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

In the Matter of	*	
CITY OF LYNN	*	Case No. MUP-11-1318
and	*	Date Issued: June 27, 2016
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES LOCAL 1736	*	

CERB Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Katherine G. Lev, CERB Member

Appearances:

David Grunebaum, Esq.	Representing the City of Lynn
Erin L. DeRenzis, Esq.	Representing American Federation of State, County and Municipal Employees, Local 1736

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On April 2, 2015 a duly-designated Department of Labor Relations (DLR) Hearing Officer issued a decision holding that the City of Lynn (City) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by eliminating a vacation-retirement benefit for bargaining unit members who worked past February 1st in their retirement year and retired by July 1st in the same year

without first providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

In its request for review to the Commonwealth Employment Relations Board (CERB), the City asserts that the Hearing Officer made numerous errors of law and fact, leading to erroneous conclusions and an erroneous decision. We affirm the Hearing Officer's conclusion.

Background

The parties stipulated to certain facts and the Hearing Officer made additional findings of fact that we adopt, except where noted, and summarize the salient facts below. Further reference may be made to the Hearing Officer's decision, published at 41 MLC 297, and attached to the slip opinion of this decision.

Prior to June 21, 2006, all civil service employees working for the Lynn School Department were represented by AFSCME Local 1736 (Union or Local 1736), and covered by a collective bargaining agreement (CBA) negotiated between Local 1736 and the School Committee, effective July 1, 2004 through June 30, 2006 (2004-2006 Committee Agreement).[1] Article XIII of the 2004-2006 Committee Agreement set forth the amount of vacation earned by bargaining unit employees and stated that:

[1] In its supplementary statement the City asserts that the Hearing Officer erroneously stated that AFSCME Local 193 represented all civil service employees employed in the City's School Department. We concur that the reference to Local 193 representing civil service employees working for the School Department is incorrect and include, here, the correct reference to Local 1736 as being the bargaining unit representative of all civil service employees who worked for the School Department prior to June 21, 2006.

> (B) For the purpose of determining vacations, the work year shall commence July 1st. Vacations due for a given year terminating June 30th shall be permitted only after the above date.

Since at least 1992, the School Department has offered custodial employees a vacation entitlement (vacation-retirement benefit) if they worked past February 1st but retired before July 1st of that year.[2]

On or about June 21, 2006, as a result of a Home Rule Amendment,[3] the custodial and maintenance employees that worked for the School Department were transferred to the City's Inspectional Services Department (ISD). Thereafter, they were included in a City bargaining unit represented by AFSCME Local 1736. The School Department civil service employees who were not transferred continued to work for the School Department. Thus, they remained covered by Local 1736's collective bargaining agreement with the School Committee and continued to receive the vacation-retirement benefit.

The City and Local 1736 negotiated an Agreement effective July 1, 2006 through June 30, 2007 (2006-2007 City Agreement) and an Agreement effective July 1, 2007 through June 30, 2010 (2007-2010 City Agreement).[4] On or about June 30, 2008, the

[2] The vacation-retirement benefit credited the eligible retiring employee with the amount of vacation time that he or she would have accrued as of July 1 of their retirement year.

[3] Chapter 117 - An Act Transferring Responsibility for the Maintenance and Repairs of All City of Lynn School Buildings and Grounds.

[4] In its supplementary statement the City asserts that the Hearing Officer erroneously found that "around the passage of c.117, the City and Local 1736 reached an agreement…" and that the City actually reached its first agreement with Local 1736 on or about June 30, 2008, the same day it reached the successor agreement, with both being

City and Local 1736 executed an Agreement that contained the following "Duration" provision in Article 42:

> (A) This Agreement shall consist of two (2) collective bargaining agreements, the first of which was effective for the one (1) year period from July 1, 2006 to June 30, 2007 and the second of which will be effective for the three (3) year period from July 1, 2007 to June 30, 2010.

From June 21, 2006 to around June 30, 2007, the School Committee continued to control the payroll for the custodians who transferred to the ISD. At some point on or after July 1, 2007, the City assumed control over the payroll for the transferred custodians. On May 1, 2007, Bradley Bowdren (Bowdren), who was one of the transferred custodians, retired. Bowdren received the vacation-retirement benefit, i.e., he was paid, through the School Department's payroll, for the vacation days he would have earned on July 1, 2007.

During negotiations for the 2007-2010 City Agreement, the City proposed that each party create and exchange a list of existing past practices, and then bargain over which practices to include or exclude in the contract. The Union rejected that proposal, refused to provide the City with a list of past practices and ceased further bargaining over the issue.[5] The parties agreed to include the following provisions:

> Article 44 - Alteration of Agreement

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signed contemporaneously. The City further asserts that, prior to June 30, 2008, the parties maintained the terms and conditions of the prior agreement with the Committee. Since this case involves the denial of the vacation-retirement benefit to custodians who retired after June 30, 2008, there is no need to reconcile this discrepancy.

[5] In its supplementary statement the City asserts that the Hearing Officer erroneously found that the Union voted on this proposal. Whether the Union conducted a vote on this proposal is not material, as there is no dispute that the Union rejected the proposal.

> No amendment, alteration, or variation of the terms or provisions of this Agreement shall bind the parties hereto unless made and executed in writing by the parties. The failure of the City or the Union to insist, in any one or more situations upon performance of any of the terms or provisions of this Agreement, shall not be considered a waiver or relinquishment of the right of the City or of the Union to future performance of any such terms or provisions, and the obligations of the Union and the City to such future performance shall continue.
>
> Article 45 – Waiver
>
> (A) The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited rights and opportunity to make demands and proposals with respect to any subject matter not removed by law from the area of collective bargaining, and that the understandings and agreements were arrived at by the parties after exercise of that right and opportunity as set forth in this Agreement.
>
> (B) Therefore, the City and the Union for the life of this Agreement, each voluntarily and unqualifiedly, waive the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or discussed during bargaining, except compensation and duties for new or changed job classifications.

In April 2011, the Union first became aware that the City had denied the vacation-retirement benefit to at least two ISD custodians: Dennis Trainor (Trainor) who retired after February 1, 2011 but before July 1, 2011; and Jerry Pryor (Pryor) who retired a few years earlier.

Opinion[6]

The Hearing Officer, after correctly stating the standard applied to determine whether there has been a unilateral change in an existing condition of employment in violation of Section 10(a)(5), found that the City had violated Section 10(a)(5) and,

[6] The CERB's jurisdiction is not contested.

derivatively, Section 10(a)(1) of the Law when it denied certain unit members the vacation-retirement benefit. For the reasons set forth below, we agree.

