

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

MASSACHUSETTS CONVENTION
CENTER AUTHORITY

and

FIREMEN AND OILERS,
LOCAL 3, SEIU

Case No. SUP-20-8336
SUP-20-8337

Date Issued: December 24,
2024

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Eric T. McKenna, Esq.	-	Representing the Massachusetts Convention Center Authority
Jasper Groner, Esq. ¹	-	Representing the Firemen and Oilers, Local 3, SEIU

AMENDED HEARING OFFICER'S DECISION²

SUMMARY

1 The issues in this case are whether the Massachusetts Convention Center
2 Authority (Authority) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by: a) unilaterally requiring

¹ After the hearing record closed, Paige W. McKissock succeeded Jasper Groner as counsel for the Firemen and Oilers, Local 3, SEIU and submitted its post-hearing brief.

² The Hearing Officer amends the original decision, which was issued on December 19, 2024, to correct a scrivener's error on page 32 in the conclusion of the decision that referenced the Town rather than the Authority.

1 members of the Firemen and Oilers, Local 3, SEIU's (Union) bargaining unit to take
2 accrued vacation leave and to take that leave at specified periods of time; and b) failing
3 and refusing to bargain on demand with the Union over the requirement that unit members
4 take vacation leave and take that leave at specified periods of time. For the reasons
5 described below, I find that the Authority has violated the Law in the manner alleged.

6 Statement of the Case

7 On November 25, 2020, the Union filed two charges of prohibited practice with the
8 Department of Labor Relations (DLR) in Case Nos. SUP-20-8336 and SUP-20-8337,
9 alleging that the Authority had violated Sections 10(a)(5) and (1) of the Law. The DLR
10 subsequently consolidated the cases for investigation, and a DLR investigator
11 investigated the charges on March 31, 2021. On May 18, 2021, the investigator issued
12 a two-count complaint alleging that the Authority: 1) unilaterally required unit members to
13 take vacation leave and to take that leave at specified periods of time; and b) refused to
14 bargain on demand with the Union over the requirement that unit members take vacation
15 leave and take that leave at specified periods of time in violation of Section 10(a)(5) and,
16 derivatively, Section 10(a)(1) of the Law. The Authority filed its answer to the complaint
17 on May 28, 2021.

18 I conducted a hearing on March 8, 2022.³ Both parties had an opportunity to be
19 heard, to call witnesses, and to introduce evidence. The parties submitted their post-
20 hearing briefs on May 19, 2022. Upon review of the entire record, including my

³ I conducted the hearing remotely via the Webex videoconferencing platform.

1 observation of the demeanor of the witnesses, I make the following findings of fact and
2 render the following opinion.

3 Stipulated Facts

- 4 1. The Authority is a public employer within the meaning of Section 1 of the Law.
- 5 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 6
- 7 3. The Union is the exclusive bargaining representative of employees employed by
8 the Authority in the positions of Electrician/Plumber,
9 Carpenter/HVAC/Mason/Sound Technician, Sound Technician II, Painter/Skilled
10 Maintenance, Semi-Skilled Maintenance, Small Motor Mechanic,
11 Plumbing/HVAC/Electrical Apprentice, and Working Foreman.
- 12
- 13 4. The Union does not object to the admission of the Respondent's exhibits as long
14 as they are authenticated.
- 15
- 16 5. The Union stipulates to the authenticity of Respondent Exhibit 7.
- 17
- 18 6. The Respondent does not object to the admission and authenticity of the Union's
19 exhibits.
- 20
- 21 7. Union Exhibit 6 is a document compiled by the Authority in response to an
22 information request from the Union. The two pages reflect the information that was
23 contained in the Authority's business records.
- 24
- 25 a. Part I shows the hire date, seniority date, and information about vacation
26 for each employee. The column titled "vac on 06/01/20" indicates the
27 number the number of hours of vacation that the employee had
28 accumulated as of June 1, 2020. The "Date" column shows the dates on
29 which the employee requested vacation time that fell in June through
30 August 2020. The remaining columns show the dates upon which the
31 employee took vacation time in June through August 2020. The text color
32 for on the "Date Requested" column corresponds with the text color of the
33 vacation days requested on that date. The coloring/shading in the rows
34 themselves reflects employees that belong to different work groups; Yellow
35 are BCEC employees, White are Hynes employees; Grey are tech reps.
- 36
- 37 b. Part 2 shows whether an employee took vacation time on November 27th,
38 December 24th or December 28th-31st in 2020. The codes on the chart have
39 the following meaning: V means vacation; WC means worker
40 compensation; Not sched. means the employee was not scheduled to work
41 that day; PL means personal leave; Care Act means Care Act-qualifying
42 quarantine related to COVID-19; Sick FAM means sick time; and Sick Fam
43 means family leave. The dates that are highlighted were requested before

1 the November 10, 2020 announcement regarding vacation use on those
2 dates.

- 3
4 c. A handful of Union represented employees were left off of Union Exhibit 6
5 inadvertently. The information from the Authority[']s regarding these
6 employees will be submitted if needed for any remedy or compliance
7 hearing.

8 Findings of Fact⁴

9 Background

10 The Authority is an independent public authority that owns and operates four sites
11 in Boston, the Boston Convention and Exposition Center (BCEC), the Hynes Convention
12 Center (Hynes), the Boston Common Garage, and the Lawn on D.⁵ The BCEC and the
13 Hynes host trade shows, conventions, exhibitions, conferences, and other large public
14 events. The Union represents approximately fifty skilled workers who work at the BCEC
15 and the Hynes. They perform duties that are necessary for the running of the facilities
16 and perform the set up and breakdown of the various events that the facilities host.

17 Relevant Contractual Provisions

18 The Authority and the Union are parties to a collective bargaining agreement that,
19 by its terms, was in effect from July 1, 2019, through June 30, 2022 (2019-2022 CBA).
20 The 2019-2022 CBA includes the following provisions that state in pertinent part:

21 Article V Managerial Rights/Productivity

22
23 Except as otherwise limited by an express provision of this Agreement, the Authority shall
24 have the right to exercise complete control and discretion over its organization and
25 technology, including but not limited to: determination of the standards of service to be
26 provided; ...; the determination of the methods, means and personnel by which its
27 operations are to be conducted; the right to alter scheduled work periods where
28 necessary; ... the relief from duty of its employees because of lack of work or for other

⁴ The DLR's jurisdiction in this matter is uncontested.

⁵ The Authority also owns and operates the Massachusetts Mutual Center in Springfield.

1 legitimate reasons;and taking of all reasonable actions to carry out its mission in
2 emergencies. ...⁶

3 Article XI Vacation

5 Section 1

7 Vacation leave earned during any vacation year shall be credited on the last day of the
8 fiscal year and shall be available during the next fiscal year. ...

