

In the Matter of TOWN OF DANVERS

and

DANVERS POLICE BENEVOLENT ASSOCIATION

Case No. MUP-07-5058

54.24	vacation
54.3	management rights
67.15	union waiver of bargaining rights
67.8	unilateral change by employer

December 8, 2010

Erica F. Crystal, Hearing Officer

Paul T. Hynes, Esq. Representing Danvers Police
Benevolent Association

Geoffrey P. Wermuth, Esq. Representing Town of Danvers

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Town of Danvers (Town) unilaterally implemented a special order limiting the use of vacation time on July 3, 2007 that exceeded the restrictions set forth in the collective bargaining agreement and conflicted with the parties' past practice without first notifying and bargaining with the Danvers Police Benevolent Society (Union), in violation of Sections 10(a)(5) and 10(a)(1) of M.G.L. c. 150E (the Law). I find that the Town unilaterally implemented the special order in violation of Sections 10(a)(5) and 10(a)(1) of the Law.

STATEMENT OF THE CASE

The Union filed a charge with the Labor Relations Commission (Commission) on September 19, 2007, alleging that the Town violated Sections 10(a)(1) and (5) of the Law by unilaterally issuing an order restricting the use of vacation days on July 3, 2007 without providing the Union notice or an opportunity to bargain.¹ After the parties filed Written Submissions, on May 14, 2009, the Commonwealth Employment Relations Board (Board)² issued a Com-

plaint of Prohibited Practice, alleging that the Employer violated Sections 10(a)(5) and derivatively Section 10(a)(1) of the Law by issuing a special order limiting the use of vacation time on July 3, 2007 that exceeded the restrictions set forth in the collective bargaining agreement without giving the Union prior notice and an opportunity to bargain to resolution or impasse.³ The Employer timely filed its Answer to the Complaint.

I conducted a Hearing on March 4, 2010. The parties were afforded full opportunity to be heard and to examine and cross-examine witnesses. Both parties filed post-hearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

A. The Collective Bargaining Agreement

1. Provisions Regarding Time Off

The Union is the exclusive bargaining representative for all patrol officers, including sergeants and lieutenants, employed by the Town. Article 11 of the parties' Agreement is entitled "Leaves Pertaining to Vacation, Sick Time and Emergencies" and provides in relevant part:

1. Vacations

...

The current system as to the scheduling of vacations shall be maintained including the requirement that posting for the summer 2 week vacation period shall be May 1 and further, consistent with Article 11, Section 6, that during the summer vacation period of June through August no more than one officer and five patrolmen shall be allowed to be on vacation at the same time, except with the approval of the Chief...⁴

...

Consistent with, and subject to, the provisions and terms of this Agreement in any one 24-hour period, up to five (5) Patrolmen and one (1) sergeant shall be entitled to take off (including, but not limited to, vacation) as provided therein, with a second sergeant so eligible if on [sic] overtime is required because of his/her time off from duty, as provided therein. All such vacation time must be approved in advance by the Chief of Police or the Executive Officer or designee; subject to the Chief of Police or the Executive Officer on

1. On April 17, 2009, the Union withdrew its repudiation charge.

2. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations in effect prior to November 15, 2007, this case was designated as one in which the Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Board is the body within the Division charged with deciding adjudicatory matters. References to the Board include the Commission.

3. Following the hearing in this case, on October 22, 2010, the Supreme Judicial Court (SJC) issued a decision which held that the term of a collective bargaining agreement cannot extend beyond the three-year requirement under Section 7(a) of the Law. *Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3*, 458 Mass. 155 (2010). Here, the collective bargaining agreement (Agreement) between the Union and the Town was dated 7/1/03 through 7/1/07, with an evergreen clause. Because the alleged violation occurred in May 2007, which was in the fourth year of the Agreement, it appears the contract was no longer in effect

when the alleged violation occurred. However, a public employer is prohibited from making unilateral changes in established conditions of employment that affect mandatory subjects of bargaining after an agreement expires. *Town of Chatham*, 28 MLC 56, 58 (2001). Established terms and conditions of employment that are in effect when the contract expires can be evidenced by relevant provisions of the expired contract and the practice of the parties. *Id.* Therefore, despite the fact that the Agreement had expired, the Union's allegation that the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law when it changed the established practice for scheduling vacations is not impacted by the *Boston Housing Authority* case.

