

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

SUFFOLK COUNTY SHERIFF'S
DEPARTMENT

and

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 93,
LOCAL 419

Case No. SUP-20-7984

Issued: December 8, 2022

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Melissa J. Garand, Esq. - Representing the Suffolk County
Sheriff's Department

Justin Murphy, Esq. - Representing the American Federation
of State, County, and Municipal
Employees, Council 93, Local 419

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Suffolk County Sheriff's Department
2 (Department or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 G.L. c. 150E (the Law) by failing to bargain in good faith with the American Federation of
4 State, County, and Municipal Employees, Council 93, Local 419 (Union or Local 419) to
5 impasse or resolution over the decision to eliminate in-service training on the 3:00 p.m. –
6 11:00 p.m. shift, and the impacts of that decision on employees' terms and conditions of

1 employment. For the reasons explained below, I find that the Employer did not violate the
2 Law in the manner alleged by failing to bargain in good faith with the Union when it
3 eliminated in-service training on the 3:00 p.m. – 11:00 p.m. shift without giving the Union
4 prior notice and an opportunity to bargain to impasse or resolution over the decision and
5 the impacts of that decision on employees' terms and conditions of employment.

6 STATEMENT OF THE CASE
7

8 On April 29, 2020, the Union filed a Charge of Prohibited Practice with the
9 Department of Labor Relations (DLR) alleging that the Employer had engaged in
10 prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section
11 10(a)(1) of the Law by: (1) unilaterally changing the prior practice concerning in-service
12 training without bargaining with the Union to resolution or impasse over the decision to
13 change that practice and the impacts of that decision on employees' terms and conditions
14 of employment; and (2) repudiating the parties' in-service training agreement.¹ On
15 September 28, 2020, a DLR Investigator issued a Complaint of Prohibited Practice
16 (Complaint), alleging that the Department had violated Section 10(a)(5) and, derivatively,
17 Section 10(a)(1) of the Law when it failed to bargain in good faith with the Union by
18 reducing available training dates and times without bargaining to impasse or resolution
19 over the decision, and the impacts of the decision, on employees' terms and conditions
20 of employment.

¹ The Union later withdrew its repudiation allegation.

- 1 8. The CO-4s (Lieutenants) in Local 419 attend a separate training that is held
2 exclusively for Captains and Lieutenants on the 7-3 shift.
3
- 4 9. On December 19, 2019, the Department created the 2020 training calendar
5 which offered 24, three-day in-service training sessions throughout the year
6 on the 7-3 shift only for custody staff in the position of CO-1 through CO-3.
7
- 8 10. The 24 in-service training sessions in the 2020 training calendar were all
9 scheduled on the same days, Wednesday through Friday.
10
- 11 11. On April 21, 2020, AFSCME entered into an Agreement with the
12 Department in which it agreed, given the COVID pandemic, that all in-
13 service training would be conducted online for the year 2020, for that
14 calendar year only.
15
- 16 12. On April 29, 2020, AFSCME filed an unfair labor practice against the
17 Department docketed as SUP-20-7984 alleging that the Department
18 eliminated a 3:00 p.m. to 11:00 p.m. training shift without providing the
19 Union notice and opportunity to bargain to resolution or impasse.
20
- 21 13. On September 28, 2020, the DLR issued a Complaint in Case. No. SUP-
22 20-7984 alleging that the Department violated Section 10(a)(5) and,
23 derivatively, Section 10(a)(1) of the Law.
24

25 FINDINGS OF FACT

26 **Background**

28 On November 7, 2011, the Employer hired Jonathan Corey (Corey) as a Deputy
29 Sheriff, CO-1. Since that time and continuing to present, Corey has worked in that position
30 at the South Bay House of Correction. Beginning in or around late June of 2019 and
31 continuing to the present, Corey has served as Union President. Beginning in or about
32 1996 and continuing to the present, the Employer hired Michael Simpson (Simpson) as a
33 CO. Since 1998, Simpson has also held various Union positions including Legislative
34 Director, negotiating team member, and a delegate on various committees. At all relevant
35 times, Simpson has served as Union Vice President.

1 On or about July 5, 1995, the Employer hired Jose Mojica (Mojica) as a Jail Officer
2 and later promoted him to Corporal in 2002, and to Sergeant in 2008. In or about April of
3 2013 and continuing to present, the Employer promoted Mojica to the position of Assistant
4 Deputy Superintendent (ADS). In or about 1990, the Employer hired William Sweeney
5 (Sweeney) as a custodian, and later promoted him to custodian supervisor in or about
6 1992. In or about 2001, the Employer promoted Sweeney to Assistant Director of
7 Personnel, to Director of Personnel in 2005, and to Superintendent in 2018 where he has
8 remained at all relevant times. In or about 1997, the Employer hired Michelle Gibbons
9 (Gibbons) and, in 2003, promoted her to a position in its Labor Relations Department. In
10 or about 2019,³ the Employer promoted Gibbons to the position of ADS where she has
11 remained at all relevant times.

