COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

SEEKONK FIREFIGHTERS ASSOCIATION,
LOCAL 1931, IAFF

and

TOWN OF SEEKONK

Case No.: MUPL-16-5526
Date Issued: September 20, 2018

Hearing Officer:

Jennifer Maldonado-Ong, Esq.

Appearances:

Patrick N. Bryant, Esq. - Representing the Seekonk Firefighters Association, Local 1931, IAFF

Joseph S. Fair, Esq. - Representing the Town of Seekonk

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Seekonk Firefighters Association, Local 1931, IAFF (Association) violated Section 10(b)(2), and, derivatively, Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law), by engaging in surface bargaining during successor contract negotiations with the Town of Seekonk (Town).

Specifically, the Town alleged that, under the totality of the circumstances, the Association failed to bargain in good faith during successor contract negotiations by engaging in surface bargaining with respect to the issue of twenty-four hour shifts. I find
that the Association did not violate the Law in the manner alleged and, for the following reasons, dismiss all allegations contained in the Complaint.

STATEMENT OF THE CASE

On October 3, 2016, the Town filed a charge with the Department of Labor Relations (DLR), alleging that the Association had engaged in prohibited practices within the meaning of Section 10(b)(2), and, derivatively, Section 10(b)(1) of the Law. Following an in-person investigation that took place on October 21, 2016 and November 22, 2016, a DLR investigator dismissed the Town’s charge for lack of probable cause on December 12, 2016. On December 22, 2016, the Town filed a request for review of the dismissal pursuant to DLR Regulation 456 CMR 15.05 (9).

On January 13, 2017, the Association filed an opposition to the Town’s request for review. On June 16, 2017, the Commonwealth Employment Relations Board (CERB) issued a ruling concluding that there is probable cause to warrant a hearing to determine whether the Association violated its duty to bargain in good faith under Section 6 of the Law by engaging in surface bargaining in connection with the twenty-four hour shift issue. Therefore, the DLR issued a single count complaint of prohibited practice on remand by the CERB on June 16, 2017, alleging that the Association had violated Section 10(b)(2), and, derivatively, Section 10(b)(1) of the Law.

On June 23, 2017, the Association filed an answer to the June 16 Complaint on Remand. I conducted a hearing on January 10, 2018 and January 16, 2018, at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. The parties filed post-hearing briefs on or before February 20, 2018. Based on the record, which includes witness testimony, my observation of the witnesses’ demeanor, stipulations of fact, and documentary exhibits, and in consideration of the
parties’ arguments, I make the following findings of fact and render the following opinion.

STIPULATED FACTS

1. The Town is a public employer within the meaning of Section 1 of the Law.

2. The Association is an employee organization within the meaning of Section 1 of the Law.

3. The Association is the exclusive representative for all of the Town’s Fire Department’s full-time firefighters, with the exception of the positions of Chief and Deputy Chief.

4. The Town and the Association were parties to a collective bargaining agreement (CBA) that expired on June 30, 2016.

5. In the period from March 2016 to September 2016, the parties met to negotiate a successor collective bargaining agreement.

6. On September 19, 2016, the Association filed a petition with the Joint Labor Management Committee (JLMC) docketed as Case Number JLM-16-5505 seeking to have the JLMC assert jurisdiction over the parties’ successor contract negotiations.

7. On November 16, 2016, the JLMC voted to exercise jurisdiction over the parties’ successor contract negotiations and subsequently scheduled and held mediation sessions.

8. The parties were unable to reach agreement at mediation and the matter eventually proceeded to arbitration.

9. A JLMC arbitration award was issued on January 9, 2018.

FACTUAL FINDINGS

Background

The Town and the Association were parties to a collective bargaining agreement (Agreement) that, by its terms, was in effect from July 1, 2013 through June 30, 2016. Between March 2016 and September 2016, the parties met seven times to negotiate a successor collective bargaining agreement. The Board of Selectmen (Board) is the
executive branch of the Town. Accordingly, the Board designates certain collective
bargaining teams to negotiate on behalf of the Town. For the purposes of negotiating a
successor to the Agreement, the Town appointed the Town Administrator Shawn
Cadime (Cadime), Fire Chief Michael Healy (Healy), and Joseph S. Fair, Esq. (Fair), the
Town’s legal counsel.

Currently, firefighters employed by the Town are divided into twelve groups
consisting of seven firefighters and one lieutenant. All groups work a forty-two hour work
week based upon a rotating eight-day cycle of two consecutive ten-hour day shifts,
followed by two consecutive fourteen-hour evening shifts, followed by four days off
duty.\(^1\) The Town operates two fire stations and an Advanced Life Support Emergency
Medical Service (EMS) ambulance service, which are staffed by firefighting personnel.
Under the current group configuration, up to two firefighters may be absent without the
Town directing additional firefighters to work on an overtime basis. Generally,
firefighters use paid leave in shift increments and receive overtime compensation for all
hours worked outside of regularly scheduled shifts or in addition to forty-two hours per
week.

First Bargaining Session – March 10, 2016

The Town and the Association first met for approximately thirty minutes on March
10, 2016. Fair, Cadime, and Healy participated in this session for the Town, while local

\(^1\) The Town and the Association entered the parties’ most recent collective bargaining
agreement (Agreement) in the record as Joint Exhibit 1. Article 9, Section 1 of the
Agreement, titled “Work Hours,” provides the following: “The regular work schedule for
all employees shall be an average of forty-two (42) hours per week in an eight (8) week
cycle ... consisting of two (2) consecutive ten (10) hour days...immediately followed by
two (2) consecutive fourteen (14) hour nights...immediately followed by four (4)
consecutive days off duty.”
Association president Shaun Whalen (Whalen), Adam Clement (Clement), a member of
the negotiations committee, and Brandon Miranda (Miranda), a bargaining unit member,
participated for the Association. During this session, the parties proposed and
discussed ground rules and agreed to schedule two subsequent bargaining sessions for


On March 23, 2016, the Town and the Association met for approximately
seventy-five minutes.² Fair, Cadime and Healy represented the Town, while Whalen,
Miranda and Leah M. Barrault, Esq. (Barrault) represented the Association. During this
meeting, the Town and the Association formally executed the following ground rules
discussed at the March 10 session. Those ground rules state:

1. Negotiations shall be closed to the public and non-bargaining committee
members with the exception of those persons necessary for a particular issue
(expert or consultant). Parties agree to give advance notice of any such
appearance.

2. No press releases or other communications with the media, or communications
which most likely will reach the media, shall be unilaterally made until one or both
parties petitions for mediation.

3. No tape recording or transcription of the negotiations shall be made. Each party
is free, however, to keep its own notes.

