

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

SEEKONK FIREFIGHTERS ASSOCIATION,
LOCAL 1931, IAFF

and

TOWN OF SEEKONK

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Case No.: MUPL-16-5526

Date Issued: September 20, 2018

Hearing Officer:

Jennifer Maldonado-Ong, Esq.

Appearances:

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

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

HEARING OFFICER'S DECISION

1 SUMMARY

2 The issue in this case is whether the Seekonk Firefighters Association, Local
3 1931, IAFF (Association) violated Section 10(b)(2), and, derivatively, Section 10(b)(1) of
4 Massachusetts General Laws, Chapter 150E (the Law), by engaging in surface
5 bargaining during successor contract negotiations with the Town of Seekonk (Town).
6 Specifically, the Town alleged that, under the totality of the circumstances, the
7 Association failed to bargain in good faith during successor contract negotiations by
8 engaging in surface bargaining with respect to the issue of twenty-four hour shifts. I find

1 that the Association did not violate the Law in the manner alleged and, for the following
2 reasons, dismiss all allegations contained in the Complaint.

3 STATEMENT OF THE CASE

4 On October 3, 2016, the Town filed a charge with the Department of Labor
5 Relations (DLR), alleging that the Association had engaged in prohibited practices
6 within the meaning of Section 10(b)(2), and, derivatively, Section 10 (b)(1) of the Law.
7 Following an in-person investigation that took place on October 21, 2016 and November
8 22, 2016, a DLR investigator dismissed the Town's charge for lack of probable cause on
9 December 12, 2016. On December 22, 2016, the Town filed a request for review of the
10 dismissal pursuant to DLR Regulation 456 CMR 15.05 (9).

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

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

parties' arguments, I make the following findings of fact and render the following opinion.

STIPULATED FACTS

1. The Town is a public employer within the meaning of Section 1 of the Law.
2. The Association is an employee organization within the meaning of Section 1 of the Law.
3. The Association is the exclusive representative for all of the Town's Fire Department's full-time firefighters, with the exception of the positions of Chief and Deputy Chief.
4. The Town and the Association were parties to a collective bargaining agreement (CBA) that expired on June 30, 2016.
5. In the period from March 2016 to September 2016, the parties met to negotiate a successor collective bargaining agreement.
6. On September 19, 2016, the Association filed a petition with the Joint Labor Management Committee (JLMC) docketed as Case Number JLM-16-5505 seeking to have the JLMC assert jurisdiction over the parties' successor contract negotiations.
7. On November 16, 2016, the JLMC voted to exercise jurisdiction over the parties' successor contract negotiations and subsequently scheduled and held mediation sessions.
8. The parties were unable to reach agreement at mediation and the matter eventually proceeded to arbitration.
9. A JLMC arbitration award was issued on January 9, 2018.

FACTUAL FINDINGS

Background

The Town and the Association were parties to a collective bargaining agreement (Agreement) that, by its terms, was in effect from July 1, 2013 through June 30, 2016. Between March 2016 and September 2016, the parties met seven times to negotiate a successor collective bargaining agreement. The Board of Selectmen (Board) is the

1 executive branch of the Town. Accordingly, the Board designates certain collective
2 bargaining teams to negotiate on behalf of the Town. For the purposes of negotiating a
3 successor to the Agreement, the Town appointed the Town Administrator Shawn
4 Cadime (Cadime), Fire Chief Michael Healy (Healy), and Joseph S. Fair, Esq. (Fair), the
5 Town's legal counsel.

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

17 First Bargaining Session – March 10, 2016

18 The Town and the Association first met for approximately thirty minutes on March
19 10, 2016. Fair, Cadime, and Healy participated in this session for the Town, while local

¹ The Town and the Association entered the parties' most recent collective bargaining agreement (Agreement) in the record as Joint Exhibit 1. Article 9, Section 1 of the Agreement, titled "Work Hours," provides the following: "The regular work schedule for all employees shall be an average of forty-two (42) hours per week in an eight (8) week cycle ... consist[ing] of two (2) consecutive ten (10) hour days...immediately followed by two (2) consecutive fourteen (14) hour nights...immediately followed by four (4) consecutive days off duty."

1 Association president Shaun Whalen (Whalen), Adam Clement (Clement), a member of
2 the negotiations committee, and Brandon Miranda (Miranda), a bargaining unit member,
3 participated for the Association. During this session, the parties proposed and
4 discussed ground rules and agreed to schedule two subsequent bargaining sessions for
5 March 23, 2016 and April 5, 2016.

6 Second Bargaining Session – March 23, 2016

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

- 12 1. Negotiations shall be closed to the public and non-bargaining committee
13 members with the exception of those persons necessary for a particular issue
14 (expert or consultant). Parties agree to give advance notice of any such
15 appearance.
16
- 17 2. No press releases or other communications with the media, or communications
18 which most likely will reach the media, shall be unilaterally made until one or both
19 parties petitions for mediation.
20
- 21 3. No tape recording or transcription of the negotiations shall be made. Each party
22 is free, however, to keep its own notes.
23
- 24 4. Each party shall have the right to caucus at any time for a reasonable period of
25 time.
26
- 27 5. Initial proposals will be submitted by the Union at the first negotiation session that
28 follows the ground rules session. The Town will submit its initial proposals at the
29 next session that follows that. No new proposals, excluding counterproposals
30 and amended proposals, may be submitted subsequent to the fourth bargaining
31 session that follows the ground rules session. The parties, however, may
32 mutually agree in writing to extend the time to submit proposals.

