

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

COMMONWEALTH OF MASSACHUSETTS,
SECRETARY OF ADMINISTRATION
AND FINANCE

and

ALLIANCE, AMERICAN FEDERATION
OF STATE, COUNTY, AND MUNICIPAL
EMPLOYEES, LOCAL 3485/ SERVICE
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO

* Case No. SUP-19-7394

* Date issued: May 21, 2021

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Patrick G. Butler, Esq.

- Representing Commonwealth of
Massachusetts, Secretary of Administration and
Finance

Ashley Peel, Esq.

- Representing Alliance, American Federation of
State, County, and Municipal Employees, Local
3485/ Service Employees International Union,
AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

- 1 The issue in this case is whether the Commonwealth of Massachusetts
- 2 (Commonwealth), Secretary of Administration and Finance, Department of Conservation

1 and Recreation (DCR or Department) (collectively Employer) violated Section 10(a)(5)
2 and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the
3 Law) by changing the meal breaks and work hours for certain statewide bargaining unit 2
4 (Unit 2) employees assigned to the Boat Launch Areas (BLA) at the Quabbin/Ware River
5 Watershed (Quabbin Reservoir or Quabbin/Ware) without giving the Alliance, American
6 Federation of State, County, and Municipal Employees, Local 3485/ Service Employees
7 International Union, Local 888, AFL-CIO (collectively Union or Alliance) prior notice and
8 an opportunity to bargain to resolution or impasse over the decision and the impacts of
9 the decision on employees' terms and conditions of employment. For the reasons
10 explained below, I find that the Employer did not violate the Law by changing meal breaks
11 and work hours for certain Unit 2 employees assigned to work at the Quabbin Reservoir
12 BLAs without giving the Union prior notice and an opportunity to bargain to resolution or
13 impasse over the decision and the impacts of the decision on employees' terms and
14 conditions of employment.

STATEMENT OF THE CASE

17 On June 12, 2019, the Union filed a Charge of Prohibited Practice (Charge) with
18 the Department of Labor Relations (DLR), alleging that the Employer had engaged in
19 prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section
20 10(a)(1) of the Law by unilaterally changing the meal breaks and departing times of
21 certain Unit 2 employees in May of 2019. On August 22, 2019, a DLR Investigator issued
22 a Complaint of Prohibited Practice (Complaint), alleging that the Employer had violated

1 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law changing the meal breaks
2 and departing times of certain Unit 2 employees assigned to work at the Quabbin
3 Reservoir BLAs without giving the Union prior notice and an opportunity to bargain to
4 resolution or impasse over the decision and the impacts of the decision on employees'
5 terms and conditions of employment. On August 23, 2019, the Employer filed its Answer
6 to the Complaint. On September 25, 2020 and November 23, 2020, I conducted a remote
7 hearing via WebEx¹ at which both parties had a full opportunity to be heard, to examine
8 and cross-examine witnesses, and to introduce evidence. Both parties filed their post-
9 hearing briefs on January 19, 2021.

ADMISSIONS OF FACT

11 The Employer admitted to the following facts:

- 13 1. The Union, a member of the Alliance, is an employee organization within the
14 meaning of Section 1 of the Law and represents certain Unit 2 employees
15 employed by the DCR at the BLA of the Quabbin/Ware River Watershed, including
16 Recreation and Facility Supervisors I (RF I), Recreation Facility Supervisors II (RF
17 II), and Forest and Park Supervisors III (F&P III).
18

19 2. The Commonwealth and the Union are parties to a collective bargaining
20 agreement (CBA) effective July 1, 2017 to June 30, 2020. Article 7, Section 3 of
21 the CBA provides that: "A meal period shall be scheduled as close to the middle
22 of the shift as possible considering the needs of the Department/Agency and the
23 needs of the employee."²

¹ I conducted the hearing remotely pursuant to the Governor Baker's teleworking directive to executive branch employees. Neither party objected to participating remotely in the hearing via WebEx.

² The parties also stipulated to this fact.

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. The Department is a public employer within the meaning of Section 1 of the Law.
 2. The Union is the exclusive bargaining representative for employees in statewide bargaining Unit 2.
 3. The Quabbin Reservoir is a recreational facility that is overseen and operated by the Department.
 4. The Department oversees and operates the Fishing Program at the BLAs within the Quabbin Reservoir.

FINDINGS OF FACT

Background

19 The Employer hired Kevin Drake (Drake) in or about 1985 who, since that time,
20 has worked in the following job titles: Laborer I, RF I, RF III, RF IV, and Regional
21 Coordinator. At no time did the Employer ever assign Drake to work at the BLAs. Starting
22 in 1990, Drake held the following Union positions: Executive Board member, Secretary-
23 Treasurer, and President. Since approximately 2011, and at all relevant times, Drake was
24 Union President. In or about 2011, the Employer hired Kyle Nevue (Nevue) to perform
25 seasonal work at the DCR. In 2016 and continuing to present, the Employer promoted
26 Nevue to full-time work at the DCR and assigned him to the BLAs at the Quabbin
27 Reservoir. During his tenure, the Employer has employed Nevue as a RF I, RF II, and
28 Laborer II, and assigned him to work as a RF II at the Hardwick BLA during the 2019
29 season. In 2007, the Employer hired Thomas Barnes (Barnes) as a RF I and, later, as a

1 permanent RF Repairer. In 2016, the Employer promoted Barnes to a RF II and assigned
2 him to work at a BLA in Quabbin/Ware.

3 At all relevant times, Jim Budness (Budness) worked for the Employer and was a
4 member of Unit 2. At some point after 2011 and continuing through the 2019 season the
5 Employer assigned Budness as a F&P III at Quabbin/Ware where he supervised all RFs
6 at the BLAs. In 1995, the Employer hired Lisa Gustavsen (Gustavsen) and promoted her
7 in 2013 to Assistant Regional Director at Quabbin/Ware. At all relevant times, John
8 Scannell (Scannell) was the Acting Regional Director at Quabbin/Ware. In 1995 the
9 Employer hired Dan Clark (Clark) and, in January of 2018, promoted him to Regional
10 Director at Quabbin/Ware.

