CITY OF NEW BEDFORD
JONATHAN F. MITCHELL, MAYOR

July 13, 2017

City Council President Joseph P. Lopes, and
Honorable Members of the City Council
133 William Street
New Bedford, MA 02740

Dear Council President Lopes and Honorable Members of the City Council:

I am submitting for your approval an ORDER that the sum of **TWENTY THOUSAND THREE HUNDRED AND EIGHTY NINE DOLLARS ($20,389)** now standing to the credit of the account from **AIRPORT STABILIZATION FUND** be and the same is hereby transferred and appropriated to as follows:

AIRPORT SALARIES AND WAGES $20,389

To be certified and approved by the Department Head

This appropriation funds the AFSCME Furlough award.

Sincerely,

Jonathan F. Mitchell
Mayor

JFM/smt

CITY OF NEW BEDFORD

CITY COUNCIL

July 20, 2017

ORDERED: That the sum of **TWENTY THOUSAND THREE HUNDRED AND EIGHTY NINE DOLLARS ($20,389)** now standing to the credit of the account from **AIRPORT STABILIZATION FUND** be and the same is hereby transferred and appropriated to as follows:

AIRPORT SALARIES AND WAGES $20,389

To be certified and approved by the Department Head

This appropriation funds the AFSCME Furlough award

OFFICE OF THE CFO

ARI J. SKY
CHIEF FINANCIAL OFFICER

CITY OF NEW BEDFORD

JONATHAN F. MITCHELL, MAYOR

July 12, 2017

TO: Mayor Mitchell
New Bedford City Council

FROM: Ari J. Sky, Chief Financial Officer

SUBJECT: AFSCME Furlough Payment Funding

Attached is a request from the City Solicitor's Office regarding the implementation of the AFSCME furlough award. As you know, the City implemented the furlough in 2009 in response to reductions in state aid. The courts subsequently determined that the manner in which the City instituted the furlough was inappropriate, and required restitution to the union members who were impacted by the furlough.

Since the final court action last November, staff has worked with the union to determine the allocation of expenses and the process for disbursing the mandated payments. The fiscal impact of the furlough, including interest, will be $1,845,942, of which $1,507,174 will consist of employees assigned to the General Fund. The remaining $338,768 will consist of employees assigned to the Water ($208,821), Wastewater ($109,558) and Airport ($20,389) funds. The requisite funding will be provided by the enterprise funds' stabilization funds, and the Wastewater Fund's special projects account. The current balances in those funds are as follows:

Fund	Balance (June 30, 2017)
General Fund Stabilization	$8,350,521
Water Enterprise Fund Stabilization	$3,487,403
Wastewater Special Projects Fund	$586,511
Airport Enterprise Fund Stabilization	$176,254

Restoration of the stabilization fund balances will be a priority when considering the disposition of Free Cash when it is certified later this year.

I respectfully request that the Mayor and City Council consider a set of four transfers for the July 20, 2017, City Council meeting to appropriate funding for the furlough payments. A draft order is included with this correspondence.

Thank you for your consideration, and please do not hesitate to contact me if you require any additional information.

City of New Bedford
OFFICE OF THE CITY SOLICITOR

MIKAELA A. McDERMOTT
City Solicitor

JANE MEDEIROS FRIEDMAN
First Assistant City Solicitor

ERIC JAIKES
KREG R. ESPINOLA
Assistant City Solicitors

SHANNON C. SHREVE
ERIC C. COHEN
JOHN E. FLOR
THOMAS J. MATHIEU
ELIZABETH TREADUP PIO
Associate City Solicitors

July 7, 2017

Mayor Jonathan F. Mitchell
City of New Bedford
133 William Street
New Bedford, MA 02740

RE: AFSCME Furlough payment

Dear Mayor Mitchell:

I am writing to request that an appropriation be submitted to the City Council to fund the AFSCME furlough award.

On or about January 28, 2009, due to a deficiency in State revenue, the City was advised that the Governor had exercised his authority pursuant to M.G.L. c. 29, § 9C, to decrease the allotment funds that had been allocated for the 2009 fiscal year. The decrease in allotted funds negatively impacted state aid funding that had been allocated to the City and other municipalities within the Commonwealth. As a result of the 9C cuts, the City was faced with a reduction in non-school State Aid for the 2009 fiscal year, in the amount of $2,789,923. Upon receiving notice of the 9C cuts, the City had only five months remaining in the fiscal year, in which to address the resulting revenue shortfall, and was forced to implement layoffs.

At the time the City was advised of the 9C cuts, the City was also advised that it should anticipate an $8,173,602 reduction in State Aid for the 2010 fiscal year. To ensure that City departments did not become nonfunctional, former Mayor Scott Lang decided to close City Hall

on Friday afternoons, rather than implement additional layoffs. The Friday afternoon City Hall closures began on August 30, 2009 and ended on July 1, 2011. During this time period, most AFSCME employees did not work on Friday afternoons and were not compensated for hours they did not work.

As a result of former Mayor Lang's decision to close City Hall on Friday afternoons, and the resulting reduction in work hours, AFSCME Counsel 93 filed an unfair labor charge against the City.

On April 3, 2012, the Commonwealth Employment Relations Board ("CERB") issued a decision ordering the City to "make unit members whole for any economic losses that they have suffered as a direct result of the City's unilateral reduction in their hours of work, plus interest on any sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly." A copy of the CERB decision is attached hereto.

The CERB decision was appealed to the Massachusetts Appeals Court, which issued an unpublished decision on August 26, 2016, denying the City's appeal. The City appealed the Appeals Court decision was to the Supreme Judicial Court ("SJC"), which denied the City's request for further appellate review on November 30, 2016. As a result, the City must comply with the CERB decision.

Since the SJC's denial of further appellate review, the City has been working to determine exact amounts owed to current and former affected AFSCME members, and the City and Union have been working cooperatively to locate former AFSCME members. With these tasks complete, the City now has the information necessary to proceed in issuing full payment to affected unit members. The total amount owed to current and former affected AFSCME members under the CERB award is $1,845,942.

For these reasons, I respectfully request that an appropriation in the amount of $1,845,942 be submitted to the City Council to fund the back pay award that is due to AFSCME members, in accordance with the April 3, 2012 CERB decision.

Sincerely yours,

Jane Medeiros Friedman
First Assistant City Solicitor

cc: Ari Sky
Sandra Vezina
Mikaela McDermott

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of		
CITY OF NEW BEDFORD	Case Nos.	MUP-09-5581 MUP-09-5599
and		
AFSCME COUNCIL 93, AFL-CIO	Date Issued:	April 3, 2012

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Jane Medeiros Friedman, Esq.
Kay H. Hodge, Esq. - Representing the City of New Bedford
John M. Simon, Esq.

Joseph L. DeLorey, Esq. - Representing AFSCME, Council 93, AFL-CIO

CERB DECISION ON APPEAL

SUMMARY

This dispute began when AFSCME Council 93 (Union) brought charges alleging that the City of New Bedford (City) violated its statutory duty to bargain in good faith in the wake of municipal budgetary shortfalls and statewide cuts in local aid that first arose in May of 2008, continued in 2009 and involved City budgets for fiscal years 2009 and 2010.

Upon review of the record on appeal, the Board affirms the Hearing Officer's dismissal of Counts I and II, finding that the City did not repudiate the 2008 settlement agreement or unlawfully refuse to bargain prior to the February 2009 layoffs. We partially affirm and partially reverse her conclusions as to Count III. We ultimately conclude that the City failed to provide the Union with notice and opportunity to bargain

before furloughing employees in August 2009. We also affirm her ruling as to Count IV, that the City violated its obligations under Section 10(a)(6) of the Law by implementing the furloughs while a Section 9 petition was pending.

Findings of Fact

The City did not challenge any of the Hearing Officer's findings but sought certain additional findings. The Union challenged a single finding and proposes three additional findings in support of its challenge. For reasons noted below, the Board denies the Union's challenge and declines to supplement the record as requested, except as where noted. The Board adopts the Hearing Officer's factual findings in their entirety, with a few minor corrections,[1] as summarized and supplemented below.

The Union and the City were parties to a collective bargaining agreement that was effect from July 1, 2006 through June 30, 2009 (CBA). The CBA contained a duration or "evergreen" clause that continued the terms in effect from year to year until either party notified the other that it wished to modify the agreement. The parties believed the terms of this CBA to be in effect during the successor negotiations that

[1] See footnotes 12,16 and 19, below.

began in the course of this dispute.[2]

The City faced a series of budgetary shortfalls and state aid cuts in fiscal years 2009 and 2010. The first shortfall occurred around May 2008, ten months into the FY09 budget. At that time, Mayor Scott Lang (Mayor Lang) held a meeting to discuss the budgetary issues with a number of Union and management representatives, including local Union president Mark Messier (Messier) and the City's special labor negotiator Arthur Caron (Caron). At this meeting, Mayor Lang told Messier that the City's budget for FY 2009 had a shortfall of approximately $960,000 and asked whether, in light of this shortfall, the Union would agree to take weekly one-hour furloughs. Mayor Lang explained that if the Union did not agree to take furloughs, the City would lay off unit members. The Union responded that its membership needed to vote on this question at a general membership meeting, and the City and the Union agreed to hold the meeting on June 5, 2008 at one of the City's public schools. Before the meeting, the City distributed notices in bargaining unit members' paychecks, indicating that Mayor Lang would address the Union local on the topic of "City Budget." The notice also stated that a "vote will be taken that could affect your employment with the City of New Bedford."

