

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

TOWN OF HARVARD

and

AFSCME, COUNCIL 93

Case Number: MUP-21-8528

Date Issued: February 1, 2024

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Marc Terry, Esq. - Representing Town of Harvard

Justin P. Murphy, Esq. - Representing AFSCME, Council 93

HEARING OFFICER'S DECISION

SUMMARY

1           The issues in this case are whether the Town of Harvard (Town or Employer)  
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General  
3 Laws, Chapter 150E (the Law) by: I) paying new bargaining unit members a starting rate  
4 other than Step 1 of the pay scale without giving AFSCME, Council 93, Local 1703 (Union)  
5 prior notice and an opportunity to bargain to resolution or impasse over the decision and  
6 impacts of that decision; and II) promoting bargaining unit member Joseph Miller (Miller)  
7 to Step 2 of the pay scale without giving the Union prior notice and an opportunity to  
8 bargain to resolution or impasse over the decision and impacts of that decision. Based

1 on the record, and for the reasons explained below, I find that the Town did not violate  
2 the Law regarding Count I, but the Town violated the Law as to Count II.

### 3 STATEMENT OF CASE

4 On March 16, 2021, the Union filed a charge (Charge) with the DLR. On August  
5 13, 2021, a DLR investigator investigated the Charge. On September 8, 2021, the  
6 investigator issued a two-count Complaint and Partial Dismissal (Complaint), alleging that  
7 the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by:  
8 I) paying new bargaining unit members a starting rate other than Step 1 of the pay scale  
9 without providing the Union with prior notice and an opportunity to bargain to resolution  
10 or impasse over the decision and impacts of that decision; and II) promoting bargaining  
11 unit member Miller to Step 2 of the pay scale without giving the Union prior notice and an  
12 opportunity to bargain to resolution or impasse. The investigator dismissed an additional  
13 allegation that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of  
14 the Law by direct dealing with Miller. On September 24, 2021, the Employer filed its  
15 Answer to the Complaint. On August 31, 2022, I conducted an in-person hearing, during  
16 which the parties received a full opportunity to be heard, to examine and cross-examine  
17 witnesses, and to present evidence. On December 8, 2022, the parties filed post-hearing  
18 briefs. Based on the record, I make the following findings of fact and render the following  
19 opinion.

### 20 STIPULATIONS OF FACT

- 21 1. The Town of Harvard is a public employer within the meaning of Section 1 of  
22 Massachusetts General Laws, Chapter 150E.
- 23 2. AFSCME, Council 93 is an employee organization within the meaning of  
24 Section 1 of the Law.  
25  
26

- 1 3. AFSCME is the exclusive bargaining representative for Local 1703, a unit of  
2 several employee classifications for the Harvard Department of Public Works.  
3
- 4 4. At the time of the facts involved in this case, within the bargaining unit of the  
5 Department of Public Works were several positions including Truck  
6 Driver/Laborers, Equipment Operators, Lead Groundskeeper,  
7 Mechanic/Equipment Operators, and Working Foremen.  
8
- 9 5. In early 2021, the Town posted for a vacant position within the Harvard Public  
10 Works Department for the position of Truck Driver/Laborer position.  
11
- 12 6. On March 15, 2021, the Town hired a new employee, Matthew Wright as a  
13 Truck Driver/Laborer at Step III of the wage schedule within the parties'  
14 Collective Bargaining Agreement.  
15
- 16 7. The first step of the wage schedule for the Truck Driver/Laborer is Step I.  
17
- 18 8. On February 9, 2021, the Town posted a vacancy/promotional opportunity  
19 within the Harvard Public Works Department for the position of  
20 Mechanic/Equipment Operator.  
21
- 22 9. An existing bargaining unit member and Truck Driver/Laborer, Joseph Miller  
23 applied for the position of Mechanic/Equipment Operator.  
24
- 25 10. In or around March 2021, the Town selected Mr. Miller for the  
26 Mechanic/Equipment Operator position at Step II of the wage schedule within  
27 the parties' Collective Bargaining Agreement.  
28
- 29 11. The first step of the wage schedule for Mechanic/Equipment Operator is Step  
30 I.  
31

### FINDINGS OF FACT

#### General Background

35 This matter concerns the Town's Department of Public Works (DPW), which  
36 serves a population of approximately 6,000 residents. The Union's bargaining unit  
37 consists of 11 DPW positions. Tom Kilhart (Kilhart) is the Director of the DPW. The DPW  
38 has had turnover throughout the years, but turnover increased in 2020 when the  
39 pandemic began, and the Town has sometimes had difficulty hiring qualified employees.

