

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

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In the matter of \*

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CITY OF NEW BEDFORD \*

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Case No. MUP-10-6032

and \*

\*

AMERICAN FEDERATION OF \*  
STATE, COUNTY AND MUNICIPAL \*  
EMPLOYEES, COUNCIL 93, \*  
AFL-CIO, LOCAL 85 \*  
\*

Date Issued: March 31, 2014

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Board Members Participating:

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, Board Member  
Harris Freeman, Board Member

Appearances:

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

Karen Clemens, Esq. - Representing the American Federation  
of State, County and Municipal  
Employees, Council 93, AFL-CIO, Local  
851

1 DECISION ON APPEAL

SUMMARY

2 The City of New Bedford (City or Employer) appeals from a June 27, 2013  
3 Hearing Officer decision holding that the City violated Section 10(a)(5) of M.G.L. c.  
4 150E (the Law) when it reduced bargaining unit members' hours of work without  
5 providing the Union with an opportunity to bargain to resolution or impasse over that

1 decision and its impacts.<sup>1</sup> The Employer filed a timely notice of appeal and a  
2 supplementary statement arguing that certain findings were erroneous and that the  
3 Investigator's conclusions were not supported by substantial evidence. The charging  
4 party, AFSCME Council 93 (Union) filed a supplementary statement in response to the  
5 Employer's appeal. After careful consideration of the parties' supplementary statements  
6 and the record as a whole, the Commonwealth Employment Relations Board (Board)  
7 affirms the Hearing Officer's decision in its entirety.

8 Facts

9 The Employer challenged some of the Hearing Officer's findings of fact and  
10 credibility findings. After a thorough review of the record below, we have decided to  
11 adopt the Hearing Officer's findings of fact, as set forth in the attached decision and  
12 supplemented by the record. We briefly summarize the relevant portions and address  
13 the challenges below.

14 On three occasions in December 2009, the parties met and negotiated over how  
15 to correct a pay structure that, several months earlier, the United States Department of  
16 Labor (DOL) had found violated certain provisions of the Fair Labor Standards Act  
17 (FLSA). The parties met for a fourth and final time on January 4, 2010. At this meeting,  
18 the Employer made a proposal to allow Paramedics and EMTs to retain their eight-week  
19 cycle of 10- and 14-hour shifts with 42 hours a week averaged for each cycle. The  
20 Employer told the Union that this was its final offer and asked the Union to present this

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<sup>1</sup> The Hearing Officer dismissed the allegations that the Employer repudiated its January 4, 2010 proposal (described below) and violated Section 10(a)(6) of the Law by failing to participate in good faith in the mediation process. She also rejected the Employer's affirmative defense that the management rights clause of its collective bargaining agreement constituted a waiver of the Union's right to bargain over the change. Neither party appealed from these rulings and these issues are not before us.

1 offer to its membership for a ratification vote. The Employer stated that if the Union  
2 voted down the proposal, it would implement an eight-hour per day, five-day work week.  
3 The Employer gave no deadline for the Union's response. On January 14, 2010, the  
4 Union presented a counterproposal to the Employer that retained the eight-week cycle  
5 proposed on January 4, but with increased benefits.

6 On January 25, 2010, the Employer, through its special counsel Arthur Caron  
7 (Caron), wrote a letter to the Union stating, among other things, that the Union's  
8 January 14 response was unacceptable and failed to respond to the City's request for a  
9 Union vote on its proposal.<sup>2</sup> The letter then stated that the parties were at impasse and  
10 the City intended to establish an eight-hour per day, five-day and 40-hours per week  
11 work schedule to comply with FLSA. On February 4, 2010, however, the Union voted to  
12 ratify the City's January 4, 2010 proposal and, shortly thereafter, Union steward Phillip  
13 Saraiva (Saraiva) notified EMS Director Mark McGraw (McGraw) about the newly-  
14 ratified plan.<sup>3</sup> McGraw was involved in all of the negotiations regarding the new

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<sup>2</sup> Although the Hearing Officer made no specific findings as to whether the Union held a vote, the decision quotes from an email that Union shop steward Rosemary Nunes (Nunes) wrote to the membership on January 29, 2010. The email states that on January 11, 2010, the membership unanimously rejected the City's offer and voted instead to offer the counterproposal the Union presented on January 14.

<sup>3</sup> In several places in its Supplementary Statement, the City challenges the Hearing Officer's use of the term "newly-created work plan." The City claims that there was no documentary evidence or testimony of such plan. However, two Union witnesses, shop stewards Nunes and Saraiva, used this term when testifying. Further, based on this testimony, it is clear that the term "newly-created work plan" simply refers to the January 4, 2010 City proposal that was initially rejected by the Union and subsequently approved in February.

1 schedule.<sup>4</sup> At their February 2010 monthly meeting, Saraiva asked McGraw about the  
2 status of the “new, ratified work schedule” and McGraw responded that it was “still” on  
3 the Mayor’s desk awaiting final approval.<sup>5</sup> On March 10, 2010, Saraiva sent an email to  
4 Union members informing them, among other things, that “[McGraw] asked me to let  
5 everyone know that our new negotiated working plan is on the Mayor’s desk for signing.  
6 . . . We can expect to see it implemented in April.”

7 On May 25, 2010, Caron sent a letter to Union Staff Representative Michael  
8 Medeiros (Medeiros) listing proposed changes impacting AFSCME personnel in the FY  
9 2011 budget, including a paramedic schedule of a 40-hour work week, 5-2 work  
10 schedule, effective on or about June 27, 2010, and offering to impact bargain about the  
11 changes. On June 9, 2010, Caron again wrote Medeiros relating the reduction in local  
12 aid and necessity to review every expenditure to reduce the municipal budget. He  
13 states that as “a result we reviewed the proposed addendum to negotiation last  
14 December 2009 and January 2010.” He further relates that “it appears the continuing  
15 loss in state aid makes this schedule too costly because it actually provides a pay  
16 increase for paramedics when the built in overtime cost is taken into account.” Caron

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<sup>4</sup> McGraw testified that he was involved in all of the negotiations regarding the new schedule. The Board has supplemented the findings with this fact for the sake of completeness.

