

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

BRISTOL COUNTY COMMISSIONERS

and

OPEIU, LOCAL 6

Case Number: SUP-20-8269

Date Issued: June 16, 2023

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Robert M. Novack, Esq. - Representing Bristol County Commissioners

Luke Liacos, Esq. - Representing OPEIU, Local 6
Steven J. Fonseca, Esq.

HEARING OFFICER'S DECISION

SUMMARY

1 The issues in this case are whether the Bristol County Commissioners
2 (Commissioners or Employer) violated Massachusetts General Laws, Chapter 150E (the
3 Law) by: I) implementing their last best offer during successor contract negotiations when
4 they were not at impasse with OPEIU, Local 6 (Union) in violation of Section 10(a)(5) and,
5 derivatively, Section 10(a)(1) of the Law; II) refusing to participate in the mediation
6 process of the Department of Labor Relations (DLR) in violation of Section 10(a)(6) and,
7 derivatively, Section 10(a)(1) of the Law; and III) refusing to bargain with the Union at a
8 November 2, 2020 meeting in violation of Section 10(a)(5) and, derivatively, Section

1 10(a)(1) of the Law. Based on the record, and for the reasons explained below, I find that
2 the Employer violated the Law as alleged.

3 STATEMENT OF CASE

4 On October 27, 2020, the Union filed a charge (Charge) with the DLR. On January
5 19, 2021, a DLR investigator investigated the Charge. On June 29, 2021, the investigator
6 issued a three-count Complaint and Partial Dismissal (Complaint), alleging that the
7 Employer violated the Law by: I) implementing its last best offer during successor contract
8 negotiations when it was not at impasse with the Union in violation of Section 10(a)(5)
9 and, derivatively, Section 10(a)(1) of the Law; II) refusing to participate in the mediation
10 process of the DLR in violation of Section 10(a)(6) and, derivatively, Section 10(a)(1) of
11 the Law; and III) refusing to bargain with the Union at a November 7, 2020 meeting in
12 violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.¹ The
13 investigator dismissed additional allegations of regressive bargaining, imposing artificial
14 and unreasonable deadlines, and threatening to unilaterally implement changes. On June
15 30, 2021, the Employer filed its Answer to the Complaint. On April 7, 2022, I conducted a
16 remote hearing via WebEx, during which the parties received a full opportunity to be
17 heard, to examine and cross-examine witnesses, and to present evidence. On June 21,
18 2022, the parties filed post-hearing briefs. Based on the record, I make the following
19 findings of fact and render the following opinion.

20 STIPULATIONS OF FACT

¹Count III of the Complaint mistakenly alleges that the meeting occurred on November 7, 2020. The meeting was on November 2.

- 1 1. Bristol County is a public employer within the meaning of Section 1 of
2 Massachusetts General Laws, Chapter 150E.²
3
- 4 2. Local 6 is an employee organization within the meaning of Section 1 of
5 Massachusetts General Laws, Chapter 150E.
6
- 7 3. Local 6 is the exclusive bargaining representative for all full-time and regular
8 part-time boiler room and custodial employees employed by Bristol County.
9
- 10 4. Local 6 and Bristol County are parties to a collective bargaining agreement
11 dated July 1, 2017 through June 30, 2020.
12
- 13 5. On June 3, 2020, Local 6 and Bristol County began negotiations for a
14 successor collective bargaining agreement for the period July 1, 2020 through
15 June 30, 2023.
16
- 17 6. On October 13, 2020, Mr. Daly sent a petition for mediation to Ms. Gomes and
18 asked her to sign it.
19
- 20 7. That same day, Ms. Gomes told Mr. Daly that the County would not jointly file
21 a petition for mediation.
22
- 23 8. On October 22, 2022, Bristol County implemented its Last Best Offer, giving
24 notice of the same to the Union.
25
- 26 9. On October 23, 2020 Local 6 Chief Field Services and Legal Officer Phillip
27 Basile ("Mr. Basile") sent Ms. Gomes an email stating that the Union was willing
28 to continue negotiations and discuss the outstanding issues.
29
- 30 10. On October 23, 2020, Local 6 filed a petition for mediation with the DLR.
31
- 32 11. On October 27, 2020, Local 6 filed a charge with the DLR alleging that Bristol
33 County engaged in prohibited practices within the meaning of Sections
34 10(a)(1), 10(a)(5), and 10(a)(6) of Massachusetts General Laws, Chapter
35 150E.
36
- 37 12. In early November 2020, a mediator from the DLR scheduled a mediation
38 meeting with the Parties for November 19, 2020. Bristol County did not appear
39 at, or participate in, the mediation meeting.
40
- 41 13. On January 19, 2021, the DLR conducted an investigatory conference.
42
- 43 14. On June 29, 2021, the DLR issued a complaint.

²More precisely, the County Commissioners are the Employer within the meaning of Section 1 of the Law.

1 15. A DLR pre-hearing conference was scheduled for March 10, 2022.
2

3 FINDINGS OF FACT

4 General Background

5 The Commissioners are the appointing authority for certain Bristol County (County)
6 employees, including custodians that the Union represents. Among other things, the
7 Commissioners are responsible for approving a budget and negotiating and approving
8 collective bargaining agreements. During the events that gave rise to this proceeding, the
9 three Commissioners were Chairman Paul B. Kitchen, John R. Mitchell, and John T.
10 Saunders (Saunders). The Commissioners meet every other week to conduct County
11 business.

12 Maria Gomes (Gomes) is the County Administrator. Gomes reports to the
13 Commissioners, and decision-making authority for the County ultimately resides with
14 them. Gomes' duties include, but are not limited to, managing the day-to-day operations
15 of the Commissioners' Office, and assisting the Commissioners during collective
16 bargaining negotiations. Gomes sits at the bargaining table with whichever Commissioner
17 participates in a negotiation, and she works in concert with the Commissioners to develop
18 their bargaining proposals.³ Gomes communicates on behalf of the Commissioners
19 during collective bargaining negotiations.

20 The Bristol County Advisory Board (Advisory Board) is comprised of elected
21 representatives from the 4 cities and 16 towns in the County. The Advisory Board is the
22 funding authority for the County, and it has responsibility for appropriating funds, including

³Gomes testified that individual Commissioners are assigned to collective bargaining negotiations. In the instant matter, the bargaining committee consisted of Gomes and Saunders.

1 funding for collective bargaining agreements that the Commissioners negotiate.⁴ The
2 Advisory Board generally meets once a year to fund the County's annual budget, but it
3 can also meet as needed, including to supplement the budget.⁵ Generally, after the
4 Commissioners approve a budget, it is forwarded to the Advisory Board, whose
5 Chairperson then sets the date of its annual meeting. Before the Advisory Board meets,
6 the Commissioners' budget is printed and forwarded to the cities and towns within the
7 County along with the meeting agenda; the meeting notice also must be advertised in a
8 local newspaper for 14 calendar days prior to the meeting.⁶

9 The County operates three Registry of Deeds buildings. The County also leases
10 several County courthouse buildings to the Commonwealth's Trial Court. Pursuant to its
11 leases, the County maintains the buildings and provides custodial staff. In or around
12 March 2018, the County converted the boiler system at the Taunton courthouse from a
13 high-pressure boiler, which requires a second class fireman's license to maintain, to a
14 low-pressure boiler, which does not require a license to maintain.

