

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF NEW BEDFORD

and

AFSCME COUNCIL 93,  
AFL-CIO

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Case Nos. MUP-09-5581  
MUP-09-5599

Date Issued: November 17, 2011

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Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Jane Medeiros Friedman, Esq. - Representing the City of New Bedford

Joseph L. DeLorey, Esq. - Representing AFSCME Council 93,  
AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of New Bedford (City) violated Section  
2 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: a) repudiating a settlement  
3 agreement when it laid off certain unit members on or about February 13, 2009 (Count  
4 I); b) failing and refusing to bargain about the continued imposition of a weekly one-hour  
5 furlough after February 13, 2009 (Count II); and c) unilaterally reducing unit members'  
6 hours of work when it implemented half-day furloughs in August 2009 (Count III). The  
7 City also allegedly violated Section 10(a)(6) and, derivatively, Section 10(a)(1) of the  
8 Law by failing to participate in good faith in mediation under the auspices of the

1 Department of Labor Relations (DLR or Department)<sup>1</sup> (Count IV). I find that the City  
2 violated the Law as alleged in Counts III and Count IV but dismiss Counts I and II.

3 STATEMENT OF THE CASE

4 On August 10, 2009, AFSCME Council 93, AFL-CIO (Union) filed a charge with  
5 the DLR in Case No. MUP-09-5581, alleging that the City of New Bedford (City) had  
6 violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the  
7 Law). On August 25, 2009, the Union filed a charge in Case No. MUP-09-5599,  
8 alleging that the City violated Sections 10(a)(5), (6) and (1) of the Law. A Department  
9 investigator conducted separate investigations of the two cases on October 5, 2009.  
10 On October 30, 2009, the investigator issued a complaint of prohibited practice in Case  
11 No. MUP-09-5581 and a complaint and partial dismissal in Case No. MUP-09-5599.

12 The Union subsequently filed a request for review of the partial dismissal in Case  
13 No. MUP-09-5599 pursuant to Department Rule 456 CMR 15.04(3). On March 3, 2010,  
14 the Board reversed the partial dismissal and remanded Case No. MUP-09-5599 to the  
15 investigator to issue a complaint consistent with its ruling. The investigator  
16 subsequently consolidated Case No. MUP-09-5599 with Case No. MUP-09-5581. On  
17 March 31, 2010, the investigator issued a consolidated, amended complaint for both  
18 cases. The City filed its answer to the amended complaint on April 14, 2010.

19 I conducted a hearing on December 10, 2011, December 16, 2010, February 15,  
20 2011, February 18, 2011, and April 6, 2011, at which time all parties had the opportunity  
21 to be heard, to examine witnesses and to introduce evidence On July 18, 2011, the

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<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2011, the Division of Labor Relations is now the Department of Labor Relations.

1 parties filed post-hearing briefs. Upon review of the entire record, including my  
2 observation of the demeanor of witnesses, I make the following findings of fact and  
3 render the following decision.

4 FINDINGS OF FACT<sup>2</sup>

5 Weekly One-Hour Furloughs

6 The Union is the exclusive bargaining representative for certain employees of the  
7 City in the Classification and Compensation Plan referred to as Unit A and Unit B. The  
8 City and the Union were parties to a collective bargaining agreement that, by its terms,  
9 was in effect from July 1, 2006 through June 30, 2009 (2006-2009 Agreement).<sup>3</sup> In mid-  
10 May 2008, the City's Mayor Scott Lang (Mayor Lang) held a meeting in his office with  
11 Union local president Mark Messier (Messier). The City's special labor negotiator Arthur  
12 Caron, Esq. (Caron), the City's auditor/acting chief financial officer Peter Schmidt

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<sup>2</sup> The Department's jurisdiction in this matter is uncontested.

<sup>3</sup> Article XXXVI of the 2006-2009 Agreement states in pertinent part:

This Agreement shall remain in full force and effect for the term beginning the first day of July 2006 and ending the thirtieth day of June 2009. (Emphasis in original). It shall continue in effect from year to year thereafter unless either party shall notify the other in writing at least sixty (60) days prior to the end of the term, or at least sixty (60) days prior to the end of any subsequent yearly period, that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than thirty (30) days prior to the end of the yearly term then in effect; this Agreement shall remain in full force and effect during the period of negotiations and until notice of termination of this Agreement is provided to the other party in the manner set forth in the following paragraph.

In the event that either party desires to terminate the Agreement, written notice must be given the other party not less than ten (10) days prior to the desired termination date, which date shall not be before the end of the last completed yearly term of the Agreement.

1 (Schmidt), and Union business agent Michael Medeiros (Medeiros) also were present at  
2 the meeting. The Mayor talked about the City's fiscal situation and pointed out that  
3 there was a shortfall of approximately \$960,000 in the City's budget for fiscal year 2009  
4 (FY09).<sup>4</sup> In light of the budgetary shortfall, he asked the Union whether it would agree  
5 to take weekly one-hour furloughs. He commented that he preferred that unit members  
6 take weekly one-hour furloughs instead of the City laying off employees. However, if  
7 the Union would not agree to take the furloughs, the City would lay off unit members.  
8 Messier responded that the Union needed to hold a general membership meeting and  
9 to take a vote on the issue. In response to the Mayor's inquiry about how quickly such a  
10 meeting could take place, Messier indicated that the Union needed to give members  
11 notice ten days in advance of the meeting. Mayor Lang then offered to have the City  
12 distribute notices of the meeting and the vote with unit members' paychecks. The  
13 Mayor also suggested that the Union use the Keefe Middle School Auditorium as the  
14 location for the meeting, and the Union agreed. Thereafter, unit members received  
15 copies of the following document<sup>5</sup> with their paychecks:<sup>6</sup>

16 NOTICE OF AFSCME COUNCIL 93 LOCAL 851 MEETING

17 Mayor Scott Lang will address the Local,

18 TOPIC:  
19  
20  
21

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<sup>4</sup> The budgetary shortfall resulted from increased salary, health insurance, and pension costs.

<sup>5</sup> The City sent a draft copy of the notice to the Union prior to its issuance to unit members, and the Union made several revisions that were incorporated in the final draft.

<sup>6</sup> The City previously had not sent out notices about union meetings along with unit members' paychecks.

1 City Budget

2  
3 Thursday, June 5, 2008 at 4:30 p.m.

4  
5 LOCATION:

6  
7 New Keith Middle School Auditorium

8  
9 225 Hathaway Blvd. New Bedford MA 02740

10  
11 A vote will be taken which could affect your employment with the City of New Bedford.

12  
13 Please plan to attend<sup>7</sup>

14 On June 5, 2008, approximately 300 unit members attended the meeting at the  
15 Keith Middle School, which lasted nearly seventy-five minutes. Messier opened the  
16 meeting and introduced Mayor Lang.<sup>8</sup> The Mayor spoke about the financial hardships  
17 that the City and the Commonwealth faced, the budget shortfall in the City's FY09  
18 budget, and the City's proposal that unit members take weekly one-hour furloughs for  
19 fifty-two weeks or a total of six and one-half days.<sup>9</sup> Mayor Lang stated that if the Union  
20 accepted the furloughs, there would be no layoffs. Further, he commented that any  
21 union who did not agree to the furlough program would incur layoffs, if layoffs were  
22 needed. He instructed unit members to look to the left and to the right and opined that  
23 one of the employees seated next to them likely would lose their jobs if the Union did  
24 not accept the furlough program. Mayor Lang then accepted questions from the  
25 audience. Unit members posed between twenty and twenty-five questions to the

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<sup>7</sup> Messier and other members of the Union local's leadership also verbally informed unit members about the meeting and the vote.

<sup>8</sup> Caron accompanied Mayor Lang to the meeting.

<sup>9</sup> Mayor Lang discussed how unit members potentially could take half-day furloughs or other combinations of time in lieu of taking the weekly one-hour furlough as long as the total furlough time equaled six and one-half days.

1 mayor. The questions included inquiries about how the furlough program would apply  
2 to unit members who work for the City's Emergency Medical Services (EMS), how the  
3 furloughs would affect unit members' eligibility for overtime, and how the City's  
4 Retirement Board would treat the furloughs when calculating unit members' creditable  
5 service. A unit member also asked Mayor Lang several times whether he would  
6 guarantee that the City would not lay off unit members if the Union agreed to take the  
7 furloughs. The Mayor replied that although he did not intend or expect to lay off unit  
8 members if the Union accepted the furlough program, he would not guarantee it. After  
9 Mayor Lang and Caron left the meeting, the Union conducted a secret ballot election,  
10 and unit members voted in favor of participation in the furlough program.<sup>10</sup>

11 On June 18, 2008, the City and the Union executed the following agreement  
12 (June 2008 Agreement):<sup>11</sup>

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<sup>10</sup> When Mayor Lang left the meeting, he gave Messier his cell phone number and asked Messier to contact him with the results of the vote. When Messier later called the Mayor, the Mayor thanked the Union for agreeing to take the furloughs.

<sup>11</sup> Caron drafted the June 2008 Agreement on or about June 5, 2008 and sent a copy to Medeiros shortly thereafter. Messier indicated that he did not receive a copy of the June 2008 until June 18, 2008, the date on which he executed the agreement.

1 Addendum to the Collective Bargaining Agreement between the City of  
2 New Bedford and AFSCME Local 851, State Council 93

3  
4 In accordance with the provisions of Article XXVI<sup>12</sup> of the collective  
5 bargaining agreement dated December 7, 2006, the above-named parties  
6 have executed this addendum effective July 6, 2008 through June 29,  
7 2009 to address the budgetary issues for fiscal year 2009. At the end of  
8 fiscal year 2009 this addendum shall no longer be operative and the full  
9 term and conditions of employment set forth in the collective bargaining  
10 agreement dated December 7, 2006, and in particular the weekly hours of  
11 work shall be reinstated.

12  
13 I. Furlough

14  
15 It is agreed that in order to avoid the reduction in workforce the members  
16 of the bargaining unit shall participate in a voluntary furlough program  
17 without pay of no more than fifty-two (52) hours in accordance with an  
18 agreement reached within a municipal department with its employees and  
19 representative(s) of AFSMCE, Local 851 with the approval of the Mayor  
20 and his designee.

