

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF FALL RIVER

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 93, LOCAL 3177

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Case No. MUP-20-7869

Date Issued: January 21, 2022

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

John J. Clifford, Esq. - Representing the City of Fall River

Justin P. Murphy, Esq. - Representing the American Federation
of State, County and Municipal
Employees, Council 93, Local 3177

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Fall River (City) violated Section
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter
3 150E (the Law) by unilaterally changing a past practice of granting the American
4 Federation of State, County and Municipal Employees, Council 93, Local 3177's (Union)
5 unit members paid leave to administer internal union elections. For the reasons explained
6 below, I find that the City did not violate the Law in the manner alleged in the complaint.

7

Statement of the Case

1 On February 19, 2020, the Union filed a charge of prohibited practice with the
2 Department of Labor Relations (DLR) in Case No. MUP-20-7869, alleging that the City
3 violated Sections 10(a)(2), 10(a)(5) and derivatively Section 10(a)(1) of the Law. A DLR
4 investigator investigated the charge on August 12, 2020. On October 9, 2020, the
5 investigator issued a complaint alleging that the City violated Sections 10(a)(5) and,
6 derivatively, Section 10(a)(1) of the Law by unilaterally changing a past practice of
7 granting unit members paid leave to conduct union elections. The City filed its answer on
8 May 27, 2021.

9 I conducted a hearing on August 3, 2021.¹ Both parties had an opportunity to be
10 heard, to call witnesses and to introduce evidence. The parties submitted their post-
11 hearing briefs on October 29, 2021. Upon review of the entire record, including my
12 observation of the demeanor of the witnesses, I make the following findings of fact and
13 render the following opinion.

14 Stipulated Facts

- 15 1. The City of Fall River is a public employer within the meaning of Section 1 of the
16 Law.
- 17 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 18 3. The Union is the exclusive collective bargaining representative for employees in
19 multiple departments in the City including, but not limited to, certain clerical,
20 facilities, code enforcement, and water treatment employees.
- 21 4. The Union holds its internal elections annually in or about September of each year.
- 22 5. On September 18, 2019, Scott Taveira (Taveira), the Union's Staff Representative,
23 asked Madeline Coelho (Coelho), the City's Human Resources Director, by e-mail,
24 to allow election committee members, and members of the bargaining unit referred
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¹ The investigator dismissed the remaining allegations in the case alleging that the City violated Sections 10(a)(2), (3) and (5) of the Law.

1 to in paragraph 3, Lisa Golden and David Medeiros paid release time in order to
2 run the Union's annual election scheduled for September 24, 2019.

3
4 6. On September 18, 2019, Coelho informed Taveira by email that the City would
5 require the Union's election committee members to use vacation or personal time
6 to administer the Union's annual elections.

7
8 7. Vacation, personal, and union release time are mandatory subjects of bargaining.

9 Findings of Fact²

10 The Union is the exclusive bargaining representative for a unit of approximately
11 288 City employees, including certain employees who work in code enforcement, the
12 traffic unit, the water department, water filtration, and the library, certain civilian
13 employees in the police and fire departments, and certain clerical employees who work
14 in various municipal departments. The Union and the City are parties to a collective
15 bargaining agreement that, by its terms, was in effect from July 1, 2018 through June 30,
16 2021 (2018-2021 CBA).³ Article X of the 2018-2021 CBA states:

17 A written list of Union Stewards and other representatives shall be furnished
18 to the employer immediately after their designation and the Union shall
19 immediately notify the Employer of any changes.

20
21 The Union shall designate one (1) Steward or representative from among
22 themselves who shall be granted reasonable time off during working hours
23 to investigate and settle grievances. The Steward shall handle grievances
24 at Step 1. The representative or designee shall handle grievances at Step
25 2. Such time off shall be without loss of pay. The time off shall be
26 determined and established by agreement between the Union and [a]
27 representative of the City, with input provided by the affected department
28 head and shall continue for the term of this Agreement.

29 Union officials shall be allowed to attend labor union conventions and
30 conferences without loss of pay as follows:

31
32 International Conference Up to 3 delegates

² The DLR's jurisdiction in this matter is uncontested.

³ The parties agreed that the 2018-2021 CBA was still in effect as of the date of the hearing.