⁴I note that as the "body which has the power of appropriation" with respect to the Employer, the Advisory Board is the "legislative body" within the meaning of Section 1 of the Law.

⁵Although the Employer repeatedly suggested at the hearing that doing so would be inconvenient, Gomes acknowledged on cross-examination that the Advisory Board can meet as needed. In 2018, it called a special meeting to consider a school renovation project. M.G.L. c. 35, section 28B(g) pertains to supplemental budgets.

⁶In addition to fielding a quorum, the Advisory Board must satisfy certain statutory notice requirements prior to meeting. See M.G.L. c. 35, Section 28B. Gomes testified that newspapers require at least three business days for a publication to appear in print. Regarding the total lead time that this process requires, Gomes testified that the total lead time to convene a meeting of the Advisory Board would be about 23 or 24 days.

1 The Union represents a bargaining unit of approximately 12 custodians, including
2 senior building custodians and regular custodians, who perform cleaning, light
3 maintenance, and maintain the buildings' boiler systems. During the period that gave rise
4 to this dispute, the bargaining unit included a second class fireman/senior building
5 custodian, who, in addition to performing custodial duties, maintained the high-pressure
6 boiler in the Taunton courthouse until the 2018 conversion. The second class
7 fireman/senior building custodian position paid a higher wage than the senior custodian
8 position. Glen Souza (Souza), the Union's shop steward, was the incumbent in the
9 second class fireman/senior building custodian position. Patrick Daly (Daly) has worked
10 for the Union as a business agent since March 16, 2020. His responsibilities include
11 negotiating collective bargaining agreements and handling grievances. Daly has a second
12 class fireman's license.⁷ Phil Basile (Basile) is the Union's Chief Field Services/Legal
13 Officer, and he is Daly's supervisor.

14 Successor Negotiations

15 Initial Communications

16 By email on February 11, 2020, Gomes stated to Dan Totten (Totten), then the
17 Union's bargaining agent, that the parties' collective bargaining agreement (CBA) would
18 expire on June 30, 2020, and she requested that Totten "provide the County with several

⁷Daly testified: "The Second Class Fireman's license is the lowest form of steam engineering license in the state. Every boiler in Massachusetts that is above 15 pounds pressure requires some form of attendance in the state. Meaning that a fireman, or an engineer, needs to be present in the boiler room at least some part of the day, and performing preventative maintenance, and – keeping log books concerning boiler operations. So fireman's license, like I said, is the lowest thing. You can't be in charge of the plants, but you can, you know, run the plant, watch the boiler. Generally, to be in charge of a plant, you'd need an engineer's license."

1 dates and times over the next two months to open contract negotiations.”⁸ On February
2 19, 2020, Totten acknowledged receipt of Gomes’ communication and told her that he
3 would “send our formal intent to negotiate letter along with some ground rules, by the end
4 of the week.” By email on May 14, 2020, Gomes, not having received the materials that
5 Totten stated he would send, requested “three dates and times” to “open negotiations
6 with the County.” On May 15, 2020, Totten confirmed receipt of Gomes’ email and told
7 her that he would get back to her with dates.

8 By email on May 21, 2020, Totten informed Gomes that the Union’s negotiating
9 team was “available for our initial negotiation session, next Thursday, May 28, 2020” from
10 11:00 A.M. until noon. Totten further stated that he had “sent along ground rules
11 previously but not received a response from you.” That afternoon, Gomes responded that
12 May 28 did not work for her, and she indicated that she did not “recall ever receiving any
13 ground rules.” Gomes further requested at least three dates and times “so that I can
14 coordinate with the Commissioner who will be negotiating the contract.” Still on May 21,
15 2020, Totten responded that he would “resend the ground rules this evening.” He asked
16 Gomes to propose three dates to meet and also requested information about the
17 composition of the Employer’s bargaining team.

18 By email on May 28, 2020, Gomes wrote to Totten that:

⁸Gomes testified that the Commissioners directed her to initiate contact with the Union because the Union had not contacted the Employer. Gomes described this time as “peak budget season,” and testified that the Employer wanted to know where it was with its economics. This action, however, conflicts with Article 28 of the parties’ CBA, which expressly provides, in relevant part, that, “The party wishing to modify this Agreement shall serve written notice upon the other no earlier than sixty (60) calendar days prior to the expiration.” This article also provides that the “Agreement shall remain in full force and effect until such time as [a] successor Agreement is executed.”

1 I haven't seen those ground rules yet! As for dates, the County would like to offer
2 June 2nd, 3rd, or 4th any time after 10:30 am. The negotiating team at this time will
3 be Commissioner John Saunders and County Administrator Maria Gomes. All
4 communication will be through the County Administrator's email or the
5 Commissioner's Office Phone line (see below). The County reserves the right to
6 have legal representation at any negotiation session.
7

8 By email on June 1, 2020, Totten tentatively agreed to meet on "June 3 from 12 noon to
9 1pm," subject to confirmation, and forwarded proposed ground rules.

10 June 3, 2020 Bargaining Session

11 On June 3, 2020, the parties remotely convened their initial bargaining session.
12 After making introductions, the Union verbally presented its initial bargaining proposal.
13 The parties agreed to meet again on June 10, and Gomes asked the Union to forward its
14 proposal to the Commissioners in writing, which it subsequently did.

15 Employer Cancels June 10 Bargaining Session

16 On Wednesday morning, June 10, 2020, Gomes notified Totten that Saunders was
17 "unable to meet today and would like to reschedule to next Wednesday or Thursday."

18 That morning, Totten responded that:

19 Moving forward, please provide notice of any cancellations within a reasonable
20 time frame. Cancellations are listed on the ground rules, which I still await your
21 signature on. [emphasis in original]

22 Given you've postponed our meeting today on short notice and in an effort to make
23 progress, OPEIU Local 6 requests without precedence that you supply your initial
24 proposal along with any responses you have to our proposal of last Wednesday,
25 June 3, 2020 to us via email within the next 48 hours in order to have a productive
26 meeting next Wednesday.

27 We can meet next Wednesday via teleconference from 11am to 12 noon.

28 Lastly, please reach out to me directly should any sudden issues occur which
29 impact negotiations.
30

31 Later that morning, Gomes responded that she contacted Totten "immediately after
32 receiving a message from Commissioner Saunders." Referencing the ground rules,
33 Gomes stated that the County had to cancel the meeting due to "unforeseen

1 circumstances.” She further stated that she would confirm the next session with Saunders
2 and asked Totten to “hold that time.” That evening, still on June 10, Gomes wrote to Totten
3 that, “next Thursday or Friday work best at 11 or 12.”

