

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 888

Case No.: MUP-23-9938

Date Issued: December 18, 2025

Hearing Officer:

Meghan Ventrella, Esq.

Appearances:

John Magner, Esq. – Representing SEIU, Local 888

Robert Boyle, Esq. – Representing the City of Boston

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the City of Boston (City) violated Section 10(a)(5)
2 and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the
3 Law) by failing to bargain in good faith by reducing the number of allowed shift swaps and
4 increasing the number of weeks in a calendar year that have restrictions for time off
5 requests without bargaining with Service Employees International Union, Local 888
6 (Union) to impasse or resolution over the impacts of those decisions on bargaining unit
7 employees' terms and conditions of employment. Based on the record and for the reasons
8 explained below, I conclude that the City did violate the Law as alleged by increasing the
9 number of restricted vacation weeks without bargaining with the Union to impasse or
10 resolution over the impacts of that decision on bargaining unit employees' terms and

1 conditions of employment. I conclude that the City did not violate the Law by reducing
2 the number of swaps permitted per month as alleged.

3 STATEMENT OF CASE

4 On March 20, 2023, the Union filed a charge with the Department of Labor
5 Relations (DLR) alleging that the City had engaged in prohibited practices within the
6 meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On June 23,
7 2023, a DLR Investigator investigated the charge. On January 12, 2024, the Investigator
8 issued a two-count Complaint of Prohibited Practice (Complaint) alleging that the City
9 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.¹ On January 22,
10 2024, the City filed its Answer to the Complaint.

11 On March 5, 2025, I conducted a hearing during which the parties received a full
12 opportunity to be heard, to examine and cross-examine witnesses, and to introduce
13 evidence. On May 2, 2025, the parties filed post-hearing briefs. Based on my review of
14 the record, including my observation of the demeanor of the witnesses, I make the
15 following findings of fact and render the following opinion.

16 Stipulations

- 17 1) The City is a public employer within the meaning of Section 1 of the law.
18
19 2) The Union is an employee organization within the meaning of Section 1 of the Law.
20
21 3) The Union is the exclusive bargaining representative for a citywide bargaining unit
22 that includes emergency communication workers within the Boston Police
23 Department.
24

¹ At the beginning of the hearing, the Union withdrew the second count of the Complaint which alleged that the City violated the Law when it repudiated the parties' CBA by denying bargaining unit employees' requests for leave for cancer screening appointments.

1 4) The City and the Union are parties to a collective bargaining agreement effective
2 by the terms between October 1, 2016 through September 30, 2020; October 1,
3 2020 through June 30, 2023; July 1, 2023 through June 30, 2026, and July 1, 2026
4 through June 30, 2027.²

6 FINDINGS OF FACT

7 Collective Bargaining Agreement Provisions

8 **ARTICLE 15 – VACATION**

Section 8. Vacation leave shall be taken at such times as, in the opinion of the City, will cause the least interference with the regular work of his/her department. Subject to the preceding sentence, vacation leave selection shall be determined by seniority. Employees may carry over from one year to the next year up to ten (10) days of vacation time. All carryover days must be used by December 31st of the calendar year.

8 Supplemental Agreement Part C

An employee in the Boston Police Department (BPD) Operations unit may exchange ("swap") a scheduled shift with another BPD Operations employee up to a maximum of six (6) times per month. All exchanged shifts must be made up by the employee within thirty (30) days of the swap. An employee who exchanges a shift with another employee is required to work the shift he/she agreed to cover for the other employee, as well as the rest of his/her remaining shifts.

Employees shall not be permitted to use sick leave on a day they are scheduled to work a swapped shift or for a regularly scheduled shift immediately preceding or following the swapped shift. Supervisors may permit exceptions in the event of a documented emergency. A supervisor's refusal to permit an exception shall not be subject to the grievance procedure outlined in Article 7 beyond Step 3.

If an employee swaps a shift and fails to report for either the shift he/she has agreed to cover or any regularly scheduled shift immediately preceding or following the swapped shift that employee will not be permitted to swap a shift for ninety (90) days after the employee has worked any previously approved swap. Further, failure

² Originally, the parties stipulated that the CBA was effective October 1, 2020 through September 30, 2023. However, after the hearing, the City submitted a correction to this stipulation and the Union did not object.

