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MASSACHUSETTS POLICE & NON-POLICE COLLECTIVE BARGAINING FACT SHEET

In Massachusetts there are several areas of difference in the treatment of police and non-police collective bargaining. They include the following:

- **Interest Arbitration.** In Massachusetts police and fire bargaining units are entitled to interest arbitration to resolve bargaining disputes. Other employees have access to a less powerful non-binding fact finding process. All public employees are prohibited from striking.
- **Transparency of Rules and Agency Processes.** The rules that govern police impasse procedures are hidden in a law that was passed in 1987 and never codified, creating a “if you know, you know” process for police.
- **Use of Impact Bargaining.** While the rules of bargaining are similar for police and non-police units, the Commonwealth Employment Relations Board (CERB) is far more likely to use impact bargaining to impose the obligation in the police setting than the non-police setting.
- **Disciplinary Rules and Processes.** CERB finds many more disciplinary rules to be subject to bargaining for police than non-police units.
- **Non-Delegation.** There is a powerful non-delegation doctrine in Massachusetts which is mostly used by CERB to limit bargaining over changes to duties in police and fire units.

STATUTORY AUTHORITY FOR COLLECTIVE BARGAINING

Coverage.

The Massachusetts collective bargaining statute covers all employees “in the executive or judicial branch of a government unit employed by a public employer.”¹ Public employers include the commonwealth as well as cities, towns, counties, school districts, higher education boards, and other subdivisions.² When first enacted in 1958, the public sector law excluded police; however it was amended in 1977 to include municipal and state police.³ The law later specified that all uniformed members of the state police must be in the same bargaining unit.⁴

Employee organizations can include all unions, associations, federations or councils where the membership includes public employees and which “assists its members to improve their wages,

1 MASS. GEN. LAWS ch. 150E, § 1 (2024).

2 *Id.*

3 For a discussion of the history of the Massachusetts law, see A GUIDE TO THE MASSACHUSETTS PUBLIC SECTOR COLLECTIVE BARGAINING LAW, COMMW. OF MASS. DEP’T OF LAB. RELS. (2017), <https://www.mass.gov/a-guide-to-the-massachusetts-public-employee-collective-bargaining-law> [https://perma.cc/HN49-XWYM].

4 MASS. GEN. LAWS ch. 150E, § 3 (2024).

hours, and conditions of employment.”⁵ To operate lawfully in Massachusetts, employee organizations are required to file a written statement with the Department of Relations “setting forth the names and addresses of all of the officers of such org, the aims and objectives of such org, the scale of dues, initiation fees and assessments to be charged to members and the annual salaries to be paid to the officers.”⁶ Unions must also make their financial records available to members and services fee payers on request.⁷

Scope of Bargaining.

Like its federal counterpart, Massachusetts’s law enshrined the right of public employees to organize and to form a union “for the purpose of bargaining collectively”⁸ Thus the act requires the employer and the union to “negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment.”⁹ It is therefore a prohibited practice for an employer to “refuse to bargain collectively in good faith with the employee organization.”¹⁰ While there is no statutory difference between the scope of bargaining for police units, in Massachusetts there is a doctrine of “non-delegation” which is most commonly used to limit the scope of bargaining for police and fire fighters.¹¹

Impasse Procedure.

Statutory impasse procedures are completely different for police and non-police units, though this is not obvious from merely reading the statute. In 1973, when the collective bargaining law was amended to cover most state and municipal employees, the legislature also set out an interest arbitration process exclusively to resolving bargaining disputes for police.¹² In 1980, however, the citizens of Massachusetts approved Proposition 2 ½, which limited property tax increases and also eliminated interest arbitration for police.¹³ In 1987, in an uncodified statutory change, the legislature reinstituted interest arbitration for police,¹⁴ leaving police and non-police employees with two entirely different systems of impasse resolution and making it extremely difficult for the average citizen to notice this. Each system will be described below.

For non-police bargaining units, the parties are dependent on the when one party or the other believes that impasse has been reached, that party may petition the Department of Labor Relations (DLR) for a determination.¹⁵ DLR then investigates whether there is a genuine question

⁵ *Id.*

⁶ MASS. GEN. LAWS ch. 150E, § 14 (2024).