4 Parties Do Not Meet Week of June 15

5 By email on Tuesday morning, June 16, 2020, Gomes asked Totten if the Union
6 could “confirm Thursday or Friday at 11 or 12? Commissioner Saunders’ work schedule
7 for meetings changed to Wednesday which make[s] him unavailable.” Later that morning,
8 Totten responded that, “I had sent the email/calendar invitation to you for Wednesday.
9 It[']s not helpful to make such schedule changes the day before negotiations and not in
10 the spirit of the ground rules. I’ll see if we can do Thursday or Friday next week as I am
11 fully booked this week.” That afternoon, Totten again emailed Gomes, this time to state
12 that the Union was “extremely concerned as tomorrow is now your second cancellation
13 of a scheduled CBA negotiation session. Please provide your initial proposal to us
14 electronically asap in order to have a productive session when we negotiate next week.”
15 Later that afternoon, Gomes responded to Totten that she “never confirmed Wednesday.”
16 Still on June 16, Totten responded that, “I can understand occasional scheduling issues
17 but we seem to be getting off on the wrong foot here in terms of good faith bargaining.
18 Again, please provide a response to our proposal as well as Bristol County’s proposal to
19 us electronically, it would be helpful towards making our next session productive.”

20 Employer Signs Grounds Rules, Responds to Union Proposal, and Offers Initial
21 Proposal

22
23 By email on the morning of June 17, 2020, Totten wrote to Gomes to confirm “next
24 week, Thursday, 6/25 for our 2nd CBA negotiation session.” That morning, Gomes
25 responded to confirm June 25 at 11:00 A.M. for the second bargaining session, and she

1 stated that the Employer “would like to meet in person at the New Bedford Superior
2 Courthouse.” Later that morning, June 17, Gomes forwarded to Totten signed Ground
3 Rules, the Employer’s response to the Union’s initial proposal, and the “County’s Proposal
4 #1.”

5 Ground Rules

6 The Union executed the Ground Rules on June 4, 2020. Gomes executed them
7 on behalf of the Employer on June 12, 2020. The Ground Rules contain 15 provisions
8 and do not set a deadline for concluding negotiations.

9 Employer Response to Union’s Initial Proposal

10 The Union’s written proposal, which it presented orally on June 3, covered the
11 following subjects: Length of term 3 Year Proposal; Compensation; Economic Re-opener;
12 Vacation; Article 14/Sick time; and Clothing Allowance. The Union further proposed
13 certain “MISC. = NEW LANGUAGE PROPOSALS” that included: Snow
14 Emergency/Comp time; Employee Longevity Bonus Pay; Vision Coverage/Davis Vision;
15 and Sr. Custodian. Gomes indicated the Employer’s response to each proposal by writing
16 “Yes” or “No,” along with any comments, next to each proposal on the document.

17 The Commissioners agreed to a three-year contract, to run from July 1, 2020-June
18 30, 2023. Regarding Compensation, the Union had proposed 5% in year one; 5% in year
19 two; and 5% in year three. The Union had further proposed that “Wage payment will be
20 retroactive should negotiations proceed beyond June 30, 2020.” Gomes wrote, “See
21 County’s Counter” regarding the annual increases, and the Commissioners agreed to the
22 retroactivity provision should negotiations extend beyond June 30.

1 The Commissioners rejected the Union's proposal for an economic re-opener. The
2 Employer also rejected the Union's proposal to increase the accrual of vacation for long-
3 term employees and the Union's proposal to make "Thanksgiving Eve, Christmas Eve,
4 New Years Eve" a half-day. The Employer rejected most of the Union's sick time
5 proposals but did agree to apply sick time retroactively to any employee who is reinstated,
6 on the condition that "If laid off from County within 1 year."⁹

7 The Employer rejected the Union's proposal to increase the clothing allowance
8 from \$300 to \$375 per year. The Union had also represented that the clothing allowance
9 "should have currently been \$325," and proposed retroactive reimbursement "for the
10 previously negotiated difference of \$25 for 3 years." The Employer responded that this
11 proposal was "N/A." Additionally, the Employer rejected the Union's proposal that the
12 clothing allowance should not be taxed. Gomes wrote "See Treasurer's Memo 5/2/2012"
13 next to this item.¹⁰ The Employer rejected the remainder of the Union's proposals,
14 including to "increase staffing to 2 Senior Custodians."

15 Employer's Proposal #1

16 The Employer's proposal contained five items. Item 1 provided for a three-year
17 contract. Item 2 provided that: "Effective July 1, 2020, the County intends to discontinue
18 the position of 2nd Class Fireman/Building Custodian at the Taunton Superior Court

⁹Here, Gomes wrote "OK" rather than Yes.

¹⁰In relevant part, the referenced memo provides that: "The IRS states that in order for a uniform allowance to be non-taxable... 'the clothes cannot be suitable for everyday wear' Since the clothes are suitable for everyday wear, they do not qualify for the exemption, and are therefore taxable."

1 building. Employee would be changed to position of Senior Building Custodian and
2 maintain seniority date.”¹¹

3 Item 3 of the Employer’s proposal pertained to compensation. The Employer
4 countered the Union’s compensation proposal by offering the Union 0% in year one, 0%
5 in year two, and 1% in year three. Additionally, the Employer proposed to replace Article
6 9, Section 8, which covered the clothing allowance, with a new paragraph that provided:

7 Section 8

8 *Strike paragraph and replace with*

9 Effective July 1, 2020, all employees will be issued a \$300.00 clothing allowance,
10 which allowance shall be established as a credit on behalf of the employee with
11 the successful clothing supply bidder. Standardized uniforms will be issued upon
12 consensus between the County and the Union.¹²

13
14 Item 4 made minor changes to Article 15 – Personal Days. Finally, Item 5 proposed
15 to change Article 16 – Holidays by striking language that gave custodians hired prior to
16 July 1, 2012, two additional personal days beyond those provided under Article 15.

17 Union Cancels June 25, 2020 Bargaining Session

¹¹Daly testified: “The Employer was going to eliminate the Second Class fireman/Custodian title, and take the incumbent employee, Glenn Souza, and put him down to a senior building custodian. The extent is not cited here, that would result in a \$7,000 decrease in his wages.” Gomes described the second class fireman position as in a “different grade” than the senior custodian. The Employer did not dispute Daly’s \$7,000 number, and I therefore credit Daly’s testimony regarding the financial impact of the Employer’s decision to abolish the position and convert Souza to a senior custodian.

¹²Daly testified regarding this proposal that: “So the Employer was looking to change the way our clothing allowance worked. They wanted to ensure that our members had... uniforms, basically... at work. Their concern as explained to me was that our members used the clothing allowance to buy, you know, whatever clothing they needed for the job, but it, you know, was hard to identify them as Bristol County employees because a lot of times they were just wearing t-shirts, jeans, you know, stuff that you’d expect a maintenance person to wear without the identifiers tying them to the County.”