4. The Town's Police Chief, Neil Ouellette (Chief Ouellette) testified that he views the reference to "officer" in this section to mean an officer of rank, either a sergeant or lieutenant. However, unless otherwise specified, the term "officers" will refer collectively to patrolmen, sergeants, and lieutenants throughout this decision.

or before December 15th of a given year (but not before November 15th).

6. Time Off Rule

Effective July 1, 1989, in any one 24-hour period (commencing at 9AM), up to five (5) patrolmen and one (1) sergeant shall be entitled to take time off (ADO), including but not limited to vacation, holiday or personal time off, provided they give notice to the Police Department prior to the shift they take off, and provided, further, a second sergeant may similarly take such time off if, as to the second sergeant only, his time off from duty does not require, consistent with present practice, the Police Department to cover for him/her with overtime...

The above language has been included in the parties' collective bargaining agreements since at least as early as 1994. Prior to 2007, the Town Police Department (Department) attempted to accommodate time off in any 24-hour period for five patrolmen and two sergeants. It is undisputed that, since at least the 1990s, no officer had their vacation cancelled. Annually, for the summer vacation posting period beginning around May 1, a sheet is posted and the officers fill it out. In early June the posting period is over. Any patrolmen vacation conflicts are resolved by seniority.⁵

2. Management Rights and Stability of Agreement

Article 2 of the Agreement is a Management Rights Clause, which provides in relevant part:

Except as otherwise and specifically provided in this Agreement, the Association recognizes and agrees that supervision, management and control of the Town's business, operations, working force and facilities are exclusively vested in the management of the Town; without limiting the generality of the foregoing, the Association agrees that the right to plan, direct and control the Town's business, operations and working force; to hire, promote, transfer and lay-off employees; and lawfully and for just cause to demote, discipline, suspend or discharge employees; and the right to determine the hours, schedules and assignments of work, the work tasks, classifications and standards of performance for employees is vested exclusively in the management of the Town...

Article 19, entitled "Stability of Agreement," provides in relevant part:

(b) The failure of the Town or the Association to insist, in any one or more situations, upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the Town or of the Association to future performance of any such term or provision and the obligations of the Association and the Town to such future performance shall continue in full force and effect.

B. *The May 8, 2007 Special Order*

On May 8, 2007, Chief Ouellette issued a special order (Special Order) requiring that all off-duty personnel work on July 3, 2007 for the Danvers Family Festival (Festival).⁶ The Festival is an event that has been held in the Town for at least 25 years,⁷ and includes various vendors, parachutists, flyovers, stunt pilots, and is capped off by evening fireworks. Over the years, the event has grown dramatically, with approximately 60,000 people attending in 2006. The residential population of the Town is 26,000.

Chief Ouellette testified that he made the decision to require all off-duty personnel to work on July 3, 2007 because of problems that occurred at the 2006 Festival, leading to an increase in arrests than in previous years. In fact, Chief Ouellette testified that after the 2006 Festival, the Department was still responding to disorder calls and booking people at four a.m. the next morning. During the Festival, a captain had to leave the command center to assist several officers who were rolling around on the ground with attendees of the event, two patrolmen were maced, and other officers had difficulty working their way through the crowd to assist the officers in distress.

Following the 2006 Festival, several officers, including Union President Dana Hagan (Hagan), expressed concern to Chief Ouellette that there had not been enough staffing for the Festival. Chief Ouellette testified that he determined public safety would be better served by having a larger contingent of Town police officers to monitor and supervise the Festival. Although Chief Ouellette admitted that officers from surrounding communities and the State Police had been utilized at past Festivals and could have been utilized in 2007, he preferred Town officers since they knew the area and could be relied upon to perform their duties.⁸ Chief Ouellette had also experienced problems in the past with certain departments, such as the State Police, who did not follow through with their assignments one year,⁹ and the Peabody Police Department, which sent over all-terrain vehicles (ATVs) even after they were advised by the Town that the vehicles were not needed.

C. *The Union's Response to the Special Order*

On May 7, 2007, Chief Ouellette called Hagan to inform him of the Special Order. Also on May 7, 2007, Sergeant Robert Bettencourt (Bettencourt), a sergeant in the specialty group, requested vacation for the week of July 1 - July 6, 2007. On May 8, 2007, Chief Ouellette emailed the Special Order to Bettencourt and all Department members.