1 to work an agreed-to shift or a regularly scheduled shift immediately
2 preceding or following a swapped shift may result in progressive
3 discipline consistent with Article 6 of this Agreement.
4

5 General Information

6 The Union is the exclusive representative for a citywide bargaining unit that
7 includes emergency communication workers within the Boston Police Department
8 (Department), such as dispatchers and call takers. The Union and the City are parties to
9 a collective bargaining agreement (CBA) dated July 1, 2023 through June 30, 2026.
10 Under the CBA, the unit members accrue sick leave and vacation time and are credited
11 a certain number of personal days at the beginning of the calendar year.

12 Vacation List

13 In advance of each calendar year, the Department releases a “vacation list” for
14 that year. The “vacation list” is a list of available weeks that a certain number of unit
15 members can request to take an entire week of paid time off.³ When the Department
16 releases the vacation list, the unit members sign up for the available weeks based on
17 seniority. The Department keeps the vacation list on a superior police officer’s desk. For
18 most weeks in a calendar year, the Department allowed two unit members per job
19 description, per shift, to request vacation per week, which resulted in potentially eighteen
20 (18) unit members for that week out on vacation leave at a time. For example, the
21 Department allowed up to 18 unit members to be out on vacation for the following time
22 periods: the week of April school vacation, the week of July 4th, the week of the Caribbean
23 Festival, and the week of the Labor Day holiday. However, for a select few weeks in a

³ The “vacation list” does not include requests for unit members to take personal days or requests to take vacation time for individual days.

1 calendar year, the Department further restricted the number of unit members that could
2 take an entire week for vacation. For example, the Department “blacks out” the week of
3 Christmas and does not allow two unit members per job description, per shift to request
4 an entire week of vacation for that time period.⁴

5 In January of 2023, the Department released the vacation list for calendar year
6 2023. For the 2023 calendar year, Hoppie reduced the number of unit members who
7 could take vacation from 18 unit members to 9 unit members for four additional weeks on
8 the vacation list. Due to staffing shortages and historically high call volumes, Hoppie
9 decided to reduce the number of unit members able to sign up for an entire week of
10 vacation for the following time periods: the week of April school vacation, the week of July
11 4th, the week of the Caribbean Festival, and the week of the Labor Day holiday.
12 Therefore, only one unit member per job description, per shift could sign up for an entire
13 week off on the vacation list for those four weeks.

14 After the Department released the vacation list in January of 2023, Micheal
15 Shackford (Shackford), Chapter Chairperson for Local 888, discovered that the
16 Department had reduced the number of vacation requests allowed during certain weeks.
17 By email dated January 18, 2023, Shackford wrote to John Wilton (Wilton), an attorney
18 for the Boston Police Labor Relations Office, stating that the Union was requesting a
19 meeting regarding the 2023 vacation list. Shackford informed Wilton that the unit

⁴ The Union asserted that the Department had allowed at least 18 unit members to sign up for vacation for the week of Christmas and the week of Thanksgiving. However, I do not find that the Union demonstrated that prior to January of 2023, at least 18 unit members could sign up for vacation for the week of Christmas and the week of Thanksgiving. Moreover, Warren Hoppie (Hoppie), Captain for the Operations Division testified that the week of Christmas was “blackened out,” and I credit his testimony.

1 members would not fill out the vacation list until the Department met with the Union about
2 the changes it made to the list. By email dated January 20, 2023, Wilton responded to
3 Shackford that the Department would hold off on the vacation list until the parties met.
4 Wilton provided dates and times that the Department was available to meet with the
5 Union. In subsequent emails dated January 20, the parties scheduled a meeting.

6 On or about January 23, 2023, the parties met to discuss the vacation list. Neal
7 O'Brien (O'Brien), the Union Business Rep, Tom McKeever (McKeever), the Union
8 president, and Shackford attended the meeting for the Union, and Hoppie, Deputy
9 Superintendent Luis Cruz (Cruz), and Wilton attended for the Department. During the
10 meeting, Hoppie explained that in previous years the Department faced a staffing shortage
11 and a high number of calls during these four additional weeks, and it created a public
12 safety issue. To reduce the risk to public safety, Hoppie decided to reduce the number of
13 vacation requests for additional weeks where there was a historically high call volume.
14 Hoppie informed the Union that if the staffing levels increased in 2023, the parties could
15 look at bringing the number of vacation requests back up to two unit members during
16 those time periods.

