

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF WORCESTER

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

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Case No. MUP-07-5034

Date Issued:

March 2, 2012

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Lisa Carmody, Esq.: Representing the City of Worcester

Michael Manning, Esq.: Representing the National Association of
Government Employees, AFL-CIO

HEARING OFFICER'S DECISION

1 Summary

2 The issue is whether the City of Worcester (City or Employer) violated Section
3 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter
4 150E (the Law) by failing to bargain in good faith with the National Association of
5 Government Employees, AFL-CIO (Union or NAGE) by refusing to allow the Union
6 President paid time off to conduct Union business and requiring that he use vacation or
7 personal time to do so, without giving the Union prior notice of this decision and an
8 opportunity to bargain to resolution or impasse. Based on the record and for the
9 reasons explained below, I conclude that the City violated the Law as alleged when it

1 refused to allow the Union President paid time off to attend National Executive Board
2 meetings and required instead that he use vacation or personal time to do so without
3 giving the Union prior notice and an opportunity to bargain to resolution or impasse over
4 that decision. However, I conclude that the City did not violate the Law when it refused
5 to allow the Union President paid time off to conduct other types of Union business.

Statement of the Case

6 On August 8, 2007, the Union filed a Charge of Prohibited Practice with the
7 Labor Relations Commission (LRC)¹ alleging that the City had engaged in prohibited
8 practices within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. On May 28,
9 2009, the Commonwealth Employment Relations Board (Board) issued a Complaint of
10 Prohibited Practice (Complaint) alleging that the City had failed to bargain in good faith
11 over its refusal to allow the Union President paid time off to conduct Union business
12 since February 9, 2007, and requiring instead that he use vacation or personal time to
13 do so.² On June 15, 2009, the City filed its Answer. On May 10, 2010, the City filed a
14 Motion to Dismiss the Complaint, claiming that the Board “has no authority under M.G.L.
15 c. 150E to issue complaints against employers and the Board has no jurisdiction over

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations (DLR) was given “all of the legal powers, authorities, responsibilities, duties, rights and obligations previously conferred on the labor relations commission.” References to the DLR include the LRC.

² Pursuant to Standing Order 2009-1 and 456 CMR 13.01(1) of the Rules and Regulations of the DLR, the Board designates Hearing Officers to preside over hearings and decide the allegations set forth in complaints for prohibited practice charges filed on or before November 14, 2007.

1 the City because no appeal has been filed by the parties in this matter” and “[n]o statute
2 or regulation exists authorizing the issuance of complaints by the [Board] and therefore
3 it has no authority to do so.” On May 18, 2010, the Union filed its opposition. On May
4 20, 2010, I denied the City’s Motion to Dismiss.

5 Pursuant to the Notice of Hearing, I conducted a hearing on May 20, 2010. I
6 conducted additional days of hearing on June 9, August 26, and August 27, 2010. The
7 parties were afforded a full opportunity to be heard, to examine and cross-examine
8 witnesses and to introduce evidence. On November 15, 2010, the Union filed its post-
9 hearing brief and on November 16, 2010, the City filed its post-hearing brief. On the
10 entire record, including my observation of the demeanor of the witnesses, I make the
11 following findings:

12 Stipulations of Fact

- 13 1. The Employer is a public employer within the meaning of Section 1 of the Law.
- 14 2. The Union is an employee organization within the meaning of Section 1 of the
15 Law.
- 16 3. The Union is the exclusive bargaining agent for a bargaining unit of employees
17 employed by the Employer.
- 18 4. Sean Maher has at all times relevant to this matter been a member of the Union
19 and has served as its President since on or about January 8, 2007.
- 20 5. Michael Lavin was the President of the Union immediately preceding the term of
21 Sean Maher. Walter Zawalich was a President of the Union immediately
22 precedent to the term of Michael Lavin.
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Relevant Contract Provisions