On May 11, 2007, Hagan sent an email to Chief Ouellette requesting a meeting to discuss the Union's concerns with the order that all officers had to work on July 3, 2007. Chief Ouellette responded

5. There was also testimony about the specialty group, which does not have a summer vacation posting. Members of the specialty group resolve any vacation conflicts themselves.

6. Chief Ouellette testified that he drafted the Special Order on May 4, 2007, which is why it is dated May 4, though he did not issue it until May 8, 2007.

7. Chief Ouellette testified that the Festival was cancelled one year because of construction at the site where it was to be held.

8. Chief Ouellette conceded that he also could have made a request for assistance from the Northeastern Massachusetts Law Enforcement Council (NEMLEC), a statewide emergency team, although he stated that there was no guarantee that resources would have been provided.

9. The Town has not utilized the State Police for the Festival since 2002.

with three available dates to meet. Hagan did not respond to this email. On June 20, 2007, the Union forwarded to Chief Ouellette a Board decision, which held that vacation is a mandatory subject of bargaining. The Union also included a letter asserting that any changes or restrictions on the summer vacation period would have to be bargained and stated, “[h]opefully, we can reach some compromise so that the current practice could be continued this year and we’ll work it out for next year.” The Town did not bargain with the Union and all off-duty personnel (aside from one officer, as explained below) were required to work at the Festival.¹⁰

Bettencourt had to return from his vacation on July 3, 2007 to work the Festival because of the Special Order. Chief Ouellette testified, however, that if Bettencourt had spoken to him and explained his situation, he would have permitted Bettencourt to take the day off. Chief Ouellette permitted another officer, scheduled to deploy to Iraq, to have the day off. Bettencourt testified that he knew Chief Ouellette would have given him the day if he requested it, but because he did not want to be put in the position of receiving the time off due to his friendship with the Chief, he did not request it.

OPINION

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees’ exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Commonwealth of Massachusetts*, 30 MLC 64 (2003). The duty to bargain extends to conditions of employment established through custom and past practice, as well as those conditions of employment that are established through a collective bargaining agreement. *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1696 (1983).

To establish a violation of Section 10(a)(5) of the Law, an employee organization must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and, (3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts*, 30 MLC 63, 64 (2003); *Town of Shrewsbury*, 28 MLC 44, 45 (2001); *Commonwealth of Massachusetts*, 27 MLC 11, 13 (2000).

Here, it is undisputed that the Town changed its existing practice, which had been in place since at least the 1990s, of permitting at least five patrolmen and one sergeant to be on vacation at the same

time. The Union has established that this change was made without prior notice or an opportunity to bargain when, on May 8, 2007, the Chief issued a Special Order requiring that all off-duty officers work the Festival. The manner in which benefits such as vacation are distributed is a mandatory subject of bargaining. *City of Revere*, 21 MLC 1325 (1994);¹¹ *Massachusetts Port Authority*, 20 MLC 102 (2000). The Town argues that 1) its decision was not bargainable because the Chief has discretion to make managerial decisions involving matters of public safety; 2) the impacts were not bargainable because they were a natural and inevitable consequence of the Town’s non-bargainable decision; 3) the Union waived any right to bargaining because it did not follow through with Chief Ouellette’s suggested dates to meet and because it never specifically requested impacts bargaining; and 4) the Union has waived any right to bargain through the contract language.

A. The Town’s Decision Is a Mandatory Subject of Bargaining

The Town admits that the practice permitting five patrolmen and one sergeant to take vacation at the same time has been in place since at least the 1990s. The Town contends, however, that because the Chief of Police has the inherent, statutory and non-bargainable authority to determine departmental staffing for annual public events held within his jurisdiction, he could require all members of the Department to work mandatory overtime on July 3, 2007 for public safety reasons without bargaining. In support of its position, the Town relies on a handful of cases for the proposition that a police chief has the discretion to make decisions about the police force when matters of public safety are at issue.

