

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

In the Matter of *
*
CITY OF BOSTON * Case No. MUP-10-5895
*
and * Date Issued: August 30, 2017
*
BOSTON POLICE SUPERIOR OFFICERS *
FEDERATION *

Board Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Robert J. Boyle, Jr., Esq. - Representing the City of Boston
Leah Marie Barrault, Esq. - Representing the Boston Police Superior
Jillian M. Ryan, Esq. Officers Federation

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION ON
COMPLIANCE

1 SUMMARY

2 The Boston Police Superior Officers Federation (Union) appeals from a
3 Department of Labor Relations (DLR) Hearing Officer decision dismissing its petition for
4 enforcement of an order that the CERB issued in 2014 in connection with the above-
5 captioned unfair labor practice proceeding (Order). The Union sought to enforce that
6 portion of the Order requiring the City of Boston (City) to, “upon request, bargain in good
7 faith with the Union to resolution or impasse concerning the impacts of the May 1, 2010

1 decisions to eliminate the position of SSI [Street Sweeping Initiative] supervisor and
2 discontinue the practic[e] of assigning unit members to that position on a regularly-
3 scheduled overtime basis.” The Union claimed that the City violated the Order by
4 eliminating the SSI position without first bargaining to resolution or impasse. The City
5 opposed the petition, arguing, among other things, that it had complied with the Order
6 by bargaining with the Union to impasse and/or that the Union had waived its right to
7 bargain by inaction. After holding a hearing, the Hearing Officer issued a decision
8 holding that the Union had waived its right to bargain by inaction and dismissed the
9 petition. The Union seeks reversal on grounds that the decision contained material
10 errors of fact and law. Upon consideration of the record and the parties' Supplementary
11 Statements, we affirm the Hearing Officer's decision for the reasons below.

12 Facts

13 The parties entered into stipulations of fact and the Hearing Officer made further
14 findings of fact based on the hearing record. We adopt those findings except where
15 noted and summarize the salient facts below. See Massachusetts Board of Regents,
16 13 MLC 1267, SUP-2809 (November 17, 1986). Further reference may be made to the
17 facts set out in the Hearing Officer's Decision on Compliance, reported at 43 MLC 157
18 (September 8, 2016), and the CERB's decision reported at 41 MLC 31 (August 8,
19 2014).

20 Background¹

21 The Union is the exclusive bargaining representative of non-detective sergeants,
22 lieutenants, captains and superior officers at the Boston Police Department

¹ The facts in this section are taken from the CERB's 2014 decision.

1 (Department). In 2007, the City launched the SSI, which covered City-wide street
2 sweeping on the day shift from Monday through Friday between April 1 and November
3 30 every year. The City established four additional telephone lines in its Operations
4 Department to handle SSI-Tow-related calls. Those lines, also known as “Tow Lines,”
5 were staffed by civilian call takers. In 2007, the Union filed a prohibited practice charge²
6 over the staffing of these lines. The City settled the charge by agreeing to hire a
7 bargaining unit SSI supervisor on an overtime basis (SSI supervisor/overtime position)
8 to supervise the four SSI civilian call takers. This practice continued until May 2010,
9 when the City announced a decision to eliminate the SSI supervisor/overtime position
10 and to assign regularly-scheduled bargaining unit supervisors to assume the duties, in
11 addition to their other duties. On June 25, 2010, the Union filed the underlying charge
12 of prohibited practice alleging that the City’s conduct violated Section 10(a)(5) and,
13 derivatively, Section 10(a)(1) of the Law. The matter proceeded to hearing. On
14 October 29, 2013, the Hearing Officer issued a decision concluding that the City did not
15 violate the Law by failing to bargain with the Union to resolution or impasse over the
16 decision to eliminate the SSI position because that was a level of services decision
17 insulated from the statutory obligation to bargain. She did, however, conclude that the
18 City had a statutory duty to bargain over the impacts of the decision that it failed to
19 satisfy.

20 Both parties appealed from various aspects of the Hearing Officer’s decision.
21 On August 8, 2014, the CERB affirmed the decision and issued an Order that, among
22 other things, required the City to “Upon request, bargain in good faith with the Union to

² Case No. MUP-07-4942.

