

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

In the Matter of	*	
	*	
TOWN OF PLYMOUTH	*	Case No. MUP-11-1061
	*	
and	*	Date Issued:
	*	January 30, 2014
AMERICAN FEDERATION OF STATE	*	
COUNTY AND MUNICIPAL	*	
EMPLOYEES, COUNCIL 93	*	

Board Members Participating

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

Appearances:

David C. Jenkins, Esq.:	Representing the Town of Plymouth
Joseph L. DeLorey, Esq.:	Representing AFSCME, Council 93, AFL-CIO

DECISION ON APPEAL OF HEARING OFFICER DECISION

1 SUMMARY

2 This is an appeal by the Respondent, Town of Plymouth (Respondent or
3 Town), from the decision that a Department of Labor Relations (DLR) Hearing
4 Officer issued on August 22, 2013. The Hearing Officer found that Respondent
5 had failed to bargain in good faith when it implemented a Cell Phone Policy
6 without bargaining with the Charging Party, American Federation of State,
7 County and Municipal Employees, Council 93 (Union), to resolution or impasse
8 over the decision and impacts of that decision, in violation of Section 10(a)(5)

1 and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E
2 (the Law). Plymouth filed a timely request for review of the decision with the
3 Commonwealth Employment Relations Board (Board) and a Supplementary
4 Statement contending that the Hearing Officer's decision contains errors of law.
5 The Union did not file a reply. After reviewing the record on appeal, we affirm the
6 Hearing Officer's decision for the reasons set forth below.

7 FACTS

8 The facts of this case, as set forth in the parties' stipulations¹ and as found
9 by the Hearing Officer, are straightforward and unchallenged on appeal. We
10 therefore accept those findings as summarized below. See Massachusetts Board
11 of Regents, 13 MLC 1697, SUP-2863, SUP-2865 (May 22, 1987).

1. The Town is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive collective bargaining representative for the Town's Department of Public Works (DPW) employees, excluding clerical DPW employees, as well as managerial and confidential employees.
4. In 2011, Dale Webber (Webber) was elected Union president and has acted as an agent of the Union at all relevant times.
5. On May 18, 2011, Webber received a memo from the Town containing the Town's "Policy on Cell Phones During Work Hours" ("Cell Phone Policy") attached to it. The cell phone policy threatened discipline against bargaining unit members, up to and including discharge, for violating the policy.
6. By an email dated May 22, 2011, Webber demanded to bargain over the Cell Phone Policy described in paragraph 5.

¹ At hearing, the Town admitted to the numbered facts.

7. On June 28, 2011, the Town's Board of Selectmen approved and implemented the Cell Phone Policy described in paragraph 5. Following the meeting, agents of the Town distributed the Cell Phone Policy to bargaining unit members.

1 The Union represents a bargaining unit of 90-100 employees in the Town's
2 Department of Public Works (DPW). Webber, the Union President, is a Special
3 Heavy Motor Equipment Operator in the Solid Waste Division, one of twelve
4 divisions in the DPW. Many of the pieces of equipment operated by the DPW
5 employees, including Webber, require a Class A or B Commercial Driver's
6 License (CDL).

7 Dennis Westgate (Westgate) is the DPW Assistant Director. On May 18,
8 2011, Westgate delivered a memorandum from the Town Manager dated May
9 16, 2011 (May 16th Memorandum) to Webber. Attached to the May 16th
10 Memorandum addressed to "All Union Representatives," was a proposed policy
11 entitled, "Policy on Cell Phones During Working Hours" (Policy). The stated
12 purpose of the Policy was, "to outline the use of personal and work cell phones
13 while working, including special issues relating to camera phones, the use of
14 town provided cell phones, and the safe use of all cell phones by employees
15 operating public vehicles or public equipment." The Policy, two pages in length,
16 prohibited the use and possession of cameras in the workplace, including the use
17 of camera phones without specific authorization, limited the use of Town-issued
18 phones for personal business, prohibited use of a Town or personal cell phone
19 while operating a Town vehicle or equipment, and limited the placement or
20 receipt of personal calls while at work. The Policy also provided for disciplinary
21 action, up to and including discharge from employment, for violations of the

1 policy. The section of the policy prohibiting the use of cell phones while driving
2 provided: "Safety must come before all other concerns and talking while
3 operating a vehicle is an unnecessary distraction." The rationale for limiting
4 personal calls and use of a personal cell phone was stated as follows: "Excessive
5 personal calls during work time, regardless of the phone used, can interfere with
6 employee productivity and be distracting to others."

