

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

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CITY OF BOSTON

*

Case No. MUP-10-5895

and

*

Date Issued: December 22, 2016

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BOSTON POLICE SUPERIOR OFFICERS
FEDERATION

*

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Hearing Officer:

Kendrah Davis, Esq.

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

HEARING OFFICER'S DECISION ON COMPLIANCE

SUMMARY

1

2 The issue in this compliance proceeding is whether the City of Boston (City)
3 complied with an order rendered by the Commonwealth Employment Relations Board
4 (Board) on August 8, 2014. I find that the City has shown by preponderance of the
5 evidence that it has complied with the Board's order.

6

STATEMENT OF THE CASE

7 On June 25, 2010, the Boston Police Superior Officers Federation (Union) Union
8 filed a charge of prohibited practice (Charge) with the Department of Labor Relations
9 (DLR) alleging that the City had violated Section 10(a)(5) and, derivatively, Section

1 10(a)(1) of the Law by repudiating an oral agreement in May of 2007, and failing to
2 bargain in good faith with the Union over the May 1, 2010 decisions to eliminate the
3 street-sweeping initiative (SSI) supervisor position and to discontinue assigning unit
4 members to that position on a regularly scheduled overtime basis. A duly-designated
5 DLR investigator investigated the Charge and issued a three-count Complaint of
6 Prohibited Practice (Complaint) on January 21, 2011. The City filed its Answer to the
7 Complaint on February 1, 2011.

8 I conducted a hearing on December 21, 2011, January 20, March 30 and April
9 30, 2012. On October 29, 2013, I issued a decision, finding that the City did not
10 repudiate a May 2007 oral agreement, and did not have to bargain with the Union over
11 its decisions to eliminate the SSI supervisor position and overtime assignment
12 associated with that position. However, I held that the City had unlawfully failed to
13 bargain with the Union over the impacts of those decisions, and ordered the City to
14 restore the economic equivalent of the status quo ante during the period of impact
15 bargaining, *inter alia*. That order stated, in full:

- 16 1. [The City shall] [c]ease and desist from:
17
18 a) Failing to bargain with the Union over the impacts of the
19 decisions to eliminate the SSI supervisor position and
20 discontinue the practice of assigning unit members to that
21 position on a regularly-scheduled overtime basis.
22
23 b) In any like manner, interfering with, restraining and coercing
24 its employees in any right guaranteed under the Law.
25
26 2. [The City shall] [t]ake the following action that will effectuate the
27 purposes of the Law.
28
29 a) Upon request, bargain in good faith with the Union to
30 resolution or impasse concerning the impacts of the May 1,
31 2010 decisions to eliminate the position of SSI supervisor

1 and discontinue the practic[e] of assigning unit members to
2 that position on a regularly-scheduled overtime basis.

3
4 b) Restore the economic equivalent of the status quo ante by
5 compensating bargaining unit members who are unable to
6 receive regularly-scheduled overtime payments as the SSI
7 supervisor on Monday-Friday day shifts in the SSI season
8 between April 1 and November 30, during the period
9 beginning on the date of receipt of this decision and
10 continuing until the earliest of the following events:

11
12 i. The City and the Union reach mutual agreement
13 regarding the impact of the decisions to eliminate the
14 SSI supervisor position and discontinue the practice
15 of assigning unit members to that position on a
16 regularly-scheduled overtime basis;

17
18 ii. The City and the Union reach impasse after
19 bargaining in good faith;

20
21 iii. The Union fails to commence negotiations within five
22 days of receipt of the City's notice of its willingness to
23 bargain; or,

24
25 iv. The Union subsequently fails to bargain in good faith.

26
27 c) Sign and post immediately in conspicuous places where
28 members of the Union usually congregate and where notices
29 to employees are usually posted, including but not limited to
30 the City's internal e-mail system, and maintain for a period of
31 30 consecutive days thereafter, signed copies of the attached
32 Notice to Employees; and,

33
34 d) Notify the DLR in writing of the steps taken to comply with
35 this decision within ten (10) days of receipt of this decision.

36
37 Both parties filed timely appeals and, on August 8, 2014, the Board affirmed the
38 decision and order in its entirety,¹ ordering the City to:

- 39 1. Cease and desist from failing to bargain collectively in good faith
40 with the Union over the impacts of the May 1, 2010 decisions to
41 eliminate the SSI supervisor position and discontinue assigning unit
42 members to that position on a regularly-scheduled overtime basis;

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- 2. Cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights guaranteed under the Law.
- 3. Effectuate the purposes of the Law by bargaining in good faith with the Union, upon request, to resolution or impasse concerning the impacts of the May 1, 2010 decisions to eliminate the position of SSI supervisor and discontinue the practice of assigning unit members to that position on a regularly scheduled overtime basis.
- 4. Effectuate the purposes of the Law by paying employees an amount equivalent to the average additional overtime compensation they formerly received as the SSI supervisor, plus interest, as of the date that the Union demands to bargain, due to the City's decisions to eliminate the position of SSI supervisor and discontinue the practice of assigning unit members to that position on a regularly scheduled overtime basis, until the City has lawfully discharged its duty to bargain.