4. Each party shall have the right to caucus at any time for a reasonable period of
time.

5. Initial proposals will be submitted by the Union at the first negotiation session that
follows the ground rules session. The Town will submit its initial proposals at the
next session that follows that. No new proposals, excluding counterproposals
and amended proposals, may be submitted subsequent to the fourth bargaining
session that follows the ground rules session. The parties, however, may
mutually agree in writing to extend the time to submit proposals.

² Both the Town and the Association agreed that the March 23, 2016 meeting
constituted the second session of successor negotiations.
6. Each party will designate one official bargaining representative who will have full authorization to make commitments and tentative agreements subject to ratification of the entire agreement. The designated bargaining representative for each side is the only person who can formally agree to proposals, make proposals or reach tentative agreements.3

7. All tentative agreements are subject to an entire agreement being reached on all other issues. At the conclusion of negotiations, a Memorandum of Agreement will be drawn up and signed by the parties.

8. The Memorandum of Agreement is subject to ratification by the Union membership and the Board of Selectmen and subject to funding by Town Meeting.

9. At the conclusion of each meeting, the parties shall endeavor to set a date and time for the next two (2) meetings.

In accordance with the fifth ground rule, noted above, the Association submitted its written proposals (March 23, 2016 proposals) to the Town. The proposals addressed the following topics:

1. Elimination of the requirement that firefighters reside within fifteen miles of the Town,

2. An increase in the stipends for paramedic precepting and mentoring,

3. Twenty-four hour shifts with a forty-two hour work week,

4. Paternity leave,

5. Change in uniforms,

6. An increase in the EMS Coordinator pay differential and in the manner in which the position earns overtime,

7. Longevity pay,

8. An increase in the hourly rate for non-civic paid details with any hours over four charged as a minimum of eight hours,

9. An increase in the mechanic's pay differential,

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3 At the March 23, 2016 bargaining session, the Town and the Union designated Fair and Barrault respectively as their official bargaining representatives.
1. Expansion of the criteria for bereavement leave,
2. Change in overtime calculation,
3. Salary increase of 5%, 5% and 5%,
4. An increase in minimum manning,
5. An increase in the chain of command to include a deputy chief as well as two additional captains,
6. An increase in the number of firefighters in each group who simultaneously may take vacation,
7. Payment of EMS certification and recertification fees, and
8. Inclusion of "span of control" language.

The Association reviewed each of its seventeen itemized proposals, and identified item numbered three, the twenty-four shift proposal, as its top priority. Specifically, the Association's proposal on the twenty-four hour shift called for the four firefighter groups to work a repeating eight-day cycle. In this cycle, firefighters would work a ten hour day shift and a fourteen hour night shift. Then, they would be off duty for the next twenty-four hours. Next, the firefighters would work a ten-hour day shift and a fourteen hour night shift and then would be off duty for five days. Barrault explained that the Association's twenty-four hour shift proposal was cost neutral for the Town because it only reconfigured the existing forty-two hour weekly schedule by pairing the existing ten and fourteen hour shifts into one shift. Barrault also explained that the Association's proposal did not require an increase in shift minimums, number of groups or number of firefighters assigned to each group, adding that the proposal would not increase paid leave benefits, which could be converted to reflect new shifts.

In response, the Town asked the Association clarifying questions about the impact of the twenty-four shift as proposed on overtime, sick leave, and the interaction...
among the groups. The Town also expressed concern that the Association’s proposal would result in increased costs, especially with respect to sick leave usage. Barrault responded by stating that the twenty-four hour shift as proposed would not increase or exacerbate sick leave usage, and, in her experience, could decrease sick leave usage. Further, Barrault explained, many communities with concerns about the impact of the twenty-four hour shift on sick leave usage have developed strategies, such as agreeing to a trial period, or a trigger that stops twenty-four shifts if sick leave utilization exceeds a previously negotiated threshold. Barrault also presented language from a JLMC decision as an example of how a trial implementation of twenty-four hour shifts can work.

After the Association explained its proposals, the meeting concluded. In accordance with the parties’ previous agreement, the Town did not reject or respond to any of the Association’s proposals during this session. Similarly, the Town did not present the Association with any proposals of its own. Subsequent to this session, the Town’s bargaining representatives presented the Association’s proposals to the Board. The Board then informed the Town’s bargaining representatives that it was unwilling to accept or otherwise consider the Association’s proposal for a twenty-four hour shift.

Third Bargaining Session – April 5, 2016

On April 5, 2016, the parties met for approximately forty minutes. Cadime, Fair and Healy participated on behalf of the Town, while Whalen, Barrault, Clement and Miranda participated on behalf of the Association. At this meeting, the Town submitted to the Association its initial proposals. The Town also indicated that it intended to

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4 Cadime testified on direct examination that the Town could not respond to the Association’s proposals in that meeting because the Association had just made the proposals.
submit additional proposals, including a wage proposal. After the Town reviewed each
of its initial proposals with the Association, the parties discussed their expectations for
the next bargaining session. Additionally, the parties agreed to schedule additional
bargaining sessions for April 26 and May 10, 2016.

Before the session concluded, the Town also rejected all of the Association’s
proposals, including the twenty-four hour shift proposal. The Town made no counter-
proposals to the Association’s proposals during this session. The Association reiterated
and emphasized the importance of twenty-four hour shifts as a top priority. The parties
agreed to modify item number five of the ground rules to make April 26, 2016 the last
session to submit new proposals.

Fourth Bargaining Session – April 26, 2016

On April 26, 2016, the Town and the Association met for approximately two
hours. Cadime, Fair and Healy attended this bargaining session on behalf of the Town,
and Whalen, Barrault, Clement and Miranda represented the Association. The Town
first presented the Association with its revised proposals, which consisted of nineteen
separate items, and then reviewed them with the Association. The revised proposals
included proposals that the Town introduced at the April 5, 2016 bargaining session as
well as new proposals that the Town had not previously introduced. The Town’s revised
proposals concerned the following topics:

1. Removal of the last sentence in the recognition clause,
2. Revision to the language concerning new hires requiring them to pay the legal
costs that the Town incurs when a firefighter leaves the Town’s employ and the
Town seeks recoupment of the tuition that it paid for the firefighter to attend the
Fire Academy,
3. A revision to the just cause language,
4. Replacement of the term Town Administrator with Fire Chief in the seniority provision,

5. An addition of work history/performance as a component in the weighted score used for promotions and appointments,

6. Inclusion of language concerning the eligibility to be “officer in charge;”

7. Replacement of pagers with the One Call system for general alarms,

8. Clarification that the rate of pay for general alarms is the rate of pay for off-duty, permanent firefighters,

9. Elimination of compensatory time as a payment option for authorized training,

10. Revision to the grievance procedure indicating that the Board of Selectmen’s response is due within ten days of the Board’s meeting at which the grievance was heard,

11. Deletion of certain language in the grievance procedure,

12. Changes to whom firefighters notify when they are absent, the time frame when they make those notifications and the manner in which the duty officer notifies a supervisor about the firefighter’s absence,

13. Requirement that sick leave incentive be treated the same as holiday pay rather than compensatory time,

14. Deletion of EMT 1 stipends,

15. Addition of successful completion of a physical agility test every three years as a condition of continued employment,

16. Clarification as to what constitutes revocation of EMS certification,

17. Correction of a typographical error in the EMT pay stipends provision,

18. Deletion of the word “net” in language involving the health insurance stipend, and

19. Addition of a new article stating that all amounts paid under the collective bargaining agreement are gross amounts subject to applicable taxes and other withholdings.