⁷ *Id.* The law also provides that employee organization may “require a non-member to pay for the reasonable costs and fees . . . for grieving or arbitrating a matter arising under the agreement.” MASS. GEN. LAWS ch. 150E, § 5 (2024).

⁸ MASS. GEN. LAWS ch. 150E, § 2 (2024).

⁹ MASS. GEN. LAWS ch. 150E, § 6 (2024).

¹⁰ MASS. GEN. LAWS ch. 150E, § 10(a)(5) (2024).

¹¹ See *e.g.*, Boston Firefighters Union, Local 718 v. City of Bos., 205 N.E.3d 282, 291 (Mass. 2023) (finding the department’s COVID-19 vaccination policy “nondelegable” and therefore excluded from bargaining).

¹² 1973 Mass. Acts 1124; see also 1977 Mass. Acts 889 (creating the Joint Labor Management Committee to oversee disputes between police departments and police unions).

¹³ MASS. GEN. LAWS ch. 59, § 21C (2024)).

¹⁴ 1987 Mass. Acts 1125.

¹⁵ MASS. GEN. LAWS ch. 150E, § 9 (2024).

about impasse, and if so, will appoint a mediator to assist the parties in reaching an agreement.¹⁶ The mediator issues a report either describing the settlement or confirming the parties' impasse.¹⁷ Thereafter, either party can petition for a fact-finding proceeding in which a neutral will assess their positions and issue a non-binding recommendation.¹⁸ Then, if further negotiation does not produce an agreement, the employer may implement its last, best offer.¹⁹ Strikes are statutorily prohibited and can be enjoined in state court.²⁰

Police, on the other hand, have a much more favorable process, often shorthand as the “Section 4” process but not included in Chapter 150E. First, the 1987 law created an Joint Labor Management Committee (JLMC) devoted exclusively to overseeing collective bargaining negotiations involving police and firefighters, and “not subject to the jurisdiction” of the DLR.²¹ The JLMC is comprised of 14 members, three nominated by statutorily identified police unions, three nominated by firefighter unions, and six nominated by an advisory committee on local government.²² The remaining two are the chair and vice chair, selected by the committee.²³ Where an issue before the Board involves police, only the police union members and three of the six local government members are permitted to vote.²⁴ When either party to a negotiation believe that impasse has been reach, it may petition the JLMC for a decision as to whether negotiations have been exhausted.²⁵ The JLMC then holds a hearing to identify the issues in dispute, the parties' positions, and whether there is an impasse.²⁶ If there is an impasse, the JLMC appointed an interest arbitration who has the power to issue a decision imposing the terms of the contract.²⁷ That resolution is binding on the executive and subject to the necessary approval of the legislative body.²⁸

Unfair Labor Practices

Where the union believes the employer has refused to bargaining in good faith, or otherwise engaged in a prohibited practice, the union may file a charge before the DLR.²⁹ The DLR will then investigate the charge and if it states a claim of a prohibited practice, the DLR will issue a complaint and set the matter for hearing before a DLR Hearing Officer.³⁰ That Hearing Officer, after conducting the hearing, will issue a written decision, which will become final and binding if

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 MASS. GEN. LAWS ch. 150E, § 9A (2024).

21 1987 Mass. Acts 1125 at §4(1)(a); *see also* *Joint Labor Management Committee*, COMMW. OF MASS. DEP'T OF LAB. RELS., <https://www.mass.gov/joint-labor-management-committee-jlmc> (last visited July 10, 2024).

22 1987 Mass. Acts 1125 at §4(1)(a)(i) (identifying the police unions as “the international Brotherhood of Police Officers” and “the Massachusetts Police Association”).

23 1987 Mass. Acts 1125 at §4(1)(a)(ii).

24 *Id.* at § 4(1)(b).

25 *Id.* at §4(2)(c).

26 *Id.* at §4(3)(a).

27 *Id.*

28 *Id.*

29 MASS. GEN. LAWS ch. 150E, § 11 (2024).

30 MASS. GEN. LAWS ch. 150E, § 11(a)-(c) (2024).

not appealed to the Commonwealth Employment Relations Board within 10 days.³¹ If appealed, the CERB acts as an appellate body reviewing the Hearing Officer's decision.³²

Law Enforcement Officer Bill of Rights

Massachusetts does not have a LEOBOR statute.