1 By email on the morning of June 25, 2020, Totten wrote to Gomes that he “never
2 received a signed copy” of the ground rules. A few minutes later, Gomes responded that
3 she “sent it to you along with our responses and proposals on the 17th.” Later that
4 morning, Totten wrote to Gomes that, “We need to postpone our session for 11am.
5 Apologies on late notice but due to late receipt of your proposal, we need to review
6 internally. I’ll set up our next session for next Thursday at 11am-12 noon.” Gomes quickly
7 responded that, “I sent proposal responses, our proposals and the signed Ground Rules
8 on June 17th. You opened the document on June 18th. It’s unfortunate that we need to
9 postpone today! Now with year end, we won’t be able to schedule until after July 10th.”
10 That afternoon, Totten responded that, “I opened your email on June 18, however, as you
11 can certainly see by my request for ground rules, there was a technical issue in Microsoft
12 outlook. Bristol has now postponed twice and yes it is unfortunate whenever there is a
13 postponement necessary.”¹³

14 A few minutes later, Gomes responded to Totten that she would send him a few
15 dates, and that the County was “requesting in-person negotiations to avoid these issues.”
16 Totten responded:

17 As I mentioned previously, I have [a medical issue] until CV19 gets to a better
18 place, I am not comfortable meeting in person but I realize at some point we will
19 have to have a personal meeting, if we are getting close to a TA and given your
20 most recent proposal, we are not close at this point but I’m hopeful we can reach
21 common ground on some matters.
22

¹³Totten did not testify at the hearing. To the extent that a finding is necessary, I do not credit the representations contained in this email. If a technical issue had prevented the documents from opening on the 18th, one would expect that Totten would have asked Gomes to resend the materials. Moreover, according to the record, Gomes did not resend the materials but referred Totten to the June 17 email, which he apparently accessed without issue. The mistake, if any, appears to be Totten’s.

1 Gomes then offered July 14, 16 or 17 for the next bargaining session, to be conducted
2 via teleconference.

3 By email on June 30, 2020, Gomes asked Totten, who had not responded to her
4 offer of dates, to confirm a date. Totten responded, "Let's put a hold on Thursday, July
5 25th from 11am to 12 noon (I am on vacation that previous week). I'll confirm by end of
6 day today." Later that morning, Gomes responded that, "That was not one of our
7 options...and July 25th is a Saturday. Commissioner Saunders will not [be] available the
8 week of July 20th." Totten responded that he was on vacation "the week of July 13th
9 through 17th." Later that afternoon, Gomes proposed the parties next meet on July 30 or
10 31.

11 Daly replaces Totten as Union's Bargaining Agent

12 Totten did not respond to Gomes' offer of dates. On July 9 and 22, 2020, Gomes
13 attempted to follow up with Totten, who did not respond. At some point in July, Totten
14 stepped aside due to medical reasons, and Daly replaced him as the Union's chief
15 negotiator. By email on July 28, Gomes wrote to Daly and Basile to "confirm our next
16 negotiating session for Tuesday, August 4th at 1 pm." On July 29, Daly confirmed the
17 August 4 date, and asked Gomes to also confirm that the next meeting would be the
18 second bargaining session. Later that day, Gomes confirmed "this will be session two."

19 August 4, 2020 Bargaining Session

20 On August 3, 2020, Daly informed Gomes that Deb O'Brien, a Union business
21 agent at the time of bargaining, Phil Rodrigues, a member of the bargaining unit, and
22 maybe Souza, would participate in the upcoming bargaining session in New Bedford. On
23 August 4, the parties met in person at the New Bedford courthouse for their second

1 bargaining session. They shared and reviewed proposals on each side; the Union did not
2 agree to the Employer's proposal to abolish the second-class fireman position.¹⁴

3 Bargaining up to September 24, 2020

4 The parties met again on August 27, September 10, and September 24, 2020. In
5 or around early September, Gomes told Daly that the Advisory Board would be meeting
6 in November. As of September 24, 2020, the parties had reached five tentative
7 agreements. The parties had agreed to changes in the language of Article 14 – Sick Time,
8 Section 4; they had agreed to changes in the language of Article 15 – Personal Days;
9 they had agreed to remove language from Article 16 – Holidays, Section 1 that referred
10 to personal days; they had agreed to add a new Section 7 to Article 10 – Hours of Work
11 and Overtime, which related to compensation during COVID-19-related closures of
12 County facilities; and they had agreed to annual wage increases of 2%, 2%, and 2%
13 during a three-year contract, with the first increase being retroactive to July 1, 2020.¹⁵

14 At the end of the September 24 bargaining session, the Union had several
15 proposals it was still hoping to make progress on, including sick leave buyback, overtime,

¹⁴The record lacks specific details about this session. Gomes testified that, "We had some discussions early on about certain things, language, corrections, and whatnot in the Collective Bargaining Agreement that I think we pretty much had agreed to at that point that were just corrections within the contract. Things having to do with personal days, language that – that had been left in the contract that could now be taken out because it no longer had any bearing. So we had progress in that respect, and in respect to just the sharing and reviewing of our – our proposals on each side. But we were, you know, still stuck on that main point of the fireman, specifically." I note that this was the first time the parties met to bargain after the Employer emailed the Union its initial proposal to abolish the position and convert Souza to a senior building custodian.

¹⁵I have made this finding by comparing the initial proposals and the Employer's response, with the tentative agreements that the Union's November 2, 2020 proposal references and the contents of the Employer's October 22, 2020 implementation letter.

1 the clothing allowance, and holidays.¹⁶ The Employer continued to press to eliminate the
2 second class fireman position. Additionally, as of September 24, the Employer proposed
3 to remove language from Article 3, Section 2, which pertained to agency service fees, but
4 the parties had not agreed on new language for that section. The Employer was also
5 proposing a change to Article 16 - Holidays, Section 1, to add Juneteenth as a holiday
6 and include language providing that if any of the enumerated holidays ceased to be a
7 legal holiday under state law, that day would cease to be a holiday under the agreement.
8 At the end of the session, Daly indicated that he wanted to speak to the bargaining unit
9 members to figure out where they stood on the Employer's proposals. The parties
10 scheduled an additional bargaining session for on or around October 8, 2020. At no time
11 during bargaining did the Employer present its proposals on September 24 as its final or
12 last best offer.

13 Parties Postpone October 8, 2020 Bargaining Session

14 On or around October 6, Daly called Gomes and told her that he could not convene
15 a meeting of the bargaining unit until October 9. The parties mutually agreed to postpone
16 the October 8 bargaining session until after Daly could meet with the bargaining unit.

