

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOARD OF TRUSTEES
OF THE UNIVERSITY
OF MASSACHUSETTS-AMHERST

and

NEW ENGLAND POLICE
BENEVOLENT ASSOCIATION, INC.

*
*
*
*
*
*
*
*
*
*
*

Case No. SUP-11-1399

Date Issued: August 8, 2014

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Ethan Mutschler, Esq. - Representing the Board of Trustees
of the University of Massachusetts-Amherst

Thomas E. Horgan, Esq. - Representing the New England Police
Benevolent Association, Inc.

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Board of Trustees of the University of
2 Massachusetts-Amherst (the University) violated Section 10(a)(5) and, derivatively,
3 Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: a)
4 repudiating an oral agreement; and b) failing to bargain to resolution or impasse over
5 the decision to subcontract armored car services and the impacts of that decision on
6 certain unit members' hours of work and workweek. I find that the University failed to

1 bargain to resolution or impasse over the impacts of decision to subcontract armored
2 car services on unit members' hours of work and workweek. However, I dismiss the
3 allegations that the University repudiated the oral agreement and that the University
4 failed to bargain to resolution or impasse over the decision to subcontract the armored
5 car services.

6 STATEMENT OF THE CASE

7 On December 9, 2011, the International Brotherhood of Police Officers (IBPO or
8 the Union) filed a charge of prohibited practice with the Department of Labor Relations
9 (DLR) alleging that the University had violated Sections 10(a)(5) and (1) of the Law. A
10 DLR hearing officer conducted an investigation on February 27, 2012. On June 18,
11 2012, the investigator issued a complaint alleging that the University violated Sections
12 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: a) repudiating an October 18,
13 2011 Agreement (Count I); and b) failing to bargain to resolution or impasse over the
14 decision to subcontract armored car services and the impacts of that decision on certain
15 unit members' hours of work and work week (Count II). The University filed an answer
16 to the complaint on June 29, 2012.

17 On February 14, 2013, the NEPBA, the successor bargaining representative to
18 the IBPO, filed a motion to have the DLR substitute it as the charging party in Case No.
19 SUP-11-1399. I allowed the NEPBA's motion to substitute on February 22, 2013.

20 I conducted a hearing on April 25, 2013.¹ Both parties had an opportunity to be

¹ On April 25, 2013, the University orally filed a motion to dismiss, which I denied without prejudice to its refiling. The University resubmitted its motion to dismiss in writing on May 31, 2013 along with its post-hearing brief. Because I have incorporated my ruling on the University's motion as part of this decision, I decline to render a separate ruling on that motion.

1 heard, to examine witnesses and to introduce evidence. The parties submitted their
2 post-hearing briefs postmarked May 31, 2013. Upon review of the entire record,
3 including my observation of the demeanor of the witnesses, I make the following
4 findings of fact and render the following decision.

5 Stipulated Facts

- 6 1. The University is a public employer within the meaning of Section 1 of the
7 Law.
8
- 9 2. The employee organization referenced in the complaint of prohibited
10 practice has succeeded to a new employee organization the New England
11 Police Benevolent Association (NEPBA) as certified by the DLR pursuant
12 to SCR-12-1484.
13
- 14 3. The NEPBA is an employee organization within the meaning of Section 1
15 of the Law and is the exclusive bargaining representative for patrol officers
16 employed by the University.
17
- 18 4. On August 8, 2011, the Administrator of Labor Relations notified the Union
19 [IBPO] of the University System's intent to eliminate the armored car unit
20 of the Police Department known as the Fargo unit and go out to bid to
21 replace those services with an outside vendor.
22
- 23 5. Prior to December 2011, the days and hours of work for employees in the
24 FARGO unit were a five on and two off work day schedule, with work
25 hours of 8:30 AM to 4:30 PM Monday through Friday.
26
- 27 6. On October 7, 2011, the Union Vice-President sent an email to the
28 Administrator of Labor Relations, the Chief of Police and Deputy Chief of
29 Police, which the University received on October 13, 2011. The email
30 stated: "It is our impression that this "contracting out" needs to be
31 bargained. I am also in possession of an email from the Deputy Chief that
32 states that it is management's intention to return these positions to regular
33 shifts and hours ... Unless I have missed something, we have not sat
34 down and bargained anything."
35
- 36 7. On October 14, 2011, Union Business Representative, Robert Dickson,
37 sent an email to the Administrator of Labor Relations. The email stated:
38 "Local 432A desires to impact bargain the termination of the Fargo
39 assignment prior to its demise. Specifically, as it impacts the
40 administrative schedule (5+2) possibly becoming a regular schedule (4+2)

1 and the obvious changes that means to the individuals currently assigned
2 to Fargo.”

3
4 8. On October 18, 2011, the parties met to discuss the work hours referred to
5 in #6 above for the employees impacted by the elimination of the FARGO
6 unit.

7
8 9. The Police Department issued a shift bid for the Spring Semester which
9 included two positions slotted for a 5+2 schedule and hours of work
10 established at 7AM-3PM.

11
12 10. As a result of this shift bid, one officer formerly assigned to the FARGO
13 unit selected a new 4+2 schedule. A second officer formerly assigned to
14 the FARGO unit selected a 5+2 schedule with the revised hours which
15 were a change from the previous reporting hours.