1 Timothy Bragan (Bragan) has been the Town Administrator since 2007. Bragan  
2 represents the Town in various aspects of collective bargaining with the Union and serves  
3 as the hiring and appointing authority for the Town. Bragan also approves DPW  
4 promotions upon conferring with Kilhart. Bragan performs his functions in cooperation  
5 with Marie Sobalvarro, the Assistant Town Administrator and Director of Human  
6 Resources, and Kilhart.

7 Daniel Morse (Morse) has been AFSCME, Council 93's Assistant Director of Field  
8 Services and Organizing since approximately 2019. Prior to that position, Morse was a  
9 staff representative for AFSCME, Council 93 for two years. In that capacity, Morse  
10 oversaw numerous collective bargaining agreements, including Local 1703's collective  
11 bargaining agreement (CBA) with the Town.

12 In the first quarter of 2021, the parties were in negotiations for a successor to the  
13 July 1, 2017 – June 30, 2020 CBA. Article 8, Section 1 of the 2017 – 2020 CBA provides  
14 that, "The wages for all employees shall be in accordance with Schedule A." Schedule A  
15 contains an 11-step pay scale for each position in the bargaining unit, with Step 11  
16 reachable upon 25 years of employment. The CBA is silent regarding placement on the  
17 pay scale upon hire and/or promotion.<sup>1</sup>

18 By email on January 25, 2021, Ron Gilbert (Gilbert), a DPW working foreman with  
19 over 20 years of experience and former Union steward, wrote to Bragan, in relevant part,

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<sup>1</sup>Schedule A in the parties' 1999-2002 CBA provided for a five-step pay scale: "Start;" "1 yr;" "2 yr;" "3 yr;" and "4 yr." Schedule A in the parties' 2004-2006 CBA contained the same five-step pay scale. Ron Gilbert, a DPW working foreman and former Union steward, testified that the parties changed to an 11-step pay scale because the Union "wanted to extend the steps so people would make more money."

1 that Gilbert was not sure “how or if the problem we are having with the pay scale can be  
2 fixed or not.” Gilbert stated that the bargaining unit members “are half fighting to get [their]  
3 pay scale up, but on the other half they are looking out for the town to be able to hire  
4 better skilled help.” Gilbert went on to note that the Town was having difficulty getting  
5 “anyone to apply with a CDL license or experience.” Bragan responded that afternoon  
6 that:

7 [H]ere is the language in the police contract. We can do something like this or  
8 move away from the Step system to a scale and merits system that provides  
9 flexibility.

10  
11 I continue to work through all that was said last Thursday and hopefully this would  
12 help with the flexibility to have people brought on beyond Step 1 of any  
13 classification and that includes foreman.<sup>2</sup>

14  
15 By email on February 26, 2021, Morse sent Bragan a bargaining proposal that the  
16 Union believed “addresses the issues of existing employees being encouraged to stay  
17 and allows for new hires to be enticed to leave other towns and come” to the Town. The  
18 Union’s proposal included, among other things, “Ability for the Director of the DPW to hire  
19 into wage scale up to step 5” and “Ability for the Director of the DPW to award employee  
20 being promoted with placement onto scale at any step.”<sup>3</sup> The Town rejected the Union’s  
21 proposal.

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<sup>2</sup>The referenced language in the police contract allows the Chief of Police to hire new employees “at any one step, not to exceed Step 3.” The language also provided that the Chief of Police “may make a request to the Town Administrator to hire someone above Step 3, depending on experience and education.” Bragan testified that around this time he decided that the Town would do whatever it needed to do to get people to fill positions and to keep the DPW running.

<sup>3</sup>Morse testified regarding this proposal that, “We felt this would benefit both the Town and the employees to be able to hire more qualified personnel, thinking that it would bring people in who had licenses that were needed by the Town to operate some – some piece of equipment. And up to this point... the belief is... they could only hire at Step 1.”

