COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 16-2670-B

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Plaintiff,

vs.

CITY OF BOSTON,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION

The Boston Police Patrolmen's Association, Inc. ("BPPA") has filed Plaintiff's Motion for Injunctive Relief ("Motion"), seeking to enjoin immediate implementation of a mandatory Body Worn Camera ("BWC") Pilot Program ("Pilot Program") which it contends will undermine the integrity of a collectively-bargained grievance arbitration process. The court held an abbreviated evidentiary hearing on the Motion on the afternoon of September 6 and 7, 2016. BPPA President Patrick Rose, Officer Daniel MacIsaac and Police Commissioner William Evans testified live. The Court also considers the numerous affidavits and attached exhibits, as well as the oral and written arguments of the parties. For the reasons that follow, the Motion is DENIED.

BACKGROUND

The Court finds the following facts preliminarily, for purposes of the Motion only.

A. The Employer/Union Relationship

1. Defendant City of Boston ("City") is a municipality in Suffolk County, Massachusetts, and a public employer under G.L. c. 150E § 1, *et seq.*
2. The BPPA is the collective bargaining unit for Boston Police Officers, representing more than 1500 men and women who serve as Patrol Officers in the Boston Police Department ("BPD").

3. The most recent collective bargaining agreement ("CBA") between the BPPA and the City was for the period July 1, 2013 through June 30, 2016. It continues in force, by its terms, until a successor contract takes effect. The parties are bargaining over the terms of a successor CBA.

4. The relevant CBA provisions read in relevant part:

> **Article IV, §1**
>
> The term "grievance" shall mean any dispute concerning the interpretation, application or enforcement of the Agreement.
>
> **Article VIII**
>
> **Section 1.**
> No amendment, alteration or variation of the terms or provisions of this Agreement shall bind the parties hereto unless made and executed in writing by the parties hereto.
>
> **Section 2.**
> The failure of the City or the Association to insist, in any one or more situations, upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the City or of the Association to future performance of any such term or provision, and the obligations of the Association and the City to such future performance shall continue in full force and effect.
>
> **Article XVI, §§ 4 & 5**
>
> **Section 4.**
> Except as improved herein, all benefits specified in the published rules and regulations, general and special orders in force on the effective date of this Agreement shall be continued in force for the duration of this Agreement. No employee shall suffer a reduction in such benefits as a consequence of the execution of this Agreement. "Benefits" hereunder shall be deemed to include by way of example and not by way of limitation, sick leave, vacation leave, and paid injured leave.
>
> **Section 5.**
> The provisions of this Agreement supersede any conflicting or inconsistent rule, regulation or order promulgated by the Police Commissioner. . . .
>
> **Article XVII**
> **COMPENSATION**
> [full text omitted]

B. The Dispute.

5. On October 13, 2015, Boston Police Deputy Superintendent Steven Whitman sent a letter to Police Officers Patrick Rose and Michael Leary, who are, respectively, the BPPA's President and Vice President. The letter officially notified Officers Rose and Leary "that the Department is in the initial internal phase of discussing a pilot program for Body Worn Cameras (BWC)/Dashboard Cameras" ("Pilot Program") and invited the bargaining unit to meet for formal discussion about the Pilot Program.
6. Officer Rose responded to Deputy Superintendent Whitman on October 14, 2015 stating, among other things, that the "use of body cameras by BPPA bargaining unit police officers is a mandatory subject of collective bargaining."
7. Deputy Superintendent Whitman wrote back on October 23, stating that while he "may not agree with all of the content" of the October 14, 2015 letter, "the Department intends to meet any bargaining obligations it may have pursuant to this issue and will provide periodic updates."
8. The two sides then met and exchanged correspondence, as set forth in the Affidavit of Patrick Rose and Exhibits 4-20 of the complaint, all of which the Court incorporates in these preliminary fact findings.
9. Both sides approached the issue of BWCs cautiously. For instance, in an August 2015 meeting with the City Council, Commissioner Evans expressed some concerns about them, including constitutional privacy issues, the potential for breaking down relationships with individual members of the community and the need for guidance in the case law. He said he wanted to move slowly on the BWC question and recognized that the Union had a legitimate role. In April 2016, in community meetings, he said he wanted a slow process so that the Department could get it right.
10. Commissioner Evans became more convinced that BWCs were an important tool to increase transparency, which he hopes would reduce the potential for excessive use of force and citizen complaints. Three recent incidents captured on private surveillance cameras, involving Boston police and the use of force (or citizen-initiated violence), played an important role in convincing the Commissioner of the

need to evaluate BWCs as a potentially important tool to increase transparency, accountability and positive community relationships. Research into experience in other cities, particularly Rialto, Mesa, Phoenix and Arlington, TX reinforced that view.