16 FINDINGS OF FACT²

17 The University's Police Department consists of patrol officers, sergeants,
18 lieutenants, the deputy chief and the chief. Prior to April 18, 2012, the IBPO was the
19 exclusive bargaining representative for police officers below the rank of sergeant. The
20 University and the IBPO were parties to a collective bargaining agreement that, by its
21 terms, was in effect from July 1, 2009 through June 30, 2012 (2009-2012 Agreement).
22 The 2009-2012 Agreement contained the following relevant provisions:

23 Article 7-Work Week and Work Schedules

24
25 Section 1: Scheduled Hours, Workweek, Workday

26
27 Except as otherwise specified in this Agreement, the regular hours of work
28 for full-time employees shall be thirty-seven and one-half (37.5) hours per
29 week excluding meal period or forty (40) hours per week excluding meal
30 periods, as has been established for that job title at the particular job
31 location. Any employee whose regular workweek has averaged more
32 than forty (40) hours excluding meal periods in the past shall have a forty
33 (40) hour workweek.
34

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

1 The work schedule, both starting times and quitting times, of employees
2 shall be posted on a bulletin board at each work location or otherwise
3 made available to employees and Union stewards.
4

5 When the Employer desires to change the regular work schedule of an
6 employee, the Employer shall give the affected employee at least eight (8)
7 working days written notice of such contemplated change, except in cases
8 of emergency involving the protection of property of the University or
9 involving the health and safety of those persons whose care and/or
10 custody have been entrusted to the University.
11

12 To the extent practicable, the normal workweek shall consist of five (5)
13 consecutive days, Monday through Friday, with the regular hours of work
14 each day to be consecutive except for meal periods. Similarly, to the
15 extent practicable, employees in continuous operations shall receive two
16 (2) consecutive days off in each seven (7) day period. This subsection
17 should not apply to employees in authorized flexible hours programs or on
18 a four (4) and two (2) schedule.
19

20 Each employee shall be required to record his/her attendance in
21 accordance with procedures presently established by the appointing
22 authority. Thirty (30) days prior to any change in the existing method of
23 recording attendance, the CEO or his/her designee will notify the Union of
24 any such change and will meet and confer with the Union to discuss such
25 change. ...
26

27 Article 30-Management Rights 28

29 The Union and the Board of Trustees and/or the administration of the
30 University agree that the provisions of this Agreement shall be expressly
31 limited to conditions of employment covered by this Agreement, and no
32 provision shall be construed to restrain the University from the
33 management of its operations, including but not limited to the determination
34 of the standards of service to be provided and standards of productivity and
35 performance of its employees; the right to determine the size and
36 composition of the work force; to determine educational and work
37 standards to decide the location and number of its offices, administrative
38 buildings, dormitories, facilities, and physical plant; to determine the
39 quantity and type of equipment to be used in its operations; the speed of
40 such equipment and the manning requirements of such equipment of any
41 job; to determine the content of job classification; to promulgate reasonable
42 rules and regulations; to select supervisory and managerial employees; to
43 discipline, demote and discharge employees; to contract out work; to
44 control and determine the state of products which may be used by
45 employees; to determine the time of work, staffing pattern and work area;
46 to determine the method and place of performing work including the right to

1 determine that the University's work force shall not perform certain work; to
2 transfer employees from one administrative area to another; to schedule
3 work shifts and work breaks; to determine the method of performing work
4 including the introduction of improved methods and facilities; to determine
5 whether such work shall be performed by bargaining unit employees or
6 others; to fix standards of quality and quantity of work to be done; to
7 determine whether any part of the whole of its operations shall continue to
8 be done; to determine whether any part of the whole of its operations shall
9 continue to operate; to establish, to change or abolish any service; to
10 maintain order and efficiency in its facilities and operations; to determine
11 the duties of employees; to hire, layoff, assign, transfer, retrench; to
12 determine the qualifications of employees; to promote employees; to
13 upgrade, allocate, reallocate or reclassify employees; to determine the
14 starting and quitting time; to require overtime, and all other rights and
15 prerogatives including those exercised unilaterally in the past, subject only
16 to regulations and restrictions governing the exercise of these rights as
17 expressly provided in this Agreement, statute or law. Any management
18 right set out in this Article shall be subject to the grievance and arbitration
19 provision herein.

20 21 Article 31-Scope of Agreement

22 23 Section 1

24
25 The parties agree that during the negotiations of the terms of this
26 Agreement, they were afforded the unrestricted right to negotiate all
27 matters covered by Chapter 150E, that they shall be governed exclusively
28 by and limited to the terms and provisions of this Agreement and that
29 neither shall have any other obligation or be obligated to negotiate with
30 respect to any matter pertaining to wages, hours or other terms and
31 conditions of employment whether or not specifically included in this
32 Agreement or discussed during the negotiations preceding the execution
33 of this Agreement.

34 35 Section 2

36
37 No addition to, alteration, modification, practice, or waiver of any term,
38 provision, covenant, or condition or restriction in this Agreement shall be
39 valid, binding or of any force or effect unless made in writing and executed
40 by the Employer and the Union.

41
42 Any prior agreements covering employees covered by this Agreement
43 shall be terminated and of no effect, upon the effective date of this
44 Agreement and shall be superseded by this Agreement except for those
45 benefits that are specifically continued into the new Agreement by mutual
46 consent.

1 Article 35-Contracting Out

2
3 Within a reasonable time prior to the appointing authority contracting out
4 work, which will result in the layoff of an employee who performs the
5 function that is contracted out, the Union shall be notified and the
6 appointing authority and the Union shall discuss the availability of similar
7 positions within the appointing authority's jurisdiction for which the laid-off
8 employee is determined to be qualified and the availability of any training
9 programs which may be applicable to the employee. In reviewing these
10 placement possibilities, every effort will be made to seek matches of work
11 skills and qualifications with available, comparable positions.
12

13 Memorandum of Understanding-Page 83

14
15 The University of Massachusetts at Amherst agrees to keep in effect, in
16 accordance with past practice, the existing workweek schedule consisting
17 of four (4) work days followed by two (2) consecutive days off and all the
18 arrangements attendant thereto.
19

20 The University further agrees to conduct semi-annual bidding for shift
21 preferences to become effective on or about the first week of January and
22 the first week of July of each year of the agreement. If a shift slot is
23 eliminated between bids, the affected employee shall be able to displace a
24 less senior employee from the shift of his choice who in turn may displace
25 a less senior employee until the least senior employee is reached.

26 On April 18, 2012, the DLR in Case No. SCR-12-1484 certified the NEPBA as
27 the successor bargaining representative to the IBPO. The NEPBA and the University
28 subsequently agreed that all provisions of the 2009-2012 Agreement would continue to
29 remain in effect, with the exception of Article 3, Union Security, and Article 13, Health
30 and Welfare. The NEPBA and the University executed separate side letters of
31 Agreement concerning those provisions.