19 On October 15, 2015, the Union filed a Petition for Enforcement of the Board's
20 Order (Petition)² pursuant to 456 CMR 16.08, alleging that the City had failed to comply

¹ Neither party filed an appeal of the Board's decision.

² In support of its Petition, the Union filed an Affidavit from counsel Leah M. Barrault (Barrault), stating in pertinent part:

2. The first time the parties met to bargain the impacts of the City's decisions to eliminate the...[SSI] supervisor and to discontinue the practice of assigning unit members to that position on a regularly-scheduled overtime basis, as order[ed] by the Hearing Officer and affirmed by the...Board in MUP-10-5895 was on September 18, 2014.

3. The parties met for a second time on October 31, 2014. The parties did not reach an agreement or impasse at the conclusion of this meeting, and the parties did not meet again before the next street sweeping season began in April 2015, at which time the City continued to staff the SSI supervisor consistent with the status quo.

5. On September 14, 2015, the parties met to bargain over the City's decision to eliminate the SSI position. During this meeting, the City refused to discuss the impacts of its decision, including the increased workload of supervisors in Operations. The City did not make any proposals during this meeting.

1 with the Order.³ On December 23, 2015, the City filed its Response to the Petition,
2 opposing it on three grounds: (1) the parties reached impasse in their negotiations
3 concerning the impacts of the Department's decision to end SSI overtime; (2) the Union
4 waived its right to impact bargain with the Department; and (3) the [Board's] order to
5 impact bargain constitutes an impermissible infringement on the Boston Police
6 Commissioner's non-delegable right of assignment. On March 24, 2016, I conducted a
7 hearing on the Petition to determine the City's compliance with the Board's order. At
8 the end of the hearing, I closed the record.

9 On July 21, 2016, the Union filed an Emergency Motion to Reopen the Record
10 (Motion) to offer a document. The City filed its response to the Motion by e-mail dated
11 July 28, 2016, stating that it "does not assent" to the Motion, but "will not be filing an
12 opposition document." On August 11, 2016, I denied the Motion; and, eight days later
13 on August 19, 2016, both parties filed their post-hearing briefs.

14 STIPULATIONS OF FACT⁴

- 15 1. The City is a public employer within the meaning of Section 1 of the Law.
- 16 2. The Union is an employee organization within the meaning of Section 1 of the
17 Law.
- 18 3. The Union is the exclusive bargaining representative of non-detectives,
19 sergeants, lieutenants, captains and superior officers of the Boston Police
20 Department (Department).
- 21 4. The DLR issued a complaint of prohibited Practice on January 21, 2011.
- 22 5. A full hearing in Case No. MUP-10-5895 was held on December 21, 2011,
23 January 20, 2012, March 30, 2012 and April 30, 2012.

³ In concert with the Petition, my decision addresses only whether the City complied with the Board's impact bargaining order without addressing the make-whole remedy.

⁴ The parties agreed to these factual stipulations at the compliance hearing.

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- 2 6. On October 29, 2013, the DLR issued a decision and order in MUP-10-5895.
- 3
- 4 7. The Board affirmed the Hearing Officer's decision and issued its own order in
- 5 MUP-10-5895 on August 8, 2014.
- 6
- 7 8. When the City's SSI occurs, it occurs Monday-Friday, April 1st through
- 8 November 30th, annually—weather permitting.
- 9
- 10 9. On October 30, 2013, the City restored the status quo of assigning
- 11 supervisors on overtime to the SSI supervisor position, per the Hearing
- 12 Officer's decision.
- 13
- 14 10. The parties met to bargain pursuant to the Board's decision on September 18,
- 15 2014 and October 31, 2014.
- 16
- 17 11. On August 24, 2015, the Department met with the Union on an unrelated
- 18 matter and during the meeting advised the Union that, inadvertently, towline
- 19 overtime continued into the 2015 season.
- 20
- 21 12. The parties met a final time on September 14, 2015.
- 22
- 23 13. The City eliminated the SSI supervisor overtime assignment, effective
- 24 October 1, 2015.
- 25