12 **The CBA**

13 Article V of the parties' CBA⁴ pertained to "Management Rights" and stated in
14 pertinent part:

15 Section 1. Subject only to the express provisions of the Agreement[,]
16 the Municipal Employer shall not be deemed to be limited in any way
17 by this Agreement in the performance of the regular and customary
18 functions of municipal management and shall have complete
19 authority and supervision of the Suffolk County House of Correction
20 at South Bay. The Municipal Employer reserves and retains all
21 common law, statutory and inherent rights including, without
22 limitation the exclusive right of the Sheriff of Suffolk County to issue
23 rules and regulations and from time to time change, alter and add to

³ The record is unclear about which specific positions Gibbons held prior to 2019.

⁴ Corey gave un rebutted testimony that the parties finalized a successor agreement at some certain point.

1 such rules, governing all Departmental operations and the conduct
2 of Suffolk County Sheriff employees.

3 Section 2. The failure of the Municipal Employer to insist in any one
4 or more instances upon compliance with any rule or regulation, policy
5 or procedure, or upon full enforcement of the [E]mployer's rights
6 under any law shall not be considered a waiver or relinquishment of
7 the right of the Municipal Employer to insist upon future compliance
8 or full enforcement. Such rules and regulations shall include but not
9 be limited to the Suffolk County Sheriff's Department employee
10 policy manuals.

11
12 Article IX of the CBA pertained to "Stability of Agreement" and stated in full:

13 Section 1. No agreement, understanding, alteration or variation of
14 the agreements, terms or provisions herein contained shall bind the
15 parties hereto unless made and executed in writing by the parties
16 hereto.

17
18 Section 2. The failure of the Municipal Employer or the Union to
19 insist, in any one or more incidents, upon performance of any of the
20 terms and conditions of this Agreement shall not be considered as a
21 waiver or relinquishment of the right of the Municipal Employer or of
22 the Union to future performance of any such term or condition, and
23 the obligations of the Union and the Municipal Employer to such
24 future performances shall continue in full force and effect.

25 Article X, Section 1 of the CBA pertained to "Hours of Work and Overtime," and
26 stated in full:

27 The regular workweek shall consist of five (5) eight-hour days
28 between any Sunday and the following Saturday, inclusive. It shall
29 consist of eight (8) hours of work and one-half (1/2) hour of unpaid
30 meal break in the course of an 8 1/2 hour shift. The Municipal
31 Employer agrees to maintain the existing shift schedules and will
32 provide the Union notice and an opportunity to bargain over any
33 proposed changes.

1 Section 8(H)⁵ of the CBA pertained to “Assignment, Shift and Days-off Selection,”

2 and stated in full:

3 H. Any officer, at the discretion of the Sheriff, may be scheduled and
4 reassigned to work other assignments for a period not to exceed
5 three (3) weeks per employee per year, exclusive of those instances
6 described in paragraph 8F,⁶ above.

⁵ Corey admitted that, during his tenure as Union President, he did not negotiate the current CBA, but that Union Vice President Simpson participated in those negotiations. However, Simpson testified that he did not participate in negotiating the language of Article X, Section 8(H). Corey also admitted that he was not at the bargaining table when the parties first included the language from Article X, Section 8(H); however, while he did not know how long that language has been in the contract, it would not surprise him if the inclusion date was around 2000.

Conversely, Sweeney testified that since 2005 he was a member of the Department’s negotiating team, and was the Department’s chief negotiator for the last four years. He also gave unrebutted testimony about the bargaining history concerning Article X where the Department “agreed to maintain [the] three main shifts and will not alter the start and end times of those shifts without bargaining with the Union over those [alterations].” Specifically, Sweeney testified that the parties did not intend for Article X to pertain to temporary reassignments to other shifts, but included Article X, Section 8(H) “back in 2000, 2001” per the CMRs to give the Sheriff discretion to reassign members for training purposes or operational needs “up to three weeks a year.” He also testified further that prior to inserting this language, members were able to pick their shift time but not their assignment because only the Sheriff “had full discretion to assign the staff to whatever post he or she so elected.” Additionally, Sweeney testified that prior to 2020, the Employer had regularly reassigned members assigned to the 11:00 p.m. – 7:00 a.m. shift by rescheduling them to attend in-service trainings on either the 7:00 a.m. – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift. Moreover, he testified that by selecting the training shift, employees are “consenting to the reassignment and to the rescheduling of their days off for the week.”

Based on the totality of this evidence, I credit Sweeney’s testimony because, unlike Corey and Simpson, Sweeney participated in negotiating the terms of Article X, Section 8(H), and recalled the bargaining history related to that provision. Thus, I also credit Sweeney’s testimony that the parties intended Article X, Section 8(H) to give the Employer discretion to temporarily reassign members to other shifts for training and operational needs up to three weeks a year.

1 1) This assignment shall be considered as their regular hours of
2 work for the purposes of training or operational needs.

