

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

In the Matter of

ESSEX NORTH SHORE AGRICULTURAL  
& TECHNICAL SCHOOL DISTRICT

and

AMERICAN FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES, COUNCIL 93,  
LOCAL 245

Case No. MUP-20-8072

Issued: November 9, 2022

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Brett Sabbag, Esq. - Representing the Essex North Shore  
Agricultural & Technical School District

Justin Murphy, Esq. - Representing the American Federation  
of State, County, and Municipal  
Employees, Council 93, Local 245

**HEARING OFFICER'S DECISION**

**SUMMARY**

1           The two issues in this case are whether the Essex North Shore Agricultural and  
2 Technical School District (District, Employer, or Respondent) violated Section 10(a)(5)  
3 and, derivatively, Section 10(a)(1) of G.L. c. 150E (the Law): (1) by changing bargaining  
4 unit members' summer work schedules and requiring that they use personal leave or  
5 vacation leave on certain Fridays or take unpaid days, without bargaining to impasse or  
6 resolution with the American Federation of State, County, and Municipal Employees,

1 Council 93, Local 245 (Union or Charging Party) over the decisions and the impacts of  
2 the decisions on employees' terms and conditions of employment; and (2) by failing to  
3 meet with the Union to continue bargaining over these changes. For the reasons  
4 explained below, I find that the District violated the Law: (1) by changing unit members'  
5 summer work schedules and requiring that they use personal leave or vacation leave on  
6 certain Fridays or take unpaid days without bargaining to impasse or resolution with the  
7 Union over the decisions and the impacts of the decisions on employees' terms and  
8 conditions of employment; and (2) by failing to meet with the Union to continue bargaining  
9 over these changes.

#### 10 STATEMENT OF THE CASE

11  
12 On June 29, 2020, the Union filed a Charge of Prohibited Practice with the  
13 Department of Labor Relations (DLR), alleging that the District had engaged in prohibited  
14 practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the  
15 Law by unilaterally changing the summer work schedule for bargaining unit members on  
16 or about June 23, 2020. On December 8, 2020, a DLR Investigator issued a Complaint  
17 of Prohibited Practice (Complaint), alleging that the District had violated Section 10(a)(5)  
18 and, derivatively, Section 10(a)(1) of the Law: (1) by modifying unit members' summer  
19 work schedules without bargaining to impasse or resolution with the Union over the  
20 decision and the impacts of the decision on employees' terms and conditions of  
21 employment; and (2) by failing to meet with the Union to continue bargaining over the  
22 changes in summer work hours and use of paid time off.

1 On December 16, 2020, the District filed its Answer to the Complaint. On July 6,  
2 2021, the District filed a Motion to Amend its Answer to the Complaint (Motion). On July  
3 12, 2021, the Union filed its Opposition to the Motion. By Ruling issued on July 14, 2021,  
4 I allowed the Motion. On December 8, 2021, the parties filed their post-hearing briefs.

5 STIPULATED RECORD

6 The parties stipulated to the following facts:

- 7 1. The District is a public employer within the meaning of Section 1 of M.G.L. c. 150E  
8 ("the Law").
- 9 2. AFSCME Council 93 ("Union") is an employee organization within the meaning of  
10 Section 1 of the Law.
- 11 3. The Union is the exclusive bargaining representative for a bargaining unit of  
12 clerical, transportation, and maintenance staff employed by the District.
- 13 4. The District and the Union were parties to a [collective bargaining agreement  
14 (CBA)] from July 1, 2016, to June 30, 2019.
- 15 5. The Parties negotiated terms of a successor contract to be in effect from July 1,  
16 2019, through June 30, 2022. The terms of the new contract are memorialized in  
17 a Memorandum of [Agreement] or MO[A]. The terms of the prior CBA remain in  
18 place excepted as modified in the MO[A].

19 **The CBA**

20 Article 1 of the CBA covered the "Recognition and Scope" of the bargaining unit  
21 which included "all rank and file clerical, maintenance, custodians, cafeteria, and technical  
22 support employees." Article 2 of the CBA pertained to Management Rights, and stated in  
23 pertinent part:

- 24 A. Unless an express, specific provision of this Agreement clearly  
25 provides otherwise, the School District and such other officials as  
26 may be authorized to act on its behalf, retain all rights and

1 prerogatives to manage and control the functions in which bargaining  
2 unit personnel are employed.  
3

4 B. By the way of example, but not limitation, management retains the  
5 following rights: to determine the mission, budget and educational  
6 policy of the School District; to determine the organization of each  
7 unit and the School District, and the number, types or grades of  
8 employees assigned to a department, office, shift, building, work  
9 project or task; to determine whether work will be performed by  
10 bargaining unit personnel or outside contractors, regardless of  
11 whether such work was formerly performed by such personnel; to  
12 establish policies, rules and regulations; to make all determinations  
13 involving or affecting the hiring, promotion, assignment, direction,  
14 and transfer of personnel; to determine the equipment to be used,  
15 and clothing to be worn, in the performance of duty; to establish  
16 qualifications for ability to perform work in jobs, ranks, classes or  
17 ratings, including physical, intellectual and mental health  
18 qualifications; to create and amend job descriptions; to lay off  
19 employees in the event of lack of work or funds or under conditions  
20 where management believes that continuation of such work would  
21 be less efficient, less productive, or less economical; to take actions  
22 necessary to carry out its responsibilities in situations of emergency;  
23 to enforce existing rules, regulations and policies and to add to or  
24 modify as management deems appropriate; to dismiss, demote,  
25 suspend or discipline bargaining unit members; to require an  
26 employee to participate in a fitness for duty examination; and, to  
27 require the cooperation of all employees in disciplinary  
28 investigations.  
29

30 C. The failure to exercise any management right shall not be deemed a  
31 waiver. Except as expressly provided by a specific provision of this  
32 Agreement, the exercise of the aforementioned rights shall be final  
33 and binding and shall not be subject to any further bargaining  
34 obligation.  
35

36 Article 5 of the parties' CBA pertained to "Hours of Work," and stated in pertinent

37 part:

38 A. Generally

39  
40 1. Work Day. The District retains the right to determine employees'  
41 daily schedules and shall provide at least 30 days' notice of a

- 1 change in shift, except in the case of an emergency as
- 2 determined by the District. During the 30 day period the District
- 3 will meet with the Union to discuss the employees impacted.
- 4
- 5 2. The schedules set forth below will apply to most full time
- 6 employees. Part-time employees shall work a schedule
- 7 determined by the District and communicated to the employee.
- 8
- 9 3. Work Year. Specific positions may have different work years
- 10 (e.g., 185 days, 195 days, etc.) as set forth in the job description
- 11 or other documents describing the job duties and conditions. The
- 12 District reserves the right to alter the work year of a position with
- 13 reasonable notice to best meet the needs of the District.
- 14

15 B. Custodial, Maintenance and Farm Employees

- 16
- 17 1. Full-time employees shall work eight (8) hours per day, five (5)
- 18 days per week, and generally be scheduled by the District to work
- 19 either 7:00 a.m. to 3:00 p.m. or 2:30 p.m. to 10:30 p.m.
- 20
- 21 2. During summer and school vacations, custodial and maintenance
- 22 employees shall work one shift from 7:00 a.m. to 3:00 p.m.
- 23

24 C. Clerical Employees

25 Full-time clerical employees shall generally be scheduled by the

26 District to work eight (8) hours a day, five (5) days a week from 7:30

27 a.m. to 3:30 p.m.

28

29

30 D. Cafeteria [Employees]

31 Cafeteria employees shall work from 6:00 a.m. to 2:00 p.m. or 7:00

32 a.m. to 3:00 p.m. depending on the employee's assignment.

33

34 E. Technology Department [Employees]

35 Full-time employees in the Technology Department shall be required

36 to work up to eight (8) hours a day five (5) days a week.

