

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF NEW BEDFORD

and

NEW BEDFORD FIRE FIGHTERS,  
LOCAL 841, I.A.F.F., AFL-CIO-CLC

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Case No. MUP-20-7875

Date Issued: August 9, 2021

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Jane Medeiros Friedman, Esq.

Patrick N. Bryant, Esq.

Representing the City of New Bedford

Representing the New Bedford  
Fire Fighters, Local 841, I.A.F.F.,  
AFL-CIO-CLC

HEARING OFFICER'S DECISION

SUMMARY

1           The issues in this case are whether the City of New Bedford (City or Employer): a)  
2 failed to bargain to resolution or impasse with the New Bedford Fire Fighters, I.A.F.F.,  
3 AFL-CIO-CLC (Union) over the impacts of the City's decision to end a practice of rolling  
4 blackouts and to decommission fire apparatus Engine 11 on unit members' workload and  
5 safety in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law; b)  
6 failed to provide the Union with requested information that was relevant and reasonably  
7 necessary to the Union's role as exclusive bargaining representative in violation of

1 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law; and, c) discriminated  
2 against bargaining unit members for engaging in concerted, protected activities by failing  
3 to bargain over the impacts of its decision to end the rolling blackouts and to shutdown  
4 Engine 11 in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.  
5 For the reasons explained below, I find that the City violated the Law as alleged when it  
6 failed to: a) bargain to resolution or impasse with the Union over the impact of the City's  
7 decision to end the rolling blackouts and to decommission Engine 11 on unit members'  
8 workloads; and b) timely notify the Union that the requested documentation did not exist.  
9 However, I dismiss the allegations that the City: a) failed to bargain resolution or impasse  
10 with the Union over the impact of the City's decision to end the rolling blackouts and to  
11 decommission Engine 11 on unit members' safety, and b) discriminated against unit  
12 members for engaging in concerted, protected activities.

13 Statement of the Case

14 On February 20, 2020, the Union filed a charge of prohibited practice with the  
15 Department of Labor Relations (DLR) in Case No. MUP-20-7875, alleging that the City  
16 violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law. A DLR  
17 investigator investigated the charge on April 27, 2020.<sup>1</sup> On May 12, 2020, the investigator  
18 issued a three-count complaint, alleging that the City had violated Sections 10(a)(5),  
19 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.<sup>2</sup> Counts I and II alleged that the

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<sup>1</sup> During the investigation, the Union amended its charge to include an allegation that the City had violated Section 10(a)(3), and derivatively, Section 10(a)(1) of the Law.

<sup>2</sup> The investigator dismissed the remaining allegations in the case alleging that the City violated Section 10(a)(5) of the Law by failing to bargain to resolution or impasse over its decision to decommission Engine 11 and to end the practice of rolling blackouts. The

1 City violated Section 10(a)(5) by: a) failing to bargain in good faith when it ended the  
2 practice of rolling blackouts and decommissioned Engine 11 without giving the Union  
3 notice and an opportunity to bargain to resolution or impasse over the impacts of the  
4 decision on unit members' workloads and safety; and b) not providing the Union with  
5 requested information that was relevant and reasonably to the Union's in its role as  
6 bargaining representative. Count III alleged that the City violated Section 10(a)(3) of the  
7 Law when it discriminated against unit members for engaging in concerted, protected  
8 activities by ending the practice of rolling blackouts and decommissioning Engine 11  
9 without bargaining with the Union over the impacts on unit members' workloads and  
10 safety. The City filed its answer to the complaint on May 22, 2020.

11 I conducted a hearing on November 24, 2020.<sup>3</sup> Both parties had an opportunity to  
12 be heard, to call witnesses and to introduce evidence. The parties submitted their post-  
13 hearing briefs on January 29, 2021. Upon review of the entire record, including my  
14 observation of the demeanor of the witnesses, I make the following findings of fact and  
15 render the following opinion.

16 Stipulated Facts

- 17 1. The City is a public employer within the meaning of Section 1 of the Law.
- 18 2. The Union is an employee organization within the meaning of Section 1 of the Law.
- 19 20
- 21 3. The Union is the exclusive bargaining representative for a unit of firefighters
- 22 employed by the City (Unit).

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Union did not file a request for review pursuant to 456 CMR 15.05(9) of the portions of the charge that the investigator dismissed.

<sup>3</sup> I conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

- 1 4. The removal of apparatus within the City's Fire Department from service, including  
2 the transfer of firefighters assigned to the apparatus, is known as a "blackout."  
3
- 4 5. For several years, the City has addressed budgetary shortfalls by rotating an  
5 apparatus in the City's Fire Department out of service. The practice of rotating an  
6 apparatus out of service is known as "rolling blackouts."  
7
- 8 6. Through the practice of rolling blackouts, the entire Fire Department shared the  
9 impact of one less engine on a rotating basis.  
10
- 11 7. On or about January 3, 2020, the City decided to end rolling blackouts and  
12 permanently decommission Engine 11.  
13
- 14 8. By letter dated February 25, 2020, the City informed the Union that it had a  
15 nondelegable right to decommission a piece of equipment out of service and  
16 determine the level of services for the Department, and that the City would be  
17 available to meet with the Union to discuss impacts of this decision.  
18
- 19 9. By letter dated February 27, 2020, the Union responded to the City and stated that  
20 it needed the following information to prepare for any negotiations pertaining to  
21 Engine 11.  
22
  - 23 a. Options considered by the City prior to identifying Engine 11 as the  
24 apparatus to be removed, all analyses or reports of the impacts to response  
25 times, including fire, medical and other emergency calls, as a result of  
26 closing Engine 11;  
27
  - 28 b. Documents created or considered in deciding to close Engine 11, including  
29 budgets;  
30
  - 31 c. Proposed plans for reassignment of Engine 11 company members, and any  
32 past practice in support of these plans;  
33
  - 34 d. Proposed plans for staffing Marine 11;  
35
  - 36 e. Communications, including electronic about closure of Engine 11, including  
37 but not limited to discussions within and between [the] New Bedford Fire  
38 Department administration and City Hall.  
39
- 40 10. At the start of March 2020, the City ended the practice of rolling blackouts and  
41 permanently decommissioned Engine 11.

1 Findings of Fact<sup>4</sup>

2 The City has a land area of twenty miles and over four miles of water with a  
3 population of approximately 95,000 residents. The distance between the City's northern  
4 and southern tips is approximately thirteen miles, and the City's distance from east to  
5 west varies between one and three miles. The City has an airport and two interchanges  
6 with Interstate I-95. The City's Fire Department employs 409 fire fighters. The Union  
7 represents all the City's fire fighters, except the chief and the deputy chief. The City and  
8 the Union were parties to a collective bargaining agreement that, by its terms, was in  
9 effect from June 1, 2016 through June 30, 2019 (2016-2019 CBA).

10 City's Fire Stations and Apparatus as of Late 2019, Early 2020

11 The City had seven fire stations, which included: a) Station 2 at 868 Pleasant  
12 Street; b) Station 5 on 3675 Acushnet Avenue; c) Station 6 at 151 Purchase Street; d)  
13 Station 7 at 8 Durfee Street; e) Station 8 at 1599 Acushnet Avenue; f) Station 9 at 799  
14 Ashley Boulevard; and g) Station 11 at 754 Brock Avenue. The geographical areas for  
15 which these stations were responsible were known as "still" areas and were delineated  
16 by streets or municipal border lines. The City also had ten fire apparatus, consisting of  
17 three ladder trucks and seven fire engines. A ladder truck, colloquially referred to as a  
18 "hook and ladder," carries a crew of fire fighters and a long aerial ladder, which extends  
19 upward, as well as an assortment of other portable ground ladders and other tools to  
20 ventilate fires and to conduct search and rescue operations. A fire engine, colloquially  
21 referred to as a "pumper," carries a crew of fire fighters and has a pump that is used to  
22 pump water through fire hoses as well as a water tank and a hose line for applying water

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<sup>4</sup> The DLR's jurisdiction in this matter is uncontested.

1 (water suppression). Both ladder trucks<sup>5</sup> and fire engines<sup>6</sup> respond to medical calls, car  
2 accidents and alarms in buildings. Ladder trucks usually respond to medical calls in high-  
3 rise buildings, except for Tripp Towers. Engine 11 responded to medical calls there  
4 because Station 11 was nearby.<sup>7</sup> Fire fighters are on-duty for twenty-four hours, which  
5 includes a day shift of 8 a.m. to 6 p.m. and a night shift from 6 p.m. to 8 a.m. and are off-  
6 duty for seventy-two hours.<sup>8</sup> The City and the Union have negotiated a minimum staffing  
7 ratio of four fire fighters to each apparatus per shift,<sup>9</sup> and the fire fighters, who are  
8 assigned to an apparatus, are known as a company. The seven fire stations had the  
9 following apparatus: a) Station 2<sup>10</sup>-Engine 1, Ladder 1 and the District Chief's vehicle  
10 #2;<sup>11</sup> b) Station 5-Engine 5; c) Station 6-Engine 6 and Ladder 3; d) Station 7- Engine 7;

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<sup>5</sup> Ladder trucks also respond to calls involving carbon monoxide, gas, and natural gas.

<sup>6</sup> Fire engines also respond to call involving water breaks or flooding, construction fires and hazardous materials.

<sup>7</sup> Tripp Towers was a high-rise complex with ten to twelve floors with approximately 200 apartments, whose residents were senior citizens or persons with disabilities.

<sup>8</sup> The City assigns two district chiefs, who are unit members, to each shift. Usually about ninety minutes before the start of a shift, a district chief will call a station to check on the staffing levels for the upcoming shift. If a company has less than the minimum staffing, the district chief may decide to move fire fighters to cover the shortfall or to hire on overtime.

<sup>9</sup> During successor contract negotiations, which began in 2019, the City proposed to reduce the minimum staffing ratio per apparatus.

<sup>10</sup> Station No. 2 also contains the Fire Dispatch.

<sup>11</sup> The two district fire chiefs assigned to each shift are incident commanders. As incident commanders, they arrive at fires or other emergency incidents in small vehicles which are not designed for fire suppression or to carry hoses or ladders.