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[2] The evergreen clause is set forth in Article XXXVI and states in pertinent part:

> This Agreement shall remain in full force and effect for the term beginning the first day of July 2006 and ending the thirtieth day of June 2009. (Emphasis in original). It shall continue in effect from year to year thereafter unless either party shall notify the other in writing at least sixty (60) days prior to the end of the term, or at least sixty (60) days prior to the end of any subsequent yearly period, that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than thirty (30) days prior to the end of the yearly term then in effect; this Agreement shall remain in full force and effect during the period of negotiations and until notice of termination of this Agreement is provided to the other party in the manner set forth in the following paragraph.
>
> In the event that either party desires to terminate the Agreement, written notice must be given the other party not less than ten (10) days prior to the desired termination date, which date shall not be before the end of the last completed yearly term of the Agreement.

At the June 5th meeting, Mayor Lang told bargaining unit members about the FY09 budget shortfall and the City's proposal that unit members take weekly one-hour furloughs for fifty-two weeks, or a total of six and one-half days. Mayor Lang stated that if the Union accepted the furloughs, there would be no layoffs.[3] Mayor Lang further told audience members that any union that did not accept furloughs would undergo layoffs. He invited audience members to look to their left and to their right and opined that one of the employees seated next to them likely would lose their jobs if the Union did not accept the furlough program.[4] An audience member asked the Mayor whether he would guarantee there would be no layoffs if the Union voted to accept the furlough. The Mayor replied that even though he did not intend or expect to lay off unit members if the Union agreed to take the furloughs, he could not guarantee it.[5] After Mayor Lang and Caron left the meeting, the Union conducted a secret ballot election and the unit members voted to participate in the furlough program.

Over the next few months, the parties entered into a number of written agreements regarding the implementation of the furlough program. Specifically, on June 18, 2008, the City and the Union executed the following agreement (June 2008 Agreement):

> Addendum to the Collective Bargaining Agreement between the City of New Bedford and AFSCME Local 851, State Council 93

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[3] Caron, who attended the meeting, did not hear the Mayor clearly articulate whether furloughs would prevent layoffs for entire fiscal year (FY09) or for only the next few months. This finding, which is supported by Caron's testimony, has been added at the Union's request.

[4] The Union seeks an additional finding that Mayor Lang did not recall making this statement. Although the proposed finding is consistent with the Mayor's testimony, the Mayor's failure to recall making the statement adds no relevant fact to the record. The Hearing Officer's finding that this statement was made is otherwise unrequited and fully supported by the testimony of three Union witnesses and the City's witness, Chief Labor Negotiator Caron, all of whom were present at the June 5 meeting.

[5] The Union challenged this finding. For the reasons set forth in the Opinion section of this decision, the challenge is denied and the finding stands.

In accordance with the provisions of Article XXVI of the collective bargaining agreement dated December 7, 2006, the above-named parties have executed this addendum effective July 6, 2008 through June 29, 2009 to address the budgetary issues for fiscal year 2009.[6] At the end of fiscal year 2009, this addendum shall no longer be operative and the full terms and conditions of employment set forth in the collective bargaining agreement dated December 7, 2006, and in particular the weekly hours of work shall be reinstated.

I. Furlough

It is agreed that in order to avoid the reduction in workforce the members of the bargaining unit shall participate in a voluntary furlough program without pay of no more than fifty-two (52) hours in accordance with an agreement reached within a municipal department with its employees and representative(s) of AFSCME, Local 851 with the approval of the Mayor and his designee.

II. Vacation

Notwithstanding the furlough provisions contained herein employees will be entitled to their full vacation pay in accordance with Article XXI of the collective bargaining agreement.

III. Sick Leave

Notwithstanding the furlough provisions each employee shall accrue sick leave at the rate of one and one-quarter (1 1/4) days for each month of service.

IV. Personal Leave

Notwithstanding the furlough provision contained herein all permanent, permanent part-time and provisional employees eligible for personal leave shall be entitled to his/her full personal leave in accordance with Article XIII.

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[6] Article XXVI of the 2006-2009 Agreement states in part:

> The parties agree that all negotiable items have been discussed during the negotiations leading to this Agreement, and therefore, agree that negotiations will not be reopened on any item, whether contained herein or not, during the life of this Agreement. All terms and conditions of employment not covered nor abridged by this Agreement shall continue to be subject to the City's exclusive direction and control, and shall not be subject to negotiation during the life of this Agreement. . . .
>
> This Agreement cannot be changed, altered or modified, except in writing, signed by both parties, which writing shall be considered as an addendum to this Agreement.

V. Health Insurance

Notwithstanding the furlough provisions contained herein no employee on furlough shall be deemed ineligible for health or life insurance protection under the collective bargaining agreement or M.G.L. c.32B.

VI. Retirement

In accordance with PERAC Memorandum #10 issued on February 20, 2003, the City will petition the New Bedford Retirement Board to grant credible service to employees who take a furlough so that employees will be entitled to have their regular compensation that they would have received but for the furlough included in their three year average compensation. The member will not be required to make contributions for this period in order to receive this benefit. If the period of absence is not the period used to calculate the three year average compensation, then regular compensation is not relevant for retirement purposes.

On July 2, 2008, Mayor Lang issued the following notice to unit members:

In accordance with the Agreement reached between AFSCME, Local 851, State Council 93 and the City of New Bedford a furlough program for fifty-two weeks will be implemented effective July 6, 2008.

Accordingly, beginning with the payroll period for the week ending July 12, 2008, each employee will have one (1) hour per week of their regular hourly rate of pay deducted from their gross weekly pay.

Employees will be released for one (1) hour of work per week as per the agreement with the Union within the municipal department.[7]

Separate Agreements for Paramedics, 911 Dispatchers and Call-Takers

Unit members subsequently began to take their weekly one-hour furloughs, except for certain unit members who were 911 dispatchers, 911 call takers and paramedics, or who worked at the City's freshwater treatment plant. Because those unit members worked in municipal departments that operated twenty-four hours per day, seven days per week, the City had difficulty administering furloughs for those employees that would not negatively impact the operations of those departments. Thus, on or about September 4, 2008, the City and the Union executed an agreement that

[7] Mayor Lang placed a handwritten notation on the July 2, 2008 Notice stating, "Thank you for your cooperation and sacrifice."

specifically addressed how the City would implement furloughs for the paramedics. The City entered into another agreement in December 2008 with police dispatchers who were also represented by the Union. These agreements ran concurrently with the June 2008 agreement, but each contained a "Holiday Pay" clause that addressed the challenges of administering 24-hour/7-day operations in these departments.[8]

Fire Furlough Agreement

In September 2008, the Union and the City entered into an agreement regarding furloughs for members of the City's police and fire bargaining units. The agreement that the City executed with Local 841, I.A.F.F. states that, in exchange for giving up four unpaid half-holidays, "During fiscal year 2009 there shall be no layoffs of existing uniformed personnel within the New Bedford Fire Department."[9]

February 2009 Layoffs

In January of 2009, Governor Deval Patrick announced mid-year local aid cuts in for FY09 pursuant to M.G.L. c.29, §9(c). These 9(c) cuts reduced the City's local aid

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[8] The holiday pay clause for the paramedics stated:

> In accordance with paragraph I above it is agreed that in lieu of one hour per week of furlough paramedics shall forego five (5) paid holidays without pay during fiscal year 2009. The holiday pay clause for the 911 dispatchers stated: In accordance with paragraph I above, it is agreed that Police Telecommunications Dispatchers shall forego three (3) paid holidays without pay during fiscal year 2009, i.e. Veterans Day, Thanksgiving Day, and the Friday after Thanksgiving. Beginning the week ending December 13, 2008, Police Emergency Telecommunication Dispatchers [911 dispatchers] shall have one (1) hour pay per week deducted from their weekly salary and shall be released during that week for one (1) hour when staffing levels permit.

The 911 dispatchers and call takers subsequently did not perform the weekly furloughs because the Police Department received a federal grant that provided additional monies to the Police Department.

[9] The full text of this agreement is set forth in the Hearing Officer's decision.

from $28,630.412 to $25,840,489 for a total reduction of $2,789,923 for the remainder of FY09.

On January 29, 2009, Mayor Lang sent a letter to the City's employees and citizens informing describing the local aid shortfall for FY09 and estimated shortfall for FY10 and proposing some measures that he hoped would resolve the budget shortfall and avoid "hundreds of layoffs." The proposed measures to prevent layoffs for the remainder of FY09 included a ten per cent reduction in the base salary of every city employee and three and one-half payless holidays.

With respect to FY10, the Mayor's letter stated:

> **Action for Fiscal Year 2010**
> The state has reduced New Bedford's FY 2010 local aid allocation by $8,173,602.00. I intend to work with all employee unions to again maintain full employment. This will require a combination of the 10% reduction in base salary for the year, as well as seven (7) payless holidays to be determined. In addition, continued flexibility regarding police and fire overtime will be required. [Emphasis in original].

The Mayor also stated that, "in an attempt to preserve all of our employees' positions," the City would take other measures including a salary freeze effective July 1, 2009, a hiring freeze on all but essential personnel positions, merging various school and safety departments and regionalizing certain services, and a "reduction in hours as a last resort."[10]

Mayor Lang subsequently met with the Union concerning his January 29, 2009 letter, and Messier made several proposals in response to the Mayor's proposals. Specifically, Messier suggested that the City reduce the number of management personnel, eliminate the practice of certain employees taking home city vehicles at night, and eliminate part-time employees and retired employees working as

[10] A full list of the City's proposal may be found on p. 11 of the Hearing Officer's slip opinion.

contractors for the City. At a regularly scheduled meeting on February 11, 2009, the Union presented the Mayor's proposals to its members, but the members declined to consider those proposals. Messier then notified the Mayor that the Union membership had declined to accept his proposals.

Shortly thereafter, the City hand-delivered a letter to Messier stating that the City intended to lay off unit members. Messier then contacted the City's Personnel Department and the Mayor's Office to protest the proposed layoffs. In particular, Messier protested to Mayor Lang that he thought that his unit members were not going to be touched because they previously had agreed to the furloughs. The Mayor replied that it was out of his control and that he had to implement the layoffs.[11] Messier then asked if the City would stop the one-hour weekly furloughs for his unit members. Mayor Lang replied that the City had not calculated how many additional unit members it would need to lay off if the City ceased the one-hour furloughs. Messier then asked the Mayor to provide him with that figure.