3
4 2) Except in the case of emergency, officers will be given at least
5 seven (7) calendar days' notice of rescheduling.

6 7 **The 2017-2019 Training Schedules**

8 The Department assigns bargaining unit members to work at various locations on
9 one of three shifts: 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., or 11:00 p.m. to 7:00
10 a.m. Each unit member bids on their work shift assignment based on seniority.

11 At all relevant times, certain sections of the Code of Massachusetts Regulations
12 (CMR) have required the Department to provide 40 hours of annual employee training in
13 various areas, including first aid, fire safety, firearms, use of force, interpersonal
14 communications, sexual harassment, discrimination, etc.⁷

⁶ Article X, Section 8(F) of the parties' CBA stated in full:

F. After the assignment process is complete, the Municipal Employer shall have the right to review the assignments selected by all eligible officers. In the event the Sheriff wishes to alter an officer's assignment, s/he or his/her designee shall meet with the Union to discuss the proposed change.

- 1) Any proposed change in assignment must be based on "objective disqualifying criteria."
- 2) For example, an officer who selects a transportation assignment whose license to operate a motor vehicle has been suspended would be subject to reassignment; and provided however, that lack of training to perform a particular assignment will not constitute an "objective disqualifying criteria" unless an officer previously has declined an opportunity for such training.

⁷ The Department also requires members to complete 480 hours of Correctional Officers Training Academy (COTA) training, along with another 40 hours of post-graduation

1 Prior to the 2020 calendar year, 24 hours out of the annual 40-hour training
 2 requirement comprised in-service training which was held in-person at the Chelsea
 3 Training Center during three-day “blocks” on either the 7:00 a.m. – 3:00 p.m. shift or the
 4 3:00 p.m. – 11:00 p.m. shift, comprising the entire shift.⁸ The Employer does not conduct
 5 in-service training during the 11:00 p.m. – 7:00 a.m. shift.⁹

6 During the 2017 calendar year, the Employer created a 2017 Training Calendar
 7 which offered 32 three-day, in-service training blocks with various trainings during the
 8 7:00 – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift, on the following dates:

- 9 • Jan. 18-20
- 10 • Feb. 8-10, 15-17
- 11 • March 1-3, 15-17, 22-24, 29-31
- 12 • April 5-7, 12-14
- 13 • May 3-5, 10-12, 17-19, 24-26
- 14 • June 7-9, 14-16, 21-23, 28-30
- 15 • July 26-28
- 16 • Aug. 2-4, 9-10, 23-25, 30-31 (and Sept. 1)
- 17 • Sept. 13-15, 20-22, 27-29
- 18 • Oct. 18-20, 25-27
- 19 • Nov. 1-3, 15-17, 29-30 (and Dec. 1)
- 20 • Dec. 6-8, 13-15

training which occurs from 5:45 a.m. to 2:15 p.m. Additionally, the Department requires eight hours of “specialized” training in professional development programs for newly promoted captains, lieutenants, and sergeants, which occurs during the 7:00 a.m. – 3:00 p.m. shift.

⁸ All members select their in-service training schedule by seniority. Prior to the 2020 calendar year, members regularly assigned to the 3:00 p.m. – 11:00 p.m. shift who did not have seniority to attend in-service training on that same shift, attended training on the 7:00 a.m. – 3:00 p.m. shift.

⁹ Prior to the 2020 calendar year, the Employer reassigned all COs who worked regularly on the 11:00 p.m. to 7:00 a.m. shift to attend in-service trainings on either the 7:00 a.m. – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift.

1 During the 2018 calendar year, the Employer created a 2018 Training Calendar
2 which offered 31, three-day, in-service training blocks with various trainings during the
3 7:00 – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift, on the following dates:

- 4 • Jan. 17-19, 31 (and Feb. 1-2)
- 5 • Feb. 7-9, 14-16, 28 (and March 1-2)
- 6 • March 7-9, 14-16, 21-23, 28-30
- 7 • April 4-6, 11-13
- 8 • May 2-4, 9-11, 16-18, 23-25
- 9 • June 13-15, 27-29
- 10 • July 18-20
- 11 • Aug. 8-10, 22-24
- 12 • Sept. 5-7, 12-14, 26-28
- 13 • Oct. 3-5, 17-19, 24-28, 31 (and Nov. 1-2)
- 14 • Nov. 7-9, 14-16, 28-30
- 15 • Dec. 5-7

16
17 During the 2019 calendar year, the Employer created a 2019 Training Calendar
18 which offered 31, three-day, in-service training blocks with various trainings during the
19 7:00 – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift, on the following dates:

