

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF MARLBOROUGH

and

MARLBOROUGH MUNICIPAL EMPLOYEES
ASSOCIATION

*
*
*
*
*
*
*
*
*

Case No.: MUP-19-7198

Date Issued: December 16, 2021

Hearing Officer:

Kathleen Goodberlet, Esq.

Appearances:

Kier Wachterhauser, Esq. - Representing the City of Marlborough

Sheilah McCarthy, Esq. - Representing the Marlborough
Municipal Employees Association

HEARING OFFICER'S DECISION

SUMMARY

1
2 The issue in this case is whether the City of Marlborough (City) violated Section
3 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter
4 150E (the Law) by failing to bargain in good faith with the Marlborough Municipal
5 Employees Association (Association, Union, or MMEA) by its actions in unilaterally
6 implementing new bereavement leave eligibility requirements, by changing the parties'
7 bereavement leave practice in denying Jennifer DiBuono's (DiBuono's or Jen's)
8 December 11, 2018, bereavement leave request for the death of her father. For the

1 following reasons, I find that the City's conduct violated Section 10(a)(5), and
2 derivatively, Section 10(a)(1) of the Law by unilaterally adding a step in the
3 bereavement leave approval process considering the specific nature of the relationship
4 between an employee and the deceased person that the employee identified as their
5 parent, and limiting eligibility to biological parents.

6 STATEMENT OF THE CASE

7 On March 6, 2019, the Association filed a Charge of Prohibited Practice (Charge)
8 with the Department of Labor Relations (DLR), alleging that the City had engaged in
9 prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section
10 10(a)(1) of the Law. Following an investigation, the DLR issued a Complaint of
11 Prohibited Practice (Complaint) on June 11, 2019. The City filed an Answer to the
12 Complaint on February 5, 2019. I conducted a hearing on February 13, 2020, at which
13 both parties had the opportunity to be heard, to examine witnesses and to introduce
14 evidence. The parties subsequently filed post-hearing briefs on March 27 and 28, 2020.
15 Based on the record, which includes witness testimony, my observation of the
16 witnesses' demeanor, stipulations of fact, and documentary exhibits, and in
17 consideration of the parties' arguments, I make the following findings of fact and render
18 the following opinion.

19 ADMITTED FACTS

20
21 The City admitted the following facts in its February 5, 2019, Answer:

- 22
23 1. The City is a public employer within the meaning of Section 1 of the
24 Law.
25
26 2. The Association is an employee organization within the meaning of
27 Section 1 of the Law.
28

4. The City and the Association are parties to a collective bargaining agreement (CBA).

Background

Subject to the provisions of Addendum A, Section 32.28, a full-time employee will be permitted up to four (4) days of leave without loss of pay following the death of any member of his/her immediate family provided that he/she actually attends the funeral or a memorial service held in the honor of the deceased immediate family member. "Immediate family" is defined as a spouse or domestic partner, child, mother, father, grandchild, brother, sister, grandparent, brother-in-law, sister-in-law, mother-in-law, father-in-law, and those who reside in the same household with the employee.

- The parties' July 1, 2009 - June 30, 2012 (2009-2012 Agreement) contains the following language:

Effective July 1, 2007, subject to the provisions of Addendum A, Section 32.28, a full-time employee will be permitted up to five (5) days of leave without loss of pay following the death of any member of his/her immediate family provided that he/she actually attends the funeral or a memorial service held in the honor of a deceased immediate family member. "Immediate family" is

² The 2015-2018 Agreement may have remained in effect by operation of the duration clause through 2019, but this point is not material to my decision.

1 defined as a spouse or domestic partner, child, mother or father of
2 the employee.
3

4 A full-time employee will be permitted up to three (3) days of
5 leave without loss of pay to attend the funeral or memorial service
6 following the death of the employee's grandchild, brother, sister,
7 mother-in-law, father-in-law, grandparents (and those of spouse) or
8 others who reside in the same household with the employee.
9

10 A full-time employee will be permitted one (1) day leave
11 without loss of pay to attend the funeral of an aunt, uncle, niece or
12 nephew.
13

- 14 • During successor negotiations on September 18, 2012, the Association offered
15 the following proposal:
16

17 Bereavement leave. Replace the existing clause with the following:
18

19 In the event of a death occurring in the immediate family or a
20 significant other of an employee covered by this Agreement, said
21 employee shall be granted five (5) working days off without loss [of]
22 pay. Significant other is defined as someone who contributed to the
23 employee's financial and emotional well-being over multiple years.
24