On February 13, 2009, the City began to lay off unit members. The City ultimately laid off 84 unit members, and 37 non-bargaining unit members, which included Unit C members.[12] On February 17, 2009, Messier sent a letter to Mayor Lang stating:

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[11] The Union's request to add a finding regarding this conversation is denied, since the proposed finding was already included in the Hearing Officer's findings.

[12] The City did not realize savings equivalent to an employee's salary when it laid off an employee, because the City had to compensate laid off employees for unused vacation time as well as pay them unemployment benefits. Instead, the City would need to layoff four employees to fully realize the savings equivalent to three employees' salaries. Because the City was concerned that any additional layoffs would impair its ability to provide services to residents, it transferred monies from its free cash to its stabilization fund to cover the expenses that resulted from the 121 layoffs (84 bargaining unit members plus 37 non-bargaining unit members) rather than covering those expenses with more layoffs. The Board has modified the Hearing Officer's finding in footnote 24 of her decision to correct a typographical error in the number of laid off employees.

> In light of the recent layoffs, the Union would expect a complete restoration of all hours of work, relative to the furlough, for all affected members of AFSCME, Local 851, effective February 13, 2009.
>
> I thank for your anticipated cooperation in this matter.

Mayor Lang and Messier subsequently crossed paths near the City Hall parking lot. Messier asked whether the Mayor had received his February 17, 2009 letter, and Mayor Lang answered affirmatively and replied that if he agreed to the February 17, 2009 letter, he would need to lay off more unit members. Messier then asked him how many unit members would be laid off as a result of the cessation of the furlough, and the Mayor responded that he did not have that number. Messier reiterated that the Union wanted that information but the City never provided the number.

The weekly one-hour furloughs for unit members did not cease until June 30, 2009, the date referenced in the June 2008 Agreement.

In mid-May 2009, the Mayor submitted a preliminary budget to the City Council for FY 2010 showing a deficit of $3,866,501 and projected an $8.7 million cut in local aid, which the Mayor previously had referenced in his January 29, 2009 letter.[13] The City Council is legally obligated to approve only a balanced budget . It decided to delay action on the budget in the expectation that the City soon would receive its cherry sheet figures.

Successor Contract Negotiations

In a December 2008 letter, the Union notified the City that it desired to enter into successor contract negotiations. The City acknowledged receipt of the Union's request on January 8, 2009. The parties, however, agreed to delay the commencement of

[13] The Mayor usually submitted a completed proposed budget at this time, but did not do so this year because the City had not received a final confirmation of how much local aid the City would receive, the so-called "cherry sheet" figures.

successor contract negotiations for several months. It was not until late May, early June of 2010, that the Union and the City began to discuss scheduling of successor contract negotiations.

On June 24, 2009, the Union and the City held their first successor bargaining session. The Union's bargaining team consisted of Medeiros, who was the chief spokesperson, Messier and six other bargaining unit members. The City's bargaining team consisted of: Caron, the chief spokesperson; Irene Schall (Schall), the City Solicitor; and Angela Natho (Natho), the Director of Human Resources. At the first session, the parties discussed and verbally agreed upon ground rules governing their negotiations. The parties held a brief discussion about the City's financial status, including the projected budget deficit. The Union commented upon certain statements that Mayor Lang allegedly had made in the media concerning the FY10 budget[14] and asked questions about possible layoffs.[15] However, the City did not provide definitive answers, because the City still had not received the cherry sheet figures and the City Council was scheduled to discuss Mayor Lang's preliminary budget the following day.[16] Finally, the parties agreed upon dates for the next bargaining session.

July 20, 2009 Session

The parties met for a second bargaining session on July 20, 2009, and executed a written copy of the previously agreed-upon ground rules. On substantive matters, the City proposed that the Union agree to a one-year contract that would freeze wages, as

[14] The record does not reveal the nature of Mayor Lang's alleged comments.

[15] Messier contended that the City had a history of raising budgetary concerns at negotiations for various successor collective bargaining agreements.

[16] The City Council subsequently approved a budget solely for the month of July 2009, a so-called "1/12th budget." The Board has modified the Hearing Officer's finding on this point to correct a typographical error in date.

well as longevity and sick leave incentive payments.[17] The Union proposed that the City: a) expand the hours of work for which paramedics would earn a shift differential; b) allow the use of sick, vacation, personal, and compensatory leaves in one-hour increments; c) expand the eligibility for funeral leave; d) change how it calculated vacation leave for paramedics; e) place paramedics in group four of the public employee retirement system; f) add a fourth ambulance on a trial basis; f) define seniority as unit-based seniority; and g) re-classify all inspectors as grade 12 on the salary scale. Neither party accepted the other party's proposal. The City commented that it did not have the resources to expand unit members' benefits or give them upgrades, and reiterated that the City was facing a possible budget deficit. The parties then discussed possible layoffs to the bargaining unit. The Union raised concerns that the City unfairly had singled out unit members during the February and March of 2009 layoffs, pointing out that the City did not lay off any employees who worked at the airport, the freshwater treatment plant and the wastewater treatment plant, and that the City had recalled those police officers and fire fighters whom the employer had laid off on or about February 2009. The Union asked the City at the next bargaining session to identify the unit positions that the City would eliminate as part of a reduction in force.

July 27, 2009 Session

The City and the Union met for a third bargaining session on July 27, 2009. As of this date, the City Council still had not passed a budget for FY10 and had not voted whether to accept a local option to add an excise of .75% (local sales tax) on hotels and meals in addition to the state sales tax of 6.25%. The City notified the Union that the

[17] The City's proposals would not have required any additional financial outlay beyond FY09 levels.

Legislature had not approved a bill that the parties previously discussed that would have reduced the City's pension costs.

Although the City had not yet approved the final budget, it proposed that the Union accept a ten percent reduction in its unit members' rates of pay for one year. The City's proposal also reserved the right to initiate further layoffs if the Commonwealth imposed additional 9(c) cuts.[18] The City indicated that, if the Union did not accept this proposal, the City would commence a reduction in force in accordance with a list of fifty-two positions, which it provided to the Union in response to the Union's July 20, 2009 request. The Union declined to accept the City's proposal and told the City to implement layoffs, if necessary.

Cherry Sheet and Budget Figures

On July 28, 2009, the City passed a second 1/12th budget for the month of July 2009.[19] Shortly thereafter, the City received its cherry sheet figures[20] showing that it would receive unrestricted general government aid in the amount of $20,267,970.[21] On August 11, 2009, the City Council approved a budget for FY10 that provided for a ten percent decrease in the budget's wages and salaries account. The City Council also declined to adopt a local sales tax on hotels and restaurants.

[18] The City reduced this proposal to writing at the Union's request.

[19] The Board has modified the Hearing Officer's finding to correct a typographical error in date.

[20] The City contended that it received the cherry sheet figures on an unspecified date in late July 2009, a contention that the Union did not challenge.

[21] The Commonwealth reclassified additional assistance and lottery aid as unrestricted general government aid.

August 17, 2009 Session

The City and the Union met for a fourth bargaining session on August 17, 2009. The Union offered two proposals to the City, both of which the City declined to accept. The Union proposed that the City: a) permit unit members to use personal time in one-hour increments; b) expand the definition of family sick time to include the care of mothers-in-law and fathers-in-law; c) reclassify the clerks in the assessing department; and d) give a full paid day off on December 24 when Christmas falls on a Friday and give December 26 as a paid day off when Christmas falls on a Thursday. The Union also proposed that in exchange for a one-year wage freeze, the City agree to upgrade or provide increases in the base wages of various unit positions.

The City informed the Union about the City Council's ten percent cut in the wages and salaries account. But, instead of the layoffs it proposed at the July 27 bargaining session, the City proposed that unit members take weekly half-day furloughs commencing on August 31, 2009 and ending on June 30, 2010. To accommodate the furloughs, the City proposed to close most municipal departments on Fridays at noon, but that the Union agree to give the City flexibility to determine how to impose the furloughs in departments that operate seven days per week, twenty four hours per day.

The City proposed the half-day furloughs rather than implement the fifty-two layoffs that it referenced on July 27, 2009 because of concerns about the negative effects that the layoffs would have on municipal operations and on the local economy, as well as the difficulties that laid off employees would have in securing other employment.

The City reduced its proposals to writing in a document titled "Proposals of City of New Bedford, August 14, 2009."[22] In addition to what is described above, the proposal stated that the Municipal building would be closed for one-half day on beginning on August 31, 2009 for the remainder of the fiscal year. The proposal also addressed retirement and overtime issues arising out of the service cut. Only one of the City's proposals addressed a non-furlough issue, its proposal to delete Article XXIX of the CBA, titled "Blue Cross, Blue Shield" since Blue Cross, Blue Shield was no longer under contract with the City.

During the August 17 meeting, the Union declined the City's proposal and instead suggested that, if necessary, the City reduce its work force to achieve cost savings. Members of the Union's bargaining team declined to accept the City's proposal because they believed that weekly half-day furloughs would negatively impact a greater number of unit members than layoffs would.

The City then informed the Union that, pursuant to the Management Rights clause of the 2006-2009 Agreement, it was going to implement the weekly half-day furloughs on or about September 1, 2009, but that it was willing to discuss the details of the implementation with the Union. The Union protested the City's decision to implement the furloughs, announced that the parties were at impasse, and indicated that it would file for mediation. When the City reiterated that it was going to implement the half-day furloughs, the Union protested that the City was acting unlawfully and that the Union would file a prohibited practice charge.

[22] We have supplemented the Hearing Officer's findings to include this proposal, which entered into evidence as Joint Exhibit 11. This document was also attached to the Union's August 18, 2009 Petition for Mediation, which was entered into the hearing record as Joint Exhibit 43. Although the proposal is dated August 14, there is no indication that the Union received it before the August 17 bargaining session.

