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

In the Matter of	*	Case No. MUP-17-5924
CITY OF BOSTON	*	Date Issued: January 7, 2020
and	*	
SALARIED EMPLOYEES OF NORTH AMERICA, LOCAL 9158	*	

CERB Members Participating:

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

Appearances:

Robert J. Boyle, Jr., Esq.	-	Representing the City of Boston
Alfred Gordon O'Connell, Esq.	-	Representing SENA, Local 9158

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

The issue before the Commonwealth Employment Relations Board (CERB) on appeal is whether the City of Boston (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally changing the criteria by which Salaried Employees of North America, Local 9158 (Union) bargaining unit members accrue vacation leave. In an opinion dated September 6, 2019, a Department of Labor Relations (DLR) Hearing Officer concluded that the City violated the Law in the manner alleged. After reviewing the hearing record and the parties'

arguments on appeal, the CERB affirms the decision for the reasons set out below and in the Hearing Officer's decision.

Facts

The facts of this case center on the provisions of the various collective bargaining agreements and policies that address when and under what circumstances a bargaining unit member's use of paid, unpaid, authorized and unauthorized leave in a calendar year delays when the bargaining member is eligible to use the vacation leave that he or she ordinarily accrues on January 1 of the following year.[2] The City does not dispute any of the Hearing Officer's lengthy and detailed findings regarding this issue. We therefore adopt those findings and provide a brief, chronological summary of the relevant findings below. Further reference may be made to the Hearing Officer's decision, reported at 46 MLC 52 (2019).

Article XVI, Section 4 of the parties' 2006-2010 collective bargaining agreement (CBA) requires any employee, who, in the previous calendar year, has been absent "with or without authorization" for more than 60 days, excluding authorized vacation leave to complete 120 days of actual work in the following calendar year, before they were "vacation eligible." Unlike subsequent provisions and policies, the 2006-2010 provision did not differentiate between the types of absences that would count towards the 60 days, except to exclude vacation leave from the calculation.

2010-2016 Version of Article XVI, Section 4

[2] The parties use the term "vacation drop" to refer to when employees receive vacation leave that they are eligible to use.

In 2013, the parties executed two separate Memoranda of Agreement extending the terms of the 2006-2010 CBA with certain changes, including a complete change to Article XVI, Section 4. The revised provision stated:

> Any employee on an authorized leave of absence shall accrue or not accrue vacation time in accordance with the City's Family & Medical Leave Policy (Medical Leave Policy) or Military Leave Policy, whichever is applicable.

Medical Leave Policy

The parties incorporated the Family and Medical Leave Policy (Medical Leave Policy) referred to in the 2010-2016 version of Article XVI, Section 4 into their CBA in 2013. The Medical Leave Policy describes three different types of family and medical leave: Leave up to 12 Months due to Medical Condition; Leave of up to 12 Months due to Childbirth or Adoption; and Leave of up to 12 or 26 Weeks under the Family and Medical Leave Act. This policy begins with an Overview, which states:

> The City provides a variety of different leave periods depending on an employee's length of service and the specific reasons for the leave of absence. **The specific provisions applicable to family and medical leaves are set forth below.** (Emphasis added).

The Medical Leave Policy then contains separate sections devoted to each type of leave. Each of those sections has a subsection entitled "Effect of Leave on Vacation Accrual" (Accrual Provision). The Accrual Provision is the same for all three types of leave, and states in pertinent part:

> Any use of leave (be it paid or unpaid) sick, vacation, personal, no paid LOA, in the previous calendar year, that, when combined, exceeds 12 weeks (60 days) excluding two weeks of vacation, that employee [sic] will be eligible for vacation only once they've made up, in actual work the total length of the absence or 6 months, whichever is less. Actual work equal to the length of the authorized absence or six (6) months shall begin to run on the day the employee returns from the last leave of absence.

This provision continued with the following example:

> An employee takes a medical leave for six months commencing August 1, using accrued vacation time during the first month of the leave. When the employee returns to work on February 1, the employee must work for six months (until August 1) before he will earn the vacation time that he would have earned January 1 had he been at work at that time. Any period or periods during this six months for which an employee is not paid shall extend the six months by that amount of time.