Unilateral Change

A public employer violates Sections 10(a)(5) and (1) of the Law when it unilaterally changes wages, hours, or other terms and conditions of employment without first bargaining to resolution or impasse with the employees' exclusive bargaining representative. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Town of Arlington, 21 MLC 1125, MUP-8966 (August 1, 1994). To establish a unilateral change violation, a charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours, or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice or an opportunity to bargain. Bristol County Sheriff's Department, 31 MLC 6, 18, MUP-2872 (July 15, 2004) (citing City of Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000)). The Hearing Officer found that the City did not dispute that vacation time is a mandatory subject of bargaining or that it failed to provide the Union with prior notice and an opportunity to bargain before denying certain unit members the vacation-retirement benefit. On appeal, however, the City disputes the existence of a past practice obligating it to bargain and asserts that it did bargain in good faith.

Past Practice

The threshold issue in a unilateral change analysis is whether the employer changed an existing practice or instituted a new one. Commonwealth of Massachusetts,

27 MLC 70, 72, SUP-4503 (December 6, 2000). To determine the existence of a past practice, the CERB analyzes the combination of facts upon which the alleged practice is predicated. Town of Hingham, 21 MLC 1237, MUP-8189 (August 29, 1994). The Hearing Officer found a past practice based on the fact that, since at least 1992, the School Committee offered custodial employees a vacation-retirement benefit if they worked past February 1 in their retirement year but retired before July 1 of that year. On appeal, the City contends that it could not have known and did not know of the alleged practice of providing the vacation-retirement benefit. It notes that, during negotiations for the 2007-2010 City Agreement, it proposed that each party prepare a list of existing past practices and then bargain over including or excluding them from the CBA. The Union declined to do so. The City argues that by refusing to provide a list of past practices the Union prevented the City from knowing of the past practice claimed here. Because knowledge and acceptance are key ingredients in establishing a past practice, the City contends that the Union cannot rely on a practice unknown to the City. The City further argues that any practice that may have existed while the custodians were School Committee employees did not survive the transfer of those employees pursuant to c. 117 and the negotiation of entirely new contracts with the City.[7]

[7]The City also argues that the Hearing Officer erroneously implies, from the one (Bowdren) example that arose after the transfer, a past practice binding the City. The City argues that it had no knowledge that Bowdren received the vacation-retirement benefit because his wages were under the exclusive control of the School Committee at all times up to his retirement and the City did not take control of the payroll in FY 2008. Therefore, that one example cannot be viewed as creating a past practice binding the City. In reaching our conclusion that the Hearing Officer's decision should be upheld, we do not rely upon the Bowdren case.

We are not persuaded by this argument. Section 1 of the Law defines "employer" as any "town … acting through its chief executive officer…. In the case of school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives." M.G.L. c. 150E, § 1. Based on this definition, the CERB has repeatedly held that a school committee is not a separate municipal employer, but rather a municipality and school committee are a single employing entity under Chapter 150E and jointly share responsibility when bargaining obligations have not been fulfilled. Town of Weymouth, 40 MLC 253, 255, MUP-10-6020 (March 10, 2014); Town of Saugus, 28 MLC 13, 17, MUP-2343, CAS-3388 (June 15, 2001); Town of Bridgewater, 25 MLC 103, 104, MUP-8650 (December 30, 1998); City of Malden, 23 MLC 181, 183, MUP-9312, 9313 (February 20, 1997)(and cases cited therein)). Based on this provision, in both Town of Weymouth and Town of Saugus, the CERB expressly rejected the argument that a municipality cannot be held accountable under Chapter 150E for a school department decision that it did not know about, endorse, or otherwise participate in. Town of Weymouth, 40 MLC at 255-256; Town of Saugus, 28 MLC at 17. In rejecting this argument in Town of Weymouth, the CERB further noted that, for the purpose of the municipal employer being represented by the school committee, Section 1 of the Law states that "the chief executive officer of a city or town or his designee shall participate and vote as a member of the city or town school committee." Town of Weymouth, 40 MLC at 255-256. Relying on this portion of the Law,

the CERB stated that it was fair to infer that the town would, at a minimum, know of school committee conduct that could implicate the town's bargaining obligations. Id. at 256.

We reach the same conclusion here. The City does not dispute that the transferred employees, when working in the School Department, were eligible for and received the vacation-retirement benefit. Thus, as in Town of Weymouth the City's liability turns on its statutory status as an employer, even though, in the past, it was represented for purposes of collective bargaining by the School Committee vis-à-vis the now-transferred employees. Town of Weymouth, 40 MLC at 255-256. The City cannot escape this liability by pleading ignorance of the past practice at issue here. Id.

The City nevertheless argues that the parties themselves recognized that the Committee and City were separate employers in the Recognition Articles contained in the Agreement between the Committee and Union, and in the subsequent Agreements between the City and the Union. In addition, the City, for the first time on review, relies upon the position taken by the Union in litigation that the City initiated in 2006 against the Union, in which it claimed that the Union asserted that the Plaintiff City of Lynn is an "entirely separate legal entity from the School Committee by operation of the Massachusetts Public Employee Collective Bargaining Law, Chapter 150E and, accordingly is not a party to the Defendants' Collective Bargaining Agreement with the School Committee."[8] Although the City contends that no party considered or intended

[8] Although the City's statement indicates that a copy of the filing was attached, it was not attached to the copy submitted to the DLR.

that the City and the School Committee be viewed as a single employer, the City cited no authority that contradicts our case law interpreting the definition of employer cited above. We therefore affirm the Hearing Officer's conclusion that the City was obligated to bargain to resolution or impasse with the custodians' exclusive bargaining representative, as the Committee would have been, before terminating the practice of providing the vacation-retirement benefit.

Waiver by Contract

The City further contends that it did, in fact, bargain over the change. Specifically, in its post-hearing brief, it argued that through the parties' adoption of certain proposals, notably those regarding Alteration of Agreement (Article 44) and Waiver (Article 45), and the Union's rejection of its "list" proposal, the parties agreed to eliminate past practices. The Hearing Officer treated these arguments as an affirmative defense that the Union had waived its right to bargain over changes to the vacation-retirement benefit and rejected that argument.

On review, the City argues that imposing the burden on the City to prove waiver was error because, among other things, as a separate employer, it had no knowledge of the School Committee's past practices and, as a separate employer, knowledge could not be imputed to it. However, the Hearing Officer rejected the City's claim that it was not bound by the past practice in effect prior to the transfer of the custodial employees and we have affirmed her conclusion. As such, the Hearing Officer properly treated the City's contractual/bargaining history arguments as an affirmative defense that the Union had

waived by contract its right to bargain over subsequent changes to this past practice. We therefore turn to the merits of these arguments.