7 The Town Manager stated in the May 16th Memorandum that he would
8 present the Policy to the Selectmen on June 7, 2011, and then disseminate it to
9 all employees.

10 On May 20, 2011, Webber sent a letter via e-mail to Town Manager Mark
11 Stankiewicz (Stankiewicz), entitled "Bargaining Demand and reminder." The
12 letter stated in pertinent part:

13 ...I would suggest an Administrative Caution Letter that would point
14 out the potential dangers of Cell use when driving, but to make it
15 mandatory and attach discipline to a formal policy, leads me to
16 issue you the following response;
17 In regards to your 5-16-2011 memo alerting me to the Town's
18 desire to implement a Policy on Cell Phone Use during Work
19 Hours, I must demand that you Cease and Desist in any further
20 activity on this matter until such time that you fulfill your legal
21 obligations and Bargain to impasse or resolution with the Union
22 over this drastic change in working conditions.
23 I must further inform you that failure to bargain with the Union over
24 this issue prior to implementation and vote of the Board of
25 Selectmen will result in immediate charges to be filed for the
26 Town's violation of M.G.L. Chapter 150E.

27 Stankiewicz responded the same day:

28 The memo was sent for your review and comment. It has not been
29 implemented. It would be helpful if AFSCME could point out what is
30 objectionable or offer their own proposal.

31 Later that evening, Webber sent Stankiewicz the following email:

1 I will certainly consider your request, but honestly, don't we all have
2 enough to do?
3

4 We are all adults and know the potential hazards of this issue. It's
5 Common Sense. I remember one of your predecessors wanting to
6 do something like this about Seat Belt Use. (20 years ago) It was
7 dropped when it was pointed out that individual choice is just that. It
8 is not illegal (or it wasn't then).
9

10 In time, Cell use while driving may well become illegal....when it
11 does State Law supercedes [sic] Contract Law. Let this go. (Note:
12 this is not an Official AFSCME response)

13 On May 31, 2011, Stankiewicz resumed the e-mail communication and
14 offered to meet with Webber the following afternoon. Webber responded later
15 that day indicating that he was off on Tuesday (the following day) and Thursday,
16 but would make time late in the day, if "you (Stankiewicz) give me (Webber) a
17 clue as to the direction you desire to take on these..." Stankiewicz declined
18 stating he did not want to negotiate by e-mail. He closed by stating, "I'll try to
19 schedule another time." The parties did not meet regarding the policy or bargain
20 over it between the Union's demand to bargain on May 20th and June 28th. On
21 June 28, 2011, the Town's Selectmen approved and implemented the policy.

22 Prior to June 28, 2011, the Town did not have a cell phone policy and
23 employees used Town and personal cell phones during work time and while
24 driving without consequence. On occasion, Town officials received phone calls
25 from citizens expressing concerns that employees were observed using cell
26 phones while driving. Jonathan Beder (Beder), the DPW Director, spoke with
27 the driver of the Town's street sweeper, a bargaining unit member, after
28 observing him talking on a cell phone while driving. Beder counseled him to be
29 careful and pull over if he needed to make a call. Beder did not communicate his

1 concerns regarding cell phone use while driving to Webber or the Union. Both
2 Beder and Webber believed there is a federal law that prohibits drivers of
3 vehicles that require a CDL from operating while using a cell phone. Neither was
4 aware of any corresponding state law.

5 Opinion²

6 The Hearing Officer correctly stated the standard applied to determine
7 whether there has been a unilateral change in an existing condition of
8 employment in violation of Section 10(a)(5). Applying this standard, she found
9 that the Town had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
10 the Law when it implemented the Cell Phone Policy without first bargaining with
11 the Union over the decision to implement the Policy and the impacts of that
12 decision. She rejected the Town's affirmative defense that the Union had waived
13 by inaction its right to bargain over the change. For the reasons set forth below,
14 we agree.