Council 93 Convention Up to 3 delegates
Murray-Gompers Up to 2 delegates
AFL-CIO Conference Up to 2 delegates
Pres/Treasurer Conference Up to 2 delegates

Requests to attend said conferences shall be given to the **City Administrator** [Emphasis in original] and shall be accompanied by the agenda and conference notice, including dates and locations.

The members of the bargaining committee shall consist of the entire Executive Board and a minimum of one (1) representative per department (i.e., minimum of one representative for Parks/Cemeteries, Water, and one representative for Police dispatchers, one representative for clerical, and Library). Each bargaining team shall be granted leave of absence without loss of pay or benefits for all meetings between the City and the Union for the purposes of negotiating the terms of the Collective Bargaining Agreement or supplements thereto.

UNION PRESIDENT

The Union President will be granted **eight (8) hours in a work** week without loss of pay to conduct union business. Said hours shall be documented.

The parties agreed upon the above-referenced language granting the union president eight hours of weekly paid leave to conduct union business as part of negotiations for the 2018-2021 CBA. Prior contracts between the City and the Union, which covered the ten-year period from July 1, 2008 through June 30, 2018 (2008-2018), contained language granting the union president one day per week off without loss of pay to conduct union business. Neither the 2018-2021 CBA nor the prior contracts covering the 2008-2018 period contained language expressly addressing the issue of whether unit members would be granted paid leave to conduct internal union elections. Also, neither party made proposals during negotiations for the 2018-2021 CBA specifically addressing the issue.

Description of Union Elections

Each September, the Union conducts elections for its union leadership using the International Union's Constitution as its guide. The Union's leadership team consists of

1 the positions of president, vice-president, secretary, and treasurer, all of whom are
2 members of its executive board, as well as three other executive board positions. The
3 positions are for one-year terms. The Union also solicits two or three union members to
4 participate on its election committee each year. Election committee members cannot be
5 candidates for the Union leadership positions that year. The election committee members
6 determine the date that the Union will accept nominations for candidates for the positions
7 and the date that the Union will hold the election. The Union mails out notices to all unit
8 members fifteen days prior to the Union meeting at which nominations will be accepted
9 informing them of the date of that Union meeting as well as the election date. If only one
10 candidate is nominated for a particular position, that position will not be on the election
11 ballot. If candidates for all positions are unopposed, then no election will be held that
12 year.

13 Prior to twenty years ago, the City held its elections on the first floor of Government
14 Center, the site of the City's government offices. Approximately twenty years ago, after
15 certain unit members working at other locations raised equity concerns about only holding
16 elections at Government Center, the Union began to hold elections there for the first half
17 of the day and in a conference room on the first floor of the police station for the second
18 half of the day.⁴ About five to eight years ago, unit members voted to move the elections
19 off municipal property to a conference room at a private venue called the Liberal Club.

20 Elections take place from 9:00 a.m. to 5:30 p.m. If the election committee has three
21 members, one committee member checks voters' identifications against the voter
22 eligibility list that the City provides and checks off their names on the list, another

⁴ The Union president would seek the City's permission in advance to use those sites.

1 committee member gives the voters their ballots, and the third committee member stands
2 by the locked ballot box to ensure that voters insert their ballots properly and turn the
3 handle on the box to update the numerical count on the front. When voting ends, the
4 election committee members unlock the ballot box, and compare and verify that the
5 number of ballots inside the box is consistent with the numerical count on the outside as
6 well as the number of voters who received ballots. The election committee members then
7 count the ballots and record the tally. They draft a memo announcing the outcome of the
8 election, which is posted at various locations where unit members work.

9 Overview of Paid Leave for Unit Members to Conduct Internal Union Elections

10 Rachel Rapoza (Rapoza)

11 Rapoza has worked for the City since 1988.⁵ She first became Union president in
12 2000 and subsequently has held the position two or three times. Rapoza could not recall
13 the exact years when she had been Union president other than 2000 but believed she
14 had been president in 2005. Rapoza was not president in 2018 or 2019 when certain
15 events referenced in this case took place, but she resumed the presidency in 2020.
16 Rapoza asserted that the City always paid unit members when they conducted internal
17 union elections and that the City did not require them to use their own accumulated
18 personal or vacation leave to cover their absences from work⁶ while they conducted the
19 elections. However, she did not identify any unit members that had received paid leave
20 to conduct internal union elections or the years in which they received that paid leave.