17 By letter dated January 24, 2023, O'Brien informed the "BPD Labor Relations
18 Office" that the Department had departed from a long-standing precedent for vacation
19 requests. O'Brien asserted that in the past, the Department approved two bargaining unit
20 members for vacation for the week of April school vacation, the week of July 4th, the week
21 of the Caribbean Festival, the week of Thanksgiving, and the week of Christmas. O'Brien
22 further stated that:

23 Local 888 believes and understands [it] to be historical fact that any
24 Department denial of [an] employee['s] earned time or [an]

1 unreasonably ordering [of] employees to work additional shifts and
2 exorbitant hours especially [with] the responsibility of child, elder care
3 or ordinary quality of life is related to the Department[']s recurrent
4 failure to properly staff the Department. It has been three years [that]
5 the Boston Police Department has been listening to Local 888's
6 relentless request to properly staff the operations unit but to no avail.
7 BPD has experienced a high level of attrition and lost quality and well-
8 trained employees due to the stress suffered from the Department[']s
9 conspicuous failure to staff. The Department[']s abuse of its
10 employees is a disgrace to the [C]ity and now represents the single
11 most undesirable workplace city wide.
12

13 This communication is a demand to cease and desist from departing
14 from long standing established precedent and secondly demand to
15 bargain changes that negatively impact bargaining unit members on
16 the following items:
17

- 18 • Limitation of Vacation
- 19 • Swaps
- 20 • Positions in the Human Resources Department
- 21 • The directive of entering personal days through Schedule Express
22

23 Please provide dates and times for the above requested items
24 forthwith. Thank you for your attention to this matter.
25

26 By letter dated January 25, 2023, Cruz responded to O'Brien's January 24 letter

27 stating:⁵

28 I am in receipt of your email dated January 24, 2023, demanding to
29 bargain over the vacation week selection for specific vacation weeks
30 in Operations. I am confused in light of the meeting we had just the
31 day before your email.
32

33 At the meeting, the Department reviewed the vacation language with
34 you, SEIU President Tom McKeever, Michael Shackford and Irana
35 Fernandez. Article 15 states that: Vacation leave shall be taken at
36 such times as, in the opinion of the City, will cause the least
37 interference with the regular work of his/her Department. Captain
38 Hoppie explained the reason Operations felt it necessary to limit by 1

⁵ The record does not contain any information on when the Department directed unit members to enter their personal days through Schedule Express or the process for requesting personal days prior to the directive to utilize Schedule Express. Additionally, the record does not contain details on how the unit members enter their personal time requests into Schedule Express.

1 the number of employees allowed vacation weeks for Call Taker,
2 Dispatcher, and Support Unit Analyst for each shift for a total of 9
3 employees for 4 specific vacation weeks, down from 2 of each position
4 for each shift. We discussed that limiting vacations during certain
5 weeks might allow for the Department to be able to grant any single
6 days of accrued leave during the mentioned particular weeks.
7 Captain Hoppie had a study of the vacation weeks the Department
8 was short staffed and explained why the Department found it was
9 necessary to reduce the number of pre-allowed vacations. Tom
10 McKeever asked if there was room for compromise and the
11 Department responded that any proposal would be considered. The
12 Department further responded that there were two proposals
13 currently on the table for the parties to consider as compromise, one
14 to open up vacation weeks as the Department became staffed up
15 or sufficient staffing as the specific holiday weeks approached. The
16 other was to consider adjusting the number for the Support Staff
17 Analyst to bid on the week before the Christmas holiday. The union
18 agreed to put any other proposal they had in writing as a response to
19 the Department's proposal. The Department agreed in the meantime,
20 it would consider the two compromise proposals. Does the union have
21 any additional proposals to add? If so, please send them as agreed.

22
23 At your request, we also discussed certain positions that SEIU
24 believed were being considered to move into the SENA bargaining
25 unit. My office explained this was the first we had heard of such a
26 plan and would ensure that the Department understood that if it did
27 formulate such a plan, it would need to negotiate that with the SEIU.
28 That assurance should be enough to not need to meet further unless
29 the Department determined it actually wanted to make such a
30 proposal. At which point, we would of course contact you to convey
31 it.

32
33 The Department has discussed Swaps with your bargaining unit on
34 many occasions and the Department is aware that the parties have
35 a dispute as to whether the Department may limit swaps on
36 particular weeks, notwithstanding the language in the contract.