CBA Provisions

The City relies on a number of CBA provisions to support its claim that it could unilaterally implement the half-day furloughs. Article XXV, the management rights clause of the 2006-2009 CBA states in pertinent part:[23]

> Except as otherwise provided in this Agreement, the City retains all rights of management, including the right to direct employees, to hire, classify, promote, train, transfer, assign and retain employees and to suspend, demote, discharge or take other disciplinary action against employees for just cause, to relieve employees from duty because of lack of work, lack of funds, or for causes beyond the City's control; to provide uniforms and equipment when required, to determine organization and budget, to maintain the efficiency of the operations entrusted to the City and to determine the methods, technology, means and personnel by which such operations are to be conducted, including contracting and subcontracting; similarly, to take whatever action may be necessary regardless of prior commitments to carry out the responsibilities of the City in an emergency or any unforeseen combination of circumstances which calls for immediate action. The City and its management officials have the right to make reasonable rules and regulations pertaining to employees consistent with this Agreement. The City agrees, however, pursuant to the above, that whenever it wishes to transfer an employee from a position identified under Unit C of said plan, it will notify the Union at least thirty (30) days before such transfer is planned to take place.

The City subsequently contended that Article IV and Article XXVI of the 2006-2009 Agreement,[24] also permitted it to institute the half-day furloughs. Article IV, Section 6, Seniority, states:

> Seniority shall be recognized as the controlling factor for shift assignments within a department or division. The exercise of seniority shall be limited to an opening with a classification title only. When an employee is newly assigned to a job, the city may, for a period of three (3) months, select the shift assignment for the employee. Nothing in this section shall be construed to limit the right of the City to establish, change, enlarge or decrease shifts or the number of personnel assigned thereto, provided the

[23] This same management rights clause has been present in the parties' contracts for over forty years. The City relied on this language previously when it privatized the wastewater treatment plant and the solid waste transfer station. However, in the past forty years, the City had not previously placed unit members on involuntary furloughs.

[24] See footnote 6, supra.

> rights of seniority set forth in this Agreement are followed in making the necessary personnel assignments.[25]

On August 18, 2009, the Union filed a petition for mediation and fact finding with the DLR pursuant to Section 9 of the Law and 456 CMR 21.03, and sent a copy of the petition to the City. The next day, Mayor Lang sent the following letter to Messier:

> This is to officially inform you that due to lack of funds in the City budget for Fiscal 2010, I am closing municipal offices and reducing the hours that AFSCME members will be employed each week. Each AFSCME member will be relieved from duty half of one regularly scheduled work day each week to accomplish the needed savings until further notice. We are willing to work with your local to address the impact regarding the implementation. You may contact the Solicitor's Office directly.
> These actions are being taken pursuant to Article XXV "Management Rights" of the AFSCME contract wherein management retains the right to "relieve employees from duty because of ... lack of funds, or for causes beyond the City's control."
>
> These are difficult times for all of us, but we will get through them together, and emerge the stronger for them. Regrettably, the more limited budget due to reductions in state aid, and increased pension and health insurance costs led me to implement this reduction in service to the public and to relieve from duty AFSCME members employed by the City. (Emphasis in original.)

On August 20, 2009, Mayor Lang issued Executive Order No. 2009-5, which states in relevant part that:

> WHEREAS, the budgetary limitations on the City of New Bedford for fiscal year 2010 require that employees be relieved from duty because of lack of funds, for causes beyond the City's control; and
>
> WHEREAS, as Mayor of New Bedford I have the authority to alter the work days of City employees, notwithstanding obligations pursuant to M.G.L. c.150E, to accomplish a budgetary savings. ...

[25] Article IV, Section 6 has been present in the parties' collective bargaining agreements for nearly forty years. However, during that forty-year period, the parties have negotiated certain modifications to the language of the provision. In particular, the Union, at some point, proposed that its members bid for shifts based on seniority. The City agreed but insisted on language to protect it from being obligated to maintain certain minimum staffing per shift.

> Effective August 30, 2009, due to the lack of funds and to meet the budgetary challenge, for reasons beyond the City's control, I am implementing a policy to relieve employees from duty for lack of funds. This reduction of hours is to be accomplished by the closing of all municipal offices at noon on each Friday for the rest of that day, beginning on August 30, 2009. The reduction in hours worked is to be considered a furlough and will be first reflected in payroll checks issued on September 10, 2009 and will continue until further notice.
>
> Work reductions for certain operations of the Department of Public Facilities, the Zoo, Health Department, Library and Emergency Medical Services are to be implemented in accordance with their prior discussions with the Personnel Department. Police Dispatchers shall have their work schedule reduced by four hours per week as approved by the Chief. Paramedics shall have their work schedule reduced by one-half hour as approved by the Director. ...[26]

AFSCME unit members were still serving weekly half-day furloughs as of the 2010-2011 hearing dates.

Post-Implementation Litigation

In addition to filing prohibited practice charges and a Section 9 petition with the DLR, on August 28, 2009, AFSCME filed a complaint in Bristol Superior Court alleging two causes of action. The first count was brought by Messier and nine other taxable inhabitants (ten taxpayers) of the City. This count alleged a violation of M.G.L, c.40, §53 for which the plaintiffs sought injunctive relief. The second count was brought by the Union as plaintiff. This count sought declaratory and injunctive relief under M.G.L. c.231A. On September 11, 2009, Superior Court Judge Richard T. Moses (Judge Moses) denied the requests for injunctive relief. AFSCME and the ten taxpayers then filed a petition to a single justice requesting interlocutory review of Judge Moses'

[26] On August 20, 2009, Mayor Lang also sent a memorandum to all City department heads specifically notifying them that the hours of AFSCME unit members would be reduced by one-half their regular work day per week.

September 11, 2009 order pursuant to M.G.L. c.231, §118. On October 13, 2009, Appeals Court Judge James Milkey denied the petition.[27]

On October 22, 2010, the Supreme Judicial Court issued its decision in Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, 458 Mass. 155 (2010) (BHA). That case ruled that an evergreen clause contained in a collective bargaining agreement cannot extend the terms of the agreement beyond three years under the plain language of Chapter 150E, Section 7(a). Id. at 165. Thereafter, the City has refused to proceed to arbitration on grievances that the Union has filed on the grounds that the parties do not currently have a collective bargaining agreement, although the City has acknowledged that certain terms and conditions of employment remain in effect.

On July 12, 2011, the ten-taxpayer litigation returned to Judge Moses on the City's motion for judgment on the pleadings. As described in Judge Moses' order, the City argued that BHA did not apply to the dispute, while the Union argued that the BHA decision mandated a ruling in its favor. Mark Messier, et. al v. City of New Bedford and Scott W. Lang, as he is Mayor of New Bedford, No. 2009-01187, slip op. at 1 (Sup. Ct., July 12, 2011). Acknowledging the several "important and beneficial purposes" of §7(a) of the Law cited in BHA, but further acknowledging that its holding placed the parties in limbo, and that both parties had acted in the belief that the evergreen clause was valid, the Court "assume[d] that the difficult questions raised in this matter will be fairly addressed in the pending proceeding in the context of a fully developed record." Id. at 2. The Court accordingly ordered the matter stayed pending further order. Id.

[27] The DLR subsequently intervened in the proceeding.

On November 22, 2011, five days after the Hearing Officer issued her decision in this case, Chapter 198 of the Acts of 2011 (Chapter 198) took effect. That statute amended Section 7(a) of the Law as follows:[28]

> *Whereas*, the deferred operation of this act would tend to defeat its purpose, which is to ensure that public employers and public employees have appropriate tools to negotiate collective bargaining agreements, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.
>
> Section 1. Subsection (a) of section 7 of chapter 150E of the General Laws . . . is hereby amended by inserting after the word "years," in line 3 the following words: -Provided, however, that the employer and the exclusive representative through negotiation may agree to include a provision in a collective bargaining agreement stating that the agreement's terms shall remain in full force and effect beyond the three years until a successor agreement is voluntarily negotiated between the parties.

Sections 2 and 3 of the amendment state:

> Section 2: Section 1 shall apply to any collective bargaining agreement that: i) contained a provision stating that the terms of the agreement remain in full force and effect beyond 3 years while the parties negotiate a successor agreement; and (ii) expired before the effective date of this act; provided, however, the application of section 1 to specific matters may be prohibited under section 3.
>
> Section 3. Section 2 shall not apply to specific matters that were pending or adjudicated in a court of competent jurisdiction between October 22, 2010 and the effective date of this act; provided, however, that an agreement that has been the subject of such specific matters shall be in full force and effect for all other purposes if the agreement: i) contained a provision stating that the terms of the agreement remain in full force and effect beyond 3 years while the parties negotiate a successor agreement; and (ii) expired before the effective date of this act.

Opinion[29]

The Union and the City filed appeals challenging different portions of the Hearing Officer's decision. The Union asks the Board to reverse the Hearing Officer's

[28] The unamended portion of Section 7(a) states, in pertinent part: "Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years."

[29] The Board's jurisdiction is uncontested.

determination in Count I that the City did not repudiate the June 2008 agreement when it laid off employees in February 2009 without bargaining. The Union also argues that the Hearing Officer incorrectly decided Count II, and asks the Board to find that City violated its duty to bargain in good faith over its decision to continue the one-hour furloughs even after it implemented layoffs in February 2009. As explained herein, we reject the Union's arguments and affirm the Hearing Officer's dismissal of Counts I and II.

The City seeks reversal of the Hearing Officer's rulings on Counts III and IV. The City raises a series of arguments as to why it was not obligated to bargain before implementing the half-day furloughs in 2009. The City also argues that it did not violate the Law as alleged in Count IV when it implemented the furloughs even after the Union filed a Section 9 petition for mediation with the Department of Labor Relations.