15 In its request for review, the Town asserts that the Hearing Officer erred in
16 concluding that the Town's implementation of a Cell Phone Policy for purposes of
17 ensuring the safety of residents and DPW employees is not a non-delegable
18 management right. In addition, the Town asserts that the Hearing Officer erred in
19 concluding that the Union did not waive its right to bargain over this Policy when
20 its president repeatedly failed to meet with the Town Manager to provide a
21 counterproposal or specific objections to the Policy.

22

² The Board's jurisdiction is not contested.

1 Unilateral Change

2 A public employer violates Sections 10(a)(5) and (1) of the Law when it
3 unilaterally changes wages, hours, or other terms and conditions of employment
4 without first bargaining to resolution or impasse with the employees' exclusive
5 bargaining representative. School Committee of Newton v. Labor Relations
6 Commission, 388 Mass. 557 (1983); Town of Arlington, 21 MLC 1125, MUP-
7 8966 (August 1, 1994). To establish a unilateral change violation, a charging party
8 must show that: 1) the respondent has changed an existing practice or instituted
9 a new one; 2) the change affected employee wages, hours, or working conditions
10 and thus implicated a mandatory subject of bargaining; and 3) the change was
11 implemented without prior notice or an opportunity to bargain. Commonwealth of
12 Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989);
13 School Committee of Newton at 572; City of Boston, 20 MLC 1603, 1607, MUP-
14 7976 (May 20, 1994).

15 Here, as the Hearing Officer found, the Union established all three prongs
16 of this test. First, prior to implementation of the disputed policy, the Town had no
17 policy or rule in effect with respect to employees' use of cell phones during work
18 hours. The new Cell Phone Policy is very broad, covers a wide range of work
19 situations, both driving and non-driving, and places restrictions on use of
20 personal cell phones and cameras in addition to new restrictions on the use of
21 Town-provided phones. Second, the new Cell Phone Policy, by limiting
22 employees' use of their own and Town-provided phones during working hours
23 and by subjecting employees to disciplinary action up to and including discharge

1 for violating the policy, affects covered employees' working conditions, thereby
2 implicating a mandatory subject of bargaining. City of Lowell, 28 MLC 126, 128
3 (MUP-2299 (October 10, 2001) (citing City of Peabody, 9 MLC 1447, 1452
4 (1982); Johnson Bateman Co., 295 NLRB 180, 183 (1989) (policies that provide
5 for the discipline and/or discharge of employees who violate them are a
6 mandatory subject of bargaining). Third, the change was implemented without
7 providing the Union with notice and the opportunity to bargain to impasse or
8 resolution.

9 The Town does not dispute that the Cell Phone Policy as implemented
10 constitutes a change in working conditions for Union members. However, the
11 Town argues on appeal, that, under the balancing test set forth in Town of
12 Danvers, 3 MLC 1559, 1577 MUP-2292 (April 6, 1977), the Union's right to
13 bargain over the change is greatly outweighed by the Town's compelling
14 managerial interest in preventing deadly accidents by distracted employees
15 operating heavy equipment.

16 In applying the balancing test, the Board has framed the interests of the
17 union and public employer by asking the following questions: First, "[is] the
18 predominant effect of a decision directly upon the employment relationship, with
19 only limited or speculative impact on core (managerial) policy? Or, is the
20 predominant effect upon the level or types of (governmental services) with only a
21 side effect upon employees." Boston School Committee, 3 MLC 1603, 1607
22 MUP- (1977). To answer these questions, several factors are to be considered,
23 "including the degree to which the topic has a direct impact on terms and

1 conditions of employment, whether the issue involves a core governmental
2 decision, or whether it is far removed from the terms and conditions of
3 employment.” Town of Danvers, 3 MLC at 1577.

4 The Town contends that proper application of this balancing test shows
5 that the Town’s interest in preventing serious and deadly accidents strongly
6 outweighs any minor interest a DPW employee maintains in using cell phones
7 while on duty. The Town argues that the Hearing Office misapplied the balancing
8 test and the holding in Suffolk County Sheriff’s Department, 29 MLC 63, MUP-01-
9 2979 (October 9, 2002), a case addressing a public employer’s obligation to
10 bargain over a cell phone policy applicable to jail officers within a prison.