During this session, the Town also made a verbal wage proposal of 1.0%, 1.25% and 1.5%. The parties then held a caucus of unspecified duration. The Association
agreed to proposed item numbered 17, which regarded the correction of the
typographical error in the EMT pay stipend provision. The Town also made two more
verbal proposals during the course of this session. One of the proposals entailed the
conversion of payments for uniforms to purchase orders, while the other proposal
entailed changing the eligibility for stipends when a firefighter opts out of the Town's
health insurance. The Town then advised the Association that the revised written
proposals, the verbal wage proposal, and the two other verbal proposals on uniform and
health insurance stipends, constituted “its universe” of proposals. In response to those
proposals, the Association accepted some, rejected some and made counter proposals
on others. The Association then made one additional proposal for a change in the
grievance procedure and reiterated the importance of implementing a twenty-four hour
shift schedule. Before the meeting concluded, the parties mutually agreed to cut off all
new proposals even though it was a session earlier than the parties’ ground rules
specified.

Fifth Bargaining Session – May 10, 2016

On May 10, 2016, the parties met for approximately two hours. Cadime, Fair and
Healy participated in the bargaining session on behalf of the Town, and Whalen,
Barrault, Clement and Miranda participated for the Association. The parties discussed
each other’s proposals and asked questions about them. To that end, the Town
submitted an updated written itemization of its proposals to reflect the proposals it made
verbally at the previous bargaining session. Each party provided responses to the other
party’s proposals. The Association rejected items numbered 1, 5, 9, 11, 13, 16, and 19
of the Town’s revised proposals and the Town’s verbal proposal concerning health
insurance. The Association, however, accepted the Town’s proposed items numbered
4, 6, 7, 8, 15 and 17. The Association made counterproposals to the Town’s items numbered 2, 10, 12, 14, and 18 and requested more information about the Town’s items numbered 3 and 10, and the verbal proposal concerning purchase orders. In all, the Association rejected eight of the Town’s proposals, accepted six of the Town’s proposals, made counter-offers with respect to five of the Town’s proposals and inquired further about three of the Town’s proposals.

Meanwhile, the Town rejected items numbered 3, 6, 7, 10, 12, 13, 14, 15 and 17 of the Association’s proposals and suggested that items numbered 13, 14 and 17 of the Association’s proposals implicated managerial prerogatives. Although the Town did not agree to any of the Association’s proposals or make modifications or counteroffers with respect to them, the Town did not reject the Association’s proposals, either. However, the Town indicated that it was open to discussion about the Association’s proposed item numbered 1. With respect to the Association’s proposed item numbered 8, the Town indicated that it was “okay” with looking at a rate increase for non-civic details, but that it had an issue with increasing the minimum number of hours. On the Association’s proposed item numbered 2, the Town requested clarification about the different dates.

The Town also rejected the portion of the Association’s proposed item numbered 2 seeking a paramedic stipend. However, the Town stated that it was open to payment of an hourly stipend of $3.00 for paramedics who hold the position of preceptor or mentor, but that the offer was dependent upon the overall package that the parties negotiated. The Town never formally accepted or rejected the Association’s proposed

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5 Healy testified that the parties did not really “delve into the twenty-four hour shift” issue during this bargaining session. Healy also testified that the Town was “not looking for a twenty-four hour shift” for firefighting personnel.
items numbered 4, 9 and 16. Regarding the Association's proposed item numbered 9, the Town asked about the Association's justification for seeking an increase in the mechanic's differential. The Town also noted that it would take item number 16 of the Association's proposal under advisement. Finally, the Town also pointed out that it already had made proposals that conflicted with the Association's proposed items numbered 5 and 11.

The Association also submitted four counteroffers to the Town. Regarding the Town's proposed item numbered 2, the Association proposed that, in exchange for allowing the Town to recoup legal fees that it might incur while seeking repayment of a former firefighter's tuition costs, the Town needed to include a step down provision and a hardship exemption. Over a five-year period, the stepdown provision would reduce incrementally the total amount that a former firefighter could owe for tuition. Regarding the Town's proposed item numbered 12, the Association agreed to the suggested change that firefighters would notify the officer on duty rather than a superior officer if they were going to be absent. In addition, the Association agreed with the proposed change that firefighters would notify the Town of their absences within two hours of the start of their shifts instead of within the previous one-hour time frame.

However, the Association proposed that the two-hour notification requirement only would apply when a firefighter used personal leave or sick leave for the firefighter's own illness. According to the Association's proposal, when a firefighter was absent because of a family member's illness, the one-hour notification requirement would still apply. While the Association agreed with the Town's proposition that the on-duty officer would be required to notify the fire chief via phone call about a firefighter's absence, the Association proposed that the on-duty officer would also be allowed to provide notice to
the fire chief via text message. The Association also questioned the application of the
term "immediately" in regards to a duty officer's obligation to notify a supervisor about a
firefighter's absence.

For the Town's proposed item numbered 15, the Association made a counteroffer
that an annual physical exam by a primary care physician would be sufficient to confirm
a firefighter's fitness for duty. Additionally, for Town proposed item numbered 19, the
Association agreed to delete the word "net" from the health insurance stipend provision,
but sought to increase the stipend to $3,500.00 and make future hired firefighters
eligible for the stipend. As of the conclusion of this bargaining session, neither party
had withdrawn any of their own proposals.

