

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	Case No. MUP-20-8232
CITY OF BOSTON	*	
	*	
and	*	Date Issued: March 27, 2025
	*	
BOSTON POLICE SUPERIOR	*	
OFFICERS FEDERATION	*	
	*	

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Robert J. Boyle, Jr., Esq.	-	Representing the City of Boston
Patrick N. Bryant, Esq.	-	Representing the Boston Police Superior Officers Federation ¹

HEARING OFFICER'S DECISION

1 SUMMARY

2 The two issues in this case are whether the City of Boston (City or Employer)
3 violated Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws,
4 Chapter 150E (the Law) by: 1) prohibiting members of the bargaining unit represented by
5 the Boston Police Superior Officers Federation (Union or Federation) from using
6 previously approved vacation time from October 31, 2020 through November 7, 2020,
7 and personal leave time from November 2 to 9, 2020, without bargaining to impasse or

¹ Attorney Jillian M. Bertrand submitted the post-hearing brief for the Boston Police Superior Officers Federation.

1 resolution with the Union over the impacts of that decision on employees' terms and
2 conditions of employment; and 2) changing the vacation request approval process without
3 bargaining with the Union to resolution or impasse over the impacts of that decision on
4 employees' terms and conditions of employment. I find that the City violated the Law as
5 alleged.

6 STATEMENT OF THE CASE

7 The Union filed a charge of prohibited practice with the Department of Labor
8 Relations (DLR) on October 10, 2020, alleging that the City had violated Sections 10(a)(5)
9 and, derivatively, Section 10(a)(1) of the Law. A DLR investigator investigated the charge
10 and issued a two-count Complaint of Prohibited Practice and Partial Dismissal
11 (Complaint) on August 6, 2021. Count 1 alleged that the City violated the Law by
12 prohibiting bargaining unit members from requesting or utilizing vacation leave time from
13 October 31, 2020 through November 7, 2020, and utilizing personal leave time from
14 November 2 to 9, 2020 (collectively, the Presidential Election period), without bargaining
15 to resolution or impasse over the impacts of that decision on employees' terms and
16 conditions of employment. Count 2 alleged that the City altered the vacation request
17 approval process without bargaining to impasse or resolution over the impacts of that
18 decision on employees' terms and conditions of employment.² The City filed an Answer
19 to the Complaint on or about August 9, 2021.³

² The investigator dismissed the allegation that the City violated the Law by failing to bargain over the decision to prohibit the use of leave time during the Presidential Election period.

³ On June 10, 2022, the City filed a Motion to Defer the Complaint to the Arbitration Award. I denied the Motion on July 8, 2022.

I conducted a hearing on July 20, 2022, at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. Both parties filed post-hearing briefs on or about September 23, 2022. Based on the record, which includes witness testimony, my observation of the witnesses' demeanor, admissions of fact, and documentary exhibits, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

ADMISSIONS OF FACT

1. The Employer is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. By email dated October 8, 2020, the Employer advised bargaining unit members that they would not be permitted to utilize or request vacation time from October 31 to November 7, 2020, and could not utilize personal leave from November 2 through November 9, 2020.
4. By email dated October 9, 2020, the Union demand[ed] to bargain over the decision and impacts of the decision to deny vacation time and discretionary leave time as referenced in paragraph [3].

FINDINGS OF FACT⁴

Background

The Union represents the uniformed branch of sergeants, lieutenants, and captains (collectively, superior officers) who are employed by the City in its police department. As of July 20, 2022, the date of the hearing in this matter, there were approximately 250 bargaining unit members.

Contractual Provisions

⁴ I take administrative notice that the 2020 election day took place on November 3, 2020.

1 The City and the Union are parties to a collective bargaining agreement (CBA) that
2 was in effect at all times relevant to the events in this case. Article XI, Vacation Leave,
3 Section 1 of the CBA provides in pertinent part as follows:

4 Subject to the operating needs of the Department, members of the bargaining unit
5 who are entitled to vacation benefits may exercise their option to use their vacation
6 time or to be compensated as provided for in Section 3 of this Article.⁵
7

8 Article XVIII Miscellaneous, provides in pertinent part as follows:

9 Section 3A. Personal Leave Benefit. Effective July 1, 1987, in each fiscal year,
10 each employee shall be credited with and shall be entitled to four (4) personal
11 leave tours.
12

13 The employee must provide the Police Department with notice of an intention to
14 take a personal leave tour no later than noontime on the calendar day immediately
15 prior to the personal leave tour involved.
16

17 At the option of each employee, all or any part of any employee's annual personal
18 leave entitlement can be taken in the year of entitlement, can be redeemed for
19 cash payment or can be placed in a bank of accumulated, unused personal leave.
20

21 The parties also introduced into the record as Joint Exhibit #1 their collective
22 bargaining agreement that, by its terms, was in effect from 1979 through 1981 (1979-
23 1981 CBA). Article XVIII, Miscellaneous, Section 8 of the 1979-1981 CBA states in
24 pertinent part:

25 All employees covered by this Agreement may take up to three (3) of their fifteen
26 annual sick days as personal days, provided that the employee shall schedule any
27 such personal days in advance with the approval of his/her commanding officer.
28 Such approval will not be unreasonably withheld.⁶
29

30 **Requesting and Scheduling Leave Time**

⁵ Section 3 describes a process by which certain bargaining unit members may redeem vacation time in cash in lieu of utilizing the week as vacation.

⁶ The hearing record contains no information explaining the interplay, if any, between the number of personal days in the current CBA and the number of personal days referenced in Section 8 of the 1989-1981 CBA.

1 Bargaining unit members earn vacation time as well as various other types of paid
2 leave. The parties use the term “discretionary leave” to refer to leave time other than
3 vacation weeks and personal days. Unit members receive so-called “C-days” when they
4 do something that is considered “above and beyond” the call of duty, and they are
5 approved for a “Commendation Day.” They receive “WIWO” days for working a tour when
6 they are off duty, which they can use on a scheduled workday. Superior officers who work
7 on an administrative schedule receive 17 “E” days per year, and all superior officers
8 receive four personal or “P-days” which can be used for anything and are almost always
9 approved. Unused personal days can be banked or bought back.