11 **The Collective Bargaining Agreement**

12 The parties' CBA was effective from June 1, 2017 until June 30, 2020. For the past
13 20 years the parties have kept unchanged certain CBA provisions including Article 7
14 which pertained to "Workweek and Work Schedules" and stated, in pertinent part:³

15 Section 1. Scheduled Hours, Workweek, Workday

16
17 A. Except as otherwise specified in this Agreement, the regular hours of
18 work for full-time employees shall be thirty-seven and one-half (37.5) hours
19 per week excluding meal periods or forty (40) hours per week excluding
20 meal periods, as has been established for that job title at the particular job
21 location. Any employee whose regular workweek has averaged more than
22 forty (40) hours excluding meal periods in the past shall have a forty (40)
23 hour work-week.

³ Drake gave unrebutted testimony that he participated in contract negotiations over the past 20 years and during that time the parties have kept unchanged the CBA language of Article 7.

1 B. 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 made
3 available to employees and Union stewards.

4

5 D. To the extent practicable, the normal work week shall consist of five (5)
6 consecutive days, Monday through Friday, with the regular hours of work
7 each day to be consecutive except for meal periods. Similarly, to the extent
8 practicable, employees in continuous operations shall receive two (2)
9 consecutive days off in each seven (7) day period....

10

11 **Section 3. Regular Meal Periods**

12 A meal period shall be scheduled as close to the middle of the shift as
13 possible considering the needs of the Department/Agency and the needs of
14 the employee.

15

16 **Boat Launch Areas**

17 The DCR manages state parks, recreational facilities, and the public drinking water
18 supply which includes the Quabbin Reservoir. There are three BLAs at the Quabbin
19 Reservoir located in New Salem, Hardwick, and Belchertown. The DCR provides various
20 services at the BLAs such as public boat rentals, access to private boat launches, shore
21 fishing, and parking access for hiking. Employees assigned to the BLAs perform certain
22 duties such as record keeping of private boats, attaching and removing private boat seals
23 (i.e., tagging),⁴ responding to water emergencies (e.g., stranded boats and medical

⁴ Tagging entails the placement of seals on private boats upon exiting the water. When visitors return to a BLA with their boats, attendants check the seals to determine if they can “cut the seal” and allow the boat to enter the water or if they need to order a “decontamination wash” before allowing the boat to enter the water. The seal check process may take between “seven or eight minutes” to complete.

1 emergencies), collecting payment information, explaining rules and instructing renters
2 how to operate rental boats, storing life jackets, cleaning and fueling rental boats, and
3 performing ground maintenance such as moving docks and locking park gates.

4 Seasonal work at the BLAs occurs annually between April and October, seven
5 days weekly, with public hours varying between 6:00 a.m. and 8:30 p.m. The Employer
6 usually assigns four employees to each of the three BLAs on various days. On Saturdays,
7 Sundays, and Mondays, the Employer assigns two BLA attendants to work the second
8 shift due to a higher volume of visitors. However, on Tuesdays, Wednesdays, Thursdays,
9 and Fridays, the Employer assigns only one BLA attendant to the second shift due to a
10 lower volume of visitors.

11 At all relevant times, the Employer has assigned BLA employees to work on one
12 of two daily shifts (i.e., first morning shift or second afternoon shift). Both shifts comprise
13 8.5 hours.⁵ The Employer expects all BLA staff to arrive 30 minutes prior to the 6:00 a.m.

⁵ Gustavsen testified that both the first and second shifts have always comprised 8.5 hours with a 30-minute meal break. Similarly, Clark testified that his understanding was that BLA employees “are scheduled for an 8.5-hour shift” where “at some point near the middle of their shift, they would be taking a 30-minute meal break.” Conversely, Nevue testified that when the Employer first hired him, he understood that his hours would be “a straight eight.” Nevue testified further that the Employer had always paid him for eight hours. While Nevue did not clarify who in management informed his understanding, he conceded to taking meal breaks whenever possible. He also testified that when the Employer assigned him to the first shift in 2011, his supervisor Tom Peloquin (Peloquin) allowed him to work through his meal breaks and leave 30 minutes before the end of his shifts. Nevue later clarified that Peloquin was a member of the bargaining unit and not a part of management. Based on the totality of this evidence, I find that the Employer assigned BLA employees to work 8.5 hour shifts which included a 30-minute unpaid meal

1 opening time, and to stay 30 minutes past the 8:30 p.m. closing time.⁶ Based on this
2 expectation, the first shift is always 5:30 a.m. to 2:00 p.m.,⁷ and the second shift varies
3 depending on the amount of seasonal daylight⁸ (e.g., 12:30 p.m. to 8:30 p.m.). The
4 Employer has also expected BLA employees to take a 30-minute meal break as close as
5 possible to the middle of their shift. Meal break times for BLA employees assigned to the
6 second shift on Tuesdays through Fridays have varied due to regular interruptions from
7 visitors and boat users.⁹ Prior to the 2019 season, BLA employees assigned to the second

break during each shift and paid those employees for eight hours per shift. I base this finding primarily on the fact that the Union did not call any witnesses on rebuttal, while the Employer recalled Gustavsen as a rebuttal witness.

⁶ Nevue testified that the Employer generally expects BLA employees to arrive at their assigned BLA 30 minutes before opening and remain there 30 minutes after closing.

⁷ Nevue gave unrebutted testimony that the morning shift stays the same throughout the season and is “always...from 5:30 a.m. to 2:00 p.m.”