32 Unit Members' Work Schedules

33 The University's Police Department has a so-called four and two work schedule
34 whereby most unit members work for four consecutive days and then have two days off.
35 The work day typically consists of three shifts: the day shift from 7:00 AM to 3:00 PM,

1 the evening shift from 3:00 PM to 11:00 PM, and the night shift from 11:00 PM to 7:00
2 AM. At times, the Police Department also has assigned a few officers to work a split
3 shift from 7:00 PM to 3:00 AM in order to reduce overtime costs on the night shift.

4 Unit members bid on work shifts based upon seniority. Shift bids occur three
5 times per year in April, August and December. In April, unit members bid on shifts for
6 the period from May through August (the summer period). They bid in August on shifts
7 for the period from September through December (the fall period). Finally, in
8 December, they bid on shifts for the period from January through April (the spring
9 period).

10 Fargo Unit

11 For more than twenty-five years, unit members performed the specialized
12 assignment of providing armored car services to campus businesses and offices, an
13 assignment which colloquially was referred to as the Fargo unit. Two uniformed unit
14 members traveled in an armored van along a regular route picking up cash deposits at
15 various sites, including snack bars, the bursar's office, the convenience store and the
16 book store, and delivered those deposits to banks both on and off-campus for
17 processing. They also delivered any coin or currency orders that the businesses or
18 offices had requested from their banks. Those unit members worked Monday through
19 Friday from 8:30 AM to 4:30 PM³ and had Saturdays and Sundays off,⁴ a so-called five

³ Prior to 2005, unit members who held the Fargo assignment had a five and two schedule but their hours of work were 8:00 AM to 4:00 PM.

⁴ When businesses or offices needed to make deposits on nights and weekends when the Fargo unit employees did not work, the Police Department sent patrol officers to transport the deposits in their cruisers. The Police Department had keys to the night depositories at various banks.

1 and two schedule.⁵ Unlike employees who worked a four and two schedule,
2 employees, who had a five and two schedule, had every holiday off and received an
3 additional seventeen days off per year.⁶ Because of the five and two schedule and the
4 hours of work, senior unit members considered the Fargo unit assignment to be
5 desirable and sought out that assignment via the bid process.⁷

6 Summer 2011

7 In summer 2011, the Treasurer's Office (Treasurer's Office) of the University of
8 Massachusetts system issued RFP's soliciting private vendors to perform armored
9 transportation services at the campuses in Amherst, Boston, Dartmouth, Lowell and
10 Worcester.⁸ Several days later, during the first week of August 2011, Deputy Chief
11 Patrick Archbald (Deputy Chief Archbald) held two meetings to notify the Union and the
12 affected employees about the RFP. The first meeting took place solely with then IBPO
13 local president Kevin Shaw (Shaw) and the second meeting was with Shaw and the two
14 unit members who held the Fargo unit assignment for the summer period, Raymond
15 Babb (Babb) and Roman Kucinski (Kucinski).⁹ At both meetings, Deputy Chief

⁵ The University also sometimes referred to the five and two schedule as an administrative schedule. Unit members who worked as the accreditation officer and the evidence officer also worked an administrative schedule.

⁶ A four and two schedule inherently contains seventeen more days off per year than a five and two schedule. To equalize the two schedules, employees who work a five and two schedule receive an additional seventeen days off per year.

⁷ Fargo unit employees also were eligible for the same overtime opportunities as other bargaining unit members.

⁸ Although there was still a need for armored car services to pick up deposits at the campuses, the widespread use of ATM cards and electronic funds transfers had reduced the overall amount of cash deposits at the campuses.

⁹ Babb and Kucinski were among the five most senior bargaining unit members.

1 Archbald provided specific details about the RFP. He also discussed how the change to
2 a private vendor for armored car services would impact the businesses and offices that
3 previously used the services of the Fargo unit and what was the possible timeline for the
4 change. He noted that after the private vendor took over, he intended to return the two
5 affected officers to a regular day shift schedule.¹⁰ On August 8, 2011, Nicholas
6 Marshall (Marshall), the University's Labor Relations Administrator, sent a letter to
7 Robert Dickson (Dickson), the IBPO's business agent, stating in pertinent part:

8 I am writing to formally notify you that the University is going out to bid for
9 armored car services for all campuses of the University. This bid will
10 result in elimination of the "Fargo Van" service currently operated by the
11 University of Massachusetts Amherst Police Department. No officers will
12 be laid off as a result of this service being eliminated. It is anticipated that
13 officers, currently serving in the "Fargo" duty assignment, will be
14 reassigned to other Patrol duties in accordance with their seniority. Until
15 the bid process is completed, a contract awarded and the successful
16 bidder starts to provide armored car service, the services will be provided
17 by the University of Massachusetts Amherst Police Department in the
18 current manner.

19
20 If IBPO Local 432A would like to meet and discuss the anticipated
21 contracting out of this service, the Chief of Police, Deputy Chief of Police
22 and I are available to meet with you. Please contact me if you have any
23 questions.

24 On or about mid-August 2011, unit members bid upon shifts for the fall period. Babb
25 and Kucinski again successfully bid on the Fargo assignment.¹¹ The University issued

¹⁰ The University and the NEPBA understood the regular day shift to be a four and two schedule with hours of work of 7:00 AM to 3:00 PM.

¹¹ A third unit member Barry Flanders, who was on extended medical leave, was also listed as assigned to the Fargo unit in the event that he returned to active duty during the fall period, which he ultimately did not.

1 the finalized list of shift assignments on August 18, 2011 (Fall Bid '11).¹² The Fall Bid
2 '11 listed unit members Babb, Kucinski, Brian Davies, who worked as the accreditation
3 officer, and Christopher LaFlamme (LaFlamme),¹³ who worked as the evidence officer,
4 as working days with hours that varied from the usual day shift of 7 AM to 3 PM¹⁴ and
5 with a five and two schedule. The University assigned all other unit members to the
6 day, evening or night shifts, with the exception of two unit members, whom the
7 University assigned to the 7PM to 3 AM split shift, and they all worked a four and two
8 schedule.