<sup>5</sup> From our review of the record and the decision, the Hearing Officer’s finding that Saraiva notified McGraw about the ratification vote shortly after it took place appears to be based on Saraiva’s testimony that he discussed the ratified proposal with McGraw at their February 2010 monthly meeting. Although the City argues that this conversation is insufficient to support the Board’s conclusion that the parties were not at impasse, the City does not dispute that Saraiva and McGraw ever held this conversation.

1 offered to discuss the change to a 40-hour week that would and did take place on June  
2 27, 2010.

3 Opinion<sup>6</sup>

4 Section 10(a)(5) of the Law requires a public employer to bargain to resolution or  
5 impasse before changing terms and conditions of employment involving a mandatory  
6 subject of bargaining. Commonwealth of Massachusetts v. Labor Relations  
7 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations  
8 Commission, 388 Mass. 557 (1983). Impasse is a question of fact requiring a  
9 consideration of the totality of the circumstances to decide whether, despite their good  
10 faith, the parties are simply deadlocked. City of Worcester, 39 MLC 271, 272, MUP-11-  
11 6289 (March 29, 2013) (citing City of Boston, 29 MLC 6, 9 (2002) (further citing School  
12 Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 574 (1983)).  
13 The factors to be considered in determining whether impasse has been reached include  
14 the bargaining history, good faith of the parties, length of negotiations, importance of the  
15 issues to which there is a disagreement, and the contemporaneous understanding of  
16 the parties concerning the state of the negotiations. Ashburnham-Westminster  
17 Regional School District, 29 MLC 191, 195, MUP-01-3144 (April 19, 2003).  
18 Furthermore, impasse only exists where the parties have bargained in good faith to the  
19 point where it is clear that further negotiations would be fruitless because the parties are  
20 deadlocked. Id. If one party indicates a desire to continue in collective bargaining, this  
21 demonstrates that the parties have not exhausted all possibilities of compromise, thus

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<sup>6</sup> The Board's jurisdiction is not contested.

1 precluding a finding of impasse. Commonwealth of Massachusetts, 25 MLC 201, 205,  
2 SUP-2075 (June 4, 1999).

3         The Hearing Officer found that the parties had not reached impasse because the  
4 record before her did not establish that further negotiations would have been fruitless.  
5 In particular, she found that the Union's January 14, 2010 counterproposal, which  
6 retained the eight-week cycle of 10- and 14-hour shifts but with increased benefits,  
7 demonstrated both that the Union wished to continue bargaining and that they were not  
8 deadlocked. She further found that the submission of the Union's ratified work plan to  
9 the Mayor demonstrated that the parties had not exhausted all possibilities of  
10 compromise.

11         On appeal, the City argues that the Hearing Officer's conclusion that the parties  
12 had not reached impasse was not supported by substantial evidence and that, overall,  
13 the Union failed to meet its burden of proof. The City's argument, while couched in  
14 evidentiary terms, is derived from the flawed premise that its declaration on January 25,  
15 2010, that the parties were at impasse, justified the unilateral action that followed five  
16 months later. However, the fact that the City may have believed that the parties were at  
17 impasse is not dispositive of this issue where the facts do not otherwise demonstrate  
18 the parties were deadlocked. Rather, in determining that the parties were not at  
19 impasse, the Hearing Officer properly relied on the fact that the Union's January 14,  
20 2010 counteroffer demonstrated both that the Union wished to continue bargaining and  
21 that the parties were not deadlocked. See, e.g., City of Boston, 21 MLC 1350 (1994)

1 (union's request to continue negotiations required the employer to delay implementation  
2 of a reorganization and continue negotiations).<sup>7</sup>

3 To support her finding that there was still room for bargaining, the Hearing Officer  
4 also properly relied on the parties' conduct following the City's January 25 declaration of  
5 impact. As explained in greater detail below, the Hearing Officer relied on the following  
6 set of unrefuted facts to conclude that the parties were not at impasse: First, that the  
7 Union responded to the City's January 4 request and held a vote on the January 4  
8 proposal, accepting its terms, and; second, that McGraw, informed two Union shop  
9 stewards that the ratified proposal had been transmitted to the Mayor for her review.

10 The City's declaration of impasse is also called into question by its own conduct  
11 following its January 25 letter to the Union. Caron's June 9, 2010 letter to the Union  
12 indicates that the particulars of the City's January 4, 2010 proposal were still under  
13 consideration by the City five months later when changes to the FY 2011 budget were  
14 being made. Clearly, the Union- ratified proposal that McGraw said was on the Mayor's  
15 desk was still being discussed by the City in June, indicating that there was ample time  
16 for further negotiations between January 25, when the City unilaterally declared  
17 impasse, and June 27, 2010, when the schedule change was implemented.

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<sup>7</sup> As the January 25 letter reflects, the DOL's determination that the parties' existing pay structure violated the FLSA was a factor in both the City's declaration that its January 4 proposal was its final offer and its declaration of impasse after the Union rejected that offer. However, as the Hearing Officer noted, the City never gave the Union a deadline for responding to the January 4 proposal and there is no evidence that the changes had to be implemented by a date certain. Therefore, although, as the Hearing Officer found, complying with the DOL's order was important to the City, that consideration, standing alone, did not justify the January 25 declaration of impasse. See, e.g., City of Boston, 33 MLC 1 (2006), *aff'd sub nom. City of Boston v. CERB*, 456 Mass. 389 (2009) (Absent evidence supporting a finding that factors outside the City's control mandated the implementation of a 28-day work period by a date certain, the City remained obligated to bargain to resolution or impasse before implementing proposed changes).

1 Given these salient facts, derived from undisputed testimony at hearing, there is no  
2 error in the Hearing Officer's finding that the parties were not at impasse when the  
3 changes were implemented.