⁸ Gustavsen testified that the Employer sets its opening and closing hours based on the available amounts of seasonal daylight. For example, in April, the Employer opens the BLAs to the public at 6:00 a.m. and closes around 8:00 p.m. Barnes testified that during the 2016, 2017, 2018, and 2019 seasons, the Employer assigned him to work the second shift at the New Salem BLA, which usually ended at 8:30 p.m. or 9:00 p.m. He later testified that when he was assigned to the BLA on the second shift in 2007 and 2008, his schedule in the beginning of the season was 12:30 p.m. to 8:30 p.m., which changed later in the season to 12:00 p.m. to 8:00 p.m., which changed again to 11:00 a.m. to 7:00 p.m. by the end of the season in October.

⁹ Nevue testified that his lunch periods were interrupted by customers “almost on a regular basis.” Clark testified that “typically at the boat launch areas most fisherman like to get on the water first thing in the morning, and then the boat traffic slows down. And, then for the rest of the morning, it’s probably fairly light and then picks up again maybe around noon, and then [picks up] again later in the afternoon when they’re required to get off. So, there

1 shift on Tuesdays through Fridays usually took their meal breaks at or near the end of
2 their shifts or not at all. During the 2019 season, BLA employees assigned to the second
3 shift on those days tried to take their lunch meal break around 3:00 p.m.; however, on
4 days when the BLAs were busy and had to work alone, they often worked through their
5 lunch without taking a meal break.¹⁰ At no time during the 2019 season did BLA

are periods of time when no one [from the public] is either entering or exiting." Thus, "there [is] more than one opportunity throughout a shift where there is a lull in the action and a 30-minute break could easily be accommodated." Clark later conceded on cross-examination that if BLA employees are taking their meal break and a customer needed assistance, they were "advised through [Budness] to help the customer [in] whatever time period it took to assist that customer" and that "they could make that time up in their lunch break if their lunch break got interrupted." Similarly, Gustavsen testified that "based on our Boat Launch Area Report" and based on "real time data" from an app that monitors BLA activity, "Tuesday through Thursday" at the BLAs are "really slow, typically, with regular boaters" and that "the busy activity is Friday through Sunday. Monday, we have double people on each shift to do projects." On rebuttal, Gustavsen conceded that she "very rarely" visits the BLAs because it is "35 [minutes] to an hour away from [her] office location" and because her BLA supervisor Budness reports to LaPierre who reports to her. However, when Gustavsen did visit the BLAs, she testified that those visits lasted "for maybe 15 minutes to an hour" and "longer than that" when she "worked on different projects." Based on the totality of this evidence, I find that meal break times for BLA employees assigned to the second shift on Tuesdays through Fridays have varied due to regular interruptions from visitors and boat users.

¹⁰ Nevue testified that during the 2011 season he would either eat his lunch when he could or "at the end of the day," and that "until 2019" he always worked through his lunch—taking it as close to the middle of his shift as he could; but, if he had to, would work through it. He also testified that during the 2019 season, he tried to take his meal break around 3:00 p.m. whenever possible. Similarly, Barnes testified that prior to the 2019 season, BLA attendants "would eat whenever we could...we would have downtime during the day when things weren't busy, but we were always available to the public for whatever came up—whether it was somebody who needed to get checked in or checked out, a disabled boat, or whatever. Nobody [from the visiting public] was ever told that you were busy eating. If anybody needed assistance, they got assistance." Barnes also

testified that “there was never any time that we were off the clock prior to 2019. We were always on the clock.” On cross-examination, Barnes conceded that while he was assigned to the BLAs at Quabbin/Ware he was “able to eat food” such as when he performed “paperwork,” and that “there would be time enough most days to eat” but he “didn’t have a designated lunch break;” however, “it’s impossible” to take a lunch break “when you’re working by yourself,” and that “you don’t have a half an hour when you leave and go to the store—you don’t have that. You don’t have a half an hour when you’re off the clock that you could leave that fishing area; you don’t have a half an hour day of your own time where you can ignore a radio call if somebody was in distress; you don’t have a half an hour where if somebody came in suffering from heat stroke—like I’ve had happen—where you can ignore them because you’re off the clock. There’s no time where you could actually say you’re off the clock. Have you got time to grab a sandwich? Yes, you do but there’s no time where your job isn’t your first responsibility of the day.” Barnes testified further that “on Saturday, Sunday, and Monday” there is time to take a 30-minute meal break “when there’s two people” assigned to shifts on those days. Conversely, Gustavsen testified that she never told BLA staff to ignore their 30-minute meal break and never permitted them to leave 30 minutes early if they did not take a meal break. She also testified that the Employer’s reasons for not permitting this practice were based on safety and operational needs “in case there is any sort of emergency on the reservoir” and because the public is “expecting us to operate at the hours of operation.”

Based on the totality of this evidence, I find that prior to the 2019 season, BLA employees assigned to the second shift on Tuesdays through Fridays often times did not take their required meal break at or near the middle of their shift due to the volume of visitors at the BLAs. Instead, those employees took their meal breaks near the end of their shifts, whenever they could, or not at all. I also find that during the 2019 season, some BLA employees assigned to the second shift on Tuesdays through Fridays tried to take their breaks around 3:00 p.m. but generally remained unable to take their required meal break at or near the middle of their shift due to the volume of visitors at the BLAs.

- 1 employees leave 30 minutes prior to the end of their shift in lieu of taking a meal break.¹¹
- 2 While the Employer does not provide designated meal-break areas at the BLA, it does
- 3 have designated break areas in the Quabbin buildings.¹²

- 4 **The 2018 and 2019 Fishing Guides**

- 5 In 2018 and 2019, the DCR issued its annual "Fishing Guide" which it distributed
- 6 to BLA employees and to the public for use at the Quabbin/Ware fishing areas. Both
- 7 guides stated in pertinent part:

- 8 The [2018/2019] Quabbin Fishing Season[s] run[] from April [21/20] to
- 9 October [20/19], conditions permitting. Boat Launch Areas are open seven
- 10 days a week from 6:00 a.m. until closing. Closing times vary throughout the
- 11 season as sunset times change and are listed under "Hours of Operation"
- 12 in the "Boating Information" section. The closing and boats off the water
- 13 times are prominently posted at the Boat Launch Areas as well. Daytime
- 14 shore fishing is open seven days a week for the season.