9 At some point,¹⁵ the IBPO proposed to the University that Babb and Kucinski
10 continue to work a five and two schedule with a workday of 8:30 AM to 4:30 PM, even
11 after the Fargo assignment ended. On October 4, 2011, Deputy Chief Archbald sent an
12 email message to Babb and Kucinski, as well as various other individuals including then
13 Police Chief Johnny Whitehead (Chief Whitehead) and Union vice-president Officer
14 Michael Billiel (Billiel), stating:

15 Ray [Babb] and Roman [Kucinski]:
16

17 There has been a recommendation by Union leadership for Management
18 to consider keeping Fargo positions M-F 0830-1630hrs. once the Unit
19 ceases to function. I'm writing to put us all on the same page that it's
20 management's intention to return these positions to regular shift
21 days/hours.
22

¹² The record is silent as to why the Fall Bid '11 lists the fall period as commencing on August 21, 2011 rather than September 1, 2011.

¹³ LaFlamme was the most senior bargaining unit member.

¹⁴ The record before me does not indicate Davies' or LaFlamme's exact hours of work for the fall period. Babb and Kucinski worked from 8:30 AM to 4:30 PM.

¹⁵ The facts before me do not show the specific date when the IBPO made its proposal.

1 I don't want anyone to be surprised when the spring bid comes out and for
2 there to be expectation of something else.

3
4 Thanks.

5 On October 13, 2011, Billiel sent an email message to various individuals including
6 Chief Whitehead, Deputy Chief Archbald and Marshall stating:

7 The Union is in receipt of your letter dated August 8, that states the
8 University is going out to bid for the armored car services and that the bid
9 will result in the elimination of the Fargo unit.

10
11 It is our impression that this "contracting out" needs to be bargained. I am
12 also in possession of an email from the Deputy Chief that states that it is
13 management's intention to return these positions to regular day
14 shift/hours. The Deputy Chief then goes on to say he doesn't want
15 anyone to be surprised when the spring bid comes out.

16
17 Unless I missed something we have not sat down and bargained anything.
18 We feel it is a substantial detriment to our union members to have these
19 positions eliminated and we feel this needs to be bargained.

20
21 I have a call into Bob Dickson and when the three of you wish to bargain
22 this contracting out please let Bob know and we can arrange a meeting.

23
24 Thank you.

25
26 On October 14, 2011, Dickson sent an email to Marshall that stated:

27
28 Local 432A desires to impact bargain the termination of the Fargo
29 assignment prior to its demise. Specifically, as it impacts the
30 administrative schedule (5+2) possibly becoming a regular schedule (4+2)
31 and the obvious changes that means to the individuals currently assigned
32 to Fargo. We would also demand to discuss seniority and how it affects
33 any current bids, whether Fargo related or not.

34
35 We are available on Tuesday October 18 at 2:00 p.m. at the police station.

1 October 18, 2011 Meeting

2 On October 18, 2011, representatives of the University and the IBPO met¹⁶ to
3 discuss Fargo as well as an unrelated issue concerning the seniority of a bargaining unit
4 member.¹⁷ The University representatives were Chief Whitehead, Deputy Chief
5 Archbald, and Marshall, while the IBPO's representatives were Dickson and unit
6 members Detective Lisa Kidwell (Kidwell) and LaFlamme.¹⁸ At the meeting, the parties'
7 representatives were aware that the Treasurer's Office had awarded Dunbar the
8 contract to provide armored car services on campus. The IBPO proposed that the
9 Fargo unit with its specialized schedule continue to exist even after Dunbar took over
10 the armored car services, although the Fargo unit employees would perform patrol
11 officer duties on a full-time basis. The parties discussed a five and two schedule versus
12 a four and two schedule and the impacts that a possible change in the work schedule
13 might have on the lifestyle of the affected employees in the Fargo unit. The parties did
14 not discuss any changes to the 8:30 AM to 4:30 PM schedule of the employees in the
15 Fargo unit.¹⁹

16 The University's representatives stepped outside and held a caucus. Deputy
17 Chief Archbald opposed maintaining the Fargo unit after Dunbar took over the armored

¹⁶ The parties' met in the police chief's conference room.

¹⁷ The record does not identify the bargaining unit member.

¹⁸ Kidwell testified that Chief Whitehead and Marshall were present on behalf of the University, while Deputy Chief Archbald testified that he also was present on behalf of the University. I credit Deputy Chief Archbald's testimony on this point because Marshall also confirmed the presence of the deputy chief at the October 18, 2011 meeting.

¹⁹ The parties did not exchange proposals in writing.

1 transportation services on campus, because he believed that the 8:30 AM to 4:30 AM
2 schedule of the Fargo unit employees would negatively impact the Police Department's
3 operational needs.²⁰ Chief Whitehead suggested that the University agree to allow the
4 affected employees in the Fargo unit to remain on a five and two schedule through the
5 spring period. Marshall concurred and opined that allowing the affected employees to
6 remain on a five and two schedule through the spring period constituted a "soft landing"
7 for the two unit members. When the University's representatives returned to the
8 meeting, they did not inform the Union about the discussion that they had during their
9 caucus. Marshall informed that the Union that the University would continue the Fargo
10 unit employees on a five and two schedule through the spring period. Chief Whitehead
11 stated that the Fargo unit would remain "as is".²¹ Neither the IBPO nor the University
12 discussed what exactly constituted "as is" or executed a written document that
13 described what the phrase "as is" meant.

14 Kidwell believed that employees in the Fargo unit would continue to work a five
15 and two schedule with hours of work from 8:30 AM to 4:30 PM until May 2012 and that
16 the parties would continue to meet and bargain. Marshall believed that for the spring
17 period, employees in the Fargo unit would work from 7 AM to 3 PM but would continue
18 to have a five and two schedule. He informed the Union that it could ask for further

²⁰ Some of Deputy Chief Archbald's concerns were that Fargo employees would arrive 1.5 hours after other patrol officers and, thus, would miss daily briefings with other patrol officers on the day shift.

²¹ Kidwell testified that Chief Whitehead had used the phrase "as is". Although Marshall testified that he could not recall anyone using that expression at the October 18, 2012 meeting, he did not, as the University claims in its brief, affirmatively deny that the phrase was used. Additionally, Chief Whitehead now works in another state and was unavailable to testify. Accordingly, I credit Kidwell's testimony on this point.