25 In the event of the death of an employee's aunt or uncle, the
26 employee shall receive on (1) day off without loss of pay for the
27 purpose of funeral attendance.
28

29 For the purpose[s] of this Article, the term "immediate family" shall
30 include the following: mother, father, mother-in-law, father-in-law,
31 sister, brother, wife, child, grandchild, grandparents, sister-in-law,
32 brother-in-law, or a dependent as qualified by the Internal Revenue
33 Service who lives in the employees' household.
34

- 35 • In a December of 2013 Memorandum of Agreement (2013 MOA), the parties
36 replaced the existing bereavement leave clause with the following language:
37

38 Subject to the provisions of Addendum A, Section 32.28, a full-time
39 employee will be permitted up to four (4) days of leave without loss
40 of pay following the death of any member of his/her immediate
41 family provided that he/she actually attends the funeral or a
42 memorial service held in the honor of the deceased immediate
43 family member. "Immediate family" is defined as a spouse, or
44 domestic partner, child, mother, father, grandchild, brother, sister,
45 grandparent, brother-in-law, sister-in-law, mother-in-law, father-in-

1 law, and those who reside in the same household with the
2 employee.
3

4 In summary, the 2013 MOA eliminated the tiered system of bereavement leave in Article
5 13, Section 10 of the 2009-2012 Agreement and provided four days of leave for
6 "immediate family." The parties expanded the definition of immediate family to include
7 grandchild, brother, sister, grandparent, brother-in-law, sister-in-law, mother-in-law,
8 father-in-law, and those who reside in the same household with the employee.
9 Bereavement leave was no longer available upon the death of a spouse's grandparent,
10 or for an aunt, uncle, niece, or nephew. In adopting the 2013 bereavement leave clause,
11 the parties had no discussions about the meaning of father or mother or whether those
12 terms excluded non-biological parents. The parties made no changes to the
13 bereavement leave clause after 2013, and the definition of immediate family is the same
14 in the 2015-2018 Agreement as it was in the 2013 MOA.

15 Over the course of at least the last decade of successor contract negotiations
16 and grievance processing, the parties never discussed stepparents, the definition of
17 "mother" or "father," or adding a definition of mother or father to the bereavement leave
18 provisions of an agreement. Neither party has ever proposed explicitly including
19 bereavement leave for stepparents in an agreement. There is also no evidence that the
20 parties have ever discussed adding managerial discretion to the language of the
21 bereavement leave policy.

22 Prior to 2019, when a family member of a bargaining unit member passed away,
23 the bargaining unit member would notify their department head that they would be out of
24 the office on bereavement leave, and the department head would grant the
25 bereavement leave. The City did not inquire about the specific nature of the relationship

1 between the employee and the deceased, or seek to verify the relationship between the
2 employee and the deceased prior to granting bereavement leave. The City had never
3 denied bereavement leave on the basis that a person defined by the bargaining unit
4 member as being covered by the bereavement leave clause was not in fact that relation.
5 For example, when bargaining unit member and Association President Christine
6 Monfalcone's (Monfalcone's)³ grandmothers passed away, she called her supervisor on
7 each occasion to let them know that she would be out of the office on bereavement
8 leave, and her supervisors granted the bereavement leave without further inquiry.
9 Likewise, when bargaining unit member and Senior Tax Collector Jennifer DiBuono's
10 (DiBuono's)⁴ mother-in-law passed away, the same process applied.

11 The City's Human Resources Director, David Brumby (Brumby),⁵ testified at the
12 hearing that he was unaware of any employee having received bereavement leave for
13 the death of a stepparent over the course of his tenure with the City. However, there is
14 no evidence that in administering bereavement leave prior to 2019, Brumby, a Town
15 Manager, or any other agent of the City investigated or verified employees' parental
16 relationships to ensure that the City did not extend bereavement leave for the death of a
17 stepparent. No City official had ever sought to confirm that a deceased parent was a

³ Monfalcone has been working for the City since 1987. She is the Finance Assistant in the Treasurer's Office, a position that she has held for 27 years. Prior to that, she worked in the Tax Collector's Office for about 5 years. Monfalcone has been Association President for about 10 years. Prior to that she was the Association Vice President for about 8 years. Her duties include conducting collective bargaining negotiations, and hearing grievances.

⁴ DiBuono began working for the City in about 2013, and worked in the Tax Collector's Office during the relevant time period.

