

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	
BOSTON SCHOOL COMMITTEE	*	Case No.: MUP-13-2795
	*	
and	*	Date Issued: June 24, 2014
	*	
BOSTON TEACHERS UNION	*	
	*	

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Eamonn Gill, Esq.:	Representing Boston School Committee
Mark Esposito, Esq.:	Representing Boston Teachers Union

HEARING OFFICER'S DECISION

Summary

1 The issue is whether the Boston School Committee (School Committee or
2 Committee) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws Chapter 150E (the Law) by transferring paraprofessional
4 duties to non-unit personnel without providing the Union with prior notice and an
5 opportunity to bargain to resolution or impasse. Based on the record and for the
6 reasons explained below, I find that the School Committee violated the Law as alleged.

Statement of the Case

7 On May 6, 2013, the Union filed a charge with the Department of Labor Relations
8 (DLR) alleging that the School Committee had engaged in prohibited practices within

1 the meaning of Sections 10(a)(5) and 10(a)(1) of the Law. On August 6, 2013, a DLR
2 Investigator issued a Complaint of Prohibited Practice (Complaint). The School
3 Committee did not file an answer to the Complaint. On March 7, 2014, the Union filed a
4 Motion to Amend the Complaint. The School Committee did not oppose the motion.
5 The DLR Investigator denied the Union's motion on March 18, 2014. The Union then
6 filed a Request for Review with the Commonwealth Employment Relations Board
7 (Board) on March 28, 2014. On April 25, 2014, the Board affirmed the Investigator's
8 ruling denying the Union's motion. In its brief, the Union renews its request to amend
9 the Complaint to include an allegation that the School Committee repudiated the
10 collective bargaining agreement. For the reasons explained below, I deny the Union's
11 request.¹

12 Prior to the hearing, the parties waived their right to a hearing with witness
13 testimony and agreed to submit evidence in the form of a stipulated record. The Union
14 filed a brief on April 30, 2014. The School Committee did not file a brief. Based on the
15 record, which includes stipulated facts and documentary exhibits, and in consideration
16 of the Union's arguments, I render the following opinion.

17 Stipulated Facts

- 18 1. The City of Boston (City) is a public employer within the meaning of Section 1 of
19 the Law.

¹ In its original Motion to Amend the Complaint, the Union also requested that the Complaint include a withdrawal of recognition allegation. Because the Union does not make this request in its brief, I will not address it further.

- 1 2. The Committee is the City's collective bargaining representative for the purpose
2 of dealing with school employees.
- 3
- 4 3. The Union is an employee organization within the meaning of Section 1 of the
5 Law.
- 6
- 7 4. The Union is the exclusive bargaining representative for all paraprofessionals
8 employed by the City in the Boston Public Schools.
- 9
- 10 5. The Baldwin Early Learning Center is a pilot school within the Boston Public
11 School system.
- 12
- 13 6. Beginning at least by the 2012-2013 school year, the Committee hired non-
14 bargaining unit member classroom assistants to perform the following work at the
15 Baldwin Early Learning Center:
 - 16 a. Watch children during outdoor/indoor play and rest time
 - 17 b. Pick up breakfast and/or snack from the cafeteria and supervise snack
18 and lunch time
 - 19 c. Set out materials used by children during center time and other activities
 - 20 d. Adhere to school-wide discipline and reporting procedures
 - 21 e. Maintain a classroom climate conducive to learning
 - 22 f. Assist small children with toileting as needed
 - 23 g. Perform other duties as requested by the office and the cafeteria manager
- 24
- 25
- 26 7. Paraprofessionals in the bargaining unit perform the same and/or similar duties
27 as those listed in paragraph 6.
- 28
- 29 8. The duties listed in paragraph 6 are bargaining unit work.
- 30
- 31 9. In February 2013, the Union learned that the Committee had hired non-
32 bargaining unit personnel to perform bargaining unit work.
- 33
- 34 10. The collective bargaining agreement states that "[t]he jurisdiction of the Union
35 shall include those individuals employed by the Committee who now or hereafter
36 perform the duties of paras...".
- 37
- 38 11. The collective bargaining agreement defines a paraprofessional (para) as "a non-
39 certified individual employed by the Boston School Committee whose function is
40 to assist teachers and other school personnel, except that paras shall not
41 perform the work of custodial or cafeteria workers."
- 42