1 e) Station 8-Engine 8, Ladder 4 and the District Chief's vehicle #1; f) Station 9-Engine 9;  
2 and g) Station 11-Engine 11 and Marine 11.<sup>12</sup>

3 FACETS Report

4 In mid-November 2014, the City executed a contract with a private company called  
5 FACETS Consulting (FACETS) to conduct a Fire and Emergency Medical Services study,  
6 which, in part, included: a) a review of internal operations staff and management  
7 resources for the Fire and Emergency Medical Services (EMS) departments; and b) a  
8 financial sustainability analysis, including current organizational configurations  
9 accompanied by the identification of potential efficiencies and service improvements.  
10 FACETS' representatives made six trips to the City and on November 12, 2015, issued a  
11 one-hundred-page draft report (Report). As part of the study, FACETS conducted a  
12 facility review of the City's seven fire stations and the EMS building, which included  
13 making recommendations about immediate repairs, minor renovations, major renovations  
14 and the projected costs for new fire stations and administrative space. It also examined  
15 existing fire station configurations as well as potential new station configurations, which  
16 included the creation of coverage maps representing four-minute response capabilities  
17 and call volume. The Report contained a recommendation that the City consolidate Fire  
18 Station 6 and Fire Station 11 in a new station near Morton Court and Cove Street, a  
19 recommendation that the City subsequently adopted. The Report noted that the proposed

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<sup>12</sup> Marine 11 is a small, hard-bottomed boat with inflatable pontoons on the sides and a console in the center. Engine 11 towed Marine 11 to a boat ramp nearest an incident scene where Marine 11 responded to medical calls occurring on boats and water rescues. The fire fighters in Engine Company 11 had undergone training to operate Marine 11. Engine 6 was the backup for Marine 11 when Engine 11 already was on a call or blacked out.

1 location would provide adequate coverage to the southern part of the City with limited  
2 impact on those living in the main body of the City and on the peninsula, and that the new  
3 facility could accommodate an engine and ladder company and the decommissioning of  
4 Engine 6 or Engine 11. As of the date of the hearing, construction on the new station had  
5 been ongoing for approximately one year and was expected to be completed in March or  
6 April 2021.

### 7 History of Blackouts

8         The City's removal of an apparatus from service, including the transfer of fire  
9 fighters assigned to that apparatus, is known as a "blackout." The City first started using  
10 blackouts in 2009 to achieve cost savings on overtime. The City would only blackout  
11 Ladder 3 on the 8 a.m. to 6 p.m. shift. Thereafter, the City decommissioned Engines 6  
12 and 9 and laid off forty fire fighters for approximately nine months, but the City still blacked  
13 out Ladder 3 sometimes. On or about 2010, the City received a federal SAFER grant that  
14 allowed it to rehire most of the laid off fire fighters. In 2013, the City received a federal  
15 sustainment grant, which allowed it to restore Engines 6 and 9 to service and to hire an  
16 additional forty-three fire fighters. In 2016, the City began to occasionally blackout Ladder  
17 3 on the 8 a.m. to 6 p.m. shift as a cost-saving measure as the federal grant monies  
18 began to diminish. The City then expanded the rolling blackouts to sometimes remove  
19 the other two ladder trucks from service on the 8 a.m. to 6 p.m. shift instead. Thereafter,  
20 the City began to blackout any apparatus, both fire engines and ladder trucks, which had  
21 a staffing shortage, to save on overtime expenditures. In early 2018, when the SAFER  
22 funds were exhausted, the City began to blackout pieces of apparatus for twenty-four-  
23 hour shifts, and the blackouts began to occur almost daily. In mid-2018, the City



1 implemented a schedule of rolling blackouts for which a district chief compiled a calendar  
2 showing when a particular piece of apparatus would be blacked out.<sup>13</sup> In July or August  
3 2018, then Deputy Chief,<sup>14</sup> now Provisional Fire Chief Paul Coderre Jr. (Coderre),<sup>15</sup> had  
4 a conversation with then Union president Lieutenant Tom Carreiro (Carreiro) in which  
5 Carreiro asked Coderre to end the blackouts. Coderre declined, citing the Fire  
6 Department's need to stay within its budget, which meant limiting overtime and being  
7 unable to hire additional fire fighters to keep the companies fully staffed. Carreiro  
8 responded that the City needed to fully fund the Fire Department.

9 October 2019

10 On October 22, 2019, a neighbor notified the Fire Department about a structure  
11 fire on Coffin Avenue. Ladder 4 and District Vehicle #1 arrived at the scene from Station  
12 8, which is about five blocks away, in under six minutes, which is within National Fire  
13 Protection Association (NFPA) guidelines. The windows of the building had already  
14 blown out when they arrived.<sup>16</sup> Because Engine 8, which also is located at Station 8, was  
15 on a twenty-four blackout that day, that apparatus was not at the fire scene. The Ladder  
16 4 fire fighters entered the building to perform a search and found a working fire on the

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<sup>13</sup> The City created a blackout schedule in response to unit members' concerns that they did not know with whom they would be working on a particular day.

<sup>14</sup> The former fire chief was on leave.

<sup>15</sup> Coderre became the provisional fire chief in January 2019 after holding the rank of deputy chief for eight years. He began with the Fire Department twenty-eight years ago as a fire fighter and then moved up the ranks.

<sup>16</sup> At hearing, Coderre cited those factors as the basis for his opinion that the fire had been burning for an unknown period before the fire fighters got the call from the neighbor.

1 third floor. They gained entry to an apartment and located an unconscious resident,  
2 whom they extricated from the building. The resident later succumbed to her injuries.

3 The Union posted several comments about the October 22, 2019 incident on the  
4 Union's Facebook page with links to its Instagram account.<sup>17</sup> The Union gave its  
5 condolences to the deceased's family, described the specifics of the fire, and spoke out  
6 against the City's actions in continuing to blackout fire apparatus. The Union emphasized  
7 that there had been a fatality and that Engine 8, which was only five blocks away and  
8 could have provided water suppression, was out of service due to the blackout. Carreiro  
9 was interviewed on Rhode Island television channels 6, 10 and 12 and by the New  
10 Bedford Standard Times, the local newspaper. He spoke out against the blackouts and  
11 described how the October 22, 2019 fire took place while Engine 8 was out of service.  
12 The City's Mayor Jonathan Mitchell (Mayor Mitchell) subsequently commented publicly  
13 that the City had sufficient staffing at the fire scene, and that the outcome would not have  
14 been any different if Engine 8 was in service.<sup>18</sup>

15 Approximately one week later, a ceremony at the Keith Junior High School was  
16 scheduled to take place to congratulate ten new fire fighters who had just graduated from

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<sup>17</sup> From 2009 and continuing the Union had posted updates about the blackouts on its Facebook page along with a link to its Instagram's account. The frequency of the Union's postings varied. However, beginning in 2018, the Union began to post daily about the blackouts, which included posting photos of the blacked-out apparatus as well as a map of the still area for which the apparatus was responsible. The Union also had statements encouraging the public to protest to the Mayor about the blackouts. After the October 22, 2019 incident, the Union also began to post a copy of the calendar that the district chief had prepared showing the blackout schedule.

<sup>18</sup> At the hearing, Sylvia opined that the deceased resident's chance of surviving the fire would have increased if Engine 8 had been in service. Conversely, Coderre disagreed for the reasons described in Footnote 16. I need not resolve this issue because it is not pertinent to the allegations before me.

1 the Fire Academy. Afterwards, a recognition and awards ceremony also was scheduled  
2 to take place to honor fire fighters who had gone above and beyond in the performance  
3 of their duties. Mayor Mitchell, some City Councilors, Coderre, Deputy Chief Scott Kruger  
4 (Kruger),<sup>19</sup> the district chiefs, and the fire chaplain were expected to attend.

5 Twenty-five to thirty Union members attended the event in their dress uniforms to  
6 show support for the new fire fighters and the fire fighters receiving awards. According  
7 to current Union president and former treasurer William Sylvia (Sylvia),<sup>20</sup> Union members  
8 decided “to make a statement” at the event because they knew Mayor Mitchell was  
9 expected to attend. They stood outside on both sides of the main entrance to the building  
10 and waited for the Mayor to arrive. When the Mayor arrived and acknowledged them,  
11 they simultaneously turned their backs to him. The Mayor then proceeded into the  
12 building and approached Coderre and Kruger. The Mayor was visibly upset by the fire  
13 fighters’ actions and commented to Coderre and Kruger that he had never encountered  
14 such behavior during his time in public office and that he would remember it.

15 The Union members then went into the building’s auditorium and took their seats.  
16 Coderre approached Carreiro and told him that he was disinvited from the ceremony and  
17 asked him to leave. Coderre was not “thrilled” that Carreiro had turned a family event for  
18 the Fire Department into a political statement,<sup>21</sup> and that it was his decision, not the

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<sup>19</sup> Coderre and Kruger had organized the event along with several other City employees.

<sup>20</sup> Sylvia has been a fire fighter for fourteen years and became Union president in December 2019.

<sup>21</sup> Mayor Mitchell was running for reelection in November 2019, and ultimately was reelected.

1 Mayor's decision, to ask Carreiro to leave. Coderre also told Carreiro that Union members  
2 could have voiced their opinions outside of Coderre's venue, specifically at a School  
3 Committee meeting, which the Mayor was speaking at prior to the Fire Department  
4 ceremony. Coderre also told Carreiro that the Mayor would not forget the Union's actions  
5 that night.

6 Later, during the recognition ceremony, two unit members, Lieutenant Cormier, the  
7 Union vice-president, and Fire Fighter Mount, the steward for Engine 8, received awards  
8 for their work at the October 22, 2019 fire.<sup>22</sup> After receiving their awards, both men turned  
9 around so they did not have to shake Mayor Mitchell's hand in the reception line. The  
10 two unit members were upset that they needed to enter the active fire scene on the third  
11 floor of the Cormier Street building without a hose line present or the additional fire fighters  
12 that they believed Engine 8 would have provided if had not been blacked out.

### 13 Options to End Rolling Blackouts

14 In late November, early December 2019, Mayor Mitchell directed Coderre to study  
15 options to end the rolling blackouts. Shortly thereafter, Coderre verbally presented the  
16 Mayor with the following alternatives: a) increase the Fire Department's overtime budget  
17 from \$700,000 to \$1.13 million, which were its typical annual overtime costs; b) hire  
18 twenty-four fire fighters at the cost of \$2.7 million<sup>23</sup> to ensure that the Fire Department  
19 had sufficient fire fighters to staff all ten pieces of apparatus;<sup>24</sup> or c) permanently shut

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<sup>22</sup> The record does not identify either fire fighters' first names.