10 Bargaining unit members request vacation and other leave time by submitting a
11 “blue form” to their commanding officers. The commanding officer considers the request
12 and decides whether to approve the time off. If there is a shortage of personnel,
13 commanding officers can disapprove a request or suggest that a unit member take leave
14 at a different time. The Police Commissioner does not review vacation leave requests on
15 a case-by-case basis. Unit members are allowed to carry over 10 days of unused
16 vacation time, as well as E days and C days, into the following year. Vacation days that
17 are carried over this way must be used by the end of January, but E-days must be used
18 by January 20. In some instances, officers can sell back some of their unused vacation
19 time, but days not timely used in January will be lost.

20 **Full Call-Ups Prior to October 8, 2020**

21 Prior to October 8, 2020, the Boston Police Department (BPD) has cancelled leave
22 time for special events and emergencies: this is known as a “full call-up.”⁷ The general

⁷ It is also known as a “full call-out.”

1 practice has been to exempt sworn personnel on a P-day or a previously approved
2 vacation week from the full call-up. Officers are unable to use their discretionary days off
3 on a full call-up⁸ but have taken P-days during full call-ups. The BPD ordered full call-
4 ups and exempted sworn personnel on a P-day or previously approved vacation week
5 from the full call-up on the following days prior to the events at issue in this case:

- 6 • September 25, 2020⁹
- 7 • August 30, 2020
- 8 • August 31, 2019 (Straight Pride Parade)
- 9 • April 15, 2019 (Boston Marathon)
- 10 • February 5, 2019 (New England Patriots Parade)
- 11 • February 3, 2019 (Superbowl)
- 12 • August 25, 2018 (Caribbean Festival)
- 13 • April 16, 2018 (Boston Marathon)
- 14 • February 4, 2018 (Superbowl)
- 15 • August 26, 2017 (Caribbean Festival)
- 16 • June 17, 2017 (Sail Boston)
- 17 • April 17, 2017 (Boston Marathon)
- 18 • February 7, 2017 (New England Patriots Parade)
- 19 • February 5, 2017 (Superbowl)
- 20 • August 27, 2016 (Caribbean Festival)
- 21 • April 18, 2016 (Boston Marathon)
- 22 • August 25, 2015 (Caribbean Festival)
- 23 • April 20, 2015 (Boston Marathon)
- 24 • August 23, 2014 (Caribbean Festival)
- 25 • July 4, 2014
- 26 • June 19, 2008 (Boston Celtic's Victory Rally)
- 27 • June 17, 2008 (Boston Celtic's Game 6)

⁸ Some of the full call-ups only impacted certain shifts.

⁹ The record does not clearly reflect the specific reason for the full call-ups on August 30 and September 25, 2020. However, the record indicates that there were full call-ups during the summer of 2020 for "riots and unrest."

1 An exception to this general practice occurred in 2004, when the Democratic
2 National Convention (DNC) was held in Boston. The City was concerned about people
3 coming in from outside the City during that time period and causing disturbances, so the
4 BPD notified the Union on July 11, 2003, that it planned to cancel vacation, personal, "C"
5 and "E" days for "a period of time prior to and during the DNC." During the DNC full call-
6 up, the BPD cancelled all vacations and P-days, as well as all discretionary days.¹⁰ The
7 Union grieved the City's action, and the City denied the grievance at Steps 1, 2 and 3.¹¹

8 **Concerns for the Potential for Election Day Violence**

9 In early October of 2020, media sources published articles noting the possibility of
10 election day violence. For example, *The Washington Post* ran an article on October 2,
11 2020, headlined: **Justice Dept., FBI planning for the possibility of Election Day**
12 **violence, voting disruptions**. In pertinent part, the article stated:

13 Bracing for possible civil unrest on Election Day, the Justice Department is
14 planning to station officials in a command center at FBI headquarters to coordinate
15 the federal response to any disturbances or other problems with voting that may
16 arise across the country, officials familiar with the matter said. ...

17
18 The FBI said in a statement that, as in previous years, it is "committed to protecting
19 the American public's right to a fair and safe election by securing it" and that
20 officials "are working closely with our federal, state and local partners so everyone
21 involved with safe-guarding the election has the information and resources
22 necessary to respond in a timely manner to any violations that may arise."...

¹⁰ Deputy Superintendent Luis Cruz (Cruz), Director of the BPD's Office of Labor Relations, testified that during the DNC full call-up, the BPD cancelled all vacations and P-days. Union president Sgt. Jeanne Carroll (Carroll) testified that personal days are "never refused," that officers could use personal days on full call-ups, and she was not familiar with approved vacation weeks being cancelled prior to October 8, 2020. However, when asked whether she was familiar with the situation where personal days had been prohibited prior to November of 2020, she responded: "I don't recall any...Possibly back with DNC, but I don't really recall either way." Given Carroll's lack of recollection, I credit Cruz's testimony that the BPD cancelled vacation time and P-days during the DNC.

¹¹ The record does not disclose whether the parties arbitrated the grievance.

1
2 Federal law prohibits U.S. government officials from sending “armed men” to
3 polling places, and the Justice Department has determined that means a U.S.
4 attorney cannot order FBI agents or U.S. marshals to the polls. Justice
5 Department policies and tradition also call for federal law enforcement to keep a
6 low profile when it comes to elections, because the states, rather than the federal
7 government, are responsible for making sure the voting process is conducted
8 fairly. ...
9

10 *The New York Times* published an article on October 7, 2020, headlined: **Election**
11 **Officials Are Preparing for Potential Unrest at the Polls** that contained the following
12 statement:

13 The FBI and the Department of Homeland Security have begun exercises with
14 local law enforcement groups and election officials around the nation....
15

16 At some point prior to October 8, 2020, the BPD received intelligence about the
17 potential for civil unrest during the election week.¹² By November 3, 2020, the BPD's
18 Incident Action Plan noted that “[t]he BRIC does not possess any credible, specific
19 information indicating a planned physical or cybersecurity threat to the November 3
20 election in the MBHSR¹³ at this time.”

