

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

BOSTON PUBLIC LIBRARY
PROFESSIONAL STAFF ASSOCIATION

*
*
*
*
*
*
*
*
*

Case No. MUP-16-5202

Date Issued: May 29, 2018

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Jessica L. Dembro, Esq.:

Representing the City of Boston

James A.W. Shaw, Esq.:

Representing the Boston Public Library
Professional Staff Association

HEARING OFFICER'S DECISION

Summary

1 The issue in this case is whether the City of Boston (City or Employer) violated
2 Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws
3 Chapter 150E (the Law) by repudiating an oral agreement with the Boston Public Library
4 Staff Association (Association, Union, or PSA). Based on the record and for the reasons
5 explained below, I conclude that the City did not violate the Law and dismiss the
6 complaint.

Statement of the Case

1 On April 22, 2016, the Association filed a Charge of Prohibited Practice with the
2 Department of Labor Relations (DLR) alleging that the City had engaged in prohibited
3 practices within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. On September
4 1, 2016, a DLR investigator issued a Complaint of Prohibited Practice (Complaint). I
5 conducted a hearing on October 6, 2017. Following the hearing, the Association and City
6 each timely filed post-hearing briefs. On the entire record, including my observation of
7 the demeanor of witnesses, I make the following findings.

Stipulations of Fact

- 8 1. PSA is an employee organization as defined in G.L. c. 150E, Section 1.
- 9
- 10 2. [The City] is an employer as defined in G.L. c. 150E, Section 1.
- 11
- 12 3. PSA has been the exclusive representative since at least 1973.¹
- 13
- 14 4. At all times relevant to this dispute, Karen Shafts [(Shafts)] was a BPL employee
- 15 in the PSA bargaining unit. She was also the Chief Steward for the PSA, a position
- 16 she has held since 2002. She has served on the PSA Executive Board in various
- 17 positions since 1989. She was also a member of the negotiating team for the entire
- 18 period of the prior round of contract negotiations.
- 19
- 20 5. At all times relevant to this dispute, James A.W. Shaw [(Shaw)] was legal counsel
- 21 to the PSA.
- 22
- 23 6. The parties were subject to a collective bargaining agreement that expired on
- 24 September 30, 2010.
- 25
- 26 7. The parties engaged in negotiations for a successor CBA starting in 2010.
- 27

¹ In its answer, the City admitted that the Association is the exclusive representative for a unit of professional librarians who are employed in the City's Public Library (BPL).

- 1 8. On January 17, 2014, the parties signed [a] Memorandum of Agreement,
2 establishing new CBAs for October 1, 2010 to September 30, 2013 and October
3 1, 2013 to September 30, 2016.
4
- 5 9. Effective January 1, 2015, the Library awarded 7.5 days of sick leave to the
6 account of each bargaining unit member.
7
- 8 10. The parties corresponded through various representatives regarding this dispute,
9 some of which is reflected in the joint exhibits.
10
- 11 11. On March 4, 2016, the Library sent a letter to all members of the PSA bargaining
12 unit announcing its intention to remove some sick leave from each member's bank.
13 The letter from Claudia Araujo addressed to Diane Parks is identical in form and
14 content to other letters sent to all members of the bargaining unit (except for the
15 number of hours the Library alleges were erroneously awarded, which was an
16 individualized determination).²
17
- 18 12. In April 2016, the Library did in fact deduct some sick leave from bargaining unit
19 employees' banks, as reflected in the attachment to Araujo's letter of March 11,
20 2016.
21
- 22 13. The PSA filed this charge of prohibited practice on April 22, 2016.
23
24

25 Relevant Contract Provisions
26

27 The parties' July 1, 2002 – September 30, 2006 Collective Bargaining Agreement
(CBA) contained the following provision:

28 ARTICLE XV
29 SICK LEAVE
30

- 31 (A) Effective January 1, 1981, and each July 1 thereafter, all employees
32 shall receive 7 ½ days of sick leave for use during the 6 month period
33 except that new employees shall receive 1 day per month for each

² Joint Exhibit 8 is the letter Araujo sent to Diane Parks. Joint Exhibit 12 is an example of a letter that Araujo sent to a unit member where the City followed a different sick leave deduction schedule to ensure that unit members were not left with a negative sick leave balance.

1 month of the year they are employed until the beginning of the next six
2 month interval.

3
4 (B) On December 31 of each year, the unused portion of each employee's
5 sick leave will be remanded to his/her personal sick leave balance.
6

Findings of Fact

Negotiations for a Successor Agreement

7
8 The parties began negotiations for a successor CBA in 2010. When they were
9 unable to reach an agreement, the parties submitted their dispute to factfinding with
10 Arbitrator Gary Altman (Altman). On September 4, 2013, the City provided its last best
11 offer to Altman, which included the following:

ARTICLE XV – SICK LEAVE

Amend Section 1 to read as follows:

Section 1. Sick Leave Accrual

15 (A) ***Effective the January 1st after this contract becomes effective, sick***
16 ***leave shall accrue at the rate of one and a quarter (1.25) days for each***
17 ***month of service.***

18 * * *

19
20 The Association's counterproposal with regard to sick leave provided as follows:³

Section 1: Sick Leave Accrual

21
22 (A) Effective January 1, 1981, and each July 1 thereafter until Paragraph (B)
23 goes into effect, all employees shall receive 7 ½ days of sick leave for use
24 during the 6 month period except that new employees shall receive 1 day
25 per month for each month of the year they are employed until the beginning
26 of the next six month interval.
27

³ This document indicates that proposed changes were marked with underline and/or
strikeout.