2017 Vacation Memo

In 2016, the City distributed a memorandum to certain human resource employees entitled "2017 Vacation Eligibility Provisions" (2017 Vacation Memo). Like the Medical Leave Policy described above, the 2017 Vacation Memo contained a section entitled "Effect of Leave on Vacation Accrual," which, despite referencing the Medical Leave Policy, contained different language and terms. The 2017 Vacation Memo Accrual Policy stated:

> Any use of leave (be it paid or unpaid) sick, vacation, personal, no paid LOA, in the previous calendar year, that, when combined, exceeds 12 weeks (60 days) excluding two weeks of vacation, that employee [sic] will be eligible for vacation only once they've made up, in actual work the total length of the absence or 6 months, whichever is less.

The 2017 Vacation Memo provided three examples of its intended operation, all of which were different from the examples in the Medical Leave Policy. One such example stated:

> A 35 hr. employee used sick time and personal and vacation time which totaled 455 hours. His last absence was December 12. This employee must actually work 455 hours starting on December 13 before he is entitled to vacation again.

This section of the 2017 Vacation Memo concluded with the following statement:

> Absences used in the past calendar year to determine vacation eligibility **OVER 12 WEEKS** = NO Vacation January 1st

> Employees who have used any combination of the following absences **must make up time in actual work** before they are entitled to vacation in the new calendar year. (Emphasis in original).

The absences listed after this paragraph included the three types of family and medical absences covered under the Medical Leave Policy and more than ten others, including "suspension," "AWOL," "Tardy," Dock/Loss Time" and "Personal."

Implementation of 2017 Vacation Memo

In or around January 2017, two bargaining unit members informed the Union president that they had not received their vacation drop for 2017. Both employees had taken a medical leave during 2016 in addition to using unrelated vacation leave during 2016. The Hearing Officer found, and the City does not dispute, that this was the first time that the Union president had received a complaint of this nature from any members of the bargaining unit.[3] The bargaining unit members were both 35 hour per week employees. One of them had used 328 hours of sick time in 2016, in addition to 196.75 hours of vacation independent of her medical leave. The other missed 378 hours when she was on a medical leave and used 133 hours of vacation before the medical leave began. Upon investigating the members' complaints, the Union president contacted a City payroll employee who forwarded the 2017 Vacation Memo to him. The Union president had never seen the Memo before, nor any of its previous iterations.

Hearing Officer Decision

Based on these facts, the Hearing Officer made three key findings that the City contests on appeal. 1) that the parties' 2010-2016 CBA provides that an employee

[3] The Hearing Officer rejected the City's assertion that the charge was untimely. The City did not appeal from this determination.

receive his or her annual vacation drop on January 1 *unless* the Medical Leave Policy or the Military Leave Policy applies to his or her "authorized" leave of absence; 2) "by its plain meaning," the Medical Leave Policy affects vacation accrual only under the three types of leave expressly contemplated in the Medical Leave Policy itself; and 3) the 2017 Vacation Memo differs from, and expands the Medical Leave Policy by including *all* types of leave, whether paid or unpaid, or authorized or unauthorized, in determining whether and when employees would be eligible to take vacation in the calendar year following those leaves.

Based on these findings, the Hearing Officer concluded that the City violated Section 10(a)(5) and, derivatively Section 10(a)(1) of the Law by altering the criteria for a delay in vacation accrual without giving the Union prior notice and an opportunity to bargain to resolution or impasse. As discussed below, we agree.

Opinion[4]

A public employer violates its duty to bargain in good faith when it implements a change in a mandatory subject of bargaining without first giving the exclusive representative of the affected employees notice and an opportunity to bargain to resolution or impasse about the change. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). On review, the City argues, as it did to the Hearing Officer, that there has been no change in its vacation accrual policy. However, for all the reasons stated in the Hearing Officer's decision and below, we agree that the 2017 Vacation Memo, as written and applied, differed from Article XVI, Section 4 of the 2010-2016 CBA and the Medical Leave Policy incorporated therein because the 2017 Vacation

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

Memo counted *all* types of authorized and unauthorized leave, and not merely the three types of Family and Medical Leave described in the Medical Leave Policy, towards the calculation of whether employees were eligible to take vacation. None of the City's arguments on review persuade us otherwise.

The City first claims that the Hearing Officer erred by failing to consider the import of the fact that, in negotiating a revised Article XVI, Section 4, they eliminated the section that excluded all vacation leave from the eligibility calculation. According to the City, this demonstrates that the parties intended in 2013 that *all* types of leave, and not merely the three listed in the Medical Leave Policy, would be factored into the calculation of when bargaining unit members get their vacation drop. However, this argument ignores all of the other changes that the parties made to Article XVI, Section 4 in the 2010-2016 CBA, including, most significantly, the references to, and incorporation of, the Medical Leave Policy. For the reasons carefully explained by the Hearing Officer, when the 2010-2016 version of Article XVI, Section 4 and the Medical Leave Policy are read as a whole, it is clear that only the three types of family and medical leaves described in the Medical Leave Policy affect vacation eligibility. Moreover, this analysis does not render the elimination of the total vacation exclusion irrelevant, as the City suggests. As the example in the Medical Leave Policy illustrates, bargaining unit members can use accrued vacation time during all or part of their leave. Thus, the elimination of the total vacation exclusion ensures that an employee's use of vacation time during a family or medical leave will be counted towards determining when the employee receives his or her vacation drop.

