

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

CITY OF BOSTON

and

SALARIED EMPLOYEES OF
NORTH AMERICA, LOCAL 9158

*

*

*

*

*

*

*

*

Case Number: MUP-17-5924

Date Issued: September 6, 2019

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Robert J. Boyle, Jr., Esq. Representing the City of Boston

Jillian M. Ryan, Esq. Representing SENA, Local 9158

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this matter is whether the City of Boston (City) violated Section
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter
3 150E (the Law) by, in or around January 2017, unilaterally changing the criteria by
4 which SENA, Local 9158 (Union) bargaining unit members accrue vacation leave
5 without giving the Union prior notice and an opportunity to bargain to resolution or
6 impasse.¹ Based upon the record, and for the reasons explained herein, I find that the
7 City violated the Law.

¹ The Complaint alleges that prior to January 2017, the City required bargaining unit members who missed more than sixty days of work in a calendar year due to the use of medical leave to either make up the hours of actual work missed or complete six

STATEMENT OF THE CASE

On April 11, 2017, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On July 28, 2017, a DLR Investigator conducted an in-person investigation of these allegations. On August 15, 2017, the Investigator issued a Complaint of Prohibited Practice (Complaint) alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On August 29, 2017, the City filed its Answer to the Complaint.

13 STIPULATIONS OF FACT

Additionally, the Union indicated that its “primary focus” would be the way the City is applying its medical leave policy to vacation accrual and eligibility. This focus also falls within the scope of the Complaint.

- 1 1. The City of Boston is a public employer within the meaning of Section 1 of M.G.L.
2 c. 150E.
- 3
- 4 2. Salaried Employees of North America, Local 9158 is an employee organization
5 within the meaning of Section 1 of M.G.L. c. 150E.
- 6
- 7 3. Salaried Employees of North America, Local 9158 is the exclusive bargaining
8 representative for administrative and supervisory personnel employed by the City
9 and assigned to work in various departments.
- 10
- 11

FNIDINGS OF FACT

Relevant Provisions of July 1, 2006 – September 30, 2010 Collective Bargaining Agreement

Article XVI. Vacation Leave

Section 2. Effective January 1, 1989, vacation leave shall be calculated on each January 1 as follows;²

- 20 A) An employee who starts work before July 1, and who works for one
21 hundred and twenty (120) days of actual work shall be entitled to one
22 (1) week of vacation before December 31. An employee who starts
23 work after July 1, shall receive one (1) week of vacation leave upon the
24 completion of one hundred and twenty (120) days of actual work....
- 25
- 26 B) An employee who on January 1, has more than one hundred and
27 twenty (120) days of actual work, and up to fourteen (14) years of
28 service, shall receive four (4) weeks of vacation leave.
- 29
- 30 C) An employee who on January 1, has more than fourteen (14) years of
31 service shall receive five (5) weeks of vacation leave.
- 32
- 33 D) An employee who on January 1 has more than thirty (30) years of
34 service shall receive six (6) weeks vacation leave.
- 35

36

37
38 Section 4. Any employee who has been absent with or without authorization for
39 a total of more than sixty (60) days excluding authorized vacation leave in any
40 one calendar year must complete one hundred and twenty (120) days of actual
41 work to be vacation eligible as outlined in Section 2. Any period or periods
42 during this one hundred and twenty (120) days of actual work in which the
43 employee is absent with or without authorization (including as little as one (1)

² The parties colloquially refer to this as the "vacation drop."

day) shall extend the effective date of vacation eligibility. The one hundred and twenty (120) days of actual work shall begin to run on the day the employee returns from the last period of absence in the calendar year in which the employee has exceeded the sixty (60) day limit.