Sixth Bargaining Session – May 26, 2016

On May 26, 2016, the parties agreed to explore an "off-the-record" bargaining
process. During such a session, proposals and arguments advanced by either party
would not prejudice on record negotiations. Cadime, Fair and Healy participated in the
"off-the-record" bargaining session for the Town, while Whalen, Barrault, Clement and
Miranda participated for the Association. During the session, the parties were to identify
the proposals that were a priority for them. The parties would then present their priority
items as part of a package but the absence of a particular proposal in a package would
not signify that the party had withdrawn that proposal. The Association made the
following "off-the-record" package proposal: items numbered 1, 2, 3, 5 and 8 were its
top priority; it revised its wage increase to three percent per year; it identified five of the
Town's proposals in which it was willing to make concessions, and expressed a

6 The Association was willing to make concessions on the following five Town proposals:
willingness to abandon overtime proposed items numbered 6 and 11, provided that the Town sustained two pending overtime grievances.

In turn, the Town informed the Association that it needed to meet with the Board before it could respond to the Association's package proposal, and that the next Board meeting was scheduled for June 15, 2016. The parties agreed to postpone the negotiating session that was previously scheduled for June 9, 2016 and reschedule that session for June 16, 2016. The Association then orally presented its package proposal before the bargaining session concluded.

Board Executive Session Meeting – June 15, 2016

In the executive session portion of the June 15, 2016 meeting, the Town's bargaining representatives presented the Board with the Association's "off-the-record" proposal, which included the proposed twenty-four hour shifts in a forty-two hour work

- Town Proposal #5-The Association referenced the Town's ability to bypass a candidate for promotion using the Civil Service Commission model of 2n +1 with a written statement containing the reasons for the bypass and an appeal process.

- Town Proposal #9-The Association proposed that unit members be allowed to earn up to 200 hours of compensatory time for authorized training, which is a reduction from the current 900 hours.

- Town Proposal #11-The Association agreed to delete language in the grievance procedure that sustained the grievance unless the Town answered the grievance within the requisite time period.

- Town Proposal #14-The Association would agree to the fitness for duty language that the Town of Lexington and its Firefighters Union have in their collective bargaining agreement.

- Town Proposal #10-The Association would agree to the Town's language revision that the Board of Selectmen's answer was due within ten days of the meeting at which the grievance was heard provided that grievances would be heard at the Board of Selectmen's meeting immediately following their receipt. The Association also acknowledged that the Town's receipt of a grievance had to fall within the time frame necessary to place the grievance on a meeting's agenda.
week. The Board requested additional information about the Association’s proposed item numbered 3 regarding the twenty-four hour shifts. Because the Board requested further research on the issue and Barrault requested to cancel the June 16 session, the June 16, 2016 negotiating session was postponed to a later date. Because the Town’s bargaining representatives were scheduled to be out of town at various times throughout the month of July, the parties subsequently scheduled a negotiating session for August 4, 2016.

By telephone on August 1, 2016, however, Fair proposed to Barrault that the August 4 bargaining session be postponed because he would not be in a position to provide the Association with any definitive responses until after an upcoming Board meeting scheduled for August 10, 2016. By email dated August 3, 2016, Fair reiterated his request to postpone the August 4 negotiating session and asked to receive the Association’s position on postponement. The August 4 negotiation session did not take place.

Seventh and Final Bargaining Session – September 15, 2016

7 Barrault testified that she did not recall requesting to postpone the bargaining session to a later date. However, Healy and Cadime both testified that Barrault requested that the bargaining session be rescheduled due to child care issues. Therefore, I credit their testimonies over the testimony of Barrault on this point. See Town of Weymouth, 19 MLC 1126, 1132, MUP-6839 (August 4, 1972) (noting that a hearing officer may believe parts of a witness’s testimony and disbelieve other parts).

8 Healy testified that the Board tasked him with researching alternatives to the Association’s twenty-four hour shift proposal. According to Healy, his research consisted of contacting the Fire Chief of Tiverton, Rhode Island, who employs a fifty-six hour work week. However, Healy did not speak with the firefighters’ union for Tiverton or any Tiverton firefighter to glean their experiences with a fifty-six hour work week. Healy further testified that the Town had not been willing to implement a twenty-four hour work schedule prior to September 2016.
As a result, the September 15, 2016 meeting was the first bargaining session to occur since the parties first engaged in an “off-the-record” negotiations on May 26, 2016. On September 15, 2016, the parties met for approximately two hours. Cadime, Fair and Healy participated in the bargaining session on behalf of the Town, and Whalen, Barrault, Clement and Aaron Grillo (Grillo), the new Association Vice-President, participated on behalf of the Association. During the meeting, the Town presented the Association with an “off-the-record” package proposal. The Town noted that all tentative agreements to date would be included in its package proposal. The Town then identified proposed items numbered 1, 2, 5, 9, 12(c), 13, 15 and 19 as its most important proposals and identified four Association proposals on which it was willing to make concessions. The Town also indicated that it agreed to drop all of its other proposals, meaning that they were excluded from its package and the parties did not need to agree upon them in order for the parties to reach a deal on a successor contract.

In addition, the Town offered a salary increase of 1.5%, 1.5% and 1.5%. The Town also gave a verbal counterproposal to the Association’s proposed item numbered 12(a). The Town was willing to make concessions on the following four Association proposals:

- Association proposed item numbered 4 - Town agreed to the paternity leave proposal.
- Association proposed item numbered 2 - Town offered to increase the hourly preceptor stipend to $2.00 instead of the Union’s proposed $3.00 increase.
- Association proposed item numbered 8 - Town agreed to a non-civic detail rate of $44 upon implementation of a successor collective bargaining agreement.
- Association proposed item numbered 16 - Town agreed to pay the firefighters’ EMS certification and recertification fees.
3 by offering twenty-four hour shifts within a fifty-six hour work week. The Town explained that it would have three work groups consisting of two groups with eleven firefighters and one group with ten firefighters, with a twenty-four hour shift rotation of twenty-four hours on, twenty-four hours off, twenty-four hours on, twenty-four hours off, twenty-four hours on, and 4 days off in a nine-day cycle. The Town would hire one additional firefighter and create two additional lieutenant’s positions.

At first, the Association responded that no other community in Massachusetts or adjacent states has a fifty-six hour work week or three work groups, and that it wanted the same work week as its peers. At some point during the discussions, the Town pointed out that the Tiverton, Rhode Island Fire Department had a fifty-six hour work week with three groups. The Association also inquired whether the Town’s twenty-four hour shift proposal would have overtime implications under the Fair Labor Standards Act (FLSA). The Town acknowledged that it could have overtime implications under the FLSA, but stated that it was not trying to reduce the firefighters’ overtime opportunities.

The Association did not ask the Town any questions about its proposal prior to taking a caucus, which was subsequently held for approximately thirty minutes. When the negotiations resumed, the Association stated that it intended to make a comprehensive counter proposal, which was its second “off-the-record” proposal and included the Association’s proposal regarding the twenty-four hour shifts. The

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10 The Town currently uses a 212 hour, twenty-eight day work period for the purposes of calculating overtime eligibility under the FLSA.