10 The vacation year shall be from July 1 through June 30.

12 Employees shall be entitled to paid vacations as follows:

- 14 1. For less than one (1) year of employment beginning after July 1 and ending June
15 30, vacation time of one (1) day shall be granted for each calendar month of
16 employment but in no case may an employee earn more than ten (10) days of paid
17 vacation credit during his first year of employment with the Authority. Vacation
18 leave credit will begin at once for persons starting work on the first working day of
19 a calendar month.
- 21 2. For one (1) year of continuous employment but less than five (5) years of
22 continuous employment prior to July 1 of the vacation year an employee will be
23 entitled to two (2) weeks of paid vacation leave.
- 25 3. For five (5) or more years of continuous employment to July 1 of the vacation year,
26 an employee will be entitled to three (3) weeks of paid vacation leave.
- 28 4. For ten (10) or more years of continuous employment to July 1 of the vacation
29 year, an employee will be entitled to four (4) weeks of paid vacation leave.
- 31 5. For twenty (20) or more years of continuous employment prior to July 1 of the
32 vacation year, an employee will be entitled to five (5) weeks of paid vacation leave.
33 ...

35 Section 4. Special Vacation Provisions

- 37 a) An employee may accumulate and carry forward to subsequent years one year's
38 vacation. Otherwise, all vacation credits earned as of the beginning of a vacation
39 year must be taken that year unless additional accumulation is authorized by the
40 Authority. ...

⁶ The record is silent about the parties' bargaining history that resulted in Article V, except Michael Byrnes (Byrnes), the Union's business agent and assistant business agent respectively from 2001 to 2007 and 2018 and continuing, indicated that the language has been present in the parties' collective bargaining agreements for more than twenty years.

1
2 c) Preference in vacation time shall be in order of seniority. However, the Authority
3 shall have the right to require specific schedules of vacations to be consistent with
4 the needs of the facility as reasonably determined by the Authority.⁷ Vacation
5 periods not reserved with the Authority's approval by the thirtieth day of September
6 in any vacation year can no longer be claimed on the basis of seniority and must
7 be taken at the time assigned by the Authority. Requests for vacation days outside
8 the selection made by the employee by the thirtieth of September in any vacation
9 year must be submitted three (3) calendar days prior to the requested day except
10 the request must be submitted four (4) calendar days in advance if there is an
11 intervening holiday.

12
13 d) At the request of an employee the Authority may purchase the third and/or fourth
14 and/or fifth week of an employee's vacation.

15
16 XXI-Grievances

17
18 Section 1

19
20 For the purpose of this Agreement, a grievance shall be defined as a written complaint
21 by the Authority or the Union and/or any employee involving a violation of specific
22 provision of this Agreement. ...

23
24 Section 5

25
26 A grievance not initiated within the time specified shall be deemed waived. Failure of the
27 moving party to appeal a decision within the time limit specified will mean that the
28 grievance shall be considered settled on the basis of the decision last made and shall not
29 be eligible for further appeal. Failure of a party to answer an appeal may be taken to the
30 next step immediately. These provisions shall apply equally to grievances brought by the
31 employee, the Union, or the Authority.

32 COVID-19 Pandemic

33 Beginning in March 2020, public health restrictions that were imposed in response
34 to the COVID-19 pandemic precluded the Authority from hosting large public events and
35 required it to cancel certain trade shows, exhibitions, etc., which previously were

⁷ The record is silent about the bargaining history that resulted in the language in Article XI, Section 4, except that Byrnes indicated that the language has been present in the parties' collective bargaining agreements for at least twenty years.

1 scheduled to occur in Spring and early Summer 2020.⁸ The Authority and the Union
2 negotiated various measures to protect the health and safety of unit members, which
3 included the adoption of a schedule whereby unit members worked two twelve-hour shifts
4 each week with twenty four hours in-between but received compensation for a full work
5 week. Also, in early April of 2020, the BCEC became the site of Boston Hope,⁹ both a
6 field hospital for patients who required ongoing medical treatment for COVID-19 and a
7 shelter for unhoused individuals, who had tested positive for COVID-19 and had mild
8 symptoms but had no place to quarantine.¹⁰

9 Unit Members' Use of Vacation Leave Prior to June 2020

10 Prior to June 2020, unit members could choose to carry over up to one year's worth
11 of vacation leave to the next year. Unit members also could choose to receive financial
12 compensation for their third, fourth or fifth week of vacation leave in lieu of taking that time
13 off from work, and certain unit members did so each year. Both practices were described
14 in Article XI, Sections 4(a) and (d) respectively of the 2019-2022 CBA. Both Michael
15 Rooney (Rooney), the Union steward for the Hynes who has worked for the Authority
16 since 1988,¹¹ and John Donahue (Donahue), the Chief of Operations and Capital

⁸ In March 2020, the Authority anticipated that the public health restrictions would be eased as of mid-July 2020, and that it could then begin hosting certain events.

⁹ Partners Health Care operated Boston Hope. The Authority received no funds for Boston Hope, except for monies that it received approximately one year later from the Federal Emergency Management Agency (FEMA). FEMA did not reimburse the Authority for unit members' regular payroll costs and only reimbursed the Authority for overtime that unit members incurred while providing services to Boston Hope.

¹⁰ Boston Hope ultimately closed in late July 2020.

¹¹ Rooney is the foreman for the sound technicians at the Hynes.

1 Projects, who has worked for the Authority in various capacities since 1999, described
2 how the Authority previously had not required unit members to take vacation leave during
3 the time that they had worked there.

4 The Hynes and the BCEC were open twenty-four hours per day, seven days per
5 week, although certain hallways could be shut down when not in use. Unit members,
6 who selected vacation leave by seniority, would often voluntarily forego taking leave when
7 big shows were scheduled. They were cognizant that their services were needed for
8 those events, what Donahue referred to as self-regulation. Donahue cited an instance of
9 a longstanding unit member, who typically took vacation leave on Fridays during the
10 summer but informed his supervisor that he would not take leave on a particular Friday,
11 because a big show was scheduled. Rooney also noted that because big events often
12 generated overtime opportunities for unit members, they did not want to be on vacation
13 leave and miss those opportunities.

14 Donahue could not recall any instances where the Authority denied unit members'
15 vacation leave requests, although he noted that the Authority on a few occasions had
16 asked unit members to adjust the start or end date of their vacation requests to
17 accommodate a big event. Rooney indicated that the Authority had never denied his
18 requests for vacation leave¹² but described an instance from about five years ago when

¹² Each year, Rooney pre-scheduled his vacation leave to take time off in July and near Thanksgiving and Christmas.

1 the Authority had denied¹³ a sound technician's request to use vacation leave because a
2 big show was scheduled.¹⁴

3 June 2, 2020 Vacation Directive

4 On or about June 2020, the Authority noticed that unit members were not taking
5 vacation leave at the usual rate,¹⁵ which the Authority presumed was the result of the
6 modified work schedule, or which the Union contended, at hearing, was the result of
7 pandemic travel restrictions. On June 2, 2020, Christopher Donato (Donato), the
8 Authority's General Counsel,¹⁶ sent via email a letter (June 2, 2020 letter) to Byrnes that
9 stated in pertinent part:¹⁷

10 The COVID-19 pandemic has resulted in the entire closure of our
11 conventions and events operations. As we look forward to returning to our
12 regular business operations, we need to plan for our future staffing needs.
13 Recognizing that many of our employees have substantial amounts of
14 accrued vacation time, and in preparing for the return of our business
15 operations, we will need to schedule employees to use some of their
16 vacation time now so that when we do return to our regular business
17 operations, our employees will be available.¹⁸

¹³ The sound technician had not requested that the Union file a grievance on his behalf, and Rooney did not indicate when and how he became aware of the Authority's denial of the leave request.