FINDINGS OF FACT

27 By letter dated October 30, 2013, the City notified the Union that it intended to
28 comply with the Hearing Officer's decision and invited the Union to engage in impact
29 bargaining on November 4, 5 and 7, 2013. Per that letter, the City also notified the
30 Union of its "desire to end the past practice and assign supervisors to overtime in
31 Operations strictly based upon operational needs." By reply e-mail the following day,
32 the Union demanded to bargain with the City over the decision without responding to
33 the City's offer to bargain on November 4, 5, and 7, 2013. By surreply e-mail on
34 November 1, 2013, the Union informed the City that it had made the "demand to bargain
35 to preserve [its] rights" but did not intend to bargain until after resolution of the appeal.
36 By e-mail that same day, the City responded that it wanted to commence impact

1 bargaining on one of the three November dates offered. By e-mails on November 6 and
2 17, 2013, the Union reiterated its position about not wanting to bargain until after
3 exhaustion of the appeals process. By reply e-mails on November 12 and 18, 2013, the
4 City disagreed with the Union's position and acknowledged it, respectively.

5 By letter dated November 27, 2013, the City offered the Union three additional
6 dates on which to engage in impact bargaining over the Hearing Officer's decision:
7 December 5, 9 and 19, 2013. Per that letter, the City also reiterated its position that it
8 desired "to end the past practice of hiring supervisors on overtime to monitor street
9 sweeping initiative tow lines and assign supervisors to overtime in Operations strictly
10 based upon operational needs." After the Union failed to respond to that letter, the City
11 sent the Union a follow-up letter dated December 31, 2013, offering three new dates on
12 which to engage in impact bargaining: January 10, 13 and 14, 2014. By that letter, the
13 City also reiterated that it "still desires to end the practice of hiring supervisors on
14 overtime to monitor street sweeping initiative tow lines and distribute overtime in
15 Operations based on operational needs." Again, the Union failed to respond to the
16 City's follow-up letter. The parties did not further correspond with each other over this
17 issue until after the Board issued its August 8, 2014 decision on appeal.

18 By letter dated August 12, 2014, the Union demanded to bargain with the City
19 over the impacts of the decisions to eliminate the SSI position and the regularly-
20 scheduled overtime associated with the position. By letter on August 19, 2014, the City
21 responded to the Union's demand and offered three dates on which bargain: September
22 8, 9 and 12, 2014. By that letter, the City also stated that it was "reserving its right to
23 argue the Union waived its right to impact bargain." By reply e-mail the next day, the

1 Union agreed to meet with the City on September 9, 2014. By e-mail on September 8,
2 2014, the Union notified the City that it could not meet on September 9th and requested
3 to meet, instead, on September 18, 2014. By reply e-mail that same day, the City
4 agreed to reschedule the parties' first bargaining session for September 18, 2014.

5 When the parties met for the first time on September 18, 2014, the City restated
6 its intent to eliminate the SSI position and discontinue the practice of assigning unit
7 members to that position on a regularly-scheduled, overtime basis. In lieu of offering a
8 proposal, the Union first asked the City to provide certain information pertaining to the
9 SSI. The City did not object to the Union's request for information; and, shortly
10 thereafter, the meeting ended. By letter dated October 1, 2014, the Union reiterated its
11 request for information seeking the following items:

- 12 1. All contracts between the City and any tow companies related to
13 towing during the street sweeping season.
- 14 2. A description of the number of calls received by Operations in
15 2012, 2013, and 2014 during the street sweeping season.
- 16 3. A description of the number of calls received by Operations in
17 2012, 2013, and 2014 outside of the street sweeping season.
- 18 4. A description of the number of calls made to any phone line
19 dedicated to taking calls related to the towing of cars (i.e., tow-line)
20 in 2012, 2013, and 2014 during street sweeping season.
- 21 5. A description of the number of calls made to any phone line
22 dedicated to taking calls related to the towing of cars (i.e., tow-line)
23 in 2012, 2013, and 2014 outside street sweeping season.
- 24 6. A description of the number of calls made to Operations related to
25 street sweeping in 2012, 2013, and 2014.
- 26 7. A description of the number of overtime hours worked by Superior
27 Officers in Operations during the street sweeping season in 2012,
28 2013, and 2014.
- 29 8. Any job descriptions for positions held by Superior Officers in
30 Operations.
- 31

32 On October 21 and 22, 2014, the City responded to item #1 of the Union's
33 October 1, 2014 information request. By letter dated October 24, 2014, the City

1 provided the Union with additional information for item #1, and with new information for
2 item #7. By that same letter, the City also responded to items #2-6, stating that "the
3 Department is not in possession of that information. However, the Department has
4 reached out to Verizon and was advised that Verizon can do 'traffic studies' on a per
5 line basis." By letter on October 29, 2014, the City responded to item #8, indicating that
6 it "does not have job descriptions for positions held by Superior Officers in Operations."
7 Instead, the City provided the Union with copies of Department Rules and Procedures
8 104 and 105, which establishes the duties and responsibilities of Sergeants and
9 Lieutenants in the Department.