² Both the Town and the Association agreed that the March 23, 2016 meeting constituted the second session of successor negotiations.

6. Each party will designate one official bargaining representative who will have full authorization to make commitments and tentative agreements subject to ratification of the entire agreement. The designated bargaining representative for each side is the only person who can formally agree to proposals, make proposals or reach tentative agreements.³

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

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

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

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

1. Elimination of the requirement that firefighters reside within fifteen miles of the Town,
2. An increase in the stipends for paramedic precepting and mentoring,
3. Twenty-four hour shifts with a forty-two hour work week,
4. Paternity leave,
5. Change in uniforms,
6. An increase in the EMS Coordinator pay differential and in the manner in which the position earns overtime,
7. Longevity pay,
8. An increase in the hourly rate for non-civic paid details with any hours over four charged as a minimum of eight hours,
9. An increase in the mechanic's pay differential,

³ At the March 23, 2016 bargaining session, the Town and the Union designated Fair and Barrault respectively as their official bargaining representatives.

1 10. Expansion of the criteria for bereavement leave,

2
3 11. Change in overtime calculation,

4
5 12. Salary increase of 5%, 5% and 5%,

6
7 13. An increase in minimum manning,

8
9 14. An increase in the chain of command to include a deputy chief as well as two
10 additional captains,

11
12 15. An increase in the number of firefighters in each group who simultaneously may
13 take vacation,

14
15 16. Payment of EMS certification and recertification fees, and

16
17 17. Inclusion of "span of control" language.

18
19 The Association reviewed each of its seventeen itemized proposals, and

20 identified item numbered three, the twenty-four shift proposal, as its top priority.

21 Specifically, the Association's proposal on the twenty-four hour shift called for the four

22 firefighter groups to work a repeating eight-day cycle. In this cycle, firefighters would

23 work a ten hour day shift and a fourteen hour night shift. Then, they would be off duty

24 for the next twenty-four hours. Next, the firefighters would work a ten-hour day shift and

25 a fourteen hour night shift and then would be off duty for five days. Barrault explained

26 that the Association's twenty-four hour shift proposal was cost neutral for the Town

27 because it only reconfigured the existing forty-two hour weekly schedule by pairing the

28 existing ten and fourteen hour shifts into one shift. Barrault also explained that the

29 Association's proposal did not require an increase in shift minimums, number of groups

30 or number of firefighters assigned to each group, adding that the proposal would not

31 increase paid leave benefits, which could be converted to reflect new shifts.

32 In response, the Town asked the Association clarifying questions about the

33 impact of the twenty-four shift as proposed on overtime, sick leave, and the interaction

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

11 After the Association explained its proposals, the meeting concluded. In
12 accordance with the parties' previous agreement, the Town did not reject or respond to
13 any of the Association's proposals during this session.⁴ Similarly, the Town did not
14 present the Association with any proposals of its own. Subsequent to this session, the
15 Town's bargaining representatives presented the Association's proposals to the Board.
16 The Board then informed the Town's bargaining representatives that it was unwilling to
17 accept or otherwise consider the Association's proposal for a twenty-four hour shift.

18 Third Bargaining Session – April 5, 2016

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

⁴ Cadime testified on direct examination that the Town could not respond to the Association's proposals in that meeting because the Association had just made the proposals.

1 submit additional proposals, including a wage proposal. After the Town reviewed each
2 of its initial proposals with the Association, the parties discussed their expectations for
3 the next bargaining session. Additionally, the parties agreed to schedule additional
4 bargaining sessions for April 26 and May 10, 2016.

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

11 Fourth Bargaining Session – April 26, 2016

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

- 20 1. Removal of the last sentence in the recognition clause,
21
- 22 2. Revision to the language concerning new hires requiring them to pay the legal
23 costs that the Town incurs when a firefighter leaves the Town's employ and the
24 Town seeks recoupment of the tuition that it paid for the firefighter to attend the
25 Fire Academy,
26
- 27 3. A revision to the just cause language,