- 1 adjusting grievances in accordance with the Grievance Procedure and
2 for reporting to the grievant a change in the status of his grievances.
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- 4 (d) No one shall be eligible to serve as a steward unless he has been an
5 employee for one (1) year. However, if the Union is unable to recruit a
6 steward with more than one (1) year of service, then the Union may
7 submit the name of a person as an acting steward for consideration by
8 the City providing said person has more than six (6) months of service
9 with the City.
10
- 11 (e) The stewards shall work at their regular work during the first hour of
12 their respective shifts and shall report to their respective supervisor
13 immediately after lunch. Stewards shall enter and remain in the
14 department only on their respective shifts unless otherwise agreed to
15 by the department head.
16
- 17 (f) It is mutually agreed that the prompt adjustment of grievances is
18 desirable in the interest of labor relations between the employees and
19 the municipal employer.
20
- 21 (g) The provision for stewards to leave their work during working hours
22 without loss of pay is based on the understanding that the time will be
23 devoted to the prompt handling of legitimate grievances or other
24 legitimate representation functions, and that the stewards will continue
25 to work at the normal assignments at other times. The City reserves
26 the right to stop paying for time that stewards or representatives spend
27 in conferences with the management during regularly scheduled
28 working hours if, in the City's judgment, the privilege is being abused.
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- 30 (h) Stewards and representatives will be considered on a regular eight (8)
31 hour shift as far as grievance pay is concerned and under no
32 circumstances shall overtime be accrued.
33
- 34 (i) The collection of dues or assessments and solicitation of membership
35 and consultation about Union affairs shall be restricted to non-working
36 hours.
37
- 38 (j) The City will authorize one (1) employee from the Department of Public
39 Works night operations to attend the monthly membership meetings of
40 the Union. This release time shall only cover the time involved in the
41 meeting and reasonable transportation time to and from the meeting.

This authorization shall not be granted to an employee who is the only employee available on such shift or during emergencies.

2. UNION BUSINESS AGENT LEAVE OF ABSENCE

Upon receipt of written notification that a bargaining unit employee has been elected President or appointed Union Business Agent of Local 495, S.E.I.U., the City Manager may in his discretion grant a two (2) year leave of absence without pay to such employee.

While such employee is on an authorized leave of absence for such purpose, he/she will be allowed to participate at his/her expense in the City's insurance program in the same manner as other employees in authorized leave of absence without pay status.

**ARTICLE 11
GRIEVANCE PROCEDURE**

...

2(o). The employee or Union shall have reasonable access to public information, in accordance with the Massachusetts General Laws, c. 66, Section 10, for proper investigation of the merit of the grievance. The employee or Union shall have the reasonable right to call necessary witnesses subject to the operational and staff needs of the City as determined by the department head, and to have himself and them excused from duty for the hearing before the arbitrator. No grievant, steward, representative or agent of the Union, nor any witnesses called, shall receive compensation from the City for those hours spent in connection with any activity under this Article or hearing of any grievance, except as provided herein or in Article 6, Union Representatives. For the hearing before an arbitrator or City Manager or his representative, the employee or authorized witnesses shall be excused from duty, and he shall receive his regular pay for those hours. In no event will overtime compensation be paid for hours spent in connection with any activity under this Article.

**ARTICLE 22
UNION DELEGATE LEAVE OF ABSENCE**

1. Upon receipt of written notification that an employee has been duly elected as a delegate, the City shall allow a leave of absence without loss of compensation for the following:

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State Labor Convention, AFL-CIO: four (4) working days, six (6) delegates.

National Convention, Service Employees International Union: four (4) working days, two (2) delegates.

Such leave of absence for attendance at the State Union convention exclusively may be permitted for one (1) convention during a calendar year, and such leave of absence for attendance at the National Convention may be permitted for one (1) convention every fourth year.

2. It is understood by the parties to this Agreement that the total number of delegates in the aggregate from all City departments who will be authorized leave to attend State Labor and National Conventions, shall not exceed six and two employees, respectively, from all units represented by the Union, notwithstanding the fact that the above clause may also appear in other agreements with the Union.

**ARTICLE 23
STABILITY OF AGREEMENT**

1. No agreement, understanding, alteration or variation of this agreement's terms and provisions herein contained shall bind the parties unless made and executed in writing by the parties hereto.

...

**ARTICLE 24
SAVINGS CLAUSE**

...

2. All job benefits hereto permitted by ordinance or law, or practices or policies duly authorized by the City Manager in writing and enjoyed by employees, which are not specifically provided for or abridged in this agreement are hereby protected.

1 observer, but these events occurred before the beginning of his work shift, so he did not
2 request leave. Lavin did not investigate grievances, did not attend disciplinary hearings,
3 civil service hearings or other administrative hearings. While Lavin was President,
4 Union Business Agent Bernard Loughnane (Loughnane), represented members at
5 disciplinary, civil service, and other administrative hearings. As Union Business Agent,
6 Loughnane also investigated grievances, attended grievance mediations and led
7 negotiations at all bargaining sessions.