4 The City nevertheless claims that the Hearing Officer's ruling does not rest on  
5 substantial evidence. First, the City argues that no reliable evidence shows that the  
6 Union wished to continue bargaining after the City declared impasse on January 25.  
7 Specifically, it claims that there is no evidence showing that the Union ever responded  
8 to Caron's January 25 letter or notified the City that it had ratified the January 4  
9 proposal. We disagree. The Hearing Officer found that both Nunes and Saraiva had  
10 several conversations with McGraw about the Union's ratification vote and that in the  
11 course of this back and forth, McGraw indicated that the ratified work plan was on the  
12 Mayor's desk waiting her approval. This finding is further buttressed by the email  
13 Saraiva wrote in March stating that McGraw wanted Saraiva to tell bargaining unit  
14 members that the plan was on the Mayor's desk. Given McGraw's status as EMS  
15 Director and his involvement in all of the negotiations regarding the new schedule, he  
16 was clearly vested with the actual or apparent authority to act on the City's behalf. See,  
17 e.g., Town of Chelmsford, 8 MLC 1913, 1916, MUP-4620 (March 12,1982) *aff'd sub*  
18 *nom. Town of Chelmsford v. Labor Relations Commission*, 15 Mass. App. Ct. 1107  
19 (1983)(supervisors are presuming to be acting and speaking for the employer absent  
20 evidence showing that Employer has communicated otherwise to employees). Thus,

1 McGraw's discussions with the Union about the status of the ratified proposal establish  
2 notice to the City of the Union's having responded to the City's proposal.<sup>8</sup>

3       The City's second and main challenge to the Hearing Officer's conclusion that  
4 the parties were not at impasse centers on a claim that the record contains no evidence  
5 establishing either that the ratified January 4 proposal was submitted to the Mayor for  
6 his approval or that, between February and June 2010, the Union made any efforts to  
7 find out about the status of the proposal. As explained in footnotes 7 - 9 of the Hearing  
8 Officer's decision, there was no evidence about whether the Mayor actually received the  
9 ratified work plan. The City is, in this respect, correct. But, whether the proposal was  
10 actually received by the Mayor is not factually dispositive. Rather, the issue is whether  
11 the Union was informed by the City's bargaining agent that the Union's proposal was  
12 being considered by the City.

13       Clearly, the undisputed testimony is that the Union was told by McGraw that the  
14 proposal was on the Mayor's desk for her consideration. In this regard, the Hearing  
15 Officer relied on Saraiva's and Nunes' testimony to establish that sometime in February  
16 and March of 2010, McGraw told them that the work plan was on the Mayor's desk.  
17 This testimony was not rebutted by McGraw, who, when asked on direct examination if  
18 he had "ever had a conversation with [Nunes] about the Union Body accepting the tens

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<sup>8</sup> The City also attempts to downplay the significance of the Union's February ratification vote by arguing that "a party who has rejected a final proposal cannot simply resurrect the proposal." In making this argument to the Hearing Officer, the City relied on Peretz v. Watson, 3 Mass. App. Ct. 727, 728 (1975) (once offer rejected, it cannot be revived by offeree's attempted acceptance) and Moss v. Old Colony Trust Co., 246 Mass. 139, 148 (1923) (offer terminated by making a counteroffer). Even assuming that these commercial contract cases are applicable in the collective bargaining context, the critical question here is whether the parties had reached impasse under the Chapter 150E precedent cited above. For all the reasons set forth herein, the Hearing Officer correctly determined that they had not.

1 and fourteens” stated, “I’m sure I did, but not specifically.” It is well-established that the  
2 Board will not overrule a Hearing Officer’s resolutions with respect to credibility “unless  
3 the clear preponderance of all the relevant evidence convinces us that the resolutions  
4 are incorrect.” Bellingham Teachers Association, 9 MLC 1536, 1543, MUPL-2236  
5 (December 30, 1982) (citations omitted). Nothing in the arguments raised by the City  
6 point to any facts in the record showing that the Hearing Officer’s decision to credit  
7 Nunes and Saraiva’s testimony was incorrect or unsupported by the record evidence.  
8 we therefore decline to disturb these findings.

9         Given this testimony reviewed above, we also decline the City’s invitation to draw  
10 an adverse inference from that fact that Union Staff Representative Medeiros never  
11 offered testimony that he conveyed the paperwork showing the Union’s approval of the  
12 plan to the City. As an evidentiary matter, the City did not refute Nunes’ and Saraiva’s  
13 testimony that Medeiros was supposed to take care of this. More importantly, the  
14 undisputed facts all indicate the more salient fact, i.e., that McGraw informed the Union  
15 that the proposal was on the Mayor’s desk for her consideration. Whether or not that  
16 proposal in fact got to her desk, or how it may have gotten there, is not material to a  
17 determination of the impasse issue. Finally, Saraiva’s and Nunes’ unrefuted testimony  
18 regarding their February/March discussions with McGraw also refutes the City’s  
19 contention that the record does not show that the Union inquired as to the status of its  
20 ratified January 4 proposal.

21         The City’s claim that the Union failed to meet its burden of proving unlawful  
22 unilateral change, i.e., a change in work hours by the City without first providing the  
23 Union with an opportunity to bargain to resolution or impasse, must therefore be

1 rejected for the reasons set forth above. The fact that in June 2010 the City offered to  
2 bargain about the impacts of this unilateral change does not alter this conclusion since  
3 at this point, having not reached impasse, it remained obligated to bargain over its  
4 decision to reduce bargaining unit members' hours of work, a mandatory subject of  
5 bargaining.

6 Conclusion

7 For all of the reasons stated above and in the Hearing Officer's decision, we  
8 affirm the Hearing Officer's conclusion that the City changed bargaining unit members'  
9 hours of work without bargaining to resolution or impasse. We therefore issue the  
10 following order.

11 ORDER

12  
13 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City  
14 of New Bedford shall:

15 1. Cease and desist from:

- 16 a. Failing and refusing to bargain in good faith with the Union by  
17 unilaterally reducing unit members' hours of work.  
18 b. In any like or similar manner interfering with, restraining or coercing  
19 employees in the exercise of their rights protected under the Law.  
20

21 2. Take the following affirmative action that will effectuate the purpose of the  
22 Law:

- 23  
24 a. Restore unit members' workweeks to the total number of hours that  
25 they worked per week prior to June 27, 2010.  
26  
27 b. Make unit members whole for an economic losses that they have  
28 suffered as a direct result of the City's reduction in their hours of work,  
29 plus interest on any sums owed at the rate specified in M.G.L c. 231,  
30 Section 6I, compounded quarterly.  
31  
32 c. Bargain in good faith to resolution or impasse with the Union before  
33 reducing unit members' hours of work.