We address the arguments raised by the parties on appeal, including the relevance of the BHA decision to our ruling, as well as the Union's challenge to the Hearing Officer's factual findings. We uphold the Hearing Officer's ruling on all counts for the reasons set forth below.

Count I – Repudiation of June 2008 Agreement

The issue before the Hearing Officer on this count was whether the City repudiated the June 2008 Agreement by implementing layoffs in February 2009. The Hearing Officer reviewed the agreement and concluded that the language was ambiguous as to whether the Union's agreement to participate in a voluntary furlough program to avoid "the reduction in workforce" referred only to layoffs resulting from the prevailing budget shortfall or to *any* subsequent layoffs that could result from additional budget shortfalls occurring after the parties signed the agreement. To aid her interpretation of the agreement, the Hearing Officer turned to bargaining history. Based

upon Mayor Lang's stated unwillingness to guarantee at the June 5th meeting that there would be no layoffs if the Union agreed to the voluntary furlough program, the Hearing Officer concluded that the facts did not demonstrate that the parties agreed that no layoffs would take place during all of FY09. Rather, they only agreed to resolve the imminent fiscal crisis and eliminate the immediate need for layoffs by agreeing to weekly one-hour furloughs.

On appeal, the Union first contests the Hearing Officer's finding that, at the June 5th meeting, Mayor Lang refused to guarantee that there would be no layoffs if the Union agreed to furloughs. The Union contends that its three proposed supplemental findings (discussed in footnotes 4,5 and 11, supra) undercut the Hearing Officer's credibility determination on this point. We disagree.

The Board will not disturb a hearing officer's credibility findings absent the clear preponderance of all relevant evidence that the resolutions are incorrect. AFSCME, Council 93, AFL-CIO, 23 MLC 279, 280, n. 7 (1997). Furthermore, "[i]f the reasons for the [Hearing Officer's] determinations are clearly stated and the evidence does not require a contrary finding, we will not disturb [those] credibility resolutions." Greater New Bedford Infant Toddler Center, 13 MLC 1620, 1622 (1987). Here, the Union does not point to any record evidence that directly contradicts the Mayor's testimony. The Hearing Officer was therefore not required to make an express credibility determination on this point. Nor does the evidence the Union points to require a contrary finding.

First, although Mayor Lang may not have recalled telling those attending the June 5 meeting to "look to their right and to their left," this alone provides no basis for the Board to question the veracity or accuracy of the remainder of the Mayor's recollections regarding the June 5 meeting where they are otherwise undisputed. Second, rather than undercutting Mayor Lang's testimony, Caron's testimony that he

could not recall whether the Mayor specified whether the furloughs would prevent layoffs for a full year or only a portion thereof, is actually consistent with Mayor Lang's testimony, that he never guaranteed that the furloughs would prevent layoffs for an entire year. In other words, as Caron testified, the Mayor never specified a timeframe one way or another.

The Union sought a third finding that, in response to President Messier's assertion that the June 2008 agreement precluded any further layoffs, Mayor Lang stated that matters were "out of his control."[30] The Union argues that if Mayor Lang had been confident that the June 2008 agreement did not prevent these layoffs, he simply would have said so. Certainly, Mayor Lang could have responded in this manner. However, the Mayor's actual response neither contradicts his prior testimony nor in any way implicates his understanding about what the agreement empowered the City to do or not do. Under these circumstances, the Union's sheer speculation as to what Mayor Lang *might* have said in no way compels the Board to disturb the Hearing Officer's finding. Even when all three statements are viewed together, the Board finds no basis to overturn the Hearing Officer's finding or make a contrary finding. The Union's challenge is denied.

As to substantive matters, the Union seeks reconsideration of the Hearing Officer's determination that the June 2008 agreement was ambiguous, thereby justifying her examination of bargaining history. The Union argues that the agreement clearly sets forth the City's agreement not to layoff unit members during FY09 if the Union agreed to the weekly one-hour furloughs. The Union alternatively argues that even if

[30] As set forth in footnote 11, although the Union sought this as an additional finding, it was already in the record.

the agreement is ambiguous, any ambiguity should be resolved in its own favor, since it did not draft the agreement.

First, we disagree that any ambiguities in the agreement must be resolved in the Union's favor. The Hearing Officer appropriately laid out the standard that the Board applies in repudiation cases - that, if language in a bargained-for agreement is ambiguous, the Board examines applicable bargaining history to determine whether the parties reached a clear agreement. Commonwealth of Massachusetts, 18 MLC 1161, 1163 (1986). The Hearing Officer committed no error of law by examining the parties' bargaining history once she determined that the agreement was ambiguous.

We further agree with the Hearing Officer that the agreement was ambiguous because it does not specifically spell out whether the Union agreed to participate in the voluntary furlough to avoid all layoffs in FY 2009 or only those that were likely to occur as a result of the City's financial state when the parties first signed the agreement in June 2008. We nevertheless note that the June 2008 agreement, and all subsequent furlough agreements that the parties signed in FY09, state that "to avoid the reduction in workforce the members of the bargaining unit shall participate in a voluntary furlough program without pay...." (Emphasis added.) The parties' use of the definite article "the" here, rather than the indefinite article "a," indicates that the referenced reduction in force refers only to the layoffs that the Mayor told the Union in May and June 2008 would occur as a result of the May 2008 budget shortfall if the Union did not accept furloughs. Cf. Commonwealth of Massachusetts, 31 MLC 115, 116 (2005) (legislature's use of definite article in statute defining the appropriate bargaining unit for

state police referred to a single, defined bargaining unit).[31]

We nevertheless agree with the Hearing Officer that the agreement's introductory paragraph stating that it was intended to address "the budgetary issues for fiscal year 2009" injects an element of uncertainty into the meaning of the phrase "the reduction in force." Given this language, it was appropriate for the Hearing Officer to examine bargaining history for clarification.

As described above, the bargaining history shows that the Mayor declined to guarantee at the June 5 meeting that there would be no layoffs in FY09. Moreover, as the Hearing Officer logically explained, in June 2008, the term budgetary shortfall could not possibly have included the 9(c) cuts that occurred in January 2009. Accordingly, we affirm the Hearing Officer's conclusion that the June 2008 agreement did not preclude layoffs occurring as a result of the unforeseen January 2009 budget cuts. We therefore affirm her finding that the City did not repudiate the agreement when it implemented layoffs in February 2009.

Count II

Count II of the complaint alleged that the City refused to respond to the Union's February 2009 request to bargain over the continued imposition of the weekly one-hour furloughs, even after the City began to lay off bargaining unit members. The Hearing Officer found that, because the Union had already agreed to take furloughs for all of FY09, the City was under no obligation to bargain over the continued imposition of the furloughs midway through the agreement, despite the February 2009 layoffs. The Union's appeal of Count II is premised on the same theory raised in Count I – that it

[31] This interpretation is strengthened by contrasting the Union's agreement to avoid "*the* reduction in force" with the firefighters' September 2008 furlough agreement, which unequivocally states, "during fiscal year 2009 there shall be no layoffs of existing uniformed personnel within the New Bedford Fire Department."

agreed to take voluntary furloughs in exchange for no layoffs in all of FY09. The Union argues that once the City stopped providing the consideration for this agreement by imposing layoffs, the Union's demand to bargain over eliminating the furlough program was justified.

The Union's argument fails, however, for the same reasons discussed above – the City's agreement not to lay off employees did not encompass all of FY09, but was limited to layoffs that would have occurred due to the May 2008 budget shortfall. In return for this promise, the Union agreed to one-hour furloughs for all of FY09. There is no evidence that the City reneged on this deal. We therefore agree with the Hearing Officer that the furlough agreement remained in effect regardless of whether there were further layoffs caused by additional unforeseen economic shortfalls and affirm the Hearing Officer's conclusion that the City was not obligated to bargain about continuing the one-hour furloughs until that agreement expired on June 29, 2009.

Count III

This count alleges that the City violated Section 10(a)(5) of the Law by failing to provide the Union with an opportunity to bargain to resolution or impasse over the decision to reduce bargaining unit members' work hours and its impacts. The City contests virtually every aspect of the Hearing Officer's decision. The City first contends that, regardless of the parties' collective bargaining agreement, it was permitted to act unilaterally on two grounds: its core managerial right to change the level of service, and the exigent circumstances that existed in early FY10. Second, with respect to the CBA, the City challenges the Hearing Officer's determination that the BHA ruling applies retroactively so that there was no management rights clause in effect at the relevant time. Finally, the City alternatively contends that, even if the CBA were in effect, the

Union contractually waived its right to bargain over the one-half day furloughs and that exigent economic circumstances permitted it to act unilaterally.

We reject the City's arguments, with one exception: we do not find that the BHA ruling can be applied retroactively to nullify the collective bargaining agreement that both parties reasonably relied on during the course of events underlying this dispute. Accordingly, we address the arguments on the scope of the City's managerial prerogative and also those arguments that arise under the governing CBA. We conclude with a discussion of the City's affirmative defense of economic exigency.

Managerial Prerogative

We begin with the legal standards governing the City's managerial prerogative argument. The Hearing Officer's starting point correctly recognized that the City's decision to close certain offices to the public one-half day per week was a level of services decision that did not require bargaining. See Town of Danvers, 3 MLC 1559 (1977). However, as the Hearing Officer correctly explained, a public employer's managerial right to change the level of services provided does not obviate its duty to bargain over the means and methods by which the public employer achieves that change. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 563 (1983).

Applying this standard, the Hearing Officer properly concluded that the decision to furlough, as well as the impacts of a change in the level of service on wages and terms and conditions of employment, are both mandatory subjects of bargaining. See, e.g., Commonwealth of Massachusetts, 18 MLC 1220, 1225 and n. 7 (1991) (After deciding a workforce reduction by 45 full time equivalent employees was necessary, the employer's statutory obligation is to bargain over options including attrition, lay-off, reductions in hours, etc.).