37
38 With regard to the directive to schedule requests for personal days
39 through Schedule Express, the Department does not believe there is
40 any impact on bargaining unit members, as the use of these days is
41 subject to operational need and schedule express is merely the means
42 by which the Department uses to facilitate shift/tour scheduling and
43 approval.

44
45 Additionally, Cruz informed O'Brien that the Department was available to meet with the

1 Union on the following dates: Monday, January 30, 2023, Tuesday, January 31, 2023,
2 Thursday, February 2, 2023, and Tuesday, February 7, 2023. Finally, Cruz requested
3 O'Brien put the Union's vacation bid proposals in writing.

4 The Union and the Department met on January 31, 2023. During the meeting, the
5 Union requested that the Department "open up" the weeks of August 19 to September 2,
6 by allowing two unit members per job description, per shift to request time off.⁶ After the
7 parties met on January 31, Cruz reached out to O'Brien to follow up on several issues.
8 By letter dated February 7, 2023, Cruz informed O'Brien that:

9 First, the Union asked the Department to open up the vacation weeks
10 of August 19th-August 25th and September 2nd to September 8th to
11 allow 2 operations civilians from each shift to select the above vacation
12 weeks, for a total of 18 bargaining unit members; up from the
13 contemplated 1 for each position for each shift, total of 9 bargaining
14 unit members. Unfortunately, due to current staffing and operational
15 needs, the Department is unable to agree to this request. However,
16 by reducing the number of employees allowed to take vacation weeks
17 during this period, the Department may be able to grant additional
18 requests for individual days off, assuming Operations can verify it has
19 sufficient staffing during a particular week.

20
21 The staffing levels are affected by the use of sick time in Operations.
22 According to payroll records, SEIU employees in Operations used
23 an average of 70 hours of sick time in 2022. While the Department
24 is not alleging sick leave abuse, this is a variable that is causing the
25 staffing shortage in a unit of critical need on a daily basis and has
26 an effect on the Department's operational needs. That said, the
27 Department will continually evaluate staffing levels and open up
28 additional bids for vacation weeks if operationally feasible. Any
29 vacation weeks opened throughout the year will be awarded under the
30 normal seniority basis.

31
32 We also discussed certain positions that SEIU believed the
33 Department was seeking to move into the SENA bargaining unit. As
34 we explained, that is not currently planned. If such a move is planned

⁶ Since at least 2019, the Department has not allowed three employees per job description per day to request off on any given week.

1 in the future, we would notify you and seek to fulfill any bargaining
2 obligations. The Department may contemplate personnel issues at the
3 management level without the Union. If the Department decides to
4 pursue such a planned move, our office will notify you and fulfill any
5 bargaining obligations.
6

7 The parties had a discussion about limiting swaps on particular
8 weeks, notwithstanding the language in the contract. The
9 Department does not believe this is contrary to the language in the
10 collective bargaining agreement. For instance, on Thanksgiving
11 week of 2022, bargaining unit member Khalilah Drummer was still
12 able to utilize 6 swaps during the month of November, even though
13 swaps were not available during certain days in November. The
14 Department explained its view that there is not an unfettered right to
15 any particular swap but that there is a maximum ceiling of how many
16 may be taken in a particular month.
17

18 With regard to the directive to schedule requests for non-emergency
19 personal days through schedule express, the Department does not
20 believe there is any impact on bargaining unit members. As the use of
21 these days is subject to operational need and schedule express is
22 merely the means by which the Department uses to facilitate shift/tour
23 scheduling and approval. Further, according to Captain Hoppie's
24 directive, floor supervisors may still approve an emergency personnel
25 day where there is insufficient time for the request to be entered into
26 Schedule Express.
27

28 Finally, the Union asked us to investigate Kelsey Ashe's recent
29 request for an emergency personnel day. Assuming the Union is
30 asking about the January 13 request, she called in at 4AM, 12 hours
31 prior to the start of her next shift. Her request was initially approved
32 by a floor supervisor, but upon reviewing Captain Hoppie's
33 directive, the floor supervisor temporarily rescinded the approval
34 until he checked in with the administrative staff during regular
35 business hours, who then approved the request. Whether similar
36 requests may be approved by the floor supervisor or the
37 administrative staff turns upon the facts of each particular case. If
38 there is time for the administrative staff to review, the request
39 should normally be processed through them- this does not mean
40 that an employee actually needs to arrive at BPD HQ and enter the
41 request into Schedule Express. An employee who intends to use a
42 personal day on an emergency basis may call it into the
43 administrative staff if it is feasible. If not feasible (e.g., an employee
44 will not have access to a phone during business hours before their
45 next shift), the employee may call the floor supervisor and the
46 supervisor may approve the request.