⁵ Brumby became the City's Human Resources Director in about 2009, and served in that capacity for about 10.5 years. Although he retired the summer before the hearing in this case, he still worked a few days a week for the City.

1 biological or blood relation before permitting a bargaining unit member to use
2 bereavement leave, or insisted over an employee's objection that an employee's father
3 or mother was a stepparent. Rather, prior to 2019, the City granted bereavement leave
4 as a matter of course, without exercising managerial discretion.

5 December of 2018 Events

6 Background

7 On December 9, 2018, DiBuono was at work in the City's Tax Collector's Office
8 when she received a call informing her that "her father" Rodney Cloutier (Cloutier or
9 Rodney) was "not good." She left work at about noon that day, and was with him at the
10 hospital until he passed away early on December 10, 2018. She was the only person
11 with Cloutier when he died.

12 By December of 2018, DiBuono had been working for the City for five years.
13 Cloutier, who was a long-time City employee, had often brought DiBuono coffee at City
14 Hall where she worked. City Mayor Arthur Vigeant (Vigeant) and other City Hall
15 employees knew Cloutier as DiBuono's father and DiBuono as Cloutier's daughter.
16 Although DiBuono always referred to Cloutier as her father and called him "dad," she
17 told one colleague, Rauf Guimaraes (Guimaraes), at an unidentified point in time that
18 while Cloutier was her father, he was not her biological father. DiBuono never referred
19 to Cloutier as her stepfather, never referred to anyone else as her father, and never
20 called anyone else "dad."

21 December 9, 2018

22 On December 9, 2018, Monfalcone, who worked in the Treasurer's Office as a
23 Finance Assistant, went to the Collector's Office, which is under the umbrella of the

1 Treasurer's Office, to discuss a work issue with DiBuono. Jill Broder (Broder) who works
2 with DiBuono in the Collector's Office told Monfalcone that DiBuono had left the office to
3 be with "her father" at the hospital as he was "gravely ill" or "very ill." Monfalcone told
4 Broder that she was sorry to hear the news, and returned to her office. At an
5 unidentified point in time prior to December 9, 2019, DiBuono had told Monfalcone that
6 "my father is sick."

7 December 10, 2018

8 At about 9:30 a.m. on December 10, 2018, DiBuono contacted her direct
9 supervisor, Tax Collector Eileen Bristol (Bristol) and told her that "my father has passed
10 away." DiBuono requested bereavement leave for her "father's" death, referring to
11 Cloutier as her father, not her stepfather. Bristol told DiBuono "no problem, whatever
12 you need." Later that morning, Monfalcone returned to speak with DiBuono, and Broder
13 informed her that "Rodney had passed away."

14 When Monfalcone returned to the Treasurer's Office, Treasurer Brian Doheny
15 (Doheny)⁶ and Guimaraes, who was another Treasurer's Office employee, were
16 standing together. Monfalcone informed them that "Jen's father passed away."
17 Monfalcone also told Doheny and Guimaraes that she had heard that Rodney was sick,
18 but that she didn't realize that he was going to die. She stated that she felt awful about
19 the situation, and that DiBuono was going to be out of the office for a bit. Monfalcone
20 wanted Doheny to know about the situation because he was DiBuono's supervisor. She
21 also wanted to alert Guimaraes to the situation because Guimaraes sometimes filled in

⁶ In December of 2017 Brian Doheny (Doheny) was the City's Treasurer, a position he had held for about 4.5 years, and Monfalcone's immediate supervisor. Prior to Doheny, Thomas Abel (Abel) was the Treasurer and Monfalcone's supervisor for 18 years.

1 at the Collector's Office, where he used to work. Guimaraes was a friend of DiBuono's
2 because they used to work together.

3 Doheny responded to Monfalcone by stating, "that's too bad I'm sorry to hear
4 that." Then he said, "I didn't think she was that close to her father," and made a face,
5 which Monfalcone interpreted as Doheny expressing surprise that DiBuono would take
6 time off from the office to the extent that Guimaraes would need to fill in at the
7 Collector's Office. Guimaraes then stated to Doheny that, "oh no, she's not close to her
8 biological father but this is her step-father that's her father, and she's very close to him."