<sup>23</sup> The City's Chief Financial Officer provided Coderre with the figure of \$2.7 million.

<sup>24</sup> Coderre indicated that the Fire Department's 209 fire fighters could only staff eight and one-half companies and that 233 fire fighters would be needed to staff ten companies.

1 down an engine company. Coderre realized then that to end the blackouts, he would  
2 need to shut down an engine company because the other two options, which required the  
3 City to make significant financial expenditures, were unlikely to happen. Coderre did not  
4 provide Mayor Mitchell with any information in writing or via emails regarding those  
5 options.

6 December 2019

7 On December 28, 2019, the Fire Department received a call from a motorist about  
8 a structure fire on Myrtle Street. Engine 8 from Station 8, which was about two miles  
9 away, and Ladder 1 from Station 2, which was one and one-half to two miles away, arrived  
10 at the scene along with the District Chief's Vehicle #1 from Station 8. The apparatus  
11 arrived at the scene in less than six minutes. Some of the building's windows already  
12 had blown out when the fire fighters arrived, and flames were shooting out of the second-  
13 floor windows. Engine 7, from Station 7, which was five blocks away, did not come to the  
14 fire scene because it was blacked out. The fire fighters conducted a search and rescue  
15 operation on the first and second floors and found a stricken resident on the first floor.  
16 They removed the resident from the building, but he later succumbed to his injuries.

17 The Union posted a statement on its Facebook page giving its condolences to the  
18 deceased's family, explaining the circumstances surrounding the fire, and speaking out  
19 against the practice of blackouts. The Union noted that Engine 7, which was only five  
20 blocks away, did not respond to the incident because it was blacked out. As Union  
21 president, Sylvia gave interviews about the December 28, 2019 incident to Channels 6,  
22 10 and 12, the New Bedford Standard Times, the New Bedford Guide, a social media  
23 site, and New Bedford Live, an internet reporting site, as well as WBSN, a local radio

1 station and continued to give interviews through the month of January 2020. In the  
2 interviews, Sylvia, in part, challenged Mayor Mitchell's public assertions that even if  
3 Engine 7 had not been blacked out, the outcome of the December 28, 2019 fire would  
4 not have been any different.<sup>25</sup> Also, after the October 22, 2019 and December 28, 2019  
5 fires, private citizens began to speak out on social media and to create social media pages  
6 protesting the blackouts.

7 January 2020

8 On Friday, January 3, 2020, Mayor Mitchell held his monthly meeting with Coderre  
9 and Kruger regarding Fire Department issues. At that meeting, the Mayor stated that the  
10 rolling blackouts were going to end immediately and that to do so the City needed to shut  
11 down an apparatus. Coderre noted that he previously expected that the blackouts would  
12 continue until the new fire station opened.<sup>26</sup> However, Coderre noted at the hearing that  
13 the media criticism of the Mayor and the press conferences helped hasten the decision  
14 to end the blackouts by bringing the issue to the forefront. He also confirmed that he and  
15 Mayor Mitchell had ongoing conversations about the Union's activities protesting the  
16 blackouts and that the Mayor was not happy about those activities. Also, Coderre  
17 contended at the hearing that the rolling blackouts were causing morale problems  
18 because long-time fire fighters did not like having to regularly float to other companies to  
19 provide staffing when their pieces of apparatus were blacked out. The Fire Department

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<sup>25</sup> As discussed in Footnote 18, I need not reach this issue.

<sup>26</sup> Coderre noted at hearing that no fire chief wants to close an apparatus even though it was the only way to end the blackouts without the City supplementing the Fire Department's budget.

1 also was having training problems when an apparatus that was scheduled to be used for  
2 training was blacked out.

3 Mayor Mitchell left it up to Coderre to decide which apparatus to shut down or to  
4 try and find another option. Coderre selected Engine 11,<sup>27</sup> because he thought that either  
5 Engine 6 or 11 was scheduled to close when construction of the City's new fire station  
6 was completed.<sup>28</sup> Further, Engine 6 and Ladder 3, which were both located in the same  
7 fire station, had gone on runs<sup>29</sup> together for a long time, and Coderre valued that history.  
8 He also believed that Engine 6 and Ladder 3 already covered most of Engine 11's still  
9 area. Previously, when there was a call from a fire alarm from a building or an  
10 investigative call about a fire, Engine 6 and Ladder 3 would provide backup to Engine 11.  
11 Because Ladder 3 previously covered the whole of Engine 6's and Engine 11's still areas,  
12 and Engine 6 previously also covered an still area within a half mile of Engine 11's still  
13 area, Coderre concluded that there would no delay in response time in the northern most  
14 part of Engine 11's still area and that there would be a delay in response time of 1.5  
15 minutes in the southern part of Engine 11's still area.<sup>30</sup> Also, Ladder 3 would take over

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<sup>27</sup> Coderre confirmed that the Union had never requested that Engine 11 or any piece of equipment be taken out of service to end the rolling blackouts.

<sup>28</sup> Sylvia challenged Coderre's claim that either Engine 6 or 11 would close when the new fire station opened. He noted that the new station had four bays and that a local City councilman, who sits on the City's public safety committee, was unaware that one of the engines would close. Coderre maintained that the four bays were for one ladder truck, one engine, EMS, and the boat. As I have not seen blueprints or models of the new fire station, I make no findings as to its storage capacity.

<sup>29</sup> A run is an emergency call, which includes medical calls, alarms in buildings, reports of structure fires, and car accidents.

<sup>30</sup> Coderre calculated the response time by driving it without the use of emergency lights or sirens.

1 responsibility for responding to medical calls from Tripp Towers. However, Coderre did  
2 not consider the total number of calls to which the various apparatus responded because  
3 he maintained that all the apparatus were busy. For the year 2019, Engine 11 went on  
4 1600 runs. At the end of the meeting, Mayor Mitchell informed Coderre that he wanted  
5 to think about the various options and would get back to him.

6 January 6, 2020 Inauguration

7 Mayor Mitchell's inauguration was scheduled to take place the evening of January  
8 6, 2020 at a downtown theater. Certain members of the public had planned a  
9 demonstration (January 6, 2020 demonstration) at the inauguration to protest issues  
10 involving the Fire Department. The Union notified its members about the January 6, 2020  
11 demonstration, and forty to fifty of them attended the demonstration in civilian clothing.  
12 The demonstrators were holding signs and making speeches protesting the underfunding  
13 of the Fire Department and the rolling blackouts. When Mayor Mitchell arrived,<sup>31</sup> the  
14 crowd was chanting "stop the blackouts, fund the Fire Department," and "staff the Fire  
15 Department." Shortly before the inauguration ceremony began, Sylvia gave a live  
16 interview, which was simultaneously recorded, to the New Bedford Guide in which he  
17 spoke out against the blackouts and challenged the Mayor's statements that even if  
18 Engine 8 and Engine 7 had not been blacked out, the outcomes of the October 22 and  
19 November 28, 2019 fires would have remained the same.

20 January and February 2020

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<sup>31</sup> Sylvia claimed that Mayor Mitchell appeared unhappy when he arrived and saw that the protest was taking place.



1           At some point<sup>32</sup> between January 7, 2020 and the end of January 2020, Coderre  
2 notified Sylvia about the planned shutdown of Engine 11.<sup>33</sup> On February 7, 2020, Coderre  
3 issued<sup>34</sup> a “Statement on Elimination of Fire Department Blackout Policy” (February 7,  
4 2020 statement):

5           Beginning in March 2020, the New Bedford Fire Department (NBFD) will  
6 end so-call fire company “rolling blackouts,” the practice of taking one of the  
7 City’s ten fire companies out of service on a rotating basis.

8  
9           The City’s ongoing financial pressures have required the NBFD to adopt  
10 variations of a blackout policy on a regular basis since 2009, including the  
11 expansion of the policy in January 2016 as SAFER grant funding ended. At  
12 its peak the SAFER grant funded 70 positions, or about one-third of the  
13 entire Fire Department. Like New Bedford, blackouts have been employed  
14 by other municipalities as a way of recalibrating spending in the wake of the  
15 last recession.

16  
17           In light of fiscal pressures on the City and concerns expressed by the New  
18 Bedford Fire Fighters Association, Mayor Jon Mitchell tasked the current  
19 NBFD leadership last year with evaluating the current blackout policy and  
20 exploring alternatives that would allow the NBFD to maintain necessary  
21 response levels with existing financial resources. After careful evaluation,

---

<sup>32</sup> Coderre testified that Mayor Mitchell notified him on January 6 or January 7, 2020 to go head and shut down Fire Engine 11 and within hours of that notification he contacted Sylvia and Billy Cabral, the representative of the statewide Union, who did not testify at the hearing. Conversely, Sylvia contended that Coderre contacted him later in January 2020 to notify him about the planned shutdown. The record contains no other independent corroboration of the date that Coderre notified the Union. I find plausible Sylvia’s contention that the Coderre had not contacted him on January 6, 2020 before the mayoral inauguration that evening because Sylvia would have announced the shutdown during the January 6, 2020 demonstration and during his various media interviews that night. Also, because the parties stipulated that the City decided to end the rolling blackouts and decommission Engine 11 on or about January 3, 2020, I need not determine the exact date when the Mayor notified Coderre of his decision other than it was after the January 6, 2020 inauguration.

<sup>33</sup> Other than my finding that Coderre contacted Sylvia after January 6, 2020, the exact date in January when Coderre contacted Sylvia is not pertinent to the outcome of the case.

<sup>34</sup> At the hearing, Coderre confirmed that he had not drafted the February 7, 2020 statement, and he assumed that the Mayor’s Office had done so.

1 the Nbfd leadership has determined that although the use of blackouts has  
2 not compromised the department's responsiveness, the practice has  
3 resulted in certain negative consequences.

4  
5 First, the use of blackouts has proven to be administratively cumbersome.  
6 The blackout policy requires time and resources to administer. The  
7 deactivation of fire companies on a rotating basis requires staff to devote  
8 significant time and attention to managing the daily re-assignment of  
9 personnel. The time consumed by staff administering the blackout policy  
10 could be much better spent focusing on training, fire prevention, and other  
11 important functions.<sup>35</sup>

12  
13 Second, the practice generates Fire Department overtime costs to the City.  
14 The projected Nbfd overtime deficit for the current fiscal year is  
15 approximately \$800,000.

