

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF PLYMOUTH

and

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
COUNCIL 93, AFL-CIO

*
*
*
*
*
*
*
*
*
*

Case No. MUP-05-4385

Date issued:
May 16, 2011

Hearing Officer:

Kathleen Goodberlet, Esq.

Appearances:

David Jenkins, Esq. - Representing the Town of Plymouth
Michael Maccaro, Esq. - Representing the American Federation
of State, County, and Municipal Employees,
Council 93, AFL-CIO

HEARING OFFICER'S DECISION¹

Summary of the Case

1 The issue in this case is whether the Town of Plymouth (Town) violated Section
2 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law) by failing to
3 provide the Union with prior notice and an opportunity to bargain to resolution or

¹ Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now the Department of Labor Relations (Department). The Commonwealth Employment Relations Board (Board) is the Department agency charged with deciding adjudicatory matters.

1 impasse about its decision to cease crediting bargaining unit members with leave time
 2 for blood donation during certain limited off duty hours and the impacts of that decision
 3 on employee's terms and conditions of employment. For the reasons explained below, I
 4 find that the Town violated the Law as alleged.

5 Statement of the Case

6 On March 15, 2005, the Union filed a prohibited practice charge with the former
 7 Labor Relations Commission, now the Department, alleging that the Employer had
 8 engaged in prohibited practices within the meaning of Section 10(a)(5) and derivatively,
 9 10(a)(1) of the Law. The Commonwealth Employment Relations Board (Board)
 10 investigated the charge and issued a one-count prohibited practice complaint on
 11 February 13, 2009. The Town filed an answer on April 7, 2009.

12 I conducted a hearing on March 19, 2010 at which both parties had the
 13 opportunity to be heard, to examine witnesses, and to introduce evidence. The Town
 14 filed its post-hearing brief on April 5, 2010. The Union filed its post-hearing brief on
 15 April 6, 2010. On the entire record, including my observation of the witness' demeanor,
 16 evidence, and the parties' briefs, I make the following findings of fact and render the
 17 following opinion.²

18 Stipulations of Fact

- 19
- 20 1. The Town of Plymouth ("Town") is a public employer within the meaning of
 - 21 Section 1 of the Law.
 - 22
 - 23 2. The American Federation of State, County and Municipal Employees,
 - 24 Council 93, AFL-CIO ("Union") is an employee organization within the
 - 25 meaning of Section 1 of the Law.

² Pursuant to Standing Order 2009-1, the Board designated hearing officers to preside over hearings and decide the allegations set forth in complaints for prohibited practice charges filed on or before November 14, 2007.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

3. The Union is the exclusive bargaining representative for Local 2824. Local 2824 is made up of nine distinct bargaining units that each have their own collective bargaining agreement. The nine bargaining units consist of employees in the following areas/departments: (1) school bus drivers, (2) school custodians, (3) school skilled craftsmen, (4) school cafeteria workers, (5) school head custodians, (6) library employees, (7) meter enforcement officers and crossing guards, (8) police dispatchers, and (9) the Department of Public Works.
4. On January 6, 1981, the Town of Plymouth through its Board of Selectmen issued a policy regarding blood donations. The policy was applicable to all Town employees, but not school employees, and allowed employees a maximum of four (4) hours leave from his or her employment to donate blood.
5. On August 10, 1993, former Department of Public Works Director Lee Peck issued a memorandum to all of the Town's Department of Public Works Employees regarding blood donation leave. The memorandum provided that employees within the Department of Public Works could still donate blood in accordance with the Board of Selectmen's 1981 Policy.
6. The August 10, 1993 memorandum also allowed Department of Public Works employees to donate blood on their own time, from 3:30 P.M. to 6:00 P.M. Employees who donated blood on their own time may have been granted four hours leave within that week. This four hour leave had to be pre-approved by the employee's manager.
7. On or about Friday, December 24, 2004, then President of Local 2824, Dale Webber, received an inquiry about the blood donation policy from another bargaining unit member.
8. This bargaining unit member informed him that he had been told by his department head that the Town's Human Resources Director, Patricia Flynn, had said that he could not take leave from work on any other day than the day in which he donated blood.
9. On or about Tuesday, December 28, 2004, Mr. Webber contacted Acting Town Manager Mark Sylvia to discuss the Town's blood donation policy. Mr. Webber informed him that he believed that the Town's blood donation policy had been in effect for several years.
10. On or about December 29, 2004, Ms. Flynn sent a letter to Mr. Webber indicating that Town employees would not be compensated in any way for donating blood on non-work time.