¹⁶Daly testified that the Union "still wanted to see headway on" its sick leave buyback proposal to increase the value of sick leave at retirement in Article 14, Section 9 from 25% to 27%. He further testified that, "There were still a few things [to] be hammered out with the – clothing allowance...how it would work. And...there was still a holiday proposal out there. We were still proposing a half-day holiday prior to...or a skeleton crew day prior to... Christmas Eve." Daly explained regarding the clothing allowance that the Union still wanted to discuss "how vendor selection would work." Daly also testified that the Union still wanted to discuss a proposal concerning, "Actual overtime for ten hours...above the regular schedule in a week before they would go into comp time."

1 During this call, Daly raised the prospect of the parties engaging in mediation to conclude
2 bargaining.¹⁷

3 On Friday, October 9, 2020, Daly met with approximately two-thirds of the
4 bargaining unit.¹⁸ He explained the state of bargaining to the members, discussing issues
5 such as the clothing allowance, wages, the second class fireman proposal, and the
6 proposals that the Union continued to pursue, including sick leave buyback and overtime.
7 Daly also spoke to the membership about what going to mediation would entail, and he
8 explained to them that mediation could delay their wage increase. The membership was
9 concerned with the second class fireman proposal and the clothing allowance.
10 Specifically, the membership was uncomfortable with the second class fireman proposal
11 because they did not want to vote to accept a wage decrease for a member of the
12 bargaining unit. Regarding the clothing allowance, the membership felt that they should
13 be compensated for switching to standardized, uniform clothing, either through an
14 increase in sick leave buyback or to overtime. The membership wanted Daly to pursue
15 mediation.

16 Directly after the meeting, Daly called Gomes. He told her that he had talked to the
17 bargaining unit members and that they were in favor of moving forward with mediation.¹⁹

¹⁷Daly testified that he could not convene his group until October 9. He stated: "I had called Maria in the interim to express that... we're in a tough position... we... weren't seeing eye to eye on a lot of issues. I believe in that call I told her that... I was interested in taking to mediation because I thought we were at loggerheads...and I thought a mediator might help us get over the hump."

¹⁸This was the Friday before the Columbus Day holiday weekend.

¹⁹Gomes and Daly recalled this conversation differently. Gomes testified emphatically that Daly told her during this call that the parties had reached "impasse," and Gomes took the position that upon Daly invoking the term "impasse," the Employer was entitled to

1 Daly mentioned either filing a petition for mediation with the DLR jointly or individually as
2 the Union. He told Gomes he would get the petition to her next week. He did not attempt
3 to schedule an additional bargaining date because he understood the parties to be
4 entering mediation and expected the mediator to set the date of their next meeting.²⁰

5 Employer Refuses to Join Petition for Mediation

6 By email on October 13, 2020, the next business day after their October 9
7 conversation, Daly sent Gomes a joint petition for mediation at the DLR. That afternoon,
8 Gomes responded via email that, “The County will not join in the petition.” A few minutes
9 later, Daly responded that he would plan on filing individually and thanked Gomes for
10 letting him know.

11 Employer Informs the Union that It Is Implementing Its September 24, 2020 Offer

12 Daly does not control the Union’s finances, and he was waiting for the Union to
13 issue a check for the \$500 filing fee for mediation with the DLR before filing the petition
14 for mediation individually.²¹ The parties did not communicate further until Gomes wrote to
15 Daly, by letter dated October 22, 2020, that:

implement its last, best offer. Daly testified that he “may have said something along the lines I believe we may be getting to impasse, but immediately followed that with I want to proceed to mediation. The conversation on the 9th was to inform...management that our unit was okay moving to mediation, we wanted to move forward with it.” Regardless of the exact wording Daly used, there is no question that he was talking about seeking mediation from the DLR on the outstanding bargaining issues rather than declaring bargaining at an impasse that would justify a unilateral change.

²⁰Gomes testified that she did not agree that the Commissioners would go to mediation and that she did not have the authority to commit the Commissioners to mediation.

²¹Daly testified that he had only filed for mediation with the DLR once before, and that he mistakenly believed that he needed to pay the filing fee at the time of filing the petition. He testified that he learned on October 23 from Basile that he could file the petition, and the DLR would bill the Union later.

1 As you know, the parties have been actively engaged in collective bargaining for
2 a successor contract since June 3, 2020. Toward that end the parties have met
3 (virtually and in person) on five occasions, specifically 6/3/20, 8/4/20, 8/27/20,
4 9/10/20 & 9/24/20 and spoken by phone several times. Some issues that either
5 party has placed on the table, have been tentatively agreed to by the parties with
6 the notable exception of the elimination of the "fireman's position." The County had
7 proposed the elimination of the fireman's position as one of its initial proposals at
8 the first bargaining session on June 3, 2020. The parties have negotiated on that
9 and other issues over many sessions and have reached impasse over several
10 issues which remain un-agreed. On October 9, 2020, County Administrator Gomes
11 was informed by Business Agent Patrick Daly that the Union considered the parties
12 to be at impasse.

13
14 At this time, the County budget must be finalized and sent to the County Advisory
15 Board (our funding authority for approval) which is set to meet on November 19,
16 2020.²² The Board meets once each year to approve the County budget and
17 collective bargaining agreements. If the Board does not vote on wage increases at
18 its annual meeting no wage increases can be given to unit members and the
19 approval of any increases likely will have to wait to be considered by the Board at
20 its next year's meeting.

21
22 Accordingly, given the fact that the parties are admittedly at impasse and that no
23 petition to the Department of Labor Relations has been served on the Employer
24 requesting the determination of the existence of an impasse, the Employer hereby
25 implements its final bargaining offer presented on September 24, 2020 forthwith.

26
27 The letter went on to recite the offer that the Employer presented at the September
28 24 bargaining session. As already discussed, the parties had tentatively agreed to some
29 of these issues, and some remained unresolved. In addition to the tentatively-agreed-to
30 issues, the letter purported to implement the following unresolved Employer proposals:

31 2. Effective July 1, 2020, the County intends to discontinue the position of 2nd Class
32 Fireman/Building Custodian at the Taunton Superior Court building. Employee
33 would be changed to position of Senior Building Custodian (top step) and maintain
34 seniority date.

35
36 3. Article 3 – Union Dues and Agency Service Fees

37
38 The title of Article 3 shall be amended to read "Union Dues"

²²This is the first time that the date of November 19 for the Advisory Board meeting appears in the record. Gomes testified that she learned of the date "later in October."

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All of the language in Section 2 of this Article shall be stricken and replaced with the following:

“The Union certifies that it is in compliance with all requirements under the law.”

4. Article 9 - Compensation

....

Section 8

Strike paragraph and replace with [emphasis in original]

The custodial employees will be issued a three hundred dollar (\$300) clothing allowance. The clothing allowance will be paid out in the first paycheck date in October. For the remainder of Fiscal Year 2021, the County will supply each custodian with two uniform shirts. Effective July 1, 2021, the employees will be required to purchase and wear the uniform shirts from the awarded provider. Uniform shirts will be kept in clean and unblemished condition by the employee and replaced as necessary.