An employer asserting the affirmative defense of contract waiver "must demonstrate that the parties consciously considered the situation that has arisen and that the union knowingly waived its bargaining rights." Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988)(citing Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986)(further citations omitted)). In determining whether a union has contractually waived its right to bargain, the CERB first examines the language of the contract to determine whether the language on which the employer relies expressly or by necessary implication gave it the right to make the change without bargaining. If the language is ambiguous, the CERB must attempt to discern the parties' intent from their bargaining history. Massachusetts Board of Regents, 15 MLC at 129-1270 (citing Melrose School Committee, 9 MLC 1713, 1725, MUP-4507 (March 24, 1983)).

In this case, the Hearing Officer found that the Union had not waived its right to bargain over changes to the vacation-retirement benefit. The Hearing Officer found that after the City made and the Union rejected the list proposal during negotiations for the 2007-2010 Agreement, the parties ceased to bargain further over the issue. The 2007-2010 City Agreement is silent about the issue of vacation-retirement benefits. She thus correctly concluded that the evidence did not show that, when rejecting the City's past practice proposal the parties consciously considered the vacation-retirement benefit and the Union knowingly waived its right to bargain over changes to that benefit. See Melrose

School Committee, 9 MLC at 1725-1726 (employer failed to demonstrate that union waived its right to bargain where bargaining history did not show that parties specifically addressed issue).

The Hearing Officer further concluded that, despite the parties' inclusion of Articles 44 and 45, neither of those provisions "expressly or by necessary implication" conferred on the City the right to implement a change to retiring unit members' vacation benefits without first bargaining to resolution or impasse with the Union. Commonwealth of Massachusetts, 19 MLC 1454, 1455-56, SUP-3528 (October 16, 1992). While the CERB has held that a zipper clause may preserve the terms of a collective bargaining agreement from modification, such a clause does not convey to either party the unilateral authority to alter the status quo of a mandatory subject of bargaining. Commonwealth of Massachusetts, 18 MLC 1220, 1226-27, SUP-3426 (November 20, 1991). The Union, here, seeks to maintain a practice not contained in the collective bargaining agreement, whereas the City seeks to alter the status quo of a mandatory subject of bargaining.

Article 44 states that no amendment, alteration, or variation of the terms or provisions is binding unless "made and executed in writing by the parties." Here, the Hearing Officer found and the City does not dispute that the 2007-2010 City Agreement is silent about the issue of vacation-retirement benefit. Thus, the maintenance of the vacation-retirement benefit practice would not amend, alter, or vary any terms or provisions of the Agreement.

In Article 45(A), both parties acknowledge that each had unlimited rights and opportunity to make demands and proposals, and that the understandings and

agreements arrived at are set forth in the Agreement. In Article 45 (B) the parties each waived the right to bargain with respect to any subject or matter referred to or covered in the Agreement or discussed during bargaining, with noted exceptions.

We agree with the Hearing Officer that the parties reached no understanding specifically with respect to the vacation-retirement benefit in the 2007-2010 Agreement and that benefit was not referred to or discussed in negotiations. Therefore, the City's reliance upon that language is unavailing. Commonwealth of Massachusetts, 18 MLC at 1227 (notwithstanding zipper clause, the statutory duty to bargain about mandatory subjects continues during the term of the contract as to all subjects that have not been resolved during negotiations).

Conclusion

Based on the foregoing, we affirm the Hearing Officer's conclusion that the City was obligated to bargain to resolution or impasse with the transferred custodians' exclusive bargaining representative before terminating the practice of providing the vacation-retirement benefit. Its failure to do so violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Order

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

1. Cease and desist from:

   a) Failing and refusing to bargain in good faith with the Union by unilaterally changing the vacation-retirement payout for unit member

custodians at the ISD who worked past February 1st in their retirement year and retired before July 1st in the same year.

b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following action that will effectuate the purposes of the Law;

a) Restore the vacation-retirement payout for unit member custodians at the ISD who worked past February 1st in their retirement year but retired before July 1st in the same year.

b) Make unit members whole for any economic losses that they have suffered as a direct result of the City's change in their vacation-retirement payout, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

c) Bargain in good faith to resolution or impasse with the Union before changing the vacation-retirement payout for unit members employed as custodians at the ISD.

d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

e) Notify the Department in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

_____
MARJORIE F. WITTNER, CHAIR

_____
ELIZABETH NEUMEIER, CERB MEMBER

_____
KATHERINE G. LEV, 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.

NOTICE TO EMPLOYEES

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

The Commonwealth Employment Relations Board has upheld a Department of Labor Relations Hearing Officer Decision holding that the City of Lynn (City) has violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to provide AFSCME, Council 93, Local 1736 (Union) with prior notice and an opportunity to bargain to resolution or impasse over changes made to the amount of vacation payout given to unit members who worked past February 1st of their retirement year but retired before July 1st in that same year.

Section 2 of the Law gives all employees: the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

The City assures its employees that:

WE WILL NOT fail or refuse to bargain in good faith with the Union by unilaterally changing the vacation-retirement payout for unit member custodians at the ISD who worked past February 1st in their retirement year and retired before July 1st in the same year.

WE WILL restore the vacation-retirement payout for unit member custodians at the ISD who worked past February 1st in their retirement year but retired before July 1st in the same year.

WE WILL make unit members whole for any economic losses that they have suffered as a direct result of the City's change in their vacation-retirement payout, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

WE WILL bargain in good faith to resolution or impasse with the Union before changing the vacation-retirement payout for unit members employed as custodians at the ISD.

_____ _____

City of Lynn Date

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

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

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	Case No.: MUP-11-1318
CITY OF LYNN	*	
	*	Date Issued: April 2, 2015
and	*	
	*	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1736	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Erin L. DeRenzis, Esq.	-	Representing American Federation of State, County and Municipal Employees, Local 1736
David Grunebaum, Esq.	-	Representing City of Lynn

AMENDED

HEARING OFFICER'S DECISION

SUMMARY

The issue is whether the City of Lynn (City or Employer) failed to bargain in good faith with the American Federation of State, County and Municipal Employees, Local 1736 (Union or Local 1736) by not permitting eligible unit members who worked past February 1st and before July 1st in their retirement year, to earn their vacation time for the following fiscal year without first providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts in violation of Section 10(a)(5)

and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). Based on the record, and for the reasons explained below, I find that the City violated the Law.