1 The parties met on March 2, 2023, April 11, 2023, June 14, 2023, September 20, 2023,
2 November 8, 2023 for successor contract negotiations. However, the parties did not
3 discuss the restrictions on the vacation list in contract negotiations.

4 Swaps

5 Under the CBA, the unit members may swap a scheduled shift with another BPD
6 Operations employee up to a maximum of six (6) times per month. All exchanged shifts
7 must be made up by the employee within thirty (30) days of the swap.

8 On January 23 and 31, 2023, as described above, the parties met to discuss
9 several issues, including swaps. By letter dated February 7, 2023, also referenced
10 above, Cruz recapped the parties' discussion on the Department's decision to limit
11 swaps on certain days. At the January 31 meeting, the Department asserted that
12 even if swaps are not available on certain days, the unit members are still able to
13 utilize six swaps per month as stated in the CBA.⁷

14 Opinion

15 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
16 when it unilaterally changes an existing condition of employment or implements a new
17 condition of employment involving a mandatory subject of bargaining without first giving

⁷ The record does not contain any information on the following issues: 1) when the Department first decided to restrict the days on which it allows unit members to utilize swaps; 2) which days the Department restricted the unit members for utilizing swaps; and 3) how, if at all, the Department restricted days that the unit members utilized swaps prior to any alleged change. The record also does not contain any evidence that the Department prohibited a unit member from swapping shifts up to six times per month. Finally, the record does not contain any evidence that the Department limited the number of unit members who could swap in any given week from 18 unit members to 9 unit members as alleged in the Complaint.

1 its employees' exclusive bargaining representative notice and an opportunity to bargain
2 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
3 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
4 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 64, SUP-
5 4784 (October 9, 2003). The employer's obligation to bargain before changing conditions
6 of employment extends to working conditions established through past practice, as well
7 as those specified in a collective bargaining agreement. Town of Wilmington, 9 MLC
8 1694, 1699, MUP-4688 (March 15, 1983). To establish a violation, a union must show
9 that: (1) the employer changed an existing practice or instituted a new one; (2) the change
10 had an impact on a mandatory subject of bargaining; and (3) the change was
11 implemented without prior notice to the union and an opportunity to bargain to resolution
12 or impasse. Commonwealth of Massachusetts, 30 MLC 63, 64, SUP-4784 (October 9,
13 2003); Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29, 2001); Commonwealth
14 of Massachusetts, 27 MLC 11, 13, SUP-4378 (August 24, 2000).

15 Swaps and Personal Leave

16 In this case, the Complaint alleges that the Department violated the Law when
17 it changed the time off approval policies by reducing the number of swaps permitted
18 per month in an effort to lessen the number of employees on leave at one time from
19 18 employees to 9 employees, and by increasing the yearly number of restricted
20 weeks in which bargaining unit employees may be denied leave to include 4
21 additional weeks without bargaining to resolution or impasse over the *impacts* of its
22 decisions on bargaining unit employees' terms and conditions of employment. After
23 the Complaint was issued, the Union did not file a motion to amend the Complaint to

1 revise the allegations or include any additional allegations.

2 The Union argues that the City violated the Law by unilaterally changing “time
3 off procedures” when it: 1) directed the unit members to enter personal day requests
4 in “Schedule Express”; 2) restricted swaps; and 3) restricted vacation weeks. First,
5 the Complaint in this case does not contain an allegation that the City violated the
6 Law when it directed unit members to enter personal days into Schedule Express.
7 Although the Complaint mentions “time off approval policies” and “accrued leave
8 time,” it does not contain an allegation involving “Schedule Express” or the procedure
9 for unit members requesting personal days. During the hearing, the City objected to the
10 Union asking questions about personal days. As the Complaint did not limit the
11 “accrued leave time” to only vacation time, I allowed the Union to ask questions about
12 personal days as it relates to the Complaint. However, the Union did not request, nor
13 did I allow, an amendment to the Complaint to include an allegation addressing the
14 Department’s mandate that unit members enter personal days into Schedule
15 Express. Therefore, I need not decide whether the City violated the Law when it
16 directed unit members to enter personal day requests in Schedule Express as the
17 allegation is not included in the Complaint.⁸

18 Next, I do not find that the City violated the Law by reducing the number of
19 swaps permitted per month to lessen the number of employees on leave at one time

⁸ Even if I considered the Union’s argument as part of the Complaint, the Union did not demonstrate that the City violated the Law when it directed unit members to enter personal day requests in Schedule Express. The Union did not provide any evidence on how the unit members requested personal days prior to any alleged change, when the alleged change occurred, and how the alleged change impacted the unit members’ terms and conditions of employment.