16  
17 Third, the blackouts have undermined firefighter morale. Under the  
18 blackout policy, firefighters and officers are regularly re-assigned to other  
19 companies based in other stations. This creates a hassle for firefighters, as  
20 they may be required from time to time to transport personal gear from their  
21 assigned station.

22  
23 Ending the blackouts by fulling funding ten fire companies was considered,  
24 but was determined to be financially unrealistic. The City's Office of the  
25 Chief Financial Officer (CFO) has estimated that funding an additional  
26 company would cost the city \$2.7 million annually. Appropriating an  
27 additional \$2.7 million from the City's General Fund every year is well  
28 beyond the City's financial means.

29  
30 Therefore, Nbfd leadership has recommended that in order to maintain  
31 adequate fire coverage, and end the practice of blackouts, the Nbfd will  
32 decommission Engine #11, which is housed at 754 Brock Avenue in the  
33 City's South End. Engine #11 will be placed in reserve status. No layoffs  
34 will result from this change; fire fighters and officers currently assigned to  
35 Engine #11 will be redeployed to other fire companies based on existing  
36 personnel protocols.

37  
38 The Nbfd has determined that the response level along the Brock Avenue  
39 corridor area will not vary materially from the current level because the

---

<sup>35</sup> Coderre credibly described how the district chiefs had complained to him about the daily need to reassign staff and their concerns about ultimately ending up with too many or not enough fire fighters working on a shift. Although Sylvia indicated that he had received no complaints from the district chiefs about this issue even though they were unit members, it is highly likely that the district chiefs complained directly to Coderre without raising the issue with the Union.

1 response area of Engine #6 (based at 151 Purchase Street) significantly  
2 overlaps the response area of Engine #11. Moreover, the scheduled  
3 opening of the South End Public Safety Center on Brock Avenue in the  
4 Spring of 2021 will shift further south the location of both Engine #6 and  
5 Ladder #3.

6  
7 With the discontinuance of blackouts, the Department has estimated a  
8 reduction in OT spending next fiscal year (FY2021) of as much as  
9 \$400,000-500,000.<sup>36</sup>

10  
11 In addition, the reassignment process will allow the NBFD Fire Prevention  
12 Unit to expand by two positions. The strengthening of Fire Prevention  
13 reflects the Department's renewed emphasis on using preventative  
14 measures to proactively reduce fire risk and improve public safety.

15 On February 16 or 18, 2020, the Union and the City met to discuss the process by  
16 which Article 25 of the 2016-2019 CBA, a provision that the parties originally negotiated  
17 when the City decommissioned Engines 6 and 9 in 2009 and continued to maintain in  
18 their successor collective bargaining agreements, would be implemented. The City and  
19 the Union also discussed the addition of the two fire prevention positions, which are  
20 referenced in the February 7, 2020 statement. The City did not lay off any fire fighters  
21 because of the shutdown of Engine 11 and did not alter its minimum staffing on the other  
22 apparatus. On February 20, 2020, the Union filed its charge of prohibited practice in Case  
23 No. MUP-20-7875. On February 21, 2020, the City issued a memo (February 21, 2020  
24 memo) to unit members, which was signed by Kruger and which was read at all roll calls,  
25 stating:

26 All members please be advised the process of reassigning members of  
27 Engine Co. 11 displaced as a result of its decommissioning will take place  
28 at the Training Division on Thursday, February 27, 2020 at 1100 hrs. Any  
29 members who are certain they will be affected including members of E-11  
30 [Engine 11], those likely to return to the floating pool, or those being

---

<sup>36</sup> As of the date of the hearing, the Fire Department's overtime costs had increased by twenty percent, which Coderre contended was a result of the COVID-19 pandemic, including unit members being called to active duty from the military reserves.

1 demoted should make every effort to attend. If you are not able to be  
2 present, you must be available by phone.

3  
4 All Department members should also be accessible by phone on that day  
5 in the event you are also affected during this reassignment.  
6

7 As a reminder the CBA Article 25 Transfers Section 5 states 'In the event a  
8 company is decommissioned or a position eliminated, the displaced  
9 member(s) shall be allowed to bump a less senior member from any  
10 position and such process will continue until all displaced or "bumped"  
11 members have a permanent assignment.'

12 On February 25, 2020, the City's counsel Jane Medeiros Friedman (Medeiros Friedman)  
13 sent a letter to Union counsel Leah Barrault stating:

14 As the Union has been previously informed by the Chief, the City has  
15 decided to remove Engine 11 from service, on or about March 22, 2020.  
16 While the City has a nondelegable core managerial right to take a piece out  
17 of service and to determine the level of service for its Fire Department, the  
18 City is available to meet with the Fire Union between now and March 22,  
19 2020 to discuss impacts, if any, of this decision.

20 Union's Request for Information

21 On February 27, 2020, Union counsel Patrick Bryant, Esq. (Bryant) sent a letter to  
22 Medeiros Friedman stating in pertinent part:

23 The City of New Bedford and the New Bedford Firefighters, Local 841 have  
24 been negotiating a successor collective bargaining agreement<sup>37</sup> for  
25 months, enabling the parties to identify changes that they seek to make to  
26 terms and conditions of employment. The City never identified closure of  
27 Engine #11, including the necessary impacts resulting from the closure, as  
28 a change that the City seeks to implement.  
29

30 The Commonwealth Employment Relations Board has ruled that a party  
31 has the right to insist that changes proposed during actual or expected  
32 successor bargaining may be negotiated only at the main table, even when  
33 the changes stem from an employer's non-delegable right. See City of  
34 Boston, 2004 WL 5656665 (2004) (police commissioner had non-

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<sup>37</sup> At the time the hearing took place, a petition was pending before the Joint Labor Management Committee for Municipal Police and Fire (JLMC) seeking to have the JLMC exercise jurisdiction over the parties' successor contract negotiations.

1 delegable right to prioritize details but was required to negotiate impacts  
2 during contract negotiations prior to implementation).

3  
4 Here, the City unilaterally announced it was closing Engine 11 without  
5 providing notice or an opportunity to bargain about the decision and/or the  
6 impacts of the decision. The City's decision was unequivocal and in such  
7 disregard of its bargaining obligations that the City issued a public press  
8 statement about its plans and its timetable for the closure.

9  
10 Only now that the Union noted the obvious failure of the City to satisfy its  
11 bargaining obligations has the City feigned a willingness to comply with  
12 Chapter 150E. Such offer was illusory, in light of your simultaneous  
13 commitment to the preexisting deadline to close Engine #11. Your offer  
14 lacks credibility unless and until the City publicly rescinds its announced  
15 closure, including the stated deadline and plans for implementation, and  
16 promises to negotiate changes to mandatory subjects within the context of  
17 successor contract bargaining.

18  
19 Further, the Union seeks information pertaining to the inflexible plan to  
20 close Engine #11, including:

- 21  
22 1. Options considered by the City prior to identifying Engine #11 as the  
23 apparatus to be removed; all analyses or reports of the impacts to  
24 response times, including fire, medical, and other emergency calls, as a  
25 result of closing Engine #11;  
26  
27 2. Documents created or considered in deciding to close Engine #11,  
28 including budgets;  
29  
30 3. Proposed plans for reassignment of Engine #11 company members, and  
31 any past practice in support of these plans;  
32  
33 4. Proposed plans for staffing Marine #11;  
34  
35 5. Communications, including electronic, about closure of Engine #11,  
36 including but not limited to discussions within and between New Bedford  
37 Fire Department administration and City Hall.

38  
39 This information is relevant and necessary for Local 841 to prepare for any  
40 negotiations regarding bargaining about mandatory subjects pertaining to  
41 Engine #11. Once we receive this information, we can confer about next  
42 steps. Please confirm that the closure will not be implemented until  
43 bargaining obligations have been satisfied.

1 The City subsequently did not respond to the Union's February 27, 2020 letter. This was  
2 the first time that the City had not responded to an information request from the Union.  
3 At hearing, the City asserted that the requested documentation did not exist, and the  
4 Union presented no evidence to the contrary.

#### 5 March 2020

6 At the start of March 2020, the City ended the practice of rolling blackouts and  
7 permanently decommissioned Engine 11. Engine 6 and Ladder 3 became the primary  
8 responder for calls in Engine 11's former still area and Engine 1 became the second  
9 engine that responded to a fire alarm or a call to investigate a fire. Sylvia estimated that  
10 Engine 6 and Ladder 3's call volume increased by forty to fifty percent with most of the  
11 calls going to Engine 6 with the remainder to Ladder 3 and with Ladder 3 taking over  
12 medical calls at Tripp Towers. Marine 11 remained inside Station 11 and Engine 6 took  
13 over responsibility for its operation. However, Marine 11 remained out of service until a  
14 sufficient number of Engine 6's members underwent training on how to operate it.<sup>38</sup>

#### 15 Post-Investigation Conduct

16 On April 27, 2020, a DLR investigator conducted an in-person investigation in this  
17 matter. Thereafter, in late April 2020, the City moved Marine 11 from Station 11 to Station  
18 6. Thirty to forty-five days later, the City began training the fire fighters who were assigned  
19 to Station 6 to operate Marine 11. The City had delayed the training to ensure that  
20 COVID-19 safety protocols were developed for the training as firefighters needed to sit

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<sup>38</sup> As a member of Engine 6, Sylvia previously had undergone one day of training regarding the operation of Marine 11. Although he had been present when Engine 6 assisted Engine 11 on calls, he had remained on land during the calls.

1 next to each other when operating Marine 11.<sup>39</sup> On May 12, 2002, the DLR investigator  
2 issued a complaint and partial dismissal in the present case.

3 On May 22, 2020, Medeiros Friedman sent a letter to Sylvia stating in relevant part:

4 In the spring, summer and fall of 2019, representatives of Local 841 I.A.F.F.  
5 proposed to the Mayor, Chief, and Deputy Chief that the City end rolling  
6 blackouts. The Mayor, Chief and Deputy have consistently informed these  
7 union representatives that the City does not have the budget to hire  
8 additional firefighters and that the only w[ay] to end the rolling blackouts  
9 was to take a piece out of service. The Chief and Union representatives  
10 bargained the impacts associated with redeployment of personnel assigned  
11 to Engine 11.