37

38

....

1 Article 22 of the parties' CBA pertained to "Stability of Agreement," and stated in  
2 full:

- 3 A. No agreements, practices, benefits, privileges or understandings,  
4 oral or written, benefiting an employee or the employees covered by  
5 this Agreement, shall be controlling or in any way affect the relations  
6 between the parties unless and until such agreements or  
7 understandings have been reduced to writing and duly executed by  
8 both parties subsequent to the date of this Agreement.  
9
- 10 B. The failure of the School District to insist, in any one or more  
11 instances, upon performance of any of the terms or conditions of the  
12 Agreement, shall not be considered as a waiver or relinquishment of  
13 the right of the School District to future performance of any such term  
14 or condition and the obligation of the Union to such future  
15 performance shall continue in full force and effect.  
16
- 17 C. No amendment, alteration, or variation of the terms of this Agreement  
18 shall bind the parties unless it is made in writing and executed by the  
19 Union and the School District.  
20
- 21 D. Should any provision of this agreement be found to be invalid by  
22 operation of law or by a court of competent jurisdiction, all other  
23 provisions of this agreement shall remain in effect.  
24

25 Article 23 of the parties' CBA pertained to "Entire Agreement," and stated in full:

- 26 A. This Agreement, upon ratification, constitutes the complete and  
27 entire agreement between the parties and concludes collective  
28 bargaining for its term. No amendment to this Agreement shall be  
29 effective unless in writing, ratified, and executed by the parties.  
30
- 31 B. The parties acknowledge that during the negotiations which resulted  
32 in this Agreement, the Union and District had the unlimited right and  
33 opportunity to make demands and proposals with respect to any  
34 subject or matter not removed by law from the areas of collective  
35 bargaining and that the understandings and agreements arrived at  
36 by the parties after the exercise of that right and opportunity are set  
37 forth in this Agreement. Therefore, the Union, for the duration of this  
38 Agreement, voluntarily and unqualifiedly waives the right and agrees  
39 that the District shall not be obligated to bargain collectively with  
40 respect to any subjects or matters referred to or covered in this

1 Agreement, even though such subjects or matters may not have  
2 been within the knowledge or contemplation of either or both of the  
3 parties at the time they negotiated or signed this Agreement.  
4

5 Article 24, Section F of the parties' CBA pertained to "Vacations," and stated in full:  
6 "Vacation shall be scheduled in accordance with the operational requirements of the  
7 school [D]istrict, as determined by the Superintendent-Director or designee."

8 **The MOA**

9 The parties' finalized the MOA on or about June 11, 2020, which modified certain  
10 parts of the CBA but did not include any changes to employees' summer work hours.<sup>1</sup>  
11 Specifically, the MOA revised Article 5, Section D, stating that, "Cafeteria employees shall  
12 work shifts depending on the employee's assignment, between [6:00 a.m. and 2:00 p.m.],  
13 as determined by the District." The MOA also revised Article 5, Section E, stating that,  
14 "Full-time employees in the Technology Department shall generally be scheduled by the  
15 District to work eight (8) hours a day, five (5) days a week, as determined by the District."  
16 The MOA also added two new sections to Article 5 regarding "Paraprofessionals" and  
17 "Paraprofessional Planning Periods" which stated, in full:

18 F. Paraprofessionals

19 Full time paraprofessionals will work a seven-hour day and will be expected  
20 to attend in-service on professional development days, early release and  
21 late start days. The current work schedule is 7:40 a.m. until 2:40 p.m.  
22

23 G. Paraprofessional Planning Periods

24 Paraprofessionals regularly assigned to support specific classrooms and  
25 teachers will be scheduled for two planning periods per 10-day cycle.  
26

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<sup>1</sup> Although the MOA revised Article 24, Section D, it did not make any changes to Article 24, Section F.

**1 The 2017-2019 MOUs**

2 Beginning in or about the summer of 2017, and continuing each summer through  
3 the summer of 2019, the District scheduled unit members to work certain ten-hour shifts,  
4 including a 7:00 a.m. – 5:00 p.m. shift with a 30-minute break, on Monday through  
5 Thursday during the summer months. During the summers of 2017, 2018, and 2019, the  
6 District also closed its buildings on Fridays but did not require unit members to either use  
7 personal or vacation leave on those Fridays or to take unpaid days. The parties  
8 memorialized this scheduling arrangement by entering into three separate memoranda of  
9 understanding (MOUs). Specifically, the 2017 MOU included “guidelines for the  
10 schedule,” which stated in full:

- 11 • All affected workers will be responsible for working 40 hours per  
12 week or the hours required by their position.
- 13 • Hours will be generally set at 7:00 am – 5:30 pm (with a 30 minute  
14 lunch) Monday – Thursday. District buildings will be closed on  
15 Friday’s [sic].
- 16 • During these hours employees are required to fulfill their 40 hours  
17 per week commitment or the hours required by their position.
- 18 • Farm Crew schedule will follow the same model of a four day/ten  
19 hour per day work week, however coverage will be scheduled to  
20 ensure representation for seven days per week with adult  
21 supervision present when minors are working.
- 22 • This schedule will commence on Monday 7.10.2017, and be active  
23 until Friday 8.18.2017 [for] a total of 6 weeks.
- 24 • During [the] affected time period employees will be charged 1.25 for  
25 SICK, VACATION, OR PERSONAL DAYS. [Emphasis in original.]
- 26 • Employees have the option of taking 0.25 vacation day[,] Monday –  
27 Thursday and only work an 8 hour day.
- 28 • This will be considered a pilot program for FY 2018.

29 Whiles the parties’ 2018 MOU included some of the same language as the 2017  
30 MOU, it also included the following new language:



- 1           • All affected workers will be responsible for working the hours  
2           required by their position.  
3           ....
- 4           • Employees are required to fulfill the hours required by their position  
5           during in [sic] the time frame given.
- 6           • Farm Crew schedule will follow the same model of a four day/ten  
7           hour per day work week with adult supervision present when minors  
8           are working.
- 9           • This schedule will commence on Monday 7.9.2018, and [will] be  
10          active until Friday 8.16.2018 [for] a total of 6 weeks.  
11          ....
- 12          • Employees have the option of taking 0.25 vacation day[,] Monday –  
13          Thursday and only work an 8 hour day for 4 days.
- 14          • This will be considered a pilot program and will be re-evaluated every  
15          year.

16  
17           Similarly, the parties' 2019 MOU contained some of the same language as the  
18 2017 and 2018 MOUs but eliminated reference to the summer work schedule being a  
19 "pilot program" subject to "be re-evaluated every year." The 2019 MOU also added the  
20 following language:

- 21           ....
- 22          • Hours will be generally set at 7:00 am – 5:30 pm (with a 30 minute  
23          lunch) Monday – Thursday. Any change in hours 6:00 am – 4:30 pm  
24          (with a 30 minute lunch) must submit a written request to their direct  
25          Supervisor, filed with Human Resource[s]. Those hours will not be  
26          changed once approved. District buildings will be closed on Fridays.  
27          ....
- 28          • Farm Crew schedule will follow the same model of a four day/ten  
29          hour per day work week, however coverage will be scheduled to  
30          ensure representation for seven days per week with adult  
31          supervision present when minors are working.
- 32          • This schedule will commence on Monday, June 24, 2019, and [will  
33          be] active until Friday, August 16, 2019.  
34          ....
- 35          • Employees have the option of taking 1.0 vacation day on Friday and  
36          only work an 8 hour day for 4 days (Monday – Thursday).

## 1 **The District Background and Budget**

2           The District is a regional vocational school district that comprises approximately  
3 17 communities and includes an agricultural campus with animals, an ice-skating rink, a  
4 restaurant, and physical therapy offices located within the ice skating rink that the District  
5 rents to third parties. The District generates revenue from its agricultural campus and from  
6 renting space at the ice-skating rink. The District relies on this revenue to help offset  
7 operational costs.