21 **The Commissioner’s Election Week 2020 Orders and the Union’s Response**

¹² Cruz credibly testified to this statement, and in response to a question regarding news accounts that the BPD sent to the Boston Police Patrolmen’s Association (BPPA), further testified that “...the FBI, Boston office, had information that was shared with us.” There is no evidence in the record to contradict Cruz’s testimony, and I credit it. However, I also note that the record contains no evidence describing the intelligence that the BPD received or any specific information that the Commissioner relied on when he decided to implement the leave restrictions at issue in this case.

¹³ I take administrative notice that the term MBHSR refers to the Metro Boston Homeland Security Region. The term BRIC refers to the Boston Regional Intelligence Center.

On October 7, 2020, the office of Police Commissioner William G. Gross (Commissioner) forwarded an email to bargaining unit members regarding vacation usage that stated in pertinent part as follows:

Relative to employee vacation time, due to the COVID-19 pandemic, many employees have not utilized their accrued vacation time as usual. With the end of the year approaching, it is important to collectively plan and schedule these vacations as a team, in efforts to avoid an influx of overlapping requests.

With the intention to support our employees and their earned paid time off, **all supervisors will immediately connect with their staff and create a plan that works best for everyone and their office.** (emphasis in original.) Vacations should be scheduled accordingly to ensure that each department is adequately staffed each day, especially during the holiday season.

All current vacation policies remain in effect for vacation carryover into 2021. No additional vacation days, beyond each contractual obligation, will be allowed to carryover into 2021. Employees are encouraged to use their vacation time in order to prevent losing days by the end of the year. ...

On October 8, 2020, at 12:44 p.m., in response to the intelligence that the BPD had received about the potential for civil unrest during the upcoming election week, the Police Commissioner's office emailed a memo to all BPD email users that stated:

Good afternoon – as an update to the [vacation usage email], for SWORN personnel, please be advised that vacations will not be allowed from Saturday, October 31 to Saturday, November 7. A separate email regarding discretionary days off will also be issued department wide. Thank you. (emphasis in original.)

One minute later, at 12:45 p.m., the Commissioner emailed a memo to all the BPD Bureau Chiefs that stated in relevant part as follows:

In order to provide sufficient public safety for the week of the election, all discretionary days off (E-Days, C-Days, single V Days, P Days, W.O.'s as well as a vacation period) for **sworn** personnel shall not be allowed as follows: (emphasis in original.)

- The vacation period from Saturday, October 31 to Saturday, November 7 will not be allowed.
- Discretionary Days Off, as noted above, will not be allowed from Monday, November 2 to Monday, November 9.

1 The City did not give the Union notice before October 8, 2020, of the vacation and P-day
2 restrictions that the Commissioner outlined in his October 8, 2020 emails (the October 8
3 leave orders).

4 By email dated October 9, 2020, Union attorney Patrick Bryant (Bryant) advised
5 Cruz, Stephen Sutliff, Deputy Director of the BPD's Office of Labor Relations, and BPD
6 Legal Advisor David Fredette that "[t]he Federation hereby demands to bargain about the
7 Commission's (sic) decisions and impacts of decisions to prohibit use of vacations and
8 discretionary days off during election week. We ask that the orders be rescinded unless
9 and until bargaining obligations have been fulfilled." Subsequently, by letter dated
10 October 15, 2020, Cruz advised the Union,¹⁴ the Boston Police Detectives Benevolent
11 Society (BPDBS) and the BPPA as follows:

12 As you know from conversation with Superintendent Ridge, the Department has
13 received intelligence that there could be civil unrest in the days surrounding
14 Election Day, November 3, 2020. In light of this information, the Department felt it
15 was necessary to disallow vacations from October 31, 2020 to November 7, 2020
16 and the use of discretionary days from November 2, 2020 to November 9, 2020.

17
18 Although public safety is paramount, we understand that this could cause some of
19 your members hardship. Recognizing the difficulty that some of your members
20 may experience as a result of this order, the Commissioner will allow officers to
21 petition, through their commanding officer, to use vacation time if it was scheduled
22 in advance of the October 8, 2020 order. The Commissioner will review each such
23 petition on a case-by-case basis when determining whether to grant the previously
24 scheduled use of vacation. Such requests should be made by October 23, 2020.
25 All other cancellations will remain in effect.

26
27 If you would like to meet over this issue, please provide me with dates as soon as
28 possible before the end of the day, October 16, 2020, and we can arrange a
29 meeting individually with your bargaining unit. If you have any questions, please
30 do not hesitate to contact me.

¹⁴ The City's only response to the Union's demand to bargain was Cruz's October 15 letter to the Union, the BPDBS and the BPPA.

1 The Union did not contact Cruz, offer any bargaining dates, or make bargaining proposals
2 to the City in response to Cruz's offer to meet. There is no evidence in the record that
3 the parties bargained over the Commissioner's October 8, 2020 orders.

4 On Tuesday, October 20, 2020, the Commissioner forwarded an email to all BPD
5 email users that included a reprint of the October 8 order noted above and adding in
6 relevant part, as follows:

7 Regarding the below previously issued email, in addition, all regular days off for
8 sworn personnel are cancelled from Monday, November 2 through Friday,
9 November 6, 2020.

