COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of ANDOVER SCHOOL COMMITTEE and ANDOVER EDUCATION ASSOCIATION	Case No.: MUP-21-8668 Date issued: March 11, 2025

Hearing Officer:

Holly L. Accica, Esq.

Appearances:

Robert Hillman, Esq.	-	Representing the Andover School Committee
Elizabeth Paris, Esq.	-	Representing the Andover School Committee
Laurie Houle, Esq.	-	Representing the Andover Education Association

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Andover School Committee (School Committee or Employer) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by refusing to grant paid leave for bargaining unit employees to attend arbitrations and other Department of Labor Relations (DLR) proceedings without providing the Andover Education Association (Union) with prior notice and an opportunity to bargain to resolution or impasse over that decision and the impacts of that decision on bargaining unit members' terms and conditions of employment. For the reasons described below, I find that the School Committee violated the Law as alleged.

STATEMENT OF THE CASE

On June 24, 2021, the Union filed a Charge of Prohibited Practice (Charge) with the DLR alleging that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. A DLR Investigator investigated the Charge on August 18, 2021. On September 21, 2021, the Investigator issued a Complaint of Prohibited Practice (Complaint) alleging that the School Committee violated Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith by ceasing to grant Unit A members paid leave to attend arbitrations or DLR proceedings without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision on bargaining unit members' terms and conditions of employment. The School Committee filed its answer on October 1, 2021. The Union filed a Motion to Amend the Complaint (Motion) on November 15, 2022, which the Employer opposed. On December 5, 2022, I denied the Union's Motion. The Union filed for interlocutory review with the Commonwealth Employment Relations Board (CERB). On February 2023, the CERB affirmed my denial.

I conducted a hearing on December 5, 2022, at which both parties had an opportunity to be heard, to call witnesses and to introduce evidence. The parties submitted their post-hearing briefs on or about June 1, 2023. Upon review of the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and render the following opinion.

STIPULATED FACTS

1. The Town of Andover (Town) is a public employer as defined by Section 1 of the Law.

2. The School Committee is the Town's representative for the purposes of collective bargaining with school employees.

3. The Union is an employee organization within the meaning of Section 1 of the Law.

4. The Union is the exclusive representative for bargaining Unit A, which includes certain professional employees in the Andover Public Schools, including teachers, librarians, media specialists, and guidance counselors.

5. The parties had an arbitration regarding discipline issued to three Unit A teachers over the course of three days in December 2020 and January 2021.

6. The three teachers each requested paid leave/release time to attend the arbitration hearing described above.

7. These requests for paid leave/release time for the three hearing days were denied by the School Committee. The three teachers used accrued personal paid leave and/or took unpaid leave to attend the arbitration hearing.

8. On or about January 5, 2021, Assistant Superintendent Sandra Trach send a letter to Union President Matthew Bach stating that the School Committee would not grant Unit A members paid leave/release time to attend arbitrations or DLR proceedings even if they are grievants or witnesses.

FINDINGS OF FACT[1]

The Union and the Employer are parties to a Collective Bargaining Agreement (CBA) dated September 1, 2020 through August 31, 2023. The relevant contractual provision reads as follows:

> Article 18: Professional Leave:
> 18.01: "The Superintendent may grant members leave of absence with pay for the purpose of attending educational conventions, professional meetings, training institutes, and other activities which have a demonstrable relationship to the improvement of professional skill, subject to budget limitations."
> 18.02: "…requests for such leave must be filed with the … building principal …"

Additionally, the parties entered into a Side Letter of Agreement (Side Letter) during September 2017. The relevant portions read as follows: "…The [Union] President

[1] The DLR's jurisdiction in this matter is uncontested.

shall be assigned to a reduce[d] work schedule of 0.30 release time while in the position of [Union] President…The [Union] First Vice President shall be assigned to a reduce[d] work schedule of 0.10 release time while in the position of [Union] First Vice President."

In December 2020, Brendan Gibson (Gibson), Nicholas Rand (Rand), and Fred Hopkins (Hopkins), bargaining unit employees and teachers at Andover High School, requested professional leave to attend their arbitration hearings to contest discipline imposed upon them. Their individual requests were sent to Andover High School Principal Caitlin Brown (Brown). Upon receiving these three requests, Brown consulted with Assistant Superintendent Sandra Trach (Trach) on how to proceed. Brown and Trach agreed that the three leave requests were not in conformance with Article 18.01 of the parties' CBA, and Brown denied the requests. Subsequently, on January 5 and 6, 2021, Trach and Union President Matthew Bach (Bach) discussed the use of professional leave time for attending arbitrations. Bach informed Trach of the Union's belief that a past practice existed with respect to the use of professional leave for this purpose. Trach explained to Bach the Employer's position that the CBA shows that professional leave is not available to bargaining unit employees for the purpose of attending arbitration proceedings, and any such requests going forward would similarly be denied.