11. BPPA and its members likewise have had concerns about the use of BWCs, as a new technology.
12. In the fall of 2015, President Rose designated Boston Police Officer and Union Representative Daniel MacIsaac ("Officer MacIsaac") as its BWC expert. In that capacity, Officer MacIsaac researched the use of BWCs in the U.S. and submitted research paper to the Union on January 28, 2016.
13. The Union also designated Officer MacIsaac as its representative on the BPD's committee to review BWC proposals and select companies. The BPD received ten proposals from various companies. The BPD committee met on May 5, May 13 and May 18, 2016 to discuss logistics, the merits of the proposals received, scoring of the proposals, and vendor selection. After each committee member submitted a scorecard, the committee selected Taser and Vie Vue as the vendors for the Pilot Program.
14. On May 17, 2016, the Rand Corporation released the results of a study of the effects of BWCs on police officers and the public, based upon data from more than 2000 officers in eight police departments in the United States and United Kingdom. BPPA expressed two concerns based on its interpretation of that study, namely that (1) wearing BWCs increased the risk of assault on police officers by 15%; over officers not wearing BWCs and (2) wearing BWCs had no effect overall on officers' use of force, but where officers had discretion to turn the BWCs on and off, the incidence of use of force by police officers wearing BWCs increased significantly. As noted below, other explanations exist for the study's findings. Other studies have reached different conclusions.
15. In general, the BPPA's concerns included members' unanswered questions about the use of the technology in addition to the issues raised by the Rand Corporation including unanswered questions about the equipment and protocols, and the possibility for negative impacts on interactions with the citizens. As to the

unanswered questions, Officer MacIsaac and representatives of the vendors and Department were available to provide at least some responses.

16. At the June 1, 2016 BPPA Executive Board meeting and the June 15, 2016 House of Representatives meeting, the Union's bargaining committee reported that it did not appear that the parties would be able to reach an agreement on BWCs and that the City might implement a pilot program unilaterally. About this time, the Union notified members that they should not volunteer to wear body cameras unless the City and Union had reached an agreement on the program.
17. Therefore, in June, 2016, before the parties reached agreement on a BWC policy, the BPPA Union took the following position, which it set forth in a memo ("June 16 Memo") distributed to its membership (Daley Ex. 3b):

> The city is pushing the Body Camera pilot plan and will be seeking out BPPA members to volunteer. The position of the BPPA is that NOBODY in the BPPA membership should volunteer for this program. If you are ordered to wear the camera you should obey the order and notify the BPPA leadership immediately. This is a change of working conditions and needs to be bargained.

18. On July 12, 2016, the BPPA, City and Boston Police Department signed a Memorandum of Agreement ("MOA"), attached to the Rose Affidavit as Exhibit 21.
19. Among other things, the MOA provided that the City and BPD "may implement a 6 (six) month Body Worn Camera (BWC) Pilot Program, in which "up to 100 patrol officers" would "be equipped with BWC's." "The patrol officers participating in the BWC Pilot Program will be chosen from volunteer officers" who would receive a $500.00 payment at the completion of the Pilot Program.
20. The MOA did not address the possibility that insufficient volunteers for the BWC program might come forward, because both sides expected that at least 100 patrol officers would volunteer if both sides fulfilled their responsibilities under the MOA.
21. The MOA provided for a true pilot project, designed at least in part to answer certain questions about possible benefits of BWCs. It stated that:

> Included among the objectives are determining whether BWCs contribute to officer safety, provide evidence for criminal prosecution, help to resolve personnel complaints and foster positive relations with the community.

It also stated: "After the completion of the 6 month Pilot program, the City/Department will decide whether to extend, expand or otherwise continue use of BWCs."

