

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF LYNN

and

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
LOCAL 1736

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Case No.: MUP-11-1318

Date Issued: April 2, 2015

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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**

1       The issue is whether the City of Lynn (City or Employer) failed to bargain in good  
2 faith with the American Federation of State, County and Municipal Employees, Local  
3 1736 (Union or Local 1736) by not permitting eligible unit members who worked past  
4 February 1st and before July 1st in their retirement year, to earn their vacation time for  
5 the following fiscal year without first providing the Union with prior notice and an  
6 opportunity to bargain to resolution or impasse over the decision and its impacts in  
7 violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts

1 General Laws, Chapter 150E (the Law). Based on the record, and for the reasons  
2 explained below, I find that the City violated the Law.

3 STATEMENT OF THE CASE

4 On October 26, 2011, the Union filed a Charge of Prohibited Practice (Charge)  
5 with the Department of Labor Relations (DLR) alleging that the City had engaged in  
6 prohibited practices within the meaning of the Law by: (1) failing to recognize the Union  
7 as the exclusive bargaining representative; (2) repudiating terms of the parties'  
8 collective bargaining agreement; and, (3) unilaterally changing an established past  
9 practice. On May 2, 2012, a DLR Investigator issued a Complaint of Prohibited Practice  
10 and Partial Dismissal (Complaint), alleging that the City had violated Section 10(a)(5)  
11 and, derivatively, Section 10(a)(1) of the Law by unilaterally changing an established  
12 past practice. The Investigator dismissed the Union's remaining allegations. On May  
13 15, 2013, the City filed its Answer to the Complaint.

14 I conducted three days of hearing on April 11, 2014, June 18, 2014,<sup>1</sup> and August  
15 25, 2014, at which both parties had the opportunity to be heard, to examine and cross-

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<sup>1</sup> 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.

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

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<sup>2</sup> 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.

<sup>3</sup> 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.
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.

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

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.

1 16.Linda Simard was a clerk who retired on February 3, 2013. She received  
2 vacation payout including the days that she would have accrued as of July 1,  
3 2013.  
4

5 17.Alicia Persia was a cafeteria worker who retired on April 30, 2012. She  
6 received vacation payout including the days that she would have accrued as  
7 of July 1, 2012.  
8

9 18.Patricia Desilets was a clerk who retired on February 2, 2011. She received  
10 her vacation payout including the days that she would have accrued as of  
11 July 1, 2011.  
12

13 19.Robert Murray was a storekeeper who retired on April 10, 2009. He used 62  
14 vacation days including the days that he would have accrued as of July 1,  
15 2009.  
16

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

21 21.Charles Wladkowski was a cafeteria worker who retired on April 11, 2008. He  
22 received vacation payout including the days that he would have accrued as of  
23 July 1, 2008.  
24

#### 25 FINDINGS OF FACT

#### 26 **Chapter 117 of the Acts of 2006**

27 Prior to June 21, 2006, the School Committee employed all civil service  
28 employees in a bargaining unit represented by AFSCME, Local 193. On June 21, 2006,  
29 pursuant to Chapter 117 of the Acts of 2006, the maintenance employees, which  
30 consisted of four to five custodians, previously employed by the School Committee  
31 transferred to the Inspectional Services Department (ISD) of the City and were placed  
32 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.<sup>4</sup> 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:

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<sup>4</sup> 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.



1 (A) For all employees there shall be one (1) week vacation after  
2 completion of sixteen (16) weeks of work, two (2) weeks vacation after  
3 completion of thirty (30) weeks of work up to two years, three (3) weeks  
4 vacation after completion of two (2) years of work up to five (5) years of  
5 work, four (4) weeks vacation after completion of five (5) years of work up  
6 to twenty (20) years, and five (5) weeks vacation after completion of  
7 twenty (20) years of work and over.

8  
9 (B) For the purpose of determining vacations, the work year shall  
10 commence July 1<sup>st</sup>. Vacations due for a given year terminating June 30<sup>th</sup>  
11 shall be permitted only after the above date.