1
2 (B) Effective the January 1st following ratification of a successor agreement to
3 the 2006 to 2010 integrated collective bargaining agreement, sick leave
4 shall accrue at the rate of one and a quarter (1.25) days for each month of
5 actual service or paid time, and shall be available for use once accrued.
6

7 The Association's November 25, 2013 brief to Altman includes the following:

8 SICK LEAVE – ARTICLE XV AND CITY'S ATTENDANCE POLICY AND
9 MEDICAL LEAVE POLICY

10
11 A. How should sick leave be accrued?

12 (1) Proposed findings of fact

13 Under the current collective bargaining agreement, this bargaining unit
14 accrues sick leave at a flat rate of 7 ½ days every six months.

15 (2) Outcome sought by the PSA

16 The PSA is willing to modify this existing language so that sick leave
17 accrues at the rate of one and a quarter (1.25) days for each month of actual
18 service or paid time.

19 (3) Rationale

20 Under the current collective bargaining agreement, bargaining unit
21 members can accrue sick time every six months, even if on unpaid leave
22 during some of the six month period. The PSA is willing to accept the City's
23 request to have this be a monthly accrual and to exclude all accrual for
24 unpaid time. The PSA's language makes clear that accrual will occur during

1 all "paid time" so that there is no ambiguity that "actual service" includes
2 vacation, holiday and other paid time.⁴

3 Altman's Factfinder Report and Recommendations (Factfinder Report) states in
4 relevant part: "Both parties agree that for Section 1 the method of accrual should be
5 changed to reflect that employees would accrue 1.25 days per month."

6 After Altman issued his Factfinder Report, the parties continued to bargain. On or
7 about January 11, 2014, Elizabeth Valerio (Valerio), the City's attorney and chief
8 negotiator; Paul Curran (Curran), the City's Director of Labor Relations;⁵ and Indira
9 Talwani (Talwani); the Association's attorney and chief negotiator, had a discussion apart
10 from the other members of the negotiating team. During this discussion, they agreed on
11 the terms for a Memorandum of Agreement (MOA), which was dated January 17, 2014.
12 The MOA includes the following, in relevant part:

13 **Article XV – SICK LEAVE**

14 **Add following language to [the] end of Section 1A:**

15 ***Effective January 1, 2015, sick leave shall accrue at the rate of one and a quarter***
16 ***(1.25) days for each month of actual service.***

⁴ The City also included its proposal in its October 4, 2013 Factfinding Presentation to Altman, which describes its proposal to change the accrual from 7.5 days on January 1 and July 1 of each year to 1.25 days per month.

⁵ Valerio sometimes shared the role of chief negotiator with Curran.

1 The January 2015 Award of Sick Leave

2 By email dated December 17, 2014, Estelle Lincoln (Lincoln), Assistant Human
3 Resources Manager,⁶ advised Shafts and Elisa Birdseye (Birdseye), Association
4 President, that the BPL would run the following reminder in the BPL Weekly⁷ the following
5 week⁸:

6 Pursuant to new contract language under Article XV, Section 1A PSA
7 employees shall accrue sick time at the rate of one and a quarter (1.25)
8 days for each month of actual service, effective January 15, 2015. Affected
9 employees shall receive seven and a half (7.5) days of sick time on January
10 1, 2015, reflecting sick time earned from July 1, 2014 – December 31, 2014.
11 Moving forward sick time will accrue monthly.

12
13 The BPL subsequently printed the above notice in the December 23, 2014 issue of the
14 BPL Weekly.⁹

15 By email dated January 3, 2015, a unit member asked Ann Langone, the PSA
16 Secretary, why BPL added 52.5 hours of sick leave to her balance and whether it was for
17 the whole year. Langone responded as follows:

⁶ From approximately November 2014 through early 2015, the Human Resources Manager position was vacant and Lincoln was the most senior Human Resources staff person. Lincoln did not participate in the contract negotiations described above.

⁷ The BPL Weekly is a weekly newsletter that all staff are required to read, which includes information such as policy changes and new hires.

⁸ Lincoln cc'd Jessica Dembro (Dembro), the City's attorney, and David Leonard (Leonard), who signed the MOA and was the Director of IT and Operations at the time, on this email.

⁹ Lincoln did not recall anyone from the BPL contacting her to inform her that unit members should not be receiving 7.5 days of sick leave on January 1, 2015.

1 The 52.5 is 6 months of leave. In the contract we signed last January we
2 agreed to allow them to change the distribution of sick time. The 52.5 is
3 owed to us because we earned it last year but have not received it yet. After
4 this, we will receive our sick time as we earn it – 1.25 days per month, I
5 think.
6

7 Langone also cc'd the PSA Executive Board and asked them to "chime in" if anything she
8 said was not "absolutely correct." Birdseye responded, "sounds right to me."

9 In or about late April 2015, a payroll clerk notified Claudia Araujo (Araujo), BPL
10 Human Resources Manager,¹⁰ that the BPL had erroneously awarded certain employees
11 7.5 days of sick leave in January 2015. In response, Araujo investigated the matter and
12 determined that employees should not have received 7.5 days of sick leave in January
13 2015, as the employees had already received their full award of 15 days of sick leave in
14 2014.

15 In or about July 2015, Araujo advised Shafts of the error. Shafts told Araujo that
16 the Association did not agree that the award of 7.5 days in January 2015 was an error,
17 as it was the Association's understanding that unit members would receive the 7.5 days
18 in January 2015 and also begin receiving 1.25 days per month. Shafts requested time to
19 confer with other executive board members and review their notes from the successor
20 contract negotiations. By email dated August 4, 2015 to Shafts, Araujo stated as follows,
21 in relevant part:

22 I wanted to follow up with you on our conversation regarding the issue I
23 raised with the balance of sick time awarded to PSA members in January

¹⁰ Araujo began her employment with the BPL in March 2015. She was not part of the contract negotiations between the City and Association.