22. Other provisions of the MOA included "viewing parameters" for access to and review of BWC recordings in the event of officer involved shootings, officer involvement in other incidents, testimony in court and statements to internal investigations.
23. The MOA stated that its provisions were for the sole purpose of implementing the Pilot Program, had no precedential value for any purpose, and were not admissible in any matter, except to enforce the terms of the MOA itself.
24. The preamble to the MOA stated: "With the execution of this Agreement, the BPPA expresses its support of the BWC pilot program and will endeavor to ensure its successful implementation."
25. In its final paragraph, the MOA stated that "the BPPA agrees the City has met its bargaining obligation with respect to the use of BWCs for this Pilot Program."
26. On or about July 15, 2016, Officer Rose sent, by way of all BPPA House of Representative members, an "open letter to all members of the BPPA" to counteract what he perceived as rumor and inaccuracies that had been circulating. His letter apologized for the premature report of the MOA in the press and for his failure to wait until notifying the BPPA House of Representatives before signing it. He stated that the MOA "met the needs and requirements of [BPPA] to support a (6) Six Month BWC "Pilot Program." He stated that "[t]he 'Pilot Program' calls for up to (100) **VOLUNTEERS**." He added: "it's a great agreement."
27. On July 18, Boston Police Commissioner William B. Evans issued Police Commissioner's Memo No. CM 16-019, describing the 2016 BWC Pilot Program and "seeking Patrol Officers to volunteer to participate" in it. The Memo set a July 29, 2016 deadline for submission of applications. It solicited applications from all patrol officers, except for those 300 or so officers assigned to special units other than the Youth Violence Task Force. Approximately 1,200 patrol officers were thus eligible to volunteer.

28. Between July 18 and July 29, when volunteer forms were due, a number of officers approached Officer MacIsaac with questions about the BWCs: such as what they looked like and how they operated. Some of that information was not yet available.
29. No officers volunteered by submitting a formal application for the BWC Pilot Program by the July 29 date. Apparently one or two volunteered informally or were willing to do so, but did not follow through with an actual application.
30. On August 2, the City asked the BPPA to take action to address the lack of volunteers.
31. At a meeting of the BPPA Executive Board on August 3, 2016, BPPA President Rose provided a statement to board members, which he asked be distributed to the officers in the members' Districts and Units. Officer Rose's statement, attached to his affidavit as Exhibit 26, stated in relevant part:

> It has now come to the attention of the Union that some patrol officers may believe that the Union does not support officers volunteering for the program. This is not accurate. The Union believes it is important that this pilot program be voluntary and officers interested in volunteering should do so.

32. Despite some efforts by the BPPA to convey this message after reaching agreement on the MOA, the strong perception created by the June 2016 Memo continued among BPPA membership. Discussions of the same tenor continued almost to the present.
33. For instance, at least one recent posting of the June 2016 Memo on a Union bulletin board occurred long after the agreement. On the same bulletin board a memo appeared with the handwritten legend "Sanction any officer who volunteers."
34. On Thursday, August 25, 2016, a Police officer attending a community meeting in Dorchester described the BWC Pilot Program and added that BPPA had told officers not to volunteer for the BWC program.
35. It appears likely that, at a minimum, the BPPA has not conveyed a strong message of support for officers to volunteer for the BWC program.
36. That is not to say that BPPA's approach was the sole reason, why no volunteers submitted formal applications for the Pilot Program. As noted above, officers had understandable questions and concerns, much as the Commissioner himself saw the need to move slowly and get it right.

37. The Union also attributes the lack of volunteers to the absence of recruitment or training by the Department, as well as short time for submitting applications, the timing of the MOA (just after the murders of multiple police officers in Dallas, with the response period including the murders of Baton Rouge police officers). As to the first point, the Union did have knowledgeable personnel available and could have coordinated training with the Department. In hindsight, it is always possible to say that both sides could have done more.
38. The surprise expressed by witnesses on both sides that not one of the 1,200 eligible BPPA members formally volunteered for the BWC Pilot Program reflects their reasonable expectation in July that at least 100 members would come forward if the Union fulfilled its obligation to "endeavor to ensure [the MOA's] successful implementation."
39. Meanwhile, on Friday, August 5, 2016, the Boston Globe reported that Commissioner Evans had said that "[i]t's looking like we're probably not going to have volunteers" and that "officers most likely are going to be assigned" to wear BWC's.
40. On August 8, 2016, Officer Rose objected to the Commissioner's reported statement.
41. On August 9, 2016, Deputy Superintendent wrote Officers Rose and Leary, as BPPA officers, stating in relevant part:

> As of today, August 9, 2016, no volunteers are forthcoming. The Department has decided to implement the agreement as written, except officers will not be selected from volunteers. The Department therefore will assign up to 100 officers to wear the Body Worn Cameras for a six month pilot program beginning on or before September 2, 2016 and those officers will receive the $500 compensation agreed to with the Union.