AGENCIES

Commonwealth Employment Relations Commission (CERB)

- **Statute:** MGL Chap. 23 §9R
- **Website:** There is no website for the CERB, other than the limited information contained in the DLR's site. There is no identification of the members of the body, their backgrounds, nor their current terms or expiration.

The CERB is a three-member appellate body whose members are appointed by the Governor. One member is appointed as the chair. No more than two members may be of the same political party but there are otherwise no requirements for eligibility. The Chair is paid a salary, and the other members are volunteers. It appears that the CERB is a highly staff driven and not independent of the DLR.³³

Board Members:

Though there is no readily accessible public information about the current members of CERB, the most recent CERB decision (June 17, 2024) identifies the follow individuals as members:

- Marjorie Wittner, Chair: Has been the Chair for 15 years and was formerly the Chief Hearing Officer.³⁴
- Kelly Strong: Executive Director, Boston Shipping.³⁵
- Victoria Caldwell: Legal Editor, Landlaw Legal Publishers³⁶ and Assistant City Solicitor for the City of Salem.³⁷

It appears that there are no members with a background representing or working for unions.

By contrast, the JLMC appears far more well represented, having its own website, which describes its role as well as the current members.

31 MASS. GEN. LAWS ch. 150E, § 11(d)-(e) (2024).

32 MASS. GEN. LAWS ch. 150E, § 11(e) (2024).

33 *Cf.* MASS. GEN. LAWS ch. 23, § 9R(a) (2024) ("The board shall in no respect be subject to the jurisdiction of the executive office of labor and workforce development.")

34 Marjorie Wittner, LINKEDIN, <https://www.linkedin.com/in/marjorie-flacks-wittner-b432316/> (last visited July 10, 2024).

35 Kelly Strong, LINKEDIN, <https://www.linkedin.com/in/kelly-strong-770bb692/> (last visited July 10, 2024).

36 Landlaw is the exclusive publisher of CERB decisions. It is unclear how this is not a conflict of interests.

37 Victoria Caldwell, LINKEDIN, <https://www.linkedin.com/in/victoria-caldwell-14a7a059/> (last visited July 10, 2024).

COMMON LAW OF MANDATORY SUBJECTS

In General

CERB defines the scope of those subjects which must be bargained for both police and non-police units. In general, CERB holds that any public employer violated Section 10(a)(5) when it unilaterally changes an existing condition of employment where that change involves a “mandatory subject of bargaining.”³⁸ In determining which subjects are mandatory, the Commission generally uses a fairly broad balancing test, “[i]s the predominant effect of a decision directly upon the employment relationship, with only limited or speculative impact on core [managerial] policy? Or, is the predominant effect upon the level or types of [governmental services], with only a side effect upon employees.”³⁹ The CERB also looks at a few factors “including the degree to which the topic has a direct impact on terms and conditions of employment, whether the issue involves a core governmental decision, or whether it is far removed from the terms and conditions of employment.”⁴⁰ Finally, especially in police cases, the CERB will occasionally find that the subject is non-delegable, that is that the authority to make a particular decision is specifically delegated to the agency by statute and therefore cannot be altered through bargaining.⁴¹

CERB often distinguishes between the obligation to bargain over the decision itself and the obligation to bargain the effects. Decision bargaining is required where the decision itself is a mandatory subject, for example the imposition of certain work rules⁴² or the transfer of bargaining unit work.⁴³ Impacts bargaining is the bargaining required where the decision itself is not a mandatory subject but the decision affects other terms of employment. CERB is often unclear about which kind of obligation it is finding, but where it expressly finds impact bargaining it is often a compromise between the positions of the parties, and it is more often used in police than non-police cases.⁴⁴

38 *Commonwealth v. Lab. Rels. Comm’n*, 533 N.E.2d 1326, 1328–29 (Mass. 1989); *Sch. Comm. of Newton v. Lab. Rels. Comm’n*, 447 N.E.2d 1201, 1211 (Mass. 1983); *Town of Andover*, 28 MLC 264, 268 (2002); *City of Newton*, 27 MLC 74, 81 (2000).