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- d. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;
- e. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) consecutive days of the steps taken by the City to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

\_\_\_\_\_  
MARJORIE F. WITTNER, CHAIR

\_\_\_\_\_  
ELIZABETH NEUMEIER, BOARD MEMBER

\_\_\_\_\_  
HARRIS FREEMAN, BOARD MEMBER



# NOTICE TO EMPLOYEES

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

The Commonwealth Employment Relations Board (Board) has held that the City of New Bedford (City) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E when it unlawfully changed hours of work for bargaining unit members without first giving the American Federation of State, County and Municipal Employees, Council 93, Local 851 (Union) notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on bargaining unit members' terms and conditions of employment.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Employer assures its employees that:

WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse over the decision to reduce hours of work for bargaining unit members.

WE WILL restore unit members' workweeks to the total number of hours that they worked per week prior to June 27, 2010.

WE WILL 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 MGL c. 231, Section 6I, compounded quarterly.

WE WILL bargain in good faith to resolution or impasse with the Union over the reduction in unit members' hours of work.

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For the City

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Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of	*	
	*	
CITY OF NEW BEDFORD	*	
	*	Case No. MUP-10-6032
and	*	
	*	
AMERICAN FEDERATION OF	*	Date Issued:
STATE, COUNTY AND MUNICIPAL	*	June 27, 2013
EMPLOYEES, COUNCIL 93,	*	
AFL-CIO, LOCAL 851	*	
	*	

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Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Jane Medeiros Friedman, Esq.	-	Representing the City of New Bedford
Karen Clemens, Esq.	-	Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, Local 851

HEARING OFFICER'S DECISION AND ORDER

1 SUMMARY

2 The issues in this case are whether the City of New Bedford (City or Employer)  
3 violated Sections 10(a)(5), 10(a)(6) and, derivatively 10(a)(1) of Massachusetts General  
4 Laws, Chapter 150E (the Law) by failing to bargain in good faith with the American  
5 Federation of State, County and Municipal Employees, Council 93, AFL-CIO, Local 851  
6 (Union) when the City reduced bargaining unit members' hours of work without

1 bargaining to resolution or impasse over that decision and its impacts. I conclude that  
2 the City violated Section 10(a)(5) of the Law when it reduced bargaining unit members'  
3 hours of work without providing the Union with an opportunity to bargain to resolution or  
4 impasse over that decision and its impacts. However, I conclude that the City did not  
5 violate Section 10(a)(5) of the Law by repudiating the City's January 2010 proposal and  
6 the Union's February 2010 ratification of that proposal, nor did the City violate Section  
7 10(a)(6) of the Law by failing to participate in good faith mediation.

8 STATEMENT OF THE CASE

9 On October 7, 2010, the Union filed a Charge of Prohibited Practice (Charge)  
10 with the Department of Labor Relations (DLR), alleging that the Employer violated  
11 Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith and  
12 repudiating a January of 2010 agreement. A duly-designated DLR investigator  
13 investigated the Charge and issued a Complaint of Prohibited Practice and Partial  
14 Dismissal (Complaint)<sup>1</sup> on December 19, 2012.<sup>2</sup> The Employer filed its Answer to the  
15 Complaint on January 3, 2012.

16 I conducted a hearing on October 9, 2012 and December 3, 2012, at which both  
17 parties had an opportunity to be heard, to examine witnesses and to introduce  
18 evidence. On January 15, 2013, the Union and Employer both filed their post-hearing  
19 briefs. Based on the record, which includes witness testimony and documentary

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<sup>1</sup> In its post-hearing brief, the City referenced an "Amended" Complaint, but there is no evidence in the record that the DLR or the Investigator issued an Amended Complaint.

<sup>2</sup> The Hearing Officer issued the Complaint on December 19, 2011 not December 19, 2012, which was a typographical error.

1 exhibits, and in consideration of the parties' arguments, I make the following findings of  
2 fact and render the following opinion.

3 ADMISSIONS OF FACT

4  
5 The City admitted to the following facts:<sup>3</sup>

- 6  
7 1. The City is a public employer within the meaning of Section 1 of the Law.  
8  
9 2. The Union is an employee organization within the meaning of Section 1 of  
10 the Law.  
11  
12 3. The Union is the exclusive bargaining representative for Paramedics and  
13 Emergency Medical Technicians (EMTs) employed by the City.  
14  
15 4. Prior to January of 2010, following an investigation by the United States  
16 Department of Labor (DOL) where the DOL determined that the City was  
17 violating the Fair Labor Standards Act (FLSA), the parties met to bargain  
18 over the hours of work for the bargaining unit members.  
19  
20 5. In a letter dated June 9, 2010, the City announced that beginning June 27,  
21 2010, bargaining unit members' schedules would change to forty hours  
22 per week.  
23  
24 6. Beginning the week of June 27, 2010, bargaining unit members hours  
25 were reduced to 40 hours per week.  
26

27 FINDINGS OF FACT

28  
29 The Union and the Employer entered into collective bargaining agreements  
30 (Agreements), effective from July 1, 2006 to June 30, 2009 (2006-2009 Agreement) and  
31 from July 1, 2009 to June 30, 2012 (2009 -2012 Agreement) (collectively Agreements).

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<sup>3</sup> In its Answer, the City made full and partial admissions of fact. This section of my decision reflects only the City's full admissions of fact.

1 While the parties were negotiating the 2009-2012 Agreement, the Union filed a petition  
2 with the DLR for mediation in or about August of 2009, to which the City participated.  
3 When the parties finalized the 2009-2012 Agreement, they renewed and incorporated  
4 all provisions from the 2006-2009 Agreement. Article IV Seniority, Section 6 states:

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

14  
15 Article XXV Management Rights of the states, in part:

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

32  
33 XXVI Contract Provisions states, in part:

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

1 Agreement cannot be changed, altered or modified, except in writing,  
2 signed by both parties, which writing shall be considered as an  
3 addendum to this Agreement.  
4

5 On July 24, 2009, the United States Department of Labor (DOL) notified the City  
6 that it was conducting a compliance inspection of the City's Emergency Medical  
7 Services (EMS) Department on August 3, 2009, pursuant to the Fair Labor Standards  
8 Act (FLSA). At the time of the DOL inspection and for at least 30 years prior, the City's  
9 Paramedics and EMTs worked an eight-week cycle of 10 and 14 hours shifts with an  
10 average weekly salary of 42 hours a week.<sup>4</sup> The DOL's compliance inspection  
11 concluded that: (1) the City's Paramedics and EMTs did not meet FLSA criteria for  
12 public safety personnel and were not "exempt" employees under the statute. The  
13 inspection also concluded that the City's current pay structure (42-hour/ eight-week  
14 cycle) for EMS employees did not comply with the FLSA and instructed the City to  
15 provide payroll records for the prior two years to determine the amount of back wages  
16 owed to Paramedics and EMTs.