¹¹ Barnes gave unrebutted testimony that he never informed the Employer that he would not take a meal break and, thus, he never left 30 minutes before the end of his shift. Rather, he testified unequivocally that he "never left that boat launch area before we closed, ever." Barnes conceded that he did not know whether other BLA attendants spoke with the Employer about not taking a meal break and/or leaving 30 minutes before the end of their shift. Similarly, Nevue conceded that neither Clark, Gustavsen, nor Scannell ever directed him to work through his lunch break in lieu of leaving 30 minutes early. While Drake gave unrebutted testimony that the Employer permits some bargaining unit members to work through their shifts without taking their 30-minute meal break, such as employees assigned to the State House, the Amelia Earhart Dam, and at the "locks and drawbridges," he conceded that the Employer does not permit BLA employees to work through their shifts without taking a meal break and that no one from management ever approached him with their approval to take such action. Based on the totality of this evidence, including the unrebutted testimony of Barnes and Drake, I find that BLA employees assigned to the second shift on Tuesdays through Fridays did not leave their areas 30 minutes early in lieu of not taking their meal breaks.

¹² Nevue gave unrebutted testimony that the nearest Quabbin building from his assigned BLA in Hardwick was "easily a half-hour."

1
2
3 Boating Information – 2018/[2019]
4 Hours of Operation

- 5 • April 21/[20] – April 30/[29] 6:00 a.m. – 8:00 p.m.
6 • May 1/[April 30] – July 30/[July 29] 6:00 a.m. – 8:30 p.m.
7 • July 31/[June 30] – August 20/[19] 6:00 a.m. – 8:00 p.m.
8 • August 21/[20] – September 3/[2] 6:00 a.m. – 7:30 p.m.
9 • September 4/[3] – October 20/[19] 6:00 a.m. – 6:30 p.m.
10 • **Boats must be off the water 1 ½ hours before closing.** “Boats Off
11 the Water Time” is posted at each boat launch area throughout the
12 season. [Emphasis in original]
13 •
14 • All Boat Launch Areas are open seven days a week for the season.
15
16

17 Boating Regulations

- 18 •
19 • Boats must return to launch area by posted times.
20 •
21 • No boats may be launched within 2 hours of the posted “Boats Off
22 the Water” time.
23
24

25 **The Employer’s 2018 Post-Season Discussions**

26 After the 2018 season had concluded, Administrative Assistant Kim Turek (Turek)
27 notified Gustavsen, Scannell, and Clark by e-mail on or about November 28, 2018, that
28 certain BLA employees assigned to the second shift during the 2018 season had not
29 taken their 30-minute meal breaks and had left 30 minutes before the end of their shift.¹³
30 Turek’s November 28, 2018 e-mail was the first time that Clark had learned that some

¹³ Neither party offered evidence about which specific employees left their shifts 30 minutes early without taking a meal break during the 2018 season.

1 BLA employees were not taking their required 30-minute meal break but were working
2 through it. By reply e-mail at 8:14 a.m. that day, Scannell asked Turek to review the 2019
3 "Summer Roster,"¹⁴ the "highlighted BLA positions," and the corresponding "schedules
4 for each position." By surreply at 8:47 a.m., Gustavsen added to Scannell's e-mail,
5 instructing Turek that "[b]ased on our work last recall season, please also include the ½
6 hour meal break in the daily schedules." At 9:21 a.m., Turek responded to Gustavsen and
7 Clark, stating in full: "Interesting, they signed off and secured the area ½ before their shift
8 ended last season. It was broadcasted [sic] over the scanner, so they actually didn't take
9 a meal break." Based on their discussion, Gustavsen prepared a roster for the 2019
10 season which expressly required all BLA employees to take a 30-minute meal break
11 during their assigned shift.

12 **The Recall Meetings**

13 In or around February of each year, the Employer conducts seasonal "recall
14 meetings" where employees select their shift assignments and BLA locations based on
15 seniority. At some point after the 2017 recall meeting but before the seasonal opening,
16 the Employer became aware that at least one non-BLA employee had requested the
17 same "deal that the fishing area staff had" in terms of working through their 30-minute

¹⁴ The parties used the terms "roster" and "recall board" interchangeably to refer to the system by which returning BLA employees select their seasonal assignments and BLA locations based on seniority.

1 meal break.¹⁵ On or about April 10, 2017, Gustavsen and Scannell met with Budness to
2 assess the BLA shift assignments and directed Budness to remind all BLA employees to
3 take their meal breaks near the middle of their shifts.

4 On February 8, 2018, the Employer conducted a recall meeting and posted a roster
5 for employees to select their preferred shift assignments by seniority, which included the
6 shift times of 6:00 a.m. to 2:00 p.m. and 12:30 p.m. to 8:30 p.m. The roster did not include
7 any language referencing the unpaid, 30-minute meal break. On February 11, 2019, the
8 Employer conducted another recall meeting where it posted a roster with the following
9 shift times: 5:30 a.m. to 2:00 p.m. and 12:00 p.m. to 8:30 p.m. For the first time, the roster
10 also included written language that referenced the 30-minute meal break.¹⁶ During the

¹⁵ Gustavsen testified that, in 2017, she and Scannell were notified anonymously about “something going on with the lunches and the lunch breaks” and whether BLA employees were taking their breaks. In response, Gustavsen and Scannell met with Budness on or about April 10, 2017, prior to the opening of the 2017 season, and discussed employee meal breaks and shift assignments. Gustavsen took notes at that meeting, where she affixed a post-it note from Budness that stated: “First shift, 5:30 a.m. to 2:00 p.m. Lunch, 11:00 a.m. to 11:30 a.m. Second shift, 12:00 p.m. to 8:30 p.m. and 5:00 to 5:30, lunch.” At that meeting, Budness assured Gustavsen and Scannell that he would make sure that BLA employees would take their meal breaks. Thus, I find that during the 2017 season and continuing through the 2018 and 2019 seasons, Gustavsen’s understanding was that the Employer required all BLA employees to work an 8.5-hour shift during their assignment which included taking a 30-minute meal break near the middle of their shift.