39 *Boston School Committee*, 3 MLC 1603, 1607 (1977)

40 *Town of Plymouth*, MUP-11-1061 at 8–9 (2014)

41 *City of Bos. v. Bos. Police Superior Officers Fed’n*, 993 N.E.2d 693, 696 (Mass. 2013) (holding “[a]lthough the statutory language does not contain the word ‘transfer,’ the statutory provision defining the commissioner’s authority, by its plain language, confers nondelegable authority over the assignment and organization of the officers within the department.”); *Weymouth Sch. Comm.*, MUP-19-7645 at 26–27 (2021) (concluding “decisions that relate directly to a public employer’s exclusive right to establish educational policy and to decide how to best deliver educational services to its students are non-delegable and thus, exempt from the obligation to bargain.”).

42 *City of Bos.*, MUF-16-5618 (2019) (finding the prohibition on eating at employees’ workstations was a MSB because it affected the availability of food sufficiently that the balance favored bargaining); *Bristol Cnty. Sheriffs Dep’t.*, MUP-2972 (2004) (holding the discussion of union business during roll call was a MSB). As described more fully below, this type of MSB is far more likely in the police than non-police context.

43 *Mass Emergency Mgmt. Agenc.*, SUP-20-7917 (2022) (holding the hiring of a non-unit employee to perform public information functions formerly performed by bargaining unit employees was an MSB); *Town of Weymouth*, 40 MLC 253 (2014) (finding the elimination of the school crossing guard job and replacing it with a non-unit position was an MSB).

44 *Coal. of Pub. Safety*, SUP 19-7421 (2022) (holding that whereas the installation of a GPS in officer vehicles did not need to be bargained, the impact of that decision on officer safety did); *Town of Natick*, MUP-15-4244 (2017) (holding that the Requirement that officers administer Narcan required impacts bargaining because it affected workload and safety, but the decision itself did not need to be bargained); *City of New Bedford*, MUP-20-7875 (2021) (finding the

Discipline and Oversight.

There are relatively few cases about disciplinary rules in non-police units, but in those cases the imposition of new disciplinary rules is most often found not to require bargaining.⁴⁵ However, in the police context, CERB has found an obligation to bargain over work rules regarding use of force⁴⁶, requirements to administer Narcan⁴⁷, determination of fitness for duty⁴⁸, prohibitions on eating at ones desk⁴⁹, and prohibitions on discussing union business during role call⁵⁰. The only case in which CERB did not find a bargaining obligation was where the employer changed the location where officers could take their breaks.⁵¹

In the area of the implementation of video or audio surveillance, CERB has historically been inhospitable to claims to bargain finding that the employer was “simply using a more efficient and dependable method of enforcing existing work rules.”⁵² In the police context, however, CERB

decision to decommission a fire engine was not a MSB, but the City was still ordered to bargain impacts); Town of Stoneham, MUP-12-2430 (2014) (the decision to transfer certain emergency medical functions away from officer was not a MSB, but CERB still ordered impacts bargaining); City of Bos., 30 MLC 23 (2003) (holding while the Department did not have the obligation to bargain over the decision to include less-than-lethal force options for officers, it did have the obligation to bargain the impacts).

45 City of Newton, MUP-20-88053 & MUP-20-8059 (2022) (prohibiting of flying “thin red line” flag was not a MSB); Nat’l Ass’n of Gov’t Emps., SUP-05-5206 (2007) (changing attendance policy, making it harder to leave early or call in sick, was not MSB); *cf.* Town of Plymouth, MUP-11-1061 (2014) (limiting use of cellphones for public works employees was a MSB and should have been bargained).

46 City of Bos., 30 MLC 23 (2003) (finding an obligation to bargain the effects of a decision to require less-than-lethal force options for officers because the decision implicated training, job duties, and workload).

47 Town of Natick, MUP-15-4244 (2017) (requiring officers administer Narcan necessitated impacts bargaining because it affected workload and officer safety).