¹⁴ Rooney also referenced several other instances where the Authority had denied unit members' vacation leave requests because the employees did not have sufficient leave to cover the requests.

¹⁵ Summer previously was a popular time of unit members to take vacation leave.

¹⁶ Donato had been the Authority's general counsel since 2018 and its associate general counsel from 2016 to 2018.

¹⁷ On June 2, 2020, Donato had called Byrnes prior to sending the letter to give Byrnes what Donato described at hearing as a "heads-up" that the directive would be issuing. Donato described Byrnes as responding unhappily to the directive.

¹⁸ Donato indicated that the Authority was anticipating that it would schedule certain large events in the Fall of 2020, that it would need a full workforce to provide services to those

1
2 Section 4(c) in Article XI of the collective bargaining agreement between
3 the Authority and Firemen & Oilers, Local 3 SEIU ("Union") provides that
4 "the Authority shall have the right to require specific schedules of vacations
5 to be consistent with the needs of the facility as reasonably determined by
6 the Authority."¹⁹ As you may recall, in the past, the Authority has directed
7 employees represented by the Union to take vacation during slow periods,
8 such as during the month of August, so that employees will be available
9 during busier periods.²⁰

10
11 Therefore, this letter is to let you know that the Authority will be directing
12 employees, with accruals greater than 3 weeks, represented by the Union,
13 to utilize two weeks of their vacation time between now and the end of July
14 2020. We invite employees to request the dates/weeks that they prefer for
15 vacation, and consistent with Section 4(c) of the collective bargaining
16 agreement, preference will be in order of seniority. Employees who do not
17 indicate a preference for vacation days/weeks by Friday, June 12, 2020
18 will be scheduled for vacation time. ...²¹

19 At hearing, Donato acknowledged that the Authority had not negotiated with the Union
20 before he issued the June 2, 2020 letter and characterized the Authority's vacation
21 requirement as non-negotiable.

events, and that it wanted to avoid filling absences on overtime if significant numbers of its employees were on vacation at that time.

¹⁹ The MCAA in its answer to enumerated paragraph #4 of the Complaint stated in part that: "Before June 2, 2020, it had not exercised its express right ... in Articles V and XI, Section 4(c) to schedule certain accrued leave during a specified period in order to carry out its mission in emergencies."

²⁰ At hearing, neither party questioned Donato about the statement in his June 2, 2024 letter that the Authority previously had directed unit members to take vacations during slow periods such as the month of August. He also did not elaborate upon the statement in his testimony. Because of the absence of specific information in the record in support of this statement, I decline to credit it.

²¹ When Donato issued his June 2, 2020 letter, the Authority was tentatively rescheduling shows that had been delayed or postponed from the Spring or Summer of 2020 to the Fall of 2020.

1 Also, on June 2, 2020, Devin Taylor (Taylor), the Authority's Director of Human
2 Resources, sent a memo (June 2, 2020 directive) to all staff stating in pertinent part:

3 As of today, 4 patients remain at the BCEC Boston Hope field hospital. We
4 are happy about this number and look forward to transitioning our building
5 back to a fully functioning Convention Center. Outlined below is important
6 information for all employees. Please read through this information as
7 there are follow-up action items required of you. If you have any questions
8 or concerns, please reach out to HR at any time.

9
10 Vacation Accruals

11
12 As you know, the COVID-19 pandemic has resulted in the entire closure of
13 your conventions and events operations. As we look forward to our regular
14 business operations, we need to plan for our future staffing needs.
15 Recognizing that many employees have substantial amounts of accrued
16 vacation time, and in preparing for the return of business operations, we
17 are directing employees with greater than three weeks of time, to use 2
18 weeks²² of vacation time during the months of June and July.²³ Having
19 employees available when we return to our regular business operation is
20 important. Managers will have a list of employees who will be required to
21 use vacation time and will work with these employees on scheduling
22 accordingly. ...

23 Additionally, in a June 5, 2020 email, Kerrie Griffin (Griffin), the Authority's Director
24 of Engineering and Maintenance (E&M), informed fifteen unit members in her department,

²² Taylor reiterated in a June 5, 2020 email to all staff that employees with more than three weeks of accrued vacation leave needed to take two weeks of vacation leave and to inform their supervisors of the proposed leave dates by June 12, 2020.

²³ Although both Donato and Taylor indicated unit members with more than three weeks of accrued vacation leave needed to use two weeks of vacation leave in June or July 2020, the Authority in its post-hearing brief indicated that unit members needed to use the two weeks of vacation leave in the period from June 2020 through August 2020. Because the Authority's assertion is consistent with the information compiled in the parties' Stipulation #7 and the information that the Authority compiled and the Union introduced as Union Exhibit #6, I have referred to the period when unit members were required to use their two weeks of vacation leave as the Summer of 2020, to include the month of August 2020. The record before me contains no additional information concerning how the mandated vacation leave period was extended through August 2020.

1 whom the Authority previously had identified as having accrued more than three weeks
2 of vacation time, that they were obligated to use two weeks of their accrued vacation
3 leave by the end of July 2020. She also noted that: they needed to notify Human
4 Resources (HR) by June 12, 2020 of the dates when they intended to use their vacation
5 time; they should notify her ASAP if they had something planned for August; and she
6 would discuss their situation with HR.²⁴

7 Union's June 8, 2020 Grievance

8 On June 8, 2020, Byrnes sent an email (June 8, 2020 email) to Donato with an
9 attached grievance challenging the June 2, 2020 directive, which William Collins (Collins),
10 the Union's steward for the BCEC, and Rooney intended to file that afternoon. Byrnes in
11 his June 8, 2020 email noted in pertinent part:

12 ... [P]lease be advised that the Union is reluctant to take this step but
13 feels compelled to do so given the clear violation of the Agreement and
14 deprivation of our members' rights to select their vacation periods and
15 to accumulate and carry over their vacation entitlements.
16 Nevertheless, the Union remains willing to sit down to discuss this issue.
17 If the Authority is willing to rescind its vacation utilization directive, I am
18 confident that we can reach a mutually agreeable solution.
19 However, time is of the essence and any such discussion must take
20 place as soon as possible.
21 If you have any questions, please do not hesitate to contact me.

22 The Authority subsequently did not respond to Byrnes' June 8, 2020 email.

23 On June 9, 2020, Donahue denied the Union's June 8, 2020 grievance at Step 1
24 of the parties' contractual grievance procedure by stating in pertinent part:

²⁴ On June 20, 2020, Griffin sent out an email clarifying that even if unit members had accrued vacation leave of three weeks and one day, those unit members needed to take two full weeks of vacation leave. Griffin noted in her email that she previously had thought that unit members only needed to reduce their accrued vacation leave to three weeks and thus, taking a single vacation day would have been sufficient.