1 discussions at the end of the spring period if it so wanted. However, the record contains
2 no evidence showing that the Union agreed to postpone bargaining until May 2012 or
3 that the Union agreed that it would need to take the initiative and request further
4 bargaining at that time. The parties subsequently did not engage in any further
5 bargaining concerning the hours of work and workweek of employees in the Fargo
6 unit.²²

7 December 2011 Shift Bid

8 On December 2, 2011, the University commenced the shift bid for spring 2012.
9 As part of the spring bid process, the University offered four slots in which the
10 successful bidders would work a five and two schedule. Two slots were for the
11 accreditation and evidence officers, who worked the day shift with varied hours. The
12 University offered the other two slots to the former Fargo unit positions, in accordance
13 with its proposal to continue those positions on a five and two schedule through the
14 spring period, even though the incumbents in those positions would now work full-time
15 as patrol officers. The University listed the hours of work of the former Fargo unit
16 positions as 7:00 AM to 3:00 PM. The remaining slots had a four and two schedule on
17 the day, evening, split or night shifts. Babb, who previously worked in the Fargo unit,

²² Kidwell made a brief reference in her testimony to the University and the NEPBA discussing the topic of the Fargo unit in successor contract negotiations. However, because I have no specific information about those discussions, including when those discussions took place, how extensive those discussions were and whether those discussions were part of settlement talks, I decline to treat those discussions as bargaining for the purposes of this decision.

1 successfully bid on one of the Fargo unit slots. A unit member named Waite
2 successfully bid on the other Fargo unit slot.²³

3 Dispute Concerning the October 18, 2011 Meeting

4 On December 6, 2011, Dickson sent an email message to Marshall stating:

5
6 I believe you were at the meeting with Union 432A with Chief Whitehead
7 when we discussed Fargo, or rather its demise.

8
9 The agreement was to preserve Fargo in its present state until May, so all
10 parties could express their views on its future.

11
12 I now understand that the Chief has changed its hours of work ..., which
13 would violate our agreement. It should remain without any modification
14 until May, a 5+2 administrative schedule and first shift,

15
16 On December 7, 2011 at 11:08 AM, Marshall responded to Dickson in an email
17 message that stated in pertinent part:

18 I spoke with the Chief about the Fargo issue. I think there may have been
19 either a misunderstanding or a lack of clarification about what we were
20 thinking. Fundamentally it makes no sense to us to have the patrol
21 officers formerly working Fargo when that function ceases to work hours
22 other than the normal hours of the day shift. If they come in after the
23 normal briefing time etc. It is harder to fit them into the shift than it would
24 be for them to have the same hours as the day shift. I cannot speak for
25 you but we thought the focus of a "soft landing proposal" was the regular
26 days off schedule which gave them every weekend off. Neither Johnny
27 nor I recall discussing the specific hours they would work or even thinking
28 about that issue. Nor did either of us think we had committed to
29 maintaining an 8:30 start to the workday. At the bottom the elimination of
30 the Fargo function is a level of services decision which is committed to the
31 employer with bargaining limited to the impact on the terms and conditions
32 of employment. We could have taken an inflexible approach and simply
33 after bargaining for a time imposed a solution that rearranged shift bids to
34 reflect the availability of Fargo officers to go back and the 4 and 2 and bid
35 the day shift. We hoped to make the change easier for them by moving

²³ The record before me is silent as to whether Kucinski, who worked in the Fargo unit in the 2011 summer and fall periods, bid on one of the two Fargo unit slots for the spring period 2012. He ultimately received a slot on the day shift and subsequently retired during the year prior to the hearing.

1 them to a 4 and 2 on the day shift but we never thought this would include
2 shift hours different than that of officers working the day shift.

3
4 Twenty-two minutes later, Dickson replied via email stating in relevant part:

5
6 I do remember Johnny [Chief Whitehead] saying that Fargo would remain
7 "as is" until May. This would give Lisa and the unit time to negotiate a
8 long term agreement. "As is" in my mind meant status quo until May. He
9 (Johnny) never ever discussed changing even the hours. They should
10 remain 8:30 to 4:30 until May unless they reach a different arrangement.

11 ...

12 Thereafter, the IBPO filed its charge of prohibited practice in Case No. SUP-11-1399 on
13 December 9, 2011.

14 Dunbar's Takeover of the Armored Car Duties

15 On December 21, 2011, Deputy Chief Archbald sent a memorandum (December
16 21, 2011 memorandum) to all staff that stated:²⁴

17 This memo will service to make you aware the University has contracted
18 with Dunbar Armored to handle cash transporting duties beginning
19 Sunday, January 1, 2012. The services provided will continue year-
20 around, replacing the work of the former Fargo Unit.

21
22 Dunbar is the largest independent armored car company in the nation with
23 a proven track record of professional services in the security and cash
24 management field. Dunbar has produced all necessary licenses and
25 insurance certificates to operate in the state and has been authorized by
26 the Treasurer's Office to carry firearms.

27
28 UMPD personnel will continue to handle deposits outside normal business
29 hours for locations such as Bowker Auditorium, the Campus Center
30 Garage and others. We will be working with these businesses to
31 purchase individual safes to secure money after hours but until that time
32 we'll continue to transport night and weekend deposits.

33
34 Armored car services Loomis and Brinks and security firm NCR/St. Moritz
35 Security continue to be authorized to repair and fill our ATM machines on
36 campus while armed.

37

²⁴ The December 21, 2011 Memorandum bore the heading RE: Fargo effective January 1, 2012.

1 Any questions please see me.

2 On January 1, 2012, the Fargo unit assignment ceased to exist, and Dunbar began
3 performing armored car services to campus businesses and offices.

4 Changes to Hours of Work and Workweek

5 On January 1, 2012, Babb and Waite, the successful bidders for the former
6 Fargo unit positions, began to work a five and two schedule from 7:00 AM to 3:00 PM
7 for the spring period. On or about May 2012, when the summer period began, the
8 former Fargo unit positions with their five and two schedule ceased to exist, and all unit
9 members, who were assigned to the day shift, worked a four and two schedule from
10 7:00 AM to 3:00 PM, except the evidence officer and the accreditation officer.