11 Barrault credibly explained on direct examination that the Association did not ask the Town questions about the Town’s proposal because she was familiar with the way the fifty-six hour schedule worked.
Association also indicated that it rejected the Town’s twenty-four hour shift proposal and that it continued to stand by its own twenty-four hour shift proposal, because the twenty-four hour shift within a forty-two hour work week was its priority, which it had stated repeatedly in each of the previous bargaining sessions. Barrault then told the Town that there was “no condition on the planet” that would persuade the Association to go to a fifty-six hour work week, or words to that effect.12

The Town then requested a caucus. After returning from the caucus, Cadime, in response to Barrault’s comment and the Association’s second “off-the-record proposal,”

12 The Association’s post-hearing brief indicated that Barrault stated that there was “no condition on the planet the Town could articulate that could persuade the Association to ask firefighters to work fourteen more hours a week.” Healy testified that Barrault stated that there was “no condition on the planet that would persuade the Association to discuss a fifty-six hour work week (emphasis supplied).” Similarly, Cadime testified that Barrault stated that there was no condition on the planet in which the union would accept the fifty-six hour work week, or words to that effect. In the Town’s post-hearing brief, it indicated that Healy and Cadime recalled Barrault stating that there was “no condition on the planet that the Union would ever agree to a fifty-six (56) hour work week.”

Barrault testified on direct examination that she informed the Town there was “no condition that they [the Town] could articulate that would persuade us to ask our firefighters to increase hours to [a] 56 hour work week.” Although each witness testified to a different version of this particular statement made by Barrault, I do not find that Barrault stated that she refused to discuss a fifty-six hour work week when she made this statement because the evidence shows that the Association and the Town continued to discuss the Town’s fifty-six hour work week proposal during this bargaining session. The fact that the Association verbally indicated to the Town that it intended to make a counteroffer, and proceeded to make that counteroffer during the same bargaining session also suggests that the Association considered the proposal, but sought to continue discussions on the twenty-four hour shift issue to achieve what it perceived to be a better result for its members.

However, I find that Barrault subsequently indicated to the Town in a separate statement that the Association was unwilling to discuss a fifty-six hour work week. I also find that Barrault made this statement while discussing the fifty-six hour work week. For this reason, I conclude that Barrault conveyed this statement to emphasize the Association’s opposition to the fifty-six hour work week rather than refuse to discuss it altogether.
stated “You’re getting the twenty-four hour shift. We’re getting nothing.” When Barrault asked what he meant by the comment, Cadime replied that the Town’s proposals gave the Town nothing. Barrault responded by stating that the Town was free to make whatever proposal it desired. When Fair asked the Association why it was opposed to the Town’s twenty-four hour shift, fifty-six hour work week proposal, the Association reiterated that no other community in Massachusetts has a fifty-six hour work week or three work groups, and that it wanted the same work week as its peers and so it was not going to discuss a fifty-six hour work week with the Town. The Town reiterated that the Tiverton, Rhode Island Fire Department had a fifty-six hour work week.\textsuperscript{13}

The Association then made a counter-offer of wage increases of 2%, 2%, and 2% in response to the Town’s wage proposal. The Association also made the following responses to the Town’s other proposals.

\begin{itemize}
\item Town proposed item numbered 1 - The Association agreed to the deletion of certain language in the recognition clause.
\item Town proposed item numbered 2 - The Association agreed to language permitting the Town to recoup legal fees that it would incur while seeking repayment of a former firefighter’s tuition costs but indicated that it wanted the Town to agree to its counteroffer of a step down provision and a hardship exemption.
\item Town proposed item numbered 5 - The Association wanted to see a draft of the actual language for the proposal concerning the use of work history/performance as a component of weighted promotional scores.
\item Town proposed item numbered 9 - The Association wanted its counteroffer of a reduction in compensatory time that unit members could earn for authorized trainings from 900 hours to 200 hours rather than the outright elimination of unit members’ earning compensatory time for authorized trainings that the Town had proposed.
\end{itemize}

\textsuperscript{13} At some point, Cadime indicated that he understood why the Association opposed the Town’s fifty-six hour work week proposal.
• Town proposed item numbered 10 - The Association agreed to the Town's proposal concerning a change in the time frame when the Board's reply to a grievance was due with the caveat that it should reflect the parties' discussions about when a grievance is discussed versus when a grievance is heard.

• Town proposed item numbered 11 - The Association agreed to the deletion of language sustaining a grievance when the Town did not timely answer at a particular step of the grievance procedure.

• Town proposed item numbered 12 - The Association agreed to the Town's proposal concerning how and when firefighters shall notify the Town of their absences but wanted a definition of the Town's use of "immediately" to describe when a duty officer was obligated to notify a supervisor of a firefighter's absence.

• Town proposed item numbered 14 - The Association would agree to language concerning fitness for duty if the Town accepted the Association's counterproposal that a letter from a firefighter's physician was sufficient to verify fitness for duty.

• Town proposed item numbered 18 - The Association would agree to a deletion from the language of the health insurance stipend if the Town would settle two pending grievances on the issue.

The Town attempted to further explain the benefits of its proposed twenty-four shift schedule to the Association, but the Association indicated again that it was not interested in that proposal under any terms. The parties held another brief caucus. Although the Board had provided the Town's bargaining team with certain parameters that would have permitted it to improve upon the package proposal it presented to the Association, the Town noted that it would need to relay the Association's position on twenty-four hour shifts to the Board, which was scheduled to meet on September 21, 2016. The Town then asked the Association for possible dates on which to schedule another bargaining session after the September 21 Board meeting. Barrault declined to provide the Town with dates at that time, but told Fair to contact her after the Board meeting and that they would talk about scheduling then to see if there was any reason
to schedule further meetings. She further stated that meetings would be scheduled only if there was movement from the Board. The bargaining session concluded at that time.

JLMC Petition

On September 19, 2016, the Association filed a petition with the Joint Labor Management Committee (JLMC), seeking to have the JLMC exert jurisdiction over the parties’ successor contract negotiations. The DLR docketed the petition as Case No. JLM-16-5505 and assigned a mediator to the matter, who subsequently met with the parties. The Town’s Board met on September 21, 2016. Citing the pendency of the JLMC petition, the Town did not contact the Association after the September 21, 2016 Board meeting to schedule another negotiating session. Instead, on October 6, 2016, the Town filed the instant charge of prohibited practice in response to the events that occurred during September 15, 2016 bargaining session.