8. Article 16 – Holidays

....

Add Juneteenth as a Holiday. Add language to Article 16, Section 1: “If any of the above enumerated holidays shall at any time cease to be recognized as a legal holiday pursuant to G.L. Chapter 4, Section 7, Clause 18, it shall cease to be recognized as a holiday under this agreement.” [emphasis in original]

The letter concludes:

As you know, the modernization of the heating system at the Taunton Superior Court site has made the fireman’s position obsolete within the county. Accordingly, we could have dealt with the issue as a matter of just cause termination of the employee based on the fact that unquestionably the modernization of the heating system constitutes just cause to eliminate the post. There is still a need for a new position of senior custodian which we had hoped this person who held the fireman’s position would accept. Please let us know if he has any interest in the new position by 12 noon on October 28, 2020. If there is interest, we can enter into a side agreement to offer him the position and avoid the bid... process.

Union Responds to Gomes’ October 22 Letter and Files Petition for Mediation

That afternoon, October 22, 2020, Daly responded to Gomes, in relevant part, that:

1 As you are aware from my 10-13-2020 email, [t]he Union has prepared a mediation
2 request. I am awaiting approval of the filing fee from our secretary treasurer and
3 intend to submit and serve a copy to you as soon as the check is approved.
4

5 We believe your best and final offer is premature and reject that implementation is
6 appropriate or lawful.
7

8 We will be following up with you when the petition is filed.
9

10 By email on October 23, 2020, Gomes wrote to Daly and Basile that:

11 The County is in receipt of your email dated October 22, 2020 and reject the
12 Union's position as disingenuous at best. As you well know once parties to
13 collective bargaining reach "impasse" the law permits the implementation of the
14 final offer unless a petition to determine whether an impasse has occurred is filed
15 with the Department of Labor Relations. On October 9th, you, on behalf of the
16 Union, announced that the parties were at impasse in bargaining. Although two
17 weeks had passed, the Union had not filed a petition for determination as to
18 whether an impasse existed. Accordingly, the County was legally entitled to
19 implement its final best offer placed on the table on September 24th. To suggest
20 now that the County's action to implement was "premature" is a renege of the
21 Union's declared position that the parties had reached impasse.
22

23 The County's action to implement was done to provide our custodians and your
24 members with the same wage increases that all other unionized county employees
25 will receive over this and the next two fiscal years. Absent implementation, no
26 wage increases could be acted on by the County Advisory Board for the
27 custodians. As you also know, unlike the legislature or a city council, the County
28 Advisory Board meets for one day only, once a year. If they do not vote on wage
29 increases for the custodians on their annual meeting of November 19th, that
30 authority would have to wait to until the next year's meeting and no raises could
31 be paid to your members. Had the Union actually filed a petition for determination
32 of impasse preventing implementation at this time, your members would have been
33 assured of not receiving any wage increases along with other county employees
34 for at least another year. [emphasis in original]
35

36 I sincerely hope that it was not the Union's intent to disadvantage all of its members
37 in favor of the personal interests of one member. In that regard, if we do not hear
38 that the member who had held the fireman's position desires to take the position
39 of senior custodian by October 28th, we will have no alternative but to treat this lack
40 of action as a resignation, post the position to other unit members, or absent
41 interest within the unit, hire a new employee from outside.
42

43 That afternoon, Basile responded to Gomes that:

1 The Petition for Mediation has been filed with the DLR.²³ Your email below contains
2 too many inaccuracies to address at this point. You had represented during the
3 latter stages of negotiations that you were amenable to pursuing mediation, even
4 at one point indicating that you would file the petition jointly. You now, surprisingly,
5 seem to have reneged on that representation.
6

7 The Union remains willing to meet again to discuss the outstanding issues that
8 were not agreed to and can be available next week at a mutually agreeable time.
9 The Union also intends to file a charge in response to your position below.
10

11 By email dated October 26, 2020, Gomes wrote to Daly that, "The County would
12 be willing to meet with you tomorrow (Tuesday), Wednesday or Thursday, depending on
13 time in Taunton. Although, I want to be perfectly clear that bargaining has ended and this
14 will not be considered a bargaining session."

15 Employer Refuses to Mediate

16 By letter to the DLR dated October 27, 2020, the Employer, through its attorney,
17 refused to mediate. In relevant part, the letter states:

18 After receipt of the County's notice that it had implemented the Last Best Offer, the
19 Union then filed under G.L. c. 150E §9. As the County had already implemented
20 its Last Best Offer, prior to the Union filing for mediation, exercising its full rights
21 under Chapter 150E, the bargaining process had ended at that time. The results
22 of the bargaining have already been effectuated. Accordingly, the instant petition
23 is untimely and improper. As such, the County will not participate voluntarily in any
24 mediation and asks the Department to dismiss the petition.
25

26 The Union, by letter to the DLR through its attorney, responded the same day. The Union
27 disputed the representations in the Employer's letter and requested that the DLR continue
28 to process the petition for mediation. The Union also filed the Charge.

29 The DLR mediator scheduled a mediation session for November 19, 2020. The
30 Union attended. The Employer did not attend.

²³The Union filed the mediation petition on October 23, 2020. The DLR docketed the matter as PS-20-8261 and assigned a mediator.

1 November 2, 2020 Meeting

2 On November 2, 2020, the parties met in Taunton. At that time, the Union
3 presented a formal counterproposal to the Employer's September 24 proposal.²⁴
4 Regarding holidays, the Union proposed that the parties add Juneteenth as a holiday.
5 The Union was now willing to give up its Christmas Eve "skeleton staffing" proposal but
6 did not want to include in the agreement language removing holidays if the legislature
7 removed them.²⁵ The Union wanted to bargain over the removal of any holidays as those
8 issues arose. The Union still sought to increase its sick leave buyback from 25% to 27%.
9 Regarding the clothing allowance, the Union wrote:

10 *As proposed* – the Union will agree to the County's proposal, on the condition that
11 the County provide the first set of work shirts giving 3 short sleeve shirts and 2 long
12 sleeve shirts to all unit employees. *Employer should bid clothing vendors*
13 *periodically to avoid large increases in cost; the requirement of a work shirt shall*
14 *not affect the employee's ability to choose appropriate work clothing outside of the*
15 *shirt.*
16

17 The Union also still sought its overtime proposal, which provided that:

18 *As proposed* – Up to 10 extra hours worked outside of an employee's regular
19 weekly schedule shall be paid at the applicable rate. Extra hours beyond ten (10)
20 in one week shall be paid as compensatory time.
21

22 Regarding the second class fireman position, the Union offered a new counter:

23 Union proposes freezing the 2nd Class Fireman/Building Custodian Rate. Upon the
24 incumbent employee's retirement or leaving the position be eliminated. Should the
25 Sr. Building Custodian position pay scale exceed the rate for the 2nd Class

²⁴Daly testified that the Union was trying to "keep things going."