1 12. The Committee took the action described in paragraph 6 without giving the Union
2 prior notice and an opportunity to bargain to resolution or impasse over its
3 decision to transfer paraprofessional duties to non-bargaining unit personnel and
4 the impacts of that decision on employees' terms and conditions of employment.
5

6 13. The decision to transfer bargaining unit work to non-bargaining unit personnel
7 and the impacts of that decision are mandatory subjects of bargaining.
8

9 Additional Facts Derived from Joint Exhibits and Stipulated Facts

10 Article I, Section A of the parties' collective bargaining agreement (Agreement)

11 provides, in relevant part:
12

13 **A. Recognition and Duration**

14 ...The Committee recognizes the Union as the exclusive bargaining
15 representative for all teacher paraprofessionals employed by the
16 Committee, including clerical paras, teacher paras, library paras, tool
17 keepers, bilingual paras, security paras, community liaison paras,
18 community field coordinators, and all other paras, but excluding lunch hour
19 monitors and bus monitors.
20

21
22 The jurisdiction of the Union shall include those individuals
23 employed by the Committee who now or hereafter perform the duties of
24 paras as described in Article IV Section A of this agreement and currently
25 performed by persons in the bargaining unit as set forth in the preceding
26 paragraph.
27

28 Article IV, Section A of the Agreement provides:

29 **A. Governing Philosophy**

30 The parties believe the collective bargaining method is workable and
31 competent and will add dignity to the joint effort of the Union and the
32 Committee to reach agreement. In entering upon this new responsibility,
33 the parties wish to declare their intention to cooperate fully in what must
34 be the joint objective of both bodies, the best education possible for
35 Boston's children.

Opinion

1 *Motion to Amend Complaint to Include Repudiation Allegation*

2 The Union contends that the Complaint should be amended to include the
3 allegation that the School Committee repudiated the Agreement by failing to apply its
4 terms to classroom assistants at the Baldwin Early Learning Center. In support, the
5 Union argues that this allegation relates to the subject matter of the Complaint, the
6 School Committee is on notice that the amended allegation would be at issue, and both
7 parties have had an opportunity to litigate the merits of the amended allegation.
8 However, as noted by the Board in its affirmation of the Investigator's denial of the
9 Union's Motion to Amend, the new allegation does not fall within the scope of the
10 Complaint because the facts that are needed to prove and defend against repudiation
11 are different from those in a transfer of bargaining unit work case. It notes that an
12 analysis of whether the School Committee repudiated the recognition clause would
13 involve "an analysis of whether the [School Committee] deliberately refused to abide by
14 this provision and an analysis of the language of this provision, including whether the
15 provision clearly and unambiguously conferred bargaining rights on the classroom
16 assistants, and, if necessary, bargaining history to elucidate this provision." The Union
17 also argues that the stipulated record includes all the facts necessary to support a
18 finding that the School Committee repudiated the Agreement. I disagree that the

1 stipulated facts fully support a repudiation allegation, as explained below, and decline to
2 amend the Complaint.²

3 Moreover, even if I were to amend the Complaint to include the repudiation
4 allegation, the Union has not established a violation. The statutory obligation to bargain
5 in good faith includes the duty to comply with the terms of a collectively bargained
6 agreement. Commonwealth of Massachusetts, 26 MLC 165, 168, SUP-4281, SUP-
7 4324 (January 7, 2000), (citing City of Quincy, 17 MLC 1603, MUP-6710 (March 20,
8 1991)). Repudiating a collectively-bargained agreement by deliberately refusing to
9 abide by or to implement an agreement's unambiguous terms violates the duty
10 to bargain in good faith. Town of Falmouth, 20 MLC 1555, MUP-8114 (May 16, 1994),
11 aff'd sub nom. Town of Falmouth v. Labor Relations Commission, 42 Mass. App. Ct.
12 1113 (1997). If the evidence is insufficient to find an agreement or if the parties hold
13 differing good faith interpretations of the language at issue, the Board will conclude that
14 no repudiation has occurred. Commonwealth of Massachusetts, 18 MLC 1161, 1163,
15 SUP-3356, SUP-3439 (October 16, 1991). If the language is ambiguous, the Board
16 examines applicable bargaining history to determine whether the parties reached an
17 agreement. Id.; Commonwealth of Massachusetts, 16 MLC 1143, 1159, SUP-3127
18 (August 8, 1989). There is no repudiation of an agreement if the language of the
19 agreement is ambiguous, and there is no evidence of bargaining history to resolve the