On November 16, 2016, pursuant to Chapter 589 of the Acts of 1987, Section 4A(2)(c), the JLMC voted to exercise jurisdiction in Case No. JLM-16-5505. Thereafter, the mediator scheduled another meeting with the parties on December 7, 2016. On September 19, 2017, an arbitration hearing took place on the matter, and the arbitrator issued an award on January 9, 2018.\footnote{Chapter 589 of the Acts of 1987, Section 4A(2)(c) states in pertinent part: \ldots when either party or the parties acting jointly to a municipal police and fire collective bargaining negotiations believe that the process of collective bargaining has been exhausted the party or both parties shall petition first the committee for the exercise of jurisdiction and for the determination of the apparent exhaustion of the process of collective bargaining.}

\footnote{I take administrative notice of the fact that the Association sent an email on May 15, 2018 to advise the DLR that the Town did not appeal the JLMC arbitration award to court, and that, on May 14, 2018, the “Town Meeting voted last night to appropriate monies to fund the JLMC award.”}
OPINION

The Issue in Dispute

The single-count Complaint alleges that the Association engaged in surface bargaining by its conduct in response to the Town’s proposal for twenty-four hour shifts within a fifty-six hour work week, which included the filing of a JLMC petition two days before the Town’s bargaining representatives were scheduled to speak with the Board about whether it was willing to reconsider the Association’s proposals,\(^{16}\) in violation of Section 10(b)(1).

The Association argues that the Complaint must be dismissed because the Town did not establish that it committed a violation of the Law with respect to the position it took regarding the Town’s off the record proposal for a twenty-four hour shift within a fifty-six hour work week, which included requesting assistance from the JLMC to facilitate successor contract negotiations.\(^{17}\) The Association contends that, instead, the record evidence demonstrates that the Association listened to, and considered, all presentations and explanations of the Town’s fifty-six hour work week proposal, and that the Association never refused to negotiate over this proposal.

The Association further posited that the entire course of bargaining, including over other proposals, reveals that the Association bargained in good faith during successor contract negotiations. In addition, the Association contends that the Town failed to bargain in good faith by failing to delegate adequate negotiating authority to its

\(^{16}\) The CERB determined in its June 16, 2017 ruling that the Association’s filing of the JLMC petition, by itself, is not a violation of the Law.

\(^{17}\) The Association also argues that the duty to bargain in good faith does not apply to off-the-record bargaining about topics that violate the ground rules.
bargaining representatives and tendering a proposal that it knew would antagonize the
Association, and that this conduct effectively eliminates or at least mitigates, any legal
claims made against the Association.\textsuperscript{18} Lastly, the Association asserts that the
Complaint is moot in light of the January 2018 JLMC arbitration award, and that DLR
should defer to that award because the DLR lacks authority to amend, vacate or reverse
the arbitrator’s award.\textsuperscript{19}

Conversely, the Town argues that the Association failed and refused to bargain
in good faith by engaging in surface bargaining regarding the Town’s twenty-four hour
shift proposal, because it did not approach that proposal with an open mind or with any
reasonable effort to compromise. The Town asserts that if the Association harbored
concerns regarding the Town’s September 15 proposal on twenty-four hour shifts, then
it was obligated under the Law to present its concerns to the Town, afford the Town an
opportunity to respond, keep an open mind, and provide the Town with the opportunity

\textsuperscript{18} The Association also asserted that the Town waived its claim by inaction, laches,
failures to exhaust administrative remedies/preserve its claims, and estoppel. However,
as noted above, because I am dismissing the Complaint on different grounds, I need not
fully address these arguments in this decision.

\textsuperscript{19} I decline to reach the Association’s argument here because I have reached the
decision based on the merits of the Complaint.

In its post-hearing brief, the Association also raised the theories of waiver by inaction,
laches, failure to exhaust administrative remedies and estoppel to argue that the Town
lacked evidence to support allegations of unlawful conduct on the part of the
Association. The Association pointed to the fact that the Town did not oppose the
jurisdiction of the JLMC at any time, timely ask that the matter be stayed pending the
instant matter, DLR Case No. MUPL-16-5526, or object to the Association’s twenty-four
hour shift proposal throughout the pendency of the JLMC petition.

However, I agree with the Town that nothing in the Law requires the Town to take those
steps to obtain a determination on a Complaint that is otherwise properly before the
DLR. I decline to address the remainder of the Association’s arguments on these points
because I decide this case on different grounds.
to potentially address those concerns and/or provide the Association with a more
beneficial package that could improve the Association’s outlook of the proposal.
Instead, the Town contends, the Association acted in bad faith when it pre-determined
that it would not accept the Town’s proposal under any circumstances by refusing to
provide the Town with dates for subsequent successor bargaining sessions as required
by the parties’ ground rules and prematurely filed the JLMC petition, which is
tantamount to declaring an impasse in negotiations, prior to learning the results of the
pending September 21 Board meeting.

Lastly, the Town argues that, because of the Association’s unlawful conduct, the
town was never afforded the benefit of ascertaining the Association’s concerns with the
proposal, nor was it given the opportunity to explore the way in which it could modify its
proposal to address those concerns. Consequently, the Town argues, the fact that the
JLMC has issued an arbitration award relating to the petition filed does not excuse the
Association’s unlawful conduct, render the Complaint moot, or discourage the
Association from engaging in similar bargaining behavior in the future.\(^{20}\) For these
reasons, the Town alleges that the Association’s conduct, taken as whole, reflects a
failure to bargain in good faith with Town in violation of Section 10(b)(2) and,
derivatively, Section 10(b)(1) of the Law. As a remedy, the Town requests that I issue
an order to the Association to cease and desist from bargaining in bad faith, post a
notice to that effect, and order the parties to return to the bargaining table to negotiate
the issue of twenty-four hour shifts notwithstanding the JLMC arbitration award.

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\(^{20}\) With respect to the issue of twenty-four hour shifts, the arbitration panel “determined
that the Town shall adopt a twenty-four-hour shift schedule of twenty-four hours on,
fourty-eight hours off, twenty-four hours on, and ninety-six hours off, with a repeated
eight-day cycle.” The arbitration panel also directed the parties “to make certain that this
shift change does not cause any other change in benefits.”
The Duty to Bargain in Good Faith

Section 6 of the Law requires a public employer and a union to meet at reasonable times to negotiate in good faith over wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but does not compel either party to agree to a proposal or to make a concession. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 562-563 (1983). “Good faith implies an open and fair mind, as well as a sincere effort to reach a common ground.” Id. at 572. Thus, the duty to bargain in good faith requires the parties to enter into negotiations with an open mind and a sincere desire to reach an agreement, and to make reasonable efforts to compromise their differences. Boston School Committee, 25 MLC 181, 187, MUP-9794 (May 20, 1999); Town of Hudson, 25 MLC 143, 147, MUP-1714 (April 1, 1999) (citing Commonwealth of Massachusetts, 8 MLC 1499, SUP-2508 (November 10, 1981)).