In *City of Worcester v. Labor Relations Commission*, 438 Mass. 177 (2002), cited by the Town, the Supreme Judicial Court upheld the Board’s decision that the city was not required to bargain the decision to assign truancy enforcement duties to its police officers because “[t]he allocation of resources among competing law enforcement priorities ‘must be reserved to the sole discretion of the public employer...’” (quoting *Lynn v. LRC*, 43 Mass. App. Ct. 172, 178 (1997)). Here, the issue is not the allocation of resources and priorities. Rather, the issue involves time off for officers, and whether the Town may unilaterally change its longstanding time off practice.

The remaining cases cited by the Town include *City of Boston v. Boston Patrolmen’s Association*, 41 Mass. App. Ct. 269 (1996); *Town of Andover v. Andover Police Patrolmen’s Union*, 45 Mass. App. Ct. 167 (1998); *Town of Saugus v. Saugus Police Superior Officers Union*, 64 Mass. App. Ct. 916 (2005); and *Town of Saugus v. Saugus Public Safety Dispatchers Union*, 65 Mass. App. Ct. 901 (2005). Although these cases contain language regarding a police chief’s discretion when matters of public safety are of concern, each of the cases decide grievance arbitrability questions,

10. Bettencourt also testified that he filed a grievance over the matter, but no grievance was offered into evidence. As suggested by the Town in its brief, it may be that Bettencourt mistakenly referred to the instant charge as a “grievance.”

11. The Town’s argument that *City of Revere* is distinguishable since the employer there changed the vacation policy for all bargaining unit members for the whole summer, rather than just one day as in the instant case is not persuasive. Rather, the holding in *City of Revere* is that vacation is a mandatory subject of bargaining;

whether the past practice change was for only one day or for many days is irrelevant. Further, the Town argues that *City of Revere* was overruled, *sub silentio* by *City of Boston*, 32 MLC 4 (2005), which involves a transfer of bargaining unit work in connection with a new police tactical unit. As with the cases referenced below, this involves a very different set of facts and a different issue, and therefore is not controlling here.

and not whether the subject matter was a mandatory subject of bargaining under the Law.

1. The Town had Ample Opportunity to Notify and Bargain with the Union Over the Change

Because I find that vacation time and the practice at issue here is a mandatory subject of bargaining, I turn next to the Town's claim that the change was of such a nature that no bargaining was required. Here, the Town has not established that the Festival was the type of emergency or public safety concern that would necessitate a change in the practice of granting vacation without bargaining. Despite the fact that the Town knew of the growing popularity of the Festival and the problems that the increased attendance was creating as early as July 3, 2006, it did not notify the Union of its intent to require all officers to work the Festival until May 2007. The Town claims that the decision to require all off-duty officers to work was not made until the Spring of 2007 because it did not know whether there would be funding for the Festival until that time. However, Chief Ouellette admitted that the Festival is held annually, and he could recall only one year in which it was canceled because the area was under significant construction. In 2007, the Town simply had no reason to believe that the Festival would not be held and no reason not to timely notify the Union of its intended vacation practice changes.

I also find that the Town's emergency argument is undercut by the practice of soliciting law enforcement assistance from a variety of neighboring communities and the State Police. Chief Ouellette could have utilized these resources for the 2007 Festival, but instead, for the first time, decided that he preferred the officers in his own Department. Chief Ouellette offered some testimony concerning the reasons for his preference for Town officers, but none of the reasons justified making this decision at such a late date without notice and an opportunity to bargain.

B. *The Town was Required to Bargain about the Decision and the Impacts of the Decision*

The Town relies on language in *Litton Business Systems*, 286 NLRB 817 (1987) to argue it was not required to engage in bargaining about the decision to change the time off policy, and it was similarly not required to engage in impacts bargaining, as the impact on vacation time was a natural and inevitable consequence of the Town's non-bargainable decision. The Town also cites two Board decisions (*Town of Billerica*, 8 MLC 1957 (1982) and *Town of Dracut*, 9 MLC 1702 (1983)), which both hold that when the decision itself is not subject to bargaining and the loss of unscheduled overtime opportunities is the only impact, no impacts bargaining is required. Here, because, as discussed above, the Town's decision itself is a mandatory subject of bargaining, an analysis of whether the impacts were a natural and inevitable consequence of the decision is unnecessary.¹²

12. The Town further cites the fact that the Chief informed the Union that any officer who had already made plans for July 3, 2007 could be exempted from the Special Order as further evidence that impacts bargaining was not required, as any impacts could have been resolved. However, whether or not individual officers could be exempted from the restriction at the Chief's discretion is not relevant to the question of whether the Town was required to bargain the impacts of the decision.