11 In discussing Suffolk County Sheriff’s Dept., the Hearing Officer accurately
12 stated that the Board identified the Sheriff’s Department’s core managerial
13 interest as the safety and security of the prison and the primary function of
14 correctional officers as the care, custody and control of inmates. See 29 MLC at
15 67. In that case, involving the specialized conditions inherent in working in
16 prisons, the Board also applied the balancing test set forth in Town of Danvers,
17 and determined that the Sheriff’s interest in ensuring that the jail officers perform
18 the “essential job duties of providing care, custody and control to inmates without
19 distraction” outweighed the union’s interest in bargaining over the issue of jail
20 officers’ possession and use of personal cell phones. Suffolk County Sheriff’s
21 Department, 29 MLC at 67.

22 As the Hearing Officer found and the parties do not dispute, safety is an
23 important consideration for both the Town and the Union. In this case, however,

1 the Policy contains an array of new rules to control the use of camera phones,
2 personal and Town-owned cell phones. This Policy applies in a variety of work
3 situations that do not implicate the safety concerns that the Town emphasizes in
4 its brief. Rather, it was implemented as a single Policy that includes the
5 possibility of discipline and discharge for violations of any aspect of the Policy.
6 Under these circumstances, the Board declines to parse portions of the Cell
7 Phone Policy or to separately analyze fragments, such as the ban on use of
8 Town-owned cell phones while operating Town-owned vehicles, to determine
9 whether application of the balancing test would require a different result had the
10 Town issued a policy more limited in scope and targeted to those safety
11 considerations. Therefore, applying the balancing test to the facts of this case,
12 we affirm the Hearing Officer's conclusion, that the Cell Phone Policy, read as a
13 whole, does not rise, on balance, to the level of a core managerial interest and,
14 thus, must be bargained.

15 Waiver By Inaction

16 The Town further argues on appeal that, after initially demanding to
17 bargain over the policy on May 18, 2011, the Union thereafter failed to make any
18 further efforts to meet with the Town or provide commentary. The Town asserts
19 that the Union's conduct amounts to waiver by inaction.

20 Where a public employer raises the affirmative defense of waiver by
21 inaction it bears the burden of proving that the union had: 1) actual knowledge of
22 the proposed change; 2) a reasonable opportunity to negotiate prior to the
23 employer's implementation of the change; and 3) unreasonably or inexplicably

1 failed to bargain or to request bargaining. School Committee of Newton v. Labor
2 Relations Commission, 388 Mass. at 570; City of Cambridge, 23 MLC 28, 37-38
3 MUP-9171), (June 28, 1996), aff'd. sub nom. Cambridge Police Superior Officers
4 Association & another v. Labor Relations Commission, 47 Mass. App. Ct. 1108
5 (1999). Once the employer gives notice and provides the union the opportunity
6 to demand bargaining, however, the burden shifts to the union to come forward in
7 a timely manner and demand bargaining, or at least voice an objection to the
8 change. If an opportunity to bargain is presented but no request is made, the
9 union by its inaction may waive its right to bargain. Town of North Andover, 1
10 MLC 1103, 1107, MUP-529 (September 3, 1974). Such a waiver will not be
11 lightly inferred. Town of Natick, 2 MLC 1086 (August 26, 1975).

12 The undisputed facts show that on May 20, 2011, Union President
13 Webber demanded that the Town cease and desist from further activity until “you
14 fulfill your legal obligations and bargain to impasse or resolution with the Union
15 over this drastic change in working conditions.” Webber also suggested an
16 “Administrative Caution Letter.” The parties exchanged several emails that day
17 and Stankiewicz, without addressing Webber’s suggestion, said it would be
18 helpful if the Union offered its own proposal. A further email exchange occurred
19 on May 31, when Stankiewicz offered to meet the following day. Webber replied
20 that he was off the following day, but would make time to meet if Stankiewicz
21 indicated what direction he would be taking. Stankiewicz replied that he did not
22 want to negotiate by email and would “try to schedule another time.” This
23 sequence clearly indicates that the Union made a timely demand to bargain.