⁵ Rapoza was a police dispatcher for approximately twenty-five years and has been a parking enforcement officer for six years.

⁶ The record does not indicate whether election committee members noted on their timesheets that they had left their work areas to conduct elections.

1 Rapoza noted that as Union president she would send a written communication to the
2 City's Human Resources Director (HR Directors) requesting that the election committee
3 members' department heads release them from duty to conduct the internal elections on
4 a specific date. She sometimes also would give the department heads copies of the
5 letters. She did not identify the HR directors to whom she addressed her communications
6 or the department heads to whom she gave copies. She noted that she tried not to have
7 two election committee members come from the same municipal department to avoid
8 interfering with that department's operations.

9 Scott Taveira (Taveira)

10 Taveira has worked for the Union as a paid staff representative since 2005 and
11 has provided services to the bargaining unit for the periods from 2005 to 2009, 2011 to
12 about 2016, and then 2017 to the present. As a staff representative, Taveira described
13 his role in internal union elections as responding to any questions from unit members or
14 questions from the election committee. He noted at hearing that the City previously
15 allowed unit members' requests for paid leave to conduct union elections. When asked
16 to elaborate upon the basis of his knowledge, he indicated that he had spoken with Kim
17 DeSoto (DeSoto), a long-time election committee member, approximately one month
18 after the Union filed its prohibited practice charge. DeSoto did not testify at the hearing.
19 When asked about the process for election committee members to seek paid leave to
20 administer internal union elections, Taveira indicated that the only process that he was
21 aware of was that the election committee members would talk directly to their department
22 heads or supervisors. Taveira also noted that before 2019, he was unaware that any
23 election committee members had been denied Union paid leave to conduct an election.

1 Madeline Coelho (Coelho)

2 Coelho has been the City's HR Director since 2008.⁷ Coelho indicated that prior
3 to 2018, she was unaware that election committee members had requested that their
4 department heads or supervisors grant them paid leave to conduct internal union
5 elections. She also indicated that she had not received a request from the Union from
6 2008 to 2018 asking her to notify the election committee members' department heads or
7 supervisors that they would need to be released from work to conduct an election.⁸
8 However, she previously had received written requests from Union presidents asking her
9 to contact department heads or supervisors to secure the release of certain unit members
10 to attend monthly Union executive board meetings.⁹ Those executive board meetings
11 typically lasted between sixty and ninety minutes. Unit members did not have to use their
12 own vacation or personal time to attend those meetings.

13 2018-2019

14 On or about September 18, 2018 at about 8:00 a.m., an election committee
15 member named Crystal Dennis (Dennis) requested that her supervisor Joe Biszko
16 (Biszko), the then Director of Code Enforcement, allow her to leave work at 9:00 a.m. to
17 conduct an internal union election at the Liberal Club without using her own vacation or
18 personal leave. Biszko contacted Coelho about Dennis' request and told Coelho that he

⁷ The City's HR Department is separate from the Auditor's Office, which handles payroll matters.

⁸ Coelho contended that Rapoza had been Union president at some point early on when Coelho became the City's HR Director. However, because Coelho did not identify the year and the record does not show whether a Union election even was held that year, I decline to use Coelho's contention to make any additional findings of fact.

⁹ A department head or supervisor could decline to release a unit member to attend executive board meetings if staffing or operational needs precluded it.

1 was not in the position to let Dennis leave. Coelho informed Biszko that there no was no
2 language in the collective bargaining agreement or a separate memorandum of
3 understanding about election committee members receiving paid leave and that Dennis
4 would need to use her own vacation or personal leave to cover her absence while
5 administering the election.¹⁰ Dennis declined to use her own personal or vacation leave
6 and did not administer the election. The record does not show that the City contacted any
7 member of the Union leadership team or Taveira about the denial of paid leave for Dennis.
8 Coelho did not receive a grievance or a demand to bargain from the Union about the
9 issue.

10 On September 18, 2019 at 8:43 a.m., Taveira sent an email to Coelho stating in
11 pertinent part:

12 The union is asking that Lisa Golden [Golden] and Dave Medeiros
13 [Medeiros], be given release time for next Tuesday, September 24, 2019,
14 as they were appointed as the election committee for the L3177 election.
15

16 The election will be from 7:00-11:00 a.m. and 2:00-6:00 p.m.
17

18 Thanking you in advance.

19 Taveira sent the email because then Union president Rui Santos (Santos)¹¹ had notified
20 him that the City had denied Dennis' request to receive paid leave to conduct the internal
21 union election, and thus, declined to participate in the election committee.¹²

¹⁰ Neither Dennis nor Biszko, who is now retired, testified at the hearing.