- 1 4. Replacement of the term Town Administrator with Fire Chief in the seniority
2 provision,
- 3
- 4 5. An addition of work history/performance as a component in the weighted score
5 used for promotions and appointments,
- 6
- 7 6. Inclusion of language concerning the eligibility to be "officer in charge,"
- 8
- 9 7. Replacement of pagers with the One Call system for general alarms,
- 10
- 11 8. Clarification that the rate of pay for general alarms is the rate of pay for off-duty,
12 permanent firefighters,
- 13
- 14 9. Elimination of compensatory time as a payment option for authorized training,
- 15
- 16 10. Revision to the grievance procedure indicating that the Board of Selectmen's
17 response is due within ten days of the Board's meeting at which the grievance
18 was heard,
- 19
- 20 11. Deletion of certain language in the grievance procedure,
- 21
- 22 12. Changes to whom firefighters notify when they are absent, the time frame when
23 they make those notifications and the manner in which the duty officer notifies a
24 supervisor about the firefighter's absence,
- 25
- 26 13. Requirement that sick leave incentive be treated the same as holiday pay rather
27 than compensatory time,
- 28
- 29 14. Deletion of EMT 1 stipends,
- 30
- 31 15. Addition of successful completion of a physical agility test every three years as a
32 condition of continued employment,
- 33
- 34 16. Clarification as to what constitutes revocation of EMS certification,
- 35
- 36 17. Correction of a typographical error in the EMT pay stipends provision,
- 37
- 38 18. Deletion of the word "net" in language involving the health insurance stipend, and
- 39
- 40 19. Addition of a new article stating that all amounts paid under the collective
41 bargaining agreement are gross amounts subject to applicable taxes and other
42 withholdings.
- 43

44 During this session, the Town also made a verbal wage proposal of 1.0%, 1.25%
45 and 1.5%. The parties then held a caucus of unspecified duration. The Association

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

15 Fifth Bargaining Session – May 10, 2016

16 On May 10, 2016, the parties met for approximately two hours. Cadime, Fair and
17 Healy participated in the bargaining session on behalf of the Town, and Whalen,
18 Barrault, Clement and Miranda participated for the Association. The parties discussed
19 each other's proposals and asked questions about them. To that end, the Town
20 submitted an updated written itemization of its proposals to reflect the proposals it made
21 verbally at the previous bargaining session. Each party provided responses to the other
22 party's proposals. The Association rejected items numbered 1, 5, 9, 11, 13, 16, and 19
23 of the Town's revised proposals and the Town's verbal proposal concerning health
24 insurance. The Association, however, accepted the Town's proposed items numbered

1 4, 6, 7, 8, 15 and 17. The Association made counterproposals to the Town's items
2 numbered 2, 10, 12, 14, and 18 and requested more information about the Town's items
3 numbered 3 and 10, and the verbal proposal concerning purchase orders. In all, the
4 Association rejected eight of the Town's proposals, accepted six of the Town's
5 proposals, made counter-offers with respect to five of the Town's proposals and
6 inquired further about three of the Town's proposals.

7 Meanwhile, the Town rejected items numbered 3, 6, 7, 10, 12, 13, 14, 15 and 17
8 of the Association's proposals and suggested that items numbered 13, 14 and 17 of the
9 Association's proposals implicated managerial prerogatives.⁵ Although the Town did
10 not agree to any of the Association's proposals or make modifications or counteroffers
11 with respect to them, the Town did not reject the Association's proposals, either.
12 However, the Town indicated that it was open to discussion about the Association's
13 proposed item numbered 1. With respect to the Association's proposed item numbered
14 8, the Town indicated that it was "okay" with looking at a rate increase for non-civic
15 details, but that it had an issue with increasing the minimum number of hours. On the
16 Association's proposed item numbered 2, the Town requested clarification about the
17 different dates.

18 The Town also rejected the portion of the Association's proposed item numbered
19 2 seeking a paramedic stipend. However, the Town stated that it was open to payment
20 of an hourly stipend of \$3.00 for paramedics who hold the position of preceptor or
21 mentor, but that the offer was dependent upon the overall package that the parties
22 negotiated. The Town never formally accepted or rejected the Association's proposed

⁵ Healy testified that the parties did not really "delve into the twenty-four hour shift" issue during this bargaining session. Healy also testified that the Town was "not looking for a twenty-four hour shift" for firefighting personnel.

1 items numbered 4, 9 and 16. Regarding the Association's proposed item numbered 9,
2 the Town asked about the Association's justification for seeking an increase in the
3 mechanic's differential. The Town also noted that it would take item number 16 of the
4 Association's proposal under advisement. Finally, the Town also pointed out that it
5 already had made proposals that conflicted with the Association's proposed items
6 numbered 5 and 11.

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

18 However, the Association proposed that the two-hour notification requirement
19 only would apply when a firefighter used personal leave or sick leave for the firefighter's
20 own illness. According to the Association's proposal, when a firefighter was absent
21 because of a family member's illness, the one-hour notification requirement would still
22 apply. While the Association agreed with the Town's proposition that the on-duty officer
23 would be required to notify the fire chief via phone call about a firefighter's absence, the
24 Association proposed that the on-duty officer would also be allowed to provide notice to

1 the fire chief via text message. The Association also questioned the application of the
2 term "immediately" in regards to a duty officer's obligation to notify a supervisor about a
3 firefighter's absence.