1           The parties agreed to a successor CBA in March or April 2022.

2   New Hires and Promotions prior to March 2021

3           From at least 2011 until March 2021, the Town hired new DPW bargaining unit  
4 employees at the first step of the contractual pay scale.<sup>4</sup>

5           From 2011 until March 2021, the Town promoted three bargaining unit members.  
6 The Town placed all three employees at the lowest step in the new position that resulted  
7 in a pay increase. On February 25, 2015, the Town promoted Nick Ammesmaki  
8 (Ammesmaki) from a Step 4 Truck Driver/Laborer, at \$19.35/hour, to a Step 1 Equipment  
9 Operator, at \$21.40/hour.<sup>5</sup> Also on February 25, 2015, the Town promoted Ben Gilbert  
10 from a Step 8 Truck Driver/Laborer, at \$21.36/hour, to a Step 5 Lead Groundskeeper, at  
11 \$21.40/hour.<sup>6</sup>

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Regarding the promotional component, Morse testified that, “I felt it would be a way to reward good employees that were willing to step up and step in promotions so they could receive more monetary supplement, and hopefully, stay with the department in Town.”

<sup>4</sup>I note that the parties submitted a joint exhibit containing, among other things, the hiring rate for all new hires from 2011 - 2021. This exhibit incorrectly lists the contractual Step 1 rate for certain new hires during 2020-2021. Bragan testified that new employees were hired at Step 1 because they lacked background or experience. On cross-examination, Bragan asserted that although he had not done so previously, he has the discretion to hire new employees between Step 1 and Step 10.

<sup>5</sup>Bragan testified that Ammesmaki was placed at Step 1 because he lacked “experience beyond what he had within the DPW.” Ammesmaki was hired on January 30, 2012, meaning that at the time of his promotion, he had worked with the DPW for approximately three years. Ammesmaki testified that at the time of his promotion he requested that he be placed higher than Step 1 but was told by the former director of the DPW that he could not be placed higher “due to the contract.” I credit Ammesmaki’s testimony that the Town denied his request to be placed at a higher step.

<sup>6</sup>Ben Gilbert is Gilbert’s son and has worked for the DPW for 13 years. Ben Gilbert testified that upon his promotion he sought to be placed at a step that would result in more than a \$.04/hour raise. Ben Gilbert testified that the reason he received from management for denying his request was “because of the contract.” I credit Ben Gilbert’s testimony that

1           In January 2021, the Town promoted Andrew Bernhardt (Bernhardt) from a Step  
2 5 Truck Driver/Laborer, at \$22.39/hour, to a Step 1 Mechanic, at \$23.92/hour. In or around  
3 February 2021, Bernhardt accepted a higher-paying position in another municipality. By  
4 email on March 7, 2021, Bernhardt wrote to Ammesmaki, a Union steward, in relevant  
5 part, that:

6           In January of 2021 Robert Tremblay resigned from the position of mechanic. I,  
7 Andrew Bernhardt, applied and interviewed for the job. During the interview Tim  
8 Kilhart, Ron Gilbert and myself discussed my skill sets, licenses and expertise. I  
9 had been working steadily with the previous mechanic for the past four years, had  
10 multiple licenses required for the position. I also had extra specialty licenses, such  
11 as; hot works and air brakes certification. I asked if I could start above step 1 due  
12 to my experience and licenses, and was denied. Tim specified that he could not  
13 start me any higher th[a]n the first step. I enjoyed the position of mechanic, and  
14 had almost 6 years of seniority but was denied the competitive wage at a higher  
15 step.<sup>7</sup>

16  
17 Town Hires Matthew Wright at Step 3 of Pay Scale

18           On March 15, 2021, the Town hired Matthew Wright (Wright) as a Truck  
19 Driver/Laborer at Step 3 of the pay scale. The Step 1 rate was \$20.29/hour and the Town  
20 hired Wright at \$21.31. Bragan hired Wright at Step 3 because Wright had 12 years of  
21 relevant experience, a number of licenses, and, at the time of Wright's hire, the Town was

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the Town denied his request to be placed at a higher step. Bragan testified that he placed Ben Gilbert where he did because Ben Gilbert did not have a pesticide license and lacked experience managing a crew.

<sup>7</sup>Bragan testified that Bernhardt had worked with the prior mechanic as a helper, lacked experience, and that Bernhardt lacked confidence in his ability to do the job or was not sure that he wanted the job. "So when we did his promotion it was more to go to Step 1 and we'll see how it goes." Bernhardt and Gilbert, who was on the interview panel for Bernhardt's promotion, both testified that Bernhardt sought an extra step during the interview, and Kilhart denied the request "because of the contract." Both also testified that Bernhardt expressed concern about being able to return to his prior position if the promotion did not work out. I credit Bernhardt's and Gilbert's testimony that the Town denied Bernhardt's request to be placed at a higher step.