1 resolution or impasse concerning the impacts of the May 1, 2010 decision to eliminate
2 the position of SSI supervisor and discontinue the practic[e] of assigning unit members
3 to that position on a regularly-scheduled overtime basis.”³

4 Facts Pertinent to the Compliance Proceeding⁴

5 The parties initially took immediate steps to comply with the Order. On August
6 12, 2014, four days after the CERB issued the Order, Union counsel Ian Russell
7 (Russell) sent a letter to City counsel Joseph P. McConnell (McConnell) demanding to
8 bargain over the impacts of the City’s decision. One week later, on August 19, 2014,
9 the Department’s Deputy Director of Labor Relations Stephen Sutliff (Sutliff) replied,
10 indicating that the City was willing to meet with the Union and that he had reserved
11 meeting space on September 8, 9 and 12, 2014.⁵ He asked the City to contact
12 Bernadette Metrano (Metrano) in his office to schedule the meeting. Russell replied the
13 next day and the parties agreed to meet on September 9 at 1:00 p.m.

³ The Hearing Officer also issued a make-whole remedy that is not at issue here.

⁴ In setting out these facts, we do not repeat the facts detailing the City’s efforts to engage in impact bargaining during the period after the Hearing Officer’s decision issued, but before the CERB issued its decision on appeal. At hearing, the City argued that the Union’s refusal to bargain during this period constituted a waiver of its right to do so. The Hearing Officer rejected this argument because both parties filed timely appeals of her decision after she issued it and thus, pursuant to 456 CMR 13.15(1) (now 456 CMR 13.19(1)), the impact bargaining order that she issued did not become final and binding on the parties until the CERB affirmed it in 2014. We agree with the Hearing Officer’s analysis. Our holding that the Union waived its right to bargain by inaction is based only on the Union’s conduct *after* August 8, 2014, when the CERB issued its decision.

⁵ That letter also indicated that, “Upon receipt of the hearing officer’s decision in October of 2013, the Department took the step of returning to the previously existing status quo.” In this letter, the City also reserved its right to argue that the Union had waived its right to bargain by inaction by not bargaining after the Hearing Officer’s decision issued.

1 On the morning of September 8, 2014, Union counsel Leah Barrault (Barrault)
2 sent an email to Sutliff stating that she was “no longer free for this meeting tomorrow
3 due to an unexpected personal commitment.” She asked to discuss the issue when
4 they met the following week, on September 18, to discuss a separate issue. Sutliff
5 replied the same day with an email indicating that, “This is an important issue to the
6 City.” He nevertheless confirmed that the parties would meet on September 18, 2014.

7 The parties met on September 18, 2014 but neither side submitted a proposal.
8 Instead, the City restated its intent to eliminate the SSI supervisor/overtime position,
9 and the Union asked the City to provide certain information pertaining to the SSI.

10 On October 1, 2014, Russell sent a written information request to Sutliff
11 containing eight separate requests. Item 1 sought all contracts between the City and
12 any tow companies related to towing during the street sweeping season. Items 2-6
13 sought a “description of the number of calls” either received by Operations or “made to
14 any phone line dedicated to taking calls related to the towing of cars . . . in 2012, 2013
15 and 2014” in a variety of scenarios, e.g., during street sweeping season, outside of
16 street sweeping season, etc. Item 7 requested the number of overtime hours that
17 Superior Officers in Operations had worked during the street sweeping season in 2012,
18 2013, and 2014. Item 8 sought “any job descriptions for positions held by Superior
19 Officers in Operations.”

20 The City responded to the information requests in a series of emails that it sent to
21 the Union between October 21 and 29, 2014. Specifically, on October 21, 2014, City
22 Labor Counsel Robert Boyle, Jr. (Boyle) sent an email to the Union providing copies of
23 the tow contracts requested in Item 1. On October 24, Deputy Superintendent Steven

1 Whitman, Commander, Office of Labor Relations (Whitman) sent a letter to Russell
2 providing the information requested in Item 7 and additional information in response to
3 Item 1. Regarding Items 2-6, Whitman stated that the Department had reached out to
4 Verizon, and was advised that Verizon could provide “traffic studies” on a per line basis
5 but that there was no historical data. Whitman indicated that the Department, therefore,
6 could not respond to Items 2-6. On October 28, 2014, Whitman wrote to Russell
7 indicating that the Department did not have the job descriptions requested in Item 8.
8 Instead, he provided Rule 104 (Sergeants) and Rule 105 (Lieutenants) of the
9 Department’s Rules and Procedures. Whitman claimed that those rules, “established
10 the Sergeants and Lieutenants Duties and Responsibilities.” Whitman closed the
11 October 28th letter by stating, “We believe this fulfills your request in its entirety. The
12 Department reserves its right to supplement this request should further information
13 become available.”