8           The District School Committee (Committee) comprises members from the regional  
9 communities who vote on the annual budget and usually approve a final budget each year  
10 around June 30th. The District's fiscal year begins on July 1st and its school year begins  
11 around late August.

### 12 **1. Spring of 2020**

13           In or about early March of 2020, the Committee "tentatively approved" the District's  
14 budget for the upcoming fiscal/school year. However, later that month, the District shut  
15 down its operations due to the Coronavirus (COVID-19) pandemic, which caused delays  
16 in the budget approval processes at the State and Committee levels.

17           By written announcement around that time, Superintendent-Director Heidi T.  
18 Riccio (Riccio)<sup>2</sup> and Union President Debbie Campbell (Campbell)<sup>3</sup> jointly notified unit

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<sup>2</sup> The District first hired Riccio as Director of Career and Technical Education for the East Academy in July of 2017. The District promoted Riccio to the position of Superintendent-Director beginning in July of 2018 and continuing to the present.

<sup>3</sup> At all relevant times, Campbell has been employed by the District as an Administrative Assistant and has been a member of the bargaining unit since 2006.

1 members that due to the COVID-19 pandemic and a limited amount of work, the District  
2 was extending the school closure period and changing employees' regular work  
3 schedules beginning April 8, 2020 through May 4, 2020. That announcement stated,  
4 however, that "[f]arm employees will continue to work full time and report to the  
5 Superintendent and Director of Facilities, Farms,<sup>4</sup> and Grounds, any need for additional  
6 labor."<sup>5</sup>

7 In or around early May of 2020, the District updated the Union about the budget.  
8 Specifically, by email on May 2, 2020, Riccio notified Campbell that the District would "be  
9 looking at the budget in the next week to determine necessary cuts....[which] may impact  
10 staffing." In that email, Riccio also stated that at the upcoming meeting with the Union,  
11 she would provide "an update to the current budget situation" and asked the Union "to  
12 brainstorm on cost-saving measures to impact as little as possible related staff."

13 On or about May 12, 2020, the parties met to discuss the District's budget. By  
14 follow-up email later that day, Riccio informed Campbell that the District had created an  
15 anonymous poll and that all administrators had agreed to take no raise next school year  
16 in the event of a severe budget reduction. Riccio also stated that the District would gather  
17 the additional information for the Union in the next few days.

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<sup>4</sup> Riccio gave un rebutted testimony that the farm crew had already been working non-stop since the pandemic started, and that they continued to work seven days a week during the pandemic to feed the animals.

<sup>5</sup> Pursuant to the shutdown in or about March of 2020, renters at the District's ice-skating rink stopped paying rent. The record is unclear about how the District's farm revenue was specifically impacted by the pandemic.

1           On or about May 21, 2020, the District provided the Union with a copy of a draft  
2 budget and draft copies of “Plan B” and “Plan C,”<sup>6</sup> which proposed a furlough for all unit  
3 members (Plan B only), summer furlough for certain unit members, pay freezes (Plan C  
4 only), hiring freezes, position reductions, material reductions, and other reductions. On  
5 May 26, 2020, the District held a staff meeting to discuss the proposed budgets. By follow-  
6 up email on May 27, 2020, Campbell notified Riccio that the Union had additional  
7 questions about the draft budget, Plans B and C, the “position reduction \$354K,” and  
8 whether Union positions were included in this number. By that same email, Campbell  
9 inquired about the proposed summer staff furlough and whether members would be able  
10 to collect unemployment. On or about May 27, 2020, the District conducted another staff  
11 meeting where it updated employees about the draft budget and the proposed summer  
12 staff furlough.<sup>7</sup>

13           **2. June of 2020**

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<sup>6</sup> Riccio testified that “Plan A” was the initial budget, while “Plans B and C” were two different options of the initial budget. Specifically, Plan B proposed a three-day furlough for unit members, subject to a reduction if funds became available; while Plan C proposed pay freezes in lieu of unit member furloughs. Plan B also proposed a later start time for admission counselors, a “five-week month,” position reductions, hiring freezes, and supply/material reductions.

<sup>7</sup> Riccio gave un rebutted testimony that beginning on or about July 1, 2020, Governor Baker declared that all municipalities as well as school districts would go to a 1/12th budget, which meant that the Commonwealth would disburse only a portion of the District’s operating budget. According to Riccio, that portion amounted only to “a pocket” of money that the District had to utilize until a final budget was approved. She also testified that around this time, the Governor notified the District that it would not be receiving the Student Opportunity Act funding, which was approximately \$256,000.00, and that this notice added to the District’s budgetary uncertainty.

1           On or about June 3, 2020, Campbell spoke directly with Riccio about the draft  
2 budget and the summer staff furlough. By follow-up email to Riccio on June 4, 2020,  
3 Campbell memorialized her understanding of their discussion which addressed six  
4 specific issues (i.e., Plan B Furlough 267K, Position Reduction, Hiring Freeze 296K,  
5 Pending, Summer Staff Furlough, and MOU), stating in full:

6           Per our conversation of yesterday afternoon this is my understanding of the  
7 answers to AFSCME questions with regards to the [b]udget draft of 5-21-20  
8 that was put out to the whole staff.  
9

10          In Plan B Furlough 267K

11          The 3 [c]lerical days is an error. This should read 3 AFSCME days which  
12 includes the whole of AFSCME except the bus drivers and cafeteria staff  
13 who do not work the proposed furlough days. These furlough days will be 3  
14 days between Sept. and March so as to lessen the impact on pay. I would  
15 like to request that you resend a corrected document so membership  
16 understands that this applies to all and not just clerical. I feel the budget  
17 draft is easier to understand than the line item document sent this morning.  
18

19          Position [R]eduction

20          This includes from the AFSCME membership 2 probationary cafeteria  
21 workers, 2 paraprofessionals, and another paraprofessional who you are  
22 looking into grant funding to continue employment.  
23

24          Hiring Freeze 296K

25          2 AFSCME positions which were proposed in the budget, IT System Admin.  
26 and Hort. Specialist = 111,401K[.]

27          2 cust/maint workers which will not be recalled from voluntary layoff =  
28 100K[.]  
29

30          Pending – I understand that this has not yet been decided on whether it will  
31 be necessary.  
32

33          Summer Staff Furlough – I understand that any summer furlough of clerical  
34 and other AFSCME staff will be done so it does not affect people who will  
35 retire in the next three years and that those affected will be able to collect  
36 unemployment.

1 I understand also that AFSCME will be receiving an MOU from Tim Norris  
2 regarding these plans.

3  
4 Please let me know if I have misinterpreted any of our brief conversation.

5  
6 By reply email to Campbell on June 7, 2020, Riccio confirmed the District's position  
7 on the above-six issues:

8 I apologize for the delay in my response. I have answered below. Please,  
9 keep in mind, our budget is not yet approved and we do not know the final  
10 impact this pandemic will have on the overall [S]tate budget which may  
11 further impact our budget.

12  
13 In Plan B Furlough 267K  
14 ...[The Union's understanding] is correct. Please let me know which  
15 document you would like re-sent. Is it the Plan B/Plan C document?

16  
17 Position Reduction  
18 ...At this time, [the Union's understanding] is correct. There were 2  
19 probationary workers, 2 paraprofessionals under [P]lan B. The third  
20 paraprofessional was not budgeted in the original 2021 budget document.  
21 We are seeking grant funding this summer to determine any positions that  
22 will be called back. Please, keep in mind, these positions may change  
23 based on the needs of the [D]istrict. Further, it may not be the same  
24 individuals depending on the needs of the department.