1 struggling to fill vacant positions.<sup>8</sup> Additionally, Wright had indicated during the interview  
2 process that he would not accept the position at the Step 1 or 2 rate of pay. Bragan had  
3 never previously had to negotiate with a potential employee to get that employee to accept  
4 a position, and this was the first time Bragan hired anyone above Step 1.

5 Town Promotes Joseph Miller to Mechanic/Equipment Operator at Step 2

6 On or around March 8, 2021, the Town promoted Joseph Miller from a Step 4 Truck  
7 Driver/Labor, at \$21.31/hour, to a Step 2 Mechanic/Equipment Operator, at \$24.51/hour.  
8 Miller replaced Bernhardt, who left the Town's employ approximately six weeks after the  
9 Town promoted him to the mechanic position. Miller would have received a pay increase  
10 even if the Town had placed Miller at Step 1 instead of Step 2, but Bragan placed Miller  
11 at Step 2 because Miller had experience as a mechanic prior to coming to work for the  
12 Town.<sup>9</sup> This was the first time that Bragan promoted an employee and did not place him  
13 at the lowest step that would result in a pay increase.

14 OPINION

15 The issues are whether the Town violated the Law by: I) paying new bargaining  
16 unit members a starting rate other than Step 1 of the pay scale without giving the Union  
17 prior notice and an opportunity to bargain to resolution or impasse over the decision and  
18 impacts of that decision; and II) promoting bargaining unit member Miller to Step 2 of the

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<sup>8</sup>Bragan testified that one of the issues with hiring was that the rates of pay contained in the 2017 – 2020 CBA were “beyond shelf life” by “the mid part of 21.”

<sup>9</sup>Bragan testified that the difficulty of hiring in the COVID-era also factored into his decision to place Miller at Step 2. On cross-examination, Bragan testified that Miller had indicated that he would not accept the promotion at Step 1.



1 pay scale without giving the Union prior notice and an opportunity to bargain to resolution  
2 or impasse over the decision and impacts of that decision.

3 A public employer violates Section 10(a)(5) of the Law when it changes wages,  
4 hours, or other terms and conditions of employment without first bargaining to resolution  
5 or impasse with the employees' exclusive bargaining representative. School Comm. of  
6 Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983); Commonwealth of  
7 Massachusetts, 30 MLC 63, 64, SUP-4784 (October 9, 2003). The duty to bargain  
8 extends to both conditions of employment established through past practice and to  
9 conditions of employment established through a collective bargaining agreement.  
10 Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To establish  
11 a unilateral change violation, a charging party must show that: (1) the employer altered  
12 an existing practice or instituted a new one; (2) the change affected employee wages,  
13 hours, or working conditions and thus affected a mandatory subject of bargaining; and (3)  
14 the change was implemented without prior notice and an opportunity to bargain to  
15 resolution or impasse. Bristol County Sheriff's Department, 31 MLC 6, 18, MUP-2872  
16 (July 15, 2004) (citing City of Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000)).  
17 To determine whether a practice exists, the Commonwealth Employment Relations Board  
18 (CERB) analyzes the combination of facts upon which the alleged practice is predicated,  
19 including whether the practice has occurred with regularity over a sufficient period of time  
20 so that it is reasonable to expect that the practice will continue. Commonwealth of  
21 Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997). A past practice is  
22 unequivocal, has existed substantially unvaried for a reasonable period of time, and is

1 known and accepted by both parties. City of Newton, 32 MLC 37,49, MUP-2849 (June  
2 29, 2005).

3 Town's Hiring of Wright at Step 3

4 On March 15, 2021, the Town hired Wright at Step 3. This was the first time that  
5 the Town offered an applicant for hire a bargaining unit position above Step 1.  
6 Regardless, the change does not affect a mandatory subject of bargaining.