1 An employee's right to use vacation time under the CBA is not unfettered.
2 Factors affecting when an employee may take vacation leave include
3 seniority and the Authority's operational needs. Furthermore, under Article
4 XI, Section 4(c) of the CBA, the Authority has the express right to require
5 "specific schedules of vacation to be consistent with the needs of the facility
6 as reasonably determined by the Authority."
7

8 As stated in the June 2nd letter, the Authority's operations have been shut
9 down entirely due to the COVID-19 pandemic. These extraordinary
10 circumstances support the Authority's decision to require employees with
11 more than three (3) weeks of vacation leave to utilize vacation time now
12 while operations are still impacted, to ensure adequate staffing is available
13 once operations resume.²⁵

14 Contrary to your assertion, this is not unprecedented. The Authority has,
15 in the past, directed employees to take vacation time during slow periods,
16 such as during the month of August, so that employees can be available
17 to work during busier periods.²⁶ Furthermore, the Authority will give
18 preference to employee requests in order of seniority, as specified in the
19 CBA. Lastly, nothing in the Authority's plans will affect employee accrual
20 of vacation leave or carryover of vacation time. Therefore, the allegations
21 raised in the Union's grievance are unfounded. ...

22 The Union subsequently did not submit the June 8, 2020 grievance to Step 2 of the
23 contractual grievance procedure.

24 Thereafter, unit members with more than three weeks of accumulated vacation
25 took the mandated two weeks of vacation leave in the Summer of 2020, but the
26 Authority's facilities continued to remain in operation during that time.²⁷

²⁵ Donahue also claimed at hearing that the June 2, 2020 directive would facilitate social distancing between unit members by having less unit members in the facilities. However, he acknowledged that there were certain assignments where unit members still needed to work in tandem.

²⁶ At hearing, Donahue noted that he was told by an unnamed individual that the Authority had closure periods at some point prior to Donahue's twenty-plus years of employment. However, Donahue did not have any personal knowledge about the closure periods or provide any other specific information about them.

²⁷ Byrnes notified Donato about a unit member, who was scheduled to be married in September 2020, and Donato agreed to allow him to use the mandated vacation time at

1 November 10, 2020 Directive

2 On November 10, 2020, Byrnes, Rooney, and Collins were at a meeting with
3 Donato and Donahue. At the end of the meeting, Donahue indicated that he wanted to
4 speak with the Union about another issue. Donahue informed the Union that the
5 Authority was going to require unit members to take an additional six days of vacation
6 leave (November 10, 2020 Directive). Specifically, the Authority was going to require
7 unit members to take vacation leave on Friday, November 27, 2020, which was the day
8 after Thanksgiving, Thursday December 24, 2020, and Monday, December 28, 2020
9 through Thursday, December 31, 2020.²⁸ Also, on November 10, 2020, Taylor sent an
10 email (November 10, 2020 email) to all Authority staff starting in pertinent part:

11 All employees except those deemed essential to securing and maintaining
12 the facilities should expect to use accrued time to cover [the six dates listed
13 above]. Having the Authority offices and operation closed on those dates²⁹
14 will allow a significant cost savings which is critical at this time. It will also
15 give our hard-working employees a break, after what has been a very long,
16 challenging 2020. Having a time period post holidays when employees are
17 off will create a buffer period for employees to monitor their symptoms and
18 ensure that they are healthy before returning to the workplace.

19 Union's November 17, 2020 Grievance

that time. Although Byrnes did not recall the conversation, Donato credibly testified that the conversation took place.

²⁸ At hearing, Rooney indicated that prior to 2020, exhibitors and event holders generally were uninterested in scheduling matters for the period from December 26 through December 31, a period which Rooney called the "dark hours," and that the Authority typically assigned unit members to perform maintenance projects during that week. The Authority previously had not required unit members to take vacation leave around Christmas and Thanksgiving although certain unit members chose to do so.

²⁹ Rooney confirmed at hearing that the Authority had informed him that its operations would be closed on the November and December dates in question.

On November 17, 2020, Byrnes sent Donato an email with an attached grievance challenging the November 10, 2020 Directive. Byrnes, in his email, noted in pertinent part:

Given the circumstances, the Union is reluctant to take this step but feels compelled to do so given the clear violation of the Agreement and unnecessary deprivation of our members' rights to select their vacation periods and to accumulate and carry over their vacation entitlements. Nevertheless, the Union remains willing to sit down to discuss this issue. If the Authority is willing to rescind its vacation utilization directive, I am confident that we can reach a mutually agreeable solution. However, time is of the essence and any such discussion must take place as soon as possible. If you have any questions, please do not hesitate to contact me.

The Authority subsequently did not respond to Byrnes' November 17, 2020 email.

On November 24, 2020, Donahue denied the Union's November 17, 2020 grievance at Step 1 of the parties' contractual grievance procedure by stating in pertinent part:

Prior Grievance Received on the Basis of Step 1 Answer by the Authority [Emphasis in Original]

On June 9, 2020, the Authority provided the Union's Assistant Business Manager Michael Byrnes with a Step 1 Response to the Union's June 2020 Class Action Vacation Grievance regarding the same conduct by the Authority-requiring employees to use vacation time. The Union did not pursue its June 2020 vacation grievance after receiving the Authority's Step 1 response which stated in part that an employee's right to use vacation time is limited by Article XI, section 4(c) which provides that "the Authority shall have the right to require specific schedules of vacations to be consistent with the needs of the facility as reasonably determined by the Authority". Because the Union did not pursue its June 2020 grievance after the Step 1 answer, in accordance with Section 5 of Article XXI, the Union's grievance "shall be considered settled on the basis of the decision last made and shall not be eligible for further appeal". Therefore, as the November 2020 vacation grievance is based on the same conduct by the Authority (i.e. requiring employees to take vacation time) as the June 2020 vacation grievance, the November 2020 vacation grievance is denied and is not procedurally or substantively arbitrable.

Managerial Rights Article V

1 The parties agreed that the Authority has the right to take “all reasonable
2 actions to carry out its mission in emergencies.” (Article V) There is no
3 dispute between the parties that the COVID-19 pandemic has been and
4 continues to be an emergency. The Authority has the right to close
5 operations on designated days in an effort to reduce utility costs-a
6 reasonable and necessary action in response to the extraordinary impact
7 that the COVID-19 pandemic has had on the Authority’s revenues.
8 Requiring employees to utilize specific schedules of vacation during these
9 days is consistent with the parties’ agreement authorizing the Authority to
10 take reasonable actions to carry out its mission and to require specific
11 schedules of vacation. Therefore, the union’s grievance is denied.

12 **Article XI, Section 4(c)**

13 The Authority has the right to require employees to utilize vacation time.
14 Article XI, section 4(c) states in relevant part that “the Authority shall have
15 the right to require specific schedules of vacations to be consistent with the
16 needs of the facility as reasonably determined by the Authority.” As COVID-
17 19 has impacted the work of the Authority, the Authority’s decision to close
18 facilities and require employees to utilize vacation time on specific
19 schedules is within the rights provided to the Authority in Article XI, section
20 4(c). Therefore, as the Authority has the right to require employees to use
21 vacation time on specific schedules, there was no violation of the parties’
22 agreement as alleged by the Union, and the grievance is denied.