42. The Union responded by letter on August 11, expressing numerous objections to implementation of the police without voluntary participation by the patrol officers wearing BWCs. The letter attached a grievance, which BPPA proposed "be immediately submitted to expedited arbitration within the provisions of Step 5 of the CBA."
43. The BPPA's grievance alleged that "Implementation of [the mandatory BWC pilot] program violates the express provisions of the negotiated Memorandum of

Agreement on Body Worn Cameras signed on July 12, 2016, in addition to numerous other provisions of the collective bargaining agreement."

44. The BPPA's Grievance cites alleged violations of the MOA and of CBA Article IV, §1; Article VIII; Article XVI, §§ 4 & 5; and Article XVII "and any and all other relevant sections of the CBA."
45. For a remedy, the BPPA's grievance asked the City's grievance officers, or an arbitrator, to "Order City not to implement proposed body worn camera pilot program. Make whole any officers detrimentally affected by implementation of such policy. Cease and desist."
46. On August 19, 2016, Deputy Superintendent Whitman wrote Officers Rose and Leary that a "Step II hearing was held on August 18, 2016 regarding the" BWC grievance and "[t]he Department finds that there was no violation of the collective bargaining agreement."
47. BPPA responded through counsel by reiterating its request for expedited processing of the grievance by moving directly to arbitration.
48. The Commissioner now intends to deploy BWCs on Monday, September 12, 2016.
49. The parties have continued to exchange correspondence regarding further bargaining, but have not settled upon an approach short of arbitration.
50. The City has not opposed arbitration, although it reserves the right to argue that the order implementing the BWC Pilot Program is within the Commissioner's non-delegable authority.

DISCUSSION

I.

The parties agree on one legal point: the BPPA's request for an injunction against implementation of the BWC pilot program prior to arbitration raises an issue of first impression in Massachusetts. BPPA asserts that, by analogy to federal labor law, the Superior Court has authority "to enjoin employers from altering the status quo during the pendency of an arbitration." BPPA Mem. at 14-15, citing Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Technologies Corp., 230 F.3d 569, 580-582 (2d Cir. 2000) and decisions of five other federal Circuit Courts of Appeals. The City argues (Mem. at 6) that "the only injunctions

permitted under Massachusetts public employee law against government actions must be brought by the Commonwealth's Department of Labor Relations ("DLR") following an evidentiary hearing and decision on the merits by the DLR. See Mass. Gen. L. c. 150E, § 11."

The parties have found only one Massachusetts case shedding any light on this question. Director of the Division of Employee Relations of the Department of Admin. and Fin v. Labor Relations Comm'n, 370 Mass. 162 (1976) ("A&F"). That case, however, decided a narrow issue: whether G. L. c. 150E, § 9A allowed the Labor Relations Commission, upon issuing a cease and desist order against a union, to add an order requiring the parties to submit an issue to arbitration in the absence of an application for arbitration by the parties or a "prohibited practice" complaint against the public employer. Here, of course, there is no unauthorized order of a state agency and – importantly – there is a union grievance and request for arbitration thereof. Cf. id. at 173-174 (noting other scenarios involving arbitration, but saying nothing about preliminary injunctive relief to preserve the arbitrator's full remedial authority). To be sure, A&F added comments distinguishing the federal authority in private sector labor disputes upon which BPPA relies. Id. at 172, distinguishing Boys Mkts., Inc. v. Local 770, Retail Clerks, 398 U.S. 235 (1970) (holding that a union's contractual waiver of its statutory right to strike may be presumptively tied to the employer's acceptance of binding arbitration for resolution of contractual disputes). The Supreme Judicial Court noted that "no similar linkage exists in public sector cases" and that the reliance of the union "on private sector precedent **seems**, therefore to be misplaced . . .." Id. (emphasis supplied).

Even apart from the tentative wording of the A&F's *dicta* in 1976, the major differences in procedural context between this case and the A&F case allow ample room for BPPA's argument that the court may enter preliminary relief to preserve the authority of an arbitrator to order an effective remedy. An important and traditional role of this Court's equity powers – captured in the preliminary injunction standard itself (see part II below) – is to prevent the irreparable loss of rights pending adjudication of the merits.[1]

[1] Another analogy is the authority to stay a trial court decision, or to enter an injunction pending appeal. A motion to stay proceedings pending appeal requires consideration of the "likelihood of success on appeal,

There is nothing in G. L. c. 150E that appears to preempt those powers. Nor does anything in A&F's discussion of the Labor Relations Commission's limited authority speak to the Court's authority to enter a preliminary injunction to prevent the irreparable loss of rights pending arbitration.