10 By e-mail on October 27, 2014, the City offered the Union three dates on which
11 to continue impact bargaining: October 29, 30 and 31, 2014. By reply e-mail on
12 October 29, 2014, the Union agreed to meet with the City on October 31, 2014. When
13 the parties met on October 31, 2014, the Union reminded the City that it had not
14 responded completely to the Union's October 1, 2013 request for information. At that
15 point, the City agreed to provide the Union with additional information, and the meeting
16 ended.

17 On November 4, 2014, the Union submitted a second request for information,
18 seeking the following items from the City:

- 19 1. All tow logs for the years 2013 and 2014.
- 20 2. The results of the one-week Verizon call study discussed during the
- 21 bargaining session on October 31, 2014.
- 22 3. A description of the amount of money received by the City from tow
- 23 companies to pay for the Department's administrative costs related
- 24 to towing in the years 2013 and 2014.
- 25

26 By letter dated November 10, 2014, the City responded to the Union's second
27 information request, confirming that it had earlier provided the Union with some of the

1 information sought on November 6, 2014. By that same letter, the City provided the
2 Union with the remaining information requested, and offered to meet again to engage in
3 impacts bargaining on November 13 or 14, 2014. By e-mail on November 12, 2014, the
4 Union informed the City that it was not available on those days but failed to provide the
5 City with alternative days on which to meet. By follow-up letters on November 21 and
6 25, 2014, the City asked the Union to select possible dates in November and December
7 on which to continue bargaining. Also, by those letters, the City informed the Union that
8 after November 28, 2014, the Department would no longer hire a SSI supervisor on
9 overtime during the street sweeping season. By those letters the City again reiterated
10 its position that it intended to end the practice of hiring supervisors on overtime to
11 monitor street sweeping initiative tow lines and to distribute overtime based on
12 operational need. In its November 25, 2014 letter, the City further notified the Union
13 that it would provide the remaining items from its October 1, 2013 information request.
14 On December 4, 2014, the City provided the Union with a copy of the Verizon traffic
15 study, which was conducted between November 20 and 29, 2014. Between November
16 of 2014 and August of 2015, the parties did not engage in further discussions over the
17 SSI supervisor/overtime issue.

18 By letter dated August 27, 2015, the City notified the Union that it had
19 inadvertently continued the SSI supervisor/overtime position through the 2015 SSI
20 season. By that letter, the City also offered dates on which to bargain over the impacts
21 of that issue between September 1 and 14, 2015. When the parties met to discuss the
22 issue on September 14, 2015, the Union stated that it had not yet reviewed the
23 information provided by the City in response to its requests. At that point, the City

1 reiterated its intent to eliminate the SSI supervisor/overtime position, effective October
2 1, 2015. By e-mail on October 1, 2015, the City eliminated the SSI supervisor/overtime
3 position. By letter on that same day, the Union demanded to bargain over the City's
4 decision to eliminate the SSI supervisor/overtime position, and made a third information
5 request seeking information related to items #2-6 and #8 from its October 1, 2013
6 request.

7 By letter dated October 13, 2015, the City responded to the Union's October 1,
8 2015 request by providing some of the information, and stating that it would make
9 further provisions. By follow-up letters on November 12 and 18, and December 1 and
10 28, 2015, the City provided the Union with additional information responsive to the
11 October 1, 2015 request; stating, again, that it intended to make further provisions. On
12 January 26, 2016, the City made its sixth and final provision in response to the Union's
13 October 1, 2015 request for information. By e-mail on March 4, 2016, the Union
14 confirmed that "the City has satisfactorily responded to the [Union's] requests from
15 October 1, 2014 and October 1, 2015."

16 OPINION

17 DLR Rule 456 CMR 16.08(5) states, in pertinent part:

19 If the [DLR] determines that there is a genuine dispute as to compliance, it
20 may order that a hearing be held to determine whether compliance has
21 occurred. At any hearing concerning the alleged non-compliance, the
22 party required to comply with the [DLR's] order shall have the burden of
23 proving such compliance by a preponderance of the evidence.