## 12 13 **2. The Agreements with the City**

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

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

26  
27 Article 3 covered Management Rights and stated in full:

28  
29 Except to the extent there is contained in this Agreement, any expressed  
30 provision to the contrary, all of the authority, power, rights, jurisdictions  
31 and responsibility of the City are retained by and reserved exclusively to  
32 the City and to its respective Department Heads including, but not limited  
33 to: the rights to manage the affairs of the City and each of its Departments  
34 and to maintain and improve the efficiency of its operation; to determine  
35 the methods, means, processes and personnel by which operations are to

1 be conducted; to determine the size of and direct the activities of the  
2 working forces; to determine the schedule and hours of duty consistent  
3 with the statute and assignment of employees to work; to establish new  
4 job classifications for all jobs; to require from each employee the efficient  
5 utilization of their services; to hire, promote, assign, and retain employees;  
6 for just cause and reason to transfer, discipline, suspend, demote and  
7 discharge employees; to promulgate and enforce reasonable rules and  
8 regulations pertaining to the operation of the City, of its Departments and  
9 to the employee which rules are not in conflict with any expressed  
10 provision of this contract. However, nothing in this Article shall be  
11 construed as a waiver of the Union's right to bargain with the City over any  
12 mandatory subject of bargaining that is not addressed in this Agreement.

13  
14 Article 20 dealt with "Vacations" and stated, in pertinent part:

15  
16 (A) Employees hired prior to July 1, 2007: one week [vacation] at the  
17 completion of sixteen weeks of work, two weeks and one day vacation at  
18 the completion of thirty weeks of work up to two years, three weeks and  
19 one day vacation after completion of two years of work up to five years of  
20 work, four weeks and one day vacation after completion of five years of  
21 work.

22  
23 (D) All full-time employees add one (1) day after fifteen (15) years, (in the  
24 16th year), two (2) days after 16 years (in the 17th year), three (3) days  
25 after...seventeen (17) years (in the 18th year), four (4) days after eighteen  
26 (18) years ([in the] 19th year). This shall not serve to increase the annual  
27 vacation accrual after twenty (20) years, which shall remain at a total of  
28 five weeks.

29  
30 (G) Employees with twenty (20) or more years of service will be granted a  
31 fifth week of vacation.

32  
33 (I) ....Members of the Bargaining Unit who are intending to retire, may, if  
34 they do so desire, notify their Department Head one (1) calendar year  
35 prior to their retirement and they may in their retirement year carry over  
36 three (3) weeks of earned, but unused, vacation from the previous  
37 calendar year.

38  
39 Article 42 covered "Duration" and stated, in pertinent part:

40  
41 (A) This Agreement shall consist of two (2) collective bargaining  
42 agreements, the first of which was effective for the one (1) year period

1 from July 1, 2006 to June 30, 2007 and the second of which will be  
2 effective for the three (3) year period from July 1, 2007 to June 30, 2010.

3  
4 Article 44 addressed "Alteration of Agreement" and stated in full:

5  
6 No amendment, alteration, or variation of the terms or provisions of this  
7 Agreement shall bind the parties hereto unless made and executed in  
8 writing by the parties. The failure of the City or the Union to insist, in any  
9 one or more situations upon performance of any of the terms or provisions  
10 of this Agreement, shall not be considered a waiver or relinquishment of  
11 the right of the City or of the Union to future performance of any such  
12 terms or provisions, and the obligations of the Union and the City to such  
13 future performance shall continue.

14  
15 Article 45 of the Agreement covered "Waiver" and stated in full:

16  
17 (A) The parties acknowledge that during their negotiations which resulted  
18 in this Agreement, each had the unlimited rights and opportunity to  
19 make demands and proposals with respect to any subject matter not  
20 removed by law from the area of collective bargaining, and that the  
21 understandings and agreements were arrived at by the parties after  
22 exercise of that right and opportunity as set forth in this Agreement.

23  
24 (B) Therefore, the City and the Union for the life of this Agreement, each  
25 voluntarily and unqualifiedly, waive the right and each agrees that the  
26 other shall not be obligated to bargain collectively with respect to any  
27 subject or matter referred to or covered in this Agreement or  
28 discussed during bargaining, except compensation and duties for new  
29 or changed job classifications.