17 Soon after the DOL's inspection results, the City contacted the Union and began  
18 negotiations to correct the pay structure for Paramedics and EMTs. The parties met on  
19 December 8, 16 and 23, 2009. At the December 16, 2009 meeting, the City offered its  
20 first proposal and the Union offered its first counter proposal. At the December 23,  
21 2009 meeting, the City made its second proposal, and at the January 4, 2010 meeting,  
22 the City offered its third and final proposal. The January 4, 2010 proposal allowed

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<sup>4</sup> This work schedule averaged 42 hours per week because during some weeks unit members worked 48 hours and other weeks they worked 34 hours. Regardless of whether unit members actually worked over or under 42 hours per week, the Employer paid them an average weekly salary of 42 hours.

1 Paramedics and EMTs to retain their eight-week cycle of 10 and 14 hours shifts with 42  
2 hours averaged for each cycle. At the end of the January 4, 2010 meeting, the City  
3 asked the Union to present its latest proposal to its membership for a vote and informed  
4 the Union that if the membership could not agree to that proposal, then the City would  
5 implement an eight-hour, five-day work week. The City did not give the Union a  
6 response deadline.

7 On January 14, 2010,<sup>5</sup> the Union submitted a counter-proposal to the City's  
8 January 4, 2010 proposal, which retained the eight-week cycle of 10 and 14 hours shifts  
9 but proposed a new increase in benefits, including vacation, sick and personal leave.  
10 By letter dated January 25, 2010, City Special Counsel Arthur J. Caron Jr. (Caron)  
11 informed Union President Mark Messier (Messier) as follows:

12 As you are aware, the United States Department of Labor (DOL) received  
13 a complaint alleging the City was in violation of the overtime provisions of  
14 the Fair Labor Standards Act (FLSA) in relation to the work schedule of  
15 paramedics represented by Local 851. It is clear [that] the present four  
16 day schedule of two ten hour day tours and two fourteen hour night tours  
17 requires the payment of overtime for all hours in excess of forty hours in a  
18 workweek. The reason is our paramedics do not qualify for the overtime  
19 exemption under the FLSA.

20  
21 Currently the DOL is calculating the overtime payments due paramedics  
22 under the FLSA and the City expects a determination in the near future.  
23 Since we have continued to work the same schedule this liability is  
24 ongoing and must be addressed. The City has attempted to reach a  
25 voluntary accord with the Union and have met with your representatives  
26 on December 8, 16 and 23, 2009 and January 4, 2010. On January 4,  
27 2010 I requested that our final proposal numbered 14, 15, 16, 17 and 18  
28 be submitted to paramedics for a vote. I advised your representatives that  
29 if this was not acceptable the City would have no choice but to implement  
30 an 8 hour five day workweek to comply with the FLSA. On January 14,  
31 2010, I received a "revised" counterproposal dated January 6, 2010 from

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<sup>5</sup> Special Counsel for the City Arthur Caron testified that he received the Union's counterproposal on January 14, 2010 even though it was dated January 6, 2010. The Union did not rebut Caron's testimony on this point.

1 the Union that is not acceptable nor did it respond to my request of  
2 January 4 for a vote on the City proposals.

3  
4 Clearly we are at an impasse on this issue and pursuant to Articles XXV  
5 and XXVI of the collective bargaining agreement the City intends to  
6 establish a 8 hour five day work schedule as soon as possible. The City  
7 remains committed to provide the Union with reasonable notice as we  
8 transition to this work schedule.

9  
10 By e-mail on January 29, 2010, Union Shop Steward Rosemary Nunes (Nunes)

11 informed Union members that:

12 [O]n January 11, 2010 the membership unanimously rejected the City's  
13 last offer (to keep our present hours with loss of benefits). And voted 18  
14 yes and 3 no to attempt to offer the changes we made written in our  
15 document labeled counterproposal, dated 1/6/10 (to keep our present  
16 hours and retain some of those benefits). You all made it very clear you  
17 would rather have an "8hr" shift/40 week schedule than the 10's and 14's  
18 with loss of benefits. Well it seems that time may come. I have received a  
19 copy of the letter from Arthur Caron which states the city has rejected our  
20 counter proposal and feels we are "clearly at an impasse" and "the city  
21 plans to establish an 8 hour five day work schedule as soon as possible".  
22 However our job is not done we still have issues to discuss (and vote on)  
23 such as the legalities of their response as well as how the "8hr" shift or 40  
24 hr week will be implemented. Therefore we will be having another  
25 meeting with the body on Thur 2/4/10 @ 7pm at the union hall. This  
26 meeting is of great importance and effects us all and ALL of us should be  
27 there to give our input and cast our vote. It does no good to discuss it  
28 after it is done. Thank you.

29  
30 Sometime in February of 2010, the Union membership voted to ratify the City's  
31 January 4, 2010 proposal and, soon after, Union Shop Steward Phillip Saraiva (Saraiva)  
32 notified EMS Director Mark McGraw (McGraw) of the ratification. At the Union's  
33 February 2010 monthly meeting,<sup>6</sup> Saraiva asked McGraw about the status of the new,  
34 ratified work schedule to which McGraw responded that the plan was still on the

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<sup>6</sup> Neither party presented evidence of a specific date for the Union's February of 2010 monthly meeting, but Saraiva testified that those meetings are usually held on the second Wednesday of each month.

1 Mayor's desk awaiting final approval.<sup>7</sup> By e-mail on March 10, 2010, Saraiva reminded  
2 Union members that the "monthly union meeting is tonight at 7pm" and that:  
3 Mark<sup>8</sup> also asked me to let everyone know that our new negotiated  
4 working plan is on the Mayor's desk for signing. Mike Medeiros is back at  
5 work on the 15th of the month and will likely review and sign it. We can  
6 expect to see it implemented in April with the exception of the vacation  
7 portion which should take effect on 1 July.<sup>9</sup>  
8  
9 By letter dated May 25, 2010, Caron notified Union Staff Representative Michael  
10 Medeiros (Medeiros) of "proposed changes which impact AFSCME personnel in the FY  
11 2011 budget," informing the Union that "Emergency Medical Services – Paramedic  
12 schedule will be a 40 hours workweek, 5-2 work schedule, effective on or about June  
13 27, 2010." By that same letter, Caron also asked the Union to contact him to schedule  
14 a meeting to bargain the impact of the proposed changes. By letter dated June 9, 2010,  
15 Caron again reminded Medeiros that:

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<sup>7</sup> Neither party presented evidence about whether the Mayor actually received, reviewed and/or approved the ratified work plan. However, McGraw testified that the Mayor has "final say over everything" and that an unidentified person informed McGraw at the budget hearing in February or March of 2010 that the City decided to move forward with the eight-hour, five-day workweek schedule. Based on this evidence, I find that the Mayor did not approve the newly negotiated work plan.