STATEMENT OF THE CASE

On October 26, 2011, the Union filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR) alleging that the City had engaged in prohibited practices within the meaning of the Law by: (1) failing to recognize the Union as the exclusive bargaining representative; (2) repudiating terms of the parties' collective bargaining agreement; and, (3) unilaterally changing an established past practice. On May 2, 2012, a DLR Investigator issued a Complaint of Prohibited Practice and Partial Dismissal (Complaint), alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing an established past practice. The Investigator dismissed the Union's remaining allegations. On May 15, 2013, the City filed its Answer to the Complaint.

I conducted three days of hearing on April 11, 2014, June 18, 2014,[1] and August 25, 2014, at which both parties had the opportunity to be heard, to examine and cross-

[1] On this date, the parties did not go on the record; instead, they agreed to numerous factual stipulations, which I read into the record on the third and final day of hearing.

examine witnesses and introduce evidence.[2] On November 20, 2014, the parties filed their post-hearing briefs.[3] On the entire record, I make the following findings and render the following decision.

[2] On August 3, 2012, the DLR notified the parties that it had scheduled this case for hearing on June 5 and 6, 2013. By letter dated April 26, 2013, the Union requested (and the City assented to) a continuance of the hearing dates, which I granted. On or about August 29, 2013, the parties requested a second continuance of the hearing dates, which I granted. On January 15 and March 7, 2014, the parties made two additional requests for continuance due to witness unavailability, which I granted. At the first day of hearing on April 11, 2014, the Union had called the City's Keeper of Records as a witness pursuant to a subpoena duces tecum. When the Union determined that it needed more information to satisfy the subpoena, it requested another continuance to procure that information. Although the City objected to the Union's request, I granted it and scheduled the next day of hearing for June 18, 2014.

[3] On August 26, 2014, I provided the parties with hard and electronic copies of the official hearing record, and instructed them to confirm receipt and ability to access the full record. Over the next two months, neither party responded to my confirmation request nor reported having difficulty accessing the record. By e-mail on September 24, 2014, for reasons unrelated to the official record, the parties jointly requested a postponement in the submission of their post-hearing briefs from September 29, 2014 to October 20, 2014, which I granted. By similar e-mail on October 17, 2014, the Union requested (and the City assented to) a second extension to postpone the submission of post-hearing briefs until October 27, 2014, which I again granted.

For the first time on October 24, 2014, the Union notified me by e-mail that it could not access certain parts of the record and requested another post-hearing brief postponement. Three days later on October 27, 2014, the Union provided me with the exact digital time and track location of the missing audio from the record. On October 31, 2014, I offered the parties a portion of my hearing notes in lieu of the missing portions from the official record. By reply e-mail on that day, the Union informed me that additional portions of the record were missing but failed to specify the precise time and track locations of the missing data. By reply e-mails that same day, and again on November 6, 2014, I instructed the Union to provide me with exact location of the missing data. The Union did not comply with this request.

Finally, by e-mail on November 12, 2014, the parties agreed to accept the portion of my hearing notes that covered the missing audio data as part of the official record. By e-

ADMISSIONS OF FACT

The City admitted to the following facts:

1. The City is a public employer within the meaning of Section 1 of the Law.

2. The Union is the exclusive collective bargaining representative for custodial and maintenance employees in the City's Inspectional Services Department.

3. Prior to June 21, 2006, the bargaining unit employees referenced in paragraph 2, were employed within the City's School Department.

4. Pursuant to Chapter 117 of the Acts of 2006, the bargaining unit members referenced in paragraphs 2 and 3 were transferred to the ISD, effective June 21, 2006.

5. Vacation time is a mandatory subject of bargaining.

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. If a member of Local 1736, currently employed by the School Committee (i.e., cafeteria workers, clerical workers, storekeepers, technology employees, etc.), retires after February 1st of a year and before July 1st of that same year, that person would be credited with their full allotment of time to include any vacation time that they would have accrued on July 1st of that year.

2. Pricilla McDonald was a cafeteria worker who retired on June 6, 2005, and received the [vacation] days that she would have earned on July 1, 2000.

3. Thomas McGaughey was a custodian who retired on May 1, 1999, and received the [vacation] days that he would have earned on July 1, 1999.

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mail the following day, I instructed the parties to submit their post-hearing briefs by November 20, 2014.

4. Paul Raney was a storekeeper who retired on February 1, 2008, and received the [vacation] days that he would have earned on July 1, 2008.

5. Bradley Bowdren was employed by the School Committee who retired on May 1, 2007, and received the vacation days that he would have earned on July 1, 2007.

6. Christine Boverini was a "clerk schools" who retired on May 1, 2006. She used 40 vacation days between 2005 and 2006, including the days that she would have earned on July 1, 2006.

7. Philip Germano, Sr. was a custodian who retired on March 13, 2001. He used 50 vacation days between 2000 and 2001, including the days he would have earned on July 1, 2001.

8. Jacqueline Hathaway was a custodian who retired on March 21, 2004. She used 40 vacation days for 2003 through 2004, including the days she would have earned on July 1, 2004.

9. Alden Kelley was a custodian who retired on May 1, 1999. He used 50 vacation days between 1998 and 1999, including the days he would have earned on July 1, 1999.

10. Alton Martin, Sr. was a painter/glazer who retired on March 9, 2002. He used 50 vacation days between 2001 and 2002, including the days that he would have earned on July 1, 2002.

11. Francis McCarthy was a custodian who retired on May 19, 1998. He used 50 vacation days for 1997 through 1998, including the days that he would have earned on July 1, 1998.

12. Marie McGovern was a house worker who retired on March 18, 2002. She used 40 vacation days for 2001 through 2002, including the days that she would have earned on July 1, 2002.

13. Linda Richardson was a clerk who retired on March 31, 2003. She used 40 vacation days for 2002 through 2003, including the days that she would have earned on July 1, 2003.

14. James Rigol was a custodian who retired on March 6, 2004, and used 40 vacation days for 2003 through 2004. The Employer also paid out 18 vacation days to him, including the days that he would have earned on July 1, 2004.

15. Rosalie Spathanas was a clerk who retired on March 20, 1999. She used 50 vacation days for 1998 through 1999, including the days that she would have earned on July 1, 1999.

16. Linda Simard was a clerk who retired on February 3, 2013. She received vacation payout including the days that she would have accrued as of July 1, 2013.

17. Alicia Persia was a cafeteria worker who retired on April 30, 2012. She received vacation payout including the days that she would have accrued as of July 1, 2012.

18. Patricia Desilets was a clerk who retired on February 2, 2011. She received her vacation payout including the days that she would have accrued as of July 1, 2011.

19. Robert Murray was a storekeeper who retired on April 10, 2009. He used 62 vacation days including the days that he would have accrued as of July 1, 2009.

20. Janice Martin was a cafeteria worker who retired on March 21, 2011. She received a vacation payout including the days that she would have accrued as of July 1, 2011.