11 Opinion

12 Alleged Repudiation

13 Section 6 of the Law requires public employers and unions that represent their
14 employees to meet at reasonable times to negotiate in good faith regarding wages,
15 hours, standards of productivity and performance, and any other terms and conditions
16 of employment. The statutory obligation to bargain in good faith includes the duty to
17 comply with the terms of a collectively bargained agreement. Commonwealth of
18 Massachusetts, 26 MLC 165, 168, SUP-3972 (March 13, 2000) (citing City of Quincy,
19 17 MLC 1603, MUP-6710 (March 20, 1991); Massachusetts Board of Regents of Higher
20 Education, 10 MLC 1196, SUP-2673 (September 8, 1983)). A public employer's
21 deliberate refusal to abide by unambiguous collectively bargained agreement
22 constitutes a repudiation of that agreement in violation of the Law. Town of Falmouth,
23 20 MLC 1555, MUP-8114 (May 16, 1994), aff'd sub nom., Town of Falmouth v. Labor

1 Relations Commission, 42 Mass. App. Ct. 1113 (1997). If the evidence is insufficient to
2 find an agreement or if the parties hold differing good faith interpretations of the
3 language at issue, the Commonwealth Employment Relations Board (CERB) will
4 conclude that no repudiation has occurred. Commonwealth of Massachusetts, 18 MLC
5 1161, 116, SUP-3439, SUP-3556 (October 16, 1991).

6 Here, the NEPBA contends that the University and the IBPO orally agreed at the
7 October 18, 2011 meeting to maintain the existing work schedule and hours of work of
8 the Fargo unit positions until May 2012, when the spring period ended. Specifically, the
9 NEPBA asserts that the University and the IBPO agreed that incumbents in the Fargo
10 unit positions would work a five and two schedule from 8:30 to 4:30 PM. Although the
11 University acknowledges that it agreed to maintain the Fargo unit positions' five and two
12 work schedule through the spring period, it denies that it agreed to maintain the hours of
13 work as 8:30 AM to 4:30 PM. Instead, the University claims that the University and the
14 IBPO never even discussed the work hours of the Fargo unit employees' at the October
15 18, 2011 meeting.

16 In determining whether an employer and a union reached an agreement, the
17 CERB considers whether there has been a meeting of the minds on the actual terms of
18 the agreement. Town of Ipswich, 11 MLC 1403, 1410, MUP-5248 (February 7, 1985),
19 aff'd sub nom., Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct.
20 1113 (1986). The CERB has long recognized that a meeting of the minds can occur
21 without anything having been reduced to writing or having been signed by either party.
22 Chief Justice for Administration and Management of the Trial Court, 35 MLC 171, 173,
23 SUP-04-5150 (January 30, 2009) (an oral agreement between a public employer and a

1 union is effective and enforceable under the Law if the agreement is otherwise valid)
2 (citing Service Employees International Union, Local 509 v. Labor Relations
3 Commission, 410 Mass. 141, 145 (1991)). The key legal inquiry to determine if there is
4 a meeting of the minds is whether both parties have manifested assent and not whether
5 a party's representatives reasonably believed that a conversation resulted in an oral
6 agreement. Town of Hanson, 39 MLC 158, MUP-11-1064 (December 13, 2012).

7 Upon review of the record, I conclude that the parties' statements and conduct do
8 not demonstrate a meeting of the minds that the University would continue to designate
9 the hours of work of the Fargo unit positions as 8:30 AM to 4:30 PM until the end of the
10 spring period. The NEPBA argues that the IBPO presented the University with a
11 proposal to maintain the Fargo unit positions' hours of work and workweek until May
12 2012, and that the University accepted the proposal when Chief Whitehead commented
13 that the Fargo unit employees would remain "as is". The NEPBA overlooks the fact that
14 Chief Whitehead's comments were made on or about the same time as Marshall put
15 forward the University's counterproposal to continue the Fargo employees on a five and
16 two schedule through spring bid. The University's counterproposal made no reference
17 to the Fargo unit employees' hours of work. Neither party inquired about any
18 differences between the IBPO's proposal and the University's counterproposal or
19 attempted to reconcile those differences. Rather, the NEPBA's witness Kidwell and the
20 University's witness Marshall both confirmed that the University and the IBPO never
21 actually discussed the hours of the work of the Fargo unit positions at the October 18,
22 2011 meeting.

1 Additionally, a review of the testimony and documentary evidence in the case
2 reveals differing good faith interpretations as to what exactly the IBPO and the
3 University had agreed to at the October 18, 2011 meeting. Compare Duxbury School
4 Committee, 25 MLC 22, 24, MUP-1446 (August 7, 1998) (finding that union and
5 employer had different beliefs whether a contractual notice requirement concerning
6 complaints by other persons applied to principal's observation of alleged wrongdoing).
7 Kidwell and Marshall testified about their beliefs as to the nature of the agreement, and
8 those beliefs varied widely. Furthermore, Dickson, the IBPO's business agent, and
9 Marshall had exchanged email messages in December 2011 that demonstrated a lack
10 of clarity as to the nature of the agreement. Dickson claimed that the parties had
11 agreed to the status quo for the Fargo unit positions, and Marshall denied that the
12 University had ever agreed to maintain the Fargo unit positions' hours of work. See
13 Chief Justice for Administration and Management of the Trial Court, 35 MLC at 173
14 (finding that no meeting of the minds on an oral agreement was reached when the result
15 of the parties' hour-long conversation was unclear).

16 Finally, the University's subsequent conduct was not consistent with the parties
17 having a meeting of the minds over the continuation of the hours of work of the Fargo
18 unit employees. Compare Suffolk County Sheriff's Department, 30 MLC at 6 (promoting
19 unit members on a temporary basis consistent with the parties' oral agreement), and
20 City of Everett, 26 MLC 25, 28, MUP-1452 (July 22, 1999) (fire chief's delivering a
21 verbal warning consistent with oral agreement). When Deputy Chief Archbald prepared
22 the form for the spring bid on or about December 2, 2011, he included two slots for the
23 former Fargo unit positions, which had a five and two schedule with hours of work of

1 7:00 AM to 3:00 PM. His formulation of the shift bid did not evince an assent by the
2 University to continue the 8:30 AM to 4:30 PM hours of work for Fargo unit employees
3 through May 2012. However, the formulation was consistent with the University's
4 October 18, 2011 counterproposal. Thus, because I conclude that the University did not
5 repudiate the October 18, 2011 Agreement, I dismiss Count I of the Complaint.