- 20 • Jan. 16-18, 23-25, 30-31 (and Feb. 1)
- 21 • Feb. 6-8, 27-28 (and March 1)
- 22 • March 6-8, 13-15, 27-29
- 23 • April 10-12, 24-26
- 24 • May 1-3, 8-10, 15-17, 22-24
- 25 • June 5-7, 12-14, 26-28
- 26 • July 17-19, 24-26
- 27 • Aug. 7-9, 21-23
- 28 • Sept. 11-13, 18-20, 25-27
- 29 • Oct. 9-11, 23-25, 30-31 (and Nov. 1)
- 30 • Nov. 6-8, 20-22
- 31 • Dec. 4-6, 11-13

32 33 **The Labor-Management Committee Meetings and Grievance**

34 At the all relevant times, the parties have met monthly for Labor-Management
35 Committee (LMC) meetings. At a LMC meeting on or about November 20, 2019, the

1 Employer announced that it was “exploring its options” about whether to stop offering in-
2 service trainings on the 3:00 p.m. – 11:00 p.m. shift, beginning with the 2020 calendar
3 year. The Union asked the Employer for more information about the announcement and
4 whether the Employer intended to implement that change. In response, the Employer
5 reiterated that it was only “exploring its options” and that no decision had been made. The
6 written minutes from that meeting addressed the training issue and stated, in pertinent
7 part:¹⁰

8 MAT: The Local asked about the hours, location, training for the
9 program. The Local asked if the training could be part of in-service.

10
11 Status: AS McCarthy spoke with ADS Mojica and MAT training will
12 be part of in-service beginning next year. Closed.

13
14 Later, on November 20, 2019, the Union filed a grievance alleging that the
15 Employer’s proposed elimination of in-service training on the 3:00 p.m. -11:00 p.m. shift
16 violated Article X, Section 1 of the CBA. At the next LMC meeting on or about December
17 18, 2019, the parties discussed the grievance and the in-service training proposal.¹¹ The
18 meeting minutes from that meeting stated, in pertinent part:¹²

19 Training: The Local asked if the Department was planning on
20 eliminating option for their members to attend in service training from
21 2:45 [p.m.] – 11:15 [p.m.] at the November meeting. The Department

¹⁰ All original emphases omitted.

¹¹ Gibson testified that during the LMC meetings on November 20 and December 18, 2019, the Employer expressed a need to eliminate in-service training on the 3:00 p.m. – 11:00 p.m. shift because it did not have adequate staffing levels to cover the 3:00 pm. – 11:00 p.m. shift while members attended the trainings. Sweeney testified that he did not know why the Employer decided to eliminate the 3:00 p.m. – 11:00 p.m. training shift because he “wasn’t involved in that decision.”

¹² All original emphases omitted.

1 stated they were exploring the option. The Local stated they called
2 ADS Mojica and he confirmed it.

3
4 Status: The Union filed a grievance after the November LMC
5 meeting. Closed.

6 On or about January 17, 2020, the Department denied the grievance at Step II.

7 **The 2020 Training Calendar and the COVID Agreement**

8 At some point between November 20, 2019 and January 29, 2020, the Department
9 issued a 2020 Training Calendar which offered 24, three-day, in-service training blocks
10 occurring only during the 7:00 a.m. – 3:00 p.m. shift on the following dates:

- 11 • Jan. 29-31
- 12 • Feb. 5-7, 12-14
- 13 • March 4-6, 11-13, 18-20
- 14 • April 1-3, 22-24, 29-30 (and May 1)
- 15 • May 6-8, 20-22
- 16 • June 3-5, 10-12, 17-19
- 17 • July 15-17, 22-24
- 18 • Aug. N/A
- 19 • Sept. 9-11, 16-18, 23-25, 30 (Oct. 1-2)
- 20 • Oct. 7-9, 21-23, 28-30
- 21 • Nov. 4-6
- 22 • Dec. N/A

23
24 At some point between January 17, 2020 and April 21, 2020, the parties met to
25 bargain over conducting in-service trainings online for the remainder of the 2020 calendar
26 year due to the COVID-19 pandemic. During those bargaining sessions, the parties did
27 not discuss the elimination of the 3:00 p.m. – 11:00 p.m. training shift. On or about April
28 21, 2020, the parties entered into an agreement to conduct in-service training online due
29 to the COVID-19 pandemic (COVID Agreement), which stated in pertinent part:

- 30 1. The parties agree that state regulations require the Department to
31 provide twenty-four (24) hours of in-service training to Union
32 members each year.

- 1 2. Given the COVID-19 pandemic, the Department is currently unable
- 2 to hold in-person training classes, and given the number of
- 3 employees who require the training, will likely be unable to complete
- 4 the in-person training for all staff before the end of the year.