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

11 Sixth Bargaining Session – May 26, 2016

12 On May 26, 2016, the parties agreed to explore an "off-the-record" bargaining
13 process. During such a session, proposals and arguments advanced by either party
14 would not prejudice on record negotiations. Cadime, Fair and Healy participated in the
15 "off-the-record" bargaining session for the Town, while Whalen, Barrault, Clement and
16 Miranda participated for the Association. During the session, the parties were to identify
17 the proposals that were a priority for them. The parties would then present their priority
18 items as part of a package but the absence of a particular proposal in a package would
19 not signify that the party had withdrawn that proposal. The Association made the
20 following "off-the-record" package proposal: items numbered 1, 2, 3, 5 and 8 were its
21 top priority; it revised its wage increase to three percent per year; it identified five of the
22 Town's proposals in which it was willing to make concessions,⁶ and expressed a

⁶ The Association was willing to make concessions on the following five Town proposals:

1 willingness to abandon overtime proposed items numbered 6 and 11, provided that the
2 Town sustained two pending overtime grievances.

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

9 Board Executive Session Meeting – June 15, 2016

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

-
- Town Proposal #5-The Association referenced the Town's ability to bypass a candidate for promotion using the Civil Service Commission model of 2n +1 with a written statement containing the reasons for the bypass and an appeal process.
 - Town Proposal #9-The Association proposed that unit members be allowed to earn up to 200 hours of compensatory time for authorized training, which is a reduction from the current 900 hours.
 - Town Proposal #11-The Association agreed to delete language in the grievance procedure that sustained the grievance unless the Town answered the grievance within the requisite time period.
 - Town Proposal #14-The Association would agree to the fitness for duty language that the Town of Lexington and its Firefighters Union have in their collective bargaining agreement.
 - Town Proposal #10-The Association would agree to the Town's language revision that the Board of Selectmen's answer was due within ten days of the meeting at which the grievance was heard provided that grievances would be heard at the Board of Selectmen's meeting immediately following their receipt. The Association also acknowledged that the Town's receipt of a grievance had to fall within the time frame necessary to place the grievance on a meeting's agenda.

1 week. The Board requested additional information about the Association's proposed
2 item numbered 3 regarding the twenty-four hour shifts. Because the Board requested
3 further research on the issue and Barrault requested to cancel the June 16 session,⁷ the
4 June 16, 2016 negotiating session was postponed to a later date.⁸ Because the Town's
5 bargaining representatives were scheduled to be out of town at various times
6 throughout the month of July, the parties subsequently scheduled a negotiating session
7 for August 4, 2016.

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

15 Seventh and Final Bargaining Session – September 15, 2016

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

⁸ Healy testified that the Board tasked him with researching alternatives to the Association's twenty-four hour shift proposal. According to Healy, his research consisted of contacting the Fire Chief of Tiverton, Rhode Island, who employs a fifty-six hour work week. However, Healy did not speak with the firefighters' union for Tiverton or any Tiverton firefighter to glean their experiences with a fifty-six hour work week. Healy further testified that the Town had not been willing to implement a twenty-four hour work schedule prior to September 2016.

1 As a result, the September 15, 2016 meeting was the first bargaining session to
2 occur since the parties first engaged in an "off-the-record" negotiations on May 26,
3 2016. On September 15, 2016, the parties met for approximately two hours. Cadime,
4 Fair and Healy participated in the bargaining session on behalf of the Town, and
5 Whalen, Barrault, Clement and Aaron Grillo (Grillo), the new Association Vice-
6 President, participated on behalf of the Association. During the meeting, the Town
7 presented the Association with an "off-the-record" package proposal. The Town noted
8 that all tentative agreements to date would be included in its package proposal. The
9 Town then identified proposed items numbered 1, 2, 5, 9, 12(c), 13, 15 and 19 as its
10 most important proposals and identified four Association proposals on which it was
11 willing to make concessions.⁹ The Town also indicated that it agreed to drop all of its
12 other proposals, meaning that they were excluded from its package and the parties did
13 not need to agree upon them in order for the parties to reach a deal on a successor
14 contract.

15 In addition, the Town offered a salary increase of 1.5%, 1.5% and 1.5%. The
16 Town also gave a verbal counterproposal to the Association's proposed item numbered

⁹ The Town was willing to make concessions on the following four Association proposals:

- Association proposed item numbered 4 - Town agreed to the paternity leave proposal.
- Association proposed item numbered 2 - Town offered to increase the hourly preceptor stipend to \$2.00 instead of the Union's proposed \$3.00 increase.
- Association proposed item numbered 8 - Town agreed to a non-civic detail rate of \$44 upon implementation of a successor collective bargaining agreement.
- Association proposed item numbered 16 - Town agreed to pay the firefighters' EMS certification and recertification fees.

1 3 by offering twenty-four hour shifts within a fifty-six hour work week. The Town
2 explained that it would have three work groups consisting of two groups with eleven
3 firefighters and one group with ten firefighters, with a twenty-four hour shift rotation of
4 twenty-four hours on, twenty-four hours off, twenty-four hours on, twenty-four hours off,
5 twenty-four hours on, and 4 days off in a nine-day cycle. The Town would hire one
6 additional firefighter and create two additional lieutenant's positions.