24
25 Preponderance of the evidence means that the City has the burden of proving
26 that it was more probable than not that the City complied with the Board's order. See
27 Goffredo v. Mercedes-Benz Truck Co., 402 Mass. 97, 102-03 (1988). If the proposition

1 is as probably false as it is true, then the City has not met its burden. See Corsetti v.
2 Stone Co., 396 Mass. 1, 24 (1985); see also Sargent v. Massachusetts Accident Co.,
3 307 Mass. 246, 251 (1940) (where evidence tends equally to support two inconsistent
4 propositions, neither can be found to be true). The City argues that it is able to show by
5 preponderance of the evidence that it has complied with the Board's order. In the
6 alternative, it raises the affirmative defenses of impasse and wavier by inaction.⁵

7 **Impasse**

8 First, the City contends that it reached impasse with the Union because both
9 parties were deadlocked in their respective positions over the issue of eliminating the
10 SSI supervisor/overtime assignment. Specifically, the City contends that the Union
11 wrongfully insisted on bargaining over the decision of eliminating the SSI
12 supervisor/overtime position, an issue that both the Hearing Officer and the CERB
13 found to be non-bargainable. The Union asserts that there was no impasse because by
14 the final bargaining session in September of 2015, it was still waiting for the City's

⁵ The City also argued that was not obligated to engage in impacts bargaining with the Union based on the City's Police Commissioner's Statute, Chapter 291, §§ 10 and 11 of the Acts of 1906, as amended by Chapter 322 of the Acts of 1962. In the alternative, the City maintained that even if it is required to bargain with the Union over the impacts of the decision to eliminate the SSI supervisor/overtime position, any back pay award coupled with prolonging of the status quo ante is an inappropriate remedy because it would not effectuate the purposes of the Law. In its decision on appeal, the Board decided that the City was obligated to bargain with the Union over the impacts of its decision to eliminate the SSI supervisor/overtime position. The Board also found no reason to disturb the Hearing Officer's remedy, ordering the City to restore the economic equivalent of the status quo ante, prospectively, by making affected employees whole for their lost overtime during the period of impact bargaining, plus interest. Because neither the City nor the Union exercised further appeal rights challenging the Board's decision and order, I need not address this argument on compliance. See Commonwealth of Massachusetts, 29 MLC 162, 164-65, SUP-3993 and SUP-3972 (Feb. 27, 2003).

1 responses to the information requests. While the Union concedes that it did not make
2 any proposals during the parties' three bargaining sessions, it maintains that it could not
3 make one until the City first provided necessary information.

4 It is well-established that impasse in negotiations occurs only when both parties
5 have negotiated in good faith on all bargainable issues to the point where it is clear that
6 further negotiations would be fruitless because the parties are deadlocked. Town of
7 Plymouth, 26 MLC 222, 223, MUP-1465 (June 7, 2000); Commonwealth of
8 Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999); see also School
9 Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 574 (1983)
10 (impasse is a question of fact requiring a consideration of the totality of circumstances
11 to decide whether, despite their good faith, the parties are simply deadlocked). To
12 determine whether impasse has been reached, the Board considers the following
13 factors: bargaining history, the good faith of the parties, the length of the negotiations,
14 the importance of the issues to which there is disagreement, and the contemporaneous
15 understanding of the parties concerning the state of the negotiations. Town of
16 Plymouth, 26 MLC at 223; Commonwealth of Massachusetts, 8 MLC 1973, 1982-83,
17 SUP-2497 (March 22, 1982).

18 Although the Board considers a party's unilateral expression of desire to continue
19 bargaining as evidence that the parties may not have bargained to impasse, the
20 ultimate test is whether there is a "likelihood of further movement by either side" and
21 whether the parties have "exhausted all possibility of compromise." Commonwealth of
22 Massachusetts, 25 MLC at 205. The Board recognizes that collective bargaining is a
23 dynamic process that is influenced by many factors, such as changing circumstances

1 which could affect the parties' relative positions on any outstanding issues, and which
2 could improve the likelihood of further compromise (especially where a union expresses
3 a desire to continue bargaining). See Wood's Hole, Martha's Vineyard and Nantucket
4 Steamship Authority, 14 MLC 1518, 1528-30, UP-2496 (Feb. 3, 1988) (no impasse
5 where hiatus in bargaining and major change in employer's bargaining proposal
6 significantly altered the framework for the negotiations); see also Town of Arlington, 15
7 MLC 1452, 1464, MUP-6187 (Feb. 3, 1989) (no impasse because union membership's
8 rejection of town's offer changed the dynamics of bargaining and created a need for
9 both sides to bargain further); Lawrence School Committee, 3 MLC 1304, 1308-09,
10 MUP-2287 and MUP-2329 (Dec. 7, 1976) (no impasse where passage of time created
11 possibility that parties could retreat from earlier positions, allowing for eventual
12 settlement). Commonwealth of Massachusetts, 20 MLC 1298, 1302-03, SUP-3843
13 (Dec. 3, 1993) (no impasse where parties only met twice and employer failed to respond
14 to union's information request).