1 2015 (in addition to the monthly accrual of 1.25 days, which started in
2 January 2015).

3
4 Have you been able to collect information from PSA board members with
5 regards to PSA's understanding of the bargaining surrounding this topic?

6
7 As I understood it, you had stated that it was the PSA's understanding that
8 for the year of 2015, as we transitioned from an award system to an accrual
9 system, the January award would remain in addition to the monthly 1.25
10 days accrual. However, as we discussed, this would result in PSA members
11 earning and [sic] 22.5 sick days (or 157.5 hours) for the calendar year of
12 2015, instead of the actual benefit of 15 sick days (or 105 hours) per year.

13
14 The Library, as I indicated, understands the intent of the transition was not
15 to award PSA members with an additional 7.5 days (or 52.5 hours) for the
16 calendar year of 2015, however, if at this point we do not come to a
17 resolution, as of December 2015, PSA members will effectively have earned
18 22.5 sick days for this period.

19
20 After not receiving a response to her above email, Araujo sent another email to
21 Shafts on August 11, 2015 asking when she could expect an update on the matter
22 because the BPL needed to take action as soon as possible and move forward with
23 discussions. By email that same day, Shafts stated that the executive board was
24 reviewing their notes from contract negotiations. She also stated that they would ask
25 Association counsel Shaw if he had access to Talwani's notes¹¹ and, if so, to review them.
26 By emails dated August 11 and August 18, Araujo asked Shafts when she could expect
27 a response. On August 18, 2015, Shafts sent the following email to Araujo:

28 I have asked the members of the Executive Board who were part of the PSA
29 contract negotiations team to review their notes, and I have asked James
30 Shaw to review the notes taken by Indira Talwani. Given all the other
31 matters that the parties are attempting to resolve, I do not have an estimate

¹¹ Talwani had left her employment at the law firm that represented the Association by this point, and is now a federal judge.

1 of when we will be able to complete those reviews. Please let me know if
2 the Library and/or the City are facing a specific timeline.
3

4 By correspondence dated October 13, 2015 to Birdseye, Araujo stated the
5 following:

6 As you know, during the last round of bargaining, the parties negotiated a
7 change to Article XV (Sick Leave), Section 1(A) such that effective January
8 1, 2015, PSA members would transition from a "dump" of sick leave twice
9 annually to a monthly accrual of their sick leave benefits. These
10 negotiations did not include a change to the total number of sick days an
11 employee earned during the course of the year, as outline[d] in the current
12 Collective Bargaining Agreement.
13

14 On July 21, 2015, the Library communicated to the PSA that there had been
15 a "dump" of 7.5 sick days in January 2015, in addition to the negotiated
16 accrual amount of 1.25 days per month, which also started in January 2015.
17 As I explained, this occurrence caused an error in the amount of sick leave
18 PSA members would accrue in calendar year 2015. Effectively, in addition
19 to the contractual benefits of 15 days of sick leave per year, which would
20 now accrue at a rate of 1.25 days per month, PSA members would
21 erroneously receive an additional award of 7.5 sick days, for a total of 22.5
22 sick days for calendar year 2015.
23

24 After being informed of the error, on July 21, 2015, Karen Shafts requested
25 time to review her bargaining notes regarding the change in sick leave
26 benefit accrual. I sent a follow up email on August 4, 2015, requesting an
27 update of the review as well as reiterating the details of our prior
28 conversation. Again, on August 11, 2015, I sent a subsequent email
29 requesting a status of the review, since we had not heard from the PSA on
30 the matter.
31

32 On August 11, 2015, as a reply to my request for status, the PSA replied
33 explaining the need for additional time to review bargaining notes and
34 gather information on the subject from its Executive Board as well as
35 Counsel with knowledge of the matter. I replied to that request on the same
36 day and requested an estimate of when the PSA expected to have the
37 review complete. On August 18, 2015, I sent yet another email requesting
38 a date the Library could expect a response, to which I received a reply from
39 Karen Shafts stating the PSA did not have an estimate as to when they
40 would be able to complete the review.

1 Despite numerous attempts to follow up on this matter, as outlined above,
2 and the Library having indicated this matter needed to be resolved ASAP,
3 to date, the Library has still not receive a substantive response from the
4 PSA on the subject.

5
6 During the July 21, 2015 meeting and subsequent email follow-up of August
7 4, 2015, the Library explained that inaction on this issue would result in PSA
8 members being awarded 22.5 days of sick leave for the year of 2015,
9 instead of the contractual benefit of 15 days of sick leave per year.

10
11 In order to resolve this issue, it is the Library's intention to adjust the affected
12 members' sick leave banks to remove the additional 7.5 days of sick leave
13 inadvertently awarded. The Library plans to take this corrective action by
14 November 15, 2015.

15
16 The Library has identified three employees, who as a result of this error,
17 have utilized more sick leave than they were entitled to earn to date, and
18 who will not have 7.5 days sick leave at the time of the correction in
19 November 2015. For those members, the Library is prepared to provide an
20 alternate correction schedule, such as recouping these additional sick days
21 over the next six months.

22
23 Please contact me by October 21, 2015 if you have any questions and/or
24 you would like to meet to further discuss alternatives to our proposed
25 corrective plan.