10
11 **The Union's Grievance**

12 On October 9, 2020, the Union filed a grievance with the City stating as follows:
13

14 The City/Department violated, pertaining to, but not limited to Articles VIII, XI and
15 XVIII of the Collective Bargaining Agreement between the City of Boston and the
16 Boston Police Superior Officers Federation, when the City/Department cancelled
17 discretionary time off during November 2, 2020 to November 9, 2020 and
18 cancelled the vacation period for October 31, 2020 to November 7, 2020. a.m.
19 Saturday, November 7.
20

21 The City and the Union processed denied the grievance through all steps in the grievance
22 procedure and arbitrated it on February 3, 2022. On June 3, 2022, Arbitrator Joan M.
23 Martin, Esq. issued an award (Arbitrator Martin's Award) sustaining the grievance and
24 stating: "[i]f the Federation can show proof of any member having lost accrued time off
25 because of time restrictions on using it, the time off shall be restored." The award further
26 stated that "[t]he Federation reported no monetary losses on the part of its members and
27 no financial award is given."

28 **Use of Leave During the Presidential Election Week**

29 None of the Union's bargaining unit members submitted a petition to the
30 Commissioner asking to use previously approved leave time during the Presidential

1 Election period. However, some unit members petitioned their commanders to use
2 vacation and P-days, and their requests were granted.¹⁵ The record contains no evidence
3 that the City extended the time period for unit members to carry their accrued but unused
4 vacation from 2020 into 2021.

5 OPINION

6 A public employer violates Sections 10(a)(5) and (a)(1) of the Law when it
7 unilaterally alters a condition of employment involving a mandatory subject of bargaining
8 without first bargaining with the union to resolution or impasse. School Committee of
9 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The employer's obligation
10 to bargain before changing conditions of employment extends to working conditions
11 established through past practice, as well as those specified in a collective bargaining
12 agreement. Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983). To
13 establish a violation, a union must demonstrate by a preponderance of evidence that
14 there was a pre-existing practice, that the employer unilaterally changed that practice,
15 and that the change impacted a mandatory subject of bargaining. Boston School
16 Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528, MUP-2541 (April 15, 1977).

17 The Law does not require the public employer to bargain about decisions that fall
18 within its exclusive managerial prerogative. Town of Dedham, 21 MLC 1014, 1022, MUP-
19 8091 (June 15, 1994). But even when a public employer is excused from bargaining over
20 a decision that is a management prerogative, that employer still has the obligation to

¹⁵ Certain bargaining unit members were allowed to take vacation leave for five days during the week beginning on Sunday, November 1 and ending on Saturday, November 7, 2020.

1 bargain with the union over the impacts its decision will have on mandatory subjects of
2 bargaining, before it implements that decision. City of Boston, 30 MLC 23, 29, MUP-2670
3 (September 3, 2003) (city required to negotiate prior to implementation over the impacts
4 of the core governmental decision to have unit members use specialized shotguns and
5 ammunition as part of a less lethal force policy); Taunton School Committee, 28 MLC
6 378, 388, MUP-1632 (June 13, 2002) (although decision to implement block scheduling
7 lies outside the sphere of collective bargaining, school committee was still required to
8 bargain over the impact of that managerial decision).

9 In this case, the Union argues that there was a past practice of exempting P-days
10 and vacation weeks from full call-ups, the City changed the practice when the
11 Commissioner prohibited bargaining unit members from taking P-days and previously
12 approved vacation weeks during the Presidential Election period and altered the
13 procedures for requesting vacation leave. The process for requesting, and the criteria for
14 granting paid leave are mandatory subjects of bargaining. Conversely, the City argues
15 that: 1) the CBA and the Police Commissioner's statute give it the right to restrict paid
16 leave based on operational needs, 2) exigent circumstances permitted the City to
17 implement the orders unilaterally, 3) the City provided a method for unit members to take
18 time off, 4) the Union waived any impact bargaining rights by its inaction and its insistence
19 on decisional bargaining, and 5) the directive had no bargainable impacts on unit
20 members' working conditions. I am not persuaded by the City's arguments and address
21 each one in turn.

22 **Count 1: The Police Commissioner's October 8 Orders**

23 **Changed Practice**

1 To determine whether a binding past practice exists, the Commonwealth
2 Employment Relations Board (CERB) analyzes the combination of facts upon which the
3 alleged practice is predicated, including whether the practice has occurred with regularity
4 over a sufficient period so that it is reasonable to expect that the practice will continue.
5 Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997). The
6 CERB inquires whether employees in the unit have a reasonable expectation that the
7 practice will continue, and looks to whether the practice is unequivocal, has existed
8 substantially unvaried for a reasonable period, and is known and accepted by both
9 parties. Commonwealth of Massachusetts, 34 MLC 143, 146, SUP-04-5052 (June 17,
10 2008). The definition of practice necessarily involves the CERB's policy judgment as to
11 what combination of circumstances establishes the contours of a past practice for
12 purposes of applying the law prohibiting unilateral changes. Id. (citing Bristol County, 23
13 MLC 114, 116, MUP-9844 (November 15, 1996)).

14 The specific issue I consider here is whether the parties had a past practice of
15 allowing bargaining unit members to use previously approved leave for vacation weeks
16 and personal leave during full call-ups, and whether the Commissioner's October 8 leave
17 orders changed that practice. The evidence shows that unit members who seek to use
18 leave time submit requests to their commanding officers, and the commanding officers
19 decide whether to approve the requested time off. During full call-ups before October 8,
20 2020, officers have been unable to use their discretionary days off but have been
21 permitted to take previously approved vacation weeks or P-days. The City consistently
22 followed this practice on a number of occasions between 2008 and 2020 when it ordered
23 full call-ups for significant events or emergencies, and there was no factual reason to

1 believe that the employees would not reasonably expect this practice to continue.
2 However, the evidence also shows that the DNC was an exception to this practice, as the
3 City did not permit unit members to take vacation time or personal leave time during the
4 DNC in 2004. Thus, I consider the legal effect of the City's single deviation from this
5 pattern.