- 1 11. On or about January 3, 2005, Mr. Webber sent a letter to Acting Town
- 2 Manager Mark Sylvia asserting that there had been a clear past practice for
- 3 many years with regards to the Town's Blood Donation Policy.
- 4
- 5 12. On March 15, 2005, the Union filed a charge of prohibited practice alleging
- 6 that the Town violated a long established past practice of permitting
- 7 bargaining unit members time off without loss of pay to donate blood. The
- 8 charge alleged the Town took these actions without notice or an opportunity
- 9 to bargain.

Findings of Fact

10

11 The Town has a five-member Board of Selectmen elected for three-year

12 staggered terms.³ Town Selectmen establish policies and the Town Manager,⁴ who

13 reports directly to the Selectmen, implements those policies. Nine Department heads,⁵

14 including the Assistant Town Manager,⁶ the Human Resources Director and the

15 Department of Public Works (DPW) Director,⁷ report to the Town Manager. Department

16 heads do not have the authority to change Selectmen policies.

17 Effective January 6, 1981, the Selectmen approved a blood donation policy

18 (1981 Blood Donation Policy) stating:

³ With the exception of possibly one person, the current Board of Selectman is not the same Board that was in place in 1993 or 2005.

⁴ Melissa Arrighi (Arrighi) testified that Mark Sylvia (Sylvia) was the Town Manager from December of 2004 until February of 2009. However, I rely on the parties' stipulations that refer to Sylvia as the Acting Town Manager in December of 2004. Arrighi was the Acting Town Manager between February of 2009 and January of 2010. Mark Stankiewicz (Stankiewicz) became Town Manager in January of 2010.

⁵ Aside from the School Department, the Town has nine departments, including: Assistant Town Manager, Public Works (DPW), Planning and Development, Police, Fire, Inspectional Services, Community Resources, and Human Resources.

⁶ Arrighi was the Assistant Town Manager from December of 2004 until February of 2009 and from January of 2010 through the hearing in March of 2010.

⁷ Lee Peck (Peck) was the DPW Director from about 1986 until 2003. The record does not include the name of Peck's successor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

1.0 PURPOSE

Town Employees shall be provided an opportunity to donate blood pursuant to the following guidelines:

2.0 POLICY GUIDELINES

2.1 Each employee shall be granted a maximum of four (4) hours leave from his or her employment to donate blood.

2.2 Said leave shall be granted at the discretion of the Department Head.

2.3 Any employee exercising said leave but judged unable to donate blood shall return to work immediately.

2.4 Employees who wish to donate blood on a repetitive basis shall do so only in conformance with Applicable American Red Cross rules and guidelines.

2.5 This policy will be reviewed on a yearly basis by the Board of Selectmen, and may be terminated at any time by the Board of Selectmen.

3.0 APPLICABILITY

This policy is applicable to all town employees.

4.0 QUESTIONS

Please contact the Town Manager's Office at (508) 830-4000 if you have any questions.

The parties stipulated that the 1981 Blood Donation Policy applied to all Town employees, except for school employees. There is no dispute that the 1981 Blood Donation Policy remains in effect and has not been amended.

The Union is the exclusive bargaining representative for the DPW unit.⁸ The DPW unit includes custodians who are assigned to the Library and Council on Aging.

⁸ Neither party provided the collective bargaining agreement.

1 On August 10, 1993, DPW Director Peck issued a memorandum (1993 Blood Donation
2 Leave Memorandum) to all DPW employees that states:

3 Any employee wishing to donate blood is eligible for a maximum of four
4 hours leave. This is in accordance with the Blood Donation Policy
5 approved by the Board of Selectmen January 6, 1981.