25  
26 Hiring Freeze 296K  
27 ...Any furlough we present beyond the 3 days, will be communicated with  
28 AFSCME. We are seeking cost saving initiatives during the summer. We  
29 may have Friday be used as vacation or personal time and keep with the  
30 four day, 8 hour work week. Any longterm furlough, staff members will be  
31 able to apply for unemployment.

32  
33 [Pending/ Summer Staff Furlough/ MOU]  
34 ....The MOU will be for the 3 furlough days only.

35 Hope this is helpful for you all. I understand this difficult to process and we  
36 are working to keep as many as possible employed. As you can see by  
37 other school systems, our reductions to staff are minimal comparatively  
38 speaking.

1 **The 2020 Summer Work Schedule Discussions**

2 By email on June 13, 2020, Riccio notified Campbell that while the District would  
3 not implement the summer staff furlough, it was “working on a document” that proposed  
4 the following summer work schedule in lieu of the furlough:

5 Monday-Thursday, normal working hours  
6 Friday – to be used as a vacation day, personal day, or unpaid day  
7

8 For those that are new with not a lot of time earned, we will work with  
9 them individually (Director/Principal level).  
10

11 By reply email on June 15, 2020, Union North Shore Coordinator Carol Markland  
12 (Markland),<sup>8</sup> requested to meet with Riccio to “to discuss hours of work.” The parties met  
13 remotely via ZOOM on June 18, 2018, during which time the District proposed that  
14 employees work eight-hour shifts, Monday through Thursday, during the summer months,  
15 and use personal or vacation leave on Fridays or take an unpaid day. The District also  
16 proposed that unit members who may not have accrued enough personal or vacation  
17 leave be allowed to borrow against their leave accrual during the Friday closures. The  
18 Union rejected the District’s proposals and counter-proposed that its members continue  
19 to work certain ten-hour shifts during the summer months on Monday through Thursday,  
20 without the need to use personal or vacation leave or take an unpaid day.

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<sup>8</sup> Markland has held her Union position since 2007 and participated in bargaining over the CBA, the MOA, and the 2017 MOU. At all relevant times, Markland was not a District employee.

1           At the conclusion of the June 18, 2020 meeting, the parties ended their bargaining  
2 session without reaching an agreement.<sup>9</sup> The parties did not meet again to bargain over  
3 the issue of summer work schedules or use of paid leave in lieu of taking unpaid days on  
4 Fridays. Instead, they exchanged correspondence beginning with a follow-up email on  
5 June 22, 2020, where Markland notified District Counsel Tim D. Norris (Norris) that the  
6 Union was still seeking a 30-day notice regarding the proposed change to summer work  
7 hours and use of leave, and that a “MOU would be needed” to memorialize any agreement  
8 reached by the parties concerning those proposed changes. By reply email on June 23,  
9 2020, Norris provided Markland with a copy of a draft MOU (2020 Draft MOU) that stated  
10 in, pertinent part:

11           [The parties] hereby agree to enact a cost saving plan made necessary by  
12 the economic upheaval related to the Coronavirus.

13  
14           The parties agree as follows:

15  
16           1. Friday Closure During Summer 2020. Effective June 2, 2020 and  
17 continuing until August 14, 2020, District offices and operations will

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<sup>9</sup> Riccio testified that the parties had reached an agreement at the conclusion of the June 18, 2020 meeting because they “clearly talked about not having [employees] have to use vacation or personal time,” and that those employees “could use unpaid time as well as if they went into their arrears.” She also testified that the parties “were in agreement” after that meeting “[b]ecause we left with the intention of having an MOU put together,” and “there was an e-mail from Carol Markland to Tim Norris that basically asked [the District] to make some of the changes.” While Riccio testified that the Union “did not clearly articulate that they were not in agreement,” she later admitted that she could not “recall specific details of [her] conversation” with the Union at that meeting. Conversely, both Campbell and Markland gave corroborating testimonies that the parties did not reach any agreement at or after the June 18, 2020 meeting; and that the parties never reached nor finalized any of the terms contained in the 2020 Draft MOU. Norris did not testify. Based on the totality of this evidence, I credit the corroborating testimonies of Campbell and Markland that the parties had neither reached an agreement at the June 18, 2020 meeting, nor reached any subsequent agreement after that meeting.



1 be closed on Fridays. Employees with available vacation or personal  
2 leave time will be required to use leave on those days or take them  
3 unpaid. Full time farm workers will arrange a day off each week with  
4 their supervisor to ensure appropriate coverage.  
5

- 6 2. Furloughs: Notwithstanding the terms of the 2020-2023 collective  
7 bargaining agreement between the parties, all bargaining unit  
8 members shall be furloughed without pay for three days during the  
9 2020-2021 school year: September 4, 2020, October 9, 2020, and  
10 March 19, 2021. Bargaining unit members will not be required to  
11 work on those days, and they shall be on an authorized unpaid leave  
12 of absence for the purposes of M.G.L. c. 32, §§ 4(1)(c) and 5(3)(b).  
13 These furlough dates may be adjusted for farm employees to ensure  
14 appropriate coverage.

15 The effect of the furlough (three times the per diem rate of pay based  
16 upon the applicable annual salary divided by the number of the  
17 contracted days) shall be spread throughout the year in order to  
18 minimize the economic impact to employees.  
19

20 By surreply email on June 23, 2020, Markland notified Norris that the Union  
21 disagreed with certain parts of the 2020 Draft MOU, including the requirement that  
22 members use their vacation or personal leave on the relevant Fridays. The Union also  
23 inquired about why the District was “mixing summer hours with [the] furlough notice for  
24 the fall,” and stated that the effective date for the proposed changes “[did] not support a  
25 30 day notice per [the] contract.” Norris responded to Markland, by email later that day,  
26 stating in pertinent part:

27 ....  
28

29 I thought we discussed all of this stuff and decided it needed to be in an  
30 MOA, so that is what this reflects. The District has been incredibly generous  
31 in its approach to this crisis when other employers have been doing layoffs.  
32 Asking folks to use some vacation time during a low activity \*period after  
33 they have been able to stay home on full pay – with shall we say a “reduced”  
34 workload and without use of leave time – does not seem unreasonable.  
35 Holding the Superintendent’s feet to the fire in the middle of a pandemic

1 over notice of a schedule that is a variation on a well known summer  
2 schedule, seems unreasonable.

3  
4 People have a choice if they don't want to use their accrued leave – they  
5 can take the time unpaid. The Superintendent said she would work with  
6 folks who don't have leave time to come up with a solution. The budget is  
7 very tight and the District is doing its best to keep everyone whole. A little  
8 cooperation will go a long way right now.

9 ....

10  
11 By email on June 24, 2020, Markland notified Norris that “the Union does not

12 anticipate any changes in hours until we complete or impact bargaining [sic] and are able

13 to ratify...[an MOU].” By reply email later that day, Norris informed Markland that “the

14 District is willing to postpone the Friday closure to July 10, which is more than 30 days

15 after the June 7 email from the Superintendent to Debbie Campbell on that subject.”

16 Norris also stated that “[a]ll unit members can expect to work this Friday as scheduled,”

17 and asked the Union to confirm whether “the MOU is ok[ay].”<sup>10</sup> The District did not contact

18 the Union again concerning further bargaining.

### 19 **The 2020 Summer Work Schedule Changes**

20 By memorandum dated June 30, 2020, Riccio notified the Union that pursuant to

21 its June 7, 2020 email, the District was changing the summer work schedules for unit

22 members, stating in pertinent part:<sup>11</sup>

---

<sup>10</sup> Riccio admitted that while Norris provided the Union with a copy of the 2020 Draft MOU, she implemented the change without reaching a finalized MOU with the Union.

<sup>11</sup> Riccio testified that she delayed implementing the summer work schedule change until July 13, 2020, based on the Union's request to comply with the contractual 30-day notice period per Article 5 of the CBA. She also testified that pursuant to the change, “[t]here were two members [who] took some Fridays unpaid.”