6 In City of Boston, 8 MLC 2057, MUP-4105 (April 23, 1982), the CERB considered
7 whether the union had established a past practice whereby its unit members performed
8 the work of roping off parade routes on an overtime basis. The city disputed the practice
9 and argued that there were two occasions on during which non-unit members performed
10 the work in question. The CERB determined that there was a past practice of unit
11 members performing the roping work, noting that on one of the two limited exceptions,
12 the union protested the city's action by filing a prohibited practice charge. Id. at 2058.
13 Similarly, I conclude that the parties here had a binding past practice of allowing unit
14 members to take previously approved vacation weeks and personal leave time during full
15 call-ups, notwithstanding the additional restrictions imposed during the DNC. Compare
16 City of Haverhill, 42 MLC 273, 275, MUP-13-3066 (May 24, 2016) (administering an
17 online training program one prior time was insufficient to establish a past practice because
18 it was neither regular nor recurring). The City frequently and consistently exempted
19 personal leave and previously approved vacation weeks from full call-ups, and on the one
20 occasion that it did not do so, the Union protested the City's unilateral action by filing a
21 grievance.

22 I further find that the City changed this practice when the Commissioner issued his
23 October 8 leave orders. As noted, prior full call-ups excluded previously approved

1 vacation weeks and P-days, and the Commissioner changed this practice by including all
2 vacation leave and P-days in his orders. The fact that the City offered a new method by
3 which unit members could petition the Commissioner to keep previously approved
4 vacation time doesn't change the fact that the past practice exempted personal days and
5 preapproved vacation weeks from full call-ups without requiring a second approval.
6 Moreover, as discussed below, the unilateral change to the vacation leave request
7 procedure was itself an unlawful change, rather than a lawful solution to the original
8 orders.

9 **Impact on a Mandatory Subject of bargaining**

10 The City doesn't argue that vacation and leave time procedures, and restrictions
11 surrounding the use of leave time, are not mandatory subjects of bargaining. See
12 Commonwealth of Massachusetts, 21 MLC 1637, 1642, (SUP-3587 (March 20, 1995.))
13 Instead, it contends that the Commissioner's October 8 leave orders had no actual impact
14 on unit members' terms and conditions of employment. Specifically, the City argues that
15 the Union presented no evidence that full call-ups negatively impacted morale and failed
16 to identify any unit member who was impacted by the leave restrictions. Conversely, the
17 Union argues that the October 8 leave orders impacted a variety of subjects for bargaining
18 including how superior officers could reschedule canceled leave time, whether the Police
19 Commissioner would extend the leave carry over period, and what criteria the Police
20 Commissioner would consider when evaluating petitions to reinstate canceled leave time.

21 I agree with the Union. As Cruz noted in his October 15 letter to the unions, the
22 Commissioner's leave restrictions could cause "hardship" and "difficulty" for unit
23 members. The directive occurred in late 2020, and the Commissioner made clear in his

1 October 7 email that the City's vacation carryover policies remained in effect, and no
2 additional vacation days, beyond each contractual obligation, would be allowed to carry
3 over into 2021. Thus, the method and criteria for rescheduling cancelled vacation time,
4 and the potential enlargement of the vacation carryover period, were bargainable impacts
5 of the Commissioner's October 8 leave orders. Moreover, the Commissioner's unilateral
6 implementation of a revised vacation procedure did not negate the impacts of his earlier
7 orders; rather, it raised questions regarding the criteria he would use to assess a vacation
8 petition. In sum, I find that the City changed its procedures for the use of vacation and
9 personal leave time, and that this change impacted unit members' terms and conditions
10 of employment.

11 **City Defenses**

12 **Waiver**

13 As noted above, the City argues that the Union waived its bargaining rights by
14 inaction, and by demanding that the City restore the status quo ante and bargain over the
15 decision to impose the leave restrictions. The City acknowledges that the Union
16 requested to bargain but maintains that the Union's failure to offer bargaining dates or
17 proposals in response to Cruz's October 15 meeting offer constitutes a waiver by inaction.

18 A union waives its right to bargain by inaction if the union: 1) had actual knowledge
19 or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the
20 subject; and 3) unreasonably or inexplicably failed to bargain or request
21 bargaining. Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999). However,
22 the CERB does not apply the doctrine of waiver by inaction where the employer presents
23 the union with a fait accompli, and an employer's duty to notify the union of a potential

1 change before it is implemented is not satisfied by presenting the change as a fait
2 accompli and then offering to bargain. Id.

3 I find that the City implemented the October 8 orders as a fait accompli. Where an
4 employer notifies a union about a decision after it has already been made, the CERB
5 looks at the record as a whole to determine whether meaningful bargaining could still take
6 place and bring about results. See, e.g., Scituate School Committee, 9 MLC 1010, 1013,
7 MUP-4563 (May 27, 1982). The Commissioner's October 8 leave orders reversed the
8 memo that he had issued the previous day encouraging unit members to schedule their
9 vacation time "as a team" to "avoid an influx of overlapping requests." At that point, the
10 Union could reasonably believe it would be fruitless to ask the Commissioner to assess
11 the vacation leave issues for a third time. Although the Commissioner subsequently
12 offered a new vacation request procedure, the City did not offer to provide a similar
13 procedure for P-days or reverse the P-day restriction. Under such circumstances, the
14 Union need not have demanded bargaining even though it did so one day after the
15 Commissioner issued the October 8 leave orders. Consequently, the doctrine of waiver
16 by inaction does not apply here.

17 The City's argument that the Union waived its bargaining rights by demanding
18 decisional bargaining and restoration of the status quo ante, and by failing to offer Cruz
19 bargaining dates and proposals, fares no better. First, since the Union had no obligation
20 to demand bargaining, it could not have waived its right to bargain by failing to provide

1 bargaining and proposals dates within one day of the City's offer to meet.¹⁶ Second, there
2 is no merit to the City's contention that the Union waived its impact bargaining rights by
3 demanding to bargain over the decision. In City of Boston, supra, the City sought to
4 establish guidelines for the use of less-than-lethal force in certain situations. In a meeting
5 held to discuss a proposed rule, the Union gave the City a document entitled "decisional
6 bargaining proposals" that stated, among other things, that the BPD should "immediately"
7 suspend efforts to implement the proposed rule. The CERB held that the City's decision
8 to implement a less lethal force policy was a managerial prerogative because it implicated
9 the nature of the services that the BPD provided. Notably, the CERB did not conclude
10 that the Union waived its bargaining rights by demanding to bargain over the decision to
11 implement the rule. Rather, it held that the City was obligated to bargain over the impacts
12 of the decision before implementing it and violated the Law by failing to do so. 30 MLC at
13 31. Finally, the Union did not waive its bargaining rights by demanding restoration of the
14 status quo ante. The City was obligated to maintain the status quo during the period of
15 impact bargaining. Thus, the Union was demanding no more than what the City was
16 legally required to do.