1 from 18 employees to 9 employees. First, it is clear from the record that the reference
2 to reducing 18 employees to 9 employees applies to the vacation list, not swaps.
3 Next, it is undisputed that the CBA allows a unit member to swap with another unit
4 member up to 6 times per month. The Union did not establish that the Department
5 had prohibited unit members from swapping shifts up to six times per month.

6 From the parties' written communications, it appears that the Department
7 decided to prohibit unit members from swapping on certain days in a month but did
8 not reduce the number of times that a unit member could swap during a month.
9 Moreover, the record does not contain information on how swaps were handled
10 before the alleged change, when the Department started putting restrictions on days
11 that could be swapped, how often the restriction was placed on swaps, or which dates
12 could not be swapped. Thus, I do not find that the Union provided sufficient evidence to
13 establish that the Department violated the Law by placing restrictions on unit members
14 utilizing swaps as alleged in the Complaint.

15 Restricted Weeks on the Vacation List

16 Unlike with swaps, the Union established that the Department decided to decrease
17 the number of unit members that were allowed to take a week of vacation during certain
18 weeks in a calendar year. Prior to January of 2023, the Department had allowed 18 unit
19 members to take a full week of vacation during the week of April school vacation, the
20 week of July 4th, the week of the Caribbean Festival, and the week of the Labor Day
21 holiday. When the Department released the vacation list for the 2023 calendar year, it
22 only allowed 9 unit members to take a full week of vacation for those weeks. It is clear
23 that the City changed the existing practice when it limited the number of unit members

1 that could take vacation during the four above-described weeks.

2 Next, I find that the City's decision to limit the number of unit members who
3 took vacation during the weeks of April school vacation, July 4th, the Caribbean Festival,
4 and Labor Day holiday impacted vacation and leave time procedures. Vacation, leave
5 time procedures, and restrictions surrounding the use of leave time, are mandatory
6 subjects of bargaining. See Commonwealth of Massachusetts, 21 MLC 1637, 1642,
7 SUP-3587 (March 20, 1995). As such, I find that the City had an obligation to bargain
8 over the impacts of its decision.

9 *Impasse*

10 Lastly, I consider whether the City implemented the restrictions in the vacation
11 list without providing the Union with an opportunity to bargain to resolution or impasse
12 over the impacts of the City's decision.⁹ The City asserts that it did not violate the Law as
13 the parties did engage in bargaining. Specifically, the City argues that the parties reached
14 impasse because Union only requested to open the restricted weeks back to 18 unit
15 members, and the Department refused that request. Additionally, the City argues that the
16 Union did not submit any other proposals and did not request to meet again after the

⁹ In the parties' post-hearing briefs, the City and the Union presented arguments about the City's obligation to bargain over the decision to place restrictions on the vacation weeks. However, the Complaint only alleges that the City violated the Law when it failed to "bargain in good faith by reducing the number of allowed shift swaps and increasing the number of restricted time off weeks without bargaining to impasse or resolution over the impacts of those decisions on bargaining unit employees' terms and conditions of employment in violation of Section 10(a)(5) of the Law." Additionally, the Complaint contains a footnote that states: "the Union only alleged that the City had an impact bargaining obligation in this context. The Union did not raise decisional bargaining in its arguments. Consequently, I have not considered whether the City was obligated to bargain over the decisions at issue." As this case is only about impacts, I do not address the parties' arguments regarding contract waiver for decisional bargaining.

1 January 31 meeting. In the City's view, this constitutes impasse.

2 To determine whether parties have reached impasse, the Commonwealth
3 Employment Relations Board (CERB) assesses the likelihood of further movement
4 by either side and whether they have exhausted all possibility of compromise.
5 Ashburnham-Westminster Regional School District, 29 MLC 191, 195, MUP-01-3144
6 (April 9, 2003). In determining whether the parties are at an impasse in bargaining,
7 the CERB examines the totality of the circumstances surrounding the negotiations.
8 Commonwealth of Massachusetts, 8 MLC 1499, 1513, SUP-2508 (November 10,
9 1981). If one party to the negotiations indicates a desire to continue bargaining, it
10 demonstrates that the parties have not exhausted the possibility of compromise.
11 Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999). The
12 issue of impasse is a question of fact. School Committee of Newton, 388 Mass at
13 575.