12  
13 In November 2019, in a discussion with you about stopping the rolling  
14 blackouts, the Chief indicated that the City was considering taking Engine  
15 9 or Engine 11 out of service to end the rolling blackouts. You indicated  
16 that the Union's preference would be to have Engine 11 taken out of service  
17 as Engine 11 would be coming out of service when the station is scheduled  
18 to close in the Spring of 2021.<sup>40</sup> As a result of that discussion with you and  
19 after months of requests to end rolling blackouts from Union  
20 representatives, the City agreed to the Union's request to end rolling  
21 blackouts and provided the Union with notice that the rolling blackouts  
22 would end and that Engine 11 would be taken out of service. The Chief and  
23 Union representatives bargained the impacts associated with redeployment  
24 of personnel assigned to Engine 11.

25  
26 Although the City does not agree with and does not admit to the allegations  
27 in the complaint issued by the Department of Labor Relations in MUP-20-  
28 7875, the City is willing to satisfy any remaining impact bargaining  
29 obligations which may exist with respect to taking Engine 11 out of service.  
30 Therefore, the City invites the Union to engage in impact bargaining on any  
31 of the following dates:

32  
33 June 9, 2020 at 10 a.m.

---

<sup>39</sup> As of the date of the hearing, Marine 11 was out of service and was expected to remain out of service during the upcoming winter. The City also had smaller inflatable boats located at Stations 5 and 8 that could be used for rescues on ponds and rivers as well as a thirty-eight-foot jet boat, which a fire captain operated Mondays through Fridays.

<sup>40</sup> At hearing, the Chief confirmed that the Union had never indicated a preference that Engine 11 or any apparatus be taken out of service. Further, he noted that the Union did not get to decide which piece of apparatus stayed open or shut but only to bargain over what happened.

1 June 16, 2020 at 10 a.m.  
2 June 23, 2020 at 10 a.m.

3  
4 Please let me know which of the above dates work for you and the Union's  
5 team. If none of the above dates work for the Union, please propose  
6 alternatives.

7 On June 1, 2020, Bryant sent a letter to Medeiros Friedman stating in pertinent part:

8 Please be advised that the Union declines to meet with the City about  
9 "impact bargaining" regarding Engine 11 closure as outlined in your May 22  
10 letter. The City is not admitting that it had an obligation to bargain the  
11 impacts, is not admitting that its closure was done for a retaliatory or  
12 discriminatory purpose and is not agreeing to restore the status quo ante  
13 during bargaining. As such, the City is not genuinely proposing to address  
14 its collective bargaining obligations.

15  
16 OPINION

17 Count I-Failure to Bargain Over the Impacts

18 Section 6 of the Law requires public employers to negotiate in good faith with  
19 respect to wages, standards of productivity and performance, and any other terms and  
20 conditions of employment. However, from that broadly defined category of mandatory  
21 subjects, the Commonwealth Employment Relations Board (CERB) has exempted  
22 certain types of managerial decisions that must, as a matter of policy, be reserved to the  
23 public employer's discretion. City of Worcester v. Labor Relations Commission (City of  
24 Worcester), 438 Mass. 177, 180 (2002). It is well established that decisions determining  
25 the level of services that a governmental entity will provide lie within the exclusive  
26 managerial prerogative of the public employer. Town of Danvers, 3 MLC 1559, 1571,  
27 MUP-2292, MUP-2299 (April 6, 1977). The City's decision to end the rolling blackouts  
28 and to decommission Engine 11 is a level of services decision. See City of Boston, 8 MLC  
29 1419, 1434, MUP-3821 (November 2, 1981) (employer's decision to close three fire  
30 companies is a managerial prerogative.) Notwithstanding a public employer's prerogative



1 to make certain types of core managerial decisions without prior bargaining, it still may  
2 be required to bargain over the impacts or effects that those decisions would have on  
3 mandatory subjects of bargaining. City of Worcester v. Labor Relations, 438 Mass. at  
4 185; Newton School Committee, 5 MLC 1016, MUP-2501 (June 2, 1978), aff'd sub nom.  
5 School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).  
6 Here, the Union contends that the City had an obligation to bargain over the impacts of  
7 the City's decision to end the rolling blackouts and decommission Engine 11 on unit  
8 members' workload and safety.

9 Workload

10 In City of Boston, the CERB determined that fire fighter workload is a mandatory  
11 subject of bargaining. 8 MLC at 1434. However, the CERB cautioned that variations in  
12 workload amongst individuals or fire companies or even from one year to the next may  
13 not trigger a bargaining obligation. Id. at 1434-1435. Instead, the workload parameters  
14 that an employer previously established for its fire department must be examined, and a  
15 bargaining obligation is triggered when those workload parameters are exceeded. Id. at  
16 1435. Since 2009, the City had a practice of occasionally blacking out a piece of  
17 apparatus for a shift. In 2010, the City decommissioned Engines 6 and 9, but still  
18 occasionally blacked out Ladder 3 on the 8 a.m. to 6 p.m. shift. The City restored Engines  
19 6 and 9 to service in 2013, but the record before me does not reveal who took over those  
20 apparatus' calls while they were decommissioned, whether it was on a permanent or  
21 rotating basis, and what bargaining, if any, took place between the City and the Union. In  
22 2016, the City again began to occasionally blackout Ladder 3 on the day shift but then  
23 expanded the rolling blackouts to the other two ladder trucks on the day shift. Thereafter,

1 the City blacked out any apparatus which had a staffing shortage. In 2018, the City  
2 implemented almost daily blackouts for twenty-four hours (two shifts), and in mid-2018,  
3 the City developed a schedule of rolling blackouts, which a district chief incorporated into  
4 a blackout calendar. When the City blacked out an engine or a ladder, other fire  
5 companies would need to respond to the calls which originated from the still area of the  
6 blacked-out apparatus. However, those fire companies were the primary responders for  
7 calls in the blacked-out apparatus' still area on a rotating basis, typically for one day.  
8 Further, the volume of calls that a fire company could receive while covering a blacked-  
9 out apparatus' still area for a shift or a day might vary considerably and could have little  
10 impact on workload.

11 In March of 2020, when the City ended the rolling blackouts and decommissioned  
12 Engine 11, the City assigned Engine 6 and Ladder 3 to become the permanent primary  
13 responder for calls in Engine 11's former still area, a still area that had 1600 calls in 2019.  
14 Sylvia gave unrebutted testimony that Engine 6 and Ladder 3's call volume increased by  
15 forty to fifty percent in the almost eight-month period between the time that those  
16 companies became responsible for Engine 11's still area and the date of the hearing.  
17 Further, the City presented no information showing that the forty to fifty percent increase  
18 was unrelated to Engine 6's and Ladder 3's taking over responsibility for Engine 11's  
19 former still area. Additionally, Ladder 3 also took over responsibility for answering all  
20 medical calls at Tripp Towers, calls to which Engine 11 previously responded. Further,  
21 Engine 6 took over responsibility for the operation of Marine 11. Previously, Engine 6  
22 was only the backup for Marine 11 when Engine 11 was out on a call or blacked out.  
23 Although Coderre noted that all the City's fire companies were busy, the City's

1 assignment of Engine 6 and Ladder to respond to Engine 11's former still area resulted  
2 in a significant increase on those companies' workload, which would not be rotated with  
3 other companies as had been done during the rolling blackouts. Thus, the City had an  
4 obligation to bargain over the impact on unit members' workload of its decision to end the  
5 practice of rolling blackouts and to decommission Engine 11.

6 The City asserts that it never refused to bargain with the Union over the impacts  
7 of ending the rolling blackouts and the decommissioning of Engine 11. The City stresses  
8 that it met with the Union on February 16 or 18, 2020 to review the bumping process for  
9 unit members who were then assigned to Engine 11. The City contends that the Union  
10 did not seek bargaining over other impacts on unit members terms and conditions of  
11 employment, including workload. Instead, on February 20, 2020, the Union filed Case  
12 No. MUP-20-7875. The City then sent its February 25, 2020 letter informing the Union  
13 that it was available from that date until March 22, 2020 to discuss any impacts of the  
14 decision to end the rolling blackouts and decommission Engine 11, but the Union did not  
15 avail itself of this offer to bargain.

16 As the Union correctly points out, even in cases where an employer is excused  
17 from the obligation to bargain over a core governmental decision, an employer may still  
18 be required to bargain with the Union over the impacts of the decision before its  
19 implementation. See City of Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004). The  
20 Union in its February 27, 2020 letter cited to that case when responding to the City's  
21 February 25, 2020 letter. In early January 2020, the City decided to end the rolling  
22 blackouts and decommission Engine 11, and the City notified the Union of its plans later  
23 that same month. On February 7, 2020, Coderre issued his February 7, 2020 statement,

1 which publicly announced the end of the Fire Department's use of blackouts and the  
2 decommissioning of Engine 11. An employer's duty to notify the Union of a potential  
3 change before it is implemented is not satisfied by presenting the change as a fait  
4 accompli and then offering to bargain. Massachusetts Port Authority, 36 MLC 5, 13, UP-  
5 04-2669 (June 30, 2009). A fait accompli exists where, "under all the attendance  
6 circumstances it can be said that the employer's conduct has progressed to a point that  
7 a demand to bargain would be fruitless." Town of Hudson, 25 MLC 143, 148, MUP-1714  
8 (April 1, 1999); Holliston School Committee, 23 MLC 211, 212-213, MUP-1300 (March  
9 27, 1997) (citing Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May 27,  
10 1982)). Here, the City presented the Union with a fait accompli. Contrary to the City's  
11 portrayal of the February 16 or 18 meeting with the Union, the meeting was convened to  
12 implement previously negotiated bumping language contained in Article 25 of the 2016-  
13 2019 CBA. During that meeting, the City and the Union also discussed the addition of  
14 two new unit positions in Fire Prevention, which Coderre announced in the City's February  
15 7, 2020 Statement on the Elimination of the Fire Department Blackout Policy. The record  
16 contains no information showing that the City agreed to delay implementation of its  
17 decision to end the rolling blackouts or to decommission Engine 11 in order that the City  
18 and the Union could negotiate the impacts of that decision to resolution or impasse.  
19 Accordingly, the City failed to comply with its statutory bargaining obligation.<sup>41</sup>

20 Safety

---

<sup>41</sup> The Union in its post-hearing brief also contended that the City decision to end the rolling blackouts and to decommission Engine 11 impacted unit members' job duties. However, the record before me does not show that the City assigned unit members' new job duties. Rather, it shows that the City increased how frequently certain unit members performed those job duties.