<sup>8</sup> Saraiva testified that Mark referred to McGraw; the City did not rebut this testimony.

<sup>9</sup> Saraiva testified that he specifically recalled meeting with McGraw in February of 2010 when McGraw told Saraiva that the newly created work plan was on the Mayor's desk awaiting final approval. Nunes also testified that she specifically recalled speaking with McGraw in or about February of 2010 regarding the status of the newly negotiated work plan, which she also believed was on the Mayor's desk awaiting final approval. McGraw testified that he had no specific recollection of his February of 2010 meetings with Saraiva or Nunes, and did not recall telling them that the newly negotiated work plan was on the Mayor's desk awaiting final approval. Based on the totality of evidence presented, including Saraiva's and Nunes' specific recollection of their discussions with McGraw in or about February of 2010, I credit their testimony and find that McGraw told them that the newly created work plan was on the Mayor's desk waiting to be approved.

1 In an effort to maintain our current work schedule and remain in compliance  
2 with federal wage laws the City attempted to reach a satisfactory work  
3 schedule last January. Unfortunately it appears the continuing loss in state  
4 aid makes this schedule too costly because it actually provides a pay raise  
5 for paramedics when the built in overtime cost is taken into account.  
6 Accordingly, effective June 27, 2010, the work schedule will transition to a  
7 forty hour work week as a matter of fiscal necessity and federal law....I look  
8 forward to discussing this matter in greater detail at our meeting on June  
9 15, 2010.

10  
11 By memorandum on June 16, 2010, McGraw informed "All EMS Personnel" that  
12 the City was beginning shift bidding (by seniority) for the new 8 hour schedule. By letter  
13 dated June 25, 2010, the DOL reminded the City that pursuant to its earlier  
14 instructions,<sup>10</sup> it was required to pay Paramedics and EMTs back wages by June 30,  
15 2010, and document evidence of those payments by July 7, 2010.

#### 16 OPINION

#### 17 **Section 10(a)(5) Unilateral Change**

18 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law  
19 when it unilaterally changes an existing condition of employment or implements a new  
20 condition of employment involving a mandatory subject of bargaining without first giving  
21 its employees' exclusive bargaining representative notice and an opportunity to bargain  
22 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations  
23 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations  
24 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 64  
25 (2003). The employer's obligation to bargain before changing conditions of employment  
26 extends to working conditions established through past practice, as well as those

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<sup>10</sup> Although the City presented evidence of those DOL instructions, there is nothing in the record indicating when the DOL sent those instructions to the City.

1 specified in a collective bargaining agreement. Town of Wilmington, 9 MLC 1694, 1699  
2 (1983). To establish a violation, the union must show that: (1) the employer changed an  
3 existing practice or instituted a new one; (2) the change had an impact on a mandatory  
4 subject of bargaining; and, (3) the change was implemented without prior notice to the  
5 union or an opportunity to bargain to resolution or impasse. Commonwealth of  
6 Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45 (2001);  
7 Commonwealth of Massachusetts, 27 MLC 11, 13 (2000).

### 8 **Impasse**

9 After good faith negotiations have exhausted the prospects of concluding an  
10 agreement, an employer may implement changes in terms and conditions of  
11 employment that are reasonably comprehended within its pre-impasse proposals. City  
12 of Leominster, 23 MLC 62, 66 (1996) (citing Hanson School Committee, 5 MLC 1671  
13 (1979)). Factors considered in determining whether impasse has been reached  
14 include: bargaining history, the good faith of the parties, the length of negotiations, the  
15 importance of the issues to which there is disagreement, and the contemporaneous  
16 understanding of the parties concerning the state of the negotiations. Ashburnham-  
17 Westminster Regional School District, 29 MLC 191, 195 (2003) (citing Town of  
18 Westborough, 25 MLC 81, 88 (1997); City of Leominster, 23 MLC at 66)). Impasse  
19 exists only where both parties have bargained in good faith on negotiable issues to the  
20 point where it is clear that further negotiations would be fruitless, because the parties  
21 are deadlocked. Ashburnham-Westminster Regional School District, 29 MLC at 195  
22 (citing Commonwealth of Massachusetts, 25 MLC 201, 205 (1999); Town of Brookline,  
23 20 MLC 1570, 1594 (1994)). If one party to the negotiations indicates a desire to

1 continue bargaining, it demonstrates that the parties have not exhausted all possibilities  
2 of compromise and precludes a finding of impasse. Commonwealth of Massachusetts,  
3 25 MLC 201, 205 (1999) (citing City of Boston, 21 MLC 1350 (1994)).

4 The City argues that it satisfactorily bargained with the Union to impasse over the  
5 decision to change unit members' working hours. Specifically, the City contends that  
6 the parties reached impasse in January of 2010 after the City presented the Union with  
7 its last offer on January 4, 2010 and the Union responded with a counteroffer on  
8 January 14, 2010. The City argues that it asked the Union to take the January 4, 2010  
9 proposal to its membership for a vote and the Union's failure to ratify that proposal on or  
10 before January 14, 2010, combined with the DOL's August of 2009 finding that the City  
11 had violated the FLSA and the City's overall budget reduction, forced the City to  
12 implement the new eight-hour, five-day work schedule to comply with the FLSA's  
13 reporting deadline on June 30, 2010.