6
7 The DPW union has brought to our attention the fact that some employees
8 would prefer to donate blood at the end of their day. In order to
9 encourage maximum employee participation and maintain department
10 coverage and efficiency, employees who opt to donate blood on their own
11 time, from 3:30 to 6:00, may be granted four-hours leave within that week.
12 The four hours blood donation leave request must be pre-approved by the
13 manager in order to plan adequate coverage.

14
15 A reminder: If for some reason you are judged unable to donate blood,
16 you are not eligible for the time off.

17
18 We hope that this trial blood donation leave will prove beneficial to
19 employees, management, and the American Red Cross Blood Services.

20
21 If you have any questions, please call Eleanor McGonagle.⁹

22
23 The parties stipulated that DPW employees "who donated blood on their own time may
24 have received four hours of leave within the week."

25 There is no dispute that in December of 2004, the DPW Director, at the direction
26 of the Human Resources Director, informed a DPW employee that he could not take
27 leave from work on a day other than the day in which he donated blood. The parties
28 stipulated that on December 28, 2004 Union President Dale Webber (Webber) and
29 Acting Town Manager Sylvia discussed the blood donation leave policy. By letter dated

⁹ Eleanor McGonagle (McGonagle) was the Personnel Director an unidentified number of years ago. The Town changed the Personnel Director title to Human Resources Director at an unidentified time. After McGonagle left, Patricia Flynn (Flynn) became the Human Resources Director. Roberta Kety (Kety) is the current Human Resources Director.

1 December 29, 2004 Human Resources Director Flynn informed Webber that "[i]f an
2 employee donates blood on non-work time, there is no compensation."

3 Arrighi, the Town's only witness to testify at the hearing, admitted that during
4 weekly labor-management meetings in December of 2004, it became clear that for more
5 than ten years, DPW employees had received leave time for blood donation during work
6 hours and off duty hours. The Union, including Steward Russ Pitsly (Pitsly), business
7 agent Kara Winslow (Winslow), and various Union Presidents including Webber, Lee
8 Regan (Regan), and Greg Santos (Santos) informed Arrighi that Peck wrote the 1993
9 Blood Donation Leave Memorandum in order to schedule time off for employees.

10 Opinion

11 The issue in this case is whether the Town violated the Law by failing to provide
12 the Union with prior notice and an opportunity to bargain to resolution or impasse about
13 its decision to cease crediting bargaining unit members with leave time for blood
14 donation during certain limited off duty hours and the impacts of that decision on
15 employee's terms and conditions of employment.

16 A public employer violates Section 10(a)(5) of the Law when it implements a
17 change in a mandatory subject of bargaining without first providing the employees'
18 exclusive collective bargaining representative with prior notice and an opportunity to
19 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
20 Commission, 338 Mass. 557 (1983). The employer's obligation to bargain before
21 changing conditions of employment applies to contract terms as well as working
22 conditions established through custom and past practice. City of Boston, 16 MLC 1429,
23 1434 (1989) (citing Town of Wilmington, 9 MLC 1694, 1697 (1983)). To establish a

1 unilateral change violation, the charging party must show that: 1) the employer altered
2 an existing practice or instituted a new one; 2) the change affected a mandatory subject
3 of bargaining; and 3) the change was established without prior notice or an opportunity
4 to bargain. Commonwealth of Massachusetts, 20 MLC 1545, 1552 (1984) (citing City of
5 Boston, 20 MLC 1603, 1607 (1994)).

6 In this case, the Union argues that prior to December 29, 2004, the Town had a
7 clear, long-standing and well-established past practice for giving blood donation leave to
8 DPW employees, as articulated in Peck's August 10, 1993 Blood Donation Leave
9 Memorandum. In contrast, the Town argues that: (1) DPW Director Peck had no
10 authority to amend the 1981 blood donation policy promulgated by the Selectmen; (2)
11 there is no evidence of a change in practice or damage; and (3) Peck's actions did not
12 result in a binding past practice.