1 The purpose of this memorandum is to confirm the details of the adjustment  
2 to the District's normal work schedule which was communicated to the  
3 AFSCME president through email correspondence on June 7, 2020, as well  
4 as discussion before and after that date. The guidelines are as follows:  
5

- 6 • All affected workers with the exception of Facilities, Farms,  
7 and Grounds will be responsible for working the hours  
8 required by their position on Monday thru Thursday.
- 9 • Hours for all workers with the exception of Facilities, Farms,  
10 and grounds will be generally set at 7:00 am – 3:30 pm (with  
11 a 30 minute lunch). As in previous years, District buildings will  
12 be closed on Fridays.
- 13 • During the affected time period employees *may* utilize  
14 personal or vacation time for Fridays. [Emphasis added.]
- 15 • This schedule will commence on Monday, July 13, 2020, and  
16 will remain active until Friday, August 21, 2020.
- 17 • Facilities, Farms, and Grounds
  - 18 ○ Hours will be 7:00 am – 5:30 pm, Monday thru  
19 Thursday
  - 20 ○ Any vacation, personal, or sick time used will be 1.25
  - 21 ○ Exceptions to ensure coverage will be made by the  
22 department head.

23  
24 Your cooperation as we navigate a global pandemic, budget cuts, and other  
25 uncertainties is sincerely appreciated. We hope not to have to make further  
26 staffing cuts.

27 Riccio issued an updated memorandum on July 1, 2020, which “adjust[ed] the  
28 District's normal work schedule for a period of time,” and removed the last sub-bullet point  
29 from the original memorandum which stated that “[e]xceptions to ensure coverage will be  
30 made by the department head.” The updated memorandum also included the following  
31 changes:

32 The purpose of this memorandum is to adjust the details of the adjustment  
33 to the District's normal work schedule which was communicated to the  
34 AFSCME president through email correspondence on June 7, 2020, as well  
35 as discussion before and after that date....

1 ....

2

- 3 • Employees are required to fulfill the [h]ours required by their position.
- 4 • During the affected time period employees *will* utilize personal or
- 5 vacation time for Fridays. [Emphasis added.]

6 ....

7

8 Effective, on or about July 13, 2020, and continuing until on or about August 14,  
9 2020, the District changed the summer work schedules for certain unit members,  
10 excluding farm employees, by closing District offices and operations on Fridays, requiring  
11 members to work certain eight-hour shifts, Monday through Thursday, and requiring them  
12 to use available vacation or personal leave on the relevant Fridays or take unpaid days.

13

#### DECISION

14

15 Section 6 of the Law requires public employers to negotiate in good faith with  
16 respect to wages, hours, standards of productivity and performance, and any other terms  
17 and conditions of employment. This statutory requirement to bargain includes the duty to  
18 give the exclusive collective bargaining representative notice and an opportunity to  
19 bargain to resolution or impasse before changing an existing condition of employment or  
20 implementing a new condition of employment involving a mandatory subject of  
21 bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404  
22 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission,  
23 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment  
24 that are established through a past practice as well as conditions of employment that are  
25 established through a collective bargaining agreement. Spencer-East Brookfield Regional  
26 School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017) (citing Town of Wilmington,

1 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)).

## 2 **1. Unilateral Change**

3 To establish a unilateral change violation, the charging party must show that: (1)  
4 the employer altered an existing practice or instituted a new one; (2) the change affected  
5 a mandatory subject of bargaining; and (3) the employer established the change without  
6 prior notice and an opportunity to bargain. Town of Lexington, 37 MLC 115, 119, MUP-  
7 08-5313 (Dec. 9, 2010) (citing Commonwealth of Massachusetts, 20 MLC 1603, 1607,  
8 MUP-7976 (May 20, 1994)); Commonwealth of Massachusetts, 1545, 1552, SUP-3460  
9 (May 13, 1994).

### 10 **a. The Altered Practice**

11 The parties do not dispute that pursuant to the 2017-2019 MOUs, the District had  
12 established a prior practice of scheduling employees to work a four-day (i.e., Monday  
13 through Thursday), ten-hour work week with Fridays off during the summer months in  
14 2017, 2018, and 2019. However, the District disputes that it ever forced employees  
15 “against their will” to use either personal or vacation leave on those Fridays or take unpaid  
16 days during the summer months in 2017, 2018, and 2019. Rather, it contends that the  
17 terms of those MOUs “afford[ed] employees the option to utilize vacation time either  
18 during the week or on Fridays,” and allowed them “to work an eight-hour day Monday  
19 through Thursday, rather than a condensed four-day, ten-hour schedule.” The District  
20 also contends that during the summer of 2020, it “could not justify moving to a four-day  
21 ten-hour work day, as done in past summers, due to the lack of work and the budget  
22 uncertainty stemming from the pandemic.” Moreover, it contends that Superintendent

1 Riccio and the District repeatedly communicated its willingness to permit individual  
2 bargaining unit members the option to take unpaid leave on the Fridays in lieu of vacation  
3 or personal time. Further, it points to Riccio's June 13, 2022 email to Campbell which  
4 made clear that the District administration would "work with" unit members who had little  
5 or no accrued time to ensure that employees continued to be paid.

6 Despite the District's contentions, the record shows that prior to the summer of  
7 2020, the District neither required employees to work four-day (Monday – Thursday),  
8 eight hour schedules during the summer months in 2017, 2018, and 2019, nor required  
9 that they use either personal or vacation leave on Fridays or take unpaid days during that  
10 time. The record also shows that the District changed this practice in the summer of 2020  
11 by requiring that employees work four-day (Monday – Thursday), eight hour schedules  
12 and use personal or vacation leave on Fridays or take unpaid days. Moreover, the CERB  
13 holds that work hours, wages, and vacation leave are mandatory subjects of bargaining.  
14 See, e.g., City of Revere, 21 MLC 1325, 1327, MUP-8793 and MUP-8795 (Sept. 30,  
15 1994) (employer violated the Law by failing to bargain over change to how it scheduled  
16 employees' vacation leave); see, also, Commonwealth of Massachusetts, 46 MLC 131,  
17 133, MUP-17-5924 (Jan. 7, 2020) (vacation leave is a mandatory subject of bargaining).

18 Based on this evidence, I find that the Union has satisfied its burden of showing  
19 that, beginning in the summer of 2020, the District changed its prior practices of  
20 scheduling employees to work a four-day/ten-hour work week, Monday through Thursday,  
21 without using personal or vacation leave on Fridays or take unpaid days, and required

1 them to work a four-day/eight hour work week and use personal or vacation leave on  
2 Fridays or take unpaid days.

3 **b. Prior Notice and an Opportunity to Bargain**

4 The parties do not dispute that the District provided the Union with prior notice prior  
5 to implementing its decisions. Instead, the Employer argues that prior to implementation,  
6 it satisfied all of its bargaining obligations with the “Union as required by the Law and by  
7 Article 5 of the parties’ CBA.” Conversely, the Union argues that the District failed to  
8 bargain to resolution or impasse prior to implementing these changes because it refused  
9 to meet after the June 18, 2020 bargaining session, and ignored the Union’s subsequent  
10 requests to continue bargaining over the changes.

11 The record shows that beginning in or around early May of 2020, the District first  
12 notified the Union about possible changes to employees’ summer work schedules.  
13 Around this time, the District also conducted several staff meetings attended by  
14 bargaining unit members, including Union President Campbell, to discuss the proposed  
15 changes to those schedules. While the District conducted one formal bargaining session  
16 with the Union on June 18, 2020 via ZOOM, the parties did not reach agreement at that  
17 meeting over the issues of employees’ summer work schedules or their use of personal  
18 or vacation leave on Fridays or taking unpaid days.