8 At some point during Lavin's presidency, his supervisor, Lieutenant Lawrence
9 Sullivan (Sullivan), directed Lavin to put in writing all requests to attend National
10 Conventions. Sullivan did not instruct Lavin to provide documentation for other types of
11 Union business; instead, those events depended on the circumstances that existed at
12 the time that Lavin made his requests. For monthly Union meetings, Lavin provided
13 verbal notice to Sullivan. Lavin testified that he did not recall whether the City denied
14 any of his requests for release time to conduct Union business, nor did he specify
15 whether the City granted those requests with or without pay.

16 The parties jointly introduced an exhibit that included several written requests
17 that Lavin made while he was Union President⁷ to attend: "National Executive Officers
18 Meetings;" a "National [U]nion [M]eeting;" a "NAGE (Union) Convention;" and, "National

⁷ One of the documents in this exhibit showed that Lavin made a request for time off in June of 2007. Lavin was no longer Union President at that time; therefore, I find that this request is not relevant.

1 Executive Board Meeting[s].” Only two of Lavin’s requests to attend National Executive
2 Board Meetings in November 2005 and September 2006, specifically requested paid
3 time off. Lavin’s September 2006 request contained an additional signature on the
4 document (other than Lavin’s), with the printed word “Approved” below the signature.
5 Lavins’ November 2005 request also contained an additional signature, but did not
6 include the word “Approved.” Lavin’s remaining requests did not specify whether he
7 sought paid release time, but they did contain additional signatures and only one
8 included the word “Approved.”⁸

9 **Mahe’s Presidency**

10 Maher became Union President in or about January of 2007,⁹ and he took a
11 more active role in the position than Lavin had taken. Maher requested paid release
12 time for activities that he felt would foster better labor relations and improve the welfare
13 of Union members, which included attending mediations and arbitrations for cases that
14 affected multiple members. Although the record is unclear as to the total number of
15 requests for leave made by Maher in his first few months as Union President, the record
16 does show that on January 8 and 22, 2007, Maher wrote to City Manager Michael
17 O’Brien (O’Brien) and requested a “reasonable amount of time to attend to, and conduct
18 recognized Union Business during working hours....I respectfully request that at this
19 time, that I be allowed the reasonable time necessary, upon reasonable prior notice to

⁸ Lavin did not testify about whether an additional signature alone, without the word “Approved,” indicated an actual approval of a request.

1 my immediate supervisor, to take care of this business.” By letter dated February 9,
2 2007, Moschos denied Maher’s two January requests, stating that, “[t]he City has
3 considered your request for paid leave to handle Union business. However, in
4 reviewing the Local 495 contract, the City finds that the contract does not provide for
5 such paid leave as far as the President of the Local.”

6 **Maher’s requests for Union Leave: March 2007 – September 2008**

7 From March 2007 through June 2008, Maher requested Union leave
8 approximately 25 times.¹⁰ Examples of Union leave for which the City paid Maher
9 include: a meeting with the City’s Human Resources Director, Nina Gallagher
10 (Gallagher); a meeting about a terminated employee; a National Executive Board
11 Meeting in June 2007;¹¹ certain Insurance Advisory Committee (IAC)

⁹ Maher is also a Union National Executive Board member.

¹⁰ Due to the multitude of Maher’s requests over the years, I summarize the requests and provide examples of those that the City granted or denied, rather than specifically detailing each and every request. Regarding certain requests, the record is unclear as to whether the City granted Maher paid release time; therefore, I address only those requests for which I can determine the stated purpose and whether the City granted or denied paid release time based on the documentary or testimonial evidence.

¹¹ Originally, the City did not grant Maher’s request for paid release time to attend this meeting, but it later restored his pay for the three days that he was on unpaid leave.

1 meetings¹² and a National Convention in June 2008.¹³ Examples of Union leave for
2 which the City did not grant Maher paid release time include:¹⁴ mediations, termination
3 meetings, meetings with Loughnane, a City Council subcommittee meeting, a DLR
4 hearing and a National Executive Board meeting in December of 2007. In May of 2008,
5 Maher requested a 90-day unpaid leave of absence to conduct Union business, but the
6 City denied this request.