13 As a threshold matter, I reject the Town's argument that Peck had no authority to
14 amend the Selectmen's 1981 blood donation policy. Authority to act for and speak on
15 behalf of the employer is governed by the principles of agency. Town of Chelmsford, 8
16 MLC 1913, 1916 (1982). Such authority may be actual, implied, or apparent. Id. The
17 test of an agent's apparent authority is whether written or spoken word or any other
18 conduct of the principal can be reasonably interpreted by a third party as consent by the
19 principal to the acts done on his behalf by a person purporting to act for him.
20 Leominster School Committee, 4 MLC 1950, 1951 (1978) (citing Neilson v.
21 Malcolm Kenneth, 303 Mass. 437, 22 N.E.2d 20 (1939)).

22 Here, the facts establish that Peck acted with the knowledge and acquiescence
23 of the Town. First, Peck's 1993 Blood Donation Leave Memorandum to DPW

1 employees referred questions to the Personnel Director. There is no dispute that the
2 Personnel Director, now the Human Resources Director, reports directly to the Town
3 Manager. There is no evidence that prior to December of 2004, the Town informed
4 Peck, the Union, or DPW employees, that the DPW Director did not have the authority
5 to grant leave time for blood donations made during certain off duty hours. The Town's
6 acquiescence between 1993 and 2005 to the DPW Director's practice of granting leave
7 time to employees for blood donation during certain off duty hours is conduct that could
8 be reasonably interpreted as consent to Peck's conduct in granting leave pursuant to
9 the 1993 Blood Donation Leave Memorandum. Therefore, I find that DPW Director Lee
10 Peck was an agent of the Town with apparent authority to establish the 1993 DPW
11 Blood Donation Leave policy.

12 I also reject the Town's argument that Peck's actions did not result in a binding
13 past practice. In determining whether a past practice exists, the Board "analyzes the
14 combination of facts upon which the alleged practice is predicated, including whether
15 the practice has occurred with regularity over a sufficient period of time, so that is
16 reasonable to expect that the practice will continue." Town of Chatham, 21 MLC 1526,
17 1531 (1995). A past practice is "unequivocal, has existed substantially unvaried for a
18 reasonable period of time and is known and accepted by both parties." Commonwealth
19 of Massachusetts, 34 MLC 143, 146 (quoting Town of Dedham School Committee, 5
20 MLC 1836, 1839 (H.O. 1978)). However, a "condition of employment may be found
21 despite sporadic or infrequent activity where a consistent practice that applies to rare
22 circumstances is followed each time the circumstances precipitating the practice recur."

1 Chief Justice for the Administration and Management of the Trial Court, 35 MLC 230,
2 235 (2009) (citing Commonwealth of Massachusetts, 23 MLC 171, 172 (1997)).

3 On August 10, 1993, Peck issued the Blood Donation Leave Memorandum to all
4 DPW employees announcing that they were eligible to receive four hours of leave time
5 for donating blood on their own time, between the hours of 3:30 p.m. and 6:00 p.m. The
6 memorandum specified that employees had to be pre-approved by the manager to
7 ensure adequate coverage. In addition, the parties stipulated that: "[e]mployees who
8 donated blood on their own time may have been granted four hours leave within that
9 week." Moreover, Arrighi, the Town's only witness, testified that for more than ten years
10 prior to December of 2004, the DPW Director had granted leave time for blood donation
11 during certain off duty hours. There is no evidence that between August of 1993 and
12 November of 2004 the DPW Director ceased granting leave time to DPW employees for
13 blood donation during certain off duty hours. Therefore, I find that for more than ten
14 years, the Town granted DPW employees leave time for donating blood during certain
15 off duty hours. The Town's practice occurred with regularity over a sufficient period of
16 time such that it was reasonable to expect that the practice would continue.
17 Accordingly, the Town's discretionary practice of crediting leave time to DPW
18 employees for blood donation during certain limited off duty hours became a condition
19 of employment that the Town could not unilaterally alter.