21  
22 II. Vacation

23  
24 Notwithstanding the furlough provisions contained herein employees will  
25 be entitled to their full vacation pay in accordance with Article XXI of the  
26 collective bargaining agreement.

27  
28 III. Sick Leave

29  
30 Notwithstanding the furlough provisions each employee shall accrue sick  
31 leave at the rate of one and one-quarter (1 1/4) days for each month of  
32 service.  
33

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<sup>12</sup> Article XXVI of the 2006-2009 Agreement states in part:

The parties agree that all negotiable items have been discussed during the negotiations leading to this Agreement, and therefore, agree that negotiations will not be reopened on any item, whether contained herein or not, during the life of this Agreement. All terms and conditions of employment not covered nor abridged by this Agreement shall continue to be subject to the City's exclusive direction and control, and shall not be subject to negotiation during the life of this Agreement. ...

This Agreement cannot be changed, altered or modified, except in writing, signed by both parties, which writing shall be considered as an addendum to this Agreement.

1           IV. Personal Leave  
2

3           Notwithstanding the furlough provision contained herein all permanent,  
4 permanent part-time and provisional employees eligible for personal leave  
5 shall be entitled to his/her full personal leave in accordance with Article  
6 XIII.  
7

8           V. Health Insurance  
9

10           Notwithstanding the furlough provisions contained herein no employee on  
11 furlough shall be deemed ineligible for health or life insurance protection  
12 under the collective bargaining agreement or G.L. c.32B.  
13

14           VI. Retirement  
15

16           In accordance with PERAC Memorandum #10 issued on February 20,  
17 2003, the City will petition the New Bedford Retirement Board to grant  
18 credible service to employees who take a furlough so that employees will  
19 be entitled to have their regular compensation that they would have  
20 received but for the furlough included in their three year average  
21 compensation. The member will not be required to make contributions for  
22 this period in order to receive this benefit. If the period of absence is not  
23 the period used to calculate the three year average compensation, then  
24 regular compensation is not relevant for retirement purposes.

25           On July 2, 2008, Mayor Lang issued the following notice (July 2, 2008 notice) to  
26 unit members:

27           In accordance with the Agreement reached between AFSCME, Local 851,  
28 State Council 93 and the City of New Bedford a furlough program for fifty-  
29 two weeks will be implemented effective July 6, 2008.  
30

31           Accordingly, beginning with the payroll period for the week ending July 12,  
32 2008, each employee will have one (1) hour per week of their regularly  
33 hourly rate of pay deducted from their gross weekly pay.  
34

35           Employees will be released for one (1) hour of work per week as per the  
36 agreement with the Union within the municipal department.<sup>13</sup>  
37

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<sup>13</sup> Mayor Lang placed a handwritten notation on the July 2, 2008 Notice stating, "Thank you for your cooperation and sacrifice."

1 Separate Agreements for Paramedics and 911 Dispatchers and Call-Takers

2 Unit members subsequently began to take their weekly one-hour furloughs,  
3 except for certain unit members who were 911 dispatchers, 911 call takers and  
4 paramedics,<sup>14</sup> or who worked at the City's freshwater treatment plant. Because those  
5 unit members worked in municipal departments that operated twenty-four hours per  
6 day, seven days per week, the City had difficulty in administering furloughs for those  
7 employees that would not negatively impact the operations of those departments.

8 On or about September 4, 2008, the City and the Union executed an agreement  
9 (September 2008 Agreement) that specifically addressed how the City would implement  
10 furloughs for the paramedics. The September 2008 Agreement stated in pertinent part:

11 In accordance with the provisions of Article XXVI of the collective  
12 bargaining agreement dated December 7, 2006, the above-named parties  
13 have executed this addendum effective July 6, 2008 through June 29,  
14 2009 to address the budgetary issues for fiscal year 2009. At the end of  
15 fiscal year 2009 this addendum shall no longer be operative and the full  
16 term and conditions of employment set forth in the collective bargaining  
17 agreement dated December 7, 2006, and in particular the weekly hours of  
18 work shall be reinstated.

19  
20 I. Furlough

21  
22 It is agreed that in order to avoid the reduction in workforce the members  
23 of the bargaining unit shall participate in a voluntary furlough program  
24 without pay of no more than fifty-two (52) hours in accordance with an  
25 agreement reached within a municipal department with its employees and  
26 representative(s) of AFSCME, Local 851 with the approval of the Mayor or  
27 his designee.

28  
29 II. Holiday Pay

30

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<sup>14</sup> The City's EMS employs paramedics and one emergency medical technician-intermediate level (EMT-intermediate) to staff its ambulances. For the purposes of this decision, the use of the term paramedic also encompasses the EMT-intermediate position.

1 In accordance with paragraph I above it is agreed that in lieu of one hour  
2 per week of furlough paramedics shall forego five (5) paid holidays without  
3 pay during fiscal year 2009.

4 Also, on December 2, 2008, the parties executed an agreement (December 2008  
5 Agreement) that addressed how the City would implement furloughs for the 911  
6 dispatchers. The December 2008 Agreement stated in pertinent part:

7 In accordance with the provisions of Article XXVI, of the collective  
8 bargaining agreement, dated December 7, 2006, the above-named parties  
9 have executed this addendum effective July 6, 2008 through June 29,  
10 2009 to address the budgetary issues for fiscal year 2009. At the end of  
11 fiscal year 2009 this addendum shall no longer be operative and the full  
12 term and conditions of employment set forth in the collective bargaining  
13 agreement dated December 7, 2006, and in particular the weekly hours of  
14 work shall be reinstated.

15  
16 I. Furlough  
17

18 It is agreed that in order to avoid the reduction in workforce the  
19 members of the bargaining unit shall participate in a voluntary furlough  
20 program without pay of no more than fifty-two (52) hours in accordance  
21 with an agreement reached within a municipal department with its  
22 employees and representative(s) of AFSCME, Local 851 with the approval  
23 of the Mayor or his designee.

24  
25 II. Holiday Pay  
26

27 In accordance with paragraph I above, it is agreed that Police  
28 Telecommunications Dispatchers shall forego three (3) paid holidays  
29 without pay during fiscal year 2009, i.e. Veterans Day, Thanksgiving Day,  
30 and the Friday after Thanksgiving. Beginning the week ending December  
31 13, 2008, Police Emergency Telecommunication Dispatchers [911  
32 dispatchers] shall have one (1) hour pay per week deducted from their  
33 weekly salary and shall be released during that week for one (1) hour  
34 when staffing levels permit.<sup>15</sup>

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<sup>15</sup> The 911 dispatchers and call takers subsequently did not perform the weekly furloughs because the Police Department received a federal grant that provided additional monies to the Police Department.

1 Furloughs for the Police and Fire Bargaining Units

2  
3       Shortly after the Union and the City executed the June 2008 Agreement, the City  
4 approached its other two employee bargaining representatives, Local 841, I.A.F.F  
5 (Local 841)<sup>16</sup> and the New Bedford Police Union (NBPU),<sup>17</sup> and requested that they  
6 agree to have their members take furloughs. On September 11, 2008, the City and  
7 Local 841 executed the following agreement (FF agreement):<sup>18</sup>

8       Whereas the City of New Bedford and IAFF, Local #841 are parties to an  
9 existing collective bargaining agreement in place during Fiscal Year 2009  
10 with an expiration date of June 30, 2010, and a Supplementary Agreement  
11 of May 2008, and

12  
13       Whereas, the City of New Bedford and IAFF, Local #841 are cognizant of  
14 existing financial pressures upon the City during Fiscal Year 2009, and

15  
16       Whereas, the City of New Bedford and IAFF, Local #841, are interested in  
17 maintaining a stable labor relations environment during the current fiscal  
18 year in order to avoid layoffs of personnel within the city fire department,  
19 they enter into the following Agreement as an Addendum to the exiting  
20 collective bargaining agreement which shall operate and be implemented  
21 consistent with the other provisions of the agreement:

22  
23               I. Article VIII, Holidays.

24  
25       So-called paid 'half holidays' on Thanksgiving Eve, Christmas Eve, New  
26 Year's Eve and Good Friday will not be paid to uniformed personnel during  
27 fiscal year 2009.

28  
29               II. Personnel

30  
31       During fiscal year 2009 there shall be no layoffs of existing uniformed  
32 personnel within the New Bedford Fire Department.

---

<sup>16</sup> Local 841 represents the City's fire fighters below the rank of deputy chief.

<sup>17</sup> The NBPU represents the City's police officers below the rank of deputy chief.

<sup>18</sup> The City and the NBPU agreed that instead of one-hour furloughs that unit members would not receive pay for certain holidays, the start of a scheduled pay raise would be delayed for eight weeks, and five police cadets would be dismissed from the police academy.

1 III. Miscellaneous  
2

3 This Addendum may be reopened by Local #841 based upon additional  
4 financial information if a change in available revenue to the City of New  
5 Bedford for fiscal year 2009.

6 February 2009 Layoffs  
7

8 In January of 2009, Governor Deval Patrick announced cuts in local aid for the  
9 ongoing fiscal year 2009 (FY09) pursuant to M.G.L. c.29, §9(c) (9(c) cuts).<sup>19</sup> The 9(c)  
10 cuts reduced the City's local aid from \$28,630,412<sup>20</sup> to \$25,840,489<sup>21</sup> for a total  
11 reduction of \$2,789,923. About that time, Gerard D. Perry (Perry) Director of Accounts  
12 for the Department of Revenue's Division of Local Services, sent out a bulletin #2009-  
13 04B to municipal elected officials, administrators and financial officers to discuss the  
14 budgetary and financial implications of the 9(c) cuts. In a section of the bulletin entitled  
15 "Impact on Municipal Budgets and Balance Sheets," Perry noted, in part, that:

16 Reductions in budgeted local aid, like shortfalls in any municipal revenue  
17 source except the property tax, will have a negative effect on FY09

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<sup>19</sup> M.G.L.c.29, §9(c) states in part:

Whenever, in the opinion of the commissioner of administration, available revenues as determined by him from time to time during any fiscal year under section 5B will be insufficient to meet all of the expenditures authorized to be made from any fund, whether by appropriation or distribution, he shall within 5 days notify in writing the governor and the house and senate committees on ways and means of the amount of such probable deficiency of revenue and the governor shall, within 15 days after such notification, reduce allotments under Sections 9B, and submit in writing a report stating the reason for and effect of such reductions, or submit to the general court specific proposals to raise additional revenues by a total amount equal to such deficiency. ....