Relevant Provisions of October 1, 2010 – September 30, 2016 Collective Bargaining Agreement³

Article XVI. Vacation Leave

Section 2. Effective January 1, 1989, vacation leave shall be calculated on each January 1 as follows;

- A) An employee who starts work before July 1, and who worked for six months shall be entitled to one (1) week of vacation before December 31. An employee who starts work after July 1, shall receive one (1) week of vacation leave upon the completion of six months of actual work....
- B) An employee who on January 1, has more than six months of actual work, and up to fourteen (14) years of service, shall receive four (4) weeks of vacation leave.
- C) An employee who on January 1, has more than fourteen (14) years of service shall receive five (5) weeks [of] vacation leave.
- D) An employee who on January 1 has more than thirty (30) years of service shall receive six (6) weeks [of] vacation leave.

....

Section 4. 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 or Military Leave Policy, whichever is applicable.⁴

³ This integrated contract covers the periods from October 1, 2010 – September 30, 2013, and October 1, 2013 – September 30, 2016 (2010-2016 CBA). On June 12, 2013, the parties executed a Memorandum of Agreement that covered the October 1, 2010 – September 30, 2013 contract (2010-2013 MOA) and a second Memorandum of Agreement that covered the October 1, 2013 – September 30, 2016 contract (2013-2016 MOA). The 2010-2013 MOA amended Article XVI, Section 4 to its current form.

⁴ The version of the policy (Medical Leave Policy) that the parties incorporated is entitled "Medical Leave," not "Family and Medical Leave."

1 Relevant Provisions of Medical Leave Policy⁵

2
3 **Overview⁶**

4
5 The City provides a variety of different leave periods depending on an
6 employee's length of service and the specific reason for the leave of absence.
7 The different provisions applicable to family and medical leaves are set forth
8 below.
9

10 **Scope**

11
12 An employee who has completed his/her probationary period may be eligible for
13 up to twelve (12) months of unpaid leave when necessary due to a medical
14 condition, to care for a new baby, or for adoption of a child. An employee's
15 eligibility for such leave and its duration is dependent upon the City's operational
16 needs. The leave may be paid, unpaid, or a combination of paid and unpaid,
17 depending on the circumstances as specified in this policy.
18

19 In addition, in accordance with the federal Family and Medical Leave Act
20 ("FMLA"), the City will provide eligible employees with a family or medical leave
21 for up to twelve (12) work weeks in any "rolling" 12-month period, measured
22 backward from the date an employee uses any FMLA leave... FMLA leave may
23 be paid, unpaid, or a combination of paid and unpaid, depending on the
24 circumstances as specified in this policy.
25

26
27

28 All leaves above will run concurrently to the extent the employee's time off falls
29 within the parameters of any of the various leaves of absence provided by this
30 policy. For example, if an employee is eligible for an eight-week maternity leave,
31 a twelve-week FMLA leave, and a twelve-month parental leave, all leaves will
32 begin on the first day of the leave and run concurrently.
33

34 **Leave Up to 12 Months due to *Medical Condition***

35 **Eligibility**

36
37
38 Employees who have completed the probationary period may be eligible to take
39 up to twelve (12) months of continuous leave measured forward from the date

⁵ The Medical Leave Policy has an issue date of June 28, 2012, and an effective date of July 1, 2012. On June 12, 2013, the parties incorporated the Medical Leave Policy into their CBA upon executing the Memorandum of Agreement covering the October 1, 2010 – September 30, 2013 CBA.

⁶ Except where otherwise noted, all emphases appear in the original.

1 the employee first uses this leave when the employee has a medical condition
2 that causes him/her to be unable to work. This leave (and its duration) is subject
3 to the City's operational needs. This leave cannot be used intermittently.
4

5 **Substitution of Paid Time**

6

7 During a medical leave, an employee must use any accumulated paid time for
8 which the employee's leave qualifies. For instance, an employee who takes a
9 12-month leave due to illness or injury must first use his/her accumulated sick
10 time and then any additional accumulated vacation and personal time....
11