1           The impact of an employer's level of services decision on unit members' safety is  
2 also a mandatory subject of bargaining. See Town of Marshfield, 30 MLC 164, 173, MUP-  
3 02-3327 (June 2, 2004). The CERB previously has noted that safety is impossible to  
4 quantify, especially in an occupation such as firefighting, which is inherently dangerous,  
5 and that a myriad of factors affects fire safety. See City of Boston, 8 MLC at 1435. Here,  
6 the Union argues that the City's decision to end the rolling blackouts and to decommission  
7 Engine 11 impacts fire fighter safety because Engine 6 and Ladder 3 have to cover a new  
8 and larger still area and that it will take those apparatus longer to respond to Engine 11's  
9 former still area. The Union presented no specific information concerning how much  
10 longer the response time would be. Rather, the Union referred to the October 22, 2019  
11 and December 28, 2019 fires in support of its argument that any delay in response time  
12 could result in a loss of life whether it be a member of the public or a fire fighter.  
13 Conversely, Coderre gave unrebutted testimony that there would be no delay in response  
14 time in the northern most part of Engine 11's still area and that there would be a delay in  
15 response time of 1.5 minutes in the southern part of Engine 11's still area. Coderre also  
16 noted that Ladder 3 previously covered all of Engine 11's still area and Engine 6  
17 previously covered a still area within a half mile of Engine 11's still area and that those  
18 apparatus had acted as backups to Engine 11. The CERB previously has noted in that  
19 the absence of conclusive evidence to the contrary, a delay in response time by itself  
20 does not sufficiently implicate safety issues. Town of Halifax, 20 MLC 1320, 1326, MUP-  
21 7823 (December 16, 1993). The record before me contains no such conclusive evidence.  
22 Moreover, because the City had an almost eleven-year practice of blacking out apparatus,  
23 which includes blackouts occurring daily on different apparatus from 2018 to 2020, the

1 response times to calls from still areas would have varied depending on which apparatus  
2 was blacked out on a particular day and what other apparatus were available to respond.  
3 This variation can be shown in the Union's assertions about the delays in apparatus'  
4 response times when coming to the October 22, 2019 and December 28, 2019 fires,  
5 although Coderre stressed that both those response times were within NFPA guidelines.  
6 Thus, I conclude that the City's decision to end the blackouts and to decommission Engine  
7 11 had no substantial impact on the safety of bargaining unit members, and I dismiss this  
8 allegation.

9 Count II-Failure to Provide Information

10 If a public employer possesses information that is relevant and reasonably  
11 necessary to an employee organization in the performance of its duties as the exclusive  
12 collective bargaining representative, the employer is generally obligated to provide the  
13 information upon the employee organization's request. Higher Education Coordinating  
14 Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997). The employee organization's right  
15 to receive relevant and reasonably necessary information is derived from the statutory  
16 obligation to engage in good faith collective bargaining, including both grievance  
17 processing and contract administration.

18 An employer may not unreasonably delay furnishing requested information that is  
19 relevant and reasonably necessary. Boston School Committee, 24 MLC 8, 11, MUP-  
20 1410, 1412 (August 26, 1977). In determining whether a delay in the produce of  
21 information is unreasonable, the CERB considers a variety of factors including: 1) whether  
22 the delay diminishes the employee organization's ability to fulfill its role as the exclusive  
23 representative; Id., 2) the extensive nature of the request, UMass Medical Center, 26

1 MLC 149, 158, SUP-4392, 4400 (March 10, 2000); 3) the difficulty gathering the  
2 information, Id.; 4) the period of time between the request and the receipt of the  
3 information, Higher Education Coordinating Council, 23 MLC at 269; and 5) whether the  
4 employee organization was forced to file a prohibited practice charge to retrieve the  
5 information. Board of Higher Education, 26 MLC 91, 93, SUP-4509 (January 11, 2000).

6 In a February 27, 2000 letter, the Union requested information about the City's  
7 decision to decommission Engine 11, including all analyses or reports of the impacts to  
8 response times, documents, including budgets, that were created or considered, the  
9 plans for reassignment of Engine 11 company members, the proposed plans for staffing  
10 Marine 11, and communications, including electronic, between City Hall and the Fire  
11 Department about the decommissioning. The City in its answer to the complaint denied  
12 that the requested information was relevant and reasonably necessary to the Union in its  
13 role as the exclusive bargaining representative.

14 The CERB's standard in determining whether the information requested by an  
15 employee organization is relevant is a liberal one, similar to the standard for determining  
16 relevancy in civil litigation proceedings. Board of Higher Education, 26 MLC at 92; Board  
17 of Trustees of University of Massachusetts (Amherst), 8 MLC 1139, SUP-2306 (June 24,  
18 1981). Information about terms and conditions of employment of bargaining unit  
19 members is presumptively relevant and necessary to an employee organization to  
20 perform its statutory duties. City of Lynn, 27 MLC 60, 61, MUP-2236, 2237 (December 1,  
21 2000). The relevance of the requested information must be determined by the  
22 circumstances that existed at the time when the exclusive bargaining representative  
23 made the request. The Union requested the information in response to the City's

1 February 25, 2020 letter offering to bargain about any impacts resulting from the  
2 decommissioning of Engine 11. The Union noted in the February 27, 2000 letter that it  
3 needed the information to prepare for any negotiations regarding mandatory subjects.  
4 Because the Union needed the information to engage in possible impact bargaining, I find  
5 that the information is relevant and reasonably necessary to the Union's role as the  
6 exclusive bargaining representative. See Trustees of the University of Massachusetts  
7 Medical Center, 28 MLC 102, 108, SUP-4331 (September 14, 2001) (information that  
8 union requested to ascertain whether it should demand impact bargaining was relevant  
9 and reasonably necessary).

10       Once a union has established that the requested information is relevant and  
11 reasonably necessary to its duties as the exclusive representative, the burden shifts to  
12 the employer to establish that it has legitimate and substantial concerns about disclosure,  
13 and that it has made reasonable efforts to provide the union with as much of the requested  
14 information as possible, consistent with its expressed concerns. Board of Higher  
15 Education, 26 MLC at 93 (citing Boston School Committee, 13 MLC 1290, 1294-1295,  
16 MUP-5905 (November 2, 1980)); Adrian Advertising a/ka Advance Advertising, 13 MLC  
17 1233, 1263, UP-2497 (November 5, 1986), aff'd sub nom., Despres v. Labor Relations  
18 Commission, 25 Mass. App. Ct. 430 (1988)). Here, the City relies on Coderre's  
19 un rebutted testimony that he only spoke verbally with Mayor Mitchell and that there was  
20 no written documentation in response to the Union February 27, 2020 request. The Union  
21 also presented no affirmative evidence showing that the documentation existed contrary  
22 to the City's claims. The City argues that it could not have violated the Law by failing to  
23 provide the requested documents when the documents did not exist. I turn now to



1 consider whether encompassed within the City's statutory duty to provide relevant and  
2 reasonably necessary information is also an obligation to timely disclose to the Union  
3 when the requested information does not exist.<sup>42</sup>

4 It is well-established that an employer is not required to provide information that is  
5 not within its possession or control. See Bristol County Sheriff's Department, 32 MLC 76,  
6 MUP-01-3068 (August 3, 2005); Board of Regents, 19 MLC 1248, 1271, SUP-3267-3272  
7 (August 24, 1992); Woods Hole, 12 MLC 1531, 1545-1547, UPL-100 (January 21, 1986).  
8 However, the facts in those cases can be distinguished from the present case. In Bristol  
9 County, the employer defended its failure to respond to a particular information case by  
10 stating that there was no evidence in the record that the documents existed. The CERB  
11 rejected this argument by stating that there was no evidence in the record that the  
12 documents did not exist, and on those grounds, refused to excuse the Employer's failure  
13 to respond to the Union's request. Further, in both Board of Regents and Woods Hole,  
14 the charging party sought specific documents that were known to exist but which the  
15 respondent did not have in its possession or control. Unlike in the present case, the  
16 question in those cases was not whether those documents existed, but whether and when  
17 the respondent was required to provide them. Board of Regents, 19 MLC at 1271  
18 (employer did not unlawfully delay in providing a copy of a health insurance plan when it  
19 provided it to the union as soon as it obtain the copy from the third-party provider); Woods

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<sup>42</sup> At the pre-hearing conference, I informed the parties that when deciding this allegation, I would consider whether the City's duty to provide requested information that was relevant and reasonably necessary also included an obligation to timely disclose to the Union when the information did not exist.

1 Hole, 12 MLC at 1547 (union did not act unlawfully when it refused to provide pension  
2 plan documents that the plan administrator possessed, and the union did not.)

3         When the Union made its request, it was not seeking documents that it already  
4 knew existed. Rather, the Union was attempting to determine if there were documents  
5 that would assist the Union in making proposals and assessing the City's proposals during  
6 impact bargaining. While the absence of documentation may excuse the City from having  
7 to provide responsive documents, it does not excuse the City from timely notifying the  
8 Union that the documentation does not exist. In Woods Hole, when the CERB determined  
9 that the respondent union had not acted unlawfully by failing to provide pension plan  
10 documents that were not in its possession or control, the CERB emphasized that the  
11 union responded to the employer's request by telling the employer to contact the pension  
12 plan administrators to obtain the information, and there was no evidence that the union  
13 "thwarted or delayed" the plan administrators from providing it. 12 MLC at 1547. Compare  
14 with Commonwealth of Massachusetts, 34 MLC 148, 152, SUP-03-4965 (June 6, 2008)  
15 (employer did not act unlawfully when it promptly informed the union at negotiations that  
16 it could not say that requested information existed, which later turned out not to exist, but  
17 union did not press the employer, ask affirmatively whether information existed, or pursue  
18 the information at subsequent negotiations). The National Labor Relations Board  
19 (NLRB)<sup>43</sup> has also recognized that the duty to disclose information includes a duty to  
20 timely disclose that the information does not exist, See In Re Endo Painting Serv. Inc.,  
21 360 NLRB 485, 486 (2014) (citing Postal Service, 332 NLRB 635, 638-639 (2000) (duty

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<sup>43</sup> The decisions of the NLRB and the federal courts provide useful guidance in interpreting state law. See Greater New Bedford Infant Toddler Center, 12 MLC 1131, 115, n.42, UP-2493 (August 8, 1985) aff'd 13 MLC 1620 (April 17, 1987).