<sup>20</sup> The \$28,630,412 in local aid included \$716,255 in Additional Assistance monies and \$27,914,157 in monies funded through lottery revenues (lottery aid).

<sup>21</sup> The \$25,840,489 in local aid included \$646,459 in Additional Assistance monies and \$25,840,489 in lottery aid.

1 operations, unless action is taken as soon as possible during the fiscal  
2 year to address them. Otherwise, the resulting general fund revenue  
3 deficit will have to be raised in FY10. The revenue shortfall can be offset  
4 in part by actual receipts from other sources that exceed the amounts  
5 budgeted, as well as regular appropriation turn-backs. It is not anticipated  
6 that ordinary favorable operations alone would be sufficient to absorb the  
7 impact of the local aid cuts in many communities.

8 Additionally, Perry presented three options for municipalities to address the local aid  
9 reduction and bring their budgets into balance, which included: a) reducing FY09  
10 operating appropriations, b) reducing special purpose appropriations, c) using reserves  
11 as an offsetting revenue source, and d) increasing special purpose appropriations.

12 On January 29, 2009, Mayor Lang sent a letter (January 29, 2009 letter) to the  
13 City's employees and citizens regarding the local aid shortfall for FY09 and FY10. In his  
14 letter, the Mayor stated in pertinent part:

15 Effective January 28, 2009, the State has reduced New Bedford's local aid  
16 by \$2,789,923.00 for the remaining 21 weeks of the fiscal year. City  
17 government must cut \$139,496.00 per week between now and June 30,  
18 2009.

19  
20 Ordinarily, a local government would meet this type of budget shortfall by  
21 calculating the number of employees to lay off. In this particular case, a  
22 massive number of layoffs would be necessary. I don't believe, however,  
23 these are ordinary times. ...

24  
25 With your commitment, I would like to propose an innovative solution to  
26 resolving our budget shortfall. To avoid hundreds of layoffs, I am  
27 proposing several measures in response to state cuts in local aid. The  
28 following combination of cost-saving measures will amount to  
29 \$2,770,046.00 in budgetary reductions over the next 5 months.

30  
31 The proposed reductions for February 1, 2009 through June 30, 2009 are  
32 as follows:

33  
34 A ten (10%) per cent reduction in the base salary of every  
35 city employee across the board. Three and one-half (3.5)  
36 payless holidays, i.e. Presidents' Day, Memorial Day and the  
37 one-half day on Good Friday.

1 Flexibility to control overtime costs for police and fire in daily  
2 non-emergency situations only.

3  
4 The adoption of these measures will prevent layoffs of collective  
5 bargaining unit employees through June 30, 2009.

6  
7 **Action for Fiscal Year 2010** [Emphasis in original]

8  
9 The state has reduced New Bedford's FY 2010 local aid allocation by  
10 \$8,173,602.00. I intend to work with all employee unions to again  
11 maintain full employment. This will require a combination of the 10%  
12 reduction in base salary for the year, as well as seven (7) payless holidays  
13 to be determined. In addition, continued flexibility regarding police and fire  
14 overtime will be required.

15  
16 In an attempt to preserve all of our employees' positions, there are several  
17 other measures the City will take, among these are:

- 18  
19 • A salary freeze effective July 1, 2009  
20 Limit on all non public safety overtime  
21 Bi-Weekly pay periods; Requiring direct deposit  
22 • Hiring freeze for all but essential personnel positions  
23 Consolidation of several departments in order to pool  
24 resources and efficiencies  
25 Assimilating some school department functions into City  
26 departments  
27 Merging 911 public safety call services and proposing New  
28 Bedford as a regional site for Emergency Dispatching  
29 Services  
30 Proposing New Bedford as a regional provider for Veterans'  
31 Services  
32 • Participation in all regionalization initiatives in Southeastern  
33 Massachusetts  
34 • Merging EMS and the Fire Department to better serve our  
35 citizens  
36 • Continuing to monitor the cost of our health care plan with  
37 our Section 19 Committee  
38 • Working with the New Bedford Retirement Board and the  
39 State to arrive at an appropriate pension contribution  
40 actuarial table regarding City payments to the New Bedford  
41 Retirement Plan  
42 Elimination of the use of city vehicles to and from work,  
43 except for approved police and fire fighter personnel  
44 Reduction in hours for some personnel as a last resort  
45 Implement energy efficient measures to cut utility expenses,  
46 as well as possible alternative energy utilization

1  
2       These cost-saving measures are necessary to balance the Fiscal Year  
3 budgets of 2009 and 2010 over the next 17 months. I am receptive to any  
4 other suggestions or bold ideas to keep our government fully functional.  
5 As the state's cuts have already taken effect, immediate action is  
6 necessary. I ask that each of you consult with your elected union  
7 representatives, fellow brothers and sisters, and families regarding how  
8 we resolve this challenge to New Bedford's stability. ...

9       Mayor Lang subsequently met with the Union concerning his January 29, 2009  
10 letter, and Messier made several proposals in response to the Mayor's proposals.  
11 Messier suggested that the City reduce the number of management personnel,  
12 eliminate the practice of certain employees taking home city vehicles at night, and  
13 eliminate part-time employees and retired employees working as contractors for the  
14 City. At a regularly scheduled meeting on February 11, 2009, the Union presented the  
15 Mayor's proposals to its members, but the members declined to consider those  
16 proposals. Messier then notified the Mayor that the Union had declined to accept his  
17 proposals.<sup>22</sup>

18       Shortly thereafter, the City hand-delivered a letter to Messier stating that the City  
19 intended to lay off unit members. Messier then contacted the City's Personnel  
20 Department and the Mayor's Office to protest the proposed layoffs. In particular,  
21 Messier protested to Mayor Lang that he thought that his unit members were not going  
22 to be touched, because they previously had agreed to the furloughs. The Mayor replied  
23 that it was out of his control and that he had to implement the layoffs. Messier then  
24 asked if the City would stop the one-hour weekly furloughs for his unit members. Mayor

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<sup>22</sup> Local 841 and the NBPU also declined to accept Mayor Lang's proposals. Both unions anticipated that the City would receive federal monies for public safety that would restore the jobs of any of their members whom the City had to lay off. The City ultimately received some federal monies and reinstated the laid off police officers and fire fighters.

1 Lang replied that the City had not calculated how many additional unit members would  
2 need to be laid off if the City ceased the one-hour furloughs. Messier then asked the  
3 mayor to provide him with that figure.

4 On February 13, 2009, the City began to lay off unit members.<sup>23</sup> The City  
5 ultimately laid off 84 unit members, and 37 non-bargaining unit members, which  
6 included Unit C members.<sup>24</sup> On February 17, 2009, Messier sent the following letter  
7 (February 17, 2009 letter) to Mayor Lang:

8 In light of the recent layoffs, the Union would expect a complete  
9 restoration of all hours of work, relative to the furlough, for all affected  
10 members of AFSCME, Local 851, effective February 13, 2009.

11  
12 I thank for your anticipated cooperation in this matter.

13 Thereafter, Mayor Lang and Messier crossed paths near the City Hall parking lot.  
14 Messier asked whether the mayor had received his February 17, 2009 letter, and Mayor  
15 Lang answered affirmatively. Lang then replied that if he responded to the February 17,  
16 2009 letter, he would need to lay off more unit members.<sup>25</sup> Messier then asked him how

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<sup>23</sup> Because some unit members had civil service rights and/or bumping rights, the layoff took place in three rounds, which concluded in March 2009.

<sup>24</sup> The City did not realize savings equivalent to an employee's salary when it laid off an employee, because the City had to compensate laid off employees for unused vacation time as well as pay them unemployment benefits. Instead, the City would need to layoff four employees to fully realize the savings equivalent to three employees' salaries. Because the City was concerned that any additional layoffs would impair its ability to provide services to residents, the employer transferred monies from its free cash to its stabilization fund to cover the expenses that resulted from the 132 layoffs rather than covering those expenses with more layoffs.

<sup>25</sup> Mayor Lang testified that Messier told him that he had to send the letter and that he was not looking for more layoffs. Alternatively, Messier denied that he made those comments. However, I need not reconcile this contradictory testimony because it is not material to the outcome of the case, because neither party alleges that Messier retracted the letter or told the mayor to disregard it.

1 many unit members would be laid off as a result of the cessation of the furlough, and  
2 the Mayor responded that he did not have that number. Messier reiterated that the  
3 Union wanted that information.<sup>26</sup>

4 The weekly one-hour furloughs for unit members did not cease until June 30,  
5 2009, the date referenced in the June 2008 Agreement.

#### 6 Successor Contract Negotiations

#### 7 June 24, 2009 Session

8 Typically, the Mayor would submit a completed, proposed budget for the next  
9 fiscal year to the City Council in mid-May, and the City Council would hold hearings on  
10 the budget in late May or early June. The City Council would then vote on the budget in  
11 mid-June. However, Mayor Lang submitted a preliminary FY10 budget to the City  
12 Council on or about mid-May of 2009, because the City had not received a final  
13 confirmation of how much local aid the City would receive, the so-called cherry sheet  
14 figures. Mayor Lang's preliminary budget showed a deficit of \$3,866,501 and projected  
15 an \$8.7 million dollar cut in local aid, which the Mayor previously had referenced in his  
16 January 29, 2009 letter. The City Council decided to delay action on the budget in the  
17 expectation that the City soon would receive its cherry sheet figures. Additionally, the  
18 City Council is legally obligated to approve only a balanced budget.

19 In late May, early June of 2010, the Union<sup>27</sup> and the City began to discuss the  
20 scheduling of successor contract negotiations. On June 24, 2009, the Union and the

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<sup>26</sup> Messier did not receive the requested number from the City.

<sup>27</sup> In a December of 2008 letter, the Union expressed its desire to enter into successor contract negotiations, and the City acknowledged receipt of the Union's request on January 8, 2009. Thereafter, the parties agreed to delay the commencement of successor contract negotiations for several months.