12 **Effect of Leave on Vacation Accrual**

13

14 Once an employee has been on paid or unpaid leave for over twelve (12) weeks
15 (excluding up to two (2) weeks (seventy (70) hours for employees who work a
16 thirty five (35) hour week or eighty (80) hours for employees who work a forty
17 (40) hour week) of authorized vacation), s/he will be eligible to accrue his/her
18 annual vacation only upon the completion of actual work equal to the length of
19 the authorized absence or completion of six (6) months of actual work, whichever
20 is less. Actual work equal to the length of the authorized absence or six (6)
21 months shall begin to run on the day the employee returns from the last period of
22 absence. For example, an employee takes a medical leave for six months
23 commencing August 1, using accrued vacation time during the first month of the
24 leave. When the employee returns to work on February 1, the employee must
25 work for six months (until August 1) before he will earn the vacation that he would
26 have earned January 1 had he been at work at that time. Any period or periods
27 during this six months for which an employee is not paid shall extend the six
28 months by that amount of time.
29

30 **Leave up to 12 Months due to *Childbirth or Adoption***

31

32 **Eligibility**

33

34 Employees who have completed the probationary period may be eligible to take
35 up to twelve (12) months of continuous leave measured forward from the date
36 the employee first uses this leave when such leave is due to childbirth or
37 adoption. This leave (and its duration) is subject to the City's operational needs.
38 This leave cannot be used intermittently.
39

40 **Effect of Leave on Vacation Accrual**

41

42 Once an employee has been on paid or unpaid leave for over twelve weeks
43 (excluding up to two (2) weeks, seventy (70) hours for employees who work a
44 thirty five (35) hour week or eighty (80) hours for employees who work a forty
45 (40) hour week, of authorized vacation), s/he will be eligible to accrue his/her
46 annual vacation only upon the completion of actual work equal to the length of

1 the authorized absence or completion of six (6) months of actual work, whichever
2 is less. Actual work equal to the length of the authorized absence or six (6)
3 months shall begin to run on the day the employee returns from the last period of
4 absence. For example, an employee takes a parental leave for six months
5 commencing on August 1, using accrued vacation time during the first month of
6 leave. When the employee returns to work on February 1, the employee must
7 work for six months (until August 1) before she will earn the vacation that she
8 would have earned January 1 had she been at work at that time. Any period or
9 periods during this six months for which an employee is not paid shall extend the
10 six months by that amount of time.

11
12 ***Leave of Up to 12 or 26 Weeks Under the Family & Medical Leave Act***
13 ***(FMLA)***

14
15 **Eligibility**

16
17 The City provides employees with time off pursuant to the requirements of the
18 federal Family & Medical Leave Act...

19
20 **Effect of Leave on Vacation Accrual**

21
22 Once an employee has been on paid or unpaid leave for more than twelve weeks
23 (excluding up to two (2) weeks (seventy (70) hours for employees who work a
24 thirty five (35) hour week or eighty (80) hours for employees who work a forty
25 (40) hour week) of authorized vacation), s/he must actually work for the lesser of
26 the length of the leave or six (6) months before s/he will be eligible to accrue
27 his/her annual vacation. Actual work equal to the length of the leave of absence
28 or six (6) months shall begin to run on the day the employee returns from the last
29 period of absence. For example, an employee takes a medical leave for six
30 months commencing August 1, using accrued vacation time during the first
31 month of the leave. When the employee returns to work on February 1, the
32 employee must work for six months (until August 1) before he will earn the
33 vacation that he would have earned January 1 had he been at work at that time.
34 Any period or periods during this six months for which an employee is not paid
35 shall extend the six months by that amount of time.