1 to respond to information requests in a timely manner includes an obligation to timely  
2 disclose that requested information does not exist)); Tennessee Steel Processors, 287  
3 NLRB 1132, 1132-1133 (1988) (respondent unlawfully waited six months to inform the  
4 union that certain requested information did not exist.)

5       Next, I must consider whether the City unreasonably delayed disclosing to the  
6 Union that the requested information did not exist. The City argues that there was no  
7 unreasonable delay because the information request was made on February 27, 2020  
8 and thereafter, the City became engrossed in dealing with the COVID-19 pandemic.  
9 However, despite the emergence of the pandemic, the City never extended the twenty-  
10 seven-day period for impact bargaining, which it announced in its February 25, 2020  
11 letter. Because the City had established this timeline, it also should have notified the  
12 Union within that timeline that the requested documentation did not exist in order that the  
13 Union could make further choices about impact bargaining. Also, because none of the  
14 requested documents existed, the City did not need to expend extensive time or  
15 resources into determining the status of different portions of the requested information,  
16 as it might have if some portions of the information existed, and other portions did not.  
17 The City simply could have confirmed that there were no records.

18       Finally, the City defends against the allegation that it acted unlawfully by noting  
19 that it previously always responded to information requests, an assertion which Sylvia  
20 confirmed on cross-examination. The City also emphasizes that it never actually refused  
21 to provide the information, and thus, did not act in bad faith. While the fact that the City  
22 previously responded to all information requests could be a factor when analyzing the  
23 appropriate remedy in the case, that fact does not constitute a defense to the City's

1 unlawful delay here in disclosing to the Union that the requested documentation did not  
2 exist. Further, prior CERB case law does not require a union to show bad faith to prevail  
3 on a claim that an employer violated its statutory obligation to provide information. See  
4 Commonwealth of Massachusetts, 11 MLC 1440,1444, SUP-2746 (February 21, 1985).  
5 Accordingly, I find that the City violated the Law by not timely disclosing to the Union that  
6 the requested documents that were relevant and reasonably necessary to the Union in  
7 its role as bargaining representative did not exist.

#### 8 Count III-Retaliation

#### 9 Prima Facie Case

10 Here, the Union alleges that the City discriminated against unit members for  
11 engaging in concerted, protected activities, which included unit members engaging in  
12 protests and making critical statements on the Union's Facebook page and in interviews  
13 with the media, by not bargaining over the impacts of the City's decision to end the  
14 practice of rolling blackouts and to decommission Engine 11. A public employer that  
15 retaliates or discriminates against an employee for engaging in activity protected by  
16 Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Reg. Voc. School  
17 District v. Labor Relations Commission, 388 Mass. 414 (1982); School Committee of  
18 Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a  
19 prima facie case of discrimination, a charging party must show that: 1) an employee was  
20 engaged in activity protected by Section 2 of the Law; 2) the employer knew of that  
21 conduct; 3) the employer took adverse action against the employee; and 4) the employer  
22 took the adverse action to discourage the protected activity. Quincy School Committee,

1 27 MLC 83, 92, MUP-1986 (December 29, 2000); Town of Clinton, 12 MLC 1361, 1365,  
2 MUP-5859 (November 9, 1985).

3 Protected Activity

4 Section 2 of the Law gives employees the right to engage in lawful, concerted  
5 activities for the purpose of collective bargaining or other mutual aid or protection, free  
6 from interference, restraint, or coercion. An employee's activity is concerted if the  
7 employee is acting with other employees or on the authority of other employees, rather  
8 than acting out of self-interest. Town of Southborough, 21 MLC 1242, 1249, MUP-8521  
9 (August 29, 1994). An employee's activity is protected if it focuses on generally applicable  
10 terms and conditions of employment that impact the collective bargaining unit as a whole.  
11 City of Newton, 32 MLC 37, 47, MUP-2849 (June 29, 2005) (citing City of Boston, 8 MLC  
12 1872, 1875, MUP-3994 (February 25, 1982)).

13 First, in the months from October 2019 through January 2020,<sup>44</sup> the Union posted  
14 on its publicly accessible Facebook page: a) copies of the Fire Department's blackout  
15 calendar; b) descriptions of the still areas that would be affected by the blackouts; and c)  
16 its safety concerns about the blackout policy. I find that when the Union communicated  
17 with unit members and the public about the impacts of the City's blackout policy on terms  
18 and conditions of employment using its Facebook page, the Union was engaged in  
19 concerted activity protected by Section 2 of the Law. See generally, Andover School

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<sup>44</sup> Although the Union had posted intermittently about the rolling blackouts on its Facebook page since 2009 and had posted the blackout calendars and maps of the affected still areas there since 2018, I have focused my analysis of the Union's concerted, protected activity and the City's knowledge of that activity for the period beginning in the Fall of 2019. From the record, it is unclear when and to what extent, the City had knowledge of the Union's postings on its Facebook page prior to the Fall of 2019.

1 Committee, 40 MLC 1, MUP-12-2294 (July 2, 2013) (email encouraging union members  
2 to picket over a contractual dispute was concerted, protected activity). Next, when Sylvia  
3 as Union president gave interviews to various media outlets after the October 22 and  
4 December 28, 2019 fires, which were critical of the blackout policy and the City's response  
5 time to the fires, he was engaged in concerted activity protected by Section 2 of the Law.  
6 See Town of Winchester, 19 MLC 1591, 1595-6, MUP-7514 (December 22, 1992) (union  
7 president's letters to newspapers criticizing employer's funding of the fire department was  
8 concerted, protected activity); City of Haverhill, 8 MLC 1691, MUP-4204 (December 16,  
9 1981) (former union president's letters to the editor criticizing the conditions of police  
10 cruisers was concerted, protected activity). Third, when the Union organized protests at  
11 the fire fighters' graduation and service awards ceremony at the Keefe Junior High School  
12 in late October 2019, it was engaged in concerted, protected activity. See Southeastern  
13 Regional School District Committee, 7 MLC 1801, 1808-1809, MUP-2970 (February 2,  
14 1981) (finding teachers' boycott of employer-sponsored parents' night and holding of their  
15 own alternative parents' night to be concerted, protected activity). The Union also  
16 engaged in concerted, protected activity when its unit members participated in protests  
17 about terms and conditions of employment on the evening of Mayor Mitchell's January 6,  
18 2020 inauguration. See generally Southern Worcester County Regional Vocational  
19 School District v. Labor Relations Commission, 377 Mass. 897 (1979) (organizing a lawful  
20 picket is concerted, protected activity). Finally, Sylvia was engaged in concerted,  
21 protected activity when on the evening of Mayor Mitchell's inauguration ceremony, he  
22 gave an interview to an online media site that was critical of the City's blackout policy.  
23 Employer Knowledge

1           Here, Coderre, an agent of the City, made the general statement that he and the  
2 Mayor were aware of the Union's activities protesting the blackouts, which I infer to  
3 include knowledge of the Union's ongoing comments critical of the blackout policy on its  
4 Facebook page and Sylvia's interviews with the various media outlets in which he  
5 criticized the blackout policies. Fowler v. Labor Relations Commission, 56 Mass. App. Ct.  
6 96 (2002) (using a totality of circumstances to infer employer knowledge rather than  
7 requiring employee to produce direct evidence of knowledge). Also, Mayor Mitchell and  
8 Coderre were both present and observed the Union's protest at the Keefe Junior High  
9 School graduation and service awards ceremony. Finally, as of January 3, 2020, the  
10 Mayor had decided to end the rolling blackouts, and Coderre had presented him with  
11 different options to achieve that goal, which included decommissioning Engine 11. The  
12 Mayor informed Coderre that he wanted to consider those options further and that he  
13 would get back to Coderre. Mayor Mitchell subsequently notified Coderre to  
14 decommission Engine 11 after he had observed a demonstration protesting the blackouts  
15 that unit members attended outside of the theater where his inauguration was taking place  
16 on January 6, 2020.

#### 17 Adverse Action

18           The CERB has consistently defined adverse action as an adverse personnel  
19 action, such as a suspension, discharge, involuntary transfer, or reduction in supervisory  
20 authority. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009) (citing  
21 Town of Dracut, 25 MLC 131, 133, MUP-1397 (February 17, 1999)). The Union contends  
22 that the City's decision to end the rolling blackouts and to decommission Engine 11  
23 without bargaining with the Union constituted an adverse action because it impacted unit

1 members' safety and workload.<sup>45</sup> Because I found earlier in this decision that there were  
2 no bargainable impacts on unit members' safety because of the City's decision to end the  
3 rolling blackouts and to decommission Engine 11, the record does not support a claim of  
4 adverse action involving unit members' safety. However, I also determined earlier in this  
5 decision that there was a bargainable impact on unit members' workload when the City  
6 ended the practice of rolling blackouts and decommissioned Engine 11. Nevertheless, a  
7 bargainable impact on workload alone is not sufficient to constitute an adverse action.  
8 The CERB previously has determined that the mere assignment of additional  
9 responsibilities, though possibly inconvenient or even undesirable, does not constitute an  
10 adverse employment action unless it materially disadvantages the plaintiff in some way.  
11 City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing MacCormack v.  
12 Boston Edison Co., 423, 652, 662 (1996)) (plaintiff failed to establish adverse action  
13 element of a prima facie case of unlawful retaliation when there was no evidence that he  
14 had been disadvantaged in respect to salary, grade or other objective terms and  
15 conditions of employment). Material disadvantage arises when objective aspects of the  
16 work environment are affected. Compare King v. City of Boston, 71 Mass. App. Ct. 460,

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<sup>45</sup> The Union in its post-hearing brief also argued that unit members' potential loss of overtime was an adverse impact. However, the facts before me do not show that unit members previously received scheduled overtime, and instead, it is highly likely, due to the City's financial situation, that unit members received unscheduled overtime, which was offered on ad hoc basis as needed. Unscheduled overtime is not a mandatory subject of bargaining. Town of West Bridgewater, 10 MLC 1040, 1046-104, MUP-4470 (July 7, 1983); aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission, 18 Mass. App. Ct. 550 (1984). Thus, the City would have no obligation to bargain over the impact of the City's decision to end the rolling blackouts and to shut down Engine 11 on unit members' loss of unscheduled overtime. Additionally, in 2020, despite the shutdown of Engine 11, the City's overtime costs increased, although Coderre linked that increase to the COVID 19 pandemic.