While the question of this Court's authority to enter any injunction at all remains for resolution by the Massachusetts appellate courts, the outcome of the Motion ultimately does not turn on that issue. For purposes of the Motion, this Court assumes that it has the power to prevent irreparable harm to a party's right to obtain a full remedy from an arbitrator.

II.

BPPA seeks a preliminary injunction. It must prove a likelihood of success on the merits of the case and a balance of harm in its favor when considered in light of its likelihood of success. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980). "One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent." Shaw v. Harding, 306 Mass. 441, 449-50 (1940). A party seeking to enjoin governmental action must also ordinarily show that "the relief sought will [not] adversely affect the public." Tri-Nel Mgt. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001), citing Commonwealth v. Mass CRINC, 392 Mass. 79, 89 (1984).

A.

On the merits, the key questions are: whether the dispute is arbitrable (in whole or part) under the CBA and, if so, whether the BPPA has sufficient likelihood of succeeding on the merits at the arbitration. The answers to these questions depend upon whether the underlying decision is a non-arbitrable management prerogative, or a condition of employment that may be arbitrated without conflicting with statutes that grant power to the Police Commissioner.

---

and irreparable harm such that the balance of hardships cuts in favor of a stay." Care and Protection of Patience, 81 Mass. App. Ct. 1137 (2012) (Rule 1:28 Decision). The factors regulating the issuance of a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the stay applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

i.

There is "a presumption of arbitrability", which prevails unless the City can say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Sheriff of Suffolk County, v. AFSCME Council 93, 75 Mass. App. Ct. 340, 342-343 (2009), quoting Local No. 1710 Intl., Ass'n. of Fire Fighters v. Chicopee, 430 Mass. 417, 420-421 (1999), quoting AT&T Technologies, Inc. v. Communications Wkrs., 475 U.S. 643, 648, 650 (1986). Here, the CBA requires arbitration of a "grievance," which it defines as "any dispute concerning the interpretation, application or enforcement of this Agreement." The MOA arose out of negotiations over a successor CBA, to resolve issues that the BPPA claimed were subject to mandatory bargaining. For threshold purposes, it may be considered a written amendment of the CBA pursuant to Article VIII ("Stability of Agreement"), although the final resolution of that question on the merits is for an arbitrator. Some of the issues resolved in the MOA concern compensation or disciplinary procedures, which the CBA addresses. The court cannot say with any assurance that the entire present dispute falls outside of the arbitration clause.

In the public sector, however, BPPA must overcome another hurdle. Section 1 of St. 1962, c. 322, (the "Commissioner's Statute") grants the Police Commissioner significant non-delegable management authority over matters such as deployment, uniforms and weapons of police officers. E.g., City of Lynn v. Labor Relations Comm'n, 43 Mass. App. Ct. 172, 178-179 (1997); Malden Police Patrolmen's Association v. City of Malden, 31 Mass. L. Rptr. 485 (2013) (Wilson, J.) (denying police union's request for preliminary relief against a test program of police car GPS tracking devices and video cameras). The Supreme Judicial Court has described the Commissioner's Statute in the following terms:

> The commissioner has "authority to appoint, establish and organize the [Boston] police" department, St. 1906, c. 291, § 10, as appearing in St. 1962, c. 322, § 1, and has "cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police." St. 1906, c. 291, § 11, as appearing in St. 1962, c. 322, § 1.

City of Boston v. Boston Police Superior Officers Fed'n, 466 Mass. 210, 214 (2013). This authority may be broad enough to include an order mandating wearing BWCs, which may fairly be analogized to non-delegable decisions regarding uniforms, weapons or definition of duties:

> "[C]onsiderations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel. . . . [T]he deployment of officer personnel to meet the tasks and responsibilities of the department is a fundamental and customary prerogative of municipal management which falls squarely within [St. 1906, c. 291, § 11] . . . ." Boston v. Boston Police Patrolmen's Ass'n, 41 Mass. App. Ct. 269, 272 (1996).

Id. at 214.

Moreover, the Commissioner's Statute encompasses at least some decisions by the Commissioner to convert an assignment from voluntary to mandatory status. City of Boston v. Boston Patrolmen's Ass'n, Inc., 41 Mass. App. Ct. 269, rev. denied, 423 Mass. 1109 (1996) (vacating arbitrator's decision that the Commissioner could not convert a patrol from voluntary paid detail to mandatory overtime detail). That might include "assigning" officers temporarily to the BWC Pilot Program (although it would probably be a mistake to give too much weight to the term "assignment"). City of Boston, 466 Mass. at 215 ("by its plain language," the statute "confers nondelegable authority over the assignment and organization of the officers within the department."); City of Boston v. Boston Police Superior Officers Federation, 9 Mass. App. Ct. 898, 899 (1980) (the "assignment by the commissioner of pa police officer for temporary duty is a decision committed to the nondelegable authority of the commissioner, and was not a proper matter for arbitration.).