9 Doheny then left the Treasurer's Office and went to the Human Resources Office
10 to speak with Brumby. Doheny explained to Brumby that he had been notified that
11 DiBuono's father had passed away, but that Guimaraes had told him that DiBuono's
12 stepfather had passed away.⁷ Doheny asked Brumby what the bereavement leave

⁷ There is conflicting testimony about whether Doheny told Brumby that he had spoken with DiBuono. Brumby testified on cross-examination that he "believed" Doheny told him that he had talked to DiBuono, and confirmed that Cloutier was her stepfather. He then testified that "I think [Doheny] told me" that he talked to DiBuono to confirm the same. Brumby also testified "I know he got the information. . . directly from Jen." Brumby subsequently testified on cross-examination that he didn't know "exactly who" talked to DiBuono, but that it was either Doheny or Bristol, and that Doheny reported to him that Cloutier was DiBuono's stepfather when they first discussed the contract language. Brumby further testified that that it was Doheny's "job to verify these kinds of things," that he "assumed Doheny did his job," and that he did not doubt Doheny because Doheny was a "senior manager." During her testimony on rebuttal, DiBuono flatly denied that Doheny or Bristol ever contacted her to ask about the nature of her relationship with Cloutier. For the following reasons, as well as witness demeanor, I do not credit Brumby's claim that Doheny told him that he had spoken with DiBuono. Brumby merely testified that he "believed" or thought that Doheny told him that he talked to DiBuono. Brumby further testified that he didn't know whether Doheny actually spoke with DiBuono to confirm that Cloutier was her stepfather, or whether Bristol may have been the one that spoke with DiBuono. Finally, Brumby conceded that he merely "assumed" Doheny did his job and did not question him because he was a senior manager. Brumby's uncertainty and assumptions stand in stark contrast to DiBuono's flat denial that either Doheny or Bristol ever contacted her directly and asked her

1 policy was with respect to stepparents. Brumby pulled out a copy of the bereavement
2 leave policy, and reviewed the language with Doheny. Brumby told Doheny that "step-
3 fathers were not part of the policy, and they weren't covered." Brumby did not offer
4 Doheny general bereavement leave guidelines, or give him options on how to handle
5 the situation.

6 Before his conversation with Doheny on December 10, 2018, Brumby, who had
7 been working as the City's Human Resources Director for nearly ten years, a period of
8 time that included DiBuono's five years of employment, had never heard DiBuono or
9 anyone else describe Cloutier as DiBuono's stepfather. Nevertheless, he did not seek to
10 confirm or investigate Guimaraes' assertions. He did not ask whether Doheny had
11 spoken directly with DiBuono to confirm or investigate the matter. He did not contact
12 DiBuono to ascertain the nature of her relationship with Cloutier, or ask Doheny to
13 contact her. Brumby and Doheny also did not discuss whether Cloutier had adopted
14 DiBuono.

15 Doheny subsequently went to the Collector's Office and told Bristol to deny
16 DiBuono bereavement leave. Bristol then called DiBuono and, contrary to her earlier
17 statement granting DiBuono bereavement leave, told DiBuono that she could not have
18 bereavement leave because Cloutier was not her biological father. Bristol said that it
19 was Doheny's decision to deny her bereavement leave and that she had to use her
20 personal or vacation leave for her "father's" funeral. Bristol, who was very upset, told
21 DiBuono said that she was sorry she had to make the phone call, and that she never

whether Cloutier was her stepfather. Accordingly, I do not credit Brumby's testimony that Doheny told him that he had spoken with DiBuono.

1 thought she would have to tell another person that the person they thought was their
2 father, wasn't their father.

3 DiBuono immediately called Monfalcone and said, "I can't believe this, but I just
4 got a call from [Bristol] who told me that I'm not going to have bereavement leave for my
5 father."⁸ Monfalcone told DiBuono that she didn't understand the situation either, but
6 that she would speak with Bristol. Monfalcone also told DiBuono that Guimaraes had
7 spoken to Doheny about Cloutier, and that "maybe things got misconstrued."
8 Monfalcone then went downstairs to the Collector's Office where she found Bristol very
9 upset. Bristol had tears in her eyes, and told Monfalcone that she felt like "such a jerk
10 for having to call [DiBuono] and tell her that she did not get bereavement leave after she
11 had already told her 'no problem, whatever you need.'"

12 Monfalcone then went upstairs to see Brumby in his office. Brumby told
13 Monfalcone that, "we were going by the contract, that there was the language in the
14 contract that we bargained between the City and the MMEA." Brumby told Monfalcone
15 that Cloutier was "not her biological father, and [was] not her blood relative, and [was]
16 not covered under the bereavement clause." In discussing Cloutier's status as
17 DiBuono's stepfather, he did not discuss adoption.⁹ Monfalcone told Brumby that, "[t]his
18 is wrong on so many levels. This is her father. This is her only father. She has no
19 relationship with the other man." Monfalcone pleaded with Brumby to see that this was

⁸ Monfalcone initially testified that Doheny then returned to the Treasurer's Office and told Monfalcone that Human Resources "weren't going to be able to give DiBuono bereavement leave." She later clarified that that the first she heard that Bristol had denied DiBuono's request for bereavement leave was when DiBuono called her at about 12:30 p.m. the morning after Cloutier's death.