C. *The Union Did not Waive Its Right to Bargain Over the Decision or Impacts by Inaction.*

The Town also contends that the Union waived any right to bargain because 1) it failed to follow up and schedule a time to meet with Chief Ouellette after he issued the Special Order and offered dates to meet; and 2) it never specifically requested impacts bargaining. In order to find a waiver of a union's right to bargain by inaction, the employer must show that the union had 1) actual knowledge or notice of the proposed action; 2) a reasonable opportunity to negotiate about the subject; and 3) unreasonably or inexplicably failed to request bargaining. *Commonwealth of Massachusetts*, 28 MLC 239, 242 (2002); *Town of Milford*, 15 MLC 1247, 1252 (1988); *Amesbury School Committee*, 11 MLC 1049 (1984); *Scituate School Committee*, 9 MLC 1010 (1982).

Here, the Union did not have knowledge of the Special Order until May 7, 2007, which was one day before it was issued. The Town claims that the Special Order was issued almost two months prior to July 3, 2007, and the Union did not respond to Chief Ouellette's email regarding possible times to meet, thereby waiving the right to bargain. However, where, as here, the Union is not offered a meaningful opportunity to bargain, the Board has found a *fait accompli* and the Union will have no obligation to meet. The doctrine of waiver by inaction will not be applied where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Town of Hudson*, 25 MLC 143, 148 (1999); *Holliston School Committee*, 23 MLC 211, 212-13 (1997); *Scituate School Committee*, 9 MLC 1010, 1012 (1982); *City of Everett*, 2 MLC 1471 (1976). In this case, the Town did not provide notice that it intended to change the vacation practice at some point in the future. Instead, it changed the practice on May 8, 2007 when it issued the Special Order because, as of that date, officers were no longer permitted to request vacation for July 3, 2007.

Further, the Town attempts to minimize the fact that the Union requested bargaining by letter on June 20, 2007.¹³ Despite the Town's claim that this letter was "ambiguous," I find that it is not ambiguous. Rather, the statements, "[e]nclosed is the LRC Decision which held that vacation is a mandatory subject of bargaining. Therefore, any changes (restrictions) on the summer vacation period would need to be bargained," is clearly a demand to bargain. Indeed, the Union is not required to use specific language, or directly request "decision" or "impacts" bargaining. Its demand for bargaining over the change in general was sufficient to trigger the Town's obligation to bargain over the decision and the impacts. *See Commonwealth of Massachusetts*, 8 MLC 1894 (1982) (the employer may not rely on technicalities of form to satisfy its burden of establishing that the union did not desire bargaining).¹⁴

With regard to impacts bargaining specifically, the Town relies on the language in *Noblit Bros.*, 305 NLRB 329, 330 (1991), where

13. Because the Union did request to bargain by its letter dated July 20, 2007, the Town cannot rely on *Norwood Fire Dept.*, 7 MLC 1465 (H.O. 1980) for the holding that a union cannot charge an employer with a refusal to bargain when the union has refused to bargain itself.

14. [See next page.]

the NLRB notes that the union was seeking only a reversal of the employer's non-bargainable change, rather than a request over adjustments in the employees' terms and conditions that resulted from the change, and therefore waived the right to impacts bargaining. However, in *Noblit*, the employer's decision at issue was not bargainable, unlike the instant situation. In addition, here the Union's June 20, 2007 letter indicated that although it wanted the current practice to remain for 2007, it was hoping for a compromise where the parties could "work it out" for the following year. Thus, the request to bargain was not seeking only a reversal of the decision as in *Noblit*, but rather a compromise between the current year and subsequent years.

*D. The Union did not Contractually Waive its Right to Bargain.*¹⁵

1. Article 11 Does Not Constitute a Waiver by the Union

The Town argues that the Union waived its right to bargain over vacation schedules through contract provisions in the parties' collective bargaining agreement. In order to find a waiver by contract, the Town must show that the contract language "expressly or by necessary implication confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union." *Commonwealth of Massachusetts*, 19 MLC 1454, 1456 (1992).