14 Also during October 2014, the parties attempted to schedule a second meeting.
15 At some unspecified date prior to October 24, 2014, the parties agreed to meet on
16 Monday, October 27, 2014. On Friday, October 24, 2014, at 5:35 p.m., Barrault wrote
17 to Boyle stating:

18 Sorry for the late notice. The Federation needs to move Monday’s
19 meeting. I have a personal conflict I just learned about. In addition,
20 we only today received documents responsive to our requests and
21 need to review them prior to having any further impact discussions.
22 We are happy to still meet next week. Please send us some dates
23 and times that work. Sorry again for the late notice.
24 (Emphasis in original.)
25

26 On the morning of October 27, 2014, Boyle sent an email indicating that this
27 week was “tough” for him but that he was available the following week. Sutliff replied

1 stating that the Department wanted to meet this week, that Barrault was available, and
2 that they could meet without Boyle if necessary. Later that morning, Metrano sent an
3 email sent an email offering three dates, October 29, 30 and 31. Two days later, on
4 October 29, 2014, Metrano sent a second email to Barrault and Russell requesting
5 follow-up on the dates offered in her October 27 email. Russell wrote back that day
6 indicating that the Union was available on October 31, 2014 at 10:00 a.m.

7 On October 31, 2014, the parties met but neither party made a proposal. Rather,
8 the Union indicated that the City had not responded completely to its October 1
9 information request. The City agreed to provide the Union with additional information,
10 and the meeting ended.

11 On November 4, 2014, Russell submitted a second request for information to
12 Sutliff seeking the following three items:

- 13 1) All tow logs for the years 2013 and 2014.
- 14 2) The results of the one-week Verizon call study discussed during
15 the bargaining session on October 31, 2014.
- 16 3) A description of the amount of money received by the City from
17 tow companies to pay for the Department's administrative costs
18 related to towing in the years 2013 and 2014.

19 On November 10, 2014, Whitman sent a letter to Russell and two Union officials,
20 Captain John Kervin, President (Kervin), and Sergeant Mark Parolin, Vice President
21 (Parolin), responding to the second information request. Whitman indicated that the two
22 years of tow logs requested in Item 1 were not available but that on November 6, 2014
23 the Department had provided the 2014 Tow Logs to Parolin by hand. Whitman stated
24 that, "to help with the analysis of the volume of tows," the Department had counted the
25 number of tows in June and determined there were 168 per day.

1 With respect to Item 2, Whitman indicated that the Department had requested the
2 week-long study of the call volume on the tow lines and expected to have that available
3 when they next met. Finally, Whitman stated that the Department determined that it
4 received \$35 per car towed for street sweeping. The City closed its letter by indicating
5 its availability to meet on November 13 or 14.

6 Barrault replied to this letter on November 12. She indicated that she planned to
7 review the documents the Department had sent, but that she had only received
8 Whitman's letter that day, and that she and Russell were not available to meet on such
9 short notice. She indicated that she would talk to Russell and her team and get some
10 dates for the following week.

11 Barrault did not provide any dates for the following week. On November 21,
12 2014, Whitman sent a letter to Russell, Kervin and Parolin, indicating that he had yet to
13 receive the dates that Barrault had promised in her November 12 email and recapping
14 the information that the Department had provided to the Union since their October 31
15 meeting. Whitman closed this letter by stating, "after November 28, 2014, no supervisor
16 exclusively for Street Sweeping will be hired on overtime. Even with that said, we are
17 willing and available to meet with you during the months of November and December to
18 hear your concerns."⁶

19 On November 25, 2014, Whitman sent another letter to Barrault and Kervin in
20 which he stated his belief that the Department had fulfilled all but one of the Union's

⁶On July 21, 2016, the Union filed an Emergency Motion to Reopen the Record to offer an email that Barrault purportedly wrote to Whitman on November 24, 2014. The Hearing Officer denied the Motion on August 11, 2016. We affirm this ruling for the reasons stated below.

1 information requests, and that the final one would be done that week.⁷ Whitman further
2 stated that the “end of the supervisors SSI overtime coincides with the end of the SSI
3 program for the year,” but that the Department was still willing and available to meet to
4 bargain the issue. The letter closed with Whitman asking the Union to, “Please contact
5 this office with any dates and times that you would like to schedule further meetings.”
6 The Union did not do so.