⁹ During his testimony, Brumby explained that he and Monfalcone were debating briskly, and he "should have widened that and said that we also consider *legally adopted* people as well."

1 DiBuono's "father, her only father." Monfalcone was upset, but professional, and told
2 Brumby that she didn't agree with the decision to deny DiBuono bereavement leave.

3 December 11, 2018

4 By email dated December 11, 2018 from Monfalcone to City Mayor Vigeant, the
5 Association requested that the City reconsider its decision to deny DiBuono
6 bereavement leave "to deal with the loss of her father," noting that Cloutier had raised
7 DiBuono from birth, that DiBuono considered him her father for 48 years, that Cloutier
8 had worked for the City for many years where it was well-known that DiBuono called
9 him her father, and that DiBuono had been at Cloutier's bedside in the 9 hours before
10 his death. Monfalcone stated, in relevant part:

11 As I am sure you have heard, Rodney passed away last night while Jen
12 was bedside with him for 9 hours before he passed away [sic]. Rodney is
13 the man who raised her from the time she was born (Jen's biological
14 father was never present in her life until she was an adult and had children
15 of her own). To say that this man was not her father simply because he
16 did not conceive her is so outdated. I had a conversation with [Brumby]
17 about this and his position is that he is not the biological father and that is
18 all that matters. Anyone can be a biological father, but the person who
19 raises you and is there for you is the real father. He has been her father
20 for all of her 48 years, and there is no one else she considers her father.
21 Saying that because he is a step father it doesn't count seems really unfair
22 to Jen and her family [sic].
23

24 I am not sure whose decision this was, whether it [was Brumby's or
25 Doheny's] or maybe yours, but [Rodney] worked for the City for many
26 years, and anyone who was around during those years knows this is the
27 man who raised Jen and who Jen has always called her father [sic]. I
28 respectfully ask that the City reconsider its decision to deny Jen
29 Bereavement time to deal with the loss of her father.
30

31 Vigeant did not acknowledge or respond to Monfalcone's December 11, 2018 email.

December 14, 2018

By email dated December 14, 2018, from Monfalcone to Vigeant, cc'd to Doheny and Brumby, the Association again requested that the City reconsider its decision to deny DiBuono bereavement leave for her "father," attaching Cloutier's obituary that referred to DiBuono as his "daughter." Monfalcone stated, in relevant part:

Good afternoon. In case you haven't seen it, here is a copy of the obituary for Jen DiBuono's father, Rodney Cloutier. If you read down, you will see that Jen is his daughter and Jake is his grandson. Our union contract lists nothing about the person having to be a blood relative, or the biological parent, which is what was mentioned to me as the reason the City was denying Jen bereavement time. Our contract simply states the word "father." [Rodney] has a baby picture of Jen tattooed on his body from when she was born. Clearly, he was her father, as she has stated. I respectfully request that you reconsider your denial of bereavement time for Jen's father.

The obituary attached to Monfalcone's December 14, 2018 email listed DiBuono as one of Rodney's two daughters, along with two sons. The City did not respond to Monfalcone's December 14, 2018 email.

December 15-16, 2018

On December 15 or 16, 2018, Monfalcone went to Brumby's office. She reiterated that the DiBuono situation was "unfair on many levels," and told him that no one had responded to her December 14, 2018 email. Brumby told her that Cloutier was a stepparent, and not DiBuono's a biological or blood relative. He also told Monfalcone that it was Doheny's decision about whether to give DiBuono bereavement leave. When Monfalcone talked to Doheny about the situation later that afternoon, Doheny said that Brumby told him that DiBuono was not covered by the bereavement leave clause. Doheny also told her that DiBuono did not get bereavement leave because Cloutier was

1 her stepfather, "not her real father." Monfalcone explained to Doheny that Cloutier had
2 raised DiBuono.