7 Around August or September of 2008, the Union and City participated in a
8 mediation regarding the instant case. At its conclusion, the parties agreed that prior to
9 the City granting (or denying) any of Maher's requests for Union release time, he would

¹² Maher testified that he was released with pay for some IAC meetings, but not for others. Matthew Labovites (Labovites), Assistant Commissioner for Operations for the Department, testified that Maher was released with pay with the following two exceptions: 1) on one occasion, the City was unclear about whether the meeting was a "true" IAC meeting or one for Union personnel only; and, 2) on another occasion, the City was delayed in notifying Maher that he had been approved for paid release time.

¹³ Regarding National Conventions and National Executive Board meetings, the parties' testimony and documents are unclear or conflict about what event took place, when and by which National Union. For example, SEIU and NAGE hold National Executive Board meetings twice every year, and hold separate National Conventions once every four years, not occurring in the same year. Regarding Maher's written requests for paid Union release time, he often referred generally to "SEIU, NAGE" or failed to specify any union. Neither party provided testimonial evidence that explained the relationship between SEIU and NAGE.

¹⁴ Maher testified that when the City denied his requests for paid Union release time, he would either use sick, vacation, or personal leave, or take the time as unpaid. For the purpose of this case, I distinguish only between paid and unpaid release time, with "unpaid" referring to those instances where Maher either used his sick, vacation or personal leave or took the time as unpaid.

1 first submit those requests, with supporting documentation, to Labovites.¹⁵ The parties
2 also agreed that Maher's requests would be submitted in writing (or voicemail if it was
3 requested on short notice). The purpose of that agreement was to formally centralize
4 the request process, which allowed the City to make informed decisions about whether
5 to release Maher with pay.

6 **Maher's Requests for Union Leave: September 2008 – July 2009**

7 From September 2008 through July 2009, Maher requested Union leave
8 approximately 20 times. Examples of Union leave for which the City granted Maher's
9 request for paid Union release time include: a National Executive Board meeting in
10 December 2008;¹⁶ three or four meetings on layoff impact bargaining; meetings with the
11 City over health insurance; and a meeting about layoff orientation. Examples of Union
12 leave for which the City did not grant Maher's requests for paid release time include: a
13 National Executive Board Meeting in June 2009; mediation; a meeting with a coalition of
14 other unions; and an internal Union meeting.

15 **Maher's Requests for Union Leave – July 2009 through June 2010**

16 On July 10, 2009, the City wrote to Maher and advised him that "effective
17 immediately, the Department will only release you from your daily work assignments
18 during your regularly-scheduled work shift, with or without pay in accordance with the

¹⁵ Prior to this, Maher requested Union release time from a foreman or general foreman in his Division.

1 terms of the collective bargaining agreement between the City and Local 495,
2 specifically Article 6 and Article 22.” The City also determined that Maher’s request for
3 release time on June 3 – 5, 2009, to attend the National Executive Board Meeting was
4 contrary to the Department’s leave policy based on an “inadequate” flight itinerary that
5 he provided to substantiate the request.

6 From July 2009 through June 2010, Maher requested Union leave approximately
7 44 times.¹⁷ Examples of Union leave for which the City granted Maher paid release
8 time include: mediation; DLR proceedings; arbitrations; a disciplinary meeting; IAC
9 meetings; meetings regarding employees; a meeting to review a draft of an integrated
10 agreement; a meeting with Moschos regarding the sale of the Worcester Airport; and a
11 meeting with Moschos regarding sick leave at the Department. Examples of Union
12 leave for which the City did not grant Maher paid release time include: meetings with
13 the teachers’ union; a meeting regarding arbitration; various Union meetings;

¹⁶ Although Labovites testified that the City did not grant Maher’s request for paid Union release time to attend this meeting, I credit Maher’s testimony that the City did grant him the paid release time based on the documents presented.

¹⁷ The documentary evidence shows that some of Maher’s written requests to the City for paid Union release time were non-specific. While Maher testified to the specific purposes for some of his requests, he failed to specify the nature for his other requests. For example, on August 6, 2009, Maher informed the City that he was requesting paid Union release time to: attend a meeting with the teachers union; meet with a candidate for City Council; and attend a termination meeting. However, on July 29, 2009, Maher informed the City that, “I will also be leaving work on Thursday August 6, 2009 from 9:30 A.M. I will be on Union Business representing NAGE Local 495 for a meeting for 2 hours or less that morning.”