14 Although neither side provided many details of the parties' conversations
15 during the January 23 and 31 meetings, it is clear that the Union and the Department
16 only spoke about the decision to restrict certain weeks on the vacation list to 9 unit
17 members. The record does not demonstrate that the parties discussed the impacts
18 of the Department's decision. As the City did not demonstrate that the parties even
19 spoke about the impacts of the Department's decision, it did not establish that the
20 parties reached impasse on bargaining over the impact of the decision.¹⁰

¹⁰ For example, the parties could impact bargain the procedure for unit members to bid on those four weeks should staffing levels improve during the calendar year. The Department mentioned that if those weeks "open up" to 18 unit members, then seniority would dictate the order of vacation sign up for those weeks. However, the parties could still impact bargain on how to handle unit members with seniority who already signed up

1 *Waiver by Inaction*

2 The City also argues that the Union waived its right to continue to impact bargain
3 by its inaction. To establish the affirmative defense of waiver by inaction, the City bears
4 the burden of showing that the Union had actual knowledge of the change, a reasonable
5 opportunity to negotiate over the change, and unreasonably or inexplicably failed to
6 bargain or request bargaining. School Committee of Newton, 388 Mass. at 570 (citing
7 Boston School Committee, 4 MLC 1912,1915, MUP-2611 (April 27,1978)). See also City
8 of Haverhill, 42 MLC 273, 276, MUP-13-3066 (May 24, 2016); City of New Bedford, 38
9 MLC at 250 (citing City of Boston, 31 MLC 25, 33, MUP-1758 (August 2, 2004)). As with
10 waivers by contract, such a waiver will not be lightly inferred. City of Haverhill, 42 MLC
11 at 276 (citing Town of Natick, 2 MLC 1086, 1092, MUP-2098 (1975)).

12 I find that the Union did not waive by inaction its right to bargain over the impacts
13 of the Department's decision to restrict the number of unit members allowed to take
14 vacation for certain weeks. After learning of the new restrictions on the vacation list, the
15 Union immediately informed the Department it wanted to discuss the issue before any
16 unit members signed up for the vacation list. Additionally, on January 24, 2023, the Union
17 submitted a written demand to bargain over the vacation list issue.

18 The City asserts that the Union waived its right to bargain by inaction when it did
19 not submit any proposals or counter proposals. However, as memorialized in Cruz's
20 February 7 letter, the Union did propose that the Department allow 18 unit members to

for a different week on the vacation list but may want to reconsider that choice if a certain week was now available.

1 sign up for vacation during the weeks of August 19 and September 2, 2023. Given the
2 Union's request that the Department allow 18 unit members to sign up for vacation for
3 only two of the four weeks at issue, the Union did not fail to act by refusing to submit
4 proposals or counter proposals. See Town of Billerica, 44 MLC 106, 196, MUP-14-4234
5 (December 27, 2017) (CERB found that by not making any proposals or
6 counterproposals, the union had waived its right to bargain by inaction).¹¹

7 For the above explained reasons, I find that the Union did not waive by inaction its
8 right to bargain over the impacts of the Department's decision to restrict the number of
9 unit members allowed to take vacation for certain weeks.

10 CONCLUSION

11 Based on the record and for the reasons explained above, I conclude that the
12 City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it
13 failed to bargain with the Union to resolution or impasse over the impacts of the
14 decision to reduce the number of unit members that were able to take vacation during
15 the weeks of April school vacation, July 4th, the Caribbean Festival, and Labor Day

¹¹ The City argues that the Union's insistence on bargaining the decision, rather than the impacts, waived its right to impact bargain. The City asserts that the facts in this case are similar to those in the CERB's decision in City of Boston v. Boston Police Superior Officers Federation, 41 MLC 31, MUP-10-5895 (August 8, 2014). I disagree. In City of Boston, the CERB did not dismiss the case because the Union failed to make any proposals on the impacts of the decision. Id. In fact, the CERB ordered the City to impact bargain the elimination of a supervisory position. However, after the CERB's order to impact bargain, the Union failed to make any proposals on the impacts of the decision. Therefore, in the CERB's compliance decision it concluded that the union's conduct constituted a waiver of the right to impact bargain via inaction. City of Boston v. Boston Police Superior Officers Federation, 44 MLC 56, MUP-10-5895 (August 30, 2017). Unlike in the City of Boston compliance decision, in January of 2023, the DLR had not ordered the parties in this case to impact bargain over the Department's decision or issued a Complaint which limited the scope of bargaining to only impacts.