3 Other Relevant Facts

4 DiBuono and her brother handled Cloutier's funeral arrangements, holding a
5 private wake and celebration of life. She paid for everything. Despite Monfalcone's
6 efforts, the City never granted DiBuono bereavement leave. Because it was the end of
7 the year and DiBuono did not have much accrued time to take off, Doheny allowed her
8 to work a 13-hour day to earn compensatory (comp) time. Ultimately, DiBuono used a
9 sick day, a vacation day, and comp time to cover the time she needed to take off in the
10 aftermath of Cloutier's death. DiBuono requested that the Association not file a
11 grievance on the matter because, at the time, she was extremely distraught. When
12 Monfalcone asked her about filing a grievance, DiBuono told her "not right now, I'm too
13 upset about what's going on and I have too much to do, and I can't even believe I'm
14 having this conversation." With the passage of time, DiBuono supported the
15 Association's 2019 Charge of Prohibited Practice in the case at issue.

16 DiBuono explained at the hearing that her mother met Cloutier when her mother
17 was three months pregnant with her. Cloutier raised DiBuono from birth. He was the
18 only father she ever knew. Growing up, Cloutier lived in the house with her mom and
19 brother and was in every respect a husband and father. DiBuono called him "dad," and
20 never called him by his first name or a nickname. Cloutier had a tattoo of DiBuono on
21 his forearm. DiBuono's biological father was never present in her life until she was an
22 adult with her own children. The only person DiBuono ever considered her father was

1 Cloutier. When he died, she requested bereavement leave for death of her father, not
2 her stepfather.

3 OPINION

4 The Complaint in this case broadly alleges that the City failed to bargain in good
5 faith "by implementing new bereavement leave eligibility requirements without giving the
6 Association prior notice and an opportunity to bargain to resolution or impasse over the
7 City's decision and the impacts of that decision on employees' terms and conditions of
8 employment." The Complaint specifically alleges that the City failed to bargain about its
9 decision to limit bereavement leave to biological or blood relatives. For the reasons
10 discussed in detail below, I find that the City violated Section 10(a)(5), and derivatively,
11 Section 10(a)(1) of the Law by unilaterally adding a step in the bereavement leave
12 approval process that assessed the specific nature of the parental relationship between
13 an employee and the deceased person that the employee identified as their parent, and
14 limited eligibility to biological parents.

15 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) when it
16 unilaterally changes an existing condition of employment or implements a new condition
17 of employment involving a mandatory subject of bargaining without first providing its
18 employees' exclusive bargaining representative notice and an opportunity to bargain to
19 resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
20 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
21 Commission, 388 Mass. 557 (1983). To establish a violation, the Association must
22 demonstrate that: 1) the City altered an existing practice or instituted a new one; 2) the
23 change affected a mandatory subject of bargaining; and 3) the change was established

1 without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 39
2 MLC 169, 171, SUP-08-5447 (December 27, 2012).

3 A past practice is a practice which is unequivocal, has existed substantially
4 unvaried for a reasonable period of time, and is known and accepted by both parties.
5 City of Newton, 32 MLC 37, 49, MUP-2849 (June 29, 2005). To determine whether a
6 practice exists, the Commonwealth Employment Relations Board (Board) analyzes the
7 combination of facts upon which the alleged practice is predicated, including whether
8 the practice has occurred with regularity over a sufficient period of time so that it is
9 reasonable to expect that the practice will continue. City of Boston, 41 MLC 119, 125,
10 MUP-13-3371, MUP-14-3466, MUP-14-3504, (November 7, 2014). The Board's inquiry
11 turns on whether employees in the unit have a reasonable expectation that the practice
12 "is unequivocal, has existed substantially unvaried for a reasonable period of time and is
13 known and accepted by both parties." Commonwealth of Massachusetts, 23 MLC 171,
14 172, SUP-3586 (January 30, 1997) (citing Town of Chatham, 21 MLC 1526, 1531,
15 MUP-9186 (January 5, 1995)).

16 The Association argues that the City changed its administration of the
17 bereavement leave benefit by "re-defining the nature of an employee's asserted
18 relationship with a family member." The Association emphasizes that DiBuono sought
19 bereavement leave for the death of her father, not her stepfather, and that she "never,
20 ever" referred to Cloutier at any time, to anyone, as her stepfather. The Association
21 argues that Doheny took Guimaraes' statement that Cloutier was DiBuono's stepfather,
22 and determined based on that information alone, that Cloutier was not DiBuono's "real
23 father," and that his death did not entitle DiBuono to bereavement leave benefits. As