¹⁶ Gustavsen testified that while she attended recall meetings when the Employer promoted her to Assistant Regional Director in 2013, she did not participate in those meetings because they were run by the Regional Director. Gustavsen also testified that she did not recall the rosters at the 2013, 2014, 2015, or the 2016 meetings, but did recall the 2017 roster because that was the year when she ran the meeting with Scannell who was Acting Regional Director at that time. While Gustavsen later admitted that she did

1 2019 recall meeting, the Employer reminded BLA employees that they had to take their
2 30-minute meal break “as close to the middle of their shift as possible” but could leave
3 the BLA during that time.¹⁷ The Employer also informed employees that it would provide
4 additional meal break information for BLA attendants who work alone on Tuesdays,
5 Wednesdays, Thursdays, and Fridays.¹⁸ The Union did not attend this meeting, and all
6 employees who were present signed the roster and selected their shifts without objection.

not recall the shifts listed on the 2017 roster, she did recall the shifts listed on the 2018 roster which were 5:30 a.m. to 2:00 p.m. or 12:00 p.m. to 8:30 p.m. She also testified that while she did not recall whether the 2018 roster referenced a meal period, she recalled attending several recall meetings where the Employer listed the hours for BLA staff on the board as “8.5 hours.” Barnes testified that he did not attend the 2007 recall meeting but did attend the 2008 recall meeting which included a “board posted on a wall with 12 different shifts on the board with 12 different attendants, three different areas, two different shifts with two different sets of dates on them.” He also testified that he “would go in and pick according to seniority; and those shifts were listed on the board as 6:00 a.m. to 2:00 p.m. and 12:30 p.m. to 8:30 p.m.” Barnes testified further that he attended the 2019 recall meeting which was different from the 2008 recall meeting because the Employer informed everyone in 2019 that “we were going to have a lunch break built into our shift, [and] that by law, we were required to have a lunch break...every eight hours that you worked...so we were going to have to have another half an hour built into our shift.” Based on this evidence, I find that the rosters between 2013 and 2018 did not reference the 30-minute meal breaks. However, I find that for the first time in 2019, the roster referenced specifically the 30-minute meal breaks.

¹⁷ Barnes gave unrebutted testimony that when employees asked at the 2019 recall meeting whether they could leave the BLAs and get a sandwich, the Employer responded that the 30-minute meal break “was your time and you can do what you want.”

¹⁸ Barnes testified that the Employer told BLA staff at the 2019 recall meeting that it was including “another half an hour built into our shift” to ensure that employees took their required 30-minute meal breaks. He also testified that after that meeting “nothing ha[d] changed. We just wind up working through our lunch break. We still grab a sandwich when we can...[but] nothing’s really changed expect that we have more time added to our day.”

1 **The 2019 Memoranda**

2 On or about April 12, 2019, Gustavsen, Clark, Budness, and Forest and Park
3 Regional Coordinator Paul LaPierre (LaPierre) met to plan for the BLA 2019 seasonal
4 opening and “to ensure that everyone was working the shifts that they were assigned and
5 taking the breaks that they needed to take.” At that meeting, Clark reiterated the contract
6 language which required a meal break. On April 19, 2019, Gustavsen, Clark, LaPierre,
7 and Budness conducted a BLA training with employees where they restated the
8 Employer’s position that all employees must take their 30-minute meal breaks “as close
9 to the middle of [their shifts] as possible,” pursuant to Article 7, Section 3 of the CBA. On
10 April 23, 2019, Gustavsen, Clark and Budness met again to discuss the 30-minute break
11 and “how to best meet everyone’s needs.” During this meeting, Gustavsen and Clark
12 reiterated to Budness that all employees were contractually required to take a 30-minute
13 meal break.

14 On April 24, 2019, Clark met with Drake to discuss the 30-minute meal breaks for
15 BLA employees. During their meeting, Clark informed Drake that his obligation was to
16 enforce the CBA and that if employees wanted to work through lunch, they would have to
17 negotiate that issue with the Employer. At some point between April 24 and May 8, 2019,
18 Clark met with Budness to discuss the meal breaks. On or about May 8, 2019, Clark
19 issued a memorandum seeking volunteers, especially Laborer IIs, to cover the meal
20 breaks of employees assigned to the BLAs on Tuesdays through Fridays as a “temporary
21 reassignment.” Clark addressed the memorandum to “Laborer II staff – Quabbin/Ware

1 Region" with copies to Gustavsen, Lapierre, Budness, and Union Steward Jason Holden
2 (Holden)¹⁹ which stated in full:

3 The Quabbin/Ware Region is looking for Laborer IIs to volunteer for a
4 schedule change to help cover meal breaks at the Boat Launch Areas. This
5 reassignment would be in effect until the fishing season closes in October.
6 The assignments are:

7 BLA 1, 2, and 3

- 8 • Mondays: employees would follow their current schedule and work
9 location
- 10 • Tuesdays-Fridays: employee[s] would report to either BLA 1 (Gate
11 8), BLA 2 (Gate 31), or BLA 3 (Gate 43) from 8:45 [a.m.] – 5:15 [p.m.]
- 12 • At the BLA, employee[s] would be covering for 2 scheduled 30-
13 minute meal breaks of the BLA attendants: 10:00 [a.m.] and 4:45
14 [p.m.]
- 15 • The Laborer II would take their own meal break at 12:00 [p.m.]
- 16 • During the attendant's meal breaks, the Laborer II would be available
17 for emergency response and to inform patrons that the attendant is
18 on break; the Laborer II would not possess any transactions and not
19 let anyone leave or enter
- 20 • Outside of covering for meal breaks, the Laborer II would perform
21 typical duties, including lawn mowing, weeding, etc.