30  
31 **Local 1736's Bargaining History**

32 In or about August of 1999, the School Department hired Richard L. Germano  
33 (Germano) as a plumber. At some point in or about 2006, the City promoted Germano  
34 to the plumber/foreman position, later transferring him to the ISD. Beginning in 2001,  
35 Germano served on Local 193's executive board (e-board) for about two years. In  
36 2007, the Union membership elected Germano as President of Local 1736 through  
37 2009, and as Vice President from 2009 through 2014. Germano did not participate in

1 the first round of bargaining for the 2006-2007 Agreement between the City and Local  
2 1736.<sup>5</sup>

3 The School Department hired Joseph B. Martin (Martin) as a junior building  
4 custodian in September of 1992, later promoting him to junior-in-charge/building  
5 custodian, building custodian and, finally, to his current position of storekeeper in 2001.  
6 From 1995 to 2001, Martin has served as Local 193 President; as Vice President from  
7 2007 to 2009; and President again since February of 2011 to present. In his capacity  
8 as Vice President, Martin, along with Union Counsel Collin Confoey (Confoey) and then-  
9 President Mark Raftery (Raftery), participated in negotiations for the 2007-2010  
10 Agreement between the City and Local 1736. The City initially hired Raftery as a senior  
11 building custodian and promoted him to the position of ISD Assistant Supervisor of  
12 Maintenance, at some point after June 30, 2008.

13 During negotiations for the 2007-2010 Agreement, the City's bargaining team  
14 consisted of Director of Personnel Joe Driscoll (Driscoll), Chief of ISD/Building  
15 Commissioner Michael J. Donovan (Donovan) and City Counsel David Grunebaum  
16 (Grunebaum). At some point during their negotiations, the City proposed that each  
17 party create and exchange a list of existing past practices, and then bargain over which  
18 practices to include or exclude in the contract. The Union presented the City's proposal  
19 to its e-board members, who later voted to present the issue to the bargaining unit;  
20 however, the membership voted down the proposal. On returning to the negotiation

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<sup>5</sup> The record is unclear about whether Germano was on the Union's bargaining team for the 2007-2010 Agreement.

1 table, the Union formally rejected the proposal, refused to provide the City with a list of  
2 past practices and ceased further bargaining over the issue. At no point during their  
3 negotiations did the parties ever specifically bargain over or propose the elimination (or  
4 modification) of the vacation-retirement benefit.

### 5 **The Retirement Year Vacation Benefit**

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

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

### 20 OPINION

21 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law  
22 when it unilaterally changes an existing condition of employment or implements a new

1 condition of employment involving a mandatory subject of bargaining without first giving  
2 its employees' exclusive bargaining representative notice and an opportunity to bargain  
3 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations  
4 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations  
5 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,  
6 SUP-4784 (Oct. 9, 2003). The duty to bargain extends to both conditions of  
7 employment that are established through past practice as well as conditions of  
8 employment that are established through a collective bargaining agreement. City of  
9 Boston, 41 MLC 119, 125, MUP-13-3371, MUP-14-3466, MUP-14-3504 (Nov. 7 2014)  
10 (citing Town of Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub  
11 nom., Town of Burlington v. Commonwealth Employment Relations Board, 85 Mass.  
12 App. Ct. 1120 (May 19, 2014); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-  
13 4304 (June 30, 2000)).

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

### 19 **Past Practice**

20 To determine whether a binding past practice exists, the Commonwealth  
21 Employment Relations Board (Board) "analyzes the combination of facts upon which the  
22 alleged practice is predicated, including whether the practice has occurred with

1 regularity over a sufficient period of time so that it is reasonable to expect that the  
2 practice will continue." City of Boston, 41 MLC at 125 (citing Swansea Water District,  
3 28 MLC 244, 245, MUP-2436 and MUP-2456 (Jan. 23, 2002); Commonwealth of  
4 Massachusetts, 23 MLC 171, 172, SUP-3586 (Jan. 30, 1997)). While the CERB  
5 "inquires [about] whether employees in the unit have a reasonable expectation that the  
6 practice in question will continue," City of Westfield, 22 MLC 1394, 1404 (H.O. 1996),  
7 aff'd, 25 MLC 163 (1999), it also looks to whether the "past practice is... unequivocal,  
8 has existed substantially unvaried for a reasonable period of time and is known and is  
9 accepted by both parties." City of Boston, 41 MLC at 125; Commonwealth of  
10 Massachusetts, 30 MLC at 64.