7 On December 4, 2014, Whitman wrote to Russell stating “This letter is in
8 response to your information request submitted to this office verbally on October 31,
9 2014, during our last meeting regarding the above-captioned matter” and enclosing a
10 copy of a nine- day traffic study on four telephone tow lines. Whitman closed the letter
11 by stating, “We believe this fulfills your request in its entirety. Please contact our office if
12 you have any further questions.” The Union did not respond to this letter.

13 After December 4, there were no discussions or meetings between the parties
14 regarding the SSI supervisor/overtime position or the City’s responses to the Union’s
15 information requests until late August 2015. According to a letter that Whitman sent to
16 Parolin on August 27, 2015, sometime in late August, the Department’s Office of Labor
17 Relations found out that the SSI supervisor/overtime position had “inadvertently” been
18 continued through the 2015 season. Whitman offered seven dates between September
19 1 and September 14 to “discuss [the Department’s] intent to end the overtime supervisor
20 assignment.”

⁷ The letter did not specify which request was still outstanding.

1 The parties met on September 14, 2015.⁸ The Union did not make any bargaining
2 proposals at this meeting, contending either that it had not yet reviewed the information
3 previously provided by the City or that it would need more time to review that information
4 “again” prior to making a proposal.⁹ The City then reiterated its intent to eliminate the
5 SSI supervisor/overtime position, effective October 1, 2015.

6 On September 15, 2015, Whitman sent a letter to Barrault summarizing his view
7 of what had transpired at the September 14th meeting. Among other things, the letter
8 indicated the Department’s continued willingness to engage in impact bargaining over its
9 decision to eliminate the SSI supervisor/overtime position with the Union and to update
10 any information already provided. The final paragraph of the letter, set forth below, again
11 advised the Union of the Department’s intention to end the SSI supervisor/overtime
12 position on October 1, 2015:

13 The meeting concluded with the Department telling the Union it would
14 respond to any timely information request on this topic from the Union. It
15 is now the Department’s intention to end the Street Sweeping Supervisor
16 overtime on October 1, 2015. Please inform the Department as soon as

⁸ The record does not reflect when the parties agreed to this date.

⁹ The Hearing Officer made a finding that during the September 14, 2015 meeting, the Union stated that it had not yet reviewed the information that the City provided in response to its 2014 requests. Whitman’s September 21, 2015 letter attributed a similar statement to the Union. In its supplementary statement, however, the Union denies ever admitting that it did not review the City’s responses to its request. Instead, relying on the City’s handwritten bargaining notes as support (City Exhibit 2), the Union claims that it told the City that it needed more time to “refamiliarize itself” with that information and that it lacked sufficient time to review it “again” before the City eliminated the SSI position/overtime on October 1. In its post-hearing brief, the Union similarly claimed that it told the City that it still needed to review the information that the City had previously provided and that it would need to request updated information before it could formulate a counterproposal. We need not resolve this dispute because, as explained below, the Union’s version of events still supports the conclusion that the City established its affirmative defense of waiver by inaction.

1 possible should the Union have a desire to meet in advance of the
2 change.

3
4 On September 30, 2015, at 5:34 p.m., the City sent an email to a number of
5 Department employees, including President Kervin, stating:

6 Effective immediately Supervisor Overtime for Street sweeping is
7 discontinued. Any supervisor already hired should be notified that it is
8 cancelled. Civilian Streetsweeping overtime will continue as usual.

9 This email was forwarded to “treasurer@bpsof” on October 1, 2015 at 3:40 p.m.

10 On October 1, 2015, Barrault sent a letter to Whitman, in which the Union
11 demanded to bargain over the City’s decision to eliminate the SSI supervisor/overtime
12 position and made a third information request. In her letter, Barrault stated that
13 Whitman’s September 15 letter “misstates the history regarding this issue as well as the
14 September 14th meeting.” The letter asserted that the Department had not made any
15 proposals at the September 14, 2015 meeting and “refused to entertain or discuss the
16 ‘impacts’ of its decision, including, but not limited to, the increased workload of
17 supervisors in operations.” The letter ended as follows:

18 Attached please find the Union’s updated information request regarding
19 the Department’s decision to eliminate the street sweeping supervisor
20 position. Also, the Union demands to bargain over the Department’s
21 decision, and accordingly requests dates from you to continue this
22 process. The Department has not satisfied its bargaining obligation
23 under [Chapter] 150E. . . To the extent the Department terminates his
24 position today, October 1, without bargaining, it does so at its peril. . . For
25 once, I implore the Department to act in good faith, comply with the Law,
26 and bargain this decision prior to implementation such that we can avoid
27 endless litigation.¹⁰