1 City held their first bargaining session for a successor contract. The Union's bargaining  
2 team consisted of Medeiros, the chief spokesperson, Messier and six other unit  
3 members, while the City's bargaining team consisted of Caron, the chief spokesperson,  
4 Irene Schall (Schall), the city solicitor, and Angela Natho, the director of human  
5 resources. The parties discussed and verbally agreed upon ground rules governing  
6 their negotiations.<sup>28</sup> The parties had a brief discussion about the City's financial status,  
7 including the projected budgetary deficit, and the Union asked questions about possible  
8 layoffs.<sup>29</sup> However, the City did not provide definitive answers, because the City still  
9 had not received the cherry sheet figures. Also, the City Council was scheduled to  
10 discuss Mayor Lang's preliminary budget the following day. The City Council  
11 subsequently approved a budget solely for the month of July 2010, a so-called 1/12th  
12 budget. Additionally, the Union commented upon certain statements that Mayor Lang  
13 allegedly had made in the media concerning the FY10 budget.<sup>30</sup> Finally, the parties  
14 agreed upon dates for the next bargaining session.

15 July 20, 2009 Session

16 The parties met for a second bargaining session on July 20, 2009, and executed  
17 a written copy of the ground rules to which they previously agreed. At the July 20th  
18 session, the City proposed that the Union agree to a one year contract that froze wages,

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<sup>28</sup> The parties agreed to reduce the proposed ground rules to writing for the next bargaining session.

<sup>29</sup> Messier contended that the City had a history of raising budgetary concerns at negotiations for various successor collective bargaining agreements.

<sup>30</sup> The record does not reveal the nature of Mayor Lang's alleged comments.

1 longevity payments and sick leave incentive payments.<sup>31</sup> The Union proposed that the  
2 City: a) expand the hours of work for which paramedics would earn a shift differential; b)  
3 allow the use of sick, vacation, personal, and compensatory leaves in one-hour  
4 increments; c) expand the eligibility for funeral leave; d) change how it calculated  
5 vacation leave for paramedics; e) place paramedics in group four of the public  
6 employee retirement system; f) add a fourth ambulance on a trial basis; f) define  
7 seniority as unit-based seniority; and g) re-classify all inspectors as grade 12 on the  
8 salary scale. Neither party accepted the other party's proposal. The City commented  
9 that it did not have the resources to expand unit members' benefits or give them  
10 upgrades and reiterated that the City was facing a possible budget deficit.<sup>32</sup>

11 The parties then discussed possible layoffs to the bargaining unit. The Union  
12 raised concerns that the City unfairly had singled out unit members when layoffs had  
13 taken place in February and March of 2009. The Union pointed out that the City did not  
14 lay off any employees who worked at the airport, the freshwater treatment plant and the  
15 wastewater treatment plant,<sup>33</sup> and that the City had recalled those police officers and  
16 fire fighters, whom the employer had laid off on or about February 2009. The Union

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<sup>31</sup> The City's proposals would not have required any additional financial outlay beyond FY09 levels.

<sup>32</sup> The Union's proposals would incur additional costs for the City.

<sup>33</sup> Special enterprise funds (funds which retain their earned revenues) finance the airport and the freshwater treatment facility. A special revenue fund, which also retains its earned revenue, finances the wastewater treatment facility. The City did not lay off any employees at the airport, the freshwater treatment facility or the wastewater treatment plant, because the 9(c) cuts did not affect the enterprise funds or the special revenue fund.

1 asked the City at the next bargaining session to identify the unit positions that the City  
2 would eliminate as part of a reduction in force.

3 July 27, 2009 Session

4 The City and the Union met for a third bargaining session on July 27, 2009. As  
5 of this date, the City Council still had not passed a budget for FY10 and had not voted  
6 whether to accept a local option to add an excise of .75% (local sales tax) on hotels and  
7 meals in addition to the state sales tax of 6.25%. However, the City notified the Union  
8 that the Legislature had not approved a bill that would have reduced the City's pension  
9 costs, a bill that the parties had discussed previously.

10 The City proposed that the Union accept a ten percent reduction in its unit  
11 members' rates of pay for one year, while the City reserved the right to initiate further  
12 layoffs if the Commonwealth imposed additional 9(c) cuts.<sup>34</sup> The City indicated that if  
13 the Union did not accept the City's proposal, the City would commence a reduction in  
14 force in accordance with a list of fifty-two positions, which it provided to the Union in  
15 response to the Union's July 20, 2009 request. The Union declined to accept the City's  
16 proposal and told the City to implement layoffs, if necessary.

17 August 17, 2009 Session

18 On July 28, 2009, the City passed a second 1/12th budget for the month of July  
19 2010. Shortly thereafter, the City received its cherry sheet figures<sup>35</sup> showing that it

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<sup>34</sup> At the Union's request, the City reduced this proposal to writing.

<sup>35</sup> The City contended that it received the cherry sheet figures on an unspecified date in late July 2009, a contention that the Union did not challenge. However, the actual cherry sheet, which the parties introduced into the record as a joint exhibit, bears a notation that the Commonwealth released it on June 30, 2009.

1 would receive unrestricted general government aid in the amount of \$20,267,970.<sup>36</sup> On  
2 August 11, 2009, the City Council approved a budget for FY10 that provided for a ten  
3 percent decrease in the wages and salaries account of the budget. The City Council  
4 also declined to adopt a local sales tax on hotels and restaurants

5 The City and the Union met for a fourth bargaining session on August 17, 2009.  
6 The Union offered two proposals to the City, both of which the City declined to accept.  
7 The Union proposed that the City: a) permit unit members to use personal time in one-  
8 hour increments; b) expand the definition of family sick time to include the care of  
9 mothers-in-law and fathers-in-law; c) reclassify the clerks in the assessing department;  
10 and d) give a full paid day off on December 24 when Christmas falls on a Friday and  
11 give December 26 as a paid day off when Christmas falls on a Thursday. The Union  
12 also proposed that in exchange for a one-year wage freeze, the City agree to upgrade  
13 or provide increases in the base wages of various unit positions.

14 The City informed the Union about the City Council's ten percent cut in the wages  
15 and salaries account. The City proposed that: unit members take weekly half-day  
16 furloughs commencing on August 31, 2009 and ending on June 30, 2010,<sup>37</sup> that most  
17 City departments close on Fridays at 12 noon to accommodate the furloughs, but that  
18 the Union agree to give the City flexibility to determine how to impose the furloughs in  
19 departments that operate seven days per week, twenty four hours per day. The Union

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<sup>36</sup> The Commonwealth had reclassified additional assistance and lottery aid as unrestricted general government aid.

<sup>37</sup> The City proposed the half-day furloughs rather than implement the fifty-two layoffs that it referenced on July 27, 2009, because of concerns about the negative effects that the layoffs would have on municipal operations and on the local economy, as well as the difficulties that laid off employees would have in securing other employment.

1 declined the City's proposal and instead suggested that, if necessary, the City reduce its  
2 work force to achieve cost savings.<sup>38</sup>

3 The City then informed the Union that pursuant to the management rights clause  
4 of the 2006-2009 Agreement, it was going to implement the weekly half-day furloughs  
5 on or about September 1, 2010, but that it was willing to discuss the details of the  
6 implementation with the Union. The Union protested the City's decision to implement  
7 the furloughs, announced that the parties were at impasse, and indicated that it would  
8 file for mediation. When the City reiterated that it was going to implement the half-day  
9 furloughs, the Union protested that the City was acting unlawfully and that the Union  
10 would file a prohibited practice charge. Article XXV, the management rights clause, of  
11 the 2006-2009 Agreement states in pertinent part:<sup>39</sup>

12 Except as otherwise provided in this Agreement, the City retains all right of  
13 management, including the right to direct employees, to hire, classify,  
14 promote, train, transfer, assign and retain employees and to suspend,  
15 demote, discharge or take other disciplinary action against employees for  
16 just cause, to relieve employees from duty because of lack of work, lack of  
17 funds, or for causes beyond the City's control; to provide uniforms and  
18 equipment when required, to determine organization and budget, to  
19 maintain the efficiency of the operations entrusted to the City and to  
20 determine the methods, technology, means and personnel by which such  
21 operations are to be conducted, including contracting and subcontracting;  
22 similarly, to take whatever action may be necessary regardless of prior  
23 commitments to carry out the responsibilities of the City in an emergency  
24 or any unforeseen combination of circumstances which calls for immediate  
25 action. The City and its management officials have the right to make  
26 reasonable rules and regulations pertaining to employees consistent with

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<sup>38</sup> Members of the Union's bargaining team declined to accept the City's proposal, because they believed that weekly half-day furloughs would negatively impact a greater number of unit members than layoffs would.

<sup>39</sup> This same management rights clause has been present in the parties' contracts for over forty years. The City relied on this language previously when it privatized the wastewater treatment plant and the solid waste transfer station. However, in the prior forty years, the City had not previously placed unit members on involuntary furloughs.

1 this Agreement. The City agrees, however, pursuant to the above, that  
2 whenever it wishes to transfer an employee from a position identified  
3 under Unit C of said plan, it will notify the Union at least thirty (30) days  
4 before such transfer is planned to take place.

5 The City subsequently contended that Article IV and Article XXVI of the 2006-2009  
6 Agreement, supra, p. 7, also permitted it to institute the half-day furloughs. Article IV,  
7 Section 6, Seniority, states:

8 Seniority shall be recognized as the controlling factor for shift assignments  
9 within a department or division. The exercise of seniority shall be limited  
10 to an opening with a classification title only. When an employee is newly  
11 assigned to a job, the city may, for a period of three (3) months, select the  
12 shift assignment for the employee. Nothing in this section shall be  
13 construed to limit the right of the City to establish, change, enlarge or  
14 decrease shifts or the number of personnel assigned thereto, provided the  
15 rights of seniority set forth in this Agreement are followed in making the  
16 necessary personnel assignments.<sup>40</sup>

17 On August 18, 2009, the Union filed a petition for mediation and fact finding with  
18 the DLR pursuant to Section 9 of the Law and 456 CMR 21.03 and sent via facsimile a  
19 copy of the petition to the City. The next day, Mayor Lang sent the following letter to  
20 Messier:

21 This is to officially inform you that due to lack of funds in the City budget  
22 for Fiscal 2010, I am closing municipal offices and reducing the hours that  
23 AFSCME members will be employed each week. Each AFSCME member  
24 will be relieved from duty half of one regularly scheduled work day each  
25 week to accomplish the needed savings until further notice. We are willing  
26 to work with your local to address the impact regarding the  
27 implementation. You may contact the Solicitor's Office directly.