On January 5, 2021, Trach issued a letter to Bach stating, in part: "To the extent that the [Union] is advising teachers that they are entitled to use professional leave to attend hearings as parties or witnesses, the plain language of the CBA requires the [Union] to cease this practice… While there is no past practice between the parties permitting the use of professional leave for non-professional matters, the [Employer] understands that in recent litigation before the DLR on November 10, 2020, certain

teachers were erroneously granted requests for professional leave… However, the [Employer] will continue to deny all future requests for professional leave inconsistent with Section 18-01 of the CBA."

Requesting the Use of Professional Leave and Past Practice

Requests for the use of professional leave time for union activities are initiated at the building level to the principal. Initially, the requests were submitted in writing but at the time of the hearing were made via the electronic attendance system. The leave requests were identified as a "professional" day in the attendance system because there was not a separate "union" or other similar category available. The Union believed that the intent of using the professional leave time was for record-keeping, and it was also supplemented by an explanation of the professional activity/event the employee was attending during use of that leave time. Professional leave has been approved since at least 2015, and as recent as 2020, with various descriptions in the supplemental explanations which included Massachusetts Teachers Association (MTA) annual meetings, arbitrations, and DLR investigations.

The teaching schedule in the school district follows block scheduling. This schedule provides regular blocks where the Union President and Vice President are released from their regular work duties in accordance with the terms of the Side Letter. Under the terms of the Side Letter, in one semester Bach teaches four classes and monitors three advisory periods, and in the other semester he teaches three classes and monitors three advisory periods. This contractual union release time was typically used for day-to-day labor relations matters such as: labor-relations meetings, meetings with bargaining unit members, attending Weingarten investigations, and preparing for similar

meetings. However, the negotiated release time did not cover other Union officials or bargaining unit members, and the allotted time often was insufficient to cover the amount of time Bach needed to adequately prepare or attend in the events listed above. Also, the Side Letter explicitly only refers to the Union President and First Vice President and does not cover other union officers or bargaining unit members who may need to attend arbitrations, and/or DLR proceedings. However, in these instances, the individuals would request and utilize professional leave, and other types of accrued personal leave were not deducted from the employee.

There has been a long history of the Employer allowing paid release time, categorized as "professional leave," for certain union activities outside of what is contained in the Side Letter and Section 18.01 of the CBA. As far back as 1980, Kerry Costello (Costello), a prior Union President, attended arbitrations along with the employee who was the subject of the arbitration. At that time, however, the leave time requests were in a paper format, rather than electronic. In or around 2015, Costello attended a grievance hearing with another bargaining unit employee, both of which were approved for a full day of professional leave.

Thomas Meyers (Meyers), a former Union President and Vice President used professional leave time at various times between approximately 1998 through 2017. Meyers was advised by a building principal in 2019 to use professional leave for an upcoming DLR investigation. Meyers frequently utilized professional leave time for union matters outside of the explicit CBA language and advised others to do the same. Meyers attended meetings to discuss building maintenance issues with staff and also attended arbitrations. On more than one occasion, Meyer's use of professional leave time

exceeded the allotted time frame afforded by the Side Letter, yet the leave requests were not denied, and his personal accrued time was not deducted.

As far back as 2018, Bach utilized professional leave to attend arbitrations and DLR proceedings, both in and outside of his capacity as Union President. The electronic attendance system does not offer a specific category for union leave, and Bach always used professional leave for such matters. Bach's attendance records show that he used professional leave time for full workdays on May 4, 2018, November 5, 2018, and May 3, 2019, when he was not serving as the Union President yet was approved to attend MTA conferences and meetings. On January 23, 2020 and November 2 and 10, 2020, in his capacity as Union President, Bach's personnel records show that he attended DLR proceedings and arbitrations while using professional leave.

Bach advised the three employees, Gibson, Rand, and Hopkins, to request professional leave in order to attend their arbitrations. The Employer denied those requests, which led the Union to file the charge in this case. However, around November 2, 2020, Bach also advised Lauren McCarron, another bargaining unit teacher, to request professional leave to attend a full day DLR mediation session, and that request was approved.