Except where the conduct in question is, on its face, a de facto refusal to bargain, the test of a party’s good faith in negotiations involves an examination of the totality of conduct. King Philip Regional School Committee, 2 MLC 1393, 1397, MUP-2125 (February 18, 1976). In examining the totality of the parties’ conduct, the CERB also considers acts away from the bargaining table. Higher Education Coordinating Council, 25 MLC 69, 71, SUP-4087 (September 17, 1998) (citing King Philip Regional School Committee, 2 MLC at 1393). Acts away from the bargaining table that suggest bad faith bargaining include unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, delaying tactics and arbitrary scheduling of meetings. Regency Serv. Carts, Inc., 345 NLRB 671 (2005).
Surface Bargaining

A union's obligation to bargain in good faith mirrors that of an employer's obligation to bargain in good faith and is not satisfied by mere surface bargaining. *Town of Saugus*, 2 MLC 1480, 1484, MUP-591 (May 5, 1976). A party engages in surface bargaining when an examination of the course of bargaining reveals various elements of bad faith bargaining that, together, tend to show that the dilatory party did not seriously try to reach a mutually satisfactory basis for agreement, but intended merely to "shadow box to an impasse." *City of Marlborough*, 34 MLC 72, 77, MUP-03-3963 (January 9, 2008). In surface bargaining cases, the issue is whether a party's approach to bargaining demonstrated an unyielding rigidity during negotiations that rendered collective bargaining a futility. *Prentice-Hall, Inc.*, 306 NLRB 31, 39 (1992).

See also *Town of Braintree*, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981) (finding a lack of willingness to fully discuss proposals). "Collective bargaining is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of take it or leave it; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960).

A determination that the Association engaged in surface bargaining does not rest on any single element, but upon an evaluation of the entire course of the Association's bargaining conduct. See *City of Marlborough*, 34 MLC 72, 77, MUP-03-3963 (January 9, 2008). In analyzing the totality of conduct, proposals are considered "not to determine their intrinsic worth but instead to determine whether in combination and in the manner proposed they evidence an intent not to reach agreement." *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993). See also *King Philip Regional School*
Committee, 2 MLC at 1397 (finding that the relevant inquiry for the CERB is an examination of conduct exhibited at the bargaining table and the nature of the bargaining rather than the terms or merits of the parties’ proposals.)

A union’s bad faith bargaining can effectively obliterate the existence of a situation in which the employer’s good faith can be tested. Cont’l Nut Co., 195 NLRB 841, 845 (1972). If good faith “cannot be tested, its absence can hardly be found.” Times Publ’g Co., 72 NLRB 676, 683 (1947). For instance, in NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997), the court concluded that the union’s refusal to discuss the employer’s no-tobacco policy proposal obviated any bad faith violation arising from the employer’s conduct. See also Commonwealth of Massachusetts, 8 MLC at 1511 (declining to find regressive bargaining after considering the union’s refusal to respond to negotiation requests, insistence on negotiating with a particular individual, and reluctance to participate in fact-finding, in juxtaposition to the employer’s attempts to set up meeting dates, willingness to continue negotiating, wish to get the union back to the table, and cooperation with the mediator’s request for a total contract proposal).

Here, the evidentiary record does not support the Town’s contention that the Association failed to enter negotiations regarding its policy proposals with an open and fair mind. Instead, the evidence shows that, in an effort to secure an agreement with the Town over its proposal for twenty-four hour shifts in a forty-two hour work week, the Association made numerous concessions for the Town’s benefit and to make progress in the negotiations.\(^{21}\) There is no credible evidence that the Association advanced its

\(^{21}\) As noted in the preceding section, the Association responded to nine of the Town’s proposals and agreed to four of those nine proposals.
own twenty-four hour shift proposal as a finished product on a “take it or leave it” basis
or that its proposal could not be modified in any way during the course of bargaining. At
no time did the Association characterize the twenty-four hour shift proposal, or any of its
other proposals, as a final offer. Moreover, the Town’s claim that the Association would
not even consider its September 15 proposal is belied by the fact that the Association
offered substantive reasons for rejecting the Town’s fifty-six hour work week proposal.

Second, as mentioned in the preceding paragraph, the evidentiary record does
not support the Town’s argument that the Association unlawfully failed to show a
willingness to consider compromises relating to the twenty-four hour shifts or any other
proposals. With respect to the entire course of bargaining between the parties, although
the Town did not offer the Association a comprehensive counterproposal, particularly on
the twenty-four hour shift issue, as noted above, the Association nonetheless addressed
the Town’s other proposals and concerns by making numerous concessions in its
written proposals while standing by its own proposals. Because Section 6 of the Law
does not compel either the Association or the Town to agree to a proposal or make a
concession, I find that the Association did not violate the Law on these grounds.

Refusal to Bargain by Failing to Provide Successor Contract Negotiation Dates
and Filing the JLMC Petition

The Town tendered its first proposal regarding the twenty-four hour shifts at the
seventh bargaining session and had not formally responded to the Association’s twenty-
four hour shift proposal prior to that session. By that time, the Association had
presented each of its proposals to the Town, explained its rationale, answered all
questions that had been advanced by the Town regarding its proposals, and provided
all other information requested by the Town with respect to it.
Although the Town alleges that the Association’s refusal to provide it with two subsequent bargaining meeting dates as the September 15 bargaining session concluded is unlawful, the evidence does not show that the Association refused to bargain or that it ignored the Town’s request for dates. The fact that the Association told the Town to contact it after the September 21 Board meeting to discuss future meetings is indicative of a desire to continue bargaining at a later date. Although it is true that Barrault also told the Town’s bargaining representatives that they should contact her “to see if there was any reason to schedule future meetings,” and only then if there was movement from the Board, I do not find that the Association’s conduct, which had the effect of merely postponing negotiations to a later date, amounts to a refusal to listen to the Town’s proposal on the fifty-six hour workweek.

The record reveals that the Association was frustrated by the Town’s bargaining configuration and protocol for relaying information to the Board. Accordingly, I find that the evidence supports the conclusion that the Association’s concern about the lack of progress seven bargaining sessions into negotiations was not a frivolous one. First, it is undisputed that negotiations ceased between May 26, 2016 and September 16, 2016. It is also undisputed that the Town’s bargaining representatives needed to receive further instruction from the Board concerning the Association’s “off-the-record” proposal, which played a substantial role in the ensuing bargaining hiatus. In addition, the Association’s bargaining stance on the twenty-four hour shift issue was a cumulative response to its perception that the Town had taken a similarly rigid stance in opposition to its proposal, which is corroborated by evidence demonstrating that the Town knew that the Board was unwilling to accept or consider the Association’s proposal for twenty-four hour shifts
and Healy’s testimony that the Board had not been willing to implement twenty-four
shifts prior to September 2016.