48 Town of Northborough, MUP-20-7911 (2021) (requiring bargaining over fitness for duty exam changes); City of Newton, MUP-16-5532 (2019) (holding “[t]he procedure by which an employer determines that an employee is physically and mentally fit for duty, including, but not limited to the selection of the evaluator, the information provided to the evaluator, the testing protocol, the results generated, and how that information will be used, are mandatory subjects of bargaining.”); Massachusetts Port Authority, UP-04-2669 (2008) (requiring bargaining over methods for determining fitness for duty in conjunction with its investigation into employee’s alleged threats of violence)

49 City of Boston, MUF-16-5618 (2019) (finding the prohibition on eating at employees’ workstations was a MSB because it affected the availability of food sufficiently that the balance favored bargaining).

50 Bristol Cnty. Sheriffs Dep’t, MUP-2972 (2004).

51 City of Somerville, MUP-14-4083 (2016) (changing the break location for officers from one parking lot to several others did not raise a decision or impact bargaining obligation despite union’s argument that the change implicated officer safety.)

52 Univ. of Mass., SUP-06-5255 at 2 (2008) (installing of technology that tracked when employees entered and exited the medical center campus was not a MSB because it was “simply using a more efficient and dependable method of enforcing existing work rules.”); City of Worcester., MUP-05-4409 at 2 (2007) (requiring DPW employees to use GPS enabled phones was not a MSB because it was “an effort to make the City’s use and monitoring of its sanding operations more efficient”); Duxbury Sch. Comm., 25 MLC 22, 24 (1998) (installation of video cameras in workplace constituted nothing more than an alternative mechanism for enforcing existing work rules); *cf.* Commw. of Mass./Secretary of Adminin. and Fin., SUP 19-7352 (2021) (secretly listening in on employees’ phone conversations changed employees working conditions sufficiently that bargaining was required).

found an obligation to bargain the impacts of the decision to install GPS in officers' vehicles because the GPS installation impacted officer safety.⁵³

There are no police cases about external oversight, and there is one non-police case in which CERB found no obligation to bargain over the Commonwealth's creation of a new "center" to investigate claims of workplace discrimination.⁵⁴

Reassignment and Skimming.

In general, CERB requires a union to prove three elements to establish a bargaining obligation for a transfer of work: "1) the employer transferred bargaining unit work to non-unit personnel 2) the transfer of unit work had an adverse impact on individuals, employees or the bargaining unit itself; and 3) the employer failed to give the employee organization prior notice and an opportunity to bargain to resolution or impasse over its decision."⁵⁵ Where, prior to the transfer, the disputed duties shared between bargaining unit and non-bargaining unit workers, CERB will only find a MSB where there has been a "calculated displacement of unit work."⁵⁶

In non-police units, CERB is expansive in its finding that the transfer of bargaining unit work outside the unit is a MSB and must be bargained.⁵⁷ In police and fire units, CERB is likely to find any staffing decision to a "non-delegable" and not subject to bargaining.⁵⁸ Nonetheless, it often finds a duty to bargain the impact of transferring work out of the unit.⁵⁹

53 Commw. of Mass./Secretary of Adminin. and Fin., SUP 19-7421 at 14 (2022) (finding no decision bargaining required but holding, the new GPS installation "impacted officer safety" because it eliminated a certain feature that was in the old version.)

54 Commw. of Mass./Secretary of Adminin. and Fin., SUP 20-7876 at 15 (2022) (finding "it is well established that an employer does not violate the Law when, without bargaining, it unilaterally alters procedural mechanisms for enforcing existing work rules")

55 Commw. of Mass. Dep't of Corr., SUP-13-2604 at 3 (2015) (quotations and citations omitted).

56 *Id.* (finding that a calculated displacement is determined "by looking at the percentage of work performed by bargaining unit employees and whether that percentage has been reduced at the same time as a similar increase in the percentage of the disputed work performed by non-bargaining unit employees.")