- 5 3. For this year only, the parties agree that active Union members will
- 6 be given a flash drive with all current Department policies, as well as
- 7 twenty-four (24) hours of on-line video training content on the policies
- 8 that would have been covered during the annual in-person training.
- 9
- 10 4. Employees who sign a policy receipt form for the policies and on-line
- 11 training will receive twenty-four (24) hours of pay, at their regular
- 12 hourly rate, to complete the training outside of work and on their own
- 13 time during a week when they are not scheduled to actually work
- 14 forty (40) hours.
- 15
- 16 5. Any employee who does not sign a policy receipt form for the policies
- 17 and the on-line training will not receive the twenty-four (24) hours
- 18 pay, and will likely be scheduled for in-person training at some point
- 19 during the year.
- 20
- 21 6. Should any employee be unable to complete the on-line training
- 22 during a period when they are not scheduled to work forty (40) hours,
- 23 they must notify Bill Sweeney in writing and he will recoup the twenty-
- 24 four (24) hours pay and schedule the individual for in-person training
- 25 at some point during the year.

....

26

27 **The 2021 Training Calendar**

28

29 At some point between the expiration of the COVID Agreement and July of 2021,

30 the Department created a 2021 Training Calendar which offered 22 three-day and four-

31 day, in-service training blocks occurring only during the 7:00 a.m. – 3:00 p.m. shift on the

32 following dates:¹³

- 33 • Jan. N/A
- 34 • Feb. N/A

¹³ The Employer scheduled at least eight trainings in 2021, three of which were scheduled to occur on July 28, 29, and 30, 2021. The Employer cancelled the July 28, 29, and 30, 2021 training dates, and subsequently scheduled five more trainings which did occur in 2021.

- 1 • March N/A
- 2 • April 7-9, 13-16, 21-23
- 3 • May N/A
- 4 • June N/A
- 5 • July 21-23, 28-30
- 6 • Aug. 4-6, 11-13, 18-20, 25-27
- 7 • Sept. 1-3, 8-10, 15-17, 22-24, 28-30 (and Oct. 1)
- 8 • Oct. 6-8, 13-15, 20-22, 26-29
- 9 • Nov. 3-4, 17-19
- 10 • Dec. 7-10, 15-17
- 11

12 The 2021 calendar year was the first time that the Employer enforced the
13 requirement that members had to complete all in-service training during the 7:00 a.m. –
14 3:00 p.m. shift, only.

15 The elimination of the 3:00 p.m. – 11:00 p.m. in-service training shift impacts at
16 least 24 unit members who are assigned to work on the 7:00 a.m. – 3:00 p.m. shift
17 because the Employer forced them to work overtime five days a week to complete the
18 required training.¹⁴ The elimination of the 3:00 p.m. – 11:00 p.m. shift did not impact unit
19 members in terms of staffing shortages.¹⁵

¹⁴ Corey gave un rebutted testimony that during certain in-service training weeks in 2021, eight members per shift were impacted by the elimination because it created “24 extra forced overtimes” for those employees. Sweeney testified that the Employer does not preclude members from volunteering for overtime when those members are regularly assigned to work the 3:00 p.m. – 11:00 p.m. shift but are also required to attend in-service training during the 7:00 a.m. – 3:00 p.m. shift. Despite the Employer’s evidence, I credit Corey’s testimony that the disputed change impacted members in terms of creating forced overtime, because Sweeney’s testimony did not rebut Corey’s testimony on this issue.

¹⁵ Corey testified that the disputed change created a staffing issue related to COTA trainings because those trainings overlapped with in-service trainings which were scheduled to occur during the 7:00 a.m. – 3:00 p.m. shift. However, Gibson testified that during the LMC meetings on November 20 and December 18, 2019, the Employer expressed a need to eliminate in-service training on the 3:00 p.m. – 11:00 p.m. shift because it did not have adequate staffing levels to cover the 3:00 pm. – 11:00 p.m. shift

1 without giving the exclusive bargaining representative prior notice and an opportunity to
2 bargain to resolution or impasse over the change. City of Boston, 26 MLC 177, 181, MUP-
3 1431 (March 23, 2000) (citing City of Peabody, 9 MLC 1447, MUP-4750 and MUP-4767
4 (Nov. 17, 1982); Town of Bridgewater, MUP-8634, slip op. (June 20, 1997); Boston
5 School Committee, 3 MLC 1603, 1610, MUP-2503, MUP-2528, and MUP-2541 (April 15,
6 1977) (other citations omitted)).

7 Here, there is no dispute that prior to the 2020 calendar year, the Employer
8 established a practice of scheduling in-service training to occur during either the 7:00 a.m.
9 – 3:00 p.m. shift or the 3:00 p.m. – 11:00 p.m. shift. It is also undisputed that the Employer
10 changed this practice when it issued the 2020 Training Calendar at some point after the
11 parties' November 20, 2019 LMC meeting, and scheduled in-service training to occur only
12 on the 7:00 a.m. – 3:00 p.m. shift, effectively eliminating all in-service training on the 3:00
13 p.m. – 11:00 p.m. shift. Based on this evidence, I find that the Union has satisfied the first
14 element of its prima facie case showing that the Employer unilaterally altered an existing
15 practice. City of Boston, 26 MLC at 181.