On appeal, the City argues that the Hearing Officer failed to recognize that a furlough, rather than a reduction in the available personnel through layoffs, was the only way to maintain the required service levels. Thus, the City claims its decision to implement half-day furloughs was inextricably connected to its level of services decision to close City offices one-half day a week and therefore not subject to collective bargaining.

On these facts, we do not agree. The City's decision to reduce its level of services resulted from the City Council passing a budget that contained a 10% reduction in wage and hour expenditures, enacted after the City received the finalized, reduced cherry sheet figures. The Mayor's decision to implement a level of service change and close City offices for one-half day as a means of complying with the budgetary reduction is surely reserved for the public employer. However, the manner in which the reduction is accomplished, whether by voluntary or involuntary reduction in hours, attrition, or otherwise, is a mandatory subject of bargaining. School Committee of Newton, 388 Mass. at 563; See also Secretary of Administration and Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91, 96 (2009) (citing Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172, 179-180 (1997))(Where a non-negotiable decision may be implemented in various ways, the public employer may be obligated to bargain over the method of implementation to the extent those methods impact on terms and conditions of employment). Therefore, the City was obligated to bargain over the possible staffing arrangements it might use to reduce its level of services and the impacts of those arrangements on terms and conditions of employment. The fact that the Union's layoff proposal was unacceptable to the City both as a matter of cost and services preservation certainly allowed the City to reject the proposal. Section 6 of the Law imposes a good faith bargaining obligation but does not

require either party to agree to a particular proposal. Everett Housing Authority; 8 MLC 1818, 1822 (1982). Nevertheless, having rejected the proposal, the City remained obligated to continue bargaining to resolution or impasse before implementation. There is no dispute that this did not occur. We therefore affirm the Hearing Officer on this point.

The Employer's Affirmative Defenses

The Hearing Officer also examined the City's affirmative defenses to its bargaining duty, including waiver by contract and economic exigency. With respect to the waiver by contract argument, she concluded that the BHA decision invalidating evergreen clauses had a retroactive effect and, therefore, the contract clauses that the City relied upon to justify its unilateral action were not in effect when the furloughs were implemented. The Hearing Officer further concluded that the management rights clause did not survive the contract's expiration. Even if the management rights and other contract provisions remained in effect, the Hearing Officer concluded that the Union had not clearly and unequivocally waived its right to bargain over the furloughs, by agreeing to these provisions. We next address each of the City's arguments challenging these Hearing Officer rulings.

BHA Decision and its Retroactivity

We first address the City's claim that the Hearing Officer erroneously concluded that BHA was retroactive, and that, even if she were correct, Chapter 198 of the Acts of 2011 restored its evergreen provision and, thus, the terms of the CBA on which it relies. We agree with the City that BHA should not be given retroactive effect.

The Hearing Officer used the three factors set forth in McIntyre v. Associates Fin. Servs. Co. of Mass. 367 Mass. 708, 712 (1975) to determine whether a new rule is retroactive: 1) whether a new principle has been established whose resolution was not

clearly foreshadowed; 2) whether retroactive application will further the rule; and 3) whether inequitable results, injustice or hardships, will be avoided by a holding of non-retroactivity. As the Hearing Officer noted, however, exceptions to the general rule of retroactivity have arisen when judicial rulings have altered rights in Massachusetts contract and property law where issues of reliance might impose hardship on unsuspecting parties. See Payton v. Abbott Labs, 386 Mass. 540, 565 (1982).

The Hearing Officer's determination that BHA was retroactive hinged on her conclusion that the plain language of Section 7(a)'s three year limit on collective bargaining units made it unreasonable for the parties to rely on longstanding Board precedent that recognized the validity of contractually-negotiated evergreen clauses. The City argues that this conclusion was erroneous because the City reasonably relied on the longstanding pre-BHA interpretation of Section 7(a) set forth in Town of Sturbridge, 16 MLC 1630, 1631-1633 and n. 3 (1990) and Town of Burlington, 3 MLC 1440, 1441 (1977), which held that evergreen clauses validly extended the terms of a collective bargaining agreement beyond three years notwithstanding Section 7(a)'s three year CBA term limit. Here, there is ample evidence that Mayor Lang relied on the provisions of the CBA to determine his course of action in the face of budgetary shortfalls. He did so in the reasonable belief that the CBA remained in effect by virtue of its evergreen clause that, at the time, was valid, lawful and enforceable under Town of Burlington, which was decided in 1977 and went unchallenged for 33 years, i.e., until BHA was decided.

Absent contrary appellate precedent, the courts have recognized that deference is to be accorded to the Board's "specialized knowledge and expertise and to its interpretation of the applicable statutory provisions." See Worcester v. Labor Relations Commission, 438 Mass. 177, 180 (2002). Given that Town of Burlington was at the

time undisturbed, longstanding precedent, we conclude that the City did reasonably rely upon the Board's established interpretation of Chapter 150E when formulating its bargaining position. Therefore, unlike the Hearing Officer, we decline to find that BHA has retroactive effect, particularly since BHA was a case of first impression. Compare Schrottman v. Barnicle, 386 Mass. 627, 635-636 (1982) (retroactive application of new malice standard justified where plaintiff was unable to demonstrate reasonable reliance on any prior standard due to unsettled nature of law) and Harrison v. Massachusetts Society of Professors, 405 Mass. 56, 62. n.7 (1989) (retroactive application of Supreme Court decision addressing agency fee procedures justified where decision neither overruled settled law nor was a case of first impression) with Tamerlane Company v. Warwick Insurance Company, 412 Mass. 486, 490-491(1982) (declining to apply decision overturning fifty year SJC precedent regarding determination of insurance policy termination date where new rule was not foreshadowed and substantial hardship resulted from application).[32] Because we hold that BHA ruling was not retroactive, the CBA was in effect in August 2009 while the parties were engaged in successor bargaining and when the furloughs were implemented. We therefore turn to the City's affirmative defense that, by agreeing to certain contract terms, the Union waived by contract its right to bargain over the furloughs.

Waiver by Contract

Where an employer raises the affirmative defense of waiver by contact, it bears the burden of demonstrating that the parties consciously considered the situation that

[32] The City also argued that even if the Board were to affirm the Hearing Officer's ruling that BHA was retroactive, it should not matter because the Legislature subsequently enacted Chapter 198 of the Acts of 2011, thereby reversing BHA. We disagree that Chapter 198 has any impact on this case due to Section 3's exception for all "pending" actions. The pending ten taxpayer and declaratory judgment litigation described above falls within this exception. The City's attempt to argue otherwise is not persuasive.

has arisen, and that the union knowingly and unmistakably waived its bargaining rights. City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); Massachusetts Board of Regents, 15 MLC 1265, 1269 (1988); Town of Marblehead, 12 MLC 1667, 1670 (1986). A waiver by contract will not be lightly inferred. There must be a "clear and unmistakable" showing that such a waiver occurred through the bargaining process or the specific language of the agreement. City of Taunton, 11 MLC 1334, 1336 (1985).

The initial inquiry focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15 (1998). If the language clearly, unequivocally and specifically permits the employer to make the change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333 (1989). Waiver will not be found unless the contract language "'expressly or by necessary implication' confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union." Commonwealth of Massachusetts, 19 MLC 1454, 1456 (1992) (quoting Melrose School Committee, 9 MLC 1713, 1725 (1983)). However, a broadly-framed management rights clause is too vague to provide a basis for inferring a clear and unmistakable waiver. Town of Hudson, 25 MLC 143, 148 (1999). And, if the contract language is ambiguous, the Board reviews the parties' bargaining history to determine whether the Union intended to waive its bargaining rights. Massachusetts Board of Regents, 15 MLC at 1269 (citing Town of Marblehead, 12 MLC at 1670)) (further citations omitted).

In this case, we have reviewed the Hearing Officer's analysis of the three CBA provisions that the City relies on to support its claim that the Union waived its right to bargain over its decision to impose half-day furloughs. We find no error in her conclusion that these provisions are insufficient to infer a clear and unmistakable waiver

of the right to bargain over furloughs.[33] On appeal, the City raises many of the same arguments it raised below concerning the proper interpretation of its contract as well as raising several new arguments in response to the Hearing Officer's ruling. We address these arguments below.

The City challenges the Hearing Officer's conclusion that the management rights clause was ambiguous and her subsequent reliance on bargaining history to aid her interpretation of the management rights clause, in particular, the fact that it bargained over furloughs in 2009. The management rights clause, states, among other things, that the City had the right to "relieve employees from duty due to lack of work, lack of funds or for causes beyond the city's control." The Hearing Officer found the phrase "relieve employees from duty" ambiguous to the extent that it could refer to layoffs, in which an employee is actually separated from employment, or to temporary furloughs, like the ones at issue here, in which employees' hours are reduced but they otherwise continue working.

We agree the phrase is ambiguous. As the NLRB has recognized, a contractual right to relieve employees from duties does not necessarily grant an employer the contractual right to reduce their hours. See Control Services, Inc., 303 NLRB 481, 484 (1991). Moreover, as the City's stated reasons for imposing furloughs instead of layoffs indicate, layoffs and furloughs have significantly different impacts on employees' compensation, eligibility for unemployment insurance, and overall employment status. Given the very different nature and impacts of these two methods of reducing the level of services, and the NLRB precedent discussed above, we agree with the Hearing Officer that the Union's agreement to waive its right to bargain over relief from duty did

[33] Because the Hearing Officer determined that BHA was retroactive, she technically did not have to reach the waiver by contract issue. She nevertheless addressed the City's contractual arguments as an alternative basis for her decision.

not necessarily mean it had waived its right to bargain over the City's decision to reduce employees' hours by half-day furloughs. The Hearing Officer therefore appropriately turned to bargaining history to aid her interpretation of this clause.