23 The Union subsequently did not submit the November 17, 2020 grievance to Step 2 of
24 the parties’ contractual grievance-arbitration procedure. On November 25, 2020, the
25 Union filed prohibited practice charges in Case Nos. MUP-20-8336 and MUP-20-8337.

26 **Events between November 27, 2020 and December 31, 2020**

27 The Authority required unit members who had sufficient accumulated leave to
28 take vacation leave on November 27, 2020, December 24, 2020, and December 28
29 through December 31, 2020 unless they were out of work on worker’s compensation
30 leave, sick leave, COVID-19 (CARES Act) leave, or were not regularly scheduled to
31 work. John “Jake” Carroll, a unit member and an electrician at the Hynes,³⁰ worked the
32 four days between December 28 and December 31, 2020. Although Carroll previously

³⁰ Carroll had worked for the Authority since 2004.

1 had seen the November 10, 2020 email, he contended that his supervisor never directly
2 informed him not to show up for work on those dates. When Carroll arrived at the Hynes
3 on those days, he punched in and was not told to go home. Carroll observed that parts
4 of the Hynes were closed off on those dates but that certain private contractors, who
5 provided cleaning, and elevator and escalator repair services, were present as well as
6 security. When Carroll received his pay stub, he noticed that the Authority had deducted
7 four vacation days from his accumulated leave for December 28 through December 31,
8 2020. Also, another unit member Mitchell Mackenzie (Mackenzie) worked on December
9 29 and December 30, 2020 because he incorrectly believed that he did not have
10 sufficient vacation leave to cover those dates and because his supervisor never directly
11 informed him not to work. On January 4, 2021, Mackenzie's supervisor Tracy Burgio,
12 senior manager of show operations, sent Mackenzie an email noting that he had
13 punched in and out on December 29 and December 30, 2020 and inquiring whether he
14 had been approved to work on those dates. The Authority subsequently deducted two
15 days of vacation leave from Mackenzie for December 29 and December 30, 2020.

16 Impacts of Pandemic on the Authority's March 2020-June 2021 Finances

17 In June 2019, the Authority's Board of Directors (Board) adopted a budget for the
18 period from July 1, 2019 through June 30, 2020 (FY'20) budget.³¹ The FY'20 budget
19 projected that the Authority would earn approximately \$75 million in operating revenues.
20 The Authority's revenues primarily comes from big show customers, as well as revenues
21 from the events, which includes the exhibitors at the events and to a lesser amount the

³¹ As was its usual practice, the Authority compiled its proposed FY'20 budget in February and March of 2019.

1 attendees at those events.³² In the period from mid-March 2020, when the COVID-19
2 public health restrictions were imposed,³³ until the end of the fiscal year on June 30,
3 2020, the Authority's revenues were 28.45% lower than the amounts projected in the
4 FY'20 budget, which resulted in total operating revenues of approximately
5 \$56,629,000.³⁴ The Authority renegotiated contracts with its vendors to lower expenses
6 and curtailed the scheduling of overtime for its part-time, non-unionized employees. The
7 Authority also cut back on all discretionary spending, which included purchases of
8 supplies and equipment and the use of consultants. The Authority also increased the
9 amount of funds that it previously projected to withdraw from the Massachusetts
10 Convention Center Fund (CCF)³⁵ to supplement the loss of revenues in the FY'20
11 budget.

12 In June 2020, the Board did not adopt a proposed budget for the entire FY'21.
13 Instead, the Board adopted an interim budget through September 2021. In September
14 2021, the Board of Directors adopted a FY'21 budget which projected that the Authority

³² In the period from March 2019 to March 2020, the Authority hosted 309 events.

³³ Except for Boston Hope, the Authority held no public events from mid-March 2020 to June 30, 2020.

³⁴ In comparison, the Authority's total operating revenue for FY'19 was approximately \$79,058,000.

³⁵ The CCF is a state-operated subsidy for the Authority, which is funded by hotel occupancy taxes. The Authority annually can draw funds from the CCF for cash expenses up to a cap of \$28 million. However, the Authority first must make annual payments on the bondholder debt for the construction of the BCEC from the CCF before using any funds for expenses.

1 would earn revenues of \$24 million³⁶ and incur \$50 million in operating expenses. The
2 Authority ultimately earned revenues of \$19 million and only hosted thirteen events³⁷ in
3 FY'21 before the public health restrictions were lifted in May 2021. The Authority worked
4 with the state to ensure that there were sufficient funds in the CCF to pay the bond debt³⁸
5 and then to utilize \$20 million from the CCF to balance the FY'21 budget.³⁹

6 Opinion

7 The issues before me are whether the Authority on two instances: a) unilaterally
8 required unit members to take accrued vacation leave and to take that leave at specified
9 periods of time; and b) failed and refused to bargain on demand with the Union over the
10 requirements that unit members take vacation leave and take that vacation leave during
11 specified periods.

12 Count I Unilateral Change

13 A public employer violates Section 10(a)(5) of the Law when it implements a
14 change in a mandatory subject of bargaining without first providing the employees'
15 exclusive collective bargaining representative with prior notice and an opportunity to

³⁶ In the Fall of 2020, the Authority anticipated a return to hosting shows with limited attendance in February or March of 2021, which did not happen.

³⁷ Most of the thirteen events were Civil Service promotional examinations that were held at the Hynes. The Authority also hosted: Summer and Halloween drive-in movie nights in the BCEC's parking lots, the Greater Boston Labor Breakfast at the BCEC, as well as Berklee College of Music classes, a local school's classes, and a COVID 19 vaccination clinic commencing in March 2021, all of which were held at the Hynes.

³⁸ Because of the pandemic, the amount of hotel occupancy taxes that were paid to the CCF dropped by \$100 million in FY'21. The CCF was not depleted as it continued to have monies from prior years' hotel occupancy taxes.

³⁹ The Authority's operating coverage ratios, which measured its ability to service its debt and meet its financial obligations, were .90 in FY'19, .66 in FY'20 and .39 in FY'21.

1 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
2 Commission, 388 Mass. 557, 572 (1983). The duty to bargain extends to both conditions
3 of employment that are established through a past practice as well as conditions of
4 employment that are established through a collective bargaining agreement. Town of
5 Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of
6 Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120
7 (2014); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To
8 establish a unilateral change violation, the charging party must show that: 1) the employer
9 altered an existing practice or instituted a new one; 2) the change affected a mandatory
10 subject of bargaining; and 3) the change was established without prior notice and an
11 opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

12 *Binding Past Practice*

13 I first consider whether the Authority altered an existing practice or instituted a new
14 one. In determining whether a binding past practice exists, the Commonwealth
15 Employment Relations Board (CERB) analyzes the combination of facts upon which the
16 alleged practice is predicated, including whether the practice has occurred with regularity
17 over a sufficient period of time so that it is reasonable to expect that the practice will
18 continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, MUP-2456 (January 23,
19 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30,
20 1997). Here, the Union contends that the Authority previously had not compelled unit
21 members to take vacation leave. Both Rooney and Donahue credibly testified that the
22 Authority had not previously required unit members to take vacation leave during
23 Rooney's and Donahue's many years of employment with the Authority. Furthermore,

1 the Union asserts that the Authority's June 2, 2020 and November 10, 2020 directives
2 ordering unit members to take vacation leave at specified periods constituted a change.
3 Although the Authority argues that unit members previously self-regulated their use of
4 vacation leave, self-regulation is exactly what it sounds like. Employees still had the
5 choice whether to request to take vacation leave, which the Authority would or would not
6 allow, but were not compelled to take leave. Here, the Authority's directives in June and
7 November 2020 mandating that certain unit members take vacation leave constituted a
8 change in a past practice.