Specifically, the Town cites the language of Article 11, Section 1, p. 9, which provides that:

...consistent with Article 11, Section 6...during the summer vacation period of June through August no more than one officer and five patrolmen shall be allowed to be on vacation at the same time, except with the approval of the Chief.

The Town contends that the language of "no more than" means that the Chief has discretion to allow less than five patrolmen and one officer to be on vacation at the same time in the summer. However, when reading the remainder of the sentence, "except with approval of the Chief," the language can be interpreted to simply mean that if more than the designated number of patrolmen and officers want to take vacation, approval is needed; whereas it is not needed if the numbers are five and one. In fact, the past practice of allowing five patrolmen to be on vacation at the same time, even in the summer, evidences that this is how the parties have interpreted this contract provision.

14. The Town also argues in its brief that because the Union's charge and the complaint allege only that the Town should have bargained over the Town's decision and not the impacts, any impacts argument has been waived. (*emphasis in original*) This argument is factually inaccurate, as the Complaint alleges that "...the Town failed to bargain in good faith by failing to give the Union prior notice and an opportunity to bargain to resolution or impasse over vacation time in violation of Section 10(a)(5) of the Law." Neither decision nor impacts bargaining is specified or excluded by this language. However, given the record in this case, it is clear that the Town was on notice that both decision and impacts bargaining were at issue in this case and the issues were fully litigated.

15. It is likely that both of the Town's arguments regarding contractual waiver are now moot in light of the recent holding by the SJC, as discussed in Footnote 3, above. Because the alleged violation occurred in May 2007, which was in the fourth year of the Agreement, the contractual provisions that the Town relies on in support of its arguments would apparently not have survived once the Agreement expired on June 30, 2006 and cannot in and of themselves support a waiver without evidence of a related practice. However, even if the contract provisions were still in ef-

This interpretation is even more compelling when read together with additional language in the Agreement regarding vacation.¹⁶ Specifically, Article 11, Section 1, p. 11 states:

[c]onsistent with, and subject to, the provisions and terms of this Agreement in any one 24-hour period, up to five (5) Patrolmen and one (1) sergeant *shall be entitled* to take off (including, but not limited to, vacation) as provided therein. All vacation time must be approved in advance by the Chief of Police or Executive Officer or designee... (*emphasis added*)

Section 6 states:

up to five (5) patrolmen and one (1) sergeant *shall be entitled* to take time off (ADO), including but not limited to vacation, holiday or personal time off....¹⁷ (*emphasis added*)

The language itself shows an intent for the provisions to be read in harmony and there is nothing in the language of Section 1, page 11, which provides that five patrolmen and one sergeant are entitled to time off in any 24-hour period, that indicates it does not apply to the summer vacation period. Instead, the language of page 9 more specifically requires that in the summer, the Chief himself must approve vacation for more than five patrolmen and one sergeant. Therefore, contrary to the Town's argument, this contract language does not indicate the Union's intent to waive its right to bargain over the Town's decision to limit the number of officers who can take time off to less than what the contract provides.

The Town asserts that the issue here is similar to *Bristol County Sheriff's Department*, 33 MLC 41 (2006), where the union was found to have waived its right to bargain over the Sheriff's decision to limit the number of officers who could take vacation at the same time. There, the contract language gave the Sheriff the right to "establish and revise the overall vacation schedule" and to grant vacation leave in the year it becomes available unless "in his opinion it is impossible or impracticable to do so because of work schedules or emergencies." In this cited language, however, it is clear that the Sheriff has the discretion to limit vacation and it cannot be compared to the contract language at issue in the instant case, which contains no such specific limiting language.

fact, I have found the Town's arguments regarding contractual waiver unpersuasive, as discussed below.

16. The Town argues that it is a standard canon of contractual interpretation that a specific contract provision governs over a more general provision; therefore, Article 11(1), p. 9 should govern over Article 11(1), p. 11 or Article 11(6). However, there is no clear inconsistency between the provisions and no reason why the language cannot be read and interpreted as a whole.

17. The Town asserts that because the charge and Complaint only contain reference to Article 11, Section 1, p. 9, any claims made in relation to other contract provisions are time-barred. However, the Union's charge alleged a violation of Article 11 of the Agreement, which put the Town on notice that all of Article 11 was at issue, rather than only page 9 of Article 11. Further, it is illogical to ask the Division to ignore relevant language within the same article when the Town is making a waiver by contract argument, especially when the language cited by the Town includes a reference to an additional provision, i.e., Article 11, Section 6.