1 holiday from 18 unit members to 9 unit members. However, I do not find that the City
2 violated the Law by reducing the number of swaps permitted per month as alleged in
3 the Complaint.

4 REMEDY

5 Where an employer's refusal to bargain is limited to the impact of a managerial
6 decision, the appropriate remedy must strike a balance between the right of management
7 to carry out its lawful decision and the right of an employee organization to have
8 meaningful input on impact issues while some aspects of the status quo are maintained.
9 Town of Burlington, 10 MLC 1387,1388, MUP-3519 (February 1, 1984). Where the
10 effects of an employer's decision are certain, and the union's efforts to impact bargain
11 cannot substantially change, but only ameliorate those effects, the CERB is guided by
12 Transmarine Navigation Corp., 170 NLRB 389 (1968), and only requires employers to
13 make affected employees whole during the period of impact bargaining. This is known as
14 a Transmarine remedy. Town of Dedham, 21 MLC 1014, 1024, MUP-8091 (June 1,
15 1994). However, the CERB distinguishes cases where the effect of the decision was not
16 inevitable and could have been changed by the union's efforts to impact bargain. Id. In
17 those cases, employers must make affected employees whole retroactively. See City of
18 Boston, 31 MLC 25, 33, MUP-1758 (August 1, 2004) (CERB orders both prospective and
19 retroactive remedy, distinguishing between impacts that did not inevitably result from
20 managerial decision).

21 In this case, Hoppie decided to limit the number of members who could take a
22 whole week of vacation for the weeks of April school vacation, July 4th, the Caribbean
23 Festival, and Labor Day holiday because the Department had a staffing shortage and

historically, these weeks involve a large volume of calls from the public which created a public safety problem. Given the public safety aspect, I do not find that impact bargaining could substantially change the decision but only ameliorate the effects of the decision. Also, I do not find that unit members lost vacation time as a result of the Department's decision as the unit members could have selected many other weeks to take a full week of vacation in the calendar year.

For the above reasons, I do not order the City to restore the status quo by increasing from 9 to 18 the number of unit members who can take vacation during the weeks of April school vacation, July 4th, the Caribbean Festival, and the Labor Day holiday. And since none of the unit members lost vacation time, the unit members do not need to be made whole, and there is no economic equivalent of the status quo ante to restore during bargaining. Thus, I order the City to bargain on request over the impacts of its decision on unit members' terms and conditions of employment. If the Union wants to impact bargain with the City over its decision to reduce the number of unit members that are able to take vacation during the weeks of April school vacation, July 4th, the Caribbean Festival, and Labor Day holiday on the unit members' terms and conditions of employment, it must request to bargain with the City within 15 days of the receipt of this decision.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the City shall:

1. Cease and desist from:

- a) Failing or refusing to bargain in good faith with the Union to resolution or impasse over the impacts of its decision to reduce the number of unit members able to take vacation during the weeks of April school vacation, July 4th, the Caribbean Festival, and Labor Day holiday from 18 unit members to 9 unit members.

1
2 b) In any like or similar manner interfering with, restraining or coercing employees in
3 the exercise of their rights protected under the Law.
4

5 2. Take the following affirmative actions that will effectuate the purpose of the Law:
6

7 a. Upon request, bargain with the Union in good faith to resolution or impasse on
8 the impacts of its decision to reduce the number of unit members able to
9 take vacation during the weeks of April school vacation, July 4th, the
10 Caribbean Festival, and Labor Day holiday from 18 unit members to 9 unit
11 members;
12

13 b. Sign and post immediately in conspicuous places employees usually
14 congregate or where notices to employees are usually posted, including
15 electronically, if the Employer customarily communicates to its employees via
16 intranet or e-mail, and maintain for a period of thirty (30) consecutive days
17 thereafter signed copies of the attached Notice to Employees;
18

19 c. Notify the DLR within ten (10) days after the date of service of this decision
20 and order of the steps taken to comply with its terms.

21 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, 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.