7 At first, the Association responded that no other community in Massachusetts or
8 adjacent states has a fifty-six hour work week or three work groups, and that it wanted
9 the same work week as its peers. At some point during the discussions, the Town
10 pointed out that the Tiverton, Rhode Island Fire Department had a fifty-six hour work
11 week with three groups. The Association also inquired whether the Town's twenty-four
12 hour shift proposal would have overtime implications under the Fair Labor Standards
13 Act (FLSA).¹⁰ The Town acknowledged that it could have overtime implications under
14 the FLSA, but stated that it was not trying to reduce the firefighters' overtime
15 opportunities.

16 The Association did not ask the Town any questions about its proposal prior to
17 taking a caucus, which was subsequently held for approximately thirty minutes.¹¹ When
18 the negotiations resumed, the Association stated that it intended to make a
19 comprehensive counter proposal, which was its second "off-the-record" proposal and
20 included the Association's proposal regarding the twenty-four hour shifts. The

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

¹¹ Barrault credibly explained on direct examination that the Association did not ask the Town questions about the Town's proposal because she was familiar with the way the fifty-six hour schedule worked.

1 Association also indicated that it rejected the Town's twenty-four hour shift proposal and
2 that it continued to stand by its own twenty-four hour shift proposal, because the twenty-
3 four hour shift within a forty-two hour work week was its priority, which it had stated
4 repeatedly in each of the previous bargaining sessions. Barrault then told the Town that
5 there was "no condition on the planet" that would persuade the Association to go to a
6 fifty-six hour work week, or words to that effect.¹²

7 The Town then requested a caucus. After returning from the caucus, Cadime, in
8 response to Barrault's comment and the Association's second "off-the-record proposal,"

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

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

However, I find that Barrault subsequently indicated to the Town in a separate statement that the Association was unwilling to discuss a fifty-six hour work week. I also find that Barrault made this statement while discussing the fifty-six hour work week. For this reason, I conclude that Barrault conveyed this statement to emphasize the Association's opposition to the fifty-six hour work week rather than refuse to discuss it altogether.

1 stated "You're getting the twenty-four hour shift. We're getting nothing." When Barrault
2 asked what he meant by the comment, Cadime replied that the Town's proposals gave
3 the Town nothing. Barrault responded by stating that the Town was free to make
4 whatever proposal it desired. When Fair asked the Association why it was opposed to
5 the Town's twenty-four hour shift, fifty-six hour work week proposal, the Association
6 reiterated that no other community in Massachusetts has a fifty-six hour work week or
7 three work groups, and that it wanted the same work week as its peers and so it was
8 not going to discuss a fifty-six hour work week with the Town. The Town reiterated that
9 the Tiverton, Rhode Island Fire Department had a fifty-six hour work week.¹³

10 The Association then made a counter-offer of wage increases of 2%, 2%, and
11 2% in response to the Town's wage proposal. The Association also made the following
12 responses to the Town's other proposals.

- 13 • Town proposed item numbered 1 - The Association agreed to the deletion of
14 certain language in the recognition clause.
15
- 16 • Town proposed item numbered 2 - The Association agreed to language
17 permitting the Town to recoup legal fees that it would incur while seeking
18 repayment of a former firefighter's tuition costs but indicated that it wanted the
19 Town to agree to its counteroffer of a step down provision and a hardship
20 exemption.
21
- 22 • Town proposed item numbered 5 - The Association wanted to see a draft of the
23 actual language for the proposal concerning the use of work history/performance
24 as a component of weighted promotional scores.
25
- 26 • Town proposed item numbered 9 - The Association wanted its counteroffer of a
27 reduction in compensatory time that unit members could earn for authorized
28 trainings from 900 hours to 200 hours rather than the outright elimination of unit
29 members' earning compensatory time for authorized trainings that the Town had
30 proposed.
31

¹³ At some point, Cadime indicated that he understood why the Association opposed the Town's fifty-six hour work week proposal.

- 1 • Town proposed item numbered 10 - The Association agreed to the Town's
2 proposal concerning a change in the time frame when the Board's reply to a
3 grievance was due with the caveat that it should reflect the parties' discussions
4 about when a grievance is discussed versus when a grievance is heard.
5
- 6 • Town proposed item numbered 11 - The Association agreed to the deletion of
7 language sustaining a grievance when the Town did not timely answer at a
8 particular step of the grievance procedure.
9
- 10 • Town proposed item numbered 12 - The Association agreed to the Town's
11 proposal concerning how and when firefighters shall notify the Town of their
12 absences but wanted a definition of the Town's use of "immediately" to describe
13 when a duty officer was obligated to notify a supervisor of a firefighter's absence.
14
- 15 • Town proposed item numbered 14 - The Association would agree to language
16 concerning fitness for duty if the Town accepted the Association's
17 counterproposal that a letter from a firefighter's physician was sufficient to verify
18 fitness for duty.
19
- 20 • Town proposed item numbered 18 - The Association would agree to a deletion
21 from the language of the health insurance stipend if the Town would settle two
22 pending grievances on the issue.
23