36
37 **General Background**⁷

⁷ Over the City's repeated objections at the hearing that doing so violated the parol evidence rule, I conditionally allowed the Union to present evidence of the parties' bargaining history for the 2010-2016 CBA and Medical Leave Policy in case I determined that the relevant language was ambiguous. In their post-hearing briefs, both parties argued that the relevant language of the 2010-2016 CBA and Medical Leave Policy is clear and unambiguous. I agree that the relevant language is clear and unambiguous and have therefore not relied on the evidence of bargaining history and the parties' intent in reaching my factual and legal conclusions. Boston School

1 The Union represents approximately 800 bargaining unit members in a City-wide
2 unit of mid-management and professional employees. The Union represents
3 employees in nearly every City-wide department, including the City's Central HR Office
4 (Central HR).⁸ The City also has human resources personnel working within most if its
5 various departments. The City's Transportation Department and Department of Public
6 Works report to one human resources group, which is part of the City's Office of the
7 Streets. Approximately once a month, the City conducts a City-wide forum (HR Forum)
8 that human resources personnel attend.

9 Joseph Smith (Smith), a thirty-three-year City employee, is Supervisor of
10 Enforcement System and Internal Operations for the City's Transportation Department,
11 and he has been the Union's President for approximately three and a half years. Prior
12 to serving as President of the Union, Smith served as Secretary, and prior to serving as
13 Secretary he served as Treasurer. As the Union's Treasurer, Smith is a signatory to
14 both the 2010-2013 MOA and the 2013-2016 MOA.

15 January 2017- Bargaining Unit Members Complain to the Union

16 In or around late January 2017, two bargaining unit members informed the Union
17 that they had not received their vacation drop for 2017. Both employees had taken a
18 medical leave during 2016 in addition to using unrelated vacation leave during 2016.
19 This was the first time that Smith had received a complaint of this nature from any

Committee, 22 MLC 1365, 1376, MUP-8125 (January 9, 1996) (no need to consider record evidence of bargaining history and the parties' intent where contract language constitutes a clear, unambiguous agreement).

⁸ The record contains no evidence that any elected Union official works or has worked in the City's Central HR office or any of the human resources offices within the various City departments since the parties settled the 2016-2016 CBA in June 2013.

1 members of the bargaining unit.⁹ The bargaining unit members were Denise Merlino
2 (Merlino), the Director of Paid Details for the Boston Police Department and a thirty-five
3 hour per week employee, and Sheila Temple (Temple), a Business Analyst in the
4 Department of Innovation and Technology and also a thirty-five hour per week
5 employee.

6 In 2016, Merlino was out on a medical leave from on or around June 23, 2016
7 through September 2, 2016, during which time she used 328 hours of sick time. Prior to
8 this, between January 4, 2016 and June 3, 2016, Merlino used 121.75 hours of
9 vacation. After her medical leave, between September 19, 2016 and December 9,
10 2016, Merlino used 75 hours of vacation. Thus, in 2016, Merlino used 196.75 hours of
11 vacation independently of her medical leave.

12 In 2016, Temple was out on a medical leave from July 18, 2016 through October
13 7, 2016. During her leave, Temple used 35 hours of sick time, 35 hours of vacation,
14 and the rest was unpaid. Excluding one week of concurrent vacation under the Medical
15 Leave Policy, Temple missed 378 hours of work. Temple used 133 hours of vacation
16 time from March 11, 2016 through July 15, 2016. Thus, in 2016, Temple used 133
17 hours of vacation independently of her medical leave.

18 Vacation Eligibility Provisions Memorandum

⁹ Although the City produced evidence that 17 bargaining unit members lost their vacation drops between January 1, 2014, the first vacation drop after the Medical Leave Policy became part of the parties' 2010-2016 CBA, and March 12, 2016, the City did not produce evidence to establish the types and dates of leave that led to the loss of the vacation drops, or that the Union, which represents approximately 800 bargaining unit members, was aware of any of these lost vacation drops.

1 As part of his investigation into the members' complaints, Smith contacted Diane
2 Curran, the employee in his department who has responsibility for processing payroll,
3 and she forwarded to him a memorandum that the City had distributed toward the end
4 of 2016 to certain human resources employees, including some bargaining unit
5 members, whose job duties include timekeeping. Although the City had been
6 distributing a similar memorandum to certain human resources employees since at least
7 2014, including some bargaining unit members, Smith had never seen this
8 memorandum before, nor had he seen any of its previous iterations from prior years; the
9 City did not circulate this memorandum, or any of its previous iterations, to the Union's
10 elected officials.¹⁰ The memorandum, entitled "2017 Vacation Eligibility Provisions"
11 (2017 Vacation Eligibility Memo), states, in relevant part:

12
13 In preparation for the new calendar year, it is important that Personnel
14 Officers/Payroll Clerks are made aware of the way vacation eligibility is
15 calculated under the provision that went into effect 7/1/12.