28  
29 These actions are being taken pursuant to Article XXV "Management  
30 Rights" of the AFSCME contract wherein management retains the right to

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<sup>40</sup> Article IV, Section 6 has been present in the parties' collective bargaining agreements for nearly forty years. However, during that forty-year period, the parties have negotiated certain modifications to the language of the provision. In particular, the Union at some point proposed that its members bid for shifts based upon seniority. The City agreed but insisted on language to protect it from being obligated to maintain certain minimum staffing per shift.

1 "relieve employees from duty because of ... lack of funds, or for causes  
2 beyond the City's control."  
3

4 These are difficult times for all of us, but we will get through them together,  
5 and emerge the stronger for them. Regrettably, the more limited budget  
6 due to reductions in state aid, and increased pension and health insurance  
7 costs led me to implement this reduction in service to the public and to  
8 relieve from duty AFSCME members employed by the City.

9 On August 20, 2009, Mayor Lang issued Executive Order No. 2009-5<sup>41</sup> stating in  
10 relevant part that:

11 WHEREAS, the budgetary limitations on the City of New Bedford for fiscal  
12 year 2010 require that employees be relieved from duty because of lack of  
13 funds, for causes beyond the City's control; and  
14

15 WHEREAS, as Mayor of New Bedford I have the authority to alter the  
16 work days of City employees, notwithstanding obligations pursuant to  
17 M.G.L. c.150E, to accomplish a budgetary savings. ...  
18

19 Effective August 30, 2009, due to the lack of funds and to meet the  
20 budgetary challenge, for reasons beyond the City's control, I am  
21 implementing a policy to relieve employees from duty for lack of funds.  
22 This reduction of hours is to be accomplished by the closing of all  
23 municipal offices at noon on each Friday for the rest of that day, beginning  
24 on August 30, 2009. The reduction in hours worked is to be considered a  
25 furlough and will be first reflected in payroll checks issued on September  
26 10, 2009 and will continue until further notice.  
27

28 Work reductions for certain operations of the Department of Public  
29 Facilities, the Zoo, Health Department, Library and Emergency Medical  
30 Services are to be implemented in accordance with their prior discussions  
31 with the Personnel Department. Police Dispatchers shall have their work  
32 schedule reduced by four hours per week as approved by the Chief.

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<sup>41</sup> Executive Order No. 2009-5 supplemented Executive Order No.2009-4 that Mayor Lang had issued on August 20, 2010, which ordered all non-union municipal employees, excluding elected officials but including the Police Chief, the Deputy Police Chief, the Fire Chief and the Deputy Fire Chief, to take 21.5 days of unpaid leave for the remainder of FY10. Mayor Lang also indicated that he voluntarily would take the same unpaid leave as the other non-union municipal employees.

1 Paramedics shall have their work schedule reduced by one-half hour as  
2 approved by the Director. ...<sup>42</sup>

3 AFSCME unit members were still serving weekly half-day furloughs as of the dates of  
4 the hearing.

#### 5 Post-Implementation Litigation

6 On August 28, 2009, AFSCME filed a complaint in Bristol Superior Court alleging  
7 two causes of action, which included a claim on behalf of Messier and nine other  
8 taxable inhabitants (ten taxpayers) of the City alleging a violation of M.G.L, c.40, §53 for  
9 which the plaintiffs sought injunctive relief and a claim with the Union itself as plaintiff  
10 seeking declaratory and injunctive relief under M.G.L. c.231A. On September 11, 2009,  
11 Superior Court Judge Richard T. Moses (Judge Moses) denied the request for injunctive  
12 relief. AFSCME and the ten taxpayers then filed a petition to a single justice for request  
13 for interlocutory review of Judge Moses' September 11, 2009 order pursuant to M.G.L.  
14 c.231, §118. On October 13, 2009, Appeals Court Judge James Milkey (Judge Milkey)  
15 denied the petition. On October 22, 2010, the Supreme Judicial Court issued its  
16 decision in Boston Housing Authority v. National Conference of Firemen and Oilers,  
17 Local 3, 458 Mass. 155 (2010). Thereafter, the City has refused to proceed to  
18 arbitration on grievances that the Union has filed on the grounds that the parties do not  
19 currently have a collective bargaining agreement, although the City has acknowledged  
20 that certain terms and conditions of employment remain in effect.

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<sup>42</sup> On August 20, 2009, Mayor Lang also sent a memorandum to all City department heads specifically notifying them that the hours of AFSCME unit members would be reduced by one-half their regular work day per week.



1 June 2008 Agreement, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1)  
2 of the Law. The Union contends that the parties agreed that the City would not lay off  
3 unit members during FY09 if the Union agreed to the weekly one-hour furloughs.  
4 Conversely, the City denies that it agreed not to lay off any unit members during the  
5 entire fiscal year in exchange for unit members' acceptance of the weekly one hour  
6 furloughs.

7 I turn first to consider the plain language of the June 2008 Agreement, which the  
8 Union contends is clear and unambiguous. The Board gives effect to the clear meaning  
9 of the bargained-for language and does not inquire into the parties' intent where the  
10 words of the agreement are unambiguous. Boston School Committee, 22 MLC 1365,  
11 1376 (1996) (citing City of Worcester, 2 MLC 1281, 1285 (1976)). Reading the June  
12 2008 Agreement carefully, giving its words their plain and normal meaning, it does not  
13 specifically state that the City will not lay off any unit members during the entire FY09.  
14 Instead, the Agreement states that to avoid the reduction in workforce, unit members  
15 would participate in the furlough program. The phrase "reduction in workforce"  
16 debatably could refer only to the reduction in workforce that likely would have resulted  
17 from the budgetary shortfall that existed at the start of FY09. On the other hand, the  
18 Agreement also states that it is effective from July 6, 2008 through June 29, 2009 and  
19 that the parties executed it to address the budgetary issues for FY09. Arguably, those  
20 phrases read together could mean that the agreement and its stated intent to avoid a  
21 reduction in the workforce should encompass all budgetary shortfalls that could occur  
22 during the one year period in question.

1           Given the ambiguity of the agreement, I next examine the parties' bargaining  
2 history to determine whether the City agreed not to lay off any unit members in FY09 in  
3 exchange for them taking the weekly one-hour furloughs. The record before me shows  
4 that the parties met in mid-May 2008 and on June 5, 2008 to discuss the \$960,000  
5 shortfall in the City's FY09 budget and to discuss the City's proposal that the Union  
6 accept the weekly one-hour furloughs to close the budgetary shortfall. At the June 5,  
7 2008 meeting with the union membership, Mayor Lang stated that there would be no  
8 layoffs if the Union agreed to take the furloughs. However, in response to a question  
9 from an audience member, he was unwilling to guarantee that there would be no layoffs  
10 even if unit members accepted the layoffs, although he reiterated that he did not intend  
11 or expect to impose layoffs. Thus, the facts before me do not demonstrate that the  
12 parties agreed that no layoffs would take place during the entire FY09, but rather that  
13 the parties would resolve the imminent fiscal crisis and eliminate the immediate need for  
14 layoffs by agreeing to the weekly one-hour furloughs.

15           Moreover, when the parties negotiated the June 2008 Agreement, they were  
16 unaware that the 9(c) cuts in local aid would take place seven months later and did not  
17 discuss that possibility at their two meetings. They also did not discuss the possibility of  
18 9(c) cuts when they supplemented the June 2008 Agreement with the September 2008  
19 Agreement concerning voluntary furloughs for paramedics and the December 2008  
20 Agreement concerning voluntary furloughs for 911 dispatchers. Because the parties  
21 could not foresee that the 9(c) cuts would taken place when the parties executed the  
22 June 2008 Agreement, the parties could not have had a meeting of the minds hat the  
23 phrase "budgetary shortfalls" in the Agreement also encompassed the almost \$2.8

1 million budgetary deficit that subsequently resulted from the 9(c) cuts. See City of  
2 Boston/Boston Public Library, 26 MLC 215, 217 (2000) (no violation because there was  
3 no meeting of the minds on the creation of a smoking room). Moreover, before the unit  
4 members voted to accept the weekly one-hour furloughs, Mayor Lang stated that he  
5 could not guarantee that the City would not layoff any employees. Thus, because I  
6 conclude that the City did not repudiate the June 2008 Agreement, I dismiss Count I of  
7 the Complaint.

8 Count II-Alleged Failure to Bargain Over the Continued Imposition of the Weekly One-  
9 Hour Furloughs

10 Failing and refusing to bargain on demand concerning mandatory subjects of  
11 bargaining is a violation of Section 10(a)(5) of the Law. New Bedford Housing Authority,  
12 27 MLC 21, 27 (2000); Boston School Committee, 11 MLC 1219, 1225 (1984). Here,  
13 the Union alleges that the City violated Section 10(a)(5) of the Law by failing and  
14 refusing to respond to the Union's February 2009 request to the bargain with the City  
15 over the continued imposition of the weekly one-hour furloughs, even after the City  
16 began to lay off unit members. Assuming that Messier's February 2009 verbal request  
17 to Mayor Lang that the City cease the imposition of the furloughs and his February 17,  
18 2009 written reiteration of that request constitute demands to bargain, (see Board of  
19 Higher Education, 22 MLC 1662, 1669) (no requirement that unions use magic words to  
20 communicate their bargaining demands for those demands to be valued)), the City had  
21 no obligation to bargain, because it already had bargained to resolution with the Union  
22 over this issue. The City and the Union had bargained about the City's proposal for  
23 weekly one hour furloughs in May and June of 2008 and subsequently executed the  
24 June 2008 Agreement. Because the June 2008 Agreement remained in effect

1 irrespective of the City's layoff of unit members in February and March 2009, the City  
2 had no obligation to bargain about continuing the weekly one-hour furloughs until June  
3 29, 2009, the date specified in the June 2008 Agreement. Therefore, I dismiss Count II  
4 of the complaint.