9 Vacation leave, including when an employee can take vacation leave (City of
10 Boston, 46 MLC 131, 133, MUP-17-5924 (January 7, 2020)), the criteria for granting
11 vacation leave (Massachusetts Port Authority, 26 MLC 100, 101, UP-2624 (January 14,
12 2000)), and the manner in which vacation leave is distributed (City of Revere, 21 MLC
13 1325, 1327, MUP-8793 (September 30, 1994)), is a mandatory subject of bargaining.
14 Here, the Authority's vacation directives changed the criteria for vacation leave by
15 removing unit members' discretion to decide how much vacation leave to take and when
16 to take that leave, albeit subject to the Authority's approval, which was rarely denied.
17 Instead, the Authority substituted its own determination about how much vacation leave
18 unit members needed to take and when they needed to take it. As discussed further
19 below, the Authority's vacation directives also changed the procedures for unit members'
20 use of vacation leave by reducing the amount of vacation leave available for unit members
21 to rollover to the next year or to submit for buy back from the Authority. See generally
22 Sheriff of Suffolk County, 28 MLC 72, 75, MUP-2382 (July 18, 2020) (finding that
23 employer was obligated to bargain over a change to vacation leave policy). I turn now to

1 consider the various defenses that the Authority has raised in response to the Union's
2 claim that the Authority failed to bargain to resolution or impasse over the change.

3 Waiver by Contract

4 The Authority contends that there was no statutory bargaining obligation attached
5 to the two directives because certain provisions of the parties' collective bargaining
6 agreement, including Article V, Managerial Rights/Productivity, and Article XI, Vacation,
7 constitute a waiver of the Union's right to bargain. Where an employer raises the
8 affirmative defense of waiver by contract, it bears the burden of demonstrating that the
9 parties consciously considered the situation that has arisen, and that the union knowingly
10 waived its bargaining rights. Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-
11 2959 (November 18, 1988); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (March
12 28, 1986). The initial inquiry focuses upon the language of the contract. Town of
13 Mansfield, 25 MLC 14, 15, MUP-1567 (August 4, 1998). If the language clearly,
14 unequivocally and specifically permits the public employer to make the change, no further
15 inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-6810 (October 10,
16 1989). If the language is ambiguous, the CERB will review the parties' bargaining history
17 to determine their intent. Peabody School Committee, 28 MLC 19, 21, MUP-2073 (June
18 21, 2001); Town of Marblehead, 12 MLC at 1670.

19 *Article XI, Section 4(c)*

20 First, relying on the portion of the language in Article XI, Section 4(c) stating that:
21 "the authority shall have the right to require specific schedules of vacations to be
22 consistent with the needs of the facility as reasonably determined by the Authority," the
23 Authority argues that consistent with its operational needs, it had the express right to

1 require unit members to use accrued vacation time. Conversely, the Union contends that
2 the disputed sentence must be read in conjunction with the sentence immediately
3 preceding it, which states “preference in vacation time shall be in order of seniority.” The
4 Union argues that, when read together, the two sentences refer to the Authority’s right to
5 refuse a vacation request from an employee, even a senior employee, when it potentially
6 conflicts with the needs of the facility. Upon review of the disputed language, I construe
7 the phrase “right to require specific schedules of vacations to be consistent with the needs
8 of the facility” to possibly have more than one meaning and, thus, to be ambiguous. The
9 phrase could refer to the Authority’s right to refuse employee requests to use vacation
10 leave on a specific date due to its staffing and workload needs or the phrase could refer
11 to the Authority’s right to compel the use of vacation leave during certain periods. The
12 right to refuse employee vacation requests and the right to require the usage of vacation
13 leave can have significantly different impacts on unit members’ terms and conditions of
14 employment.

15 In light of the ambiguous language, I must next examine the parties’ bargaining
16 history. The record before me shows that the disputed language has been present in the
17 parties’ various collective bargaining agreements for at least twenty years. However,
18 neither party presented any information about the bargaining history that resulted in the
19 disputed language’s first appearance in a collective bargaining agreement. Also, the
20 parties presented no evidence showing that once the disputed language was present in
21 a collectively bargained agreement that the parties ever bargained about the language
22 again. Furthermore, the Authority did not require unit members to take vacation leave
23 and to take that leave at specific time periods for the twenty years prior to June 2020

1 despite the presence of the disputed language in the parties' various collective bargaining
2 agreements. Because any evidence of bargaining history to support the Authority's
3 waiver defense is not present here, I find that the evidence fails to show that the Union
4 knowingly, clearly and unmistakably waived its statutory right to bargain when it agreed
5 to Article XI, Section 4(c).

6 *Article V*

7 Next, the Authority contends that the portion of Article V stating that: "the Authority
8 shall have the right to exercise complete control and discretion over its organization and
9 technology, including but not limited to: the right to alter scheduled work periods where
10 necessary; ... the establishment of reasonable work rules; ... and taking of all reasonable
11 actions to carry out its mission in emergencies. ..." clearly, specifically and unequivocally
12 permits the Authority to require unit members to take vacation leave without first
13 bargaining to resolution or impasse with the Union. However, Article V commences with
14 language stating "[e]xcept as otherwise limited by an express provision of this
15 Agreement." A plain reading of that language reveals that the terms of specific provisions
16 of the parties' contract will prevail over the Authority's management rights. Article XI
17 contains two express provisions concerning vacation leave that are pertinent to the issue
18 here. Specifically, Section 4(a) states, in part, that "an employee may accumulate and
19 carry forward to subsequent years one year's vacation." Also, Section 4(d) states, in part,
20 that "[a]t the request of an employee the Authority may purchase the third and/or fourth
21 and/or fifth week of an employee's vacation." The Authority's June 2, 2020 and November
22 10, 2020 vacation directives altered those vacation procedures. Unit members could no
23 longer carry over an entire year's worth of leave until the next fiscal year as they were

1 required to use portions of their leave, and they sustained a reduction in the amount of
2 leave that was available to them to exchange for compensation (buy back).⁴⁰ Article V,
3 by its own limiting language, could not act as a waiver of the Authority's statutory
4 obligation to bargain over how the June 2, 2020 and November 10, 2020 vacation
5 directives altered employees' use of their vacation leave.