21. Charles Wladkowski was a cafeteria worker who retired on April 11, 2008. He received vacation payout including the days that he would have accrued as of July 1, 2008.

FINDINGS OF FACT

Chapter 117 of the Acts of 2006

Prior to June 21, 2006, the School Committee employed all civil service employees in a bargaining unit represented by AFSCME, Local 193. On June 21, 2006, pursuant to Chapter 117 of the Acts of 2006, the maintenance employees, which consisted of four to five custodians, previously employed by the School Committee transferred to the Inspectional Services Department (ISD) of the City and were placed into a bargaining unit that Local 1736 represented.

On June 21, 2006, former Governor Mitt Romney approved "Chapter 117 An Act Transferring Responsibility for the Maintenance and Repairs of All City of Lynn School Buildings and Grounds" (Chapter 117), which stated in full:

> SECTION 1. Section 4-3 of the Lynn Home Rule Charter is hereby amended by striking out subsection (e) and inserting in place thereof the following subsection: (e) Control all school buildings and the grounds connected with those buildings, except maintenance and repairs which shall be under the jurisdiction of the division of inspectional services.
>
> SECTION 2. Notwithstanding chapters 44 and 70 of the General Laws or any other general or special law to the contrary, the department of inspectional services created by chapter 51 of the acts of 1999 shall be responsible for the inspection, maintenance and repairs of all buildings owned by the City of Lynn, including school buildings within the City of Lynn.
>
> SECTION 3. Employees currently employed by the City of Lynn within the school department and performing custodial repair or maintenance of school buildings and grounds shall be transferred to the department of

> inspectional services of the City of Lynn without loss of civil service or seniority rights.

SECTION 4. This act shall take effect upon its passage.

From June 21, 2006 to around June 30, 2007, the School Committee controlled the payroll for custodians who transferred to the ISD. At some point on or after July 1, 2007, the City assumed control over the payroll for those custodians.

The Home Rule Amendment

By letter dated February 1, 2006, City Solicitor Michael J. Barry (Barry) opined that pursuant to the Home Rule Amendment, the pending transfer of Local 193 employees from the School Department to Local 1736's bargaining unit at the ISD would not adversely affect any unit member. Specifically, Barry's opinion stated, in pertinent part:

> The proposed Home Rule Amendment will not [a]ffect cafeteria workers or clerks in the School Department. There will be no changes to the grievance procedure established in the current collective bargaining agreement. The Supervisor of Custodians and Maintenance shall remain the Step One Grievance Official. The Superintendent or his agent shall serve [as] the Step Two Grievance Official. The work environment for custodians will not change. The school custodians will report to the Director of Inspectional Services who will have general oversight of the physical condition of the school buildings. There will be no changes to union members' salary as a result of the Home Rule Amendment. There will be no changes to a union member's longevity or years of service. There will be no negative impact to any individual union member.

The Collective Bargaining Agreements

1. The Agreement with the Committee

Prior to the transfer, the Committee and Local 1736 had entered into a collective bargaining agreement (Committee Agreement), effective from July 1, 2004 to June 30, 2006.[4] Article I, Recognition stated in pertinent part:

> (A) The Employer recognizes the Union as the sole exclusive bargaining agent for the purpose of establishing salaries, wages, hours and other conditions of employment for all Civil Service Employees of the School Department including Custodians, Houseworkers, Clerks, Cabinet Makers, Roofers, Painter-Glazers, Cafeteria Personnel, Storekeepers, Mason-Plasterer, Plumber, Motor Equipment Operator/Truck Driver, Electrician, Graffiti/Small Motor Repair, Principal Computer Operator, Computer Operator, Systems Account Supervisor, Mail Carrier/Messenger, Apprentice, Construction Handyman and excluding all others.

Article XIII of that Agreement covered Vacations and stated, in pertinent part:

> (A) For all employees there shall be one (1) week vacation after completion of sixteen (16) weeks of work, two (2) weeks vacation after completion of thirty (30) weeks of work up to two years, three (3) weeks vacation after completion of two (2) years of work up to five (5) years of work, four (4) weeks vacation after completion of five (5) years of work up to twenty (20) years, and five (5) weeks vacation after completion of twenty (20) years of work and over.
>
> (B) For the purpose of determining vacations, the work year shall commence July 1st. Vacations due for a given year terminating June 30th shall be permitted only after the above date.

[4] The Committee and Local 1736 had entered into a successor agreement that was effective from July 1, 2011 to June 30, 2013 (Committee Successor Agreement). The Recognition clause of that successor agreement reflected the transfer of the custodians from the School Department to the ISD.

2. The Agreements with the City

Around the passage of Chapter 117, the City and Local 1736 reached an agreement that was effective from July 1, 2006 through June 30, 2007 (2006-2007 Agreement). On or about June 30, 2008, the City and Local 1736 executed a successor agreement that was effective from July 1, 2007 through June 30, 2010 (2007-2010 Agreement). Per their successor agreement, the parties agreed to carry over certain language from the 2006-2007 Agreement, such as Article 1, Recognition which stated, in pertinent part:

> (A) The Employer recognizes the Union as the sole exclusive bargaining agent for the purpose of establishing salaries, wages, hours and other conditions of employment for all Civil Service Employees of the City of Lynn's Inspectional Services Department who are employed as custodial workers, house workers, and maintenance workers…excluding all others.

Article 3 covered Management Rights and stated in full:

> Except to the extent there is contained in this Agreement, any expressed provision to the contrary, all of the authority, power, rights, jurisdictions and responsibility of the City are retained by and reserved exclusively to the City and to its respective Department Heads including, but not limited to: the rights to manage the affairs of the City and each of its Departments and to maintain and improve the efficiency of its operation; to determine the methods, means, processes and personnel by which operations are to be conducted; to determine the size of and direct the activities of the working forces; to determine the schedule and hours of duty consistent with the statute and assignment of employees to work; to establish new job classifications for all jobs; to require from each employee the efficient utilization of their services; to hire, promote, assign, and retain employees; for just cause and reason to transfer, discipline, suspend, demote and discharge employees; to promulgate and enforce reasonable rules and regulations pertaining to the operation of the City, of its Departments and to

> the employee which rules are not in conflict with any expressed provision of this contract. However, nothing in this Article shall be construed as a waiver of the Union's right to bargain with the City over any mandatory subject of bargaining that is not addressed in this Agreement.