57 *See e.g.*, Bost. Sch. Comm., MUP-20-7886 (2022) (laying off "Community Field Coordinator" and then created a "Transportation Operations Leader" with a job description that included the former duties of the CFC must be bargained); Mass. Emergency Mgmt. Agency, SUP-20-7917 (2022) (during Covid 19, hiring a non-unit employee to perform public information functions formerly performed by bargaining unit employees required bargaining); City of Bos., MUP 17-6211 & MUP-18-6679 (2019) (removing from event coordinator responsibility for approving overtime and assigned it to a non-bargaining unit position was a MSB); Town of Plymouth, MUP-14-3989 (2016) (assigning crossing guard duties, formerly shared, to an outside contractor must be bargained); Everett Sch. Comm., MUP-09-5665 (2016) (transferring duties of speech and language therapist outside the bargaining unit was MSB); City of Bos., MUP-14-3514 (2015) (assigning managerial duties formerly performed by bargaining unit worker to non-unit employee was a MSB).

58 City of Attleboro, MUP 19-7340 at 21 (2021)(city's decision to shift dispatch duties out of the firefighter bargaining unit was not a MSB because it fell within the nondelegable management prerogative to set staffing); Town of Stoneham, MUP-12-2430 (2014). Where the City transferred initial medical advice work previously performed by bargaining unit officers to a private provider it was not required to bargain the decision because it was "an inherent managerial prerogative to set public safety priorities for the deployment of police." *Id.* at 20.

59 Town of Stoneham, MUP-12-2430 (2014) (ordering impact bargaining over subcontracting decision); Bd. of Trustees of the Univ. of Mass.-Amherst, SUP-11-1399 (2014) (ordering impact bargaining over the university's

Subcontracting.

CERB uses an identical standard to analyze subcontracting and reassignment cases, therefore they are combined above.

Duties

CERB will hold in both the non-police settings that an employer's decision to assign particular duties to its employees lies within its core managerial prerogatives and is therefore not bargainable.⁶⁰ In the police context, CERB will go a step further, finding that certain decisions are non-delegable and *cannot* be bargained.⁶¹ Nonetheless, in the police context where the change in duties impinges on safety, CERB will still find a duty to bargain.⁶² In the non-police setting, CERB is more generous allowing for bargaining where the decision impinges on workload.⁶³

decision to contract out its armored car services); *cf.* Dep't of Higher Educ., SUP-12-1541 (2014) (in non-police setting finding no obligation to bargain over the decision to subcontracted certain trades work associated with a facilities project, and finding no impact obligation).

60 Weymouth Sch.Comm., MUP-19-7645 at 26-27(2021) (finding a "decision[] that relate[d] directly to a public employer's exclusive right to establish educational policy and to decide how to best deliver educational services to its students are non-delegable and thus, exempt from the obligation to bargain"); Stoughton Sch.Comm., MUP-14-4099 at 13 (2016) (adding to guidance counselor duties monitoring students' attendance was "non-bargainable" because "it lies within the Committee's core managerial prerogative and related directly to Committee's exclusive right to establish educational policy").

61 City of Bos., MUP-10-5895 (2014) (holding an agreement between union and city allowing for certain assignments was an invalid impingement on a non-delegable duty); *cf.* Town of Harwich, MUP-01-2960 (2005) (rejecting Town's argument that the decision to assign or not assign light duty is non-delegable).

62 Commw. of Mass., SUP-04-5052 (2008) (reducing staffing in an already understaffed prison was a MSB because it affected officer safety).

63 *Compare* Plymouth Sch. Comm., MUP-14-3623 (2015) (requirement that custodians on the night shift empty recycling bins was not a change in duties but was a change in workload and therefore must be bargained prior to implementation), *and* City of Haverhill, MUP-13-3066 (2015) (increasing increase firefighter's mandatory training requirements should have been bargained because it affected workload), *and* City of Malden, MUP-13-3190 (2015) (adding one more drug and alcohol test was a MSB and should have been bargained because it increased workload), *and* Bos. Sch. Comm., MUP-13-3055 (2014) (adding paraprofessional duties to autism specialists' duties should have been bargained), *with* Town of Braintree, MUP-15-4450 (2018) (reducing staffing of officers on the weekend day shift not subject to bargaining), *and* City of Everett, MUP-13-3006 (2016) (failing fil retiring captain's position was a staffing and not bargainable), *and* Commw. of Mass., SUP-05-5166 (2007) (requiring correction officers to assist staff in a different area of the prison was not a MSB).