²⁵The Union had initially proposed a ½ day off for Thanksgiving Eve, Christmas Eve, and New Year's Eve, which the Employer rejected. At some point, the Union's proposal morphed into "skeleton staffing" on Christmas Eve, whereby "1/2 the staff shall receive a 1/2 day every other year alternating with the other half each year based on seniority."

1 Fireman/Building Custodian position, the employee shall receive wage increases
2 in line with the Sr. Building Custodian.²⁶

3
4 Finally, the Union offered a counterproposal on “Post Janus Language on Agency
5 Fee/Dues:”

6 *Counter* – Amend Article 3, Section 2 to read: “Each employee who elects not to
7 join or maintain membership in the Union may consent in writing to the
8 authorization of the deduction of an agency service fee from his/her wages and to
9 the designation of the Union as the recipient thereof. The Union certifies that it is
10 in compliance with all requirements under the law regarding agency service fees,
11 and shall remain so.”

12
13 After the Union presented its counterproposal, the Employer did not substantively
14 respond. Rather, the Employer restated its position that it was implementing its
15 September 24 offer, and bargaining had concluded. The parties did not meet again.

16 OPINION

17 The issues are whether the Employer violated the Law by: I) implementing its last
18 best offer during successor contract negotiations when it was not at impasse with the
19 Union in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law; II)
20 refusing to participate in the mediation process of the DLR in violation of Section 10(a)(6)
21 and, derivatively, Section 10(a)(1) of the Law; and III) refusing to bargain with the Union
22 at a November 2, 2020 meeting in violation of Section 10(a)(5) and, derivatively, Section
23 10(a)(1) of the Law. I address each allegation in turn.

24 Implementing Prior to Impasse

25 The Commonwealth Employment Relations Board (CERB) has repeatedly stated
26 that impasse is a question of fact requiring a consideration of the totality of the
27 circumstances to decide whether, despite their good faith, the parties are simply

²⁶Daly testified that the Union was trying to “reduce harm to the incumbent.”

1 deadlocked. City of Worcester, 39 MLC 271, 272, MUP-11-6289 (March 29, 2013). To
2 determine whether impasse has been reached, the CERB considers bargaining history,
3 the good faith of the parties, the length of negotiations, the importance of the issues to
4 which there is disagreement, and the contemporaneous understanding of the parties
5 concerning the state of the negotiations. Ashburnham-Westminster Regional School
6 District, 29 MLC 191, 195, MUP-01-3144 (April 9, 2003). The ultimate test remains
7 whether there is a likelihood of further movement by either side and whether the parties
8 have exhausted all possibility of compromise. Commonwealth of Massachusetts, 25 MLC
9 201, 205, SUP-4075 (June 4, 1999). If one party to the negotiations indicates a desire to
10 continue bargaining, it demonstrates that the parties have not exhausted all possibilities
11 of compromise and precludes a finding of impasse. City of Boston, 21 MLC 1350, 1361,
12 MUP-8372 (October 17, 1994) (rejecting as inflexible the employer's approach to the
13 dynamics of collective bargaining where union had requested to continue negotiating, and
14 circumstances did not require immediate implementation of proposed changes). The
15 CERB has made clear that it views the determination of an impasse under Section 9 of
16 the Law as independent of the CERB's determination whether an impasse justifying
17 unilateral change has occurred. Massachusetts Organization of State Engineers and
18 Scientists v. Labor Relations Commission, 389 Mass 920, 925, fn.7 (1983).

19 Here, I find that the totality of the circumstances establishes that the parties were
20 not at impasse after the September 24, 2020 bargaining session or on October 22, 2020,
21 when the Employer notified the Union that it was implementing its September 24, 2020
22 offer. The parties did not formally begin discussing the Employer's proposals until the
23 second session on August 4. As of September 24, which ended up being the last date

1 that the Employer engaged in bargaining and was less than two months later, the parties
2 had scheduled an additional bargaining session. Accordingly, the parties did not
3 understand themselves to be at impasse as of September 24.

4 They postponed that additional session so that Daly could speak to the bargaining
5 unit before the parties met again, and during the October 6 conversation Daly raised the
6 prospect of seeking the assistance of a mediator to resolve the outstanding issues and
7 get them “over the hump.” Daly credibly testified that the only reason he did not seek to
8 reschedule the next bargaining session was because he thought the parties were going
9 to mediation and that the mediator would schedule it. The clear import of the October 9
10 conversation was that the Union wanted the assistance of a mediator to resolve the
11 outstanding issues, not that further movement was impossible. The only change in
12 circumstances between September 24, when the parties scheduled an additional
13 bargaining session, and October 22, when the Employer purported to implement, was
14 that the Union asked the Employer to join in mediation through the DLR. The Union’s
15 willingness to work with a mediator to get “over the hump” shows that it considered further
16 movement possible.

17 As of October 22, both parties still had positions on the table that they wanted to
18 pursue, which suggests that further movement was possible and that the parties had not
19 exhausted all possibility of compromise. For example, the evidence establishes that the
20 Union was willing to accept the change to standardized uniforms but wanted to continue
21 substantive bargaining over that significant change. Sheriff of Worcester County, 27 MLC
22 103, 106, MUP-1910 (January 11, 2001) (dress codes are a mandatory subject of

1 bargaining). Moreover, the Union immediately protested the Employer's declaration of
2 impasse and indicated a desire to resume bargaining.

3 Finally, the Employer cites no legal authority holding that a request to jointly
4 mediate frees an employer to implement its last offer before a union can file the petition.
5 Such a rule would outright discourage, if not abolish, joint requests for mediation because
6 it would allow an employer to unilaterally declare an end to bargaining, and I decline to
7 interpret the Law as allowing for such an "inflexible approach to the dynamics of the
8 collective negotiations process." City of Boston, 21 MLC 1361. Accordingly, I find that the
9 parties were not at an impasse that justified implementing unilateral changes, and the
10 Employer violated the Law when it implemented its September 24 offer on October 22.

11 Exigent Circumstances

12 The Commissioners argue in the alternative to impasse that circumstances beyond
13 their control allowed them to implement the September 24, 2020 offer. An employer who
14 relies on this narrow exception to the rule prohibiting unilateral changes in employees'
15 working conditions must show that circumstances beyond its control require the
16 imposition of a deadline for negotiations, the deadline imposed was reasonable and
17 necessary, and the union was on notice that the change would be implemented on a
18 certain date. Town of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000).

19 Here, the Commissioners did not establish any of the elements of an exigency
20 defense. As an initial matter, the parties' CBA restricts the parties from commencing
21 negotiations more than 60 days prior to the expiration of their agreement, which suggests
22 that they have not historically treated time as being of the essence for concluding
23 bargaining, and they did not impose through their ground rules a deadline for bargaining.