The City makes several additional arguments, including that the Hearing Officer erred by interpreting the Medical Leave Policy; that the Hearing Officer's interpretation

would lead to an absurd result; and, in any event, there was no change. The City finally argues that even if there were a change, it is only de minimis. We are not persuaded by these arguments

First, because the CBA clearly references the Medical Leave Policy, which is incorporated into the CBA, the Hearing Officer committed no error by interpreting the Medical Leave Policy to render his decision. Second, as evidenced by the textual analysis above, there clearly was a change. Although the City argues that the Hearing Officer's interpretation of the new Section XVI, Section 4 would lead to an absurd result, in that employees taking family or medical leave of over twelve weeks would be subject to a delay in their vacation drop, while employees taking unauthorized leave would not, the City's argument again ignores the plain language of the revised Article XVI, Section 4 and the Medical Leave Policy incorporated therein. [5] Unlike Article XVI, Section 4 of the 2006-2010 CBA, which expressly included unauthorized leave in its calculation of vacation eligibility, the revised provision contains no reference to unauthorized leave at all. A comparison of the two provisions demonstrates that if the parties had intended to continue to include unauthorized leave in the vacation drop calculation, they knew how to do so.

Finally, the City claims that the change found is de minimis because it only delays the vacation drop but does not eliminate it altogether. However, when an employee can take vacation is a mandatory subject of bargaining. Massachusetts Port Authority, 26 MLC 100, 101, UP-2624 (January 14, 2000) (criteria for granting vacation leave is a

[5] The Union responded to this argument, calling it "hyperbolic" and noting the City had not offered evidence that any employee had exceeded twelve weeks of non-medical leave in a single year, and that it seemed unlikely the City would continue to employ someone whose unauthorized leave exceeded twelve weeks.

mandatory subject of bargaining; City of Revere, 21 MLC 1325, 1327, MUP-8793 (September 30,1994) (the manner in which vacation leave is distributed is a mandatory subject of bargaining). Here, because bargaining unit members' vacation eligibility can be delayed for up to six months if they exceed twelve weeks of leave, we disagree that the City's unilateral decision to include all paid, unpaid, authorized and unauthorized leave in its calculation has only a de minimis effect on bargaining unit members' terms and conditions of employment.

Conclusion

For the reasons set forth above and in the Hearing Officer's decision, we conclude that the City violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law when it unilaterally changed the criteria by which Union members accrue vacation leave without giving the Union prior notice and an opportunity to bargain to impasse. and issue the following Order.

ORDER

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

1. Cease and desist from:

   a. Refusing to bargain collectively with the Union by failing to negotiate with the Union about the criteria for granting vacation leave; and

   b. Imposing a vacation eligibility policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision.

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

   a. Upon request, bargain collectively with the Union about the criteria for granting vacation leave;

b. Rescind the unilateral imposition of a vacation eligibility policy on the Union, as embodied in the 2017 Vacation Memo, until the City has bargained to resolution or impasse regarding the criteria for granting vacation leave;

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

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

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

NOTICE TO EMPLOYEES

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

The Commonwealth Employment Relations Board (CERB), the appeals body within the Massachusetts Department of Labor Relations (DLR) has held that the City of Boston (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by implementing a vacation eligibility policy without giving SENA, Local 9158 (Union) prior notice and opportunity to bargain to resolution or impasse.

The City posts this Notice to Employees in compliance with the CERB's Order.

WE WILL NOT refuse to bargain collectively with the Union by failing to negotiate with the Union about the criteria for granting vacation leave.

WE WILL NOT refuse to bargain collectively with the Union by imposing a vacation eligibility policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision to impose a vacation eligibility policy.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

- Upon request, bargain collectively with the Union about the criteria for granting vacation leave; and

- Rescind the unilateral implementation of a vacation eligibility policy on the Union until the City has bargained to resolution or impasse with the Union regarding the criteria for granting vacation leaves.

_____ _____

City of Boston Date