Given the subject matter and holdings of these cases, the Court sees no defensible distinction between the non-delegable decisions regarding uniforms, weapons, duties and assignments and the order in this case to wear BWCs as part of the standard equipment and mission of officers participating in the Pilot Program.

The BPPA cites decisions of the Commonwealth Employment Relations Board of the Massachusetts Department of Labor Relations ("ERB"), holding that the municipality violated its duty to bargain collectively before imposing certain changes in employee working conditions. The cases are significantly different. The most recent ERB decision

in this area involved surreptitious placement of GPS devices to enhance the employer's ability to discipline employees, based upon measuring productivity and performance, namely recording employees' location, idle time, distance driven, number of stops and speeding events. City of Springfield v. County and Municipal Employees, Council 93, MUP-12-2466 (2015). That case has minimal relevance here, because it did not involve explicit orders to carry and use equipment to enhance the employee's performance of his or her public duties. The ERB also held that the Shrewsbury Chief of Police had an obligation to bargain over an order requiring officers to wear bullet proof vests, but the parties did not raise (and the Board did not consider) the question of non-delegable authority. Town of Shrewsbury v. International Brotherhood of Police Officers, Local 426, 28 MLC 70 (2001). See also Town of Shrewsbury, 14 MLC 1664 (1988) (use of seat belts a mandatory subject of collective bargaining). These ERB decisions provide no persuasive authority that a mandatory BWC Pilot Program falls outside the Boston Police Commissioner's non-delegable authority.

The Commissioner's Statute therefore makes it very difficult for BPPA to argue that this court should (or even can) enjoin the Commissioner from implementing the Pilot Program at all. The Court stresses that it reaches only a preliminary prediction on the non-delegable duty issue, which remains for final resolution in the future by an arbitrator or, if appropriate, by the courts.

ii.

The MOA goes beyond simply requiring the wearing of body cameras. Among other things, it addresses access to and use of BWC videos and compensation for taking on additional duties. Those issues may have a different impact – and might be resolved differently -- as the pilot program ceases to be voluntary and becomes mandatory. BPPA has a sufficient likelihood of showing that certain aspects of implementing the BWC policy implicate mandatory subjects of bargaining, even if the decision to implement a BWC program in the first place is a non-arbitrable management right.

The City concedes that the Commissioner's Statute does not eliminate the duty to bargain over the impact of the Commissioner's decision. Thus, it may have to address the impact of eliminating the voluntary nature of the Pilot program. See generally Local 346, Intl. Bhd. of Police Officers v. Labor Relations Comm'n., 391 Mass. 429, 442 n.16

(1984) ("We have said that even if a decision is one committed to a public employer's prerogative, G. L. c. 150E, § 6, may impose a duty to bargain over the means and impact of the decision."). At least one arbitration proceeding has reached such a result, allowing a BWC program to proceed while ordering impact bargaining. See Montgomery County, Md. And Fraternal Order of Police, Montgomery County Lodge No. 35 (Oct. 30, 2015) (Ira Jaffe, Permanent Umpire) at 42-44.

If an arbitrator concludes that the MOA is an amendment to the CBA, he or she might also find that the involuntary assignment of BWCs violates the CBA as amended. There is, indeed, no real dispute that the Commissioner's order makes participation mandatory, not voluntary. On the other hand, BPPA itself may have committed a material breach of the MOA that excuses the City from performance. See generally Lease-It, Inc. v. Massachusetts Port Auth. 33 Mass. App. Ct. 391, 397 (1992) (material breach by complaining party may defeat a contract claim). Faced with a contractual obligation to "endeavor to ensure [the MOA's] successful implementation," the Union made only unimpressive efforts to convey that message. Indeed, well into August its membership remained influenced by the BPPA's pre-MOA explicit and strong "position . . . that NOBODY in the BPPA membership should volunteer for this program."

In any event, to avoid interference with the arbitrator's exclusive authority to interpret the CBA, the court expresses no position on the merits – or even the likely outcome of arbitration – but determines only that "the position [BPPA] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO, Local 2-286 v. Amoco Oil Co. (Salt Lake City Refinery), 885 F.2d 697, 704 (10th Cir. 1989) (quotations omitted).

B.