15 Relying on City of Boston, 41 MLC 190 (H.O. Jan. 26, 2015), the City argues that
16 the parties are at impasse based on the three bargaining sessions in September and
17 October of 2014, and in September of 2015, at which the Union failed to make any
18 impact bargaining proposals. Id. at 195 (hearing officer found impasse after only two
19 meetings because union made no proposals about transfer of unit work and continued
20 to insist that work could not be transferred). The City asserts that during those
21 meetings the Union insisted on bargaining over the decision to eliminate the SSI
22 supervisor/overtime position—an issue that both the Hearing Officer and the Board
23 found to non-bargainable. The City also points to Attorney Barrault's affidavit, which

1 states in pertinent part that, "On September 14, 2015, the parties met to bargain over
2 the *decision* to eliminate the SSI position." [Emphasis added.] Based on this evidence,
3 the City contends that the Union's insistence on bargaining over a non-mandatory
4 subject of bargaining not only constitutes a refusal to bargain and a per se violation of
5 the Law, but also supports a finding of impasse. The Union argues that although the
6 parties commenced impact bargaining on September 18, 2014, and only met twice
7 since then (once on October 31, 2014 and once again on September 15, 2015), the
8 Union could not have engaged in meaningful bargaining during that period because the
9 City had not satisfactorily responded to the Union's requests for information.

10 At the parties' second impact bargaining session in October of 2014, the Union
11 informed the City that it needed additional information before it could make any
12 proposals over the issues of eliminating the SSI supervisor position and discontinuing
13 the overtime associated with that position. Even though the parties met for a third and
14 final time on September 14, 2015, the City had not yet fully responded to the Union's
15 requests for information by that point. There is no dispute that the City maintained the
16 same position at all three meetings (i.e., its desire to eliminate the SSI
17 supervisor/overtime position); nor is there any dispute that the Union never made a
18 proposal (or counterproposal) at those meetings. Rather, the evidence shows that the
19 Union could not make any proposals until the City responded to its requests by
20 providing all of the information enumerated in the Union's October 1 and November 4,
21 2014, and October 1, 2015 letters. Although the Union confirmed that the City had
22 satisfactorily responded to those requests in March of 2016, the parties did not meet
23 again after September 14, 2015.

1 Despite the City's contentions of impasse, there is no evidence that the parties
2 were deadlocked in their respective positions by the time of their third and final
3 bargaining session on September 14, 2015. Nor is there any evidence that either party
4 had abandoned the negotiations at that point. Contrast City of Boston, 28 MLC at 185
5 (Board found impasse after parties met at least nine times without resolution, employer
6 declared parties had reached an "end point" and discontinued the negotiations). While
7 the record shows that the City maintained the same position at each of the parties
8 impact bargaining sessions (i.e., that it intended to eliminate the SSI
9 supervisor/overtime position), the record also shows that the Union did not make any
10 proposals because it first wanted to receive the City's complete responses to its
11 outstanding information requests. Contrast City of Boston, 28 MLC at 184 (no impasse
12 where there were no outstanding proposals or requests prior to employer's declaration
13 that negotiations were at an end point).

14 Based on this evidence, I find that further impact negotiations between the
15 parties after September 14, 2015 would not have been fruitless because the Union
16 agreed in March of 2016 that the City had satisfied all its requests for information. See
17 Town of Plymouth, 26 MLC at 223; see generally Wood's Hole, Martha's Vineyard and
18 Nantucket Steamship Authority, 14 MLC at 1528 (no impasse where hiatus in
19 bargaining and major change in employer's bargaining proposal significantly altered the
20 framework for the negotiations). Thus, because there was a likelihood of further
21 movement by the parties on September 14, 2015, and because the parties did not
22 exhaust all possibility of compromise at that point, I do not find the parties to be at
23 impasse. Commonwealth of Massachusetts, 25 MLC at 205.

1 Waiver by Inaction

2 The affirmative defense of waiver by inaction must be supported by evidence of
3 actual knowledge of the proposed change, a reasonable opportunity to negotiate over
4 the change, and an unreasonable or unexplained failure of the union to bargain or to
5 request bargaining. City of New Bedford, 38 MLC 239, 250, MUP-09-5581 and MUP-
6 09-5599 (Apr. 3, 2012) (citing City of Boston, 31 MLC 25, 33, MUP-1758 (Aug. 2,
7 2004)). Waiver by inaction will not be found where a union is presented with a fait
8 accompli. City of New Bedford, 38 MLC at 250 (citing Town of Hudson, 25 MLC 143,
9 148, MUP-1714 (Apr. 1, 1999)).