26
27 By email dated October 22, 2015, Birdseye informed Araujo that the following was

28 the PSA's position on the matter:

29 As part of our last contract negotiations, the City/Library proposed a change
30 in how PSA members accrue sick leave. The PSA was concerned that, if
31 the change in accrual was implemented without lead time, some of our
32 members would find that they did not have sufficient sick leave available in
33 an emergency. Thus, the City/Library agreed that we would be awarded
34 7.5 days of sick leave on January 1, 2015, as was awarded under the
35 existing contract language, in return for our agreeing to the proposed
36 system of accrual going forward from January 1, 2015. The 7.5 days was
37 a one-time award made in return for the PSA accepting the City/Library's
38 proposed system as part of our 2010 – 2016 contract.

1 As I stated in my previous email, we are more than happy to meet to discuss
2 this further. Please let us know if you would like to suggest meeting
3 dates/times.
4

5 In response, by email of November 10, 2015, Araujo stated in relevant part:
6

7 At this point, the Library's position is that if the intention was to award PSA
8 **additional time** as part of the negotiations leading to the implementation of
9 a change in how PSA members accrue sick leave, this would have certainly
10 been memorialized in the MOA. As such, the Library understands the intent
11 was to keep the same benefit of 15 sick days per year, and award the 7.5
12 sick days on January 1, 2015 as a "dump" until PSA members had a chance
13 to adjust to the transition to the accrual method.¹²
14

15 If there is any further information on your end, please feel free to let me
16 know.
17

18 We would be available to meet to hear any further concerns [on] Thursday
19 and Friday after 12 p.m., as well as next Tuesday after 11 a.m. I do have
20 shorter blocks of time on other days too, if these do not work.

21 On November 13, 2015, Araujo emailed Shafts with additional days that she was
22 available to meet, and reminded her that time was of the essence because the Library
23 intended to resolve the sick leave issue by the end of the month and would like to notify
24 affected employees. By email on November 16, 2015, Shafts notified Araujo that the PSA
25 was consulting with its lawyer and would not be able to meet at the suggested times, but
26 would be in touch shortly to schedule a time to meet.

¹² Although the second sentence of this paragraph appears to agree with the Association's position, it contradicts the first sentence of the paragraph and nothing else in the record indicates that the City was ever in agreement with the Association regarding the "dump" of 7.5 days in January 2015. Thus, I find that this sentence was simply misworded and did not reflect any agreement on the part of the City to award 7.5 days of sick leave in January 2015 and allow unit members to begin accruing 1.25 days of sick leave per month.

1 Following the November 2015 correspondence, Araujo went on a leave of absence
2 and Ann Marie Noonan (Noonan), City Labor Counsel, began corresponding with Shaw
3 about the sick leave issue. On December 17, 2015, Shaw emailed Noonan and thanked
4 her for her voicemail about the sick leave issue and stated that the PSA would respond
5 shortly. In a response email on December 17, 2015, Noonan stated in relevant part:

6 ...Because the end of the year is almost upon us, I thought it might make
7 the most sense for you and I to discuss the issue. I do not see why this is
8 something that needs to be delayed further. Members received sick leave
9 to which they were not entitled and the Library is merely seeking to remove
10 this excess time from their leave banks.

11
12 The vast majority of PSA members still have these additional 7.5 days of
13 sick leave in their sick leave banks. Accordingly, the Library's plan would
14 be to merely recoup these days during the last pay period of the year from
15 the sick leave banks. For the few (three) employees who have already used
16 this over accumulation the Library would [be] recouping this time over the
17 first few pay cycles of 2016.

18
19 Please give me a call at your earliest convenience to discuss this as time is
20 of the essence at this point. If we do not hear from you, the Library will work
21 to directly notify employees of this plan.

22
23 Shaw's December 22, 2015 email response was as follows, in relevant part:

24 As the PSA has previously explained, the City's belated position on this
25 issue is incorrect.

26
27 As you know, during the last round of negotiations, the City sought from the
28 PSA a concession on sick leave, namely converting the system from bi-
29 annual to monthly accruals. During discussions on the subject, the PSA
30 expressed concern that the transition of systems could leave some PSA
31 members without sufficient sick leave to use in an emergency. Thus, the
32 City agreed to award 7.5 days to PSA members on Jan. 1, 2015, which was
33 coterminous with the initiation of the new monthly accrual. The City made
34 this agreement in exchange for the PSA's agreement to the City's proposed
35 concession. That the PSA would agree to this concession without obtaining
36 a quid pro quo to protect its most vulnerable members is unlikely. Notably,

1 the City's practice on Jan. 1 comported with the agreement made at the
2 bargaining table.

3
4 The PSA's position has been clearly communicated to the City in the past,
5 promptly and in writing. Your suggestion that the PSA has been dilatory in
6 responding to the issue is misplaced.

7 For the City to recoup the sick leave would be a hallmark violation of
8 Chapter 150E. Not only would it be a unilateral change, but it would be a
9 repudiation of its prior agreement during contract negotiations. And, even
10 if there theoretically were merit to the City's position, the City certainly
11 waived its position by awarding the sick leave on Jan. 1 and then waiting
12 more than six months to express a view contrary to its practice. (Emphasis
13 in original) This is, of course, well past any grievance timeline or period of
14 limitations at the DLR.