11 A condition of employment may be found despite sporadic or infrequent activity  
12 where a consistent practice that applies to rare circumstances is followed each time that  
13 the circumstances preceding the practice recurs. City of Boston 2014 (citing  
14 Commonwealth of Massachusetts, 23 MLC at 172; City of Everett, 8 MLC 1036, 1038  
15 MUP-3807 (H.O. June 4, 1981), aff'd 8 MLC 1393 (Oct. 21, 1981) (city established a  
16 past practice of granting employees time off to take promotional Civil Service exams,  
17 even though the exams were given on an irregular basis and the city has had few  
18 occasions to implement the practice). In the cases where there was a sporadic action,  
19 the Board holds that the action has to be consistently followed, without any deviance, in  
20 order for it to be considered a binding past practice. City of Boston 2014; see also Town  
21 of Lee v. Labor Relations Comm'n, 21 Mass. App. Ct. 166 (1985); Town of Winthrop, 28  
22 MLC 200, MUP-2288 (Jan. 4, 2002). The Board has never set a definitive length of time

1 required for a practice to become a binding term or condition of employment; instead, it  
2 looks at the issue on a case-by-case basis. City of Boston 2014 (citing City of Boston,  
3 20 MLC 1603, 1607, MUP-7976 (May 20, 1994); Commonwealth of Massachusetts, 20  
4 MLC 1545, 1552, SUP-3460 (May 13, 1994)).

5 Here, the record shows that since at least 1992, the Committee had offered  
6 custodial employees a vacation entitlement if they worked past February 1st in their  
7 retirement year but retired before July 1st of that year. After the passage of Chapter  
8 117, members of Local 193 who remained employed at the School Department  
9 continued to receive that vacation benefit during their retirement year. Bowdren also  
10 received the benefit when he retired on May 1, 2007 even though he was transferred  
11 from the School Department to the ISD at some point after June 21, 2006. After  
12 Bowdren's retirement, the City stopped offering that benefit to the ISD custodians.

13 The City argues that because the School Department actually controlled  
14 Bowdren's vacation-retirement payout during fiscal year 2007, the City was not  
15 responsible for maintaining that same benefit when it finally assumed control of the  
16 payroll for the remaining unit members who transferred to the ISD and retired on or after  
17 July 1, 2007. On the other hand, the Union asserts that regardless of whether the  
18 Committee or the City actually controlled the payroll of the transferred unit members,  
19 the City was obligated to honor the Committee's long-established practice of granting  
20 the vacation-retirement benefit because at all relevant times the City was the statutory  
21 employer for purposes of bargaining. Additionally, the Union contends that when the  
22 custodians were transferred to the ISD pursuant to Chapter 117, they maintained a



1 reasonable expectation that the City would continue the practice of granting the  
2 vacation-retirement benefit based on: (1) the 20-year existence of the practice at the  
3 School Department, and (2) Solicitor Barry's February 1, 2006 letter, which guaranteed  
4 "no negative impact" to the transferred unit members.

5 Based on the evidence, I find that the City's decision to stop granting eligible  
6 retiring ISD custodians the vacation entitlement unilaterally changed the established  
7 practice of granting that benefit to unit members who worked past February 1st in their  
8 retirement year and retired before July 1st of that year. That decision amounted to a  
9 unilateral change because the prior practice occurred substantially unvaried and with  
10 regularity for over 20 years, which caused prospective unit member retirees to  
11 reasonably expect the practice would continue after their transfer to the ISD. City of  
12 Westfield, 22 at 1404, aff'd, 25 MLC at 165. I also find that the transferred custodians  
13 possessed a reasonable expectation that the City would continue the practice based on  
14 the February 1, 2006 guarantee by Solicitor Barry that no negative changes would  
15 impact that practice and, on Bowdren's successful receipt of the benefit during his  
16 retirement year as an ISD custodian in May of 2007. Id. (the Board's inquiry turns on  
17 "whether employees in the unit have a reasonable expectation that the practice in  
18 question will continue).