5 Count III-Alleged Unilateral Reduction of Hours of Work

6 A public employer violates Section 10(a)(5) of the Law when it implements a  
7 change in a mandatory subject of bargaining without first providing the employees'  
8 exclusive collective bargaining representative with prior notice and an opportunity to  
9 bargain to resolution or impasse. School Committee of Newton v. Labor Relations  
10 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of  
11 employment that are established through past practice as well as conditions of  
12 employment that are established through a collective bargaining agreement.  
13 Commonwealth of Massachusetts, 27 MLC 1, 5 (2000); City of Gloucester, 26 MLC 128,  
14 129 (2000); City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC  
15 1694, 1697 (1983). To establish a unilateral change violation, the charging party must  
16 show that: 1) the employer altered an existing practice or instituted a new one; 2) the  
17 change affected a mandatory subject of bargaining; and 3) the change was established  
18 without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 20  
19 MLC 1545, 1552 (1984); City of Boston, 20 MLC 1603, 1607 (1994). To determine  
20 whether a practice exists, the Board analyzes the combination of facts upon which the  
21 alleged practice is predicated, including whether the practice has occurred with  
22 regularity over a sufficient period of time so that it is reasonable to expect that the  
23 practice will continue. Swansea Water District, 28 MLC 244, 245 (2002);

1 Commonwealth of Massachusetts, 23 MLC 171, 172 (1997); Town of Chatham, 21 MLC  
2 1526, 1531 (1995). A condition of employment may be found despite sporadic or  
3 infrequent activity where a consistent practice that applies to rare circumstances is  
4 followed each time the circumstances precipitating the practice recur. Commonwealth of  
5 Massachusetts, 23 MLC at 72.

6 The issue in Count III is whether the City violated Section 10(a)(5) of the Law  
7 when it reduced unit members' hours of work by implementing weekly half-day furloughs  
8 from August 30, 2009 and continuing without bargaining to resolution or impasse with  
9 the Union. It is undisputed that prior to August 30, 2009, the City did not reduce unit  
10 members' hours of work by requiring them to take weekly half-day furloughs. However,  
11 the City asserts that it had no obligation to bargain over the decision to reduce unit  
12 members' hours of work, because it is the employer's managerial prerogative to  
13 determine staffing levels. It is well established that decisions determining the level of  
14 services that a governmental entity will provide lie within the exclusive managerial  
15 prerogative of the public employer. Town of Danvers, 3 MLC 1554 (1977). Here, the  
16 City's decision to close certain offices to the public one-half day per week is a level of  
17 services decision. However, the means by which the employer achieves that reduction  
18 in services, such as involuntary furloughs in the present case, and the manner in which  
19 those involuntary furloughs directly affect unit members' hours of work and their wages  
20 are mandatory subjects of bargaining. See School Committee of Newton v. Labor  
21 Relations Commission, 388 Mass. 557, 563 (1983). Thus, the City's reduction in unit  
22 members' hours of work by means of half-day furloughs is a mandatory subject of  
23 bargaining.

1 Waiver by Contract

2           However, the City contends that no statutory bargaining obligation attached  
3 because certain provisions of the collective bargaining agreement, including Article  
4 XXIV, the management rights clause, Article XXVI, the zipper clause, and Article IV,  
5 Section 6, constitute waivers of the Union's right to bargain. For the reasons discussed  
6 below, I decline to find that the three disputed contractual provisions constitute waivers  
7 of the Union's right to bargain.<sup>43</sup>

8           Turning to the management rights clause, the City relies upon the portion of the  
9 provision stating that the City has the right to relieve employees from duty because of  
10 lack of work, lack of funds, or causes beyond the City's control. As a threshold issue, I  
11 must decide whether the purported waiver language in the management rights clause  
12 was in effect when the City instituted the reduction in unit members' hours of work. The  
13 2006-2009 Agreement, by its terms, was in effect from July 1, 2006 through June 31,  
14 2009 but contained language in Article XXXVI that continued the term of the agreement  
15 during the period that the parties engaged in successor contract negotiations. When  
16 the City instituted the half-day furloughs on August 20, 2009, the 2006-2009 Agreement  
17 had lapsed but remained in force and effect pursuant to Article XXXVI. The parties  
18 subsequently have not negotiated a successor collective bargaining agreement.

19           Approximately, fourteen months later on October 22, 2010, the Supreme Judicial  
20 Court (SJC) issued its decision in Boston Housing Authority v. National Conference of  
21 Firemen and Oilers, Local 3 (Boston Housing), 458 Mass. 155 (2010). In the Boston

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<sup>43</sup> On February 14, 2011, the City filed a motion for summary judgment, and I deferred ruling on the City's motion at that time. Because I have rendered a decision herein based upon my consideration of the entire record in the case, I deny the City's motion for summary judgment.

1 Housing case, the SJC interpreted Section 7(a) of Chapter 150E as revealing a clear  
2 legislative intent to limit the term of a collective bargaining agreement to not more than  
3 three years. See Id. at 163. Further, the SJC determined that a provision, often referred  
4 to as a duration or evergreen clause, which provided that a collective bargaining  
5 agreement would remain in full force and effect beyond three years while the parties  
6 engaged in successor contract negotiations, was invalid. Thus, the SJC concluded that  
7 the provisions of the underlying collective bargaining agreement, including the  
8 arbitration provision, did not remain in full force and effect beyond the three-year period  
9 of the contract. Id. at 165.

10 A review of the language in Article XXXVI shows that it is similar to the language  
11 in the evergreen clause in the Boston Housing case and that it has the same purpose,  
12 which was to extend the term of the parties' collective bargaining agreement beyond its  
13 fixed-three-year term, while the parties negotiated a successor agreement. The next  
14 inquiry is whether the decision in the Boston Housing case should be applied  
15 retroactively to the facts before me here. The holding in the Boston Housing case itself  
16 was retroactive in the sense that it declared that that the employer could not compelled  
17 to arbitrate a grievance that arose during the evergreen clause, which the parties  
18 previously negotiated in good faith but which the SJC later ruled invalid. This does not  
19 end the inquiry, however, as decisions which apply retroactively to the case at hand  
20 have not always been applied retroactively to all parties in other cases similarly situated.  
21 See MacCormack v. Boston Edison Co., 423 Mass. 652, 656 (1996). Traditionally,  
22 exceptions to the general rule of retroactivity have arisen when judicial rulings have  
23 altered rights in Massachusetts contract and property law where issues of reliance

1 might impose hardship on unsuspecting parties. Payton v. Abbott Labs, 386 Mass. 540,  
2 565 (1982). I turn then to the factors enumerated in McIntyre v. Associates Fin. Servs.  
3 Co. of Mass. (McIntyre) to decide this issue. McIntyre v. Associates Fin. Servs.. Co. of  
4 Mass., 367 Mass. 708 (1975). In the McIntyre case, the following three factors were  
5 considered in determining whether a new rule was retroactive: 1) whether a new  
6 principle has been established whose resolution was not clearly foreshadowed, 2)  
7 whether retroactive application will further the rule, and 3) whether inequitable results,  
8 injustice or hardships, will be avoided by a holding of non-retroactivity. Id. at 712. First,  
9 the holding in the Boston Housing case was foreshadowed because of what the SJC  
10 described as the unambiguous language of Section 7(a) of Chapter 150E and the  
11 statute's clear legislative intent to limit the term of a collective bargaining agreement to  
12 not more than three years. Boston Housing Authority, 458 Mass. at 162. Next,  
13 because Boston Housing involves a matter of statutory interpretation, retroactive  
14 application furthers the purpose of having a consistent and clearly defined body of law.  
15 Morrissey v. New England Deaconess Ass'n-Abundant Life Communities, Inc. 458  
16 Mass. 580, 592 (2010) (ruling retroactively that private nuisance claims fall within the  
17 purview of the Massachusetts Tort Claims Act furthered the purpose of having a  
18 consistent and clearly defined body of law). Finally, because Boston Housing was the  
19 first instance in which the SJC considered the interplay between Section 7(a) of Chapter  
20 150E and the evergreen clause of a lapsed contract, the parties had not reasonably  
21 relied upon a prior interpretation of the statute when formulating their actions. See  
22 generally, Schrottman v. Barnicle, 386 Mass. 627, 635-636 (1982) (retroactivity of ruling  
23 was appropriate because defendant could not show firm ground for reliance on a legal

1 malice standard when it was not settled law.). Therefore, I conclude that the Boston  
2 Housing case should be applied retroactively to the present case and that the 2006-  
3 2009 Agreement was not in effect in August of 2009.

#### 4 Management Rights Clause

5 I turn now to consider whether the purported waiver language in the  
6 management rights clause survived the expiration of the 2006-2009 Agreement. In  
7 order to identify the terms and conditions of employment that were in effect when a  
8 contract expires, the Board examines the relevant provisions of the expired contract and  
9 the established practice between the parties. Bristol County Sheriff's Dep't, 33 MLC 41,  
10 44 (2006) (citing Town of Chatham, 28 MLC 56, 58 (2001)). However, the Board  
11 previously has stated that it is questionable whether a contractual waiver of bargaining  
12 rights would survive the expiration of a collective bargaining agreement.  
13 Commonwealth of Massachusetts, 9 MLC 1355, 1361 (1982). Turning to decisions of  
14 the National Labor Relations Board (NLRB) for further guidance,<sup>44</sup> it is well settled under  
15 NLRB case precedent that any purported waiver of a union's right to bargain in a  
16 management rights clause, does not survive the expiration of the agreement, absent  
17 evidence of the parties' intention to the contrary. Long Island Head Start Child  
18 Development Services, 345 NLRB 973 (2005), Ironton Publications, 321 NLRB 1048  
19 (1996). Here, the record is devoid of any evidence showing that that the parties  
20 intended that the purported waiver in the management rights clause would outlive the

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<sup>44</sup> The decisions of the NLRB and the federal courts provide useful guidance in interpreting state law. See Greater New Bedford Infant Toddler Center, 12 MLC 1131, 1155, n.42, aff'd 13 MLC 1620 (1987).

1 expiration of the contract. Therefore, I conclude that the purported waiver of the Union's  
2 right to bargain had ceased to exist at the time the City instituted the half-day furloughs.