16
17

18
19 This policy is in effect for all employees with the exception of uniformed Fire and
20 Police, Boston Public Schools, AFSCME 1526 (BPL), and IBEW.

21
22

23
24 **The new provision that covers employees is:**

25
26 Effect of Leave on Vacation Accrual....¹¹

¹⁰ The record contains no evidence that the City ever provided these memoranda to any elected Union official, or that any elected Union official was aware that the memoranda existed. Additionally, a memorandum from 2013 exists, but expressly states that it does not apply to SENA employees.

¹¹ The 2017 Vacation Eligibility Memo here cites the Medical Leave Policy that the parties incorporated by reference into their 2010-2016 CBA at Article XVI, Section 4.

Any use of leave (be it paid or unpaid) sick, vacation, personal, no pay, LOA, in the previous calendar year, that, when combined, exceeds 12 weeks (60 days) excluding two weeks of vacation, that employee 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.¹²

EXAMPLES

Example: 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.

Example: a 40 hr. employee used a total of 432 hours using sick and personal. His last absence was on June 18.

Since this employee did not go over a total of 12 weeks (480 hours), he will be eligible for vacation on January 1st.

Example: A 35 hr. employee went on a Medical Leave of Absence on February 1 using sick leave and LOA (no pay).

He returned on September 1st. He must actually work 6 months starting September 2nd in order to receive vacation again. Any period during this 6 months that the employee is not paid extends the eligibility period.

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.

- Sick
- Sick FMLA
- Sick Pool Used
- Sick No Pay
- Sick Bereavement
- Long Term Sick
- Vacation (anything over two (2) weeks)
- Vacation FMLA (anything over two (2) weeks)

¹² The language of the 2016 Vacation Eligibility Provisions memorandum slightly differs here. It states: "Any combination of paid and/or unpaid leave that totals twelve weeks (60 days) (excluding two weeks of vacation) requires the employee to make up in actual work (regular hours) the length of their absence or six months, whichever is less." The memoranda from 2015 and 2014 here contain the same language as the 2017 Vacation Eligibility Memo. None of the memoranda otherwise materially differ.

- Suspension
- AWOL
- Unpaid Leave of Absence (Personal, Educational, Medical)
- Unpaid Leave of Absence FMLA
- Maternity/Paternity Leave of Absence
- Administrative Leave With/Without Pay
- Dock/Loss Time
- Personal
- Personal (From Sick)
- Personal FMLA Personal FMLA (From Sick)
- Tardy
- Workers Comp (LOA)

Deborah Stein (Stein), a bargaining unit member who has never held an elected position within the Union, has worked for approximately six months in the Office of the Streets as a Principal Administrative Assistant. Stein's duties include leave administration. Stein reports to Patricia Casey (Casey), the human resources director in her department.¹³ Prior to working in the Office of the Streets, Stein worked in Central HR beginning in October 2016, where she had responsibility for leave administration. While working in Central HR, Stein was not a member of the bargaining unit. Stein's current duties require her to apply the Medical Leave Policy. She has been instructed to apply it in accordance with the Vacation Eligibility Provisions memoranda, and in November 2017, after the Union filed the charge in this case, Stein gave a presentation at the HR Forum regarding leave benefits.¹⁴

¹³ Stein testified that Casey was not a Union steward or officer, but "there was something that she did" at Union meetings in an official capacity. I do not credit this vague, non-specific testimony. Casey did not testify.