17 I am similarly unpersuaded by the City's contract waiver argument. It is well-settled
18 that waiver will not be found unless the contract language expressly or by necessary
19 implication confers upon the employer the right to implement the change in the mandatory
20 subject of bargaining without bargaining with the union. Commonwealth of
21 Massachusetts, 19 MLC 1454, 1456, SUP-3528 (October 16, 1992) (quoting Melrose

¹⁶ To the extent that the City relies on a hearing officer decision to support its argument, I note that hearing officer decisions are not precedential authority. Town of Ludlow, 17 MLC 1191, 1196, n.11, MUP-7040 (August 3, 1990).

1 School Committee, 9 MLC 1713, 1725, MUP-4507 (March 24, 1983)). The initial inquiry
2 focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567
3 (August 4, 1998). If the language clearly, unequivocally and specifically permits the
4 employer to make the change, no further inquiry is necessary. Peabody School
5 Committee, 28 MLC 19, 20-21, MUP-2073 (June 21, 2001). If the contract language is
6 ambiguous, the CERB considers evidence of the parties' bargaining history. It is the
7 City's burden to establish that the parties consciously considered the situation that has
8 arisen, and the Union knowingly waived its bargaining rights. Id.

9 The City argues that it had no obligation to impact bargain prior to the issuance of
10 the Commissioner's October 8 leave orders because the parties' CBA covers paid time
11 off and provides that it is subject to approval and operational needs. I agree with the City
12 that the contract addresses paid time off and states that vacation leave is "subject to the
13 operating needs of the Department." However, the contract is silent regarding full call-ups
14 and does not address the impacts of losing vacation or P-days that were previously
15 approved. There is no clear and unambiguous contract language that would allow the
16 Commissioner to implement the October leave orders without bargaining over the impacts
17 of a change to the practice regarding full call-ups, and no bargaining history to show that
18 the Union explored and consciously yielded its impact bargaining rights. Accordingly, the
19 CBA did not clearly, unequivocally and specifically permit the Commissioner to prohibit
20 the use of preapproved vacation weeks and P-days here without bargaining to impasse

1 or resolution over the impacts of his decision¹⁷ and thus, the City's contract waiver
2 defense fails.

3 **Exigent Circumstances**

4 The City notes that an employer facing exigent circumstances may notify the union
5 of a unilaterally established deadline for impact bargaining, implement as needed, and
6 offer to continue post-implementation impact bargaining. Although the City does not
7 specifically argue that it met each of the requirements for an exigency defense in this
8 case,¹⁸ I consider the issue, nevertheless.

9 To succeed on its exigency defense, the City must establish that: 1) circumstances
10 beyond its control required the imposition of a deadline for negotiations; 2) the Union was
11 notified of those circumstances and the deadline; and 3) that the deadline imposed was
12 reasonable and necessary. City of New Bedford, 38 MLC 239, 251, MUP- 09-5581, MUP-
13 09-5599 (April 3, 2012) aff'd sub. nom. City of New Bedford v. Commonwealth
14 Employment Relations Board, slip op., A.C. No. 15-P-1 (unpublished order pursuant to
15 Rule 1:28, August 26, 2016). The City has not met its burden.

¹⁷ I need not address the City's contract waiver arguments regarding the use of compensatory time, because the use of compensatory time is not at issue in this case. Also, the City gains no ground by citing Arbitrator Martin's award. The Arbitrator noted that the CBA contains limitations on the Commissioner's decisions and requires his actions to be reasonable and non-arbitrary. Although the Arbitrator stated that the Commissioner has the authority to cancel time off if he reasonably believes the BPD needs "all hands," the award held that the Commissioner's prohibition on the use of discretionary time off violated the CBA, and it did not address whether the Commissioner was obligated to bargain with the Union over the impacts of the decisions.

¹⁸ The City argues that the Union had a "strategy of obstruction" and unlawfully insisted on maintaining the status quo ante in the face of a national emergency.

1 Assuming arguendo that the possibility of civil unrest during the Presidential
2 Election period justified immediate unilateral action, I consider whether the City notified
3 the Union of a bargaining deadline and whether any such deadline was reasonable and
4 necessary. There is no such evidence in this case. The Commissioner's October 8 emails
5 did not mention bargaining at all, and Cruz's October 15 communication requested dates
6 but set no bargaining deadline. Accordingly, the circumstances precipitating the
7 Commissioner's October 8 leave orders did not excuse the City's failure to impact
8 bargain.

9 **The "Biotech Case"**

10 Finally, the City argues that the CERB's decision in City of Boston, 32 MLC 4,
11 MUP-2749, MUP-01-2892 (June 24, 2005) mandates dismissal of this case. In what the
12 City calls the "Biotech case," the Police Commissioner created a special tactical force as
13 part of his public safety planning during a Biotech conference in the City. He staffed the
14 special unit with non-bargaining unit detectives because he did not wish to strip district
15 police stations of unit members whom he needed to respond to other public safety
16 concerns. Id. The issue in the case was whether the City unlawfully transferred
17 bargaining unit work to non-unit personnel when it assigned non-unit detectives to
18 perform bargaining unit work during the conference and other City events without giving
19 the Union prior notice and an opportunity to bargain to resolution or impasse over the
20 decision and the impacts of that decision to transfer the work. Finding that the City was
21 faced with "serious civil unrest," the CERB held that the City was not obligated to bargain
22 over the decision to transfer the work. It further held that the City had no obligation to
23 bargain over the impact of a core managerial decision if the only identifiable impact of

1 that decision was a reduction in an employee's ability to perform unscheduled overtime,
2 and no other terms and conditions of employment were affected. Id. at 12.