² Although I have not amended the complaint to include a repudiation allegation, there are alternative means, such as a CAS petition, for the Union to pursue at the DLR to determine whether the classroom assistants should be included in the bargaining unit.

1 ambiguity. Commonwealth of Massachusetts, 28 MLC 8, 11, SUP-4448 (June 15,
2 2001) (citing Town of Belchertown, 27 MLC 73, MUP-2397 (January 3, 2000)).

3 The Union contends that its jurisdiction shall include those individuals employed
4 by the Committee who now or hereafter perform the duties of paraprofessionals, as set
5 forth in the Agreement's recognition clause. However, the language of the recognition
6 clause does not end there. The full description provides, "The jurisdiction of the Union
7 shall include those individuals employed by the Committee who now or hereafter
8 perform the duties of paras *as described in Article IV Section A of this agreement* and
9 currently performed by persons in the bargaining unit as set forth in the preceding
10 paragraph." (Emphasis Added.) Notably, Article IV, Section A does not describe the
11 job duties of paraprofessionals, or of any other position. Rather, it outlines the
12 governing philosophy of both parties, i.e., "to cooperate fully in what must be the joint
13 objective of both bodies, the best education possible for Boston's children."
14 Consequently, although the reference to Article IV, Section A in the recognition clause
15 appears to be a typographical error, I cannot reach this conclusion without any
16 supporting evidence, such as bargaining history. Although the parties stipulated that
17 the Agreement defines a paraprofessional as "a non-certified individual employed by the
18 [School Committee] whose function is to assist teachers and other school personnel,
19 except that paras shall not perform the work of custodial or cafeteria workers," there is
20 no stipulation explaining the reference to Article IV, Section A in the recognition clause.
21 Therefore, the repudiation allegation, if included in the Complaint, would be dismissed.

1 *Transfer of Bargaining Unit Work*

2 The Law requires a public employer to give the exclusive collective bargaining
3 representative of its employees prior notice and an opportunity to bargain before
4 transferring bargaining unit work to non-bargaining unit personnel. Commonwealth of
5 Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004). To
6 determine whether an employer has unlawfully transferred bargaining unit work, the
7 Board considers the following factors: 1) whether the employer transferred bargaining
8 unit work to non-unit personnel; 2) whether the transfer of unit work to non-unit
9 employees has an adverse impact on individual employees or the unit itself; and 3)
10 whether the employer gave the bargaining representative prior notice and
11 an opportunity to bargain over the decision to transfer the work. Id. at 833. In situations
12 where the work is considered shared work that is traditionally performed by both
13 bargaining unit and non-bargaining unit personnel, the Board has held that the work in
14 question will not be recognized as exclusively bargaining unit work. City of
15 Quincy/Quincy City Hospital, 15 MLC 1239, MUP-6490 (November 9, 1988). In these
16 shared work situations, there is no obligation to bargain over every incidental variation
17 in job assignments between unit and non-unit personnel – rather, bargaining must occur
18 only in situations where there is a calculated displacement of bargaining unit work. City
19 of Boston, 10 MLC 1539, 1541, MUP-4967 (April 24, 1984).