¹⁰ In its supplementary statement, the Union claims that the Hearing Officer incorrectly found that the Union demanded to bargain over the City’s decision to eliminate the SSI supervisor/overtime position in its October 1, 2014 letter. Based on the express language of that letter, as set forth in pertinent part above, the Hearing Officer correctly found that the Union demanded to engage in decision bargaining on October 1 and we adopt this finding. For reasons explained below, however, unlike the Hearing Officer,

1 The attachment to this letter contained both old and new information requests.
2 Referencing the October 24, 2014 letter in which the Department told the Union that it
3 could not respond to Items 2-6 in the Union's October 1, 2014 request, the Union asked,
4 "Can we request Items 2-6 again and for the year 2015?" The Union next stated that
5 the Department had failed to respond to Item 8 of its October 1, 2014 request.¹¹ Finally,
6 under the heading, "Here are a few requests we came up with," the Union made
7 approximately twenty requests for information that it had not previously requested.¹²

8 The Department partly responded to the Union's additional information requests
9 on October 13, 2015 and indicated its intent to respond further later. On October 15,
10 2015, the Union filed this petition for compliance. The City eliminated the SSI
11 supervisor/overtime position as of October 1, 2015 but continued to respond to the
12 Union's new information requests over the next six months. On March 4, 2016, the

our conclusion that the Union waived its right to bargain by inaction is not premised on this demand.

¹¹ It did not, however, ask for Item 8 again.

¹² For example, in the fourth paragraph of the October 1, 2015 information request, the Union requests new information and documents pertaining to the Administrative Fee section of the 2014 Tow contract that the City provided to the Union in October 2014. Some of the items the Union requested for the first time were:

- Profit from tow companies.
- How many falsely towed cars?
- How much city has paid for same?
- All laws, regulations, etc. pertaining to the lawful authorization to tow . . .
- If admin fees go to the General Fund...under whose authority? Do all fees from other initiatives go to GF or are they specifically earmarked for that project.
- Every time a PO tows a car they are supposed to request permission from the sergeant over the air. Request for all these radio transmissions.

1 Union confirmed that the City had satisfactorily responded to its October 1, 2014 and
2 October 1, 2015 requests.

3 Motion to Re-Open the Record

4 On July 21, 2016, the Union filed an Emergency Motion to Reopen the Record
5 (Motion) to submit a November 24, 2014 email from Barrault. The email was referenced
6 in Joint Exhibit 21, which was the September 15, 2015 letter from Whitman to Barrault.¹³
7 In its Motion, the Union claimed that the email was “inadvertently excluded from the
8 record” and sought to reopen the record to include it in order to “provide a full
9 understanding of the exchange between the parties regarding each party’s impact
10 bargaining obligations.” The City neither assented to nor opposed the Motion.

11 On August 11, 2016, the Hearing Officer denied the Motion on grounds that the
12 Union had failed to establish the requisite elements to reopen a closed hearing record,
13 i.e., that the November 24th email was “newly-discovered evidence, which was in
14 existence at the time of the hearing, but of which the party was excusably ignorant
15 despite the exercise of reasonable diligence.” City of Boston, 35 MLC 95, MUP-04-
16 4050 (December 10, 2008) (additional citations omitted). In so holding, the Hearing
17 Office relied on the Union’s failure to deny that it had the November 24 email in its
18 possession both prior to and during the hearing, and the fact that it could have, but did
19 not, seek to introduce that document into evidence at hearing through a witness on
20 direct or cross examination. Citing City of Haverhill, 17 MLC 1215, 1218, MUP-7194

¹³ Whitman stated that in this email, Barrault said that she would get back to the Department with future dates to meet, but that she never did. We note that the same description would apply to the November 12, 2014 email that Barrault sent to Whitman.

1 (August 21, 1990), the Hearing Officer thus found no “extraordinary circumstances” that
2 would justify reopening the record. We agree.