1 preparation for DLR charges; a civil service hearing; and a National Executive Board
2 Meeting in December of 2009.

3 **1968 Unwritten Agreement**

4 Since 1968, Moschos has represented the City in its contract negotiations with
5 Local 495.¹⁸ In 1968, the Union and the City entered into an unwritten agreement at the
6 bargaining table, which provided that City employees who participate in bargaining
7 sessions would be eligible for paid release, including an hour preparation time and a
8 half-hour travel time, but not for overtime. Based on his established experience,
9 Moschos understood that the City deems contract administration and issues arising out
10 of the contract as extensions of collective bargaining and, therefore, the City granted
11 Maher's request for paid release time to attend negotiations on contract issues.
12 However, Moschos did not recall whether he ever discussed this unwritten agreement
13 with Maher.

14 **Reasonableness Standard**

15 Labovites was unaware of the unwritten agreement and, instead, testified that the
16 City based its paid leave determinations on the "reasonableness" standard, which
17 granted Maher's requests for paid release time to attend arbitrations and mediations if
18 he was the grievant, a witness, or acting as the steward. Based on this standard, the
19 City also granted Maher's requests for paid release time to attend: (1) employee

1 disciplinary or investigatory meetings, if he was acting as the steward; (2) meetings with
2 City representatives, such as department heads; and, (3) IAC meetings, notwithstanding
3 the two exceptions referenced above in footnote 12.

4 Opinion

5 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
6 when it unilaterally changes an existing condition of employment or implements a new
7 condition of employment involving a mandatory subject of bargaining without first giving
8 its employees' exclusive bargaining representative notice and an opportunity to bargain
9 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
10 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
11 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 64
12 (2003). The employer's obligation to bargain before changing conditions of employment
13 extends to working conditions established through past practice, as well as those
14 specified in a collective bargaining agreement. Town of Wilmington, 9 MLC 1694, 1699
15 (1983). To establish a violation, a union must show that: (1) the employer changed an
16 existing practice or instituted a new one; (2) the change had an impact on a mandatory
17 subject of bargaining; and, (3) the change was implemented without prior notice to the
18 union or an opportunity to bargain to resolution or impasse. Commonwealth of

¹⁸ Prior to Moschos' position as Special Counsel to the City, he also worked for the City as Counsel for Labor Relations and Assistant City Manager, and then Director of Labor Relations from 1968 to the early 1980s.

1 Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45 (2001);
2 Commonwealth of Massachusetts, 27 MLC 11, 13 (2000).

3 To determine whether a binding past practice exists, the Board "analyzes the
4 combination of facts upon which the alleged practice is predicated, including whether
5 the practice has occurred with regularity over a sufficient period of time so that it is
6 reasonable to expect that the practice will continue." See Commonwealth of
7 Massachusetts 30 MLC at 85; see also Commonwealth of Massachusetts, 23 MLC 171,
8 172 (1997). While the Board "inquires whether employees in the unit have a reasonable
9 expectation that the practice in question will continue," City of Westfield, 22 MLC 1394,
10 1404 (H.O. 1996), aff'd, 25 MLC 163 (1999), the Board also focuses on the fact that "[a]
11 past practice is a practice which is unequivocal, has existed substantially unvaried for a
12 reasonable period of time and is known and is accepted by both parties." Town of
13 Dedham School Committee, 5 MLC 1836, 1839 (1978). It is well-established that paid
14 leave for union business is a mandatory subject of bargaining. City of Boston, 26 MLC
15 80 (2000); City of Lawrence, 12 MLC 1604 (1986).

16 **1. National Conventions and Negotiation Meetings**

17 To determine whether a binding past practice exists, I begin by assessing the
18 City's practice of allowing the Union President paid time off to conduct various types of
19 Union business. Regarding the National Conventions, the evidence establishes that,
20 pursuant to Article 22 of the Agreement, both Lavin and Maher made requests for paid
21 leave to attend National Convention meetings, and the City granted those requests.

1 The evidence also establishes that, pursuant to the "unwritten agreement" that Moschos
2 described, the City granted both Lavin's and Maher's requests for paid release time to
3 attend negotiation meetings. Thus, there was a clear practice of allowing Union
4 Presidents paid release time to attend National Convention and negotiation meetings.
5 Because the City did not deny Maher's requests to attend these, I find no violation of the
6 Law on this issue.