7 In Boston School Committee, 3 MLC 1603, 1606-1607, MUP-2503, MUP-2528,  
8 MUP-2541 (April 15, 1977), the CERB determined that a residency rule, which did not  
9 establish a prerequisite for hire or promotion, established a condition of continued  
10 employment and therefore constituted a mandatory subject of bargaining. In dicta, the  
11 CERB distinguished between a condition of hire and a condition of continued  
12 employment. Noting that Section 5 of the Law gives the exclusive representative "the right  
13 to act for and negotiate agreements covering all employees in the unit," the CERB stated  
14 that the exclusive representative does not have the right to bargain on behalf of applicants  
15 who are not "employees in the unit." Id. at 1608.<sup>10</sup> See also, City of Springfield, 41 MLC  
16 9, 14, MUP-09-5623 (H.O. July 18, 2014)(City's reduction of hours for position to eliminate  
17 certain benefits did not constitute direct dealing as is pertained to certain applicants for  
18 hire, who were not employees in the bargaining unit at the time they received offers of  
19 employment).<sup>11</sup>

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<sup>10</sup>The CERB noted that in limited situations, such as one involving a hiring hall, a condition of hire might constitute a mandatory subject of bargaining. Id. at 1609. That situation is not here present.

<sup>11</sup>Although the CERB reversed this decision on appeal, this portion of the hearing officer's decision was not under review. City of Springfield, 41 MLC 342, 345, MUP-09-5623 (May 29, 2015).

1           The Union's reliance on Melrose School Committee, 3 MLC 1299, MUP-2323  
2 (December 7, 1976), is misplaced. That case involved a duty to bargain over initial  
3 salaries for newly created bargaining unit positions. Specifically, Melrose involved a  
4 failure to bargain over stipends for newly created extracurricular positions that bargaining  
5 unit members were eligible to fill. That case did not involve applicants for hire into the  
6 bargaining unit. Similarly, Lawrence School Committee, 3 MLC 1304, MUP-2287, 2329  
7 (December 7, 1976), also does not support the Union's position. That case involved the  
8 consolidation of two positions into one and the placement of the new position on the salary  
9 schedule; direct dealing regarding a change to a pay period of employees in the  
10 bargaining unit; and a unilateral change to extra compensation for summer employment.  
11 Lawrence did not address the issue here, which is applicants for hire into the bargaining  
12 unit.

13           Because Wright was an applicant for hire and not a member of the bargaining unit  
14 when the Town offered him the position at Step 3 instead of Step 1, the Town's action is  
15 not a change affecting a mandatory subject of bargaining. Accordingly, the Town did not  
16 violate the Law by hiring Wright at Step 3, and I therefore dismiss this count of the  
17 Complaint.

#### 18 Town's Promotion of Miller

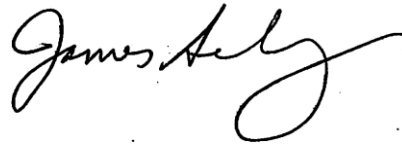
19           I reach a different conclusion regarding Miller's promotion in March 2021. The  
20 CERB has long held that conditions or standards of promotion are generally a mandatory  
21 subject of bargaining. Town of Danvers, 3 MLC 1559, 1574-1576, MUP-2292, 2299 (April  
22 6, 1977); Boston School Committee at 1610; Town of Arlington, 42 MLC 97, 100, MUP-  
23 14-3750 (September 30, 2015).





- 1       2. Take the following affirmative action that will effectuate the purpose of the Law:
- 2
- 3       a. Upon demand, bargain with the Union to resolution or impasse over the
- 4            placement of bargaining unit members on the pay scale upon promotion.
- 5
- 6       b. Post immediately in all conspicuous places where members of the Union's
- 7            bargaining unit usually congregate, or where notices are usually posted,
- 8            including electronically if the Town customarily communicates with these
- 9            members via intranet or email, and display for a period of thirty (30) days
- 10           thereafter, signed copies of the attached Notice to Employees.
- 11
- 12       c. Notify the DLR in writing of steps taken to comply with this Order within ten (10)
- 13            days of receipt.
- 14
- 15       SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



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JAMES SUNKENBERG, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

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



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# NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the Town of Harvard (Town) violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by changing bargaining unit member placement on the pay scale upon promotion without giving AFSCME, Council 93, Local 1703 (Union) prior notice and an opportunity to bargain to resolution or impasse over.

Section 2 of the Law gives public employees the right to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all the above.

WE WILL NOT fail to bargain in good faith with the Union by changing bargaining unit member placement on the pay scale upon promotion without first giving the Union prior notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT interfere, restrain or coerce any employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL, upon demand, bargain with the Union to resolution or impasse over placement on the pay scale upon promotion.

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For the Town

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Date

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

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