1 such, the Association maintains that the City improperly inserted itself and re-defined
2 the nature of DiBuono's relationship with the only person she ever considered a father,
3 recast her request as a request for bereavement leave for her stepfather, and then
4 denied it because stepfathers are not listed in the bereavement leave clause. The
5 Association argues that there is no prior history of the City inserting itself to second-
6 guess the nature of an employee's familial relationships, and that there is no prior
7 example of the City having questioned, or re-interpreted, the nature of an employee's
8 asserted relationship with the deceased person at the time an employee sought access
9 to the bereavement leave benefit. According to the Association, in DiBuono's situation,
10 the City appointed itself the arbiter of whether or not a deceased person was a "real
11 father" to an employee. Consequently, the Association argues that the City altered a
12 longstanding practice of not questioning an employee's asserted relationship with a
13 deceased relative, and instituted a new practice of inserting itself and second-guessing
14 an employee's familial relationships.

15 The City does not dispute that bereavement leave is a mandatory subject of
16 bargaining or that it did not bargain with the Association prior to denying DiBuono
17 bereavement leave on December 10, 2018. However, the City argues that no change in
18 practice occurred when it denied DiBuono bereavement leave. The City maintains that
19 the relevant contractual language does not provide bereavement leave for stepparents,
20 and that the City has never authorized bereavement leave for the death of a stepparent
21 or any step relationship. According to the City, it denied DiBuono's request for
22 bereavement leave based on Cloutier's status as a stepparent, a category of relatives
23 excluded from the definition of immediate family by the terms of the Agreement. The

1 City argues that Brumby's statement to Monfalcone that Cloutier was not DiBuono's
2 biological father was a true statement, and that by describing Cloutier as such, the City
3 did not create a new biological relation requirement for bereavement leave. The City
4 notes that the contract explicitly allows bereavement leave for non-biological relatives,
5 including spouses, brothers-in-law, sisters-in-law, mothers-in-law, and fathers-in-law.
6 The City emphasizes that the Association cannot establish an unlawful unilateral
7 change merely because it disagrees with the City's interpretation of a contractual
8 provision.

9 For the following reasons, I find that the City violated the Law as alleged. The
10 evidence establishes that prior to December 10, 2018, the parties' longstanding practice
11 was that when an employee requested bereavement leave for the death of a family
12 member that the employee identified as an individual holding a title listed in the
13 bereavement language of the Agreement, the employee's supervisor granted the
14 request without considering or questioning the specific nature of the employee's
15 relationship to the deceased. For instance, when Monfalcone's grandmothers passed
16 away, she called her supervisor on each occasion to let them know that she would be
17 out of the office on bereavement leave, and her supervisors granted the bereavement
18 leave without further inquiry. When DiBuono's mother-in-law passed away, the same
19 process applied. Likewise, when DiBuono initially contacted Bristol on December 10,
20 2018 and asked for bereavement leave for the death of her father, Bristol granted her
21 the leave without further inquiry. Accordingly, I find that the parties had a practice that
22 was unequivocal, existed substantially unvaried for a reasonable period of time, and
23 was known and accepted by both parties.

1 When Bristol, at Doheny's behest, told DiBuono later in the day on December 10,
2 2018, that she could not have bereavement leave because Cloutier was not her
3 biological father, the City changed the bereavement leave practice by considering the
4 specific and biological nature of the relationship between an employee and their
5 deceased relative in a way that it previously had not done. Whereas, before December
6 10, 2018, an employee merely had to identify the deceased as holding a family title
7 listed in the collective bargaining agreement for bereavement leave, in DiBuono's case
8 the City went a step further, and considered the nature of her relationship to Cloutier for
9 the purposes of deciding her eligibility for bereavement leave. Bristol specifically told
10 DiBuono that the City denied her bereavement leave request because DiBuono was not
11 biologically related to her father. Therefore, I find that the City unilaterally changed the
12 parties' bereavement leave practice by adding a step in the approval process
13 considering the specific nature of the relationship between an employee and the
14 deceased person that the employee identified as their parent, and limiting eligibility to
15 biological parents.