24 The Town attempted to further explain the benefits of its proposed twenty-four
25 shift schedule to the Association, but the Association indicated again that it was not
26 interested in that proposal under any terms. The parties held another brief caucus.
27 Although the Board had provided the Town's bargaining team with certain parameters
28 that would have permitted it to improve upon the package proposal it presented to the
29 Association, the Town noted that it would need to relay the Association's position on
30 twenty-four hour shifts to the Board, which was scheduled to meet on September 21,
31 2016. The Town then asked the Association for possible dates on which to schedule
32 another bargaining session after the September 21 Board meeting. Barrault declined to
33 provide the Town with dates at that time, but told Fair to contact her after the Board
34 meeting and that they would talk about scheduling then to see if there was any reason

1 to schedule further meetings. She further stated that meetings would be scheduled only
2 if there was movement from the Board. The bargaining session concluded at that time.

3 JLMC Petition

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

13 On November 16, 2016, pursuant to Chapter 589 of the Acts of 1987, Section
14 4A(2)(c),¹⁴ the JLMC voted to exercise jurisdiction in Case No. JLM-16-5505.
15 Thereafter, the mediator scheduled another meeting with the parties on December 7,
16 2016. On September 19, 2017, an arbitration hearing took place on the matter, and the
17 arbitrator issued an award on January 9, 2018.¹⁵

¹⁴ Chapter 589 of the Acts of 1987, Section 4A(2)(c) states in pertinent part:

... when either party or the parties acting jointly to a municipal police and
fire collective bargaining negotiations believe that the process of collective
bargaining has been exhausted the party or both parties shall petition first
the committee for the exercise of jurisdiction and for the determination of
the apparent exhaustion of the process of collective bargaining.

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

OPINIONThe Issue in Dispute

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

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

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

¹⁶ The CERB determined in its June 16, 2017 ruling that the Association's filing of the JLMC petition, by itself, is not a violation of the Law.

¹⁷ The Association also argues that the duty to bargain in good faith does not apply to off-the-record bargaining about topics that violate the ground rules.

1 bargaining representatives and tendering a proposal that it knew would antagonize the
2 Association, and that this conduct effectively eliminates or at least mitigates, any legal
3 claims made against the Association.¹⁸ Lastly, the Association asserts that the
4 Complaint is moot in light of the January 2018 JLMC arbitration award, and that DLR
5 should defer to that award because the DLR lacks authority to amend, vacate or reverse
6 the arbitrator's award.¹⁹

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

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

¹⁹ I decline to reach the Association's argument here because I have reached the decision based on the merits of the Complaint.

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

However, I agree with the Town that nothing in the Law requires the Town to take those steps to obtain a determination on a Complaint that is otherwise properly before the DLR. I decline to address the remainder of the Association's arguments on these points because I decide this case on different grounds.

1 to potentially address those concerns and/or provide the Association with a more
2 beneficial package that could improve the Association's outlook of the proposal.
3 Instead, the Town contends, the Association acted in bad faith when it pre-determined
4 that it would not accept the Town's proposal under any circumstances by refusing to
5 provide the Town with dates for subsequent successor bargaining sessions as required
6 by the parties' ground rules and prematurely filed the JLMC petition, which is
7 tantamount to declaring an impasse in negotiations, prior to learning the results of the
8 pending September 21 Board meeting.

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

²⁰ With respect to the issue of twenty-four hour shifts, the arbitration panel "determined that the Town shall adopt a twenty-four-hour shift schedule of twenty-four hours on, forty-eight hours off, twenty-four hours on, and ninety-six hours off, with a repeated eight-day cycle." The arbitration panel also directed the parties "to make certain that this shift change does not cause any other change in benefits."

1 The Duty to Bargain in Good Faith

2 Section 6 of the Law requires a public employer and a union to meet at
3 reasonable times to negotiate in good faith over wages, hours, standards of productivity
4 and performance, and any other terms and conditions of employment, but does not
5 compel either party to agree to a proposal or to make a concession. School Committee
6 of Newton v. Labor Relations Commission, 388 Mass. 557, 562-563 (1983). "Good faith
7 implies an open and fair mind, as well as a sincere effort to reach a common ground."
8 Id. at 572. Thus, the duty to bargain in good faith requires the parties to enter into
9 negotiations with an open mind and a sincere desire to reach an agreement, and to
10 make reasonable efforts to compromise their differences. Boston School Committee,
11 25 MLC 181, 187, MUP-9794 (May 20, 1999); Town of Hudson, 25 MLC 143, 147,
12 MUP-1714 (April 1, 1999) (citing Commonwealth of Massachusetts, 8 MLC 1499, SUP-
13 2508 (November 10, 1981)).