¹⁴ In addition to Stein, the only other witness that the City produced was Michael Kerr (Kerr), a Senior HR Generalist in Central HR. Kerr began working in Central HR in March 2018, after the Complaint in this matter issued, had not applied the Vacation Eligibility Provisions memoranda as of the date of the hearing, and his testimony was not probative of material facts relevant to this case.

1 Temple and Merlino ultimately received their vacation dumps on or around March
2 4, 2017, in the amount of 175 hours respectively, after making up the time that the City
3 required of them.

4 OPINION

5 The issue is whether the City violated the Law by unilaterally changing the
6 criteria by which Union bargaining unit members accrue vacation leave without giving
7 the Union prior notice and an opportunity to bargain to resolution or impasse. For the
8 following reasons, I conclude that the City violated the Law.

9 Unilateral Change

10 A public employer violates Section 10(a)(5) of the Law when it implements a
11 change in a mandatory subject of bargaining without first providing its employees'
12 exclusive collective bargaining representative with notice and an opportunity to bargain.
13 School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 572
14 (1983). The duty to bargain extends to both conditions of employment established
15 through past practice and to conditions of employment established through a collective
16 bargaining agreement. Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304
17 (June 30, 2000). To establish a unilateral change violation, the charging party must
18 show that: 1) the employer altered an existing practice or implemented a new one; 2)
19 the change affected a mandatory subject of bargaining; and 3) the change was
20 implemented without prior notice and an opportunity to bargain. Town of Lexington, 37
21 MLC 115, 119, MUP-08-5313 (December 9, 2010); Commonwealth of Massachusetts,
22 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

23 Employer Altered Existing Practice or Implemented a New One

1 The City argues that no change has occurred.¹⁵ According to the City, it
2 consistently applied the language of the 2010-2016 CBA and the Medical Leave Policy
3 to bargaining unit members from 2014, when the first vacation drop after the parties
4 settled the 2010-2016 CBA occurred, through 2017, when the Union brought the instant
5 charge. The Union argues that the City implemented a vacation eligibility policy that
6 differs from the Medical Leave Policy that the parties incorporated into their 2010-2016
7 CBA, and that the Union did not know about or have reason to know about this change
8 until January 2017. Because the plain meaning of the 2010-2016 CBA and the Medical
9 Leave Policy accord with the Union's interpretation rather than the City's, I agree with
10 the Union.

11 Article XVI of the 2010-2016 CBA covers vacation leave. Pursuant to Article XVI,
12 Section 2, employees receive their vacation drop on January 1. Section 4 provides that,
13 "Any employee on an authorized leave of absence shall accrue or not accrue vacation
14 time in accordance with the City's Family & Medical Leave Policy or Military Leave
15 Policy, whichever is applicable." Thus, reading Article XVI as a whole, an employee
16 receives his or her annual vacation drop on January 1 unless the Medical Leave Policy
17 or the Military Leave Policy applies to his or her authorized leave of absence.

18 As its name implies, the Medical Leave Policy applies to medical leaves. In its
19 opening sentences, the Medical Leave Policy unambiguously states that, "The City
20 provides a variety of different leave periods depending on an employee's length of

¹⁵ To support its argument that no change has occurred, the City cites a probable cause dismissal in MUP-16-5103, City of Boston and SEIU, Local 888, which involved similar allegations. That charge involving different parties is not before me, and dismissal letters have no precedential value. City of Taunton, 38 MLC 98-99, n. 7, MUP-06-4836, 08-5150 (November 21, 2011).

1 service and the specific reason for the leave of absence. The different provisions
2 applicable to family and medical leave are set forth below." The Medical Leave Policy
3 then expressly applies to three types of leave: "Leave Up to 12 Months due to *Medical*
4 *Condition*," "Leave up to 12 Months due to *Childbirth or Adoption*," and "Leave of Up to
5 *12 or 26 Weeks Under the Family & Medical Leave Act (FMLA)*." Each section of the
6 policy contains a provision that governs the effect of that type of leave on vacation
7 accrual. Once an employee has been on one of these three leaves, whether paid or
8 unpaid, for over twelve weeks, excluding up to two weeks of vacation, the employee
9 "will be eligible to accrue his/her annual vacation only upon the completion of actual
10 work equal to the length of the authorized absence or completion of six (6) months of
11 actual work, whichever is less." Accordingly, by its plain meaning, the Medical Leave
12 Policy affects vacation accrual only under three types of leave.