The evidence showed that the City's management rights clause has been in effect for over forty years, during which time the City has only twice implemented furloughs. The first time, in 2008, it bargained. The second time, in 2009, it did not. Even if, as the City argues, it bargained over these furloughs in 2008 merely as a matter of "good labor practice" and not out of an obligation to do so, there is still no bargaining history before 2008 to illuminate whether the phrase "relieve from duty" refers to reducing employees' hours via furloughs. In the face of ambiguous language, silence on an issue, without more, is insufficient to establish the knowing and unmistakable waiver required to establish the defense. See City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. at 176. We therefore affirm the Hearing Officer's determination that this contractual provision does not show a clear and unmistakable waiver of bargaining rights.

The City also argued that the CBA's seniority provision justified its unilateral implementation of furloughs. That provision states the City can "establish, change, enlarge or decrease shifts or the number of personnel assigned thereto." The Hearing Officer also determined that this disputed language did not preclude the Union from demanding to bargain over the reduction in its unit members' work because it made no reference to involuntary furloughs. Rather, she found that the seniority provision language, considered in context, addresses the right to change shifts and the number of personnel assigned to shifts. We agree that this language is ambiguous. Contractually granting the City the right to decrease shifts could arguably refer to the right to decrease the number of hours in a particular shift. On the other hand, it could mean the right to

decrease the overall number of overall shifts available for employees to work, i.e., eliminating a shift. In the face of this ambiguity, the Hearing Officer appropriately turned to bargaining history, which reflects that the parties did not discuss furloughs when negotiating this provision.

The record shows the parties negotiated this provision in response to the Union's proposal to assign shifts by seniority and the City's concerns that it would "lose control" over the shifts or become locked into a specific shift or number of personnel. The excerpt from Caron's testimony referenced in the City's brief concerning this bargaining history offers no assistance.[34] When explaining management's concerns over the Union's proposal, Caron simply reiterates the provision's ambiguous language. Caron's testimony does not show whether the City specifically told the Union that, by including this language, it retained the right to reduce the number of hours worked per shift, and that the Union clearly understood this to be the City's intent when it agreed to this provision. Thus, for the foregoing reasons, and those stated in the Hearing Officer's decision, we affirm the Hearing Officer's conclusion that the Union did not waive its right

[34] Caron testified:

> What I didn't want to happen [as a result of seniority being recognized as the controlling factor for shift assignments] when we did this is we wanted to maintain control over the shifts. If the shifts had to be changed, bigger, you know, enlarged, decreased, we wanted to retain that right. So notwithstanding the management rights clause and the zipper clause in there, when we got to this language dealing with bidding on shifts, I didn't want to have a situation because I was agreeing to some seniority language in connection with bidding that somehow or other I am locked into a specific shift or a specific number of personnel on that shift. We wanted to maintain the right to either make changes to a shift or not without having to...bargain..." Hearing Transcript, p. 632-633.

to bargain over reduced hours via furloughs by agreeing to the seniority provision.[35]

Finally, we do not agree with the City that the CBA read as a whole, expressly, or by necessary implication, supported its right to impose furloughs here. Whether taken alone or considered in the aggregate, neither the CBA's language, forty-year bargaining history nor silence as to hours establish that that the Union ever vested the City with the right to unilaterally reduce the hours of its members by imposing furloughs without first bargaining.

The City similarly contends that the Hearing Officer improperly ignored past practice showing that, for forty years, it retained control over its employees' hours and therefore, it had the power to act unilaterally. The City relies on four things to support this variant of the waiver argument – the management rights and seniority clauses discussed above, the CBA's silence as to hours, and Caron's testimony that the City had previously unilaterally changed work shifts and hours at the Quitticus Treatment plant.

[35] The City does not specifically appeal from the Hearing Officer's determination that the so-called zipper clause contained in Article XXVI of the contract did not permit its actions. We nevertheless agree with the Hearing Officer's conclusion because it is consistent with our prior precedent holding that zipper clauses with very similar language to the one at issue here do not authorize employers to unilaterally implement changes in working conditions. See, e.g., Town of Somerset, 31 MLC 47, 49 and n. 5 (2004). While such clauses may permit an employer prospectively to refuse to bargain mid-term over new subjects of bargaining, they do not authorize an employer to unilaterally implement changes in working conditions. Id. Here, there is no dispute that the City's actions changed unit members' hours and therefore the zipper clause did not apply. In any event, zipper clauses, by their very nature, refer only to mid-term requests for bargaining. They obviously do not apply during successor negotiations, when parties are generally free to raise any bargainable issues. There is no dispute that the parties were engaged in successor negotiations when the furloughs occurred. Accordingly, the City's reliance on its zipper clause to support its right to unilaterally reduce working hours either mid-contract or during successor negotiations is misplaced and contrary to well-established Board precedent.

We have already concluded that the management rights and seniority clauses do not constitute a clear and unequivocal waiver of the Union's right to bargain over changes to hours. Nor, as we indicate above, does a contract's silence as to a mandatory subject of bargaining constitute a waiver of the right to bargain over changes to that particular term and condition of employment. See City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. at 176.

Nevertheless, the Board has recognized the possibility that a past practice might establish an employer's discretion to change terms and conditions of employment, as long as the employer has followed a regular and routine practice of implementing such changes in hours. See Commonwealth of Massachusetts, 9 MLC 1355, 1360 (1982). In this case, however, the record fails to establish such a practice. The City points only to a single example to support this assertion, specifically, Caron's testimony that that the City had, at some unspecified time, changed work shifts and hours at the Quitticus Water Plant. Caron provided no further details as to the nature or extent of these changes.[36] Standing alone, this testimony is insufficient to establish that, as a matter of established past practice, the City had the discretion to unilaterally implement half-day furloughs. We therefore reject the City's argument.

Waiver, Impasse and the Operation of Section 9

At the core of the City's affirmative defense of waiver is its argument that it was entitled to implement its furlough plan based on the Union's failure to respond to its impact bargaining offers. In essence, the City argues that the Union waived by inaction its right to bargain over the impacts of its decision to implement half-day furloughs. The City alternatively argues that because the parties were at impasse, it was free to implement the furloughs. We reject both arguments.

[36] See Hearing Transcript at 630.

The affirmative defense of waiver by inaction must be supported by evidence of actual knowledge of the proposed change, a reasonable opportunity to negotiate over the change, and an unreasonable or unexplained failure of the union to bargain or to request bargaining. City of Boston, 31 MLC 25, 33 (2004) (citing Commonwealth of Massachusetts, 8 MLC 1894 (1982)). Waiver by inaction will not be found when an employer improperly tries to limit bargaining to impact bargaining. Boston School Committee, 35 MLC 277, 287, n. 23 (2009). Nor will it be found where a union is presented with a fait accompli. Town of Hudson, 25 MLC at 148 (and cases cited). Here, once the Union counter-proposed layoffs instead of furloughs, the City unlawfully refused to bargain over its decision to impose the furloughs and insisted on bargaining over only the impacts of its decision. Because, for the reasons discussed above, the City could not insist on bargaining only over the impacts of its decision to impose furloughs, its waiver defense must fail. Boston School Committee, 35 MLC at n.23.

Moreover, by announcing its decision without any meaningful bargaining, the City presented the Union with a fait accompli that left the Union without bargaining options. Town of Hudson, 25 MLC at 148. The City proposed the furloughs on August 17, 2009, and, at the same meeting, told the Union that it would implement them on September 1, 2009. Executive Order No. 2009-5, issued just two days later, shortened the implementation date by two days, to August 30. Given this legal and factual framework, the Union's implicit refusal to bargain separately over the furloughs' impacts after it filed the Section 9 mediation petition was neither unlawful nor unreasonable. See City of Boston, 31 MLC at 33 (Union did not waive by inaction its right to bargain over the impacts of City's decision to prioritize paid details when it insisted on bargaining over these issues during successor negotiations).

Finally, we find the parties were not at impasse when the City implemented the furloughs. First, the City proposed the furloughs as part of its successor negotiations. Having proceeded in this manner, it was obligated to refrain from implementing any changes to bargainable terms and conditions of employment until it bargained to impasse or resolution on all the outstanding issues in successor negotiations. See Cambridge Public Health Commission, d/b/a Cambridge Health Alliance (CHA) (appeal pending), 37 MLC 39, 45 (2010) (citing City of Leominster, 23 MLC 62, 66 (1996)).[37] Moreover, since these outstanding issues necessarily included the impact issues the City concedes it had to bargain over, as well as other issues still on the table, the City's assertion that the parties were at impasse is without merit.

Furthermore, at the single bargaining session at which furloughs were discussed, after the City rejected the Union's layoff counterproposal, the City declared its managerial right to impose furloughs by the end of the month, thereby cutting off further discussion over the means and methods of implementing the City's proposal. This single bargaining session was "not the kind of exchange and discussion of substantive views required by Sections 6 and 10(a)(5)." Revere School Committee 10 MLC 1245, 1249 (quoting School Committee of Newton v. Labor Relations Commission, 388 Mass. at 572, 573)) (parties did not reach impasse when they held a single bargaining session over means and methods of implementing reduction in level of services where employer insisted on carrying out layoffs on a date certain).

By holding that the City did not fulfill its bargaining obligations before acting unilaterally, we are mindful of the City's frustration with not being able to implement

[37] Indeed, even if the City had not included this proposal as part of successor negotiations, it would have been required to include the subject as part of successor negotiations because it made the proposal at a time when those negotiations were ongoing. See City of Boston, 31 MLC at 32-33.

cost-savings measures promptly and before completing successor bargaining. Our Law, does provide, however, a course of action for employers who believe they are facing exigent economic circumstances, even in the context of the Section 9 mediation process. CHA, 37 MLC at 46. However, as we explain below, the City failed to take well-established steps that would have positioned it to lawfully assert an economic exigency defense either before or after the Union filed its Section 9 petition with the Department.