Article 20 dealt with "Vacations" and stated, in pertinent part:

> (A) Employees hired prior to July 1, 2007: one week [vacation] at the completion of sixteen weeks of work, two weeks and one day vacation at the completion of thirty weeks of work up to two years, three weeks and one day vacation after completion of two years of work up to five years of work, four weeks and one day vacation after completion of five years of work.
>
> (D) All full-time employees add one (1) day after fifteen (15) years, (in the 16th year), two (2) days after 16 years (in the 17th year), three (3) days after…seventeen (17) years (in the 18th year), four (4) days after eighteen (18) years ([in the] 19th year). This shall not serve to increase the annual vacation accrual after twenty (20) years, which shall remain at a total of five weeks.
>
> (G) Employees with twenty (20) or more years of service will be granted a fifth week of vacation.
>
> (I) ….Members of the Bargaining Unit who are intending to retire, may, if they do so desire, notify their Department Head one (1) calendar year prior to their retirement and they may in their retirement year carry over three (3) weeks of earned, but unused, vacation from the previous calendar year.

Article 42 covered "Duration" and stated, in pertinent part:

> (A) This Agreement shall consist of two (2) collective bargaining agreements, the first of which was effective for the one (1) year period from July 1, 2006 to June 30, 2007 and the second of which will be effective for the three (3) year period from July 1, 2007 to June 30, 2010.

Article 44 addressed "Alteration of Agreement" and stated in full:

> No amendment, alteration, or variation of the terms or provisions of this Agreement shall bind the parties hereto unless made and executed in

> writing by the parties. The failure of the City or the Union to insist, in any one or more situations upon performance of any of the terms or provisions of this Agreement, shall not be considered a waiver or relinquishment of the right of the City or of the Union to future performance of any such terms or provisions, and the obligations of the Union and the City to such future performance shall continue.

Article 45 of the Agreement covered "Waiver" and stated in full:

> (A) The parties acknowledge that during their negotiations which resulted in this Agreement, each had the unlimited rights and opportunity to make demands and proposals with respect to any subject matter not removed by law from the area of collective bargaining, and that the understandings and agreements were arrived at by the parties after exercise of that right and opportunity as set forth in this Agreement.
>
> (B) Therefore, the City and the Union for the life of this Agreement, each voluntarily and unqualifiedly, waive the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or discussed during bargaining, except compensation and duties for new or changed job classifications.

Local 1736's Bargaining History

In or about August of 1999, the School Department hired Richard L. Germano (Germano) as a plumber. At some point in or about 2006, the City promoted Germano to the plumber/foreman position, later transferring him to the ISD. Beginning in 2001, Germano served on Local 193's executive board (e-board) for about two years. In 2007, the Union membership elected Germano as President of Local 1736 through 2009, and

as Vice President from 2009 through 2014. Germano did not participate in the first round of bargaining for the 2006-2007 Agreement between the City and Local 1736.[5]

The School Department hired Joseph B. Martin (Martin) as a junior building custodian in September of 1992, later promoting him to junior-in-charge/building custodian, building custodian and, finally, to his current position of storekeeper in 2001. From 1995 to 2001, Martin has served as Local 193 President; as Vice President from 2007 to 2009; and President again since February of 2011 to present. In his capacity as Vice President, Martin, along with Union Counsel Collin Confoey (Confoey) and then-President Mark Raftery (Raftery), participated in negotiations for the 2007-2010 Agreement between the City and Local 1736. The City initially hired Raftery as a senior building custodian and promoted him to the position of ISD Assistant Supervisor of Maintenance, at some point after June 30, 2008.

During negotiations for the 2007-2010 Agreement, the City's bargaining team consisted of Director of Personnel Joe Driscol (Driscol), Chief of ISD/Building Commissioner Michael J. Donovan (Donovan) and City Counsel David Grunebaum (Grunebaum). At some point during their negotiations, the City proposed that each party create and exchange a list of existing past practices, and then bargain over which practices to include or exclude in the contract. The Union presented the City's proposal

[5] The record is unclear about whether Germano was on the Union's bargaining team for the 2007-2010 Agreement.

to its e-board members, who later voted to present the issue to the bargaining unit; however, the membership voted down the proposal. On returning to the negotiation table, the Union formally rejected the proposal, refused to provide the City with a list of past practices and ceased further bargaining over the issue. At no point during their negotiations did the parties ever specifically bargain over or propose the elimination (or modification) of the vacation-retirement benefit.

The Retirement Year Vacation Benefit

Since at least 1992, the School Department had offered custodial employees in Local 193 a vacation entitlement if they worked past February 1st in their retirement year but retired before July 1st of that year. After the passage of Chapter 117, employees who stayed with Local 193 continued to receive that vacation benefit during their retirement year. Bowdren, who was transferred from the School Department to the ISD at some point after June 21, 2006, also received the benefit on his retirement on May 1, 2007. At the time of Bowdren's retirement date, the School Department still controlled his payroll, even though he was no longer employed there. He nonetheless received the same vacation entitlement that other retiring unit members who remained employed at the School Department had received.

In April of 2011, the Union first became aware that the City had denied that vacation benefit to at least two ISD custodians: Dennis Trainor (Trainor) who had retired after February 1, 2011 but before July 1, 2011; and Jerry Pryor (Pryor), who had retired a few years earlier.

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 63, SUP-4784 (Oct. 9, 2003). The duty to bargain extends to both conditions of employment that are established through past practice as well as conditions of employment that are established through a collective bargaining agreement. City of Boston, 41 MLC 119, 125, MUP-13-3371, MUP-14-3466, MUP-14-3504 (Nov. 7 2014) (citing Town of Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom., Town of Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120 (May 19, 2014); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000)).

The City does not dispute that vacation time is a mandatory subject of bargaining. Nor does it dispute that it failed to provide the Union with prior notice and an opportunity to bargain before denying certain unit members the vacation-retirement benefit. Instead, the City argues there was never an established practice of providing a vacation-retirement benefit to retiring unit members employed at the ISD.

Past Practice

To determine whether a binding past practice exists, the Commonwealth Employment Relations Board (Board) "analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue." City of Boston, 41 MLC at 125 (citing Swansea Water District, 28 MLC 244, 245, MUP-2436 and MUP-2456 (Jan. 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (Jan. 30, 1997)). While the CERB "inquires [about] whether employees in the unit have a reasonable expectation that the practice in question will continue," City of Westfield, 22 MLC 1394, 1404 (H.O. 1996), aff'd, 25 MLC 163 (1999), it also looks to whether the "past practice is… unequivocal, has existed substantially unvaried for a reasonable period of time and is known and is accepted by both parties." City of Boston, 41 MLC at 125; Commonwealth of Massachusetts, 30 MLC at 64.