20 Here, the parties' stipulations establish that the School Committee transferred
21 paraprofessional bargaining unit work to classroom assistants at the Baldwin Early

1 Learning Center beginning in the 2012-2013 school year,³ and there is no evidence that
2 the work would have gone undone had the School Committee not transferred it. The
3 Board has long held that depriving a bargaining unit of an opportunity to perform work
4 that it previously performed constitutes an adverse impact on the unit even if the loss of
5 bargaining unit work may not directly result in a reduction in the number of bargaining
6 unit personnel. See Lowell School Committee, 28 MLC 29, 32, MUP-2074 (June 22,
7 2001) (citing City of New Bedford, 15 MLC 1732, 1739, MUP-6488 (May 31, 1982)); City
8 of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28, 1996) aff'd sub nom. Cambridge
9 Police Superior Officers Association v. Labor Relations Commission, 47 Mass. App. Ct.
10 1108 (1999); Cf., Chief Justice for the Administration and Management of the Trial
11 Court v. Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374 (2011)
12 (no adverse impact where record establishes that work would have gone undone if per
13 diems were not hired). And lastly, the parties stipulated that the School Committee
14 transferred the unit work without providing the Union with prior notice and an opportunity
15 to bargain to resolution or impasse about the decision to transfer unit work to classroom
16 assistants, and the impacts of the decision. Accordingly, I conclude that the School
17 Committee violated Section 10(a)(5) of the Law as alleged.

18 Conclusion

19 Based on the stipulated record and for the reasons explained above, I find that
20 the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of

³ Although the parties' stipulations do not specify that this was exclusive bargaining unit work, I have inferred it because the parties did not stipulate that the work was shared.

1 the Law by transferring paraprofessional work to non-unit personnel at the Baldwin
2 Early Learning Center.

3 Remedy

4 The Union has requested a make whole remedy for classroom assistants.⁴ It
5 argues that without it, “the School Committee will have received all of the benefits of
6 undermining paraprofessional labor standards by transferring their work to other
7 employees who do not enjoy the benefits and protections of the collective bargaining
8 agreement, without suffering any real consequences to deter it from future violations.” I
9 decline to order this remedy. The Complaint does not allege that the School Committee
10 unlawfully retained or compensated the classroom assistants. The School Committee’s
11 continued employment of the classroom assistants and its obligations toward them, if
12 any, are distinct issues which are not before me. See generally, Town of Norwell, 18
13 MLC 1263, 1264-5, MUP-6962 (January 22, 1992).⁵

14 Order

15 Based on the foregoing, IT IS HEREBY ORDERED THAT the School Committee
16 shall:

- 17 1. Cease and desist from:
- 18 a. Transferring paraprofessional work to non-unit personnel at the Baldwin
19 Early Learning Center without first bargaining to resolution or impasse

⁴ The Union does not specifically define what its requested make whole remedy would include for the classroom assistants.

⁵ The Union has not requested a make whole remedy for unit members, nor has it alleged or provided evidence that they suffered any monetary damages.

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over the decision to transfer the work and the impacts of that decision on bargaining unit members' terms and conditions of employment.

b. In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law.

c. Take the following affirmative action that will effectuate the purpose of the Law:

i. Restore the status quo ante by returning the paraprofessional duties to the bargaining unit at the Baldwin Early Learning Center until the School Committee satisfies its obligation to bargain over the decision to transfer the duties and the impacts of the decision;

ii. Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer paraprofessional duties to non-unit employees at the Baldwin Early Learning Center and the impacts of that decision;

iii. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the School Committee 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.

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KERRY BONNER, ESQ.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



**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 that the Boston School Committee (School Committee) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally transferring work performed by paraprofessionals to non-unit personnel at the Baldwin Early Learning Center.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; 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 School Committee assures its employees that:

- WE WILL NOT fail or refuse to bargain in good faith with the Union by failing to provide the Union with prior notice and the opportunity to bargain to over the transfer of bargaining unit work.
- 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:
 - Restore the status quo ante by returning the paraprofessional duties to the bargaining unit until we satisfy our obligation to bargain over the decision to transfer those duties to non-unit employees and the impacts of that decision;
 - Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer paraprofessional duties to non-unit employees at the Baldwin Early Learning Center and the impacts of that decision;
 - Notify the DLR within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

For the School Committee

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).