2. The Management Rights Clause Does Not Constitute a Waiver by the Union

The Town further argues that the management rights clause also acts as a waiver of any bargaining rights because it provides the Town with “the right to determine the hours, schedules and assignment of work.” The Town cites *Town of Agawam*, 4 MLC 1066 (1977), in which the Board held that the management rights clause at issue, which gave the employer the right to determine the amount of overtime and employee work schedules, was a waiver of the union’s right to bargain over a change in vacation schedules.

Here, the management rights clause, in contrast, is prefaced with the language, “[e]xcept as otherwise and specifically provided in this Agreement...,” which limits the subsequent description of management rights by recognizing that various other provisions in the Agreement will prevail if in conflict with the management rights clause. As discussed above, Article 11 specifically addresses vacation scheduling and, therefore, prevails. Further, the Board has recently held that language as specific as, “time and scheduling vacation shall be at the discretion of the Director or Manager of the facility...” is too broad to constitute a waiver by the Union over the criteria for granting vacation leave. *Massachusetts Port Authority* at 101. Accordingly, the Union did not contractually waive its right to bargain over the change in vacation.¹⁸

Conclusion

Based on the record, including my observation of the demeanor of the witnesses, and for the reasons stated above, I conclude that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner alleged in the complaint.

Order

Based on the above, I order the Town of Danvers to take the following action.

1. Cease and desist from:

- a. Failing to bargain collectively in good faith with the Union as the exclusive representative of all persons in the bargaining unit by unilaterally implementing limitations on the use of vacation time that exceeded the restrictions set forth in the Agreement and conflicted with the practice that was in place within the Department prior to May 8, 2007.
- b. In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights under the Law.

2. Take the following affirmative action that will effectuate the purpose of the Law:¹⁹

- a. Restore to bargaining unit members represented by the Union the vacation practice that was in place within the Department prior to May 8, 2007.

b. Provide the Association with prior notice of any proposed vacation practice change affecting its bargaining unit members and, upon request, bargain in good faith to resolution or impasse before implementing any changes to the vacation practice.

c. Make whole bargaining unit members for any economic losses they may have suffered as a result of the Town’s unlawful change to the vacation practice, plus interest on any sums owing at the rate specified in M.G.L. c. 321, s.61 compounded quarterly.

d. Sign and post immediately in all conspicuous places where members of the Union’s bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Town customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,

e. Notify the Division in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

SO ORDERED.

APPEAL RIGHTS

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

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE
THE MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS

A Hearing Officer of the Massachusetts Division of Labor Relations has held that the Town of Danvers violated Sections 10(a)(5) and (1) of M.G.L. Chapter 150E by failing to bargain in good faith with the Danvers Police Benevolent Association (Union) by unilaterally implementing limitations on the use of vacation time on July 3, 2007 that exceeded the restrictions set forth in the collective bargaining agreement and the parties’ past practice without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to limit the use of vacation time and impacts of that decision on employees’ terms and conditions of employment.

18. The Town also contends that past practice should not supplant the rights given to the Town under the Agreement and, alternatively, no bargaining was required because the Agreement does not include a preservation of past practice clause. Because I hold that the Agreement did not give the Town the right to unilaterally change the practice for granting vacation without bargaining, it is not necessary to address these arguments.

19. I decline to grant the Union’s proposed remedy of two additional personal days for all bargaining unit members who have suffered economic loss as a result of the Town’s unlawful change to the vacation practice.

DLR Administrative Law Decisions—2010

The Town of Danvers posts this Notice to Employees in compliance with the Hearing Officer's order.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Division 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 Town of Danvers hereby assures its employees that:

WE WILL NOT implement changes to the vacation practice that was in place prior to May 8, 2007 for employees represented by the Union without first affording the Union notice and an opportunity to bargain.

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

WE WILL, upon request by the Association, bargain to resolution or impasse before implementing any changes to the vacation practice for employees represented by the Association.

WE WILL make whole employees represented by the Union for any economic losses they may have suffered, plus interest, pursuant to the changes to the vacation practice implemented on May 8, 2007.

[signed]

For the Town of Danvers

**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 Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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