3 Pursuant to DLR Rule 13.16, 456 CMR §13.16, the Hearing Officer had the
4 discretion to reopen the hearing and receive further evidence prior to the issuance of
5 the final decision. The Hearing Officer did not abuse this discretion by denying the
6 Motion. We agree that, in the absence of evidence or argument that the Union was
7 unaware of the document or somehow unable to obtain it, the Union’s claim that the
8 email was “inadvertently omitted from the record” failed to satisfy its burden of
9 demonstrating that it was excusably ignorant of the existence of the evidence at the
10 time of the hearing despite the exercise of due diligence. To hold otherwise would
11 contravene the CERB’s longstanding policy of refusing to reopen records except in
12 extraordinary circumstances, which would, in turn, erode the finality of the DLR’s
13 administrative proceedings and discourage parties from securing and presenting all
14 relevant evidence at the hearing. City of Haverhill, 17 MLC at 1219; Boston School
15 Committee, 17 MLC 1118, 1121, MUP-7210 (July 13, 1990).¹⁴

16

¹⁴ The Union also argued that the email should be admitted to demonstrate that the Union understood that it had an impact bargaining obligation. The Union claims this is particularly important considering the Hearing Officer’s determination that it improperly sought to bargain over the City’s *decision* to eliminate the SSI supervisor/overtime position. We do not find this argument persuasive for two reasons. First, as explained in footnote 22, below, our affirmation of the Hearing Officer’s decision in this case does not turn on the Union’s request to engage in decision bargaining in September 2015. More generally, the decision to reopen a record is not strictly a function of the degree of relevance of the evidence, but of the factors set forth above. Massachusetts Port Authority, 36 MLC 5, UP-04-2669 (June 30, 2009), aff’d sub nom. Massachusetts Port Authority v. CERB, 78 Mass. App Ct. 1122 (January 25, 2011) (Unpublished Disposition).

1 Opinion¹⁵

2 Pursuant to DLR Rule 16.08 (5), in cases where the DLR determines that there is
3 a genuine dispute as to compliance, it may order that a hearing be held to determine
4 whether compliance has occurred. At such hearing, the party required to comply with
5 the order has the burden of proving such compliance by a preponderance of the
6 evidence. The City opposed the petition on three grounds: 1) it bargained to impasse
7 before implementation; 2) the Union waived its right to impact bargain by inaction; and
8 3) the CERB's Order to engage in impact bargaining, on request, constituted an
9 impermissible infringement on the Boston Police Commissioner's non-delegable right of
10 assignment. The Hearing Officer rejected the impasse¹⁶ and non-delegability
11 arguments,¹⁷ but found that the City had met its burden of demonstrating that, despite
12 its multiple efforts to engage in impact bargaining with the Union, the Union had waived
13 its right to bargain by inaction by not making any bargaining proposals, requesting
14 decision bargaining and not reviewing information the City provided before the parties'
15 final bargaining session. We affirm the Hearing Officer's conclusion for the reasons set
16 forth below.

¹⁵ The CERB's jurisdiction is not contested.

¹⁶ Neither party appealed from the Hearing Officer's conclusion that the parties were not at impasse, but the Union claims that the Hearing Officer made findings in the Impasse section of her Opinion that contradict the findings she made in the Waiver by Inaction section. We address this contention below.

¹⁷ The Hearing Officer declined to address City's arguments regarding its managerial prerogative because the City filed no notice of appeal from the CERB's 2014 decision and Order. The City raises similar arguments in this appeal that we similarly decline to entertain. The City's failure to file an appeal from the CERB's 2014 decision renders any arguments regarding the propriety of the Order untimely. See City of Fitchburg, 16 MLC 1567, 1571, MUP-5896 (February 12, 1990).

1 An employer asserting the affirmative defense of waiver by inaction must
2 demonstrate: 1) actual notice of the proposed change, 2) reasonable opportunity to
3 negotiate over the issue, and 3) unreasonable or unexplained failure to bargain or to
4 request or to request bargaining. School Committee of Newton v. Labor Relations
5 Commission, 388 Mass. 557, 570 (1983); Holliston School Committee, 23 MLC 211,
6 MUP-1300, (March 27, 1997). A waiver by inaction may be found where an employee
7 organization did not take sufficient action after notice of a proposed change to terms
8 and conditions of employment affecting mandatory subjects of bargaining. Revere
9 School Committee, 3 MLC 1537, 1540, MUP-2444 (March 18, 1977) (waiver found
10 where union failed to request bargaining despite seven months notice of change).

11 There is no dispute that the Union had actual notice of the proposed change. As
12 the earlier decisions reflect, the City first notified the Union of its plan to eliminate the
13 SSI supervisor/overtime position in 2010. After the CERB's decision issued in August
14 2014, the City reiterated its intention to eliminate the position in multiple letters, emails
15 and on the three occasions that the parties met to bargain over these issues in 2014
16 and 2015.