10 On this issue, the City makes three arguments. First it argues that the Union
11 waived its rights to impact bargain based on its failure to respond within five days to the
12 City's October 30, 2013 offer to bargain. To this point, the City also contends that its
13 October 30, 2013 letter clearly notified the Union of its intent to eliminate the SSI
14 supervisor/overtime position, but because the Union failed to bargain over the issue, it
15 waived its rights to bargain by inaction. Second, the City argues that based on the
16 City's follow-up letters on November 27 and December 31, 2013, and on August 19,
17 November 21 and 25, 2014, the City notified the Union of its intent to change the SSI
18 supervisor/overtime position, gave the Union reasonable opportunities to negotiate over
19 the change, but the Union unreasonably and inexplicably failed to bargain over the
20 impacts of that change. Specifically, the City contends that the Union not only
21 deliberately avoided the City's numerous requests to schedule bargaining, but
22 repeatedly postponed the scheduling of bargaining sessions between September of
23 2014 and September of 2015. Finally, the City argues that the Union's repeated failure

1 to make any impact bargaining proposals, while simultaneously insisting on bargaining
2 over the decision to eliminate the SSI supervisor/overtime position amounts to a waiver
3 because the Union had sufficient notice of the decision, had reasonable opportunities to
4 negotiate over its impacts, but unreasonably failed to bargain over it.

5 The Union argues first that it did not waive its right to impact bargain with the City
6 in November of 2013 because was not obligated to commence bargaining until the
7 Board had rendered a decision on appeal of the Hearing Officer's decision and order.
8 Relying on 456 CMR 13.15(1), the Union contends that the Hearing Officer's decision
9 and order was not final because both parties filed separate appeals of that decision and
10 order. Next, the Union argues that it could not have waived its rights to bargain despite
11 the City's numerous notices sent between November of 2013 and September of 2015,
12 because during that time it could not engage in meaningful impact bargaining until it
13 received the City's responses to its information requests on October 1 and November 4,
14 2014, and October 1, 2015. The Union maintains that because the City did not object to
15 these information requests and, because the Union could not confirm until March of
16 2016 that the City had fully satisfied the requests, the Union could not have waived its
17 right to impact bargain during the period alleged by the City (i.e., September of 2014
18 through September of 2015). Last, the Union contends that the City's claim of
19 decisional bargaining is "absurd" and "baseless" because the Board has already ruled
20 that the City must only bargain over the impacts of the decision, not the decision itself.

21 **1. DLR Regulations**

22 Relying on 456 CMR 13.03(2), the City argues that the Union waived its rights in
23 November of 2013 by refusing to meet with the City and commence impact bargaining

1 within five days of the City's October 30, 2013 letter. The City asserts that 456 CMR
2 13.03(2) only applies to hearing decisions that are modified or overruled by the Board.
3 Thus, because the Board neither modified nor overruled the Hearing Officer's
4 decision—but, merely affirmed it—the City concludes that the Union was bound by the
5 terms of the Hearing Officer's order to commence bargaining within five days of October
6 30, 2013, but failed to do so.

7 456 CMR 13.03(2)⁶ applies only to Board rulings on interlocutory appeal, not to
8 Board decisions on appeal of a Hearing Officer's decision.⁷ As the Union correctly
9 points out, 456 CMR 13.15(1)⁸ is the applicable appeals language because it pertains to
10 requests for Board review of hearing officer decisions after the close of the hearing—not
11 to interlocutory appeals of hearing officer rulings, prior to the close of the hearing. 456
12 CMR 13.15(1) states in full:

13 The decision of the hearing officer shall become final and binding on the
14 parties unless, within ten days after notice thereof, any party requests
15 review by the Board. This procedure is the exclusive method by which the
16 parties may request review by the Board of the decision of the hearing
17 officer.

18 Here, the Hearing Officer's decision and order clearly stated that, pursuant to 456
19 CMR 13.15, it shall become "final and binding unless, within ten days after notice
20

⁶ On September 23, 2016, the DLR modified its Rules and Regulations. 456 CMR 13.03(2) is now 456 CMR 13.04(2).

⁷ The language of 456 CMR 13.03 states in relevant part: "Prior to the close of a hearing, a party may seek relief from a ruling or order of the hearing officer.... Such a motion for review shall not operate to delay or interrupt the hearing. The ruling of the hearing officer shall remain in effect until and unless modified or overruled by the Board...."