Arguments

The Union argues that the School Committee unlawfully changed a long-standing past practice of granting paid release time for union activities, including attending arbitrations and DLR proceedings. The Union specifically argues that there is an established past practice, existing for decades, in which union officers and members were granted paid release time for union-related activities, including attending arbitrations, and

DLR hearings, and that this practice was recognized and followed by multiple district administrators. Additionally, the Union argues that the School Committee unlawfully implemented a unilateral change in December 2020, without prior notice or bargaining, when the School Committee denied paid release time to three bargaining unit employees attending their arbitration hearings. The School Committee categorically rejected the practice moving forward, forcing members to use personal days or take unpaid leave. The Union contends this unilateral change violates the Law because paid union leave is a mandatory subject of bargaining; the longstanding past practice created an enforceable employment condition; and the Employer made this change without providing prior notice and an opportunity to bargain.

Conversely, the School Committee first argues that even if there was no directly contrary and unambiguous language in the CBA, the evidence in this case regarding the parties' course of conduct does not come near the threshold required to support a binding past practice. Secondly, the School Committee argues that there is agreed-upon language included in the parties' CBA, which does not define the activities for which professional leave time may be granted to include attendance at arbitrations or DLR hearings. The School Committee claims that the definition of professional leave time is unambiguously limited to activities that would improve an educator's practice: benefitting both the educator and the school district – expressly providing time for teachers to attend "educational conventions, professional meetings, training institutes, and other activities which have a demonstrable relationship to the improvement of professional skill …" The School Committee further argues that in the absence of any ambiguity in the contract language, there are no grounds for considering any parol evidence, including an alleged

past practice. Finally, the Employer argues that, to the extent the Union argues that it may amend unambiguous contract language through the assertion of an alleged inconsistent past practice, it is simply wrong as a matter of well-settled law.

OPINION

Unilateral Change

A public employer violates Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law when it implements a change in a mandatory subject of bargaining without first providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. School Committee of Newton v. Labor Relations Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as conditions of employment that are established through a collectively bargained agreement. Town of Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120 (2014); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994). To establish a unilateral change violation, the charging party must show that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain to resolution or impasse. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20, 1994).

It is well established that the use of paid leave is a mandatory subject of bargaining. Bristol County, 23 MLC 114, MUP-9844 (November 15, 1996); See generally, Sheriff of Suffolk County, 28 MLC 72, 75, MUP-2382 (July 18, 2001) (finding that employer was

obligated to bargain over a change to vacation leave policy). The parties did not dispute this matter, and, therefore, the Union has satisfied its burden with respect to this element.

Binding Past Practice

Next, I consider whether a binding past practice exists, and if so, whether the Employer altered that existing practice. In determining whether a binding past practice exists, the CERB analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, MUP-2456 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997). A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time that the circumstances preceding the event recur. Commonwealth of Massachusetts, 23 MLC at 172; City of Everett, 8 MLC 1046, 1048, MUP-3807 (June 4, 1981), aff'd 8 MLC 1393, MUP-3807 (October 21, 1981).

The Union relied on the credible testimony of three union presidents to establish the existence of a binding past practice in this case. Costello, Meyers, and Bach gave specific examples that included attending MTA conferences, mediations, arbitrations, and DLR investigations, while using approved professional leave. Further, Meyers and Bach also advised other bargaining unit members to follow this protocol, highlighting their belief that doing so was appropriate and permissible. Based on the witness testimony and attendance records, I find that bargaining unit employees were consistently granted paid professional leave for activities falling outside of the defined language in Section 18.01 of

the CBA. Irrespective of the categories available in the electronic attendance system, the Employer did not provide evidence that bargaining unit employees were corrected or redirected to use a different category of leave time by the Employer or an agent of the Employer. Therefore, the continual, approved use of this release time by bargaining unit employees establishes that the use of professional leave time became the norm for bargaining unit members and Union officials while attending arbitrations and DLR proceedings – events that do not fall within the scope of the definition provided by Section 18.01 of the CBA. Thus, I find that a binding past practice exists that allowed unit members and Union officials to use professional leave for attending arbitrations and DLR proceedings. And, in so finding, I conclude that the Employer altered an existing past practice when it denied three employees' use of this leave to attend their arbitration hearings in 2020 and 2021.

I reach this conclusion despite the Employer's arguments that the CBA language is unambiguous with respect to the defined use of professional leave and that additional evidence of an alleged past practice should not be considered. The Employer's argument is without merit as the Employer has failed to consider the actions of the school principals. The evidence reflects, and was not disputed, that the school principals are responsible for reviewing and approving employee leave requests. The Union presidents' testimony established that since at least 2015, school principals consistently approved professional leave requests for employees' activities that were not in conformance with the relevant contractual language.