6 *Exigency Claim Regarding the June 2, 2020 Directive*

7 The Authority contends that because the COVID-19 pandemic caused an
8 unprecedented health and safety and financial emergency, it was justified in requiring
9 certain unit members to use two weeks of vacation leave in the Summer of 2020 without
10 bargaining to resolution or impasse prior to implementation of the requirement. The
11 CERB has recognized a narrow exception to the rule against changing working conditions
12 prior to bargaining to resolution or impasse where circumstances beyond the employer's
13 control require immediate action, so that bargaining after the imposition of a change may
14 satisfy the employer's bargaining obligation. Cambridge Public Health Commission, 37
15 MLC 47, MUP-10-5888 (Aug. 18, 2010) (additional citations omitted), Town of Brookline,
16 20 MLC 1570, 1595, MUP-8426, MUP-8478 and MUP-8479 (May 20, 1994) (citing City
17 of Malden, 8 MLC 1620, 1626, MUP-4357 (November 25, 1981)). An employer relying on
18 the defense of exigency has the burden of establishing that: 1) circumstances beyond its
19 control require the imposition of a deadline for negotiations; 2) the bargaining

⁴⁰ Donahue in his June 9, 2020 Step 1 Answer stated, in part, that "... nothing in the Authority's plans will affect employee accrual of vacation leave or carryover of vacation time." Although Donahue was correct that unit members continued to accrue the same amount of leave and could carryover what vacation leave that they had remaining after the directive was implemented, the Step 1 response does not address the fact that the June 2, 2020 directive reduced the total amount of leave that was available for unit members to carryover or to exchange for buyback.

1 representative was notified of those circumstances and the deadline; and 3) the deadline
2 was reasonable and necessary. Bos. Firefighters Union, Loc. 718, Int'l Ass'n of Fire
3 Fighters, AFL-CIO v. City of Bos., 491 Mass. 556 (2023); City of New Bedford, 38 MLC
4 239, 251, MUP-09-5581 and MUP-09-5599 (April 3, 2012) aff'd sub nom., 2015-P-001
5 (Aug. 26, 2016) (Rule 1:28 decision) further appellate review den'd, FAR-2427 (Nov. 30,
6 2016). The COVID-19 pandemic clearly presented the Authority with both public health
7 and fiscal challenges. Because the Authority needed to implement social distancing to
8 protect the health and safety of its employees and their families, it previously had
9 negotiated with the Union about a change in unit members' work schedules resulting in a
10 reduced work week. To address the loss of revenue from the public health prohibition
11 against hosting shows and events, the Authority renegotiated contracts with its vendors,
12 curtailed the scheduling of overtime for non-unionized employees, cut back on all
13 discretionary spending, and ultimately withdrew funds from the CCF to address budget
14 gaps in the FY'20 budget. The Authority contended that it implemented the vacation
15 directive on June 2, 2020 because it anticipated that the public health restrictions would
16 be relaxed in the Fall of 2020, that it could then host certain shows and events, that certain
17 unit members might want to take vacation leave at that time, and that it wanted to avoid
18 incurring overtime costs to cover for their absences. However, the Authority failed to
19 provide a compelling, objective reason why it selected the particular date of June 2, 2020
20 to implement the vacation directive and why it could not have engaged in bargaining
21 before implementation. See Trustees of the Univ. of MA Medical Center, 26 MLC 149,
22 159, SUP-4392, SUP-4400 (March 10, 2000) (employer that imposed a two-week
23 deadline for negotiations with a union failed to provide a compelling, objective reason why

1 it needed to file merger legislation within that time period). Also, the Authority did not
2 provide the Union with an opportunity to bargain or notify the Union of a deadline by which
3 negotiations must be completed. See Commonwealth of Massachusetts, 34 MLC 115,
4 120, SUP-03-5023 (April 11, 2008) (rejecting an exigency defense when an employer did
5 not explicitly inform the union about a deadline for a change in inmate schedules).
6 Instead, it simply announced and implemented the vacation directive on the same date.
7 See City of Malden, 8 MLC at 1625 (implementing without prior notice to union of a
8 deadline for bargaining defeats an exigency defense). On June 2, 2020, Donato called
9 Byrnes to give him a heads up that the directive would be issuing, he emailed Byrnes the
10 June 2, 2020 letter containing the directive, and Taylor then emailed the directive to all the
11 staff.

12 Further, the record before me undercuts the Authority's claims in its post-hearing
13 brief that the June 2, 2020 directive was "fluid," and that the Authority was more than
14 willing to work with the Union. Donato, in his June 2, 2022 letter, indicated that unit
15 members needed to notify the Authority by June 12, 2020 when they preferred to take
16 their compulsory vacation leave, or they would be scheduled for leave. Also, Griffin in
17 her June 5, 2020 email, emphasized to employees that they needed to submit the dates
18 upon which when employees preferred to take compulsory vacation leave by June 12,
19 2020. Furthermore, the record before me does not show that the Authority ever offered
20 to negotiate with the Union about the issuance of the June 2, 2020 directive after its
21 issuance. Donato's discussion with Byrnes concerning the Authority's willingness to
22 accommodate a unit member who needed to take vacation leave for his wedding in
23 September 2020 does not constitute negotiations about the requirement that certain unit

1 members take two weeks of vacation leave in the Summer of 2020 or the impacts of that
2 decision on unit members' terms and conditions of employment. Therefore, the Authority's
3 exigency defense must fail.

4 *November 10, 2020 Directive Was the Alleged Exercise of a Non-Delegable,*
5 *Managerial Prerogative*

6 The Authority asserts that its decision to require unit members to take vacation
7 leave on November 27, 2020, December 24, 2020, and December 28, 2020 through
8 December 31, 2020 was the result of its non-delegable decision to close its offices and
9 operations on those dates.⁴¹ The Authority contends that it closed its offices to save on
10 energy costs and to lower the risk of a post-holiday spread of the COVID-19 virus. It is
11 well established that decisions determining the level of services that a governmental entity
12 will provide lie within the exclusive managerial prerogative of the public employer. Town
13 of Danvers, 3 MLC 1554, MUP-2292, MUP-2299 (April 6, 1997). Here, the Authority's
14 decision to close its offices on the six days in question was a level of services decision.
15 However, the means by which the employer achieves that reduction in services, such as
16 requiring unit members to take vacation leave to cover their absences from work while
17 the offices were closed, and the manner in which that vacation requirement directly affects
18 unit members' working conditions, which includes vacation buyback and carryover, is a
19 mandatory subject of bargaining. See School Committee of Newton, 388 Mass. at 563.
20 Although the Authority lawfully exercised its managerial prerogative to close its offices on

⁴¹ For the purposes of considering the Authority's defense of operational necessity, I am treating the Authority's assertion that it closed its offices and operations on the six pertinent dates in November and December 2025 as accurate, despite the presence of private contractors, essential personnel and/or those unit members who did not have sufficient accrued vacation leave to be absent for some or all those dates.

1 November 27, 2020, December 24, 2020, and December 28 through December 31, 2020,
2 it still had an obligation to bargain with the Union over the requirement that unit members
3 take vacation leave on the six dates in question. Compare City of New Bedford, 38 MLC
4 at 247 (finding that although employer's decision to close municipal offices for a half-day
5 each week was a level of services decision, the employer was obligated to bargain over
6 the staffing arrangements that it might use to reduce its level of services).