16 The Employer disputes the next two elements. First, it contends that the issue of
17 eliminating in-service training on the 3:00 p.m. – 11:00 p.m. shift is not a mandatory
18 subject of bargaining because it involves a core managerial prerogative to make a level
19 of services decision about when to schedule in-service training. Second, the Employer
20 contends that it did not fail to provide the Union with notice and an opportunity to bargain
21 prior to implementing the change because the Union waived its right by inaction. In the
22 alternative, the Employer contends that the Union waived by contract its right to bargain
23 over the change based on the clear and unambiguous language of the parties' CBA.

1 Core Managerial Rights

2 The Law allows public employers to exercise core managerial prerogatives
3 concerning the nature and level of its services without first bargaining with its employees'
4 exclusive bargaining representative over that decision. School Committee of Newton, 388
5 Mass. at 563. To determine whether an employer makes a change that affects a
6 mandatory subject of bargaining, the CERB balances the union's interest in bargaining
7 over safety and workload issues with the employer's interest in making the core
8 management decision of what level of services to provide. Town of Halifax, 20 MLC 1320,
9 1323, MUP-7823 (Dec. 16, 1993) (citing Town of Bridgewater, 12 MLC 1612, 1615-16
10 MUP-5356 (Feb. 7, 1986); Town of Danvers, 3 MLC 1559, 1571 and 1577, MUP-2292
11 and MUP-2299 (April 6, 1977) (other citations omitted)).

12 Despite the Employer's contention that the issue of eliminating in-service training
13 on the 3:00 p.m. – 11:00 p.m. shift is a permissive rather than a mandatory subject of
14 bargaining, the Commonwealth Employment Relations Board (CERB) has long-held that
15 compulsory training and other conditions of continued employment are mandatory
16 subjects of bargaining. See, e.g., City of Boston, 26 MLC at 181 (citing Town of
17 Bridgewater, MUP-8634, slip op.); Boston School Committee, 3 MLC at 1610) (other
18 citations omitted) (compulsory training and other kinds of continuing conditions of
19 employment are mandatory subjects of bargaining)). Moreover, the record is void of
20 evidence showing that the decision changed the level of services delivered by the
21 Employer. In fact, the Employer concedes that eliminating the disputed in-service training
22 shift neither caused a staffing shortage, nor changed the number of employees assigned
23 to cover the relevant non-training shifts. Additionally, there is no evidence demonstrating

1 a public safety rationale for the Employer's decision. Compare, Town of Halifax, 20 MLC
2 at 1324 (town not required to bargain over change to weekend day-shift assignments
3 where union failed to demonstrate sufficient impact on workload and safety; however,
4 town required to bargain over decisions to change night duty, overtime, and fire drill
5 attendance as mandatory subjects of bargaining).

6 Based on the totality of this evidence, I find that the Union has satisfied the second
7 element of its prima facie case by showing that the Employer's decision affected a
8 mandatory subject of bargaining. City of Boston, 26 MLC at 181.

9 **Waiver by Inaction**

10 Next, the Employer asserts that it provided the Union with prior notice of the
11 contemplated change at the November 20, 2019 LMC meeting when it by announcing
12 that it was "exploring its options" about whether to eliminate the disputed in-service
13 training shift. Based on this notice, the Employer contends that the Union waived by
14 inaction its right to bargain over the change because the Union never demanded to
15 bargain with the Employer prior to implementation of the 2020 Training Calendar, which
16 effectively eliminated all in-service training on the 3:00 p.m. – 11:00 p.m. shift.
17 Conversely, the Union contends that it did not waive by inaction its right to bargain over
18 the change because the Employer never provided actual notice of the proposed change,
19 but presented it as a *fait accompli*. In the alternative, the Union argues that it preserved
20 its right to bargain by filing a timely grievance alleging that the Employer's announcement
21 at the November 20, 2019 LMC meeting violated Article X of the CBA.

22 An employer asserting the affirmative defense of waiver by inaction must
23 demonstrate that the union had: (1) actual notice of the proposed change; (2) reasonable

1 opportunity to negotiate over the issue; and (3) unreasonably or inexplicably failed to
2 bargain or to request bargaining. School Committee of Newton, 388 Mass. at 570;
3 Holliston School Committee, 23 MLC 211, MUP-1300, (March 27, 1997).

4 For the following reasons, I am unpersuaded by the Employer's contention that the
5 Union waived by inaction its right to bargain over the disputed change. First, the
6 Employer's announcement at the November 20, 2019 LMC meeting did not constitute
7 actual notice of the proposed change because the Employer stated only that it was
8 "exploring its options" about whether it would make the change to stop offering in-service
9 training on the 3:00 p.m. – 11:00 p.m. shift, but had not decided either way. Next, even if
10 that announcement constituted actual notice, the Employer cannot show that the Union
11 had a reasonable opportunity to negotiate over the issue because when the Union asked
12 whether the Employer intended to implement the change at the November 19, 2019 LMC
13 meeting, the Employer reiterated that it was merely "exploring its options." Nor can the
14 Employer demonstrate that the Union unreasonably or inexplicably failed to bargain or to
15 request bargaining. Instead, the evidence shows that the Union immediately preserved
16 its bargaining rights by filing a grievance on November 20, 2019 after the meeting.