Economic Exigency

An employer relying on an economic exigency defense has the burden of establishing that: 1) circumstances beyond its control require the imposition of a deadline for negotiations; 2) the bargaining representative was notified of those circumstances and the deadline; and 3) the deadline imposed was reasonable and necessary. Id.

The Hearing Officer concluded that the City had failed to establish the elements of an economic exigency defense and that the City was therefore obligated to give the Union the opportunity to bargain to resolution or impasse before implementing the furloughs.

On appeal, the City argues that the Hearing Officer erred when she concluded that it had failed to meet the elements of an economic exigency defense. The City argues that the evidence shows that the City faced a fiscal emergency beyond its control that made immediate action reasonable and necessary. In particular, the City contests the Hearing Officer's reasoning that the fact that it anticipated a large cut in local aid as early as January 2009 rendered the August 30, 2009 implementation date unreasonable and unnecessary. It claims that it was not until the end of July that it actually knew with certainty the levels and kinds of cost savings required for FY10. The

City also notes that its legal obligation to maintain a balanced budget compelled it to act quickly at the beginning of the fiscal year to maintain a balanced budget and to avoid further furloughs.

The Board acknowledges the budgetary pressures caused by the cascading declines in local revenues and state aid commencing in late 2008 and continuing through FY 2010. Therefore, for purposes of examining the Hearing Officer's ruling on the first prong of this three-part test, we assume, without deciding, that the City would have been justified in imposing a negotiations deadline due to: reductions in local aid; the 10% decrease in wages and salaries voted by the City Council on August 11, 2009; the City Council's failure to pass a local sales tax on hotels and restaurants; and the City's legal obligation to maintain a balanced budget.

However, the City has not established justification for waiting until August 17 to place the furlough option on the bargaining table given that the record indicates that it had known that a large FY10 deficit had been looming since January 2009. In any case, the City's sudden announcement and setting a date of August 30 to furlough did not meet the exigency defense's requirement that the employer notify the union of circumstances and announcement a deadline before taking action. Thus, although the Union may have been aware of the City's fiscal condition, there is no evidence that the City gave the Union advance notice of a deadline for negotiating about the proposed furlough. We therefore affirm the Hearing Officer on this point. And, when the City finally announced that furloughs were the only option to maintain service levels, it also proclaimed that it would move to make this change pursuant to the management rights clause. As we have noted, reliance on the CBA's management rights clause was misplaced and did not excuse its failure to comply with the exigency defense's notice requirements.

Given our agreement with the Hearing Officer on the second prong of the exigency defense standard, we also affirm her conclusion as to the third prong, that the imposed deadline was reasonable and necessary. The Law does not permit an employer to satisfy the third prong of the exigency standard where it fails to demonstrate either a commitment to fully maximize the time available for negotiations, or the necessity of choosing a particular date for cutting off the negotiation process. New Bedford School Committee, 8 MLC 1472, 1479 (1981). Here, the City's claim that it could not have meaningfully bargained over economic matters before it received the final cherry sheet figures is belied by the layoff and wage reduction proposals it made on July 20 and July 27, before those figures were released. Moreover, although the City made these proposals, it never proposed a date certain to conclude bargaining over its situation, either in July or earlier. Had the City notified the Union on July 20 or 27 that it needed to conclude bargaining by the end of August to avoid further reductions in service, it would have doubled the amount of time for bargaining over the implications of the looming FY10 budget deficits, and, at a minimum, satisfied the second prong of the exigency defense. Instead, even after it received the cherry sheets on July 30, the City waited over two weeks before sitting down with the Union, never once notifying them that it needed to conclude bargaining swiftly to address the deficit. This delay shows that the City did not commit to fully maximize the time available for negotiations. Further, the City did not give the Union any advance notice of a deadline to complete negotiations over the means and methods of implementing the service cuts. Under these circumstances, we agree with the Hearing Officer that the City has failed to establish economic exigency under the Board's well-established standards.

Count IV – Section 10(a)(6) allegation

The Hearing Officer found that the City violated this section of the Law by implementing furloughs during the pendency of a petition filed pursuant to Section 9 of the Law. Section 9 states in pertinent part:

> After a reasonable period of negotiations over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse.
>
> * * *
>
> Upon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact-finding or arbitration, if applicable shall have been completed and the terms and conditions of employment shall continue in effect until the collective bargaining process, including mediation, fact finding or arbitration, if applicable shall have been completed.

The City argues that, because the CBA did not address work hours, its changes were non-contractual and, therefore, that Section 9's prohibition against unilateral changes does not even apply. However, in Cambridge Health Alliance, 37 MLC 168 (2011), we held that the duty to refrain from implementing unilateral changes after a Section 9 petition is filed includes changes to both contractual and non-contractual terms and conditions of employment. Id. at 169-170 (citing Massachusetts Community College Council MTA/NEA, 302 Mass. 352, 354 (1988)).[38] We therefore reject this argument.

[38]Notably, this would have been the situation even if the Union had not filed the petition, because an employer's obligation to maintain the status quo during negotiations, even after a contract expires, extends to both contract terms and terms and conditions of employment established by past practice. Town of Chatham, 28 MLC 56, 58 (2001) (citing Chatham I, 21 MLC 1526, 1529 (1995) and cases cited therein, including National Labor Relations Board v. Katz, 436 U.S. 736, 743 (1962)).

As previously noted, in CHA, we recognized that economic exigency can permit an employer to make unilateral changes by a date certain despite a union's filing of a petition pursuant to Section 9 of the Law. 37 MLC at 46.[39] However, because we have affirmed the Hearing Officer's conclusion that the City did not comply with the requirements of the affirmative defense of economic exigency, specifically by providing advance notice of the August 30 furlough implementation, we also affirm her conclusion that the City violated Section 10(a)(6) of the Law by implementing the furloughs before the conclusion of the collective bargaining process.[40]

[39] In its response to the City's appeal of Count IV, the Union urges to the Board to revisit its determination in CHA that economic exigency can permit an employer to make unilateral changes by a date certain despite a union's filing of a Section 9 petition, in light of the BHA decision, 458 Mass. 155 (2010), issued just ten weeks after the Board decided CHA. We decline to do so on grounds that the BHA decision was based on the SJC's "plain meaning" construction of Section 7(a), not Section 9, of the Law. Moreover, the CHA decision, which is on appeal, explained our rationale for recognizing an affirmative economic exigency defense to a Section 9 filing, including the fact that the Board has, for decades and with judicial approval, recognized various affirmative defenses to the Section 6 bargaining obligation despite Section 6's silence on this issue. CHA, 37 MLC at 46. That rationale applies with equal force to this case and we decline to revisit it at this time.

[40] In so holding, we reject the City's argument that the Hearing Officer erred by refusing to reopen the record to accept a copy of the successor agreement. First, the appropriate procedure to contest the Hearing Officer's ruling is a motion for interlocutory appeal pursuant to 456 CMR 13.03. The City did not follow this procedure. Second, whether or not the successor CBA addressed the furloughs does not aid our analysis here. The rationale for requiring parties to fold all items under discussion into successor bargaining is to allow parties to explore one another's positions over the entire range of mandatorily bargaining subjects that particularly concern them. See Town of Rockland, 7 MLC 1653, 1655-56 (1980)(quoted in Town of Brookline, 20 MLC 1570, 1595 (1994)). See also Commonwealth of Massachusetts, 8 MLC 1499, 1512-13 (1981) (Collective bargaining is a dynamic process which acts upon and reacts to many variables). That the successor CBA may not have contained provisions governing furloughs could simply reflect the ordinary give and take of bargaining, or the parties' desire to take this issue off the table until this case and related litigation were concluded.

CONCLUSION

Based on the record and for the reasons stated above, the Board affirms the dismissal of Counts I and II of the complaint. The Board further affirms the Hearing Officer's conclusion that the City violated Sections 10(a)(6), 10(a)(5) and, derivatively, Section 10(a)(1) of the Law as alleged in Counts III and IV of the complaint when it implemented half day furloughs on August 30, 2009 without first bargaining to resolution or impasse or participating in good faith in the mediation, fact-finding and arbitration procedures set forth in Sections 9 of the Law. Accordingly, we issue the following Order.

ORDER

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

1. Cease and desist from:

   a) Failing and refusing to bargain in good faith with the Union by unilaterally reducing unit members' hours of work by imposing half day furloughs;

   b) Failing to and refusing to participate in good faith in mediation and fact-finding with the Union.

   c) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following action that will effectuate the purposes of the Law;

   a) Restore unit members' work weeks to the total number of hours that they worked per week as of the date(s) that the City required them to take half-day furloughs.

   b) Make unit members whole for any economic losses that they have suffered as a direct result of the City's reduction in their hours of work, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

   c) Bargain in good faith to resolution or impasse with the Union before reducing unit members' hours of work.

d) Participate in good faith in mediation and fact-finding with the Union.

e) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City 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.

f) Notify the Department 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
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, BOARD MEMBER

HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF
THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the City of New Bedford (City) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by its unilateral reduction in unit members' hours of work by imposing half-day furloughs and has violated Sections 10(a)(6) and, derivatively, Section 10(a)(1) of the Law by its failure to participate in good faith in mediation with AFSCME Council 93, AFL-CIO (Union).

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 to bargain in good faith by unilaterally reducing unit members' hours of work by imposing half-day furloughs.

WE WILL NOT fail to participate in good faith in mediation with the Union.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1) Restore unit members' workweeks to the total number of hours that they worked per week as of the date(s) that the City required them to take half-day furloughs.

2) Make unit members whole for any economic losses that they have suffered as a direct result of the City's unilateral reduction in their hours of work, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

3) Bargain in good faith to resolution or impasse with the Union over the reduction in unit members' hours of work.

4) Participate in good faith in mediation and fact-finding.

_____ _____
City of New Bedford 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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

f) Notify the Department 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
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, BOARD MEMBER

HARRIS FREEMAN, BOARD MEMBER

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