A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time that the circumstances preceding the practice recurs. City of Boston 2014 (citing Commonwealth of Massachusetts, 23 MLC at 172; City of Everett, 8 MLC 1036, 1038 MUP-3807 (H.O. June 4, 1981), aff'd 8 MLC 1393 (Oct. 21, 1981) (city established a past practice of granting employees time off to take promotional Civil Service exams, even though the exams were given on an irregular basis and the city has had few occasions to implement the practice). In the cases where there was a sporadic action, the Board holds that the action has to be consistently followed, without any deviance, in order for it to be

considered a binding past practice. City of Boston 2014; see also Town of Lee v. Labor Relations Comm'n, 21 Mass. App. Ct. 166 (1985); Town of Winthrop, 28 MLC 200, MUP-2288 (Jan. 4, 2002). The Board has never set a definitive length of time required for a practice to become a binding term or condition of employment; instead, it looks at the issue on a case-by-case basis. City of Boston 2014 (citing City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20, 1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994)).

Here, the record shows that since at least 1992, the Committee had offered custodial employees a vacation entitlement if they worked past February 1st in their retirement year but retired before July 1st of that year. After the passage of Chapter 117, members of Local 193 who remained employed at the School Department continued to receive that vacation benefit during their retirement year. Bowdren also received the benefit when he retired on May 1, 2007 even though he was transferred from the School Department to the ISD at some point after June 21, 2006. After Bowdren's retirement, the City stopped offering that benefit to the ISD custodians.

The City argues that because the School Department actually controlled Bowdren's vacation-retirement payout during fiscal year 2007, the City was not responsible for maintaining that same benefit when it finally assumed control of the payroll for the remaining unit members who transferred to the ISD and retired on or after July 1, 2007. On the other hand, the Union asserts that regardless of whether the Committee or the City actually controlled the payroll of the transferred unit members, the City was

obligated to honor the Committee's long-established practice of granting the vacation-retirement benefit because at all relevant times the City was the statutory employer for purposes of bargaining. Additionally, the Union contends that when the custodians were transferred to the ISD pursuant to Chapter 117, they maintained a reasonable expectation that the City would continue the practice of granting the vacation-retirement benefit based on: (1) the 20-year existence of the practice at the School Department, and (2) Solicitor Barry's February 1, 2006 letter, which guaranteed "no negative impact" to the transferred unit members. Based on the evidence, I find that the City's decision to stop granting eligible retiring ISD custodians the vacation entitlement unilaterally changed the established practice of granting that benefit to unit members who worked past February 1st in their retirement year and retired before July 1st of that year. That decision amounted to a unilateral change because the prior practice occurred substantially unvaried and with regularity for over 20 years, which caused prospective unit member retirees to reasonably expect the practice would continue after their transfer to the ISD. City of Westfield, 22 at 1404, aff'd, 25 MLC at 165. I also find that the transferred custodians possessed a reasonable expectation that the City would continue the practice based on the February 1, 2006 guarantee by Solicitor Barry that no negative changes would impact that practice and, on Bowdren's successful receipt of the benefit during his retirement year as an ISD custodian in May of 2007. Id. (the Board's inquiry turns on "whether employees in the unit have a reasonable expectation that the practice in question will continue).

Single Entity

The City maintains that it was not obligated to recognize the Committee's practice of granting the vacation benefit to retiring employees because that practice ceased to exist once those employees transferred to the ISD in June of 2006. However, the Union argues that the practice survived the transfer based on the City's shared employment relationship with the Committee. The Board holds that when dealing with school employees, a municipality and a school committee are a single entity and share the responsibility for making and fulfilling contractual commitments. City of Malden, 23 MLC 181, 183, MUP-9312 and MUP-9313 (1997) (citing Lawrence School Committee, 19 MLC 1167, 1170, n.4 (1992); Town of Brookline, 20 MLC 1570, 1598, n.22 (1994)).

Here the facts show that in June of 2006, the City became the employer for the custodial employees, including Bowdren, who transferred from the School Department to the ISD pursuant to Chapter 117. From June 21, 2006 through June 30, 2007, the City remained Bowdren's statutory employer, even though the Committee continued to pay Bowdren from its own payroll even though he was no longer employed at the School Department. Nothing in Chapter 117 or the parties' Agreements expressly exempted (or delayed) the City from assuming employment control over all of the ISD custodians once the ISD transfer became complete on or about June 21, 2006. Thus, when the custodians were transferred from the Committee to the ISD, the City became obligated to bargain over any changes made to their terms and conditions of their employment post-transfer, including changes to the vacation-retirement benefit. See City of Malden, 23 MLC at 183

(citing Lawrence School Committee, 19 MLC at 1170, n.4; Town of Brookline, 20 MLC at 1598, n.22). Because the Board treats both the City and the Committee as a single employer under Section1 of the Law, it requires both to share responsibilities when bargaining obligations have not been fulfilled -- even when one party did not participate in or endorse the actions of the other. Town of Bridgewater, 25 MLC 103, 103-04, MUP-8650 (Dec. 30, 1998); Town of Saugus, 28 MLC 13, 17, MUP-2343 and CAS-3388 (June 15, 2001) (Board found a violation even though the town did not participate in the school committee's decision to unilaterally transfer bargaining unit work). Here, the City was not a party to the Committee's decision to establish the practice of granting vacation-retirement benefits to qualifying custodians; however, it was still obligated to bargain with the custodians' exclusive bargaining representative before terminating that practice on or about July 1, 2007. City of Malden, 23 MLC at 184 (citing Lawrence School Committee, 19 MLC at 1170, n.4). Consequently, the City's failure to bargain with the Union to resolution or impasse before terminating the vacation-retirement benefit for ISD custodians constituted an unlawful unilateral change in violation of Section 10(a)(5) of the Law. City of Malden, 23 MLC at 183.

Wavier by Contract

The City also raised the affirmative defense that the Union waived its right to bargain over the changes to the vacation-retirement benefit pursuant to Articles 44 and 45 of the 2007-2010 Agreement. It argues that because it presented the Union with an option to include all past practices in the Agreement but the Union rejected the offer, it

thereby waived its rights to bargain over the issue of vacation-retirement benefits per Articles 44 and 45.

The Board has long held that an employer asserting contractual waiver as an affirmative defense must show that the parties consciously considered the situation that has arisen, and that the union knowingly waived its bargaining rights. Central Berkshire Regional School Committee, 31 MLC 191, 202, MUP-01-3231 through MUP-01-3233 (June 8, 2005); Commonwealth of Massachusetts, 26 MLC 228, 231, SUP-4288 (June 12, 2000); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar. 28, 1986). The waiver needs to be clear and unmistakable. School Committee of Newton v. Labor Relations Commission, 388 Mass. at 569; City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 175 (1999). The employer bears the burden of proving that the contract clearly, unequivocally and specifically authorizes its actions. Town of Andover, 28 MLC at 270 (citing City of Boston, 48 Mass. App. Ct. at 174). Where the parties' agreement is silent on an issue, it must be shown that the matter allegedly waived was fully explored and consciously yielded. Commonwealth of Massachusetts, 5 MLC 1097, 1099, SUP-2149 (June 26, 1978) (citing City of Everett, 2 MLC 1471, 1475, MUP-2126 (May 5, 1976)).