1 There is no indication in the record, or assertion by the Town, that
2 Stankiewicz followed up on scheduling another time to meet with Webber, even
3 though he said he would try to do so. In other words, the scheduling ball thus
4 was left in the Town's court, given that the Union had already clearly objected to
5 the proposed change, demanded to bargain and expressed a willingness to
6 meet. Given this sequence of events, the Union cannot be found to have waived
7 by inaction its right to bargain over this change in working conditions. The mere
8 fact that Webber asked for an indication of the Town's direction, prior to coming
9 to a meeting on his day off, does not alter this conclusion, particularly where,
10 contrary to the Town's argument that the Union did not put forward specific
11 bargaining proposals, the Union did suggest an alternative to the policy in its very
12 first communication with the Town.

13 The Town's reliance upon the Hearing Officer's decision in Town of
14 Plymouth, 39 MLC 159, MUP 12-2123 (H.O. December 20, 2012) (appeal to
15 CERB withdrawn) is misplaced. In that case, the Union objected to the Town's
16 limiting negotiations to one day per month and the Hearing Officer found that the
17 Town did not respond to the Union's requests to bargain over the negotiation
18 schedule. Id. at 161. Relying on Boston School Committee, 11 MLC 1219, 1225
19 (1982) and City of Chelsea, 3 MLC 1169, 1175 (H.O. 1976) aff'd, 3 MLC 1384
20 (1977), the Hearing Officer found the Town's refusal to respond was a per se
21 violation of the duty to bargain. Town of Plymouth, 39 MLC at 161. Here, by
22 contrast, the Union promptly demanded to bargain over the proposed change,
23 suggested an alternative to the proposed policy, and offered to meet.

1 Significantly, the Town never responded with a meeting date, as promised. Thus,
2 as the Hearing Officer concluded, the Union did not waive by inaction its right to
3 bargain over the change.

4 Conclusion

5 For the above reasons, we uphold the Hearing Officer's decision and
6 issue the following order.

7 ORDER

8 WHEREFORE, based on the foregoing, it is hereby ordered that the Town of
9 Plymouth shall:

- 10 1. Cease and desist from:
- 11 a. Failing and refusing to bargain collectively in good faith with the
12 Union over the Cell Phone Policy;
- 13
- 14 b. Implementing a Cell Phone Policy without bargaining to resolution
15 or impasse over the decision and impacts of that decision;
- 16
- 17 c. In any like or similar manner interfering with, restraining or coercing
18 employees in the exercise of their rights protected under the Law.
- 19
- 20 2. Take the following affirmative action that will effectuate the purpose of
21 the Law:
- 22
- 23 a. Immediately rescind the Cell Phone Policy, as well as any and all
24 personnel actions taken as a result of implementing the Policy.
- 25
- 26 b. Upon request, bargain collectively in good faith with the Union to
27 resolution or impasse over the decision and impacts of the decision
28 to implement a Cell Phone Policy.
- 29
- 30 c. Sign and post immediately in conspicuous places employees
31 usually congregate or where notices to employees are usually
32 posted, including electronically, if the Town customarily
33 communicates to its employees via intranet or e-mail, and maintain
34 for a period of thirty (30) consecutive days thereafter signed copies
35 of the attached Notice to Employees;
- 36

1 d. Notify the DLR within thirty (30) days after the date of service of this
2 decision and order of the steps taken to comply with its terms.

3 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



ELIZABETH NEUMEIER, BOARD MEMBER



HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

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



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

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

The Commonwealth Employment Relations Board has held that the Town of Plymouth (Town) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E when it unlawfully implemented a Cell Phone Policy for bargaining unit members without first bargaining with the American Federation of State, County and Municipal Employees, Council 93 (Union) to resolution or impasse over that decision and its impacts on bargaining unit members' terms and conditions of employment.

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 or refuse to bargain in good faith with the Union to resolution or impasse over the decision to implement a Cell Phone Policy for bargaining unit members.

WE WILL immediately rescind the Policy, as well as any and all personnel actions taken as a result of implementing the Policy.

WE WILL bargain in good faith to resolution or impasse with the Union over the implementation of a Cell Phone Policy.

For the Town

Date

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

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