3 The holding in the Biotech case does not justify the City's unilateral action here. In
4 that case, the CERB reaffirmed the well-settled impact bargaining requirement by stating
5 that "[a]lthough the City's decision to transfer a portion of riot control work to non-unit
6 detectives is outside the scope of negotiations, the Law requires the City to negotiate with
7 the Union over the impacts of that decision on employees' terms and conditions of
8 employment." The CERB found no impact bargaining obligation simply because, in the
9 unique circumstances of that case, the only impact was the loss of unscheduled overtime
10 – which is not a mandatory subject of bargaining. See Town of Billerica, 8 MLC 1957,
11 1962-1963, MUP-4000, MUP-4122 (March 19, 1982). Conversely here, as explained
12 above, the Commissioner's October 8 leave orders impacted the unit members' ability to
13 reschedule cancelled vacation weeks and personal days, the procedures for doing so,
14 and their ability to carry unused vacation time past January of the following year.
15 Accordingly, notwithstanding any similarities between the threats to public safety facing
16 the City in 2000 and 2020, the Biotech case does not mandate dismissal of the Complaint.

17 **The Police Commissioner Statute**

18 Finally, I consider the City's statement that St. 1962, c. 322, the Police
19 Commissioner's statute,¹⁹ codifies the BPD's right to limit paid time off based on

¹⁹ The Police Commissioner's statute provides in pertinent part that "The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police . . ."

1 operational needs. The City did not point to any particular language in the statute that
2 addressed this issue, did not specify how an impact bargaining requirement interferes
3 with the Police Commissioner's statutory rights, or cite any case law to support its
4 contention. As previously noted, this case does not involve the Commissioner's authority
5 to decide to prohibit vacation leave and P-days during full call-ups without decisional
6 bargaining. Consequently, I do not find that an impact bargaining obligation would restrict
7 the Commissioner's statutory ability to make necessary rules and regulations.²⁰

8 **Count 2: Changed Procedure for Requesting Vacation Leave**

9 There is no dispute regarding the past practice for requesting and approving
10 vacation leave. Bargaining unit members submitted a "blue form" to their commanding
11 officers, and the commanding officer decided whether or not to approve the requested
12 time. The record clearly shows that the City changed that practice when it implemented
13 a new procedure whereby employees had to petition to use their previously approved
14 vacation time, and the Commissioner would review each case individually and decide
15 whether to grant it. The new procedure impacted unit members' terms and conditions of
16 employment by requiring a second approval process for preapproved vacation time, and
17 City implemented the new procedure without bargaining to impasse or resolution over its
18 impacts. There is no contract language authorizing the new two-step approval process or

²⁰ In its opening statement, the City stated that it the "Special Acts of 1947, Chapter 146" and BPD Rule 110 regulate vacations for police officers and provide that paid days off are subject to operational requirements. Both the rule and the statute state that "[t]he Police Commissioner shall arrange assignment of vacation periods for time or times as best serve the public interest." As noted above, this case does not prevent the Commissioner from unilaterally deciding to restrict the use of vacation leave and P-days during full call-ups. I merely conclude that the Commissioner must bargain to resolution or impasse over the impacts of such a decision.

1 giving the Commissioner the authority to change the prior practice without impact
2 bargaining

3 CONCLUSION

4 Based on the record and for the reasons explained above, I conclude that the City
5 violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law as alleged in Count 1 of
6 the Complaint when Commissioner Gross prohibited members of the bargaining unit from
7 requesting or using a vacation week from October 31, 2020 through November 7, 2020,
8 and using personal leave time from November 2 to November 9, 2020, without first
9 bargaining to resolution or impasse with the Union over the impacts of the decision on the
10 unit members' terms and conditions of employment. I further find that the City unilaterally
11 altered the vacation request approval process as alleged in Count 2 of the Complaint and
12 thereby violated Sections 10(a)(5) and, derivatively (a)(1) of the Law.

13 REMEDY

14 Section 11 of the Law authorizes the CERB to issue orders "requiring the charged
15 party to cease and desist from such prohibited practice and take such further affirmative
16 action as will comply with the provision of this section." This language gives the CERB
17 broad discretion in fashioning remedies that effectuate the purposes of the Law and
18 vitiate the effects of the violation. Boston Police Patrolmen's Association, Inc., 8 MLC
19 1993, 2002, MUPL-2049, MUPL-2050 (February 2, 1982 and March 23, 1982); Secretary
20 of Administration and Finance v. Labor Relations Commission, 434 Mass. 340
21 (2001). Remedies are designed to restore employees to the same position that they
22 would have been in but for the employer's unlawful action. Town of Lexington, 37 MLC
23 115, MUP-08-5313 (December 9, 2010). The CERB clarified in Plymouth County House

1 of Correction, 6 MLC 1523, 1529, MUP-2234, MUP-2429 (October 24, 1979) that “the
2 make whole remedy is intended only to replace compensation lost by virtue of the
3 prohibited practice, it is not intended to recover all consequential and indirect effects of
4 the [prohibited practice].”