16 The City's arguments that Cloutier was DiBuono's stepfather and stepfathers are
17 not a title listed in the bereavement language of the 2015-2019 Agreement are
18 unavailing. DiBuono requested bereavement leave for the death of her father.
19 Notwithstanding the parties' contractual bereavement leave language, there is no
20 evidence in the record that prior to December 10, 2018, City considered the biological
21 nature of the relationship between a bargaining unit member and the deceased family
22 member that the employee identified as an individual holding a title listed in the
23 bereavement policy, and limited eligibility to biological parents. Although Brumby

1 testified that no employee previously received bereavement leave for the death of a
2 stepparent, the City cannot be assured of this fact. There is no evidence that prior to
3 December of 2018, the City had ever inquired about the specific relationship between
4 an employee and a deceased parent after an employee requested bereavement leave
5 for the death of a person that the employee identified as their mother or father. If an
6 employee requested bereavement leave for the death of a parent, and the City never
7 inquired about the specific nature of the relationship, then the City cannot claim with
8 certainty that it never granted bereavement leave for the death of a stepparent.

9 Moreover, Bristol did not tell DiBuono that the City was rejecting her
10 bereavement leave request because Cloutier was her stepfather. Bristol specifically told
11 DeBuono that the City denied her request for bereavement leave because DiBuono was
12 not biologically related to her father. Before December of 2018, the City had not denied
13 bereavement leave to an employee who requested such leave for the death of a parent
14 that the employee identified as a mother or father because that employee was not
15 biologically related to the parent. Therefore, the City applied a bereavement leave
16 eligibility requirement to DiBuono that previously did not exist.

17 CONCLUSION

18 Based on the record, and for the reasons stated above, I conclude that the City
19 has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law by
20 unilaterally adding a step in the bereavement leave approval process of considering the
21 specific nature of the relationship between an employee and the deceased person that
22 the employee identified as their parent, and limiting eligibility to biological parents.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23

Section 11 of the Law grants the Board broad authority to fashion appropriate orders to remedy a public employer's unlawful conduct. Labor Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979). The Board fashions remedies for violations of the Law by attempting to place charging parties in the positions they would have been in but for the unfair labor practice. Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). The traditional remedy where a public employer has unlawfully refused to bargain is an order to restore the status quo ante until the employer has fulfilled its bargaining obligation, and to make all affected employees whole for any economic losses they may have suffered. Commonwealth of Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10, 2008). Nevertheless, while Section 11 of the Law grants the DLR broad authority to fashion appropriate orders to remedy unlawful conduct, that authority does not extend to speculative financial harm. Town of Marion, 30 MLC 11, 15, MUP-02-3329 (August 20, 2003).

I order the City to make DiBuono whole by restoring the earned leave time that she used after Cloutier's death, and to restore the practice of granting bereavement leave when an employee requests bereavement leave for the death of an individual that the employee identifies as their parent, without considering the specific nature of the employee's relationship to the deceased, or limiting eligibility to biological parents.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the City of Marlborough shall:

1. Cease and desist from:

- a. Failing to bargain about the decision and the impacts of its decision to change the parties' bereavement leave practice by adding a step in the bereavement leave approval process of considering the specific nature of the relationship between an employee and the deceased person that the employee identified as their parent, and limiting eligibility to biological parents.
- b. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purpose of the Law:

- a. Immediately restore the practice of granting bereavement leave to employees that request bereavement leave for the death of an individual that the employee identifies as their parent, without considering the specific nature of the employee's relationship to the deceased, or limiting eligibility to biological parents, until the City satisfies the obligation to bargain with the Association to resolution or impasse over the decision and the impacts of the decision to change the existing practice;
- b. Sign and post immediately in all conspicuous places where members of the Association's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and
- c. Notify the DLR in writing within thirty (10) days of receiving this Decision of the steps taken to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KATHLEEN GOODBERLET, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the City of Marlborough (City) has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by unilaterally changing the bereavement leave practice between the City and the Marlborough Municipal Employees Association (Association or MMEA) by adding a step in the bereavement leave approval process considering the specific nature of the relationship between an employee and the deceased person that the employee identified as their parent, and limiting eligibility to biological parents, without giving the Association prior notice and an opportunity to bargain to resolution or impasse over that decision and the impacts of that decision on employees' terms and conditions of employment.

The City posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of the Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

WE WILL not fail and refuse to bargain in good faith by unilaterally changing the parties' bereavement leave practice by adding a step in the bereavement leave approval process considering the specific nature of the relationship between an employee and the deceased person that the employee identified as their parent, and limiting eligibility to biological parents.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.

WE WILL immediately restore the practice of not considering the specific nature of the relationship between an employee and the deceased family member that the employee identified as an individual holding a title listed in the bereavement language of the 2015-2018 Collective Bargaining Agreement, and limiting eligibility to biological parents, until the City satisfies the obligation to bargain with the Association to resolution or impasse over the decision and the impacts of the decision to change the existing practice.

City of Marlborough

Date

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

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