1 468 (2008) (failing to provide female superior officers with rank-specific locker rooms rises  
2 to the level of an adverse action) with City of Holyoke, 35 MLC at 156 (co-workers'  
3 subjective opinions and office banter do not render as adverse a previously requested  
4 transfer). Upon review, the record before me does not show that the City's decision to  
5 end the practice of rolling blackouts and to decommission Engine 11 resulted in material  
6 disadvantages to unit members. The City's decision to end the rolling blackouts and close  
7 Engine 11 did not result in the layoffs of unit members or a reduction in the minimum  
8 staffing per apparatus. Further, the members of Engine 11's company bid on positions in  
9 new companies pursuant to the previously negotiated procedure in Article 25 of the 2016-  
10 2019 CBA. Finally, the record does not show that the City's decision to end the rolling  
11 blackouts and to decommission Engine 11 negatively impacted unit members' future  
12 employment status in any way. Compare Somerset School Committee, 41 MLC 335, 339,  
13 MUP-13-3085 (May 21, 2015) (deletion of laid off employee's name from staff email list  
14 and faculty list was not an adverse action because it did not affect the employee's ability  
15 to apply for new positions or communicate with others) with Board of Higher Education,  
16 32 MLC 181, 185, SUP-02-4892 (June 21, 2006) (engineering professor's teaching  
17 course load of only introductory math classes was adverse because potentially could  
18 affect his professional standing). Because the Union has failed to show that the City's  
19 decision to end the practice of rolling blackouts and to decommission Engine 11 without  
20 bargaining the impact on unit members' workloads constitutes an adverse action, the  
21 Union cannot establish a prima facie case of retaliation. Therefore, I dismiss the  
22 allegation that the City violated Section 10(a)(3) of the Law.

1 Additional Allegation

2           The Union in its post-hearing brief argues that even if I were to find that the City's  
3 decision to end the rolling blackouts and to decommission Engine 11 without bargaining  
4 over the impacts was not an adverse action, the City's conduct also constituted an  
5 independent violation of Section 10(a)(1) of the Law. However, the Union did not plead  
6 an independent Section 10(a)(1) allegation as part of the amended charge that it  
7 presented to the investigator, and the complaint also did not allege an independent  
8 Section 10(a)(1) violation. It is well established that allegations not pled in the complaint  
9 will only be considered and decided if the conduct relates to the general subject matter of  
10 the complaint and the issue has been fully litigated. Town of Norwell, 18 MLC 1263, 1264,  
11 MUP-6962 (January 22, 1992). At minimum, "full litigation" requires that the respondent  
12 be given some notice that the subject is in issue, and thus be given an opportunity to  
13 present evidence concerning the facts material to the subject. Whitman-Hanson Regional  
14 School Committee, 10 MLC 1606, 1607-1608, MUP-5249 (May 17, 1984). The test is  
15 one of fairness under the circumstances of each case-whether the respondent knew what  
16 conduct was in issue and had a fair opportunity to present its defense. Town of Randolph,  
17 8 MLC 2044, 2051, SUP-3869 (June 10, 1998). Further, even if a newly raised allegation  
18 is related to the general subject matter of the complaint, it is not considered fully litigated  
19 when a charging party did not seek to amend the complaint until after the hearing was  
20 over and the record was closed. See City of Boston, 46 MLC 191, 197-198, MUP-17-  
21 6211, MUP-18-6629 (March 31, 2020) (denying charging party's motion to amend  
22 complaint to include retaliation allegations). Here, the hearing record closed on  
23 November 24, 2020, and the parties filed their post-hearing briefs on January 29, 2021.

1 I also note that the City's post-hearing brief made no reference to an independent Section  
2 10(a)(1) allegation, thereby confirming that the City was not on notice during the hearing  
3 that the issues in dispute included an independent Section 10(1) allegation. See Id. at  
4 198 (absence of argument in employer's post-hearing brief about newly raised allegations  
5 evinces its lack of notice that those allegations were the subject of litigation). Accordingly,  
6 I decline to consider whether the City's failure to bargain over the impacts of its decision  
7 to end the rolling blackouts and decommission Engine 11 constituted an independent  
8 violation of Section 10(a)(1) of the Law.

### 9 CONCLUSION

10 Based on the record and for the reasons stated above, I conclude that the City  
11 violated Section 10(a)(5) of the Law by failing to: a) bargain with the Union over the impact  
12 of its decision to end the rolling blackouts and to decommission Engine 11 on unit  
13 members' workloads; and b) timely notify the Union that the requested documentation,  
14 which was relevant and reasonably necessary to the Union in its role as bargaining  
15 representative, did not exist. I dismiss the allegations that the City: a) failed to bargain to  
16 resolution or impasse with the Union over the impact of the City's decision to end the  
17 rolling blackouts and to shut down Engine 11 on unit members' safety in violation of  
18 Section 10(a)(5) of the Law; and b) discriminated against unit members for engaging in  
19 concerted, protected activities in violation of Section 10(a)(3) of the Law.

### 20 REMEDY

21 Section 11 of the Law grants the CERB broad authority to fashion appropriate  
22 orders to remedy a public employer's unlawful conduct. Labor Relations Commission v.  
23 Everett, 7 Mass. App. Ct. 826 (1979). I turn first to consider the appropriate remedy for

1 the City's failure to bargain with the Union over the impact of its decision to end the  
2 practice of rolling blackouts and to decommission Engine 11 on unit members' workload.  
3 When a public employer's bargaining obligation involves only the impact of the decision  
4 to alter a mandatory subject of bargaining, but not the decision itself, the appropriate  
5 remedy must strike a balance between the right of management to carry out its lawful  
6 decision and the right of an employee organization to have meaningful input on impact  
7 issues while some aspects of the status quo are maintained. Town of Burlington, 10 MLC  
8 1387, 1388, MUP-3519 (Feb. 1, 1984). The remedy that the Union seeks here is an order  
9 that the City make whole unit members financially, and that the City return to the status  
10 quo. First, pursuant to case precedent, the CERB does not make unit members whole  
11 financially for an increase in workload. City of Boston, 41 MLC 34, MUP-10-5895 (August  
12 8, 2014) (citing to Commonwealth of Massachusetts, 27 MLC 70, SUP-4503 (December  
13 6, 2000)). Thus, I decline to do so here. Additionally, in the present case, a restoration  
14 of the status quo ante would not be an order requiring the City to undo its decision ending  
15 the rolling blackouts and decommissioning Engine 11. Those decisions are managerial  
16 prerogatives over which the City has no bargaining obligation. Further, because the City  
17 decommissioned Engine 11 and must still respond to calls in Engine 11's former still area,  
18 a return to the status quo ante cannot, as a matter of public safety, be achieved here. A  
19 return to the status quo ante would leave Engine 11's former still area without any  
20 apparatus covering that area's calls as the primary responders. See Taunton School  
21 Committee, 28 MLC 378, 391, MUP-1632 (June 13, 2002) (returning to the status quo  
22 ante for teachers cannot be achieved where the structure of a high school work schedule  
23 has been changed). Here, the appropriate remedy for the City's unlawful failure to bargain

1 is an order to bargain. Additionally, a posting is the appropriate remedy for the City's  
2 failure to timely notify the Union that the relevant and reasonably necessary information,  
3 which the Union had requested, did not exist. See generally Boston School Committee,  
4 24 MLC 8, MUP-1410, 1412 (September 26, 1997) (ordering a posting when the employer  
5 failed to timely provide information).

6 ORDER

7 WHEFORE, based on the foregoing, IT IS HEREBY ORDERED that the City shall:

8 1. Cease and desist from:

- 9 a) Failing to bargain to resolution or impasse with the Union over the  
10 impact of its decision to end the practice of rolling blackouts and to  
11 decommission Engine 11 on unit members' workloads;  
12  
13 b) Failing to bargain in good faith by not timely notifying the Union that  
14 relevant and reasonably necessary information, which the Union had  
15 requested, did not exist.  
16  
17 c) In any like or related manner, interfering with, restraining or coercing  
18 employees in the exercise of their rights guaranteed under the Law.  
19

20 2. Take the following affirmative action:

- 21 a) Within five (5) days from the date of receipt of this decision, offer to  
22 bargain in good faith with the Union over the impact of the decision  
23 to end the practice of rolling blackouts and to decommission Engine  
24 11 on unit members' workload.  
25  
26 b) Timely notify the Union when relevant and reasonably necessary  
27 information that it requests does not exist.  
28  
29 c) Post immediately in all conspicuous places where members of the  
30 Union's bargaining unit usually congregate, or where notices are  
31 usually posted, including electronically, if the City customarily  
32 communicates with these unit members via intranet or email and  
33 display for a period of thirty (30) days thereafter, signed copies of the  
34 attached Notice to Employees.

- 1 d) Notify the Department in writing of the steps taken to comply with this  
2 decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



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MARGARET M. SULLIVAN  
HEARING OFFICER

APPEAL RIGHTS

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

# NOTICE TO EMPLOYEES

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

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. MUP-20-7875 that the City of New Bedford (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to: a) bargain with the New Bedford Fire Fighters, Local 841, I.A.F.F., AFL-CIO-CLC (Union) over the impact of the City’s decision to end the practice of rolling blackouts and to decommission Engine 11 on bargaining unit members’ workloads; and b) timely notify the Union that relevant and reasonably necessary documentation, which the Union had requested, did not exist.

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 to resolution or impasse with the Union over the impact of the City’s decision to end the practice of rolling blackouts and to decommission Engine 11 on bargaining unit members’ workloads.

WE WILL NOT fail to bargain in good faith by not notifying the Union in a timely manner when relevant and reasonably necessary information that the Union requests does not exist.

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

WE WILL take the following affirmative action that will effectuate the purpose of the Law:

- Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the Union over the impacts of the decision to end the practice of rolling blackouts and to decommission Engine 11 on bargaining unit members’ workloads.
- Timely notify the Union when relevant and reasonably necessary information that it requests does not exist.

\_\_\_\_\_  
City of New Bedford

\_\_\_\_\_  
Date