17 We also agree that the City has met its burden of demonstrating that it gave the
18 Union reasonable opportunities to bargain over the issue. From August 19 until
19 November 25, 2014, the City sent seven emails to the Union attempting to schedule (or,
20 on two occasions, to re-schedule) bargaining sessions and/or reiterating its willingness
21 and availability to bargain the issue. These communications resulted in the parties
22 meeting on September 18, 2014 and October 31, 2014. The City sent two more emails
23 in August and September 2015: one, on August 27, that offered seven dates to meet in

1 September; and another, on September 15, the day after the parties' final bargaining
2 session, in which the City again expressed its willingness to bargain before it
3 implemented the decision on October 1, 2015. The City's overall efforts in this regard
4 were reasonable, especially since on two occasions, (October 29, 2014 and November
5 21, 2014), the City sent follow-up letters to the Union after it failed to respond to the
6 City's earlier requests to provide times and dates to meet.

7 We finally conclude that the City has met its burden of demonstrating that the
8 Union inexplicably and unreasonably failed to bargain or request bargaining. The Union
9 does not dispute its failure to provide any impact bargaining proposals or
10 counterproposals in 2014 or 2015. On appeal, however, it claims that it was "precluded
11 from intelligently and effectively formulating an impact bargaining proposal because of
12 the City's untimely and insufficient responses to the Federation's information requests."
13 We are not persuaded by this argument for the reasons set forth below.

14 First, on December 4, 2014, the City sent the Union a letter stating that it
15 believed that it had fulfilled all the Union's information requests. The Union did not
16 respond to this letter, despite being on clear notice that the City did not intend to
17 continue the SSI position when the SSI season began again on April 1, 2015. The
18 Union's failure, at this point, to attempt to schedule further bargaining sessions, make a
19 bargaining proposal or, critically, to tell to the City that it believed that the City's
20 information responses thus far prevented it from doing so, establishes that the Union

1 inexplicably failed to bargain or request bargaining from December 4, 2014 through
2 April 1, 2015.¹⁸

3 The City would therefore not have violated the Order had it actually discontinued
4 assigning unit members to the SSI supervisor/overtime position when the 2015 season
5 began. Because the City did do so, however, we must also examine the Union's
6 conduct between August 27, 2015, when the City notified the Union that it still intended
7 to eliminate the position and sought to resume bargaining over this issue, and October
8 1, 2015, when the City finally ceased assigning unit members to this position. We
9 conclude that the Union unreasonably and inexplicably failed to bargain during this
10 period.

11 The Union defends its failure to make a bargaining proposal at the September
12 14, 2015 session on grounds that it needed more time to review the information that the
13 City had already provided. This was unreasonable given that the Union had been in

¹⁸ Although the Union received the December 4 letter after being notified that the SSI supervisor/overtime would not be continued after the end of the 2014 SSI season, there is no evidence, and the Union does not contend, that notification of the elimination of the position in November 2014 had an immediate or material effect on bargaining unit members such that further impact bargaining sessions would have been futile prior to the beginning of the 2015 SSI season, on April 1, 2015. That would have been would have been the first time that regularly-scheduled bargaining unit supervisors would actually have had to assume the duties formerly performed by the SSI supervisor/overtime position. Compare County of Middlesex, 6 MLC 2056, MUP-3449 (March 31, 1980)(finding that union waived its right to bargain by inaction when union had three month notification of elimination of day care program and union had opportunity to make a demand to bargain but failed to do so) to Town of Weymouth, 40 MLC 253, MUP-10-6020 (March 10, 2014)(rejecting Town's argument that actual implementation date of traffic supervisor layoff was September, where the Town's layoff notice had an immediate and critical impact on traffic supervisor's eligibility for unemployment insurance and job searches). The fact that the position was not actually eliminated on April 1, 2015 does not affect this analysis, as there is no evidence that the Union had advance notice of this fact.

1 possession of this information since December 2014, yet, as discussed above, failed to
2 discuss this information with the City or formulate a bargaining proposal based upon it
3 before April 1, 2015. Further, the Union had been aware since the end of August 2015
4 that the City still intended to eliminate the position but that it wished to resume
5 bargaining over the subject. Contrary to the Union's claims, this provided the Union
6 with adequate time to prepare for the September 14th meeting, particularly if, as the
7 Union claims, it had already reviewed the documents and just needed more time to look
8 at them again.¹⁹ Finally, in its September 15th letter, the City gave the Union yet another
9 two weeks to update its requests before its October 1 deadline but the Union failed to
10 respond to the letter before that date.