3       Were I to reach the issue of whether the language of the management rights  
4 clause amounted to a waiver of the Union's right to bargain over the reduction in unit  
5 members' hours of work, I would conclude that it did not constitute a waiver of the  
6 Union's right to bargain. Where an employer raises the affirmative defense of waiver by  
7 contract, it bears the burden of demonstrating that the parties consciously considered  
8 the situation that has arisen and that the union knowingly waived its bargaining rights.  
9 Massachusetts Board of Regents, 15 MLC 1265, 1269 (1988); Town of Marblehead, 12  
10 MLC 1667, 1670 (1986). The initial inquiry focuses upon the language of the contract.  
11 Town of Mansfield, 25 MLC 14, 15 (1998). If the language clearly, unequivocally and  
12 specifically permits the public employer to make the change, no further inquiry is  
13 necessary. City of Worcester, 16 MLC 1327, 1333 (1989). If the language is  
14 ambiguous, the Board will review the parties' bargaining history to determine their intent.  
15 Peabody School Committee, 28 MLC 19, 21 (2001); Town of Marblehead, 12 MLC at  
16 1670.

17       The City contends that the language in the management rights clause stating that  
18 it has the right to relieve employees from duty because of lack of work, lack of funds or  
19 causes beyond the City's control clearly, unequivocally and specifically permits the City  
20 to implement the half-day day furloughs. Upon review of the disputed language, I  
21 construe the phrase "relieve from duty" to possibly have more than one meaning and,  
22 thus, to be ambiguous. The phrase "relieve from duty" could refer to an involuntary  
23 layoff, which would mean the separation of unit members from their employment and

1 the removal of any possibility that those employees could perform their duties. The  
2 phrase could also refer to furloughs of various lengths and frequencies. Unlike  
3 involuntary layoffs, the furloughs ordered here do not separate unit members' from their  
4 employment, but instead unit members perform the same duties for fewer hours and  
5 lower pay. Involuntary layoffs and half-day furloughs can have significantly different  
6 impacts on unit members' terms and conditions of employment.

7 Next, I must examine the parties' bargaining history. The record before me  
8 shows that the disputed language has been present in the parties' various collective  
9 bargaining agreements for approximately forty years. However, neither party presented  
10 any specific information about the bargaining history that resulted in the disputed  
11 language's first appearance in a collective bargaining agreement. Also, the parties  
12 presented no evidence showing that once the disputed language was present in a  
13 collective bargaining agreement that the parties ever bargained about the language  
14 again. Furthermore, the City had never implemented involuntary furloughs in the forty  
15 years prior to August 2009 despite the presence of the disputed language in the various  
16 collective bargaining agreements. Rather, when the City sought to implement weekly  
17 one hour furloughs in June 2008, it negotiated an agreement with the Union to  
18 implement the furloughs. Because evidence of bargaining history to support the City's  
19 waiver defense is not present here, I find that the evidence fails to show that the Union  
20 knowingly, clearly and unmistakably waived its statutory right to bargain when it agreed  
21 to the management rights clause.

1 Zipper Clause

2           The City also contends that Article XXVI of the 2006-2009 Agreement, a so-  
3 called "zipper clause", constitutes a waiver of the Union's right to bargain over the  
4 implementation of the half-day furloughs. First, the language in Article XXVI states, in  
5 part, that "negotiations will not be reopened on any item, whether contained herein or  
6 not, during the life of this Agreement." As was discussed above, because the 2006-  
7 2009 Agreement had lapsed and, pursuant to the Boston Housing case, was no longer  
8 in effect when the City implemented the half-day furloughs, the zipper clause also was  
9 not in effect. Furthermore, the Board previously has decided that a waiver of bargaining  
10 rights during the term of a contract does not constitute a perpetual waiver for future  
11 contracts. Board of Trustees of Lowell University, 4 MLC 1972, 1977 (1978).

12           Were I to reach the issue of whether the zipper clause amounted to a waiver of  
13 the Unions' right to bargain, I would conclude that the zipper clause does not constitute  
14 a waiver of the Union's right to bargain. A zipper clause preserves the terms of the  
15 collective bargaining agreement by relieving the parties of their obligations to bargain  
16 prospectively about certain matters during the term of the agreement. See City of  
17 Westfield, 25 MLC 163, 166 (1999). Contrary to the City's arguments, a zipper clause  
18 does not vest in the employer any right unilaterally to alter mandatory subjects of  
19 bargaining that are not codified in a collective bargaining agreement. Commonwealth of  
20 Massachusetts, 18 MLC 1220, 1226-1227 (2001). As was discussed above, the  
21 language of the 2006-2009 Agreement alone is insufficient to establish a contractual  
22 waiver of the Union's right to bargain over the reduction in its unit members' hours of  
23 work, and the record discloses no evidence that the parties' bargaining history supports

1 the contractual waiver defense. Because the City has failed to demonstrate that the  
2 right to reduce unit members' hours of work by means of furloughs is incorporated in the  
3 language of the 2006-2009 Agreement, I find that the zipper clause does not preclude  
4 the Union from demanding to bargain over the issue.

5 Seniority Clause

6 The City also asserts that a portion of Article IV, Section 6 constitutes a waiver of  
7 the Union's right to bargain over the implementation of the half-day furloughs. The City  
8 relies specifically on the portion of Article VI, Section 6 that states:

9 Nothing in this section shall be construed to limit the right of the City to  
10 establish, change, enlarge or decrease shifts or the number of personnel  
11 assigned thereto, provided the rights of seniority set forth in this  
12 Agreement are followed in making the necessary personnel assignments.  
13

14 As was discussed above, the Union's purported waiver of its right to bargain would not  
15 have survived the expiration of the 2006-2009 Agreement, because there is no  
16 evidence of the parties' intentions to the contrary. Therefore, I conclude that the  
17 purported waiver in Article IV was not in effect when the City implemented the half-day  
18 furloughs in August of 2009.

19 Were I to reach the issue of the purported waiver in Article IV, Section 6, I would  
20 conclude that the disputed language does not preclude the Union from demanding to  
21 bargain over the reduction in its unit members' hours of work. A plain reading of the  
22 purported waiver shows that it makes no reference to involuntary furloughs and instead  
23 talks about the City's right to make changes in shifts and to limit the number of  
24 personnel assigned to those shifts. Even if the language in the purported waiver is  
25 found to be ambiguous, evidence about the bargaining history showed that the City  
26 sought and obtained the language at contract negotiations in order to protect the City

1 from incurring minimum staffing obligations. The record contains no information  
2 showing that the parties ever discussed the issue of furloughs when they negotiated the  
3 purported waiver. Silence on an issue, without more, does not constitute a waiver. See  
4 City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 176 (1999);  
5 Commonwealth of Massachusetts, 5 MLC 1097, 1099 (1978).

#### 6 Economic Exigency

7  
8 I turn now to the City's argument that because of fiscal restraints, it was justified  
9 in reducing unit members' hours of work prior to reaching resolution or impasse in  
10 ongoing successor contract negotiations with the Union. The Board has recognized a  
11 narrow exception to the rule against changing working conditions without bargaining to  
12 resolution or impasse where circumstances beyond the employer's control require  
13 immediate action, so that bargaining after the imposition of a change may satisfy the  
14 employer's bargaining obligation. Cambridge Health Alliance, 37 MLC 47, 52 (2010)  
15 (Appeal pending); Town of Brookline, 20 MLC 1570, 1595 (1994) (citing City of Malden,  
16 8 MLC 1620, 1626 (1981)); New Bedford School Committee, 8 MLC 1472, 1477-80  
17 (1981). An employer relying on the defense of economic exigency has the burden of  
18 establishing that: 1) circumstances beyond its control require the imposition of a  
19 deadline for negotiations; 2) the bargaining representative was notified of those  
20 circumstances and the deadline; and 3) the deadline imposed was reasonable and  
21 necessary. Cambridge Health Alliance, 37 MLC at 52.

#### 22 Circumstances Beyond Control

23 Turning to the first prong of the three-part test, it is undisputed that the City faced  
24 economic challenges in the spring and summer of 2009. However, the City has failed to

1 establish a link between those economic challenges and the August 17, 2010 date on  
2 which it announced implementation of the half-day furloughs. See Id. (although external  
3 events had a serious impact on the Cambridge Health Alliance's bottom line, the  
4 employer failed to establish a link between those events and a deadline). Although the  
5 City was aware of possible cuts in local aid for FY10 as early as the latter part of  
6 January 2009, its conduct was not consistent with its later claim that time was of the  
7 essence. New Bedford School Committee, 8 MLC at 1479 (employer's actions were  
8 contrary to its claim that time was of the essence in bargaining.)

9       The City did not commence bargaining with the Union over a successor contract  
10 until June 24, 2009, even though the Union first requested to commence successor  
11 contract negotiations in December of 2008. At that first negotiating session, the only  
12 substantive issue that the parties bargained about was ground rules. The parties did  
13 not meet again for approximately four weeks despite the fact that Mayor Lang had  
14 submitted a proposed budget with a deficit to the City Council in June 2009. At the July  
15 20, 2009 bargaining session, the City only proposed to freeze unit members' wages,  
16 longevity and sick leave incentive payments at the FY09 levels. One week later, the  
17 City proposed that the Union either accept a ten percent reduction in unit members'  
18 wages or that the City would lay off fifty-two unit members. The Union declined to  
19 accept the City's proposal and instead told the City to implement the layoffs. Shortly  
20 thereafter, the City received the cherry sheet with the local aid amount for FY10.  
21 However, the City and the Union did not meet again until three weeks later on August  
22 17, 2009. At that time, the City proposed the half-day furloughs of unit members. When

1 the Union rejected the proposal, the City announced that it was going to implement  
2 pursuant to the management rights clause of the 2006-2009 Agreement.

3 The City argues that it needed to implement the half-day furloughs immediately in  
4 order to realize the necessary savings for FY10. However, the City has failed to  
5 establish that it considered any alternatives to immediate implementation of the half-day  
6 furloughs, especially because it was early in FY10. See City of Malden, 8 MLC at 1626  
7 (employer failed to show that a delay in a reduction in force would have been unduly  
8 burdensome or prevented it from realizing savings.) For instance, the City did not  
9 explore giving the Union notice of a reasonable deadline for bargaining over the  
10 implementation of half-day furloughs and making up the necessary cost savings for the  
11 delay in implementation in some other manner, even if it included furloughs of non-  
12 union municipal employees<sup>45</sup> or a small number of layoffs. See Cambridge Health  
13 Alliance, 37 MLC at 53 (employer failed to explore other alternatives to a change in  
14 health insurance benefits for unit members upon retirement.) A small number of layoffs  
15 potentially would not trigger the same concerns about possible negative impacts on  
16 municipal operations and the local economy, which had caused the City not to  
17 implement its July 27, 2009 proposal to lay off fifty-two unit members.