¹¹ Santos had been Union president in 2018 and 2019 and had been preceded by Phil Rodrigues (Rodrigues) in 2017. Taveira indicated that he had no knowledge whether Santos or Rodrigues had sent requests to HR seeking paid leave for election committee members.

¹² The record does not show when Dennis told Santos about the denial of her request for paid leave or when Santos relayed that information to Taveira.

1 In a September 18, 2019 email at 4:10 p.m., Coelho responded:

2 Scott-I have spoken to Cathy [Viveiros]-they will need to take vacation or
3 personal time.¹³

4 Cathy Ann Viveiros (Viveiros), the then City Administrator, informed Coelho that Viveiros
5 had no knowledge of the City granting unit members paid leave to work internal union
6 elections. Taveira then called Coelho and informed her that the City previously allowed
7 election committee members to take paid leave to conduct Union elections during work
8 hours. Coelho replied that she was unaware that unit members performed those duties
9 during work hours, and that the City could not allow it. When asked on cross-examination
10 why she had not asked investigated further about the Union's claim of a practice, Coelho
11 responded that if there was a practice going on that management did not know about,
12 she believed that it had ended in 2018 when the City denied Dennis' paid leave request.
13 Golden and Medeiros subsequently resigned from the election committee, and Brenda
14 Ritz (Ritz) and Dawn Gehan (Gehan) took over their roles. Ritz and Gehan subsequently
15 administered the September 24, 2019 election and used their vacation or personal leave
16 to cover their absences from work. Thereafter, Taveira consulted with Santos and other
17 members of the Union leadership. They decided to file the charge of prohibited practice
18 on February 9, 2020.

19 Opinion

20 The Complaint alleges that: a) the City had a past practice of granting election
21 committee members paid release time to administer the Union's annual elections without
22 having to use vacation or personal leave; and b) the City unilaterally changed that practice

¹³ Taveira forwarded the email to Santos.

1 when it denied two election committee members, Golden and Medeiros, paid leave and
2 informed the Union that they would need to use their vacation or personal time to
3 administer the Union election. A public employer violates Section 10(a)(5) of the Law
4 when it implements a change in a mandatory subject of bargaining without first providing
5 the employees' exclusive collective bargaining representative with prior notice and an
6 opportunity to bargain to resolution or impasse. School Committee of Newton v. Labor
7 Relations Commission, 338 Mass. 557 (1983). The duty to bargain extends to both
8 conditions of employment that are established through a past practice as well as
9 conditions of employment that are established through a collective bargaining agreement.
10 Town of Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town
11 of Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120
12 (2014); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,
13 1994).

14 To establish a unilateral change violation, the charging party must show that: 1)
15 the employer altered an existing practice or instituted a new one; 2) the change affected
16 a mandatory subject of bargaining; and 3) the change was established without prior notice
17 and an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20,
18 1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13,
19 1994).

20 Binding Past Practice

21 I first consider whether the City altered an existing practice or instituted a new one.
22 In determining whether a binding past practice exists, the Commonwealth Employment
23 Relations Board (CERB) analyzes the combination of facts upon which the alleged

1 practice is predicated, including whether the practice has occurred with regularity over a
2 sufficient period of time so that it is reasonable to expect that the practice will continue.
3 Swansea Water District, 28 MLC 244, 145, MUP-2436, MUP-2456 (January 23, 2002);
4 Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997). A
5 condition of employment may be found despite sporadic or infrequent activity where a
6 consistent practice that applies to rare circumstances is followed each time that the
7 circumstances preceding the event recur. Commonwealth of Massachusetts, 23 MLC at
8 172; City of Everett, 8 MLC 1046, 1038, MUP-3807 (June 4, 1981), aff'd 8 MLC 1393,
9 MUP-3807 (October 21, 1981) (applying this standard with respect to practice of allowing
10 time off to take promotional Civil Service exams and acknowledging hearing officer's
11 finding that it was "only because the promotional Civil Service exams are given on an
12 irregular basis that the City had few occasions to implement the practice.")

