps taken to comply with same.

_____ _____

City of Everett Date

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

This notice must reman posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with the provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111, 617-626-7132.