Even with a sufficient likelihood of success on the merits, BPPA's Motion cannot prevail without showing that implementing the mandatory BWC Pilot Program will cause irreparable harm to the grievance arbitration process and the participating officers. The BPPA argues that it will suffer irreparable harm because, without injunctive relief, the City's conduct will "render[] the arbitral process a hollow formality" such that even a remedy in arbitration "could not return the parties substantially to the status quo ante."

BPPA Mem. at 27, quoting Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115, 119-120 (4th Cir. 1976), 554 F.2d at 123.

It is not clear to the Court how moving forward with the BWC Pilot Program could or would frustrate an arbitration award. After hearing, an arbitrator still has power to order a halt to all or any part of the program pending good faith bargaining, except as to matters within the Commissioner's non-delegable authority. Implementation of the Pilot Project in the interim in no way impairs that power. In addition, the Union's grievance asked to "[m]ake whole any officers detrimentally affected by implementation of such policy." There is no reason why the Court must enjoin implementation of the BWC Pilot Program to protect an arbitrator's ability to make officers whole. Monetary relief, restoration of benefits and seniority, and vacating or altering any discipline or other employment perquisites remain as much within the standard repertoire of any arbitrator in this case as in any other. Even crediting the BPPA's arguments on the merits in full, implementing the program as a temporary Pilot Project does not appear to do anything irreparable.

Apart from these logical flaws, BPPA's interference argument presupposes complete success in arbitration. But other outcomes are quite plausible – and could be frustrated by the requested injunction. The arbitrator could conclude that experience with the BWC Pilot Program may provide facts that help the arbitrator understand and resolve the dispute. The arbitrator could also conclude that the pilot program would assist the parties in bargaining over, and deciding what interim or final BWC policies serve each side's interests.

These possibilities are not just hypothetical. Implementing a similar BWC program in Montgomery County, Maryland appears to have had no adverse impact on the arbitrator's powers. On the contrary, the arbitrator (or "Permanent Umpire") in the Maryland case found it beneficial to keep portions of the BWC Pilot Program in effect pending completion of good faith bargaining.[2] The principal difference between that case

[2] In his final award, after hearing, the Permanent Umpire stated (at 51):

> There are multiple reasons why I am unpersuaded that the County should be directed to rescind the BWC Pilot Program in its entirety pending the completion of good faith bargaining over the limited aspects of the BWC Pilot Program

and this one is BPPA's opposition to implementation of any portion of the BWC program prior to arbitration. That complete opposition, however, requires holding that the Commissioner lacks the management prerogatives to require officers to wear body cameras. In going to that extreme, BPPA's argument is at its weakest. The simple truth is that granting the Motion would directly frustrate the type of measured remedy adopted by the Maryland arbitrator. Denying relief here would allow an arbitrator serve the same important interests recognized in the Maryland case.

BPPA also asserts that changing the Pilot Program from voluntary to mandatory causes harm by subjecting unwilling officers to increased risks. Citing a press release about a study by the Rand Corporation (and attaching a copy of the published journal article), BPPA argues that body cameras are associated with increased assaults against police and an increase in use-of force if officers choose when to turn the BWCs on. The City has cited contrary studies, which it says are more persuasive because they concern conditions in the United States, rather than abroad. At best, in the Court's view, the state of the research is inconclusive, particularly as to implementation of BWCs in Boston. That in itself is a reason to conduct the Pilot Program here. It is also a good reason to

---

> sought to be bargained by the FOP [i.e. Fraternal Order of Police]. First and foremost, the FOP has specifically disclaimed that relief in this case. While there are important areas regarding the introduction of the BWC Pilot Program as to which the FOP sought bargaining, the FOP concurred in the adoption of a BWC initiative and concurred further that a pilot program was appropriate and should not be discontinued in this case simply because of the PLRA violations. The information obtained under the Pilot Program is necessary as a predicate to more widespread and permanent BWC initiative and may well lead to modifications being adopted to such an eventual BWC Policy. Additionally there may well be additional relevant guidance regarding best practices and other items from the Commission Regarding the Implementation and Use of Body Cameras by law Enforcement Officers,. . . The disruptive effects of directing the complete rescission and discontinuation of [the BWC Policy] pending the completion of good faith negotiations (either mid-term or otherwise) would be significant and appear to be particularly inappropriate in light of the FOP's agreement with the majority of the BWC Pilot Program's terms, the importance of continuing that program, the fact that the basic establishment of a BWC Pilot Program may well be such a strong management prerogative as to be outside the scope of mandatory bargaining in any event, and the strong public interest in the continuation of the BWC Pilot Program.

leave intact the decision of the Police Commissioner, who is charged with weighing the risks and benefits of such decisions and who has the expertise to do so.