⁸ Pursuant to the DLR's modification of its Rules and Regulations on September 23, 2016, 456 CMR 13.15(1) is now 456 CMR 13.19(1).

1 therefore any party requests review by the Board.” Because both parties filed timely
2 appeals of the Hearing Officer’s decision, and because those appeals remained
3 pending before the Board in October and November of 2013, the Union could not have
4 waived its rights to bargain over the impacts of the City’s decision to eliminate the SSI
5 supervisor/overtime position during that time period as the Hearing Officer’s decision
6 had not yet become final and binding. Although the City notified the Union on October
7 30, 2013 of its “desire to end the past practice and assign supervisors to overtime in
8 Operations strictly based upon operational needs,” there is no evidence that the Union
9 waived its rights by failing to bargain with the City within five days of that letter because
10 the Union had a reasonable explanation for not wanting to bargain at that time (i.e.,
11 desiring to wait until the Board’s resolution of the Hearing Officer’s decision on appeal).
12 See City of New Bedford, 38 MLC at 250 (citing City of Boston, 31 MLC at 33).

13 For these reasons, the City’s waiver by inaction defense must fail. City of New
14 Bedford, 38 MLC at 250 (citing Boston School Committee, 35 MLC 277, 287 n.23, MUP-
15 03-3886 (May 20, 2009)).

16 **2. Unreasonable Delay and Decisional Bargaining**

17 Here, the record shows that the Union unreasonably refused to make any impact
18 bargaining proposals at the parties’ three bargaining sessions between September of
19 2014 and September of 2015. The record also shows that on October 1, 2015, the
20 Union inexplicably demanded to bargain with the City over the decision to eliminate the
21 SSI supervisor/overtime position. While the Union contends that its refusal to offer any
22 proposals was based on the City first responding to its information requests, it does not
23 deny making the decisional bargaining demand on October 1, 2015. Additionally, the

1 City demonstrated good faith between September of 2014 through September of 2015
2 by not only making timely responses to the Union's requests by providing the
3 information that it already had in its possession, but it also commissioned a Verizon
4 study to respond to all of the requests for information that the City did not possess.
5 Despite the Union's demand to bargain over a non-bargainable decision, the City
6 continued to demonstrate good faith by reiterating, on numerous occasions, that it
7 intended to make further provisions to satisfy the Union's requests, and made those
8 provisions to completion in January of 2016.

9 Based on this evidence, I find that the Union's refusal to make any impact
10 bargaining proposals between the first bargaining session on September 18, 2014 and
11 the final bargaining session on September 14, 2015, was unreasonable because there
12 is no evidence that the Union could not have made at least one proposal based on the
13 information already provided by the City during that time. See Haverhill School
14 Committee, 8 MLC 1947, 1955-56, MUP-4467 (March 18, 1982) (union waived right to
15 bargain after receiving notice of change but never raised the issue or demanded to
16 bargain over it at the bargaining table. Further, I find that the Union's demand to
17 bargain over the City's decision to eliminate the SSI supervisor/overtime position on
18 October 1, 2015 was also unreasonable and without explanation because the Union
19 was aware that both the Hearing Officer's decision and the Board's decision on appeal
20 exempted the City from bargaining over that decision, yet, the Union inexplicably
21 demanded to bargain over it, instead of bargaining over its impacts. Haverhill School
22 Committee, 4 MLC at 1956. Finally, I find the Union's conduct was unreasonable and
23 inexplicable because the Union stated that at the September 14, 2015 bargaining

1 session that it had not yet reviewed the information provided by the City in November
2 and December of 2014. The Union failed to offer a reason about why it could not have
3 reviewed that information in preparation for the parties' third and final bargaining
4 session, and failed to explain why it could not have offered a proposal in the intervening
5 months. Id.

6 Consequently, I find that the City satisfies its affirmative defense of waiver by
7 inaction because it has shown that the Union actual knowledge of the elimination of the
8 SSI supervisor/overtime position, had a reasonable opportunity to negotiate over the
9 impacts of that change, but unreasonably failed to make any impact bargaining
10 proposals over the issue, and inexplicably failed to bargain over the issue—demanding,
11 instead, to bargain over the decision in October of 2015.

12 CONCLUSION

13 Based on the record and for the reasons explained above, I conclude that the
14 City has shown by preponderance of the evidence that it complied with the Board's
15 order. See Goffredo, 402 Mass. at 102-03. Therefore, I dismiss the Union's Petition, in
16 its entirety.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, 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 Department 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.