The Board's initial inquiry focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (Au. 4, 1998). If the language clearly, unequivocally and specifically permits the employer to make the change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-6810 (Oct. 19, 1989).

The Board will not find waiver unless 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, SUP-3528 (Oct. 16, 1992) (quoting Melrose School Committee, 9 MLC 1713, 1725, MUP-4507 (Mar. 24, 1983)). If the contract language is ambiguous, the Board reviews the parties' bargaining history to determine their intent. Massachusetts Board of Regents/UMASS Med. Ctr., 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988) (citing Town of Marblehead, 12 MLC at 1670).

Despite the parties' inclusion of Articles 44 and 45 in the 2007-2010 Agreement, neither of those provisions "expressly or by necessary implication" conferred on the City the right to implement a change to retiring unit members' vacation benefits without first bargaining to resolution or impasse with the Union. Commonwealth of Massachusetts, 19 MLC at 1456 (quoting Melrose School Committee, 9 MLC at 1725). Additionally, Article 20, which deals specifically with "Vacation" is silent about the disputed vacation-retirement benefit for the newly-transferred ISD custodians. While Article 45 specifically covers "Waiver," the City presented no evidence showing that the Union knowingly and unmistakably waived its right to bargain over the matter based on the existing bargaining history. Massachusetts Board of Regents, 15 MLC at 1269; City of Boston, 48 Mass. App. Ct. at 176 (in the face of ambiguous language, silence on an issue, without more evidence, is insufficient to establish the knowing and unmistakable waiver required to establish the defense).

Turning to the parties' bargaining history, I find no evidence in the record that the parties fully explored (or that the Union has consciously yielded) the issue because the Agreement is silent about the issue of vacation entitlement benefits. See Commonwealth of Massachusetts, 5 MLC at 1099. Instead, the record shows that during their negotiations for a successor agreement, the City proposed that each party exchange a list of existing past practices and then bargain over which practices to include or exclude in the Agreement. The Union ultimately rejected that proposal and refused to provide the City with a list of past practices. At that point, the parties ceased to bargain further over the issue and refrained from including any language in the 2007-2010 Agreement that expressly addressed the vacation-retirement benefit.

Zipper Clause

In the alternative, the City argues that the language of Article 44 amounts to a zipper clause that precludes the Union from raising any issues not specifically covered in the 2007-2010 Agreement. The Board holds that a zipper clause may preserve the terms of a collective bargaining agreement from modification, however it does not automatically convey to either party the authority to unilaterally alter the status quo of any mandatory subject of bargaining. See Town of Somerset, 31 MLC 47, 49 and n. 5, MUP-01-2959 (Aug. 12, 2004); Melrose School Committee, 9 MLC at 1725; see also Commonwealth of Massachusetts, 18 MLC 1220, 1226-27, SUP-3426 (Nov. 20, 2001); City of Westfield, 25 MLC at 166. When a party asserts that a zipper clause constitutes a waiver of bargaining

rights, the Board examines whether the disputed matter is "covered" or "contained in" the collective bargaining agreement. See Melrose School Committee, 9 MLC at 1725.

Here, the evidence shows that City made an unsuccessful proposal concerning past practices during its 2007-2010 contract negotiations with Local 1736. After the Union rejected the proposal, the parties ceased further bargaining over the issue. Based on this evidence, I cannot conclude that Article 44 automatically conveys to the City the authority to unilaterally alter the practice of granting vacation-retirement benefits because the parties had failed to effectively "cover" or "contain" that issue in the Agreement. Melrose School Committee, 9 MLC at 1725; see also Commonwealth of Massachusetts, 5 MLC 1509, SUP-2091 (Dec. 21, 1978) (citing Newton School Committee, 5 MLC 1016, 1024, MUP-2501 (June 2, 1978)) (where certain contractual waiver provisions are so broad and sweeping, or when they so impinge upon employee rights that enforcement may be contrary to the policies of G.L. c.150E, the Board will not treat such broadly sweeping provisions as a waiver of the right to protest unilateral action with regard to mandatory subjects of bargaining); compare Board of Trustees of the University of Massachusetts, 21 MLC 1795, SUP-3375 (May 12, 1995) (evidence that union sought and then withdrew a proposal for free parking was insufficient to imply that the union had relinquished all rights regarding parking fees for the life of the contract).

Consequently, the City's zipper clause argument fails because it cannot demonstrate affirmatively that it had the right to unilaterally change the vacation entitlement for custodians employed at the ISD. See Commonwealth of Massachusetts,

17 MLC 1007, 1014, SUP-3144 (June 8, 1990); (citing Massachusetts Board of Regents, 15 MLC at 1271 n. 7) (a zipper clause does not waive a union's right to bargain during the term of the contract about an employer's change to an existing practice where the contract is silent); see also School Committee of Newton v. Labor Relations Commission, 388 Mass. at 564; Higher Education Coordinating Council, 22 MLC 1662, 1668, SUP-4078 (Apr. 11, 1996). Accordingly, without more evidence, I cannot find that the Union waived its rights to bargain over the issue of vacation-retirement benefits for qualifying custodians who transferred to the ISD on June 21, 2006.

CONCLUSION

For the reasons stated above, I conclude that the City violated Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by not permitting eligible unit members who worked past February 1st in their retirement year but retired before July 1st in the same year, to earn vacation time from the following fiscal year without first providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts.

ORDER

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

1. Cease and desist from:

   a) Failing and refusing to bargain in good faith with the Union by unilaterally changing the vacation-retirement payout for unit member

custodians at the ISD who worked past February 1st in their retirement year and retired before July 1st in the same year.

b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following action that will effectuate the purposes of the Law;

a) Restore the vacation-retirement payout for unit member custodians at the ISD who worked past February 1st in their retirement year but retired before July 1st in the same year.

b) Make unit members whole for any economic losses that they have suffered as a direct result of the City's change in their vacation-retirement payout, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

c) Bargain in good faith to resolution or impasse with the Union before changing the vacation-retirement payout for unit members employed as custodians at the ISD.

d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

e) Notify the Department in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

_____
KENDRAH DAVIS, ESQ. HEARING OFFICER