### 19 **Single Entity**

20 The City maintains that it was not obligated to recognize the Committee's  
21 practice of granting the vacation benefit to retiring employees because that practice  
22 ceased to exist once those employees transferred to the ISD in June of 2006. However,

1 the Union argues that the practice survived the transfer based on the City's shared  
2 employment relationship with the Committee. The Board holds that when dealing with  
3 school employees, a municipality and a school committee are a single entity and share  
4 the responsibility for making and fulfilling contractual commitments. City of Malden, 23  
5 MLC 181, 183, MUP-9312 and MUP-9313 (1997) (citing Lawrence School Committee,  
6 19 MLC 1167, 1170, n.4 (1992); Town of Brookline, 20 MLC 1570, 1598, n.22 (1994)).

7 Here the facts show that in June of 2006, the City became the employer for the  
8 custodial employees, including Bowdren, who transferred from the School Department  
9 to the ISD pursuant to Chapter 117. From June 21, 2006 through June 30, 2007, the  
10 City remained Bowdren's statutory employer, even though the Committee continued to  
11 pay Bowdren from its own payroll even though he was no longer employed at the  
12 School Department. Nothing in Chapter 117 or the parties' Agreements expressly  
13 exempted (or delayed) the City from assuming employment control over all of the ISD  
14 custodians once the ISD transfer became complete on or about June 21, 2006. Thus,  
15 when the custodians were transferred from the Committee to the ISD, the City became  
16 obligated to bargain over any changes made to their terms and conditions of their  
17 employment post-transfer, including changes to the vacation-retirement benefit. See  
18 City of Malden, 23 MLC at 183 (citing Lawrence School Committee, 19 MLC at 1170,  
19 n.4; Town of Brookline, 20 MLC at 1598, n.22).

20 Because the Board treats both the City and the Committee as a single employer  
21 under Section 1 of the Law, it requires both to share responsibilities when bargaining  
22 obligations have not been fulfilled -- even when one party did not participate in or

1 endorse the actions of the other. Town of Bridgewater, 25 MLC 103, 103-04, MUP-  
2 8650 (Dec. 30, 1998); Town of Saugus, 28 MLC 13, 17, MUP-2343 and CAS-3388  
3 (June 15, 2001) (Board found a violation even though the town did not participate in the  
4 school committee's decision to unilaterally transfer bargaining unit work). Here, the City  
5 was not a party to the Committee's decision to establish the practice of granting  
6 vacation-retirement benefits to qualifying custodians; however, it was still obligated to  
7 bargain with the custodians' exclusive bargaining representative before terminating that  
8 practice on or about July 1, 2007. City of Malden, 23 MLC at 184 (citing Lawrence  
9 School Committee, 19 MLC at 1170, n.4). Consequently, the City's failure to bargain  
10 with the Union to resolution or impasse before terminating the vacation-retirement  
11 benefit for ISD custodians constituted an unlawful unilateral change in violation of  
12 Section 10(a)(5) of the Law. City of Malden, 23 MLC at 183.

### 13 **Waiver by Contract**

14  
15 The City also raised the affirmative defense that the Union waived its right to  
16 bargain over the changes to the vacation-retirement benefit pursuant to Articles 44 and  
17 45 of the 2007-2010 Agreement. It argues that because it presented the Union with an  
18 option to include all past practices in the Agreement but the Union rejected the offer, it  
19 thereby waived its rights to bargain over the issue of vacation-retirement benefits per  
20 Articles 44 and 45.