5 First, I order the City to bargain to resolution or impasse with the Union over the
6 impacts of the City’s decision to deny unit members the use of previously approved
7 vacation weeks and personal days during Election Week and the impacts of the City’s
8 decision to change the vacation approval process. The City shall restore the status quo
9 of allowing unit members to use previously approved vacation weeks or personal days if
10 a full call-up takes place before the parties negotiate to resolution or impasse. The City
11 also shall make whole unit members who had received approval prior to October 8, 2020
12 to take vacation weeks but could not use the leave because of the Commissioner’s
13 October 8, 2020 order, including those unit members who appealed the rescission of their
14 previously approved vacation requests to the Commissioner through their commander
15 but whose appeals were denied, and who then were unable to sell back the time or use
16 it at a later date. The City must credit those individuals with the vacation time that they
17 lost. In addition, the City must restore P-days to any unit member who was not permitted
18 to take a requested P-day during the Election Week and who was unable to bank it, sell
19 it back, or use it at a later date. I deny the Union’s request to order the City to pay damages
20 to compensate members for any monetary losses suffered and to order the City to provide
21 unit members with additional time to use the restored leave. Doing so would either place
22 the employees in a better position than they would otherwise have been in by increasing
23 the amount of their vacation time if they had received approval prior to October 8, 2020

1 to take that leave, or improperly compensate them for the indirect effect of the prohibited
2 practice. See Id.

3 ORDER

4 WHEREFORE, based on the foregoing, I hereby order the City of Boston to:

5 1. Cease and desist from:

- 6
7 a) Prohibiting members of the bargaining unit represented by the Union
8 from requesting or using vacation weeks or personal leave during full
9 call-ups without first bargaining to impasse or resolution with the Union
10 over the impacts of the decision on unit members' terms and conditions
11 of employment.
12
13 b) Changing the vacation approval process for unit members without
14 bargaining to impasse or resolution with the Union over the impacts of
15 the decision on unit members' terms and conditions of employment.
16
17 c) In any like or similar manner, interfere with, restrain, or coerce any other
18 employee in the exercise of their Section 2 rights.

19
20 2. Take the following affirmative action that is necessary to effectuate the
21 purposes of the Law:

- 22
23 a) Make affected unit members whole by giving vacation leave credit to any
24 unit member who was approved to take a vacation week prior to October
25 8, 2020 but could not take the leave due to the Commissioner's order,
26 including those unit members who appealed the rescission of their
27 vacation weeks to the Commissioner through their commanders but
28 whose appeal was denied, and who then were unable to sell back the
29 time or use at a later date. The vacation credit they receive should equal
30 the vacation time they lost during the Presidential Election period.
31
32 b) Make affected employees whole by restoring P-days to any unit member
33 who requested but was not allowed to take a P-day during the
34 Presidential Election period and was unable to bank it, sell it back, or
35 use it at a later date. The number of P-days restored to each bargaining
36 unit member should equal the number of P-days that the unit member
37 was not permitted to take during the Presidential Election period.
38
39 c) Bargain to resolution or impasse over the impacts on unit members'
40 terms and conditions of employment of the issuance of a prohibition
41 during full call-ups of unit members using previously approved vacation
42 weeks or requested personal days or the impacts on unit members

1 terms and conditions of employment of the implementation of a change
2 in the vacation approval process during those call-ups.
3

- 4 d) Restore the status quo ante by permitting unit members to take
5 previously approved vacation weeks or requested personal days if the
6 Commissioner institutes a full call-up prior to the City and the Union
7 bargaining to resolution or impasse as ordered in paragraph (c).
8
- 9 e) Immediately post signed copies of the attached Notice to Employees in
10 all conspicuous places where members of the Union's bargaining unit
11 usually congregate, or where notices are usually posted, including
12 electronically, if the City customarily communicates with these unit
13 members via intranet or email and display for a period of thirty (30) days
14 thereafter, signed copies of the attached Notice to Employees.
15
- 16 f) Notify the DLR in writing of the steps taken to comply with this decision
17 within ten (10) days of receipt of this decision.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



Margaret M. Sullivan, Esq.
Hearing Officer

APPEAL RIGHTS

The parties are advised of their right pursuant to M.G.L. c. 150E, Section 11, and 456 CMR 13.19 to request a review of this decision by the CERB 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 the ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations has held that the City of Boston violated Section 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E by prohibiting members of the Boston Police Superior Officers Union' (Union) bargaining unit from requesting or using vacation weeks from October 31, 2020 through November 7, 2020, and using personal leave time from November 2 to November 9, 2020, without first bargaining to resolution or impasse with the Union over the impacts of the decision on the unit members' terms and conditions of employment, and by unilaterally altering the vacation request approval process.

Section 2 of M.G.L. c.150E gives public employees the following rights:

To engage in self-organization, to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purposes of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT prohibit members of the bargaining unit represented by the Union from requesting or using vacation weeks or personal leave during full call-ups without first bargaining to impasse or resolution with the Union over the impacts of the decision on unit members' terms and conditions of employment.

WE WILL NOT change the vacation approval process for unit members without bargaining to impasse or resolution with the Union over the impacts of the decision on unit members' terms and conditions of employment.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce any other employee in the exercise of their Section 2 rights.

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

- a) Make affected unit members whole by giving vacation leave credit to any unit member who was approved to take a vacation week prior to October 8, 2020 but could not take the leave due to the Commissioner's order, including those unit members who appealed the rescission of their vacation weeks to the Commissioner through their commanders but whose appeal was denied, and who then were unable to sell back the time or use at

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

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

a later date. The vacation credit they receive should equal the vacation time they lost during the 2020 Presidential Election period.

- b) Make affected employees whole by restoring P-days to any unit member who was not allowed to take a requested P-day during the 2020 Presidential Election period and was unable to bank it, sell it back, or use it at a later date. The number of P-days restored to each bargaining unit member should equal the number of P-days that the unit member was not permitted to take during the 2020 Presidential Election period.
- c) Bargain to resolution or impasse over the impacts on unit members' terms and conditions of employment of the issuance of a prohibition during full call-ups of unit members using previously approved vacation weeks or requested personal days or the impacts on unit members terms and conditions of employment of the implementation of a change in the vacation approval process during those call-ups.
- d) Restore the status quo ante by permitting unit members to take previously approved vacation weeks or requested personal days if the Commissioner institutes a full call-up prior to the City and the Union bargaining to resolution or impasse as ordered in paragraph (c).

City of Boston

Date

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