17 Despite meeting again with the Union at the December 18, 2019 LMC meeting,
18 and despite denying the Union's grievance at Step II on January 17, 2020, the Employer
19 issued its 2020 Training Calendar which eliminated the 3:00 p.m. – 11:00 p.m. in-service
20 training as a *fait accompli*. Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999)
21 (*a fait accompli* exists only where "under all the attendant circumstances, it can be said
22 that the employer's conduct has progressed to a point that a demand to bargain would be
23 fruitless"). Specifically, beginning with the November 20, 2019 LMC meeting and the

1 grievance, the Employer knew that the Union wanted to bargain over the potential
2 elimination of the 3:00 p.m. – 11:00 p.m. in-service training shift. However, at some point
3 between November 20, 2019 and January 29, 2020, and without additional notice to the
4 Union, the Employer issued the 2020 Training Calendar which effectively changed the
5 established practice. Because the Union became aware of the change after the
6 Employer's implementation of the 2020 Training Calendar, any demand to bargain by the
7 Union would have been fruitless. Town of Hudson, 25 MLC at 148. Consequently, the
8 Employer is unable to prove that the Union waived by inaction its right to bargain over the
9 disputed change because the Employer presented the change as *a fait accompli*. See,
10 Id. (CERB found no waiver by inaction where employer presented change as *a fait*
11 *accompli*, and where union did not have sufficient advance notice of the change and did
12 not have a meaningful opportunity to bargain prior to implementation).

13 Based on the totality of this evidence, I find that the Union has satisfied the
14 remaining element of its prima facie case by showing that the Employer unilaterally
15 changed an existing practice that affected a mandatory subject of bargaining without
16 giving the Union prior notice and an opportunity to bargain to resolution or impasse over
17 the change. City of Boston, 26 MLC at 181.

18 **Waiver by Contract**

19 In the alternative, the Employer argues that the Union waived by contract its rights
20 to bargain over the disputed change.

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 has
23 arisen, and that the union knowingly waived its bargaining rights. City of Newton, 29 MLC

1 186, 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents/UMass
2 Medical Center (Board of Regents), 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988)).
3 The initial inquiry focuses on the language of the contract. Town of Mansfield, 25 MLC
4 14, 15, MUP-1567 (Aug. 4, 1998)). If the language clearly, unequivocally, and specifically
5 permits the public employer to make the change, no further inquiry is necessary. City of
6 Worcester, 16 MLC 1327, 1333, MUP-6810 (Oct. 19, 1989). If the language is ambiguous,
7 the CERB will review the parties' bargaining history to determine their intent. Board of
8 Regents, 15 MLC at 1269.

9 The Employer contends that Article X, Section 8(H) gives it clear and unambiguous
10 discretion to schedule and reassign officers "to work other assignments for a period not
11 to exceed three weeks per employee per year," and that the "assignment shall be
12 considered as their regular hours of work for the purposes of training or operational
13 needs." The Employer also contends that its reassignment of members to the 7:00 a.m.
14 – 3:00 p.m. shift to attend in-service training did not alter the regular work week because
15 the reassignment is considered "regular hours of work" as defined in Article X, Section 1.
16 Based on this language, the Employer asserts that the Union knowingly and unmistakably
17 waived its rights to bargain over the change because the CBA clearly and unambiguously
18 permits it to eliminate in-service training on the 3:00 p.m. – 11:00 p.m. shift, and require
19 members to attend that training on the 7:00 a.m. – 3:00 p.m. shift, only.

20 Conversely, the Union argues that it did not waive by contract its rights to bargain
21 over the change because the CBA language is not clear and unambiguous on the subject
22 of eliminating in-service training shifts. Specifically, it asserts that Article X, Section 8(H)
23 is silent on that matter, and there is no evidence of the parties' bargaining history to prove

1 that the Union consciously considered the issue and waived its rights to bargain over it.
2 Instead, the Union points to Simpson's testimony that the parties never bargained over
3 changing the in-service training shifts. It also asserts that Article X, Section 1 requires
4 expressly that the Employer must "maintain existing shift schedules and will provide the
5 Union notice and an opportunity to bargain over any proposed changes," which it failed
6 to do here.

7 Here, Article X, Section 1 stated, in full:

8 The regular workweek shall consist of five (5) eight-hour days
9 between any Sunday and the following Saturday, inclusive. It shall
10 consist of eight (8) hours of work and one-half (½) hour of unpaid
11 meal break in the course of an 8 ½ hour shift. The Municipal
12 Employer agrees to maintain the existing shift schedules and will
13 provide the Union notice and an opportunity to bargain over any
14 proposed changes.