21 The Board has long held that an employer asserting contractual waiver as an  
22 affirmative defense must show that the parties consciously considered the situation that  
23 has arisen, and that the union knowingly waived its bargaining rights. Central Berkshire

1 Regional School Committee, 31 MLC 191, 202, MUP-01-3231 through MUP-01-3233  
2 (June 8, 2005); Commonwealth of Massachusetts, 26 MLC 228, 231, SUP-4288 (June  
3 12, 2000); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (Mar. 28, 1986). The  
4 waiver needs to be clear and unmistakable. School Committee of Newton v. Labor  
5 Relations Commission, 388 Mass. at 569; City of Boston v. Labor Relations  
6 Commission, 48 Mass. App. Ct. 169, 175 (1999). The employer bears the burden of  
7 proving that the contract clearly, unequivocally and specifically authorizes its actions.  
8 Town of Andover, 28 MLC at 270 (citing City of Boston, 48 Mass. App. Ct. at  
9 174). Where the parties' agreement is silent on an issue, it must be shown that the  
10 matter allegedly waived was fully explored and consciously yielded. Commonwealth of  
11 Massachusetts, 5 MLC 1097, 1099, SUP-2149 (June 26, 1978) (citing City of Everett, 2  
12 MLC 1471, 1475, MUP-2126 (May 5, 1976)).

13 The Board's initial inquiry focuses on the language of the contract. Town of  
14 Mansfield, 25 MLC 14, 15, MUP-1567 (Au. 4, 1998). If the language clearly,  
15 unequivocally and specifically permits the employer to make the change, no further  
16 inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-6810 (Oct. 19,  
17 1989). The Board will not find waiver unless the contract language "expressly or by  
18 necessary implication confers upon the employer the right to implement the change in  
19 the mandatory subject of bargaining without bargaining with the union." Commonwealth  
20 of Massachusetts, 19 MLC 1454, 1456, SUP-3528 (Oct. 16, 1992) (quoting Melrose  
21 School Committee, 9 MLC 1713, 1725, MUP-4507 (Mar. 24, 1983)). If the contract  
22 language is ambiguous, the Board reviews the parties' bargaining history to determine

1 their intent. Massachusetts Board of Regents/UMASS Med. Ctr., 15 MLC 1265, 1269,  
2 SUP-2959 (Nov. 18, 1988) (citing Town of Marblehead, 12 MLC at 1670).

3 Despite the parties' inclusion of Articles 44 and 45 in the 2007-2010 Agreement,  
4 neither of those provisions "expressly or by necessary implication" conferred on the City  
5 the right to implement a change to retiring unit members' vacation benefits without first  
6 bargaining to resolution or impasse with the Union. Commonwealth of Massachusetts,  
7 19 MLC at 1456 (quoting Melrose School Committee, 9 MLC at 1725). Additionally,  
8 Article 20, which deals specifically with "Vacation" is silent about the disputed vacation-  
9 retirement benefit for the newly-transferred ISD custodians. While Article 45 specifically  
10 covers "Waiver," the City presented no evidence showing that the Union knowingly and  
11 unmistakably waived its right to bargain over the matter based on the existing  
12 bargaining history. Massachusetts Board of Regents, 15 MLC at 1269; City of Boston,  
13 48 Mass. App. Ct. at 176 (in the face of ambiguous language, silence on an issue,  
14 without more evidence, is insufficient to establish the knowing and unmistakable waiver  
15 required to establish the defense).

16 Turning to the parties' bargaining history, I find no evidence in the record that the  
17 parties fully explored (or that the Union has consciously yielded) the issue because the  
18 Agreement is silent about the issue of vacation entitlement benefits. See  
19 Commonwealth of Massachusetts, 5 MLC at 1099. Instead, the record shows that  
20 during their negotiations for a successor agreement, the City proposed that each party  
21 exchange a list of existing past practices and then bargain over which practices to  
22 include or exclude in the Agreement. The Union ultimately rejected that proposal and

1 refused to provide the City with a list of past practices. At that point, the parties ceased  
2 to bargain further over the issue and refrained from including any language in the 2007-  
3 2010 Agreement that expressly addressed the vacation-retirement benefit.