7 **2. National Executive Board meetings**

8 The evidence shows that the City consistently granted Lavin's requests for paid
9 release time to attend National Executive Board meetings in November of 2005 and
10 September of 2006. However, the City changed this consistent practice in June of
11 2007¹⁹ and December of 2007, when it denied Maher's requests for paid leave to attend
12 the same meetings. While the City granted Maher's request for paid leave to attend the
13 National Executive Board meeting in December of 2008, it again denied his paid leave
14 request to attend the event in June of 2009. The City argues that, because "Lavin never
15 testified about having made requests to attend National Executive Board meetings
16 when he was President, any requests by Mr. Maher to attend these meetings or any
17 meeting other than the [N]ational [C]onvention are irrelevant to the Complaint."
18 However, the documentary evidence shows that the City granted Lavin's written
19 requests for paid leave to attend the November 2005 and September 2006 National

¹⁹ As mentioned above in footnote 11, the City initially denied Maher's request for paid release time to attend this event, but it later restored his pay for the three days that he took the time as unpaid.

1 Executive Board meetings; thus, Maher's requests to attend the National Executive
2 Board meetings fall within the scope of the Complaint.

3 Relying on Article 24, Section 2 of the Agreement, the City argues that the only
4 enforceable past practices are those that are "authorized by the City Manager in
5 writing," and the Union failed to present evidence establishing "that the City Manager
6 was aware of any of Lavin's requests for paid time off to conduct [U]nion business."
7 The City contends that Section 1 of the Law defines a public employer "as the City's
8 chief executive officer," and that under the City's Charter,²⁰ "only the City Manager or
9 other representative duly designated by the City's Manager to act on his behalf can bind
10 the City with respect to matters of collective bargaining." Therefore, the City argues that
11 without "any evidence concerning the City Manager's knowledge and acquiescence of
12 any of Mr. Lavin's paid leave requests, no binding past practice can exist." However, it
13 is well-established that a public employer's obligation to bargain before changing
14 conditions of employment extends to working conditions established through past
15 practice, as well as those specified in a collective bargaining agreement. Town of
16 Wilmington, 9 MLC at 1699. I find that the Union met its burden of showing that the City
17 had established a consistent practice of granting Lavin paid leave to attend National
18 Executive Board meetings and unilaterally changed this practice when it denied Maher's

²⁰ At the hearing, the City requested that the hearing officer take judicial notice of the City's Charter. The Union did not object to this request, and I granted it.

1 requests for paid leave to attend those same events in June of 2007, December of 2007
2 and June of 2009.

3 Relying on Article 23, Section 1, the City also argues that the Union waived its
4 right to bargain over the issue of paid Union release time. Where an employer raises
5 the affirmative defense of contract waiver, it must show that the union knowingly and
6 unmistakably waived its right. Town of Andover, 28 MLC, 264, 270 (2002) (citing Town
7 of Mansfield, 25 MLC 14, 15 (1998)). The employee bears the burden of proving that
8 the contract clearly, unequivocally and specifically authorizes its actions. Town of
9 Andover, 28 MLC at 270 (citing City of Boston v. Labor Relations Commission, 48
10 Mass. App. Ct. 169, 174 (1999)). Where the parties' agreement is silent on an issue, it
11 must be shown that the matter allegedly waived was fully explored and consciously
12 yielded. Commonwealth of Massachusetts, 5 MLC 1097, 1099 (1978) (citing City of
13 Everett, 2 MLC 1471, 1475 (1976)). Further, the Board holds that zipper clauses do not
14 waive a union's right to bargain during the term of the contract about a change to an
15 existing practice where the contract is silent. Commonwealth of Massachusetts, 17
16 MLC 1007, 1014 (1990); (citing Massachusetts Board of Regents of Higher Education,
17 15 MLC 1265, 1271 n. 7). Here, the parties' Agreement is silent on the subject of
18 requests for paid leave to attend National Executive Board meetings. The City
19 presented no evidence of bargaining history showing that the Union, in a clear,
20 unmistakable and unequivocal manner, fully explored and consciously yielded its rights
21 to bargain over this issue. Commonwealth of Massachusetts, 5 MLC at 1099; see also

1 School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 569
2 (1983) (a waiver must be shown clearly, unmistakably, and unequivocally).