22 Depending on interest, we may have 1 Laborer II cover both BLA 2 & 3. If
23 necessary, the schedule would be:

24 BLA 2 & 3

- 25 • Mondays: employee[s] would follow their current schedule and work
26 location
- 27 • Tuesdays-Fridays: employee[s] would report to BLA 2 (Gate 31) from
28 8:45 [a.m.] – 5:15 [p.m.]
- 29 • At the BLAs, employee[s] would be covering for 4 scheduled 30-
30 minute meal breaks for the BLA attendants: 9:00 [a.m.], 10:15 [a.m.],
31 3:30 [p.m.], and 4:45 [p.m.]
- 32 • After the 9:00 [a.m.] meal break at BLA 2, the Laborer II would drive
33 to BLA 3 and cover a meal break at 10:15 [a.m.]

¹⁹ Nevue gave unrefuted testimony that Holden was the Union Steward at Quabbin/Ware in 2019.

- 1 • The Laborer II would stay at BLA 3 and take their own meal break at
2 12:00 [p.m.]
3 • The Laborer II would cover the afternoon meal break at BLA 3 at 3:30
4 [p.m.]; the Laborer II would then drive back to BLA 2 and cover the
5 afternoon break at 4:45 [p.m.]
6 • During the meal breaks, the Laborer II would be available for
7 emergency response and to inform patrons that the attendant is on
8 break; the Laborer II would not process any transactions and not [let]
9 anyone leave or enter
10 • Outside of covering for meal breaks, the Laborer II would perform
11 typical duties, including lawn mowing, weeding, etc.

12 If you are interested in one or both of these assignments, please let Paul
13 Lapierre know by the end of the day on 5/10/19.

14 If you have any questions, please let me know.

15
16 Thank-you [sic]

17
18 At some point on or around May 8, 2019, Clark met again with Budness and later
19 decided against implementing the temporary reassignment procedure referenced in his
20 May 8, 2019 memorandum. Instead, Clark favored a different method suggested by
21 Budness (i.e., basing the meal break start time on the volume of customers at the time of
22 the break; thereby leaving the meal break start time to the employees' discretion). On or
23 about May 15, 2019, Clark issued a second memorandum to all "BLA Attendants"
24 explaining this procedural change, and stating in full:

25 Jim,

26
27 Thank you for your help and the help of the BLA attendants as we worked
28 to finalize the BLA schedules. Below is a summary of what we discussed.
29 Please share with all the BLA attendants.

30
31 On Tuesdays-Fridays, when only one attendant is working each shift (am
32 and pm), the attendant should take their 30-minute meal break when it is

convenient for them, as long as it is around the middle of their shift. The attendants should record their meal break on their weekly SSTA.²⁰

The attendants should plan the end of their scheduled day so that they are either leaving the gate or closing and locking the gate at the end of their scheduled shift.²¹

Thank-you [sic]

DECISION

10 Section 6 of the Law requires public employers to negotiate in good faith with
11 respect to wages, hours, standards of productivity and performance, and any other terms
12 and conditions of employment. The statutory obligation to bargain in good faith includes
13 the duty to give the exclusive collective bargaining representative notice and an
14 opportunity to bargain to resolution or impasse before changing an existing condition of
15 employment or implementing a new condition of employment involving a mandatory
16 subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission,
17 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations

²⁰ Gustavsen gave unrebutted testimony that Budness was responsible for approving all BLA staff timecards until the Employer eliminated them “several years ago” in place of SSTA timesheets. At all relevant times, Budness was responsible for approving all SSTA “timesheets” for BLA staff. Neither party submitted any timecards or timesheets into evidence.

²¹ Clark gave unrebutted testimony that some BLA attendants had complained about having to leave the BLA fishing area and drive to the gate at the end of their shift, which could take an additional 10 – 15 minutes after their shift had ended. Based on these complaints, Clark added the last sentence in his May 15, 2019 memorandum to recognize “that their shift...can end when they leave the gate. So, if it takes them 10 minutes [or] 15 minutes to get from their fishing location to the gate, they can factor that into their shift so that they’re leaving the premises, the property, at the end of their scheduled shift.”

1 Commission, 388 Mass. 557 (1983). The duty to bargain also extends to both conditions
2 of employment that are established through a past practice as well as conditions of
3 employment that are established through a collective bargaining agreement. Spencer-
4 East Brookfield Regional School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017)
5 (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)). A public
6 employer's unilateral alteration of a condition of employment involving a mandatory
7 subject of bargaining without first negotiating with the union to resolution or impasse
8 before implementing the change constitutes a prohibited practice under Section 10(a)(5)
9 of the Law. School Committee of Newton v. Labor Relations Commission, 388 Mass. at
10 574.

11 To establish a unilateral change violation, the charging party must show that: (1)
12 the employer altered an existing practice or instituted a new one; (2) the change affected
13 a mandatory subject of bargaining; and, (3) the change was established without prior
14 notice and an opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May
15 13, 1994); Boston School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528 and
16 MUP-2541 (April 15, 1977). To determine whether a past practice exists, the
17 Commonwealth Employment Relations Board (CERB) analyzes the combination of facts
18 upon which the alleged practice is predicated, including whether the practice has occurred
19 with regularity over a sufficient period of time. Town of Chatham, 21 MLC 1526, 1529,
20 MUP-9186 (Jan. 5, 1995) (citing Town of Hingham, 21 MLC 1237, 1240, MUP-8189 (Aug.
21 29, 1994); City of Boston, 5 MLC 1796, 1797, MUP-2688 (April 10, 1979); City of

1 Worcester, 4 MLC 1317, 1320, MUP-2525 (H.O. Sept. 13, 1977), aff'd 4 MLC 1697 (Jan.
2 31, 1978)).

3 **1. Meal Breaks**

4 The CERB holds that meal breaks are mandatory subjects of bargaining. See City
5 of Boston, 46 MLC 64, 68-69, MUP-16-5618 (Sept. 27, 2019) (prohibiting employees from
6 eating at their workstations violated the Law because availability of food and conditions
7 under which employees consume food in workplace are mandatory subjects of
8 bargaining); see also City of Boston, 15 MLC 1209, 1214, 1216, MUP-6431 (H.O. Oct.
9 19, 1988), aff'd 16 MLC 1086 (July 12, 1989) (city violated the Law by closing dining area
10 and changing meal options, where employees could not leave premises during meal
11 breaks); City of Peabody, 9 MLC 1447, 4767, MUP-4750 (Nov. 17, 1982) (scheduling of
12 lunch period is a mandatory subject of bargaining).