13 The examples contained within the Medical Leave Policy support this
14 interpretation. In two of the three sections entitled "Effect of Leave on Vacation
15 Accrual," the example involves an employee who "takes a medical leave for six
16 months." The other example involves an employee who "takes a parental leave for six
17 months." The examples do not include leave taken independently of a medical leave,
18 and the Medical Leave Policy does not contain any language to remotely suggest that it
19 affects vacation accrual in circumstances unrelated to a medical leave. On the contrary,
20 its application is limited to these three types of medical leave.

21 After the parties incorporated the Medical Leave Policy into their 2010-2016 CBA
22 in June 2013, the City, relying on the vacation accrual language that - by that policy's
23 terms - is limited to three types of medical leave, implemented a different, sweeping

1 policy related to vacation eligibility generally. The 2017 Vacation Eligibility Memo, like
2 the 2014, 2015, and 2016 iterations, interprets this language to mean that:

3 *Any use of leave* (be it paid or unpaid) sick, vacation, personal, no pay, LOA, in
4 the previous calendar year, that, *when combined*, exceeds 12 weeks (60 days)
5 excluding two weeks of vacation, that employee will be eligible for vacation only
6 once they've made up, in actual work, the total length of the absence or 6
7 months, whichever is less. (*emphasis added*)
8

9 Further, the 2017 Vacation Eligibility Memo states that absences "OVER 12 WEEKS =
10 NO Vacation January 1," and that, "Employees who have used any combination of the
11 following absences must make up time in actual work before they are entitled to
12 vacation in the new calendar year."

13 Thus, the City implemented a vacation eligibility policy that differed from the
14 parties' bargained Medical Leave Policy. The Medical Leave Policy does not anywhere
15 state that any combined use of any leave in a calendar year that exceeds twelve weeks,
16 excluding two weeks of vacation, will cause an employee to become ineligible for his or
17 her vacation drop. Nor is it reasonably susceptible to that interpretation. Rather, the
18 Medical Leave Policy states that if one of the three types of medical leave identified in
19 the policy exceeds twelve weeks, excluding two weeks of vacation, the employee will
20 become ineligible for a vacation drop. Accordingly, the Union has established the first
21 element of its case.

22 The City also argues that the Union's case is untimely because the Union knew
23 or should have known since at least 2014 that the City was implementing the Medical
24 Leave Policy according to the Vacation Eligibility Provisions memoranda. I disagree. In
25 addition to the plain meaning of the bargained language not supporting the City's
26 implementation, the City did not distribute any of these memoranda to any Union

1 officials over the years, and the record contains no evidence that any Union official was
2 aware of the City's implementation. Moreover, the record contains no evidence that the
3 Union was aware that 17 of its more than 800 bargaining unit members lost their
4 vacation drop between 2014 and 2016. Finally, although individual members of the
5 bargaining unit may have been aware of the City's implementation going back to 2014,
6 the Union leadership was not aware and did not have reason to be aware. Under well-
7 established law, notice will be imputed to a union when a union executive officer with
8 authority to bargain is first made aware of the employer's proposed plan.
9 Commonwealth of Massachusetts, 28 MLC 239, 242, SUP-4485 (January 23, 2002)
10 (citing Town of Hudson, 25 MLC 143, 148, (1999)). Here, according to the evidentiary
11 record, this happened in January 2017. The charge is therefore timely under 456 CMR
12 15.04. Town of Lenox, 29 MLC 51, 52, MUP-01-3214, 01-3215 (September 5, 2002).