15 * * *

16
17
18 By email dated December 24, 2015, Noonan responded to Shaw as follows:

19
20 It appears there may be some confusion on your end regarding the issue.
21 We are in agreement that the City agreed to award 7.5 days of sick leave
22 on Jan. 1, 2015, that is not the issue. As I indicated in my prior email, the
23 parties further agreed that beginning on July 1, 2015, the sick leave would
24 be converted to a monthly accrual rather than a two time per year dump of
25 time. Accordingly, on July 1, 2015, PSA employees were not to receive an
26 additional 7.5 days of sick leave for the year, but were instead to begin
27 accruing time on a monthly basis. However, due to an inadvertent error, the
28 7.5 days of sick leave were in fact "dumped" into the PSA members' sick
29 leave banks. In addition, they began accruing sick leave on a monthly
30 basis.¹³ As a result, at this time, they have received an additional 7.5 days
31 of sick leave above and beyond that which was agreed to in the contract.
32 The City is merely looking to recoup the 7.5 additional days of sick leave
33 that were inadvertently "dumped" into your members' sick banks giving
34 them more than the 15 days agreed to for the year.

35
36 The PSA has not previously explained anything regarding this matter.
37 Instead, they have repeatedly indicated that they need to have further
38 internal discussions and will get back to the Library. Moreover, they have

¹³ Noonan clarified in a later email that this erroneous award of 7.5 days occurred in January 2015 rather than July 2015, and that employees began accruing sick leave on a monthly basis in January 2015, and not July 2015.

1 refused to meet and/or discuss this issue. Accordingly, if the Library were
2 to move forward with notifying employees that it intends to recoup this over
3 provision of sick leave it would not be in violation of Chapter 150E since the
4 PSA has refused to meet and/or discuss this issue, leaving the Library no
5 option but to communicate directly with employees. Further, it would not
6 constitute a unilateral change nor be a repudiation of the agreement, but
7 merely fixing a clerical error.

8 * * *

9
10
11 I suggest we set up a time to discuss this matter on Monday so that the
12 Library can move forward with informing employees before the end of next
13 week (when the new year takes effect) about the error and the need to
14 resolve the issue. The Library has been and continues to be willing to
15 discuss this and how to work with the 3 individuals who used additional sick
16 leave to which they were not entitled, but cannot continue to delay.

17
18 After a few more email exchanges about the issue, in which Noonan and Shaw
19 continued to disagree, by email dated January 11, 2016, Shaw advised Noonan of the
20 following:

21 Following a meeting of its E-Board, the PSA stands by its position that there
22 was no error in the 2015 award of sick time. It is therefore the PSA's
23 position that the City may not recoup any sick time provided in 2015. Thank
24 you.

25
26 In a response email that same day, Noonan asked Shaw if the PSA had anything
27 in writing to support its position. He responded on the same day by email that there did
28 not "appear to be a writing between the parties." By email dated January 26, 2016,
29 Noonan advised Shaw, in relevant part:

30 The City and Library strongly disagree with the Union's position on this
31 matter. The CBA previously provided that on each January 1 and each July
32 1 employees within the bargaining unit would receive 7.5 days of sick leave
33 for use during the 6 month period, this resulted in a total of 15 days of sick
34 leave per year, consistent with (or in many cases more than) other City

1 bargaining units. Note that no other bargaining unit in the City receives
2 more than 15 days annually.

3
4 During the last round of bargaining, as reflected in the parties' MOA, the
5 parties reached agreement on January 17, 2014, that effective January 1,
6 2015, employees would begin to accrue sick leave at the rate of one and a
7 quarter (1.25) days for each month of actual service. The City agreed to
8 delay implementation of this change for a full year in order to allow
9 employees to adjust to the change. It should be noted that this change
10 allowed employees to continue to accrue up to 15 sick days throughout the
11 year.

12
13 There was no agreement to provide an additional 7.5 days to employees in
14 January 2015 nor to provide them with more than 15 days in a given year.
15 It is worth noting that since at least Jan. 1981 this unit has never received
16 more than 15 days in a given year. Such an important change would clearly
17 have been memorialized between the parties.

18
19 Accordingly, the City and Library stand by their position that the additional
20 time provided in January of 2015 was an inadvertent error that the Library
21 seeks to fix immediately. The Library through its Human Resources
22 Manager Claudia Araujo first notified the Union during the Fall of 2015 of
23 this issue and its desire to meet with the Union to discuss this issue. The
24 Union responded, indicating that they disagreed with the Library and that
25 their attorney was reviewing the matter and therefore they were not
26 available to meet during the dates/times provided by the Library.
27 Thereafter, Ms. Araujo again raised this issue in November and sought to
28 meet with the Union. The Union did not respond to those attempts.
29 Accordingly, my office reached out to you in mid-December via email and
30 voicemail to try to resolve this matter and/or meet with the Union to discuss
31 this issue. The Union has continued to refuse to meet.

32
33 Since the Union has refused to meet to discuss this matter and the impacts
34 it might have on its members, the Library believes the parties are at impasse
35 and plans to notify employees by February 5 that this additional time will be
36 recouped on February 19. For those employees who do not have sufficient
37 time remaining in their sick leave banks the Library will notify them of this
38 and provide them an opportunity to meet with Human Resources to discuss
39 how such time will be recouped.

1 The Library remains willing to discuss the impacts with you, but should we
2 not hear back from you prior to next Friday, January 29, we will move
3 forward as described above.

4
5 By email on January 29, 2016, Shaw responded:

6 There is no "impasse." An impasse can occur only within the confines of
7 good faith negotiations. In fact, what will have happened if the City follows
8 through on its threatened action is that the City will have repudiated its
9 agreement with the PSA and done so more than a year after the agreement
10 was made and implemented.

11
12 By email on February 1, 2016, Noonan replied:

13
14 There was no agreement to provide PSA with both a "dump" of 7.5 days
15 and an annual accrual of 15 days last year. Instead, the agreement, as
16 written in the parties' memorandum of agreement, was to phase out the
17 "dumps" of sick leave in 2014 and beginning on 1/1/2015 to have employees
18 accumulate sick days on a monthly basis up to 15.