19 The record also shows that the District failed to engage in further bargaining with  
20 the Union over these issues after the June 18, 2020 meeting. In fact, by email on June  
21 22, 2020, the Union informed the District that an “MOU would be needed,” before it could  
22 finalize any agreement on the matter; and, by reply email the next day, the District

1 provided the Union with a copy of the 2020 Draft MOU. One day later, the Union informed  
2 the District that it “[did] not anticipate any changes in hours until we complete or impact  
3 bargaining [sic] and are able to ratify [an MOU].” By follow-up email on June 30, 2020,  
4 the Union also informed the District that it specifically disagreed with parts of the 2020  
5 Draft MOU which related to changing the prior ten-hour/four-day work week and requiring  
6 that employees use personal or vacation leave on certain Fridays or take unpaid days.  
7 By that same email, the Union also informed the District that it still had questions about  
8 the summer work schedules and the contractual 30-day compliance notice.

9 While the District later notified the Union that it was willing to comply with the 30-  
10 day compliance notice per the parties’ CBA, it neither responded to the Union’s request  
11 to continue bargaining, nor responded to the Union’s counter proposal to keep the  
12 summer work schedules and use of leave unchanged until the parties reached a final  
13 agreement and the Union presented a tentative MOU to its membership for ratification.  
14 Rather, by memorandum on June 30, 2020, the District notified the Union that it was  
15 implementing the new summer work schedules along with the paid leave changes,  
16 effective July 13, 2020.

17 Based on the totality of this evidence, I find that the District implemented its  
18 planned changes to employees’ summer work schedules and their use of personal or  
19 vacation leave on Fridays or take unpaid days without bargaining with the Union to  
20 resolution or impasse. This is because the parties had only one bargaining session on  
21 June 18, 2020, and were still in the process of exchanging proposals by emails on June  
22 23, 24, and 30, 2020, when the District unilaterally implemented the changes by



1 memorandum on June 30, 2020. City of Revere, 21 MLC at 1327; Commonwealth of  
2 Massachusetts, 46 MLC at 133.

### 3 **2. Impasse**

4 As an alternative argument, the District contends that the parties had reached  
5 impasse by the time it implemented the changes on June 30, 2020. Conversely, the Union  
6 argues that the parties were not at impasse because there was only one bargaining  
7 session on June 18, 2020, and because the Union informed the District that it disagreed  
8 with the proposed changes, requested additional information concerning those proposals,  
9 communicated its need for continued bargaining, and needed a tentative MOU along with  
10 membership ratification prior to finalizing any agreement. Thus, the Union asserts that  
11 there was no impasse because it believed that the parties were going to complete  
12 bargaining prior to implementation, which had been their practice on reaching the 2017-  
13 2019 MOUs.

14 The CERB holds that impasse exists only where both parties have bargained in  
15 good faith on negotiable issues to the point where it is clear that further negotiations would  
16 be fruitless because the parties are deadlocked. Ashburnham-Westminster Regional  
17 School District, 29 MLC 191, 195, MUP-01-3144 (April 9, 2003) (citing Commonwealth of  
18 Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999); Town of Brookline, 20 MLC  
19 1570, 1594, MUP-8426, MUP-8478, and MUP-8479 (May 20, 1994)). To determine  
20 whether negotiating parties have reached impasse, the CERB assesses the likelihood of  
21 further movement by either side and whether they have exhausted all possibility of  
22 compromise. Ashburnham-Westminster Regional School District, 29 MLC at 195 (citing

1 Town of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000); Woods Hole, Martha's  
2 Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529-30, UP-2496 (Feb. 3,  
3 1988)).

4 Relying on Town of Billerica, 43 MLC 195, 196, MUP-14-4234 (H.O. Feb. 23,  
5 2017), the District contends that the parties had reached impasse because the Union  
6 failed to offer counter proposals concerning the impacts of the summer work schedules,  
7 and because there was no further likelihood of movement by either party due to the  
8 District's "budgetary uncertainty"<sup>12</sup> and to the "fast-approaching" summer season. While  
9 the District concedes that the parties met via ZOOM on June 18, 2020, and that  
10 bargaining "continued over email," it maintains that the Union's failure to respond to

---

<sup>12</sup> To the extent that the District is raising the affirmative defense of economic exigency, I find that it has failed to meet its burden of demonstrating that it provided the Union with notice that circumstances beyond its control required the imposition of a deadline for negotiations over the changes to employees' summer work schedules and use of paid and unpaid leave. See, City of New Bedford, 38 MLC 239, 251, MUP-09-5581 and MUP-09-5599 (April 3, 2012), aff'd sub. nom. 2015-P-0001 (Aug. 26, 2016) (Rule 1:28 decision), further appellate review den'd, FAR-24727 (Nov. 30, 2016) (citing Cambridge Public Health Commission, 37 MLC 39, 46, MUP-10-5888 (Aug. 18, 2020) (additional citations omitted) (to satisfy an exigency defense, the employer has the burden of showing that: (1) circumstances beyond its control require the imposition of a deadline for negotiations; (2) the bargaining representative was notified of those circumstances and the deadline; and, (3) the deadline imposed was reasonable and necessary)).

Specifically, while the District kept the Union informed about its budgetary uncertainty due to the COVID-19 pandemic, the District failed to establish a hard deadline to finalize negotiations over the disputed changes, and it never notified the Union about such a deadline. In fact, there is no dispute that the District willingly postponed its original imposition date from June 26, 2020 to July 10, 2020, to assuage the Union's concerns about compliance with the 30-day contractual notice requirement. For all these reasons, I find no evidence of economic exigency that exempted the District from bargaining with the Union over its changes to employees' work schedules and use of paid and unpaid leave during the summer of 2020.

1 Norris' email on June 24, 2020, supports a finding of impasse because the parties had  
2 exhausted all possibilities of compromise by that point. Specifically, the District asserts  
3 that it would have been futile to continue delaying the start of the Friday closures as a  
4 cost saving measure because the "summer was running out."

5 The District also relies on Dixon Distributing Co., 211 NLRB 241, 244 (1974) to  
6 argue that the length of the parties' negotiations is a factor that is not outcome  
7 determinative. Both Town of Billerica and Dixon are distinguished. First, while the hearing  
8 officer's decision in Town of Billerica is instructive, it does not represent CERB precedent.  
9 See, generally, County of Worcester, 3 MLC 1117, 1123 n. 6, MCR-2234 and MCR-2367  
10 (Sept. 10, 1976) (citing City of Chicopee School Committee, 1 MLC 1195, MCR-1228  
11 (Nov. 18, 1974) (factual determinations and legal conclusions not resulting from CERB  
12 decisions have no precedential value)). Moreover, the parties in that case met more than  
13 once prior to the disputed change, and the union never made any proposals or  
14 counterproposals during or after those meetings. Town of Billerica, 43 MLC at 195-96.

15 In Dixon, the National Labor Relations Board (NLRB) held that a single, 20-minute  
16 bargaining session was sufficient to satisfy the employer's bargaining obligation.  
17 However, the NLRB also found "indications" that the union had agreed to the disputed  
18 changes at that meeting, along with an underlying question of representation. Id., 211  
19 NLRB at 244. Additionally, the NLRB held that because the employer admitted that it had  
20 "refused to bargain in order to test, in the court of appeals, the validity of the [NLRB's]  
21 certification," it found that the employer had violated Section 8(a)(5) of the National Labor  
22 Relations Act. Id.