18 Finally, Mayor Lang in his January 2009 letter announced a possible loss of state  
19 aid of \$8,173,602 for FY10. The actual loss in local aid was \$5,572,519.<sup>46</sup> However,

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<sup>45</sup> On August 19, 2010, two days after the City announced the half-day furloughs for unit members, Mayor Lang issued Executive Order No. 2009-5 which ordered all non-union municipal employees to take 21.5 days of unpaid leave.

<sup>46</sup> \$25,840,489, the reduced local aid figure for FY09, minus \$20,267,970, the actual local aid figure for FY10, equals \$5,572,519.

1 the City never explained why a loss of local aid,<sup>47</sup> which was less than the City  
2 previously had expected in late January 2009, should require the immediate  
3 implementation of the half-day furloughs, even though the City previously had not  
4 announced a deadline for negotiations with the Union when the City believed that it was  
5 facing a much greater loss in local aid. See generally New Bedford School Committee,  
6 8 MLC at 1479 (school committee's decision to lay off twelve positions rather than the  
7 eighteen positions originally called for indicates substantial flexibility in implementation.)

#### 8 Notification of Circumstances and Deadline

9 Next, a review of the facts before me shows that prior to August 17, 2009, the  
10 City never informed the Union that it was going to implement half-day furloughs.  
11 Without making the Union explicitly aware that a deadline existed, the City did not  
12 provide the Union with a sufficient opportunity to bargain. Commonwealth of  
13 Massachusetts, 34 MLC 115, 120 (2008) (exigency defense rejected where an  
14 employer did not explicitly inform the union about a deadline for a change in inmate  
15 schedules). Instead, the City simply announced implementation after the Union  
16 declined to accept the City's proposal for half-day furloughs. See City of Malden, 8 MLC  
17 at 1625 (employer implemented without prior notice to union of a deadline for  
18 bargaining.) Furthermore, the City had not raised the topic of half-day furloughs at any  
19 of the three prior bargaining sessions, even when it referred to a possible deficit in the  
20 City's FY10 budget at those sessions. Thus, the City has failed to meet the second  
21 prong of its affirmative defense.

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<sup>47</sup> \$8,173,602, the January 29, 2009 projected reduction in FY10 local aid, minus \$5,572,519, the actual reduction in FY10 local aid, equals \$2,601,083.

1 Reasonable and Necessary Deadline

2       Also, the City has failed to meet its burden of establishing that the August 20,  
3 2009 implementation date was reasonable and necessary under all of the prevailing  
4 circumstances. New Bedford School Committee, 8 MLC at 1479. First, the City has not  
5 produced a compelling, objective reason why it selected the particular date of August  
6 20, 2009 for implementation. See Trustees of the Univ. of MA. Medical Center, 26 MLC  
7 149, 159 (2000) (employer, which imposed a two-week deadline for negotiations with a  
8 union, failed to provide compelling, objective reason why it needed to file merger  
9 legislation within that time period). The City relies upon two events that occurred after  
10 the July 27, 2009 bargaining session, i.e. the City's receipt of the cherry sheet figures  
11 for FY10 in late July 2009 and the City Council's passage of the FY10 budget with a ten  
12 percent cut in the wages and salaries account, to support its implementation of the half-  
13 day furloughs on August 20, 2009. However, the record before me does not show that  
14 those events caused the City to attempt to accelerate bargaining with the Union before  
15 the August 20, 2009 session. An employer will not be allowed to avoid its obligation to  
16 bargain to the point of resolution or impasse when it has established neither a  
17 commitment to fully maximize the time available for negotiations, nor the necessity of  
18 choosing a particular date for cutting off the negotiation process. City of New Bedford at  
19 1479. Additionally, the City was aware in late January 2009 that it faced possible cuts  
20 in local aid, but the City and the Union did not even exchange economic proposals until  
21 the second bargaining session on July 20, 2009. The Board previously has rejected an  
22 employer's arguments that a date certain to unilaterally implement was reasonable and  
23 necessary when the employer had longstanding knowledge of the circumstances

1 precipitating the unilateral change. See Cambridge Health Alliance, 37 MLC at 55.

2 Accordingly, the City's economic exigency defense must fail.

3 Therefore, the City was obligated under the Law to give the Union the  
4 opportunity to bargain to resolution or impasse before the employer implemented the  
5 half-day furlough.

6 Count IV-Section 10(a)(6) Allegation

7 A public employer violates Section 10(a)(6) of the Law if it fails to participate in  
8 good faith in the mediation, fact-finding and arbitration procedures set forth in Sections  
9 8 and 9 of the Law. Section 9 of the Law states in pertinent part:

10 After a reasonable period of negotiation over the terms of a collective  
11 bargaining agreement, either party or the parties acting jointly may petition  
12 the board for a determination of the existence of an impasse. Upon  
13 receipt of such petition, the [DLR] shall commence an investigation  
14 forthwith to determine if the parties have negotiated for a reasonable  
15 period of time and if an impasse exists, within ten days of such petition,  
16 the board shall notify the parties of the results of its investigation. Failure  
17 to notify the parties within ten days shall be taken to mean that an  
18 impasse exists.

19  
20 Upon the filing of a petition pursuant to this section for a determination of  
21 an impasse following negotiations for a successor agreement, an  
22 employer shall not implement unilateral changes until the collective  
23 bargaining process, including mediation, fact-finding or arbitration, if  
24 applicable, shall have been completed and the terms and conditions of  
25 employment shall continue in effect until the collective bargaining process,  
26 including mediation, fact finding or arbitration, if applicable, shall have  
27 been completed, provided, however, that nothing contained herein shall  
28 prohibit the parties from extending the terms and conditions of such a  
29 collective bargaining agreement by mutual agreement for a period of time  
30 in excess of the aforementioned time. For the purposes of this paragraph,  
31 the board shall certify the parties that the collective bargaining process,  
32 including mediation, fact finding or arbitration, if applicable, has been  
33 completed.

34 Here, the Union filed a petition for mediation and fact-finding on August 18, 2009 and  
35 sent a copy of that petition to the City on the same date. However, despite the

1 pendency of the Union's petition, the City issued Executive Order No. 2009-5 on August  
2 20, 2009, which reduced unit members' hours of work effective August 30, 2009. Thus,  
3 the City instituted a unilateral change in a mandatory subject of bargaining during the  
4 pendency of a petition that was filed pursuant to Section 9 of the Law. As was  
5 discussed above, because the City did not establish the requisite elements to prevail  
6 upon an economic exigency defense, the City also cannot rely on an economic  
7 exigency claim as a shield against its obligations under Section 9 of the Law. See  
8 Cambridge Health Alliance, 37 MLC at 52 (2010) (economic exigency can permit an  
9 employer to make unilateral changes by a date certain despite a union's filing of a  
10 petition pursuant to Section 9 of the Law).

11 I have already determined that the City failed to bargain in good faith of Section  
12 10(a)(5) of the Law by reducing unit members' hours of work. Because the unilateral  
13 change took place during the pendency of a petition that the Union had filed pursuant to  
14 Section 9 of the Law, the City's conduct also violated Section 10(a)(6) of the Law.

#### 15 CONCLUSION

16 Based on the record and for the reasons stated above, I conclude that the City  
17 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner  
18 alleged in Count III of the complaint and also violated Section 10(a)(6) and,  
19 derivatively, Section 10(a)(1) of the Law in the manner alleged in Count IV of the  
20 complaint. I dismiss Counts I and II of the complaint alleging that the City violated  
21 Section 10(a)(5) of the Law.

#### 22 ORDER

23 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City shall:

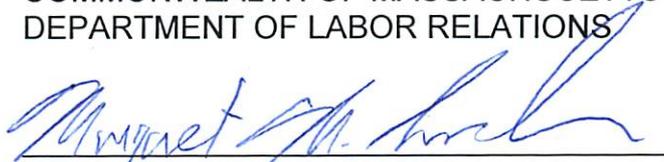
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1. Cease and desist from:
  - a) Failing and refusing to bargain in good faith with the Union by unilaterally reducing unit members' hours of work.
  - b) Failing to and refusing to participate in good faith in mediation and fact-finding with the Union.
  - c) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.
  
2. Take the following action that will effectuate the purposes of the Law;
  - a) Restore unit members' work weeks to the total number of hours that they worked per week as of the date(s) that the City required them to take half-day furloughs.
  - b) Make unit members whole for any economic losses that they have suffered as a direct result of the City's reduction in their hours of work, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.
  - c) Bargain in good faith to resolution or impasse with the Union before reducing unit members' hours of work.
  - d) Participate in good faith in mediation and fact-finding with the Union.
  - e) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

- 1  
2 f) Notify the Department in writing of the steps taken to comply with  
3 this decision within ten (10) days of receipt of this decision.

SO ORDERED.

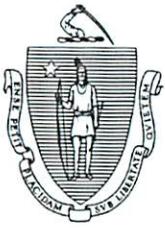
COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN  
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 ten days, the decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

# 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 New Bedford (City) has violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by its unilateral reduction in unit members' hours of work and has violated Sections 10(a)(6) and, derivatively, Section 10(a)(1) of the Law by its failure to participate in good faith in mediation with AFSCME Council 93, AFL-CIO (Union).

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:  
to engage in self-organization; to form, join or assist any union;  
to bargain collectively through representatives of their own choosing;  
to act together for the purpose of collective bargaining or other mutual aid or protection; and  
to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by unilaterally reducing unit members' hours of work.

WE WILL NOT fail to participate in good faith in mediation with the Union.

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

- 1) Restore unit members' workweeks to the total number of hours that they worked per week as of the date(s) that the City required them to take half-day furloughs.
- 2) Make unit members whole for any economic losses that they have suffered as a direct result of the City's unilateral reduction in their hours of work, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.
- 3) Bargain in good faith to resolution or impasse with the Union over the reduction in unit members' hours of work.
- 4) Participate in good faith in mediation and fact-finding.

\_\_\_\_\_  
City of New Bedford

\_\_\_\_\_  
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 Labor Relations Commission, 399 Washington St., 4<sup>th</sup> Floor, Boston, MA 02108-5213 (Telephone: (617) 727-3505).