13 Mandatory Subject of Bargaining

14 The manner in which a benefit such as vacation leave is distributed, as well as
15 the amount of leave, is a mandatory subject of bargaining. City of Revere, 21 MLC
16 1325, 1327, MUP-8793, 8795 (September 30, 1994); Massachusetts Port Authority, 26
17 MLC 100, 101, UP-2624 (January 14, 2000). Accordingly, the Union has established
18 the second element of its claim.

19 Prior Notice and Opportunity to Bargain

20 The City implemented the vacation eligibility policy without providing the Union
21 with prior notice and an opportunity to bargain. As already discussed, the Union did not
22 become aware that the City had implemented a vacation eligibility policy that changed
23 and expanded the bargained Medical Leave Policy until January 2017, and the City's

1 arguments notwithstanding, the record contains no evidence that would impute notice of
2 the City's unlawful implementation to the Union. Commonwealth of Massachusetts, 28
3 MLC 242.

4 The City also argues that the Union waived by contract any bargaining rights
5 when it agreed to incorporate the Medical Leave Policy into the 2010-2016 CBA
6 because the language of the CBA and the Medical Leave Policy expressly and clearly
7 conferred upon the City the right to include paid vacation in the 12-week limit. The
8 Commonwealth Employment Relations Board (CERB) has consistently held that an
9 employer asserting the affirmative defense of contract waiver must show that the
10 subject was consciously considered, and that the union knowingly and unmistakably
11 waived its rights to bargain. Commonwealth of Massachusetts, 28 MLC 308, 311, SUP-
12 4740 (April 11, 2002) (citing Board of Trustees of the University of
13 Massachusetts/University Medical Center, 21 MLC 1795, 1802, SUP-3375 (May 12,
14 1995)).

15 Here, the Medical Leave Policy expressly and clearly confers upon the City the
16 right to include paid vacation in the 12-week limit for the three types of medical leave
17 that the Medical Leave Policy covers. The Union did not agree to a 12-week limit on the
18 combined use of any and all leave in the calendar year. Accordingly, the Union has not
19 waived by contract any bargaining rights, and the Union has established the third and
20 final element of its case.

21 CONCLUSION

22 The City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law
23 when it implemented a vacation eligibility policy that differed from the parties' bargained

1 Medical Leave Policy without providing the Union with prior notice and an opportunity to
2 bargain to resolution or impasse over the decision and the impacts of the decision on
3 employee terms and conditions of employment.

4 ORDER

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

7 1. Cease and desist from:

- 8
9 a. Refusing to bargain collectively with the Union by failing to negotiate with the
10 Union about the criteria for granting vacation leave; and
11
12 b. Imposing a vacation eligibility policy without giving the Union prior notice and
13 an opportunity to bargain to resolution or impasse over the decision and the
14 impacts of the decision.
15

16 2. Take the following affirmative action that will effectuate the purposes of the
17 Law:¹⁶
18

- 19 a. Upon request, bargain collectively with the Union about the criteria for
20 granting vacation leave;
21
22 b. Rescind the unilateral imposition of a vacation eligibility policy on the Union,
23 as embodied in the Vacation Eligibility Provisions memoranda, until the City
24 has bargained to resolution or impasse regarding the criteria for granting
25 vacation leave;
26
27 c. Post immediately in all conspicuous places where members of the Union's
28 bargaining unit usually congregate, or where notices are usually posted,
29 including electronically if the City customarily communicates with these unit
30 members via intranet or email, and display for a period of thirty (30) days
31 thereafter, signed copies of the attached Notice to Employees; and
32
33 d. Notify the DLR in writing of steps taken to comply with this Order within ten
34 (10) days of receipt.
35

¹⁶ The Union argues that I should order the City to make any bargaining unit member whole for the loss of vacation accrual as attributed to the unilateral change. I decline to do so because the record indicates that the two adversely affected bargaining unit members did receive their vacation drop, albeit belatedly.

1 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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

A Hearing Officer of 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 Hearing Officer'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

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 of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).