14 Except where the conduct in question is, on its face, a de facto refusal to bargain,
15 the test of a party's good faith in negotiations involves an examination of the totality of
16 conduct. King Philip Regional School Committee, 2 MLC 1393, 1397, MUP-2125
17 (February 18, 1976). In examining the totality of the parties' conduct, the CERB also
18 considers acts away from the bargaining table. Higher Education Coordinating Council,
19 25 MLC 69, 71, SUP-4087 (September 17, 1998) (citing King Phillip Regional School
20 Committee, 2 MLC at 1393). Acts away from the bargaining table that suggest bad faith
21 bargaining include unilateral changes in mandatory subjects of bargaining, efforts to
22 bypass the union, failure to designate an agent with sufficient bargaining authority,
23 delaying tactics and arbitrary scheduling of meetings. Regency Serv. Carts, Inc., 345
24 NLRB 671 (2005).

1 Surface Bargaining

2 A union's obligation to bargain in good faith mirrors that of an employer's
3 obligation to bargain in good faith and is not satisfied by mere surface bargaining.
4 Town of Saugus, 2 MLC 1480, 1484, MUP-591 (May 5, 1976). A party engages in
5 surface bargaining when an examination of the course of bargaining reveals various
6 elements of bad faith bargaining that, together, tend to show that the dilatory party did
7 not seriously try to reach a mutually satisfactory basis for agreement, but intended
8 merely to "shadow box to an impasse." City of Marlborough, 34 MLC 72, 77, MUP-03-
9 3963 (January 9, 2008). In surface bargaining cases, the issue is whether a party's
10 approach to bargaining demonstrated an unyielding rigidity during negotiations that
11 rendered collective bargaining a futility. Prentice-Hall, Inc., 306 NLRB 31, 39 (1992).
12 See also Town of Braintree, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981) (finding a
13 lack of willingness to fully discuss proposals). "Collective bargaining is not simply an
14 occasion for purely formal meetings between management and labor, while each
15 maintains an attitude of take it or leave it; it presupposes a desire to reach ultimate
16 agreement, to enter into a collective bargaining contract." NLRB v. Ins. Agents' Int'l
17 Union, AFL-CIO, 361 U.S. 477, 485 (1960).

18 A determination that the Association engaged in surface bargaining does not rest
19 on any single element, but upon an evaluation of the entire course of the Association's
20 bargaining conduct. See City of Marlborough, 34 MLC 72, 77, MUP-03-3963 (January 9,
21 2008). In analyzing the totality of conduct, proposals are considered "not to determine
22 their intrinsic worth but instead to determine whether in combination and in the manner
23 proposed they evidence an intent not to reach agreement." Coastal Electric
24 Cooperative, 311 NLRB 1126, 1127 (1993). See also King Philip Regional School

1 Committee, 2 MLC at 1397 (finding that the relevant inquiry for the CERB is an
2 examination of conduct exhibited at the bargaining table and the nature of the
3 bargaining rather than the terms or merits of the parties' proposals.)

4 A union's bad faith bargaining can effectively obliterate the existence of a
5 situation in which the employer's good faith can be tested. Cont'l Nut Co., 195 NLRB
6 841, 845 (1972). If good faith "cannot be tested, its absence can hardly be found."
7 Times Publ'g Co., 72 NLRB 676, 683 (1947). For instance, in NLRB v. Hi-Tech Cable
8 Corp., 128 F.3d 271 (5th Cir. 1997), the court concluded that the union's refusal to
9 discuss the employer's no-tobacco policy proposal obviated any bad faith violation
10 arising from the employer's conduct. See also Commonwealth of Massachusetts, 8
11 MLC at 1511 (declining to find regressive bargaining after considering the union's
12 refusal to respond to negotiation requests, insistence on negotiating with a particular
13 individual, and reluctance to participate in fact-finding, in juxtaposition to the employer's
14 attempts to set up meeting dates, willingness to continue negotiating, wish to get the
15 union back to the table, and cooperation with the mediator's request for a total contract
16 proposal).

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

²¹ As noted in the preceding section, the Association responded to nine of the Town's proposals and agreed to four of those nine proposals.

1 own twenty-four hour shift proposal as a finished product on a "take it or leave it" basis
2 or that its proposal could not be modified in any way during the course of bargaining. At
3 no time did the Association characterize the twenty-four hour shift proposal, or any of its
4 other proposals, as a final offer. Moreover, the Town's claim that the Association would
5 not even consider its September 15 proposal is belied by the fact that the Association
6 offered substantive reasons for rejecting the Town's fifty-six hour work week proposal.

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

17 Refusal to Bargain by Failing to Provide Successor Contract Negotiation Dates
18 and Filing the JLMC Petition
19

20 The Town tendered its first proposal regarding the twenty-four hour shifts at the
21 seventh bargaining session and had not formally responded to the Association's twenty-
22 four hour shift proposal prior to that session. By that time, the Association had
23 presented each of its proposals to the Town, explained its rationale, answered all
24 questions that had been advanced by the Town regarding its proposals, and provided
25 all other information requested by the Town with respect to it.