13 Here, the Union argues that the Employer failed to bargain in good faith and
14 violated the Law when it changed meal breaks for BLA employees. Specifically, it
15 contends that prior to the 2019 season, BLA employees assigned to the second shift on
16 Tuesdays through Fridays rarely took meal breaks at or near the middle of their shift;
17 instead, they usually took those breaks near the end of their shifts or not at all. It also
18 contends that those employees almost always worked a "straight, eight-hour" shift without
19 a lunch period. However, during the 2019 season, the Employer changed this practice by
20 requiring all BLA employees to take their meal breaks at or near the middle of their shifts.
21 Despite these contentions, the record shows that at all relevant times the Employer has

1 required BLA employees to work 8.5-hour shifts which included unpaid, 30-minute meal
2 breaks to be taken "as close to the middle of their shift as possible."

3 The language of Article 7, Section 3 of the CBA has remained unchanged for 20
4 years, stating in full that "A meal period shall be scheduled as close to the middle of the
5 shift as possible considering the needs of the Department/Agency and the needs of the
6 employee." The parties do not dispute the viability of this contractual language. While the
7 record shows that prior to 2019, BLA employees assigned to the second shift on
8 Tuesdays through Fridays usually took their meal break near the end of their shift or not
9 at all, the Employer did not learn about this practice until Turek's November 28, 2018,
10 which prompted Clark, Scannell, and Gustavsen to take immediate corrective action,
11 including meeting with Budness and preparing a more accurate roster for the 2019
12 season which reminded BLA employees that pursuant to the CBA they were required to
13 take a meal break. While the record also shows that Nevue worked through his meal
14 breaks when he was assigned to the first shift in 2011, there is no evidence that the
15 Employer was either aware of this action or ever authorized Peloquin to take that action
16 on its behalf. See, City of Boston, 41 MLC 119, 125-126, MUP-13-3371, MUP-14-3466
17 and MUP-14-3504 (Nov. 7, 2014) (after considering whether the alleged past practice
18 was unequivocal, had existed substantially unvaried for a reasonable period of time, and
19 was known and accepted by both parties, CERB found no violation because union failed
20 to show that a binding practice existed)." Instead, Nevue's practice of working through his
21 lunch break on the first shift during the 2011 season demonstrated an inconsistent and

1 non-recurring event that deviated from the established practice of taking meal breaks and
2 staying until the end of the shift. Thus, the Union's reliance on Nevue's experience in
3 2011 is insufficient to establish a binding past practice. Id. at 126. In fact, the record shows
4 that in 2011 Nevue was the only BLA employee who left his shift 30 minutes early in lieu
5 of taking a meal break, which contradicts Barnes' unequivocal testimony that, since 2008,
6 he never left his shift 30 minutes early in lieu of taking a meal break and was not aware
7 of other employees who had engaged in this practice. Based on this evidence, I find that
8 the Employer's actions at the 2019 recall meeting did not constitute a new or changed
9 condition of employment because they merely restated and reminded BLA employees of
10 the long-standing requirement that they must take a 30-minute meal break near the
11 middle of their shift. See Town of Scituate, 16 MLC 1195, 1198, MUP-6752 (Aug. 25,
12 1989) (mere change in procedure for administering a condition of employment that does
13 not alter the actual condition does not constitute a change in a mandatory subject of
14 bargaining); see also, Town of Stoneham, 28 MLC 171, 173, MUP-2615 (Nov. 15, 2001)
15 (citing City of Boston, 4 MLC 1153, 1155, MUP-2222 (July 26, 1977); Winchester School
16 Committee, 6 MLC 1046, 1048, 1049, MUP-2926 (May 15, 1979) (where facts did not
17 reveal change in pre-existing conditions of employment that affected mandatory subjects
18 of bargaining, the CERB declined to find a violation)); see, generally, City of Boston, 2
19 MLC 1331, 1334, MUP-2152 (Jan. 20, 1976) (CERB found no Section 10(a)(5) violation
20 after city had paid an employee for lunch periods during his extended overtime

1 assignment). Consequently, the Union has failed to show that the Employer unlawfully
2 changed employees' meal breaks at the Quabbin Reservoir BLAs.

3 **2. Work Hours**

4 The CERB has long held that hours of work and shift schedules are mandatory
5 subjects of bargaining. Suffolk County House of Correction, 22 MLC 1001, 1005, MUP-
6 8820 (March 18, 1994); City of Boston, 10 MLC 1189, 1193-95, MUP-4931 (Sept. 2,
7 1983). Here, the Union argues that the Employer changed the work hours for BLA
8 employees when it added an unpaid, 30-minute block of time to their workday in 2019. It
9 contends that since at least 2008, the Employer had established a practice where BLA
10 employees "worked a straight eight-hour shift, with no lunch period." It also contends that
11 both parties knew about this practice based on Barnes who worked a "straight eight hours"
12 from 2008 through 2019 and based on Nevue who worked the same hours from 2011
13 through 2019. The Union also argues that the Employer presented the change as a *fait
accompli*²² at the February 11, 2019 meeting because the Union did not have prior notice
15 of that meeting, did not attend that meeting, and did not learn about the change until after
16 the meeting had concluded. Conversely, the Employer argues that it did not change the

²² To the extent that the Union anticipated that the Employer would raise the affirmative defense of waiver by contract in its brief, the Union cited to Boston Water and Sewer Commission, 12 MLC 1250, MUP-5860 and MUP-5861 (Sept. 20, 1985) and Central Berkshire Regional School Committee, 31 MLC 191, MUP-01-3231, MUP-01-3232, and MUP-01-3233 (June 8, 2005), respectively, to argue that the CERB will not require a union demand to bargain nor apply the waiver doctrine where a union is faced with a *fait accompli*. Because the Employer did not raise an affirmative waiver defense in its Answer and did not raise the issue in its brief, I decline to address it here.