14 The evidence shows that the parties bargained three times in December of 2009  
15 and once on January 4, 2010, at which the parties exchanged proposals and counter-  
16 proposals over several issues, including a workweek schedule for Paramedics and  
17 EMTs. At the January 4, 2010 meeting, the City presented a proposal, informed the  
18 Union that it was the City's last offer and asked the Union to have its membership vote  
19 on the proposal. At that meeting, the City also informed the Union that rejecting the  
20 January 4, 2010 proposal meant that the City would implement the eight-hour, five-day  
21 work week schedule; however, the City failed to indicate a deadline by which it expected  
22 the Union to accept or deny the offer. While the evidence shows that Union was aware  
23 of the City's need to comply with the FLSA, there is no evidence that the City needed to

1 comply with the FLSA statute by January 14, 2010 (the day of the Union's last counter-  
2 proposal). Although the Union was aware that the January 4, 2010 proposal was the  
3 City's last offer, it rejected that proposal and submitted a counter-proposal on January  
4 14, 2010. Eleven days later on January 25, 2010, the City declared impasse.

5 The record does not show that further negotiations between the parties would  
6 have been fruitless. The Union indicated a desire to continue bargaining based on its  
7 January 14, 2010 counter-proposal and weeks later, the City submitted the Union's  
8 ratified work plan to the Mayor, which demonstrates that the parties did not exhaust all  
9 possibilities of compromise and precludes a finding of impasse. Commonwealth of  
10 Massachusetts, 25 MLC 201, 205 (1999) (citing City of Boston, 21 MLC 1350 (1994)).

11 Further, the record does not show any sign that the parties were deadlocked on  
12 the issue of hours of work because while the City and the Union disagreed about certain  
13 benefits, both parties agreed that they wanted to retain the eight-week cycle of 10 and  
14 14 hour shifts, which was reflected in the City's January 4, 2010 proposal and the  
15 Union's January 14, 2010 counter-proposal. Ashburnham-Westminster Regional  
16 School District, 29 MLC at 195. Therefore, after reviewing the parties' bargaining  
17 history, the importance of the issues (e.g., the City's need to comply with the FLSA and  
18 the Union's desire to maintain the established practice of the eight-week work cycle of  
19 10 and 14 hour shifts) and, after considering the length of the parties' negotiations (four  
20 meetings in two months), I conclude that the parties did not reach impasse.

### 21 **Management Rights and Contractual Waiver**

22 Working hours of bargaining unit members is a mandatory subject of bargaining.  
23 Holyoke School Committee, 12 MLC 1443, 1450 (1985). An employer has a continuing

1 obligation to bargain over mandatory subjects not covered by a collective bargaining  
2 agreement. Middlesex County Commissioners, 9 MLC 1589 (1983). Here, the City  
3 does not dispute that it changed unit members' working hours effective June 27, 2010.  
4 The City also concedes that the parties' Agreements are silent about work hours for the  
5 Paramedic and EMT positions. Rather, the City argues that the Union contractually  
6 waived its rights to bargain under Article IV, Section 6, Article XXV and Article XXVI of  
7 the Agreements. Specifically, the City maintains that Article IV, Section 6 gives it the  
8 right to establish, change, enlarge or decrease shifts, while Article XXV gives it the  
9 managerial prerogative to change unit members' work schedules without bargaining  
10 over the impacts, and that Article XXVI, as a zipper clause, further buttresses that  
11 managerial prerogative. The City also contends that by those provisions, the Union  
12 contractually waived its right to bargain over the decision to reduce unit members  
13 working hours from 42 hours on an eight-week 10 and 14 hour shift schedule to 40  
14 hours on an eight-hour, five day work schedule.

15       The Commonwealth Employment Relations Board (Board) has long held that an  
16 employer asserting contractual waiver as an affirmative defense must show that the  
17 parties consciously considered the situation that has arisen, and that the union  
18 knowingly waived its bargaining rights. Central Berkshire Regional School Committee,  
19 31 MLC 191, 202 (2005); Commonwealth of Massachusetts, 26 MLC 228, 231 (2000);  
20 Springfield School Committee, 18 MLC 1357, 1362 (1992) (citing Town of Marblehead,  
21 12 MLC 1667, 1670 (1986)). The initial inquiry focuses on the language of the contract.  
22 City of New Bedford, 38 MLC 239, 248 (2012) (appeal pending); (citing Town of  
23 Mansfield, 25 MLC 14, 15 (1998)). If the language clearly, unequivocally and

1 specifically permits the employer to make the change, no further inquiry is necessary.  
2 City of New Bedford, 38 MLC at 248 (citing City of Worcester, 16 MLC 1327, 1333  
3 (1989)). Waiver will not be found unless the contract language “expressly or by  
4 necessary implication’ confers upon the employer the right to implement the change in  
5 the mandatory subject of bargaining without bargaining with the union.” City of New  
6 Bedford, 38 MLC at 248 (citing Commonwealth of Massachusetts, 19 MLC 1454, 1456  
7 (1992)). However, a broadly-framed management rights clause is too vague to provide  
8 a basis for inferring a clear and unmistakable waiver. City of New Bedford, 38 MLC at  
9 248 (citing Town of Hudson, 25 MLC 143, 148 (1999)). And, if the contract language is  
10 ambiguous, the Board reviews the parties’ bargaining history to determine whether the  
11 Union intended to waive its bargaining rights. City of New Bedford, 38 MLC at 248  
12 (citing Massachusetts Board of Regents, 15 MLC at 1269). In the face of ambiguous  
13 language, silence on an issue, without more, is insufficient to establish the knowing and  
14 unmistakable waiver required to establish the affirmative defense of contractual waiver.  
15 City of New Bedford, 38 MLC at 248 (citing City of Boston v. Labor Relations  
16 Commission, 48 Mass. App. Ct. 169, 176 (1999)).