1           Next, the evidence shows that the parties here had previously bargained to  
2 resolution over employees' summer work schedules and use of leave pursuant to the  
3 2017, 2018, and 2019 MOUs. The Union relied on that prior bargaining history during the  
4 summer of 2020 when it met formally with the District on June 18, 2022, and  
5 communicated the need for another mutually-agreeable MOU that the Union could  
6 present to its membership for ratification. While I agree with the District that the parties'  
7 continued bargaining informally by emails on June 22, 23, 24, and 30, 2020, I find that  
8 the Union wished to continue bargaining over the disputed changes at the time of  
9 Superintendent Riccio's memorandum on June 30, 2020. Per those emails, the Union not  
10 only informed the District of its desire to continue bargaining, but demonstrated that the  
11 parties had lacked a contemporaneous understanding over both the length of their  
12 negotiations and the District's timeline for implementation.

13           For all these reasons, I find that the parties had not reached impasse when the  
14 District implemented the changes to employees' summer work schedules and required  
15 them to use personal or vacation leave on certain Fridays or take unpaid days beginning  
16 on or about June 30, 2020. Ashburnham-Westminster Regional School District, 29 MLC  
17 at 195; see, also, Commonwealth of Massachusetts, 25 MLC at 205-06 (if one party to  
18 the negotiations indicates a desire to continue bargaining, the CERB holds such an  
19 indication may demonstrate that the parties have not exhausted all possibilities of  
20 compromise, thus precluding a finding of impasse); compare City of Boston, 21 MLC  
21 1350, 1360-62, MUP-8372 (Oct. 17, 1994) (no impasse where parties met on five  
22 occasions over three months, exchanged proposals, reached consensus on certain

1 issues, but union demonstrated sincere desire to continue discussing outstanding issues,  
2 and renewed its request for subsequent negotiations).

### 3 **3. Waiver by Contract**

4 Next, the District argues that the Union waived by contract its right to bargain over  
5 both the decision to change to employees' work schedules and their use of paid or unpaid  
6 leave on Fridays during the summer of 2020, and the impacts of that decision based on  
7 Articles 2, 5, 22, 23, and 24 of the CBA.

8 Where an employer raises the affirmative defense of waiver by contract, it bears  
9 the burden of demonstrating that the parties consciously considered the situation that has  
10 arisen, and that the union knowingly waived its bargaining rights. City of Newton, 29 MLC  
11 186, 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents, 15 MLC  
12 1265, 1269, SUP-2959 (November 18, 1988)). The initial inquiry focuses on the language  
13 of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (Aug. 4, 1998)). If the  
14 language clearly, unequivocally, and specifically permits the public employer to make the  
15 change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-  
16 6810 (Oct. 19, 1989). If the language is ambiguous, the CERB will review the parties'  
17 bargaining history to determine their intent. Town of Marblehead, 12 MLC 1667, 1670,  
18 MUP-5370 (March 28, 1986).

19 Concerning Article 2 of the CBA, the District contends specifically that provision  
20 gives it the express right to determine employees' shifts and to conduct layoffs "in the  
21 event of lack of work or funds[,] or under conditions where management believes that  
22 continuation of such work would be less efficient, less productive, or less economical."

1 Concerning Article 5, Section A(1) of the CBA, the District contends that provision gives  
2 it the express “right to determine employees’ daily schedules and shall provide at least  
3 30 days’ notice of a change in shift, except in the case of an emergency as determined  
4 by the District.” It also contends that Article 5, Section A(3) gives it “the right to alter the  
5 work year of a position within reasonable notice to best meet the needs of the District,”  
6 which includes implementing changes to employees’ summer work schedules. Similarly,  
7 the District argues that Article 24, Section F gives it the express right to change  
8 employees’ vacation schedules “in accordance with [its] operational requirements.”  
9 Finally, the District contends that the language of Articles 22 and 23 of the CBA, when  
10 read in conjunction with Article 5, supports contractual waiver because those Articles  
11 constitute a “zipper clause.”

12 Conversely, the Union argues that it did not waive by contract its right to bargain  
13 over the changes because Articles 2, 5, 22, 23, and 24 of the CBA are too broad; and  
14 because Article 5, particularly, contains no language that permits the District to dictate  
15 the number of hours employees may work, or their use of accrued benefit time. The Union  
16 also argues that there is no other contractual provision that allows the District to make  
17 such changes unilaterally.

18 To support its arguments, the District cites to Commonwealth of Massachusetts,  
19 19 MLC 1454, 1455-56, SUP-3528 (Oct. 16, 1992). In that case, the CERB found that the  
20 union waived by contract its right to bargain over schedule changes based on the parties’

1 bargaining history<sup>13</sup> and the clear language of their contract which addressed  
2 unambiguously the employer's "desire to change the work schedules of employe[es]."  
3 The CERB also found that the contract established procedures for notifying employees  
4 of the change, included a method of selection "whenever practicable [to] solicit volunteers  
5 from among the ...affected employees," and expressly prohibited work schedule changes  
6 "for the purpose of avoiding the payment of overtime." Id. at 1456. Despite the CERB's  
7 holding in that case, I find it is distinguished here because the parties' bargaining history  
8 does not support the District's interpretation of Articles 2 or 5 of the CBA. In fact, the  
9 record is void of bargaining history evidence concerning these provisions.

10 To the extent that the parties' 2017-2019 MOUs constitute material bargaining  
11 history, these agreements are completely silent on Articles 2, 5, and 24, and make no  
12 reference to any other contractual provision. Specifically, the 2017, 2018 and 2019 MOUs  
13 all show that the parties intended to effectuate the changes contained in those  
14 agreements only for the specific period stated. For instance, the 2017 MOU stated that  
15 the "four day/ten hour....schedule will commence on Monday 7.10.2017, and be active  
16 until Friday 8.18.2017 [for] a total of six weeks," and that "[t]his will be considered a pilot

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<sup>13</sup> In its decision, the CERB stated that because neither party challenged the hearing officer's findings of fact, it adopted those findings in their entirety. Commonwealth of Massachusetts, 19 MLC at 1455. The full extent of the hearing officer's findings on the matter of bargaining history stated that the parties had negotiated "several collective bargaining agreements" over the past "several years," including the most recent agreement which included the disputed contractual provision. Commonwealth of Massachusetts, 18 MLC 1259, 1261, SUP-3528 (H.O. Jan. 17, 1992). It also stated that the employer submitted several arbitration decisions which agreed with the employer's interpretation of that provision. Id. at 1261.

1 program for FY 2018.” The 2018 MOU stated that the “four day/ten hour....schedule will  
2 commence on Monday 7.9.2018, and be active until Friday 8.16.2018 [for] a total of six  
3 weeks,” and that “[t]his will be considered a pilot program and will be re-evaluated every  
4 year.” The 2019 MOU stated that the “four day/ten hour....schedule will commence on  
5 Monday, June 24, 2019, and [be] active until Friday, August 16, 2019.” Nothing in those  
6 MOUs refer to the parties’ CBAs or address the District’s right to change employees’ work  
7 schedules and use of leave after the stipulated time frames.

8           Based on the evidence presented, the District is unable to show that the Union  
9 consciously considered the issues of employees’ summer work schedules and their use  
10 of personal or vacation leave on certain Fridays or take unpaid days during the summer  
11 of 2020. Nor can the District show that the Union knowingly waived its rights to bargain  
12 over these issues. Further, the record is void of evidence demonstrating how the  
13 language of Articles 2, 5, 22, 23, and 24, of the parties’ CBA expressly confers on the  
14 District the contractual rights to unilaterally implement these changes. While Article 2  
15 references the management rights to determine “shift[s]” and to “lay off employees,” and  
16 while Article 24 pertains specifically to vacation schedules, I find that the language of  
17 these contractual provisions is framed too broadly to demonstrate contractual waiver  
18 because those Articles do not expressly distinguish between shifts and vacation leave  
19 occurring during the regular school year versus those occurring during the summer  
20 months. See, e.g., Town of Hudson, 25 MLC 143, 148-49, MUP-1714 (April 1, 1999) (a  
21 broadly-framed management rights clause is too vague to provide a basis for inferring  
22 a clear and unmistakable waiver). Moreover, the CERB holds that while a zipper clause



1 may support a finding of a waiver, a broadly formed management rights clause is too  
2 vague to infer a clear and unmistakable waiver by a union over mandatory subjects of  
3 bargaining. School Committee of Newton vs. Labor Relations Comm'n, 388 Mass. at  
4 569; see also Commonwealth of Massachusetts, 17 MLC 1007, 1014 (1990); (citing  
5 Massachusetts Board of Regents of Higher Education, 15 MLC 1265, 1271 n. 7)) (CERB  
6 holds that zipper clauses do not waive a union's right to bargain over a change to an  
7 existing practice where the contract is silent on that subject).