1 work hours for BLA employees in 2019 but was merely enforcing the unambiguous terms
2 of the CBA which requires unit members to remain at their work site until the scheduled
3 end of their shift. The Employer also argues that it neither knew about nor accepted the
4 8-hour practice alleged by the Union and, even if it did know, that practice cannot
5 overcome the explicit language of the parties' CBA. Instead, the Employer maintains that
6 work hours for BLA employees have always been based on 8.5-hour shifts which have
7 always included an unpaid 30-minute meal break.

8 Article 7, Section 1 of the CBA states unambiguously that "the regular hours of
9 work for full-time employees shall be...(37.5) hours per week excluding meal periods
10 or...(40) hours per week excluding meal periods, as has been established for that job title
11 at the particular job location." Article 7, Section 3 states further that, "A meal period shall
12 be scheduled as close to the middle of the shift as possible considering the needs of the
13 Department/Agency and the needs of the employee." The parties have kept this
14 contractual language unchanged for 20 years. Moreover, it is undisputed that at all
15 relevant times the Employer has scheduled BLA employees to work the first shift from
16 5:30 a.m. to 2:00 p.m. which comprises 8.5 hours total. This fact is corroborated by
17 Nevue's unrebutted testimony that the morning shift is "always...from 5:30 a.m. to 2:00
18 p.m.," and is also corroborated by the 2018 and 2019 Fishing Guides which list an
19 unchanged opening time of 6:00 a.m. from April to October.

20 Concerning the second shift, the record shows that the Employer has scheduled
21 BLA employees to work 8.5 hour shifts that changed on the second shift depending on

1 the amount of seasonal daylight. The record also shows that the Employer directed those
2 employees to remain on site 30-minutes after the BLAs closed to the public. While the
3 Union points to numerous occasions prior to 2019 when Barnes and Nevue worked
4 "straight, eight hours" without taking meal breaks on the second shift, it failed to reconcile
5 the other occasions when Barnes and Nevue did take a break even though it was usually
6 not near the middle of their shift and they were never "off the clock."

7 Further, I am unpersuaded by the Union's argument that the practice of BLA
8 employees working through their meal breaks constitutes a new or changed practice over
9 which the Employer was required to bargain. This is because the Union failed to show
10 that the Employer knew about the existence of this practice between the 2008 and 2018
11 seasons or that it accepted the practice once Turek informed Clark, Scannell, and
12 Gustavsen about it in November of 2018. City of Boston, 41 MLC at 126; see also Town
13 of Chatham, 21 MLC 1526, 1529, MUP-9186 (Jan. 5, 1995) (citing Town of Hingham, 21
14 MLC 1237, 1240, MUP-8189 (Aug. 29, 1994) (union failed to prove town had changed a
15 pre-existing condition of employment); cf Town of Weymouth, 11 MLC 1448, 1456, MUP-
16 5215 (Feb. 2, 1985) (CERB dismissed complaint after union failed to prove that town
17 changed a pre-existing condition of employment). Additionally, the Union failed to show
18 how the Employer's decision to include the unpaid, 30-minute meal break on the 2019
19 roster materially changed the terms and conditions of employment for BLA employees
20 during the 2019 season. Rather, I find that including the meal break on the 2019 roster
21 merely reflected the Employer's memorialization of its long-established 8.5-hour work

1 period which included a paid 8-hour shift assignment along with an unpaid 30-minute
2 meal break. Although the 2019 roster was the first time that the Employer memorialized
3 the entire work period, the 2019 roster continued to reflect the 8.5-hour work period which
4 had existed during prior seasons. See, e.g., Town of Danvers, 3 MLC 1559, 1576-77,
5 MUP-2292 and MUP-2299 (Apr. 6, 1977) (where employer required firefighters to include
6 more specified data on their time slips, CERB found that change was "too insignificant"
7 to be subjected to mandatory collective bargaining); contrast Chief Justice of
8 Administration and Management of the Trial Court, 35 MLC 230, 235, SUP-04-5126 (April
9 14, 2009) (CERB found employer's decision to assign employees to staff the front desk
10 one-half day per week for an eight-week period was not *de minimis* but amounted to a
11 material increase in workload and job duties that warranted mandatory bargaining).

12 Based on this evidence, I find that the Employer's decision to memorialize the 8.5-
13 hour shift times for BLA employees on the roster at the 2019 recall meeting was neither
14 a new nor a changed condition of employment because it merely reemphasized the long-
15 standing practice of assigning those employees to work 8.5-hour shifts at the Quabbin
16 Reservoir. See City of Boston, 10 MLC at 1194-95 (CERB found no past practice violation
17 after union failed to prove city had changed work hours and shift assignments); see also
18 Town of Stoneham, 28 MLC at 173 (no violation when town filled temporary vacancies by
19 involuntarily assigning night officers to day shift because union failed to show how the
20 quality or quantity of those assignments had changed); compare Town of Scituate, 16
21 MLC at 1198 (no change in past practice where on numerous prior occasions town had

1 required employees to perform involuntary dispatch duty assignments). Consequently,
2 the Union has failed to show that the Employer unlawfully changed the work hours for
3 BLA employees.

CONCLUSION

5 The Employer did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1)
6 of the Law by changing meal breaks and work hours for BLA employees assigned to work
7 at the Quabbin Reservoir without giving the Union prior notice and an opportunity to
8 bargain to resolution or impasse over the decision and the impacts of the decision on
9 employees' terms and conditions of employment.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Kendrah W

**KENDRAH DAVIS, ESQ.
HEARING OFFICER**

APPEAL RIGHTS

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