17 Here, Articles IV, XXV and XXVI shows that the parties agreed to give the City  
18 exclusive managerial control to establish, change, enlarge or decrease unit members’  
19 work shifts; however, the City failed to present “clear and unmistakable” evidence that  
20 the Union knowingly waived its rights to bargain over the City’s decision to establish,  
21 change, enlarge or decrease unit members’ “hours” of work. Central Berkshire  
22 Regional School Committee, 31 MLC at 202; School Committee of Newton, 388 Mass.  
23 at 569. The language of Articles VI and XXV is ambiguous on whether the parties

1 intended to give the City exclusive managerial authority to establish, change, enlarge or  
2 reduce hours of work for EMTs and Paramedics, and neither party offered evidence of  
3 their bargaining history to resolve the ambiguity on that matter. Further, the City  
4 admitted that the Agreements are silent on that matter. Town of Stoneham, 39 MLC 1,  
5 6 (2012); Massachusetts Board of Regents, 15 MLC at 1269. Therefore, I find that the  
6 City does not satisfy this affirmative defense, and that the Union did not waive its  
7 contractual rights to bargain over the City's decision to reduce unit members' hours of  
8 work in June of 2010 or the impacts of that decision. School Committee of Newton v.  
9 Labor Relations Commission, 388 Mass. 557, 564 (1983); Higher  
10 Education Coordinating Council, 22 MLC 1662, 1668 (1996); Springfield School  
11 Committee, 20 MLC 1077(1993). Accordingly, I find that the City unlawfully changed  
12 the parties' past practice of scheduling unit members to a 42 hour workweek when it  
13 reduced unit members' working hours to 40 hours per week on June 27, 2010.

#### 14 **Section 10(a)(5) Repudiation**

15 The statutory obligation to bargain in good faith includes the duty to comply with  
16 the terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26  
17 MLC 165, 168 (2000); Massachusetts Board of Regents of Higher Education, 10 MLC  
18 1196 (1983)). A public employer's deliberate refusal to abide by an unambiguous  
19 collectively bargained agreement constitutes a repudiation of that agreement in violation  
20 of the Law. Town of Falmouth, 20 MLC 1555 (1994), aff'd sub nom., Town of Falmouth  
21 v. Labor Relations Commission, 42 Mass. App. Ct. 1113 (1997)). If the evidence is  
22 insufficient to find an agreement, or if the parties hold differing good faith interpretations  
23 of the language at issue, the Board will conclude that no repudiation has occurred. Id.

1 (citing Commonwealth of Massachusetts, 18 MLC 1161, 1163 (1986)). There is no  
2 repudiation of an agreement if the language of the agreement is ambiguous, and there  
3 is no evidence of bargaining history to resolve the ambiguity. Id. (citing Commonwealth  
4 of Massachusetts, 28 MLC 8, 11 (2001)).

5         The Union contends that the City repudiated the January 4, 2010 proposal, which  
6 the Union ratified in February of 2010 and presented to EMS Director McGraw who then  
7 submitted it to the Mayor for final approval. Conversely, the City argues that there was  
8 no repudiation of the January 4, 2010 proposal because the Union rejected the proposal  
9 on or about January 14, 2010 and never notified the City of the ratification vote in  
10 February of 2010. The City concedes that both parties wanted to maintain the 10 and  
11 14 hour shifts, however it also asserts that the Union's January 14, 2010 counter-  
12 proposal was a rejection of the City's last offer, which resulted in there being no  
13 agreement.

14         While the record shows that the City agreed to submit the ratified proposal to the  
15 Mayor for final approval in or about February or March of 2011, the Mayor never  
16 approved it. Although the City and the Union initially agreed to keep the eight-week  
17 cycle of 10 and 14 hour shifts, the Mayor ultimately rejected that agreement because he  
18 did not sign it. Further, although the City waited until May 25, 2011 to notify the Union  
19 that the Mayor had rejected the proposed agreement, that two-month time delay alone  
20 does not establish a deliberate refusal by the City to abide by the agreement. Instead,  
21 the evidence shows that the Mayor refused to exercise his ultimate authority and sign  
22 the agreement. Thus, there is insufficient evidence to find an agreement.

1 Consequently, I conclude that a repudiation did not occur and dismiss this portion of the  
2 Complaint. See Commonwealth of Massachusetts, 18 MLC at 1163.

3 **Section 10(a)(6)**

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

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

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

31 The good faith requirement of Section □10(a)(6□) "specifically contemplates  
32 compliance with the rules of the [DLR] and generally contemplates a reasonableness,  
33 integrity, honesty of purpose and desire to seek a resolution of the impasse consistent  
34 with the respective rights of the parties." Framingham School Committee, 4 MLC 1809,

1 1814 (1978) (citing Marjure Transportation Co. v. NLRB, 198 F. 2d 735, 739 (C.A. 5,  
2 1952); Local 1009, IAFF, 2 MLC 1238, 1245 (1975)).

3 The City argues that when the parties negotiated the Agreements, the City  
4 bargained in good faith over Articles IV, XXV and XXVI, which permitted the City to  
5 reduce unit members' work hours from 42 to 40. Although the City does not dispute that  
6 the parties filed for mediation under Section 9 of the Law in August of 2009, it argues  
7 that the Union failed to submit evidence showing the actual petition or that DLR ordered  
8 fact-finding. The Union contends that the City's conduct in failing to secure the Mayor's  
9 approval of the newly negotiated work plan and the decision to change the unit  
10 members' work schedules from 42-hour workweeks to 40-hour workweeks on June 27,  
11 2010 showed bad faith in violation of Section 10(a)(6). Framingham School Committee,  
12 4 MLC at 1814; see also Massachusetts Board of Regents of Higher Education, 13 MLC  
13 1540 (1987); contrast City of New Bedford 38 MLC at 251-52 (city violated Section  
14 10(a)(6) when it reduced unit members hours of work during the pendency of the  
15 union's petition for mediation and fact-finding). Here, the evidence shows that the City's  
16 unlawful acts did not take place during the pendency of the Union's Section 9 petition.  
17 Instead, the Union filed the petition in August of 2009 and the City implemented the new  
18 work schedule almost one year later on June 27, 2010. The Union failed to present  
19 evidence showing that the City's decision to change unit members hours of work  
20 occurred while the petition was pending or that the parties were still engaged in  
21 successor bargaining during that time. See Massachusetts Board of Regents of Higher  
22 Education, 13 MLC 1540, 1542-43 (1987). Without more evidence, I cannot find a  
23 violation on this allegation and dismiss this portion of the Complaint.

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### CONCLUSION

For the foregoing reasons, I conclude that the City violated Section 10(a)(5) of the Law when it reduced bargaining unit members' hours of work without bargaining to resolution or impasse over that decision and its impacts. However, I conclude that the City did not violate Section 10(a)(5) of the Law by repudiating an agreement and did not violate Section 10(a)(6) of the Law by failing to participate in mediation.

### ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of New Bedford shall:

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. In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
  - a. Restore unit members' work weeks to the total number of hours that they worked per week prior to June 27, 2010.
  - 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 MGL 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. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via