20 The Union has established the required elements of a unilateral change violation.
21 First, in December of 2004, the Town ceased a ten-year practice of granting DPW
22 employees leave time for donating blood during certain off duty hours. It is undisputed
23 that the DPW Director informed an employee in December of 2004 that he could not

1 take leave from work on a day other than the day in which he donated blood and that on
 2 December 29, 2004 Flynn informed Webber that the Town would not compensate
 3 employees in any way for donating the blood during off duty hours. Second, leave time
 4 is a mandatory subject of bargaining. City of Boston, 3 MLC 1450, 1459 (1977). Third,
 5 there is no evidence that the Town gave the Union prior notice and an opportunity to
 6 bargain about its decision to discontinue its past practice and the impacts of that
 7 decision on employees' terms and conditions of employment.

CONCLUSION

8
 9 Based on the record, and for the reasons stated above, I conclude that the Town
 10 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner
 11 alleged in the Complaint.

ORDER

12
13
14 Based on the above, I order the Town to take the following action:

- 15 1. Cease and desist from:
 - 16 a. Failing to provide the Union with prior notice and an opportunity
 - 17 to bargain to resolution or impasse about its decision to cease
 - 18 crediting bargaining unit members with leave time for blood
 - 19 donations during certain limited off duty hours and the impacts of
 - 20 that decision on employee's terms and conditions of
 - 21 employment.
 - 22
 - 23 b. In any like or similar manner, interfering with, restraining, or
 - 24 coercing its employees in the exercise of their rights under the
 - 25 Law.
 - 26
- 27 2. Take the following affirmative action that will effectuate the purpose of the
- 28 Law:
 - 29
 - 30 a. Immediately restore employees represented by the Union to the
 - 31 status quo prior to December 29, 2004 by crediting DPW
 - 32 employees with leave time for donating blood, in accordance with
 - 33 the past practice outlined in Peck's 1993 memorandum.

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

- b. Upon request by the Union, bargain to resolution or impasse over the decision and the impact of the decision to cease crediting bargaining unit members with leave time for blood donations during certain limited off duty hours.
- c. Make whole any employees represented by the Union who suffered economic losses as a direct result of the Town's decision to cease crediting bargaining unit members with leave time for blood donations during certain limited off duty hours.
- d. Pay interest on all sums owed at the rate specified in M.G.L. c. 231 §6B up to the date the Town complies with this Order;
- e. Post immediately in all conspicuous places where bargaining unit employees usually congregate and where notices to these employees are usually posted, including electronically, if the Town customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees.
- f. Notify the Department in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Kathleen Goodberlet

KATHLEEN GOODBERLET, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

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

A hearing officer of the Department of Labor Relations has determined that the Town of Plymouth (Town) violated Section 10(a)(5) and derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to provide the American Federation of State, County, and Municipal Employees, Council 93, Local 2824 AFL-CIO (Union) with prior notice and an opportunity to bargain to resolution or impasse about its decision to cease crediting bargaining unit members with leave time for blood donation during certain limited off duty hours and the impacts of that decision on employee's terms and conditions of employment. The Town posts this Notice to Employees in compliance with the Hearing Officer's order.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and to choose not to engage in any of these protected activities.

The Town assures its employees that:

WE WILL NOT fail to bargain in good faith with the Union by failing to give the Union prior notice and an opportunity to bargain over the decision and the impact of the decision to cease crediting bargaining unit members with leave time for blood donation during certain limited off duty hours.

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

WE WILL, within five (5) days from the date of receipt of the Hearing Officer's decision, offer to bargain with the Union over the decision and the impact of the decision to cease crediting bargaining unit members who donate blood while off duty with paid leave.

WE WILL restore employees represented by the American Federation of State, County, and Municipal Employees, Council 93, Local 2824 AFL-CIO, to the status quo prior to December 29, 2004 by crediting unit members who donate blood while off duty with paid leave.

WE WILL make whole any employees represented by AFSCME, Council 93, Local 2824 AFL-CIO, who suffered economic losses as a direct result of the Town's decision to cease crediting bargaining unit members who donate blood while off duty with paid leave.

For the Board of Selectmen

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).