3 Even though the National Executive Board meetings occur only twice per year,
4 and even though Lavin only attended one meeting in November of 2005, and one
5 meeting in September of 2006, the City established a consistent practice of granting
6 Lavin's requests for paid leave to attend these events, and unilaterally changed that
7 practice when it denied Maher's June 2007, December 2007 and June 2009 requests to
8 attend the same events. See City of Newton 29 MLC 186 (2003) (a condition of
9 employment may be found despite sporadic or infrequent activity where a consistent
10 practice that applies to rare circumstances is followed each time the circumstances
11 precipitating the practice recur). There is no evidence that the City gave the Union
12 notice and an opportunity to bargain prior to changing this practice. Consequently, I find
13 that the City violated the Law by denying Maher's June 2007, December 2007 and June
14 2009 requests for paid leave to attend the Union's National Executive Board meetings.²¹

15 **3. City Council, Grievance and Other Union-Related Meetings**

²¹ The City also argues that it was forced to require Maher to use personal or vacation leave whenever his union activities occurred during his normal working hours to avoid violating the Commonwealth's Conflict of Interest Law, G.L. c. 268A, Sections 1 and 23 (b)(2). It contends that Maher would realize an "unwarranted privilege" when he simultaneously served: (1) as a municipal employee, who received regular compensation from the City; (2) as the Union President, who received an additional \$200 per month from Local 495; and as National Executive Board member, who received an extra \$350 per month from the National Union. I am not persuaded by this argument because it is speculative, and the Board does not adjudicate potential violations of G.L. c.268A.

1 The evidence shows that the City established a past practice of consistently
2 denying Lavin's requests for paid leave to attend City Council, grievance and other
3 Union-related meetings, and maintained this past practice when it denied Maher's
4 requests for paid leave to attend the same events. Consequently, the City did not
5 change the past practice when it denied Maher's requests to attend these events.

6 Further, Article 6, Section 1 of the parties' Agreement grants "Union Stewards
7 and other representatives" paid time "up to a maximum of thirty (30) minutes per
8 grievance, but not to exceed a total of three (3) hours per week" to investigate
9 grievances and attend grievance meetings. While Article 6, Section 1 extends the right
10 to paid time to the Union President only "in the case of absence of the designated
11 Steward," Article 11, Section 2(o) states that "No grievant, steward, representative or
12 agent of the Union, nor any witness called, shall receive compensation from the City for
13 those hours spent in connection with any activity under this Article or hearing of any
14 grievance, except as provided herein or in Article 6, Union Representatives." Here, the
15 Union does not assert that Maher was exercising his Article 6 rights to act as a steward
16 or a witness when he requested leave to attend City Council, grievance and other
17 Union-related meetings. Accordingly, I find that the City did not violate the Law by
18 denying Maher's requests for paid release time to attend City Council meetings,
19 grievances and other types of Union business because the City did not change a
20 consistent past practice of allowing paid release time for the Union President to attend
21 these events, or change the practice established by the Agreement.

1 The Union does not specifically argue that the City had a past practice of
2 granting paid release time for Union presidents to attend these events.²² Instead, the
3 Union argues that Lavin's and Maher's presidencies cannot be fairly compared because
4 their work shifts differed (i.e., Lavin was scheduled to work the 3:00 p.m. to 11:00 p.m.
5 evening shift while Maher was scheduled to work the 7:30 a.m. to 3:30 p.m. day shift).
6 The Union contends that Lavin's work schedule did not generate the same frequency of
7 requests for paid release time as compared to Maher's work schedule because the
8 majority of occasions on which a Union President generally conducts Union business
9 occur during the day shift. I am not persuaded by these arguments. The issue here is
10 not the number of Maher's requests for paid release time, but whether the City
11 unilaterally changed its practice of granting paid Union release time when Maher
12 became Union President.

13 The Union also contends that Lavin's presidency differed from to Maher's
14 presidency because "Maher assumed responsibility for was a very different entity than
15 that to which Lavin was elected to lead so very long ago." The evidence shows that
16 sometime in the late 1990s or early 2000s, the Union changed Local 495's jurisdiction
17 by removing all non-Worcester municipalities. During this change, Lavin remained
18 Union President and continued to preside over the Union's membership for several
19 years until Maher's term commenced in early 2007. Accordingly, I find that the Union

²² To the extent that the Union contends that it did specifically argue that there was such a change in past practice, I do not find evidence to support this argument.