13 To establish the existence of a past practice, the Union relied on the testimonies
14 of Rapoza and Taveira. The Union's first witness, current Union president Rapoza, made
15 the conclusory statement that prior to 2019, the City always granted paid leave to election
16 committee members to conduct union elections. However, Rapoza provided no details
17 in support of her contention, including the names of any unit members to whom the City
18 allegedly granted paid leave, when they were paid, and where they worked. In the
19 absence of specific examples, her testimony does not support a finding of a past practice.
20 Additionally, because Rapoza only was Union president for two or three times in the
21 period between 2000 and 2019, she provided no basis for how she knew that unit
22 members allegedly were paid during those lengthy periods of time when she was not
23 Union president.

1 The Union's other witness, Taveira, also made the broad claim that the City
2 granted unit members paid leave for administering elections without identifying specific
3 individuals or dates when the City allegedly granted leave to those individuals. When
4 asked on the cross-examination for the basis of his statement, Taveira referenced his
5 conversation with unit member and alleged former election committee member DeSoto.
6 However, because DeSoto did not testify, the basis for her knowledge remains
7 unexplained and is unable to be examined for accuracy.

8 Further, both Rapoza and Taveira described different procedures by which the
9 election committee members requested paid leave. Rapoza stressed that she always
10 sent written communications to HR asking HR to notify the election committee members'
11 department heads or supervisors and request their release. In contrast, Taveira testified
12 that his understanding was that election committee members always requested leave
13 directly from their department heads or supervisors. Further, Taveira was unaware that
14 Rodrigues and Santos, the presidents in 2017, 2018 and 2019, had ever asked HR for
15 paid leave for election committee members, which is consistent with Coelho's assertion.
16 However, even if I disregard the differences in how Rapoza and Taveira described the
17 procedure by which election committee members requested paid leave to conduct union
18 elections and only focus on whether a past practice existed whereby the City granted
19 election committee members paid leave, the Union has failed to demonstrate with any
20 specificity that election committee members received paid leave when they conducted
21 union elections.

22 Finally, the Union argues that because the elections took place in public areas,
23 including Government Center and the conference room in the police station, the City

1 should have ascertained that election committee members were on paid leave while
2 administering the elections. However, the mere presence of unit members conducting an
3 election does not reasonably result in the conclusion that those unit members were on
4 paid leave and not using their own accumulated vacation or personal leave. Further,
5 because the Union moved its elections to a private venue - the Liberal Club -
6 approximately five to seven years ago, the City's representatives no longer had the
7 opportunity to view unit members administering the election process, thereby
8 undercutting the Union's argument.

9 Additionally, the Union points to Coelho's statement at hearing that if a practice
10 existed of which management was not aware, the practice had ended when the City
11 denied Dennis' 2018 request for paid leave. However, Coelho's statement cannot be
12 viewed in a vacuum apart from her entire testimony. Coelho credibly testified that she
13 had no knowledge of a practice whereby unit members went directly to their department
14 heads or supervisors to request paid leave to participate in union elections. She also
15 noted that since she had become HR director in 2008, she had not received any requests
16 from the Union asking her to arrange for such paid leave with election committee
17 members' department heads or supervisors. Thus, Coelho's testimony viewed in its
18 entirety does not support a finding of a past practice in the absence of affirmative evidence
19 by the Union showing that department heads or supervisors had a practice of granting
20 paid leave to election committee members to conduct elections.

21 Accordingly, the Union has failed to establish by a preponderance of the evidence
22 that a binding practice existed and thus, has failed to satisfy the first element in the
23 analysis. Therefore, I must dismiss the Complaint. See City of Boston, 41 MLC 119, 126,

1 MUP-13-3371, MUP-14-3466 and MUP-14-3504 (November 7, 2014) (dismissing an
2 allegation that failed to satisfy the first prong of the unilateral change analysis); see also
3 Town of Seekonk, 14 MLC 1725, 1732-33, MUP-6131 and MUP-6132 (May 10, 1988)
4 (dismissing a complaint after union failed to show employer changed a past practice or
5 created a new practice).

6 CONCLUSION

7 Based on the record and for the reasons stated above, I conclude that the City did
8 not violate Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally
9 changing a past practice of granting election committee members paid leave to conduct
10 Union elections.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
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 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 be final and binding on the parties.