1 Moreover, the Commissioners agreed to a retroactive wage increase if bargaining
2 continued beyond the expiration of the CBA, again suggesting that time was not of the
3 essence. Furthermore, the Commissioners never announced a specific deadline for
4 bargaining. Although the Employer raised the specter of the Advisory Board during
5 negotiations, the Employer merely asserted for the first time, on October 22, 2020, as it
6 announced that it was implementing, that the Advisory Board was meeting on November
7 19 and the budget needed to be finalized. Where the Commissioners had agreed to a
8 retroactive wage increase, and the Union had accepted that mediation and extended
9 bargaining could result in a delay to the wage increase, the Commissioners' position that
10 they had to implement so that they could guarantee the bargaining unit members' wage
11 increase is unpersuasive. Finally, although the Advisory Board finds it inconvenient to
12 meet more than once a year, nothing prohibits it from calling a special meeting to
13 supplement its budget.²⁷ In sum, no circumstance beyond the Employer's control required
14 a deadline for negotiations, the Commissioners' deadline was unreasonable and
15 unnecessary, and the Union was not on notice that a change would be implemented on
16 a certain date. Accordingly, the Commissioners did not establish that exigent
17 circumstances permitted implementation as of October 22, 2020.

18 Refusal to Mediate

19 On October 23, 2020, the Union filed a petition for mediation. The DLR assigned
20 a mediator, who scheduled a mediation session for November 19, 2020. On October 27,
21 2020, the Commissioners, through counsel, announced that they would not participate in

²⁷Pursuant to Section 7(b) of the Law, the Commissioners would be required to submit the negotiated agreement to the Advisory Board within 30 days after the date on which the parties executed the agreement.

1 mediation because bargaining had already concluded. The Commissioners subsequently
2 did not attend the November 19 mediation session. This failure to mediate violated
3 Section 10(a)(6) and, derivatively, Section 10(a)(1) of the Law.

4 Refusal to Bargain

5 On November 2, 2020, the Commissioners met with the Union but refused to
6 engage in substantive bargaining with the Union. In so doing, the County failed to bargain
7 in good faith and violated the Law. Southern Worcester County Regional Vocational
8 School District, 2 MLC 1488, MUP-2090, MUPL-2010 (May 6, 1976).

9 CONCLUSION

10 The Commissioners violated Section 10(a)(5) and, derivatively, Section 10(a)(1)
11 of the Law by implementing the September 24, 2020 offer when the parties were not at
12 impasse. The Commissioners also violated Section 10(a)(6) and, derivatively, Section
13 10(a)(1) of the Law by refusing to mediate on November 19, 2020. Finally, the
14 Commissioners' refusal to engage in substantive bargaining at the November 2, 2020
15 meeting violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

16 REMEDY

17 The CERB's goal in fashioning appropriate remedies is to place the charging party
18 in the position it would have been in but for the unfair labor practice. Natick School
19 Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). Thus, the traditional
20 remedy for violating the duty to bargain in good faith is to restore the status quo ante and
21 to order it maintained until the bargaining obligation has been fulfilled. Id. In cases where
22 the employer has, however, granted an economic benefit to its employees, the CERB
23 declines to order individual employees to return the benefit; the CERB may order

1 prospective rescission of the economic benefit. Millis School Committee, 23 MLC 99, 100,
2 MUP-9038 (October 8, 1996). The CERB seeks to avoid remedies that would be onerous,
3 unjust, or that would drive a wedge between a union and the employees it represents.
4 City of Boston, 9 MLC 1664, 1669, MUP-4926 (February 18, 1983).

5 Here, the Commissioner's unlawful implementation resulted in economic benefits
6 to which the parties had tentatively agreed. These benefits included wage increases for
7 fiscal years 2021, 2022, and 2023; increased compensation for working during COVID-
8 19 related building closures; and the addition of the Juneteenth holiday. The
9 implementation also changed the clothing allowance language in the CBA from a system
10 where the employees submitted their receipts for reimbursement up to \$300 a year, to a
11 system where the Employer issues the employees a \$300 allowance that the employees
12 are required to spend through an approved provider. Accordingly, I conclude that ordering
13 the Employer to rescind these economic benefits, even prospectively, would be onerous
14 and unjust and would potentially damage the Union's relationship with its employees. I
15 therefore order the Employer to restore the status quo ante except as it pertains to the
16 economic benefits just discussed; I order the Employer to maintain these economic
17 benefits pending the conclusion of bargaining.

18 Finally, the implementation resulted in an economic loss for Souza, whose
19 conversion from a second class fireman to a senior building custodian reduced his wages.
20 Although I do not order the Employer to restore the abolished position, I order it to make
21 Souza whole for all lost wages. Prospectively, I order the Employer, pending the
22 conclusion of bargaining, to compensate Souza at the rate he would currently receive but
23 for the unlawful implementation.

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ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Commissioners shall:

1. Cease and desist from:
 - a. Failing to bargain in good faith by implementing a bargaining offer when the parties were not at impasse;
 - b. Refusing to participate in DLR mediation;
 - c. Refusing to bargain with the Union; and
 - d. In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
 - a. Restore the status quo ante as of October 22, 2020, with the exception of the abolished second class fireman position and the economic benefits contained in the Employer's September 24 offer. The Employer shall maintain these economic benefits resulting from its unlawful implementation pending the conclusion of bargaining.
 - b. Upon demand, bargain with the Union to resolution or impasse over the terms and conditions of a successor to the parties' 2017-2020 CBA.
 - c. Participate in any scheduled DLR mediation.
 - d. Make bargaining unit member Souza whole for all lost wages that resulted from the unlawful implementation of the Commissioners' September 24 offer, from October 22, 2020, through the date of this Order, plus interest at the rate specified by M.G.L. c. 231, Section 6I, compounded quarterly, up to the date that the Employer complies with this Order. Prospectively, the Commissioners shall, pending the conclusion of bargaining, compensate Souza at the rate he would currently receive but for the Commissioner's unlawful implementation.
 - e. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically if the Commissioners customarily communicates with these members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

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

3
4 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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



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NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the Bristol County Commissioners (Commissioners) violated Section 10(a)(5), 10(a)(6), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by implementing their September 24 bargaining offer to the OPEIU, Local 6 (Union) when the parties were not at impasse; refusing to participate in DLR mediation on November 19, 2020; and refusing to bargain with the Union on November 2, 2020.

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

WE WILL NOT fail to bargain in good faith with the Union by implementing bargaining proposals when the parties are not at impasse. We will not refuse to participate in DLR mediation. We will not refuse to bargain with the Union.

WE WILL, upon demand, resume bargaining with the Union over a successor collective bargaining agreement (CBA) to the 2017-2020 CBA, and we will maintain economic benefits resulting from the unlawful implementation pending the conclusion of bargaining. We will join in any DLR-related mediation. We will make bargaining unit member Glen Souza whole for all lost wages that resulted from the unlawful implementation of a successor CBA, and, pending the conclusion of bargaining, compensate him at the rate he would have received but for the unlawful implementation.

For the Commissioners

Date

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

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