11 The Union attempts to explain its inaction after September 15 by claiming that at
12 the September 14, 2015 meeting, the City agreed to wait for updated requests. The
13 Union points to the City's handwritten bargaining notes in support of this claim.
14 Standing alone, however, the notes do not establish that the City agreed to postpone
15 implementing its decision until the Union sent another information request.²⁰ Further, in
16 the September 15, 2015 letter, Whitman indicated that the City had told the Union on
17 September 14 that it would agree to any "timely" information request from the Union. In
18 the very next sentence, Whitman reiterated that the City intended to eliminate the SSI

¹⁹ For this reason, we find no support for a subsidiary finding that the Hearing Officer made in the Impasse section of her Opinion, that the Union could not make any proposals as of September 14, 2015 because the City had not yet responded to all of the Union's requests. At that point, by its own admission, the Union concedes that it did not know whether the City had responded in full to its requests, because it still needed more time to review the information. We therefore do not rely upon this finding.

²⁰ The Hearing Officer made no findings regarding these notes and the Union does not point to any witness testimony that explains or clarifies them.

1 supervisor/overtime position on October 1 and asked the Union to notify it “as soon as
2 possible should it have a desire to meet in advance of the change.” Although this
3 should reasonably have alerted the Union that the City did not intend to wait indefinitely
4 for a third information request, the Union failed to respond to the letter in any way until
5 October 1.

6 Under these circumstances, we find that the City has met its burden of
7 demonstrating that it attempted on numerous occasions in both 2014 and 2015 to
8 comply with the CERB’s order to bargain with the Union to resolution or impasse over
9 the impacts of its decision to eliminate the SSI supervisor/overtime position, but that,
10 under the totality of the circumstances, the Union repeatedly, inexplicably and
11 unreasonably failed to do so until after the SSI supervisor/overtime position was
12 eliminated.²¹

13 The fact that Union requested new information on October 1, 2015 does not
14 change this result because our holding is based on the Union’s conduct before October

²¹ In so holding, we do not shift the burden of proving compliance to the Union, as the Union claims the Hearing Officer did by basing her conclusion that the Union waived its right to bargain by failing to offer any reasons for not reviewing the information the City provided in preparation for the September 14, 2015 bargaining session and failing to explain why it could not have offered a proposal in the intervening months. Rather, just as employers are free to raise defenses to allegations as to which the union bears the burden of proof, e.g., claims arising under Section 10(a)(5) of the Law, a union has the right to defend itself against waiver by inaction claims by presenting evidence that rebuts the evidence that the employer presented in support of its claim. See, e.g., Holliston School Committee, 23 MLC at 213 (finding that union waived its right to bargain by inaction by failing to provide sufficient evidence showing that it made a timely demand to bargain). Where, as here, the employer has presented evidence satisfying its burden, a finding that a union has failed to present evidence rebutting that case, does not improperly shift the burden of proving compliance to the union but, rather, results in a conclusion that the employer has proven its affirmative defense by a preponderance of the evidence. Id. at 213.

1 1, 2015.²² In any event, although several of the Union's requests may have been for
2 updated information, many of them were for information that the Union could have, but
3 did not, request in 2014.²³ The Union cannot have it both ways. In circumstances
4 where the City repeatedly informed the Union that it would be implementing its decision
5 to eliminate the SSI supervisor/overtime position by a date certain and gave the Union
6 multiple opportunities to bargain prior to that date, the Union cannot defend its failure to
7 make any impact bargaining proposals on the City's failure to provide old or new
8 information that it inexplicably failed to discuss or request months earlier.

9 Conclusion

10 For the foregoing reasons, we affirm the Hearing Officer's conclusion that the
11 City has shown by the preponderance of the evidence that it complied with the CERB's

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²² Accordingly, unlike the Hearing Officer, we do not rely on the fact that the Union made a request to engage in decision, as opposed to impact, bargaining on October 1, 2015 to support our conclusion that the Union waived its right to bargain. By the time the Union made this request, the Union had already waived its right to bargain by inaction. In any event, although the fact that the Union twice repeated its demand to engage in decision bargaining in its October 1 letter suggests that the request was more than merely a "scrivener's error" as the Union argues, the overall record reflects that the Union understood that the CERB's Order required the City to engage in impact, not decision bargaining.

²³ See footnote 12.

- 1 2014 Order. We therefore dismiss the Union's petition for compliance.
- 2 **SO ORDERED**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.