Even the Rand Study effectively acknowledges that it has not found the cause of the numerical associations it reports. Statistical association does not equal causation. The study itself points out that, while there could be an actual change in behavior, the results are also consistent with an increase in calculated rates of assault due to an increase in reporting but not necessarily an increase in real world events: "The researchers say this could be due to officers feeling more able to report assaults once they are captured on camera – providing them the impetus and/or confidence to do so." The study's press release notes that "much more work is needed to unpick the reasons behind these surprising findings." Variation in local circumstances also calls for caution in applying study results to Boston. As the release on the Rand Report says, "[i]t may be that in some places it's a bad idea to use body-worn cameras . . . the only way you can find that out is to keep doing these tests in different kinds of places." That is essentially the City's point.

The Court is not persuaded that BWCs are more likely to increase risk to officers than to reduce it. At best, there are studies both ways. If local conditions matter (as they most likely do), then there is no study suggesting that BWCs will likely increase risk to Boston police officers. Moreover, the intuitive notion that, on average, people are less likely to misbehave while being recorded, is consistent with plausible interpretations of the Rand Study. Nothing in these studies establishes sufficient irreparable harm to warrant an injunction; on the contrary, an injunction could harm the public interest in obtaining whatever benefits the Pilot Program may provide and in obtaining the necessary information and experience to make sound decisions for the future, including decisions that could inform wise drafting of the next CBA. A key aspect of the BPPA's irreparable harm argument therefore fails. That is, if BWCs improve officer safety, or are at least neutral, then there is no harm to officer safety that must be mitigated by requiring the program to be voluntary. Particularly where the decision probably lies within the Commissioner's non-delegable authority, the Court should be very reluctant to second guess a Commissioner's decision that the benefits of the Pilot Program likely outweigh the risks.

Although the Court denies the Motion for the above reasons, it also notes that it would be particularly unfair to enjoin the Commissioner's order when the Union's alleged injury is, in significant part, self-inflicted. Cf. Second City Music, Inc. v. City of Chicago, 333 F.3d 846, 850 (7th Cir.2003) (". . . self-inflicted wounds are not irreparable injury. Only the injury inflicted by one's adversary counts for this purpose.").[3] Under the MOA, both sides shared the responsibility to implement a voluntary BWC Pilot Program. In particular, BPPA had the contractual obligation to "endeavor to ensure [the MOA's] successful implementation." Nearly everyone involved found it surprising that no officers voluntarily submitted an application to participate in the BWC Pilot Program. The Pilot Program needed only 100 volunteers out of 1200 eligible patrol officers (8.3%). The Court agrees with both sides' witnesses that, with active efforts by the BPPA to recruit volunteers from its ranks, at least one hundred volunteers likely would have materialized – certainly not zero. Had the Union mobilized even a small part of its membership, the Pilot Program would have proceeded as a voluntary program, avoiding any the negative impacts allegedly flowing from the Commissioner's orders. While the Court does not agree that BPPA engaged in misconduct or bad faith sufficient to trigger the "unclean hands" doctrine,[4] an injunction effectively rewarding the BPPA for its lackluster efforts to ensure the MOA's successful implementation would be unjust.

ORDER

For the above reasons, the Plaintiff's Motion for Injunctive Relief is DENIED.

s/ Douglas H. Wilkins
Douglas H. Wilkins
Associate Justice, Superior Court

Dated: September 9, 2016

[3] As noted above, the Union was not solely responsible for the lack of volunteers. Other factors also contributed.

[4] See Fidelity Mgmt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 200 (1996), quoting United States v. Perez-Torres, 15 F.3d 403, 407 (5th Cir.), cert. denied, 513 U.S. 840 (1994) (A person "'who comes into equity must come with clean hands. . . [T]hus 'the doors or equity' are closed 'to one tainted with inequitableness of bad faith relative to the matter in which [s]he seeks relief, however improper may have been the behavior of the' other party."). See also New York, N.H. & H. R Co. v. Pierce Coach Lines, 281 Mass. 479 , 482 (1933) ("The principle that equity will not interfere in behalf of one who is guilty of illegal or inequitable conduct in the matter with regard to which he seeks its action is well established in our jurisprudence."); Murphy v. Wachovia Bank of Delaware, N.A., 88 Mass. App. Ct. 9, 15 (2015).