19
20 As the Library has repeatedly explained the dump of time was an error that
21 they are merely looking to correct. Since PSA remains unwilling to meet
22 and bargain the impacts correcting this error will have, the Library will have
23 to move forward as indicated.

24
25 On March 4, 2016, Araujo sent letters to bargaining unit members that stated, in

26 relevant part:

27 As you know, pursuant to the Memorandum of Agreement reached with the
28 Professional Staff Association ("PSA"), effective January 1, 2015, the
29 Library transitioned its Sick Leave Benefits awards for members of PSA
30 from a biannual award of 7.5 Sick Leave days (yearly total of 105.00 hours)
31 on January 1 and July 1 to a monthly accrual system of 1.25 Sick Leave
32 days per month (yearly total of 105.00 hours).

33
34 It has come to the Library's attention that there was an erroneous award of
35 Sick Leave during this transition. Specifically, in addition to the monthly
36 accrual employees were supposed to begin receiving on January 1, 2015,
37 employees also received an award of 7.5 sick days on January 1, 2015.
38 This resulted in employees receiving up to an extra 7.5 days of sick leave
39 (or up to 52.50 hours) during 2015. Pursuant to your collective bargaining

1 agreement, as a member of PSA you may earn up to the equivalent of three
2 weeks of Sick Leave, or 105.00 hours, per calendar year. Our records
3 indicate that as of December 31, 2015, 149.02 hours of Sick Leave were
4 awarded to you during calendar year 2015. Therefore, 44.02 hours were
5 erroneously awarded to you during calendar year 2015 as a result of the
6 error described above.

7
8 In order to resolve this issue, it is the Library's intention to adjust your sick
9 leave balance and remove the additional 44.02 hours of sick leave
10 inadvertently awarded.¹⁴ The Library plans to initiate processing this
11 corrective action starting the week of March 21, 2016. We anticipate this
12 adjustment to be reflected on your paystub/hub by April 8, 2016.

13
14 If you have any questions about this adjustment and/or would like to request
15 an alternative to the corrective plan described above, please contact me by
16 March 11, 2016.

17 Araujo sent similar letters to managers and union-exempt staff on March 4, 2016,
18 notifying them that BPL would recoup the 7.5 hours of sick leave it erroneously awarded
19 to them in January 2015 when they were transitioned to the monthly accrual system. The
20 BPL's other bargaining unit employees, represented by AFSCME Council 93 (AFSCME)
21 did not receive additional sick leave in 2015 because AFSCME did not agree to switch
22 from the biannual award of 7.5 days to a monthly accrual system.

¹⁴ The letters sent to unit members varied with respect to the stated number of hours that were inadvertently awarded and had to be recouped. In addition, the BPL gave a different recoupment schedule to the unit members who would have been left with a negative sick leave balance.

1

2

3

6

1 In determining whether an employer and a union reached an agreement, the CERB
2 considers whether there has been a meeting of the minds on the actual terms of the
3 agreement. Town of Ipswich, 11 MLC 1403, 1410, MUP-5248 (February 7, 1985), aff'd
4 sub nom., Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113
5 (1986). To achieve a meeting of the minds, the parties must manifest an assent to the
6 terms of the agreement. Suffolk County Sheriff's Department, 30 MLC 1, 6, MUP-2630
7 (August 19, 2003). The CERB has long recognized that a meeting of the minds can occur
8 without an agreement being reduced to writing or signed by either party. Chief Justice
9 for Administration and Management of the Trial Court, 35 MLC 171, 173, SUP-04-5150
10 (January 30, 2009) (an oral agreement between a public employer and a union is effective
11 and enforceable under the Law if the agreement is otherwise valid) (citing Service
12 Employees International Union, Local 509 v. Labor Relations Commission, 410 Mass.
13 141, 145 (1991)).

14 In this case, the evidence does not establish that there was a meeting of the minds.
15 Although three Association witnesses testified that the Association made an oral
16 agreement with the City in January 2014, none of these witnesses were present at the
17 conversation during which the agreement was allegedly made.¹⁵ Rather, they testified

¹⁵ The City asks that I make a negative inference based on the fact that Talwani was not called as a witness to testify about the alleged conversation. Although the Association explained that Talwani is now a federal judge, it offered no explanation as to why it did not call her as a witness in this case. Accordingly, an adverse inference is appropriate. See, Bellingham Teachers Association, 9 MLC 1536, 1548, MUPL-2336 (December 30, 1982) ("When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.")

1 that Talwani told them that she made the agreement with Valerio and Curran. Conversely,
2 Valerio was present for the conversation, and she credibly testified that she did not reach
3 that agreement with Talwani.

4 In addition to Valerio's testimony, the documentary evidence supports the City's
5 position that it never made such an agreement with the Association. Specifically, the
6 Association's last best offer to Arbitrator Altman states with regard to sick leave, "The
7 PSA is willing to modify this existing language so that sick leave accrues at the rate of
8 one and a quarter (1.25) days for each month of actual service or paid time." There is no
9 additional language that conditions this acceptance of the City's proposal on an additional
10 one-time award of 7.5 days at the beginning of the year. Indeed, the Factfinder's Report
11 concludes that "both parties agree that for Section 1 the method of accrual should be
12 changed to reflect that employees would accrue 1.25 days per month." Although the
13 Association claims that the agreement was reached regarding sick leave during
14 negotiations that occurred after factfinding, I do not find it plausible that the City would
15 have agreed to give the Association a one-time award of 7.5 sick days after the
16 Association had already agreed to the City's proposed change without being conditioned
17 on the one-time award.¹⁶ Notably, the Association offered no explanation as to why the
18 parties would have renegotiated this provision after factfinding.