1 "entity" inherited by Maher was more similar to the one over which Lavin presided; thus,
2 there is no factual merit to this argument.²³

3 Conclusion

4 Based on the record and for the reasons explained above, I conclude that the
5 City violated Section 10(a)(5) of the Law when it refused to grant the Union President
6 paid time off to attend National Executive Board meetings, requiring instead that he use
7 vacation and personal time to do so. However, I conclude that the City did not violate
8 Section 10(a)(5) of the Law when it refused to grant the Union President paid time off to
9 conduct other types of Union business and required that he use vacation or personal
10 time to do so.

11 ORDER

12 WHEREFORE, based on the foregoing, it is hereby ordered that the City of
13 Worcester shall:

- 14 1. Cease and desist from:
 - 15 a. Refusing to grant the Union President's requests for paid Union release time
 - 16 to attend National Executive Board meetings without first giving the Union
 - 17 notice and an opportunity to bargain to resolution or impasse;

²³ The Union also argues that Lavin was not always required to provide the City with written requests for release time, as the City had required from Maher, and that the City repudiated Article 6, Section 2 of the Agreement when it denied Maher's request for a 90-day unpaid leave of absence to conduct Union business. I need not address either of these arguments because they are not at issue in the Complaint. However, even if I were to reach these arguments, I would find them unmeritorious. It is undisputed that in or about August or September of 2008, Maher agreed to provide Labovites with written requests for release time, unless circumstantial short-notice required a telephone request or voicemail message. Also, in their negotiations, the parties' agreed that the City's decision to grant a leave of absence under Article 6, Section 2 would be a discretionary matter for the City Manager to decide.

- 1 b. Failing or refusing to bargain in good faith with the Union to resolution or
2 impasse before changing the practice of granting the Union President's
3 requests for paid Union release time to attend National Executive Board
4 meetings;

- 5 c. In any like or similar manner interfering with, restraining or coercing
6 employees in the exercise of their rights protected under the Law.
7

- 8 2. Take the following affirmative action that will effectuate the purpose of the Law

- 9 a. Restore the practice of granting the Union President's requests for paid
10 Union release time to attend National Executive Board meetings that existed
11 prior to February 9, 2007.

- 12 b. Upon request, bargain with the Union, in good faith to resolution or impasse
13 before implementing any changes to the existing practice of granting the
14 Union President's requests for paid Union release time to attend National
15 Executive Board meetings.

- 16 c. Make the Union President(s) whole for any economic losses suffered as a
17 result of the City's unlawful action plus interest on all sums owed at the rate
18 specified in M.G.L. c. 231, Section 6I, compounded quarterly;

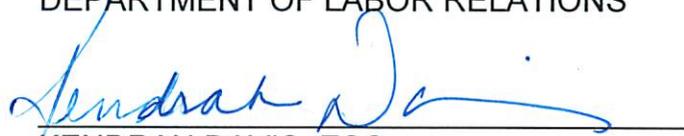
- 19 d. Sign and post immediately in conspicuous places employees usually
20 congregate or where notices to employees are usually posted, including
21 electronically, if the Employer customarily communicates to its employees via
22 intranet or e-mail, and maintain for a period of thirty (30) consecutive days
23 thereafter signed copies of the attached Notice to Employees;

- 24 e. Notify the DLR within thirty (30) days after the date of service of this decision
25 and order of the steps taken to comply with its terms.

- 26
- 27

28
29 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the City of Worcester (City) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally changing the practice of granting requests by the President of the National Association of Government Employees (Union) for paid Union release time to attend National Executive Board meetings.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; 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.

The City assures its employees that:

WE WILL NOT refuse to grant the Union President's requests for paid Union release time to attend National Executive Board meetings without first giving the Union notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse before changing the practice of granting the Union President's requests for paid Union release time to attend National Executive Board meetings

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

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

- 1) Restore the practice of granting the Union President's requests for paid Union release time to attend National Executive Board meetings that was in place prior to February 9, 2007.
- 2) Upon request, bargain with the Union, in good faith to resolution or impasse before implementing any changes to the practice of granting the Union President's requests for paid Union release time to attend National Executive Board meetings.
- 3) Make whole Union President(s), for any economic losses suffered as a result of the City's unlawful action plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

For the City

Date

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

This notice must remain 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 its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).