6 Alleged Failure to Bargain over the Decision to Subcontract

7 A public employer violates Section 10(a)(5) of the Law when it implements a
8 change in a mandatory subject of bargaining without first providing its employees'
9 exclusive bargaining representative with notice and an opportunity to bargain to
10 resolution or impasse. See School Committee of Newton v. Labor Relations
11 Commission, 338 Mass. 557 (1983). To establish a unilateral change violation, the
12 charging party must show that: 1) the employer altered an existing practice or instituted
13 a new one; 2) the change affected a mandatory subject of bargaining; and 3) the
14 change was established without prior notice and an opportunity to bargain.
15 Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994), City
16 of Boston, 20 MLC 1603, 1607, MUP-4976 (May 20, 1994). When determining what
17 constitutes a mandatory subject of bargaining, the CERB balances the public
18 employer's interest in maintaining its managerial prerogative to effectively govern
19 against the employees' interest in bargaining about subjects that directly affect wages,
20 hours, standards of productivity and performance and other terms and conditions of
21 employment. Town of Danvers, 3 MLC 1559, 1577, MUP-2292, MUP-2299 (April 6,
22 1977).

1 The facts before me show that for at least twenty-five years, unit members
2 provided armored car services to the University campus. Further, in the fall of 2011, the
3 University entered into a contract with Dunbar, a private vendor, to take over those
4 armored car services. The University contends that it had no obligation to bargain over
5 the decision to subcontract the armored car services because it was a level of services
6 decision that is subject to impact bargaining only. It is well established that decisions
7 determining the level of services that a governmental entity will provide lie within the
8 exclusive managerial prerogative of the public employer. Id. at 1573. However, the
9 CERB previously has determined that replacing unit employees with outside contractors
10 to save costs is not a level of services decision. Commonwealth of Massachusetts, 26
11 MLC 161, 163, SUP-3835 (March 13, 2000); City of Boston, 6 MLC 1117, 1121, MUP-
12 2863 (June 4, 1979), but a decision that must be bargained because it does not relate
13 to the amount of services an employer provides, but whether an affected bargaining unit
14 will continue to provide them. City of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28,
15 1996); Town of Norwell, 13 MLC 1200, 1206-1207, MUP-5655 (November 15, 1986);
16 City of Haverhill, 11 MLC 1289, 1289-1290, MUP-5330 (December 2, 1984). However,
17 I need not determine whether the Treasurer's Office decision to subcontract was a cost
18 saving measure, because the University also argues that certain language in Article 30
19 of the Management Rights provision of the 2009-2012 Agreement constitutes a waiver
20 of the Union's right to bargain over the decision to subcontract.

21 Where an employer raises the affirmative defense of waiver by contract, it bears
22 the burden of demonstrating that the parties consciously considered the situation that
23 has arisen and that the union knowingly waived its bargaining rights. Massachusetts

1 Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988); Town of
2 Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986). The initial inquiry
3 focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567
4 (August 4, 1998). If the language clearly, unequivocally and specifically permits the
5 public employer to make the change, no further inquiry is necessary. City of Worcester,
6 16 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the language is ambiguous, the
7 CERB will review the parties' bargaining history to determine their intent. Peabody
8 School Committee, 28 MLC 19, 21, MUP-2073 (June 21, 2001); Town of Marblehead,
9 12 MLC at 1670.

10 Turning to Article 30, the University contends that a portion of this provision
11 constitutes a waiver of the IBCO's right to bargain over the decision to subcontract.
12 Specifically, it is the portion of Article 30 stating that:

13 The Union and the Board of Trustees and/or the administration of the
14 University agree that the provisions of this Agreement shall be expressly
15 limited to conditions of employment covered by this Agreement, and no
16 provision shall be construed to restrain the University from the
17 management of its operations, including but not limited ... to contract out
18 work

19 Reading that portion of Article 30 carefully, giving the words their plain and normal
20 meaning, I conclude that the provision unambiguously addresses the University's
21 decision to contract out its armored car services to Dunbar and constitutes a waiver of
22 the Union's right to bargain over the decision to contract out the duties.

23 Alleged Failure to Bargain the Impacts of the Subcontracting Decision

24 In cases where an employer is excused from the obligation to bargain over a
25 decision, it is still required to bargain with the exclusive bargaining representative
26 regarding any impacts its decision will have on mandatory subjects of bargaining

1 before it implements that decision. Higher Education Coordinating Council, 22 MLC
2 1662, 1670-71, SUP-4078 (April 11, 1996). Here, the Union contends that the
3 University changed both the hours of work and workweek of the Fargo unit positions as
4 a result of its decision to subcontract the armored car services and that the University
5 failed to bargain to resolution or impasse over those changes.

6 Prior to January 2012, Fargo unit employees worked a five and two schedule
7 with hours of work from 8:30 AM to 4:30 PM. In August of 2011, Deputy Chief
8 Archbald informed the Union that when the private vendor took over the armored car
9 services, the University intended to re-assign the two unit members who worked in the
10 Fargo unit to perform patrol officer duties on a full-time basis. The University also
11 intended to change the work week and work hours of the former Fargo unit positions to
12 the regular day shift schedule, which was a four and two schedule with hours of work of
13 7:00 AM to 3:00 PM. He reiterated that statement in an October 4, 2011 email
14 message. Hours of work, including work shifts and corresponding days off, are
15 mandatory subjects of bargaining. Commonwealth of Massachusetts, 22 MLC 1039,
16 1050 n.24, SUP-3837 (July 10, 1995).