¹⁶ I also find it highly unlikely that the Association would have failed to include such an agreement in the MOA.

1 Further, the Association offered no bargaining notes to bolster its position, or an
2 explanation as to why Talwani, or any other executive board member, did not have any
3 notes reflecting this agreement or even reflecting discussions about the topic of a one-
4 time award of 7.5 days. Valerio's detailed notes of the meetings that occurred after
5 factfinding, however, do not reflect any discussion about a one-time award of 7.5 sick
6 days, or even any discussion about the City's proposal.

7 The Association points to the excerpt in the BPL Weekly, which reminds unit
8 members that in addition to beginning to accrue sick leave at the rate of 1.25 day per
9 month, they would receive 7.5 sick days on January 1, 2015 for the sick time earned from
10 July 1, 2014 – December 31, 2014 as evidence that the parties reached an agreement
11 on this matter. However, Lincoln credibly testified that she believed, in error, that unit
12 members were due the 7.5 days on January 1, 2015 to cover the previous six months.
13 Once a payroll clerk contacted Araujo about the error, Araujo looked into the matter and
14 confirmed that it was, in fact, an error.¹⁷ When the Association disagreed with her that
15 the award was made in error, she gave the Association the opportunity to provide her with

¹⁷ The fact that the City also awarded 7.5 sick days to non-bargaining unit employees on January 1, 2015 in error is further evidence that the City awarded the days to the Association in error, and not because it had agreed with the Association to do so.

1 documentation to evidence that the time was awarded because of an agreement that the
2 City had made with the Association, but the Association was unable to do so.¹⁸

3 For the reasons set forth above, I conclude that the City did not enter into an oral
4 agreement with the Association to provide its members with a one-time award of 7.5 sick
5 days in January 2015, and dismiss this allegation.

6 Unilateral Change

7 In its post-hearing brief, the Association argues that the “primary legal issue” is
8 that the City unilaterally deducted sick leave from the account of every Association
9 member without notice or the opportunity to bargain in violation of Section 10(a)(5) of the
10 Law. The Complaint, however, only alleges that the City violated the Law by repudiating
11 an oral agreement, as discussed above. The Association did not file a motion to amend
12 the complaint to include a unilateral change violation, nor did it orally move to amend the
13 complaint during the hearing. However, the Association did raise the issue during its
14 opening statement at the hearing, and the City addressed the Association’s unilateral
15 change allegation in its answer to the complaint. I therefore will consider the allegation.

16 Compare Commonwealth of Massachusetts, 18 MLC 1161, SUP-3356 (October 16,
17 1991) (allegations not in complaint considered after charging party raised allegations in

¹⁸ Although the Association has not conceded that the 7.5 days of sick leave awarded in January 2015 did not represent time owed for July – December 2014, the evidence shows that unit members received their full sick leave award in 2014. Further, in its dealings with the City on this matter, the Association seemed to abandon its original position that the sick leave was owed for the previous 6 months in favor of its position that the sick leave was a concession made by the City to encourage the Association to agree to the change.

1 its opening statement and respondent responded by raising defenses to
2 those allegations) with Whitman Hanson Regional School Committee, 10 MLC 1606,
3 MUP-5249 (May 17, 1984) (allegations not in complaint not considered where neither
4 party raised the issue in its opening statement or argued the merits of the issue in its
5 brief).

6 An employer is obligated to provide the exclusive representative an opportunity to
7 negotiate before changing an existing condition of employment or implementing a new
8 condition of employment involving a mandatory subject of bargaining. Commonwealth of
9 Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989). The employer's
10 obligation to bargain extends to working conditions established through past practice as
11 well as those specified in a collective bargaining agreement. Town of Burlington, 35 MLC
12 18, MUP-04-4057 (June 30, 2008), aff'd sub nom. Town of Burlington v. Commonwealth
13 Employment Relations Board, 85 Mass. App. Ct. 1120 (2014). To establish a violation, a
14 union must demonstrate the following: 1) the employer altered an existing practice or
15 instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3)
16 the change was established without prior notice and an opportunity to bargain. Town of
17 Shrewsbury, 28 MLC 44, MUP-1704 (June 29, 2001). To determine whether a practice
18 exists, the CERB analyzes the combination of facts upon which the alleged practice is
19 predicated, including whether the practice has occurred with regularity over a sufficient
20 period of time so that it is reasonable to expect that the practice will continue.
21 Commonwealth of Massachusetts, 23 MLC 171, SUP-3586 (January 30, 1997).

1 The Association argues that the City changed its existing practice of sick leave
2 when it deducted 7.5 days of sick leave from the entire bargaining unit in March 2016. It
3 contends that the award of sick leave was not an error¹⁹ because the change was
4 reported in an email from Lincoln to Association executive board members, and published
5 in the BPL Weekly, which went to all library staff. Further evidence that the time was not
6 awarded in error is the fact that following the email and the release of the BPL Weekly,
7 nobody contacted Lincoln to advise her that she was making an error.

8 As described above, I have determined that the award of sick leave was made in
9 error, and Lincoln's actions in sending the email and including the information in the BPL
10 Weekly were due to her mistaken belief that the 7.5 sick leave days were owed for the 6
11 months prior to January 2015. There is no credible evidence that the City owed the unit
12 members sick leave for July – December 2014, or that it agreed to a one-time payment
13 during successor negotiations, as detailed above. The fact that nobody alerted Lincoln
14 of the error after receiving her email and the BPL Weekly does not persuade me
15 otherwise. Consequently, I conclude that the City did not change an existing practice
16 when it deducted the sick leave from employees in March 2016.²⁰

¹⁹ The Association also argues that even if the City awarded the time in error, it was not a "clerical error," as stated by the City, because it was not "an error made in copying or writing" as defined by Black's Law Dictionary. Although I have concluded that the City did award the time in error, the type of error is not relevant to my decision.