The authority to act for and to speak on behalf of an employer is governed by the principles of agency and may be actual, implied, or apparent. Town of Bolton, 16 MLC

20, 25, MUP-01-3254 (June 27, 2005). The issue of agency may be gauged from the point of view of the employees. Id. As the CERB recognized in Town of Chelmsford, "supervisors are presumed to be acting and speaking for the employer, even when the employer has instructed the supervisor to refrain from such action, so long as the employer's instructions have not been communicated to employees." 8 MLC 1913, 1916, MUP-4620 (March 12, 1982), aff'd 15 Mass. App. Ct. 1107 (1983). The evidence shows that the school principals consistently permitted the use of professional leave time for activities not within the scope of Section 18.01, without demonstrable deviation until the events leading to the filing of the DLR Charge. Because the school principal is responsible for monitoring and approving employee leave requests, and the employees rely on his or her determination, the school principal's consistent approval for professional leave in this context supports the Union's claim that an obvious, reasonable expectation existed among bargaining unit employees that such practice would continue. This is similar to Town of Chelmsford, where the CERB found that the Superintendent of the Highway Department was "'unquestionably an agent of the employer' as he was in charge of the overall running of the department on a day-to-day basis." Id.; See also, Amherst Police League, 35 MLC 239, 252, MUPL-05-4521 (April 23, 2009) (citing Town of Ipswich, 11 MLC 1403, 1420 n.7, MUP-5248 (February 7, 1985) (unless communication of a limitation in one's authority is presented to the other party, an individual in charge of a transaction is held to have broad apparent authority)); Higher Education Coordinating Council, 25 MLC 69, 71, SUP-4807 (September 17, 1998) (citing Commonwealth of Massachusetts, 11 MLC 1206, SUP-2747 (October 3, 1984) (public employer is responsible for the actions

of its supervisory employees as agents who act within the scope of their apparent authority, whether or not those acts were specifically authorized)).

Therefore, I find that the Employer unlawfully changed a binding past practice when it failed to provide prior notice and an opportunity to bargain before denying Gibson's, Rand's, and Hopkins' professional leave requests to attend their arbitration hearings in December 2020, and subsequently, when the Employer announced its decision in the January 5, 2021 letter to the Union that it would deny all similar requests going forward. The Employer's decision to deny professional leave requests for bargaining unit employees to attend arbitrations and DLR proceedings affected a mandatory subject of bargaining. This change was implemented without prior notice to the Union nor an opportunity to bargain over the decision and the impacts of the Employer's decision to implement and enforce this change.

CONCLUSION

Based on the record and for the reasons stated below, I conclude that the School Committee violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law in the manner alleged in the Complaint.

ORDER

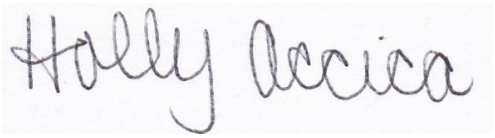
WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Employer shall:

1. Cease and desist from:
    a. Failing and refusing to bargain collectively in good faith with the Union by unilaterally changing the past practice related to release time to attend arbitrations and DLR proceedings.
    b. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:
    a. Immediately restore the parties' past practice regarding professional leave time to attend arbitrations and DLR proceedings.
    b. Upon request, bargain in good faith with the Union over professional leave time to attend arbitrations and DLR proceedings.
    c. Restore to Brendan Gibson, Nicholas Rand, and Fred Hopkins any personal or vacation leave time that they may have taken to attend the arbitrations in December of 2020 or January of 2021 related to their discipline.
    d. Immediately post signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the School Committee customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
    e. Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



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HOLLY L. ACCICA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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

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 in Case No. MUP-21-8668 that the Andover School Committee (School Committee) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it unilaterally ceased to allow use of professional leave time for bargaining unit employees to attend arbitrations and DLR proceedings.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:
to engage in self-organization to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail and refuse to bargain in good faith with the Andover Education Association (Union) by unilaterally ceasing the use of professional leave time for bargaining unit employees to attend arbitrations and DLR proceedings.

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 take the following affirmative action that will effectuate the purposes of the Law:

- Provide, in accordance with the past practice, bargaining unit employees paid release time to attend arbitrations and DLR proceedings.

- Bargain in good faith to resolution or impasse with the Union about ceasing to permit use of professional leave time for bargaining unit employees to attend arbitrations and DLR proceedings.

- Restore to Brendan Gibson, Nicholas Rand, and Fred Hopkins any personal or vacation leave time that they may have taken in to attend the arbitrations in December of 2020 or January of 2021 related to their discipline.

_____ _____
Andover School Committee Date

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