7 *Union Allegedly Did Not Demand to Bargain Over the Two Directives*

8 The Authority contends that the Union did not demand to bargain over the June 2,
9 2020 and November 10, 2020 directives. The Authority acknowledges that when the
10 Union filed the June 8, 2020 and November 17, 2020 grievances challenging the June 2,
11 2020 and November 10, 2020 directives, the Union's emails contained requests to sit
12 down and discuss the matters. However, the Authority argues that because those
13 requests were accompanied by the attached grievances, the Union requests were
14 demands to resolve the grievances rather than demands to bargain under the Law. Upon
15 review of the disputed emails, I do not find the Authority's argument to be persuasive.
16 The Union's two emails specifically reference that it is protesting a "... violation of the
17 Agreement and unnecessary deprivation of our members' rights to select their vacation
18 periods and to accumulate and carry over their vacation periods and to accumulate and
19 carry over their vacation entitlements," but that the Union was "willing to sit down to
20 discuss the issue" and that the Union sought to "reach a mutually agreeable solution."
21 There is no requirement that unions use magic words to communicate their bargaining
22 demands for those demands to be valued. See Board of Higher Education, 22 MLC 1662,
23 1669, SUP-4078 (April 11, 1996). Here, the Union clearly is seeking to negotiate with the

1 Authority over the directives. Alternatively, the Authority asserts that even if the Union's
2 requests constituted demands to bargain, it subsequently responded to those demands
3 when it denied the two grievances. However, an employer's denial of a Union's grievance
4 alleging a contractual violation does not fulfill an employer's obligation to engage in good
5 faith negotiations to resolution or impasse over a change in a mandatory subject of
6 bargaining.

7 Moreover, the Authority presented the Union with a *fait accompli* concerning both
8 vacation directives. A *fait accompli* exists where, "under all the attendant circumstances,
9 it can be said that the employer's conduct has progressed to a point that a demand to
10 bargain would be fruitless." Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999);
11 Holliston School Committee, 23 MLC 211, 212-213, MUP-1300 (March 27, 1997) (citing
12 Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May 27, 1982)). As was
13 discussed above, the Authority notified the Union about the two vacation directives on the
14 same dates that it notified unit members about the directives. The Authority made the
15 decision to implement both vacation directives without providing the Union without any
16 prior notice about the directives, other than giving the Union a so-called "heads up" either
17 via telephone or in-person shortly before the official announcements, which did not
18 constitute reasonable notice to engage in bargaining before implementation, or the
19 opportunity to bargain to resolution or impasse.

20 Accordingly, the Authority violated Section 10(a)(5) of the Law when it required
21 certain unit members to take two weeks of vacation leave in the Summer of 2020 and
22 required unit members to take vacation leave on six days in November and December
23 2020.

1 Count II-Failure to Bargain on Demand

2 Failing and refusing to bargain on demand concerning mandatory subjects of
3 bargaining is a violation of Section 10(a)(5) of the Law. New Bedford Housing Authority,
4 27 MLC 21, 27, MUP-1650 (September 7, 2000); Boston School Committee, 11 MLC
5 1219, 1225, MUP-5315 (October 22, 1984). For the reasons discussed above, I have
6 concluded that the Union's June 8, 2020 and November 17, 2020 emails constituted
7 requests to bargain over the June 2, 2020 and November 10, 2020 vacation directives
8 respectively. The Authority did not respond to the Union's requests to bargain over either
9 directive. Furthermore, I previously rejected supra the Authority's claims that its Step 1
10 answers to the June 8, 2020 and November 17, 2020 grievances constituted responses
11 to the Union's demands to bargain. Thus, I conclude that the Authority failed and refused
12 to bargain over its decisions to require certain unit members to take two weeks of vacation
13 leave in the Summer of 2020 and to take vacation leave on six dates in November and
14 December of 2020 and the impacts of those decisions on unit members' terms and
15 conditions of employment.

16 REMEDY

17 Section 11 of the Law grants the CERB broad authority to fashion appropriate
18 orders to remedy a public employer's unlawful conduct. Labor Relations Commission v.
19 City of Everett, 7 Mass. App. Ct. 826 (1979). Here, the Union, in part, seeks a remedy
20 that the Authority make all affected unit members whole for the Authority's unlawful
21 activity. Relying on the CERB's decision in Essex North Agricultural & Technical School
22 District, 50 MLC 76, MUP-20-8072 (October 20, 2023) (Appeal pending), the appropriate
23 remedy here is the restoration of the two weeks of vacation leave that certain unit

1 members used but would not have otherwise taken during the Summer of 2020, and the
2 restoration of the vacation leave that unit members used but would not have otherwise
3 taken on November 27, 2020, December 24, 2020, and December 28, 2020 through
4 December 31, 2020. Id. at 82. Using Union Exhibit #6, which consisted of business
5 records that that Authority had compiled and provided to the Union and which also was
6 the subject of the parties' Stipulation #7, the Authority must restore the vacation leave of
7 unit members, who were informed by the Authority on or after June 2, 2020 that they were
8 required to take two weeks of vacation leave in the Summer of 2020 and who submitted
9 their requests to use those two weeks of vacation leave on or after June 2, 2020. Also,
10 the Authority must restore the vacation leave of unit members, whom it required to take
11 vacation leave on some or all of the six dates of November 27, 2020, December 24, 2020,
12 December 28, 2020, December 29, 2020, December 30, 2020 and December 31, 2020
13 but excluding vacation leave that unit members used on those dates for which they
14 submitted vacation leave requests prior to November 10, 2020.

15 CONCLUSION

16 Based on the record and for the reasons stated above, I conclude that the Authority
17 violated Section 10(a)(5) of the Law in the manner alleged in both counts of the Complaint.

18 ORDER

19
20 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the

21
22 Authority shall:

23
24 1. Cease and desist from:

25
26 a) Unilaterally requiring unit members to take vacation leave and to take that
27 leave at specified periods.
28

1 b) Failing and refusing to meet and to bargain with the Union over the
2 Authority's decisions to order: a) unit members with more than three weeks
3 of accrued vacation leave to take two weeks of vacation leave in the
4 Summer of 2020, and b) unit members to take accrued vacation leave on
5 November 27, 2020, December 24, 2020, and December 28 through
6 December 31, 2020 and the impacts of those decisions on unit members
7 terms and conditions of employment.

8
9 c) In any or like or related manner interfering with, restraining or coercing
10 employees in the exercise of their rights guaranteed under the Law.

11
12 2. Take the following affirmative action:

13
14 a) Restore the two weeks of accrued vacation leave that certain unit members
15 used in the Summer of 2020 after the Authority informed them on June 2,
16 2020 that they were required to do so, and who submitted the dates on
17 which they sought to take those two weeks of vacation leave on or after
18 June 2, 2020.

19
20 b) Restore the accrued vacation leave of unit members, whom the Authority
21 required to use vacation leave on some or all of the following dates:
22 November 27, 2020, December 24, 2020, December 28, 2020, December
23 29, 2020, December 30, 2020 and December 31, 2020, but excluding
24 vacation leave that unit members took on those dates for which they
25 submitted leave requests prior to November 10, 2020.

26
27 c) Upon request, meet and bargain in good faith with the Union about the
28 Authority's June 2, 2020 and November 10, 2020 decisions to require unit
29 members to take vacation leave and to take that leave at specified periods
30 and the impacts of those decisions on unit members terms and conditions
31 of employment.

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

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, 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 be final and binding on the parties.