²⁰ In addition, even if the January 2015 award was not made in error, the parties did not have an established practice of awarding unit members 7.5 days of sick leave in January while simultaneously accruing 1.25 sick days per month. See, Town of Haverhill, 42 MLC 273, MUP-13-3066 (May 24, 2016) (single incident is insufficient to establish past practice).

1 Relying on Daycon Prod. Co., Inc., 357 NLRB 508 (2011), the Association further
2 argues that even if BPL had made a mistake, it was not permitted to unilaterally rescind
3 the sick leave. That case is distinguished, however, because the National Labor
4 Relations Board (Board) determined that the employer could not rescind overpayments
5 when it made an error in computing wages years prior to the current contract, and the
6 error was relied upon in computing wages for the current contract.²¹ Here, the City
7 corrected the error while the contract under which it was made was still in effect, it did not
8 take years for the City to discover the error, and the error was not relied upon in further
9 calculations.²²

10 The Association also contends that even if the City was correct that there was
11 never an agreement to award 7.5 days of sick leave on January 1, 2015, the City itself
12 violated the Law when it did so because providing enhanced benefits unilaterally is
13 unlawful.²³ In this scenario, if the Association had filed a charge of prohibited practice

²¹ Further, in ruling on an enforcement petition, the court remanded the case to the Board to expressly apply or distinguish the “sound arguable basis” test, which states that “where an employer has a ‘sound arguable basis’ for its interpretation of a contract and is not motivated by union animus or...acting in bad faith,” the Board *ordinarily* will not find a violation.” National Labor Relations Board, 512 Fed. Appx. 345 (4th Cir. 2013).

²² The NLRB has held in other cases that an employer may recoup an erroneous overpayment of wages without bargaining. See, e.g., Eagle Transportation Corp. & Int’l Brotherhood of Teamsters, Georgia-Florida Conference, AFL-CIO, 338 NLRB 489 (2002).

²³ The Association cites to Lenawee Stamping Corporation d/b/a Kirchhoff Van-Rob, 365 NLRB No. 97 (June 14, 2017) for this proposition. In that case, the employer granted raises and bonuses to employees without first notifying and bargaining with the union. Unlike the present situation, the employer did not do this in error.

1 protesting the award of additional sick days, the DLR would order the City to rescind the
2 sick leave only upon the Association's request. Therefore, it "defies logic" for the City to
3 assert that it was unilaterally authorized to rescind sick leave when it would only have
4 been allowed to do so following a finding of prohibited practice if the Association
5 requested it. With this argument, however, the Association is disregarding the fact that
6 the City awarded the sick leave in error, and not as an "enhanced benefit."²⁴

7 Further to its argument that the City should not be permitted to rescind the
8 unilateral change of awarding extra sick leave, the Association asserts that had sick leave
9 been deducted on January 1, 2015, rather than deposited, the Association would have
10 had six months to file a charge of prohibited practice. According to the Association, even
11 though the City could not have filed a charge against the Association for accepting the
12 benefits offered, it would be inequitable and patently unfair to allow an employer to recoup
13 a benefit it offered when it did not raise any issues for more than six months. I am not
14 persuaded that the City should not be permitted to rescind the benefits over six months
15 after they were erroneously awarded as there is no legal basis for this argument. In
16 addition, even if this argument were valid, the City notified the Association of its error in
17 July 2015, approximately three months after Araujo was made aware of the error by a
18 payroll clerk.

²⁴ Moreover, the City only unilaterally rescinded the sick leave after numerous unsuccessful attempts to discuss the issue with the Association.

1 Even if the City had an obligation to bargain about the impacts of the decision,²⁵
2 the Association waived its right to bargain through its inaction. Specifically, the City made
3 multiple offers to bargain over the course of several months, to which the Association
4 refused. Because I am dismissing the unilateral change allegation on other grounds, I
5 need not address this any further.

6 For the reasons set forth above, I conclude that the City was not required to bargain
7 about its decision, or the impacts of its decision, to rescind 7.5 days of sick leave from
8 unit members.

9 Conclusion

10 Based on the record and for the reasons explained above, I find that the City did
11 not violate the Law when it rescinded 7.5 days of sick leave from unit members in March
12 2016. Accordingly, I dismiss the complaint.

²⁵ This case can be distinguished from cases in which the CERB has held that the employer must bargain over the method and means by which it recoups an overpayment of wages, as this case does not involve wages, but rather sick leave. See, e.g., Millis School Committee, 23 MLC 99, MUP-9038 (October 8, 1996). However, even if the City was obligated to bargain over the way in which it recouped the sick leave, the Association waived its right to bargaining by inaction, as explained above. Further, a remedy involving an impact bargaining order and a return of the sick leave to employees would be impractical. See, Commonwealth of Massachusetts, 4 MLC 1869, SUP-2156, SUP-2159 (April 13, 1978), aff'd sub nom., Group Insurance Commission v. Labor Relations Commission, 381 Mass. 199 (1980) (CERB declines to order employer to refund overpayment to employees pending impact bargaining because employees would then have to return the money to the employer, creating additional administrative expenses and not conferring any ultimate benefit on anyone).

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KERRY BONNER

APPEAL RIGHTS

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