15
16 Article X, Section 8(H) also stated, in full:

17 H. Any officer, at the discretion of the Sheriff, may be scheduled and
18 reassigned to work other assignments for a period not to exceed
19 three (3) weeks per employee per year, exclusive of those instances
20 described in paragraph 8F, above.

21
22 1) This assignment shall be considered as their regular
23 hours of work for the purposes of training or operational
24 needs.

25 2) Except in the case of emergency, officers will be given
26 at least seven (7) calendar days' notice of
27 rescheduling.

28
29 While I agree with the Employer that Article X, Section 1 defines the "regular work
30 week," I also agree with the Union that provision requires the Employer to "maintain the
31 existing shift schedules" until it bargains with the Union to resolution or impasse over any
32 proposed change to those schedules. Further, I find that Article X, Section 1 is silent on

1 the terms “reassignment,” training,” and/or “in-service training.” Additionally, the language
2 of Article X, Section 8(H), does not clearly, unequivocally, and specifically permit the
3 Employer to make the disputed change because while it addresses the Sheriff’s discretion
4 to schedule or reassign members “to other work assignments,” it is silent on any terms or
5 subjects relating to “training” or “in-service training.” Compare, City of Worcester, 16 MLC
6 at 1334 (CERB found the express terms of the contract, standing alone, did not permit
7 the employer to make the change)). Rather, the language of Article X, Sections 1 and
8 8(H), when read separately and together, is ambiguous because it does not expressly
9 permit the Employer to make temporary reassignments for the specific purpose of in-
10 service training. Therefore, based on this ambiguity, I must review the parties’ bargaining
11 history to determine their intent. Board of Regents, 15 MLC at 1269.

12 The Employer presented un rebutted evidence showing that Sweeney had
13 participated in the parties’ first negotiations over the language of Article X, Section 8(H),
14 and was present when the parties agreed to give the Sheriff discretion to reassign
15 members specifically for training purposes or operational needs up to three weeks a year
16 pursuant to that language. Sweeney also gave un rebutted testimony that when unit
17 members selected their respective training shifts prior to the 2020 calendar year, they
18 were “consenting to the reassignment and to the rescheduling of their days off for the
19 week.” Conversely, the Union was unable to present persuasive evidence on this
20 bargaining history because none of its testifying witnesses (i.e., neither Corey nor
21 Simpson) were present when the parties first included Article X, Section 1 and 8(H) in
22 their CBA. Compare, Board of Regents, 15 MLC at 1269-71 (union waived by contract its

1 rights to decisional bargaining but not impact bargaining; however, because union waived
2 by inaction its rights to bargain over impacts, CERB dismissed case in its entirety).¹⁶

3 For all these reasons, I find that the Union waived by contract its right to bargain
4 over the elimination of in-service training on the 3:00 p.m. – 11:00 p.m. shift because the
5 parties' bargaining history permitted the Employer to make the disputed change.

6 **Impacts and Overtime**

7 Finally, while I have found that the Union waived its right by contract to bargain
8 over the change to in-service training scheduling, the CERB still requires an employer to
9 bargain over the impacts of a managerial decision where the decision impacts or affects
10 a mandatory subject of bargaining. City of Sommerville, 42 MLC 170, MUP-13-2977 (Dec.
11 30, 2015) (citing City of Worcester v. Labor Relations Commission, 438 Mass. 177, 185
12 (2002); Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 685 (1989); School
13 Committee of Newton, 388 Mass. at 562-564). However, despite this requirement, the
14 evidence shows that the Employer was not obligated to bargain over the impacts of the
15 disputed decision because the only identifiable impact was a reduction of members' ability
16 to perform unscheduled overtime. See, generally, City of Boston, 32 MLC 4, 12-13, MUP-
17 01-2892 (June 24, 2005), (citing, Town of West Bridgewater, 10 MLC 1040, 1044 (1983),
18 aff'd sub nom., West Bridgewater Police Association v. Labor Relations Commission, 18
19 Mass. App. Ct. 550 (1984) (a public employer has no obligation to bargain over the impact
20 of a core managerial decision, if the only identifiable impact is a reduction in the

¹⁶ The Employer raises additional defenses including contractual management rights and violation of DLR Rules and Regulations, 456 CMR 15.05(7). Because I have found that the Employer was exempt from bargaining over the disputed decision based on waiver by contract, I need not address these remaining defenses.

1 employees' ability to perform unscheduled overtime and no other terms and conditions of
2 employment are affected)). Moreover, the Union failed to demonstrate that the overtime
3 shifts were regularly scheduled; and, concerning other possible impacts, the record is
4 void of evidence showing safety or workload impacts resulting from the change. Contrast
5 City of Peabody, 9 MLC at 1450-51 n. 3 (city's elimination of practice paying police officers
6 extra compensation at an overtime rate during their lunch period was regularly-scheduled
7 overtime that required prior bargaining because it resulted in the reduction of wages).

8 CONCLUSION

9 In conclusion, I find that the Employer did not violate the Law in the manner
10 alleged, and dismiss the Complaint in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



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.