17 Hours of Work

18 On January 1, 2012, the University imposed a change in the scheduled hours of
19 work of the former Fargo unit positions to 7:00 AM to 3:00 PM, and this change was an
20 impact of the decision to subcontract armored car services. I turn now to consider
21 whether the University fulfilled its statutory bargaining obligation. As was discussed
22 above, I previously determined that the parties had not even discussed the issue of
23 hours of work at their October 18, 2011 meeting, despite the Union's demands to

1 bargain on October 13 and 14, 2011. Because the parties had not even discussed the
2 issue, they could not have negotiated to either resolution or impasse. Nevertheless,
3 the University contends that its alleged failure to bargain to resolution or impasse is
4 irrelevant, because the Union contractually had waived its right to bargain. The
5 University cites to portions of Article 30 stating:

6 The University and the Board of Trustees and/or the administration of the
7 University agree that the provisions of this Agreement shall be expressly
8 limited to conditions of employment covered by this Agreement, and no
9 provision shall be construed to restrain the University from the
10 management of its operations, including but not limited ... to determine the
11 time of work, staffing pattern and work area; ... to schedule work shifts
12 and work breaks.

13 Upon review of the disputed language, I construe both phrases to possibly have
14 more than one meaning and, thus, to be ambiguous. The phrase to determine the “time
15 of work” could refer to the University’s right to determine: the start times for employees;
16 the actual hours that constitute the workday, or the total number of hours in a workday.
17 Further, the phrase to “schedule work shifts” could refer to the University’s right to
18 separate hours of work into work shifts, to put those shifts on the work schedule or to
19 determine the total number of shifts in a week. Finally, the record before me contains
20 no specific information about the bargaining history that would clarify the ambiguous
21 language. Town of Marblehead, 12 MLC at 1670 (using bargaining history to clarify
22 ambiguous language concerning an alleged waiver). Because evidence of bargaining
23 history to support the University’s waiver defense is not present, I find that the evidence
24 fails to show that the IBPO knowingly, clearly and unmistakably waived its statutory right
25 to bargain over the change in work hours at issue here when it agreed to the
26 management rights clause.

1 Workweek

2 Turning to workweek, I find that the University implemented its counterproposal
3 to continue the former Fargo unit positions on a five and two workweek schedule until
4 May 2012. In May 2012, the University ceased to keep the two former Fargo unit
5 positions on a five and two schedule, and those positions returned to a four and two
6 schedule. The IBPO never agreed to alter the workweek of the former Fargo unit
7 positions to a four and two schedule before the University made the change.

8 The University argues that the Memorandum of Understanding (MOU) on page
9 83 of the 2009-2012 Agreement (MOU) waives the Union's right to seek bargaining over
10 the change in the workweek of the Fargo unit positions. The MOU states, in pertinent
11 part, that:

12 The University ... agrees to keep in effect, in accordance with past
13 practice, the existing workweek schedule consisting of four work days
14 followed by two (2) consecutive days off and all the arrangements
15 attendant thereto."

16 A plain reading of the purported waiver shows that it makes no reference to changes in
17 the work week of bargaining unit positions from a five and two schedule to a four and
18 two schedule, and instead talks about the University's agreement to maintain the four
19 and two schedule for employees already working that schedule. Alternatively, even if
20 the disputed provision was found to be ambiguous, the record contains no specific
21 information about the bargaining history to clarify the ambiguous language.

22 Finally, the University contends that the Union, by its previous acquiescence to
23 the three annual shift bids, has waived by past practice its right to bargain over the
24 changes in the hours of work and workweek of the Fargo unit positions. While the
25 University is correct that a longstanding practice existed whereby the University

1 conducted shift bids, which included posting the hours of work and workweek of various
2 positions, the practice does not constitute a waiver of the Union's right to bargain over
3 the changes to the Fargo unit positions. Even assuming that the Union previously had
4 waived its right to bargain over a particular position's hours of work and/or workweek,
5 the prior waiver would not constitute a waiver of all future changes to unit positions'
6 hours of work and workweek. See Town of Dennis, 28 MLC 297, 203, MUP-2634 (April
7 3, 2002) (allegedly failing to seek bargaining over prior changes in health insurance did
8 not bar union from seeking to bargain over future changes). Consequently, the
9 University has failed to bargain to resolution or impasse over the changes in the hours
10 of work and the workweek of the Fargo unit positions.

11 CONCLUSION

12 Based on the record and for the reasons stated above, I conclude that the
13 University violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by
14 failing to bargain over the impacts of its decision to subcontract the armored car
15 services on unit members' hours of work and workweek. I dismiss the portions of the
16 Complaint alleging that the University violated Section 10(a)(5) of the Law by
17 repudiating an October 18, 2011 oral agreement and by failing to bargain over the
18 decision to subcontract the armored car services.

19 ORDER

20 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the
21 University shall:

22 1. Cease and desist from:

23 a) Failing to bargain in good faith with the NEPBA to resolution or
24 impasse over the impacts of the University's decision to

1 subcontract armored car services on the hours of work and
2 workweek of bargaining unit members.

- 3
4 b) In any like manner, interfering with, restraining and coercing its
5 employees in the exercise of their rights guaranteed under the Law.
6

7 2. Take the following affirmative action that will effectuate the purposes of the Law;
8

- 9 a) Within ten days of receipt of this decision, offer to bargain in good
10 faith with the NEPBA over the impacts of the University's decision
11 to subcontract armored car services on the hours of work and
12 workweek of bargaining unit members.
13

- 14 b) As part of the next scheduled shift bid following the date of this
15 decision, restore two slots on the shift bid to a five and two
16 schedule with hours of work of 8:30 AM to 4:30 PM until the earliest
17 of the following conditions are met:
18

19 1) The University and the NEPBA reach agreement over the
20 impacts of the decision to subcontract armored car services
21 on unit members' hours of work and workweek.
22

23 2) The NEPBA fails to accept the University's offer to
24 commence bargaining within five (5) days after notice of the
25 offer.
26

27 3) The NEPBA fails to bargain in good faith.
28

29 4) The good faith bargaining of the University and the NEPBA
30 results in a bona fide impasse.
31

- 32 c) Post immediately in all conspicuous places where members of the
33 NEPBA's bargaining unit usually congregate, or where notices are usually
34 posted, including electronically, if the University customarily
35 communicates with these unit members via intranet or email and display
36 for a period of thirty (30) days thereafter, signed copies of the attached
37 Notice to Employees.
38
39

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of 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, the decision shall become final and binding on the parties.