Because the Board had been unwilling to consider the Association’s proposal on
the twenty-four hour shifts at the second and third bargaining sessions, the Town did
not present its counteroffer on the issue until September 16, nearly six months after the
Association had identified the issue as its top priority. Because six months is a
substantial amount of time, the Association perceived that additional delays in self-
directed negotiations would diminish the likelihood of executing a successor contract
and that third party assistance was necessary to resolve outstanding issues, and that
the petition for such assistance would obviate the need to provide additional dates
relating to self-directed negotiations. Furthermore, the parties’ ninth ground rule does
not affirmatively require the parties to schedule dates and times for two additional
meetings at the conclusion of each bargaining sessions, only that they shall “endeavor,”
or attempt, to do so. Therefore, I find that the Association did not violate the Law by
failing to provide subsequent dates for bargaining at the September 15 bargaining
session.

The Town also contends that the Association’s September 19 filing of the JLMC
petition constituted a failure to bargain in good faith because it prevented the Town from
presenting further bargaining proposals. However, Chapter 589 of the Acts of 1987
permitted the Association to file at the JLMC because it indicated a belief that the
process of collective bargaining had been exhausted. Although the Town may disagree
with the Association’s view of the state of negotiations, there is no evidence showing
that the Association’s belief was unreasonable or that it filed the petition in bad faith.
While it may have been more prudent for the Association to have waited for the Board’s
response to the Association's counterproposal before filing the JLMC petition, the Town
presented no evidence to suggest that the Association's conduct necessitates a
conclusion that it would have refused to listen to or consider any response proffered by
the Board as a result of the September 21 meeting.

As noted in the DLR investigator's dismissal order dated December 12, 2016,
the DLR assigned a mediator to matter once the JLMC voted to exercise jurisdiction
over the parties' successor contract negotiations. Because mediation is a component of
the JLMC's procedure, the Town and the Association had the opportunity to make
further bargaining proposals during that process. The difference here was that
negotiations were no longer self-directed by the parties, but facilitated by a DLR
mediator. Notwithstanding, nothing precluded the Town from making proposals on the
twenty-four hour shifts or working with the Association to come to mutual resolution over
the issues certified by the JLMC prior to the arbitration hearing that eventually took
place. Therefore, I find that the Association did not violate the Law by filing the
September 19 JLMC petition.

Totality of the Circumstances

When examining acts alleged to violate the statutory obligation to bargain in good
faith, the CERB looks to the totality of a respondent's conduct, and not merely to
isolated deeds. Harwich School Committee, 10 MLC 1364, 1367, MUP-5216 (January
25, 1984). Therefore, based on the totality of the Association's conduct, including its
concessions to a number of the Town's other proposals apart from the twenty-four hour
shift in a fifty-six hour work week, I do not find that the Association engaged in surface
bargaining about the twenty-four hour shift issue.
Further, the Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. *City of Marlborough*, 34 MLC at 77. Where a party is determined to maintain a set position, such as the case is here, it must approach the subject with an open mind by allowing the other side to explain the reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. *Id.* Here, the Town offered its first response to the Association’s twenty-four hour shift proposal during the seventh negotiation session, which took place on September 15, 2016. The Association offered a counterproposal on that same date, the proposed terms of which included maintaining its own twenty-four hour shift proposal.

Barrault explained that the Association wanted the same schedule as its peers located throughout the Commonwealth, and that, apart from Gloucester, no other Massachusetts community had a fifty-six hour work week with three groups of firefighters. Thus, although the Town alleges that the Association merely provided a brief and vague explanation, the Association’s rejection of the Town’s proposal nonetheless conveyed a clear, fundamental difference of opinion about the benefit of the Town’s proposed work schedule, given that nearly all Massachusetts communities, with the notable exception of Gloucester, operate on a twenty-four hour shift on a forty-two hour work week schedule.

In summary, I find that the Association engaged in good faith, hard bargaining rather than surface bargaining. *City of Marlborough*, 34 MLC at 77. The Association’s position regarding the twenty-four hour shift proposal was not so patently unreasonable as to frustrate agreement, nor did it, or the JLMC petition, constitute an effort to stall negotiations. *Cf. Framingham School Committee*, 4 MLC 1809, MUP-2428 (February 27, 1978) (finding that the employer engaged in delay tactics, and that the employer’s
proposal based on a long-abandoned position was predictably unacceptable). Further, the Association did not refuse to meet indefinitely, fail to bring a decision maker, refuse to discuss certain proposals, fail to respond to any Town proposals, or condition further negotiations or an agreement upon acceptance of certain proposals as presented. It is undisputed that the Association remained steadfast in its belief that the twenty-four hour shift within a forty-two hour work week proposal represented the most beneficial work schedule for its membership. However, the Town did not show that the Association refused to discuss or listen to the Town's proposal for a twenty-four hour shift within a fifty-six hour work week.

Although the Association rejected the Town's proposal on the fifty-six hour work week almost immediately and in the same bargaining session in which it was proposed, the record shows that negotiations did not immediately cease upon the Association's rejection of that proposal. Even though Barrault, as the Association's official bargaining representative, stated that there was "no condition on the planet" that would persuade it to agree to a fifty-six hour work week, the fact that the Association verbally indicated to the Town that it intended to make a counteroffer, and proceeded to make that counteroffer during the same bargaining session, suggests that the Association considered the proposal, but sought to continue discussions on the twenty-four hour shift issue to achieve what it perceived to be a better result for its members. While the Town may have been disappointed by the Association's unwavering stance on the matter of twenty-four hour shifts, the Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. See Town of Braintree, 8 MLC at 1197.
For all of the reasons above, I do not find that the Town has satisfied its burden
to establish that the Association lacked the required intent to reach an agreement, and
was merely going through the motions of negotiating, or presented a take it or leave it
demeanor. Accordingly, I dismiss the Complaint.

CONCLUSION

Based on the record, and for the reasons stated above, I conclude that the
Association did not violate Section 10(b)(2), and, derivatively, Section 10(b)(1) of the
Law and dismiss the Complaint in its entirety.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

JENNIFER MALDONADO-ONG, 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 Executive Secretary of the
Department of Labor Relations not later than ten days after receiving notice of this
decision. If a Notice of Appeal is not filed within the ten days, this decision shall
become final and binding on the parties.