1 Although the Town alleges that the Association's refusal to provide it with two
2 subsequent bargaining meeting dates as the September 15 bargaining session
3 concluded is unlawful, the evidence does not show that the Association refused to
4 bargain or that it ignored the Town's request for dates. The fact that the Association told
5 the Town to contact it after the September 21 Board meeting to discuss future meetings
6 is indicative of a desire to continue bargaining at a later date. Although it is true that
7 Barrault also told the Town's bargaining representatives that they should contact her "to
8 see if there was any reason to schedule future meetings," and only then if there was
9 movement from the Board, I do not find that the Association's conduct, which had the
10 effect of merely postponing negotiations to a later date, amounts to a refusal to listen to
11 the Town's proposal on the fifty-six hour workweek.

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

1 and Healy's testimony that the Board had not been willing to implement twenty-four
2 shifts prior to September 2016.

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

17 The Town also contends that the Association's September 19 filing of the JLMC
18 petition constituted a failure to bargain in good faith because it prevented the Town from
19 presenting further bargaining proposals. However, Chapter 589 of the Acts of 1987
20 permitted the Association to file at the JLMC because it indicated a belief that the
21 process of collective bargaining had been exhausted. Although the Town may disagree
22 with the Association's view of the state of negotiations, there is no evidence showing
23 that the Association's belief was unreasonable or that it filed the petition in bad faith.
24 While it may have been more prudent for the Association to have waited for the Board's

1 response to the Association's counterproposal before filing the JLMC petition, the Town
2 presented no evidence to suggest that the Association's conduct necessitates a
3 conclusion that it would have refused to listen to or consider any response proffered by
4 the Board as a result of the September 21 meeting.

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

16 Totality of the Circumstances

17 When examining acts alleged to violate the statutory obligation to bargain in good
18 faith, the CERB looks to the totality of a respondent's conduct, and not merely to
19 isolated deeds. Harwich School Committee, 10 MLC 1364, 1367, MUP-5216 (January
20 25, 1984). Therefore, based on the totality of the Association's conduct, including its
21 concessions to a number of the Town's other proposals apart from the twenty-four hour
22 shift in a fifty-six hour work week, I do not find that the Association engaged in surface
23 bargaining about the twenty-four hour shift issue.

1 Further, the Law does not require parties to make concessions during bargaining
2 or to compromise strongly felt positions. City of Marlborough, 34 MLC at 77. Where a
3 party is determined to maintain a set position, such as the case is here, it must
4 approach the subject with an open mind by allowing the other side to explain the
5 reasons for a proposal and by fully articulating its own reasons for rejecting the
6 proposal. Id. Here, the Town offered its first response to the Association's twenty-four
7 hour shift proposal during the seventh negotiation session, which took place on
8 September 15, 2016. The Association offered a counterproposal on that same date, the
9 proposed terms of which included maintaining its own twenty-four hour shift proposal.

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

19 In summary, I find that the Association engaged in good faith, hard bargaining
20 rather than surface bargaining. City of Marlborough, 34 MLC at 77. The Association's
21 position regarding the twenty-four hour shift proposal was not so patently unreasonable
22 as to frustrate agreement, nor did it, or the JLMC petition, constitute an effort to stall
23 negotiations. Cf. Framingham School Committee, 4 MLC 1809, MUP-2428 (February
24 27, 1978) (finding that the employer engaged in delay tactics, and that the employer's

1 proposal based on a long-abandoned position was predictably unacceptable). Further,
2 the Association did not refuse to meet indefinitely, fail to bring a decision maker, refuse
3 to discuss certain proposals, fail to respond to any Town proposals, or condition further
4 negotiations or an agreement upon acceptance of certain proposals as presented. It is
5 undisputed that the Association remained steadfast in its belief that the twenty-four hour
6 shift within a forty-two hour work week proposal represented the most beneficial work
7 schedule for its membership. However, the Town did not show that the Association
8 refused to discuss or listen to the Town's proposal for a twenty-four hour shift within a
9 fifty-six hour work week.

10 Although the Association rejected the Town's proposal on the fifty-six hour work
11 week almost immediately and in the same bargaining session in which it was proposed,
12 the record shows that negotiations did not immediately cease upon the Association's
13 rejection of that proposal. Even though Barrault, as the Association's official bargaining
14 representative, stated that there was "no condition on the planet" that would persuade it
15 to agree to a fifty-six hour work week, the fact that the Association verbally indicated to
16 the Town that it intended to make a counteroffer, and proceeded to make that
17 counteroffer during the same bargaining session, suggests that the Association
18 considered the proposal, but sought to continue discussions on the twenty-four hour
19 shift issue to achieve what it perceived to be a better result for its members. While the
20 Town may have been disappointed by the Association's unwavering stance on the
21 matter of twenty-four hour shifts, the Law does not require parties to make concessions
22 during bargaining or to compromise strongly felt positions. See Town of Braintree, 8
23 MLC at 1197.

1 For all of the reasons above, I do not find that the Town has satisfied its burden
2 to establish that the Association lacked the required intent to reach an agreement, and
3 was merely going through the motions of negotiating, or presented a take it or leave it
4 demeanor. Accordingly, I dismiss the Complaint.

5 CONCLUSION

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS


JENNIFER MALDONADO-ONG, ESQ.,
HEARING OFFICER

APPEAL RIGHTS

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