#### 4 **Zipper Clause**

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

17 Here, the evidence shows that City made an unsuccessful proposal concerning  
18 past practices during its 2007-2010 contract negotiations with Local 1736. After the  
19 Union rejected the proposal, the parties ceased further bargaining over the issue.  
20 Based on this evidence, I cannot conclude that Article 44 automatically conveys to the  
21 City the authority to unilaterally alter the practice of granting vacation-retirement benefits  
22 because the parties had failed to effectively "cover" or "contain" that issue in the

1 Agreement. Melrose School Committee, 9 MLC at 1725; see also Commonwealth of  
2 Massachusetts, 5 MLC 1509, SUP-2091 (Dec. 21, 1978) (citing Newton School  
3 Committee, 5 MLC 1016, 1024, MUP-2501 (June 2, 1978)) (where certain contractual  
4 waiver provisions are so broad and sweeping, or when they so impinge upon employee  
5 rights that enforcement may be contrary to the policies of G.L. c.150E, the Board will not  
6 treat such broadly sweeping provisions as a waiver of the right to protest unilateral  
7 action with regard to mandatory subjects of bargaining); compare Board of Trustees of  
8 the University of Massachusetts, 21 MLC 1795, SUP-3375 (May 12, 1995) (evidence  
9 that union sought and then withdrew a proposal for free parking was insufficient to imply  
10 that the union had relinquished all rights regarding parking fees for the life of the  
11 contract).

12 Consequently, the City's zipper clause argument fails because it cannot  
13 demonstrate affirmatively that it had the right to unilaterally change the vacation  
14 entitlement for custodians employed at the ISD. See Commonwealth of Massachusetts,  
15 17 MLC 1007, 1014, SUP-3144 (June 8, 1990); (citing Massachusetts Board of  
16 Regents, 15 MLC at 1271 n. 7) (a zipper clause does not waive a union's right to  
17 bargain during the term of the contract about an employer's change to an existing  
18 practice where the contract is silent); see also School Committee of Newton v. Labor  
19 Relations Commission, 388 Mass. at 564; Higher Education Coordinating Council, 22  
20 MLC 1662, 1668, SUP-4078 (Apr. 11, 1996). Accordingly, without more evidence, I  
21 cannot find that the Union waived its rights to bargain over the issue of vacation-

1 retirement benefits for qualifying custodians who transferred to the ISD on June 21,  
2 2006.

3 CONCLUSION

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

10 ORDER

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

13 1. Cease and desist from:

14  
15 a) Failing and refusing to bargain in good faith with the Union by  
16 unilaterally changing the vacation-retirement payout for unit  
17 member custodians at the ISD who worked past February 1st in  
18 their retirement year and retired before July 1st in the same year.

19  
20 b) In any like manner, interfering with, restraining and coercing its  
21 employees in any right guaranteed under the Law.

22  
23 2. Take the following action that will effectuate the purposes of the Law;

24  
25 a) Restore the vacation-retirement payout for unit member custodians  
26 at the ISD who worked past February 1st in their retirement year  
27 but retired before July 1st in the same year.

28  
29 b) Make unit members whole for any economic losses that they have  
30 suffered as a direct result of the City's change in their vacation-



1 retirement payout, plus interest on any sums owed at the rate  
2 specified in M.G.L. c.231, Section 6I, compounded quarterly.

3  
4 c) Bargain in good faith to resolution or impasse with the Union before  
5 changing the vacation-retirement payout for unit members  
6 employed as custodians at the ISD.

7  
8 d) Post immediately in all conspicuous places where members of the  
9 Union's bargaining unit usually congregate, or where notices are  
10 usually posted, including electronically, if the City customarily  
11 communicates with these unit members via intranet or email and  
12 display for a period of thirty (30) days thereafter, signed copies of  
13 the attached Notice to Employees.

14  
15 e) Notify the Department in writing of the steps taken to comply with  
16 this decision within ten (10) days of receipt of this decision.

17  
18 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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KENDRAH DAVIS, ESQ. HEARING OFFICER

#### APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



# **NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF A HEARING OFFICER OF THE  
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

An officer of the Massachusetts Department of Labor Relations has held 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.

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City of Lynn

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Date

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

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