8         Additionally, I find that the District's reliance on the layoff provision in Article 2 is  
9 inapposite because there is no evidence that any layoffs occurred during the relevant time  
10 period. Similarly, the language of Article 5 is not clear and unambiguous concerning work  
11 hours because while that provision pertains to "daily schedules," it makes no distinction  
12 between schedules during the school year versus those during the summer months. Last,  
13 the District failed to provide evidence defining the contractual term "work year" and  
14 whether that term includes summer months. In fact, Article 5, Section 3 states that  
15 "[s]pecific positions may have different work years" (e.g., 185 days, 195 days, etc.), but  
16 is silent on the remaining 170 or 180 calendar days. Moreover, the existence of the 2017-  
17 2019 MOUs shows that the parties never agreed to give the District the contractual right  
18 to unilaterally make the disputed changes.

19         Consequently, the District's affirmative defense of contractual waiver must fail  
20 because it cannot show that the parties consciously considered the disputed changes,  
21 that the Union knowingly waived its bargaining rights, or that the contract language

1 clearly, unequivocally, and specifically permitted the District to make the changes. City of  
2 Newton, 29 MLC at 190.

#### 3 **4. Core Managerial Prerogative**

4 Finally, the District argues that it was exempted from bargaining with the Union  
5 over the disputed changes based on its core managerial prerogative to make level of  
6 services decisions. Relying on City of New Bedford, 90 Mass. App. Ct. at 1104, the District  
7 contends that the decisions to close its facilities on Fridays during the summer of 2020,  
8 to reduce summer work schedules from a ten-hour/ four-day workweek to an eight-hour/  
9 four-day workweek, and to require that employees use personal or vacation leave on  
10 certain Fridays or take unpaid days are all level of services decisions that fall within its  
11 exclusive managerial prerogative.

12 In City of New Bedford, the CERB found, and the court affirmed, that the city's  
13 decision to close its offices at noon on Fridays "was an exercise of the city's managerial  
14 prerogative to make level of services decisions, over which it did not have to bargain."  
15 City of New Bedford, 38 MLC at 247; 2015-P-0001, page 9. However, both the CERB and  
16 the court found that the city was still required to bargain with the union over the means  
17 and methods of implementing its level of services reduction. 38 MLC at 247; (citing School  
18 Committee of Newton v, Labor Relations Commission, 388 Mass. at 563). Specifically,  
19 the CERB held that "the manner in which the reduction is accomplished, whether by  
20 voluntary or involuntary reduction in hours, attrition, or otherwise, is a mandatory subject  
21 of bargaining." Id. (other citations omitted). Based on this holding, I find that the District  
22 was obligated to bargain with the Union over the possible staffing arrangements that it

1 might have used to reduce its level of services during the summer of 2020 and the impacts  
2 of those arrangements on employees' terms and conditions of employment. While the  
3 Union rejected the District's reduction proposals at the June 18, 2020 meeting, the District  
4 remained obligated to continue bargaining with the Union to resolution or impasse before  
5 implementing its proposals. For all these reasons, I find that the District was not exempted  
6 from bargaining over its decisions to change employees' work schedules and require their  
7 use of personal or vacation leave on certain Fridays or take unpaid days during the  
8 summer of 2020.

9 CONCLUSION

10 In conclusion, I find that the District violated Section 10(a)(5) and, derivatively,  
11 Section 10(a)(1) of the Law by failing to bargain in good faith with the Union to resolution  
12 or impasse over the decisions to change unit members' summer work schedules and  
13 require them to use personal leave or vacation leave on certain Fridays or take unpaid  
14 days, and the impacts of those decisions on employees' terms and conditions of  
15 employment. I also find that it violated Section 10(a)(5) and, derivatively, Section 10(a)(1)  
16 of the Law by failing to meet with the Union to continue bargaining over those changes to  
17 resolution or impasse.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Essex  
North Shore Agricultural and Technical School District shall:

18 1. Cease and desist from:

- 1 a) Requiring that employees work an eight-hour day/four-day  
2 workweek, Monday through Thursday, and use personal or vacation  
3 leave on certain Fridays or take unpaid days during the summer  
4 months without providing the Union with prior notice and an  
5 opportunity to bargain to resolution or impasse over those decisions  
6 and its impacts;  
7
- 8 b) Refusing to bargain collectively in good faith with the Union over the  
9 requirements that employees work an eight-hour day/four-day  
10 workweek, Monday through Thursday, and use personal or vacation  
11 leave on certain Fridays or take unpaid days during the summer  
12 months;  
13
- 14 c) Interfering with, restraining, or coercing employees in the exercise of  
15 their rights under Section 2 of the Law;  
16
- 17 2. Take the following affirmative action:  
18
- 19 a) Upon request, bargain collectively with the Union over the  
20 requirements that employees work an eight-hour day/four-day  
21 workweek, Monday through Thursday, and use personal or vacation  
22 leave on certain Fridays or take unpaid days during the summer  
23 months;
- 24 b) Rescind the requirements that employees work an eight-hour  
25 day/four-day workweek, Monday through Thursday, and use personal  
26 or vacation leave on certain Fridays or take unpaid days during the  
27 summer months;  
28
- 29 c) Make whole all affected employees who worked work an eight-hour  
30 day/four-day workweek, Monday through Thursday, and who used  
31 personal or vacation leave on certain Fridays or took unpaid days  
32 during the summer of 2020, with interest compounded quarterly at the  
33 rate specified in G.L. c. 231, Sec. 6I;
- 34 d) Post immediately, signed copies of the attached Notice to Employees  
35 in all conspicuous places where members of the Union's bargaining  
36 unit usually congregate or where notices are usually posted, including  
37 electronically if the District customarily communicates with these unit  
38 members via intranet or email, and display for a period of thirty (30)  
39 days thereafter; and

- 1 e) Notify the DLR in writing of the steps taken to comply with this Order  
2 within ten (10) days of its receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



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KENDRAH DAVIS, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



## THE COMMONWEALTH OF MASSACHUSETTS

### NOTICE TO EMPLOYEES

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

The Essex North Shore Agricultural and Technical School District (District) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith with American Federation of State, County, and Municipal Employees, Council 93, Local 245 (Union) when it changed unit members' work schedules and required their use of personal leave or vacation leave on certain Fridays or take unpaid days during the summer of 2020. The District also violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith when it failed to meet with the Union to continue bargaining over these changes. The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the District assures its employees that:

WE WILL NOT require employees to work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over these decisions and its impacts;

WE WILL, upon request, bargain collectively in good faith with the Union over the requirements that employees work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months;

WE WILL rescind the requirements that employees work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months;

WE WILL make whole all affected employees who worked work an eight-hour day/four-day workweek, Monday through Thursday, and who used personal or vacation leave on certain Fridays or took unpaid days during the summer of 2020, with interest compounded quarterly at the rate specified in G.L. c. 231, Sec. 6I;

WE WILL refrain from interfering with, restraining, or coercing employees in the exercise of their rights under Section 2 of the Law.

---

Essex North Shore Agricultural and Technical School District

Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, 2 Avenue de Lafayette, Boston, MA 02111-1750 Telephone: (617) 626-7132.