

1 the decision and the effects of that decision; and b) unilaterally transferring the traffic
2 supervisors' work to non-unit safety guards employed by the Town's School Committee.
3 On appeal, the Town challenges the Hearing Officer's ruling on both counts, as well as
4 the remedy awarded.¹ The Town asserts that its decision to eliminate the traffic
5 supervisors' positions was a level of services decision over which no decisional
6 bargaining was required and that it should not be held liable for the School
7 Department's later decision to hire school safety guards to perform certain duties that it
8 eliminated for budget reasons. In a similar vein, the Town contends that the Hearing
9 Officer erred when she concluded that it and the School Department are the same
10 employer for purposes of determining whether the Town unlawfully transferred
11 bargaining unit work to the safety guards. The Town further claims error in the Hearing
12 Officer's conclusion that the Charging Party, AFSCME Council 93, (Union) did not waive
13 its right to bargain over the elimination of the traffic supervision positions. As to remedy,
14 the Town argues that because its decision here was a level of services decision, any
15 remedy awarded should be limited to ordering the Town to bargain over the impacts of
16 its decision. For the reasons set forth below, the Board affirms the Hearing Officer's
17 decision and remedy.

18 Opinion²

19 The factual findings of the Hearing Officer are unchallenged on appeal and we
20 adopt those findings as set forth in the attached Hearing Officer's Decision. We begin
21 by addressing the Town's argument regarding Count I, that the Union waived its right to

¹ AFSCME Council 93 did not file a response to the Town's supplementary statement on review.

² The Board's jurisdiction is not contested.

1 bargain over the decision and the impacts of the decision to lay off the unionized Traffic
2 Supervisors. Next we review prior Board decisions that address the core legal issue
3 posed by both Counts I and II, that of joint municipal-school committee bargaining
4 responsibility and address the Town's arguments in this regard. Finally, we address
5 remedy.

6 Waiver by Inaction

7 The Town of Weymouth takes issue with the Hearing Officer's conclusion that the
8 Union did not waive its right to bargain over the layoff and that the decision to eliminate
9 the Traffic Supervisors and lay them off was presented to the Union as a *fait accompli*.
10 Instead, the Town contends that the facts establish that the Union waived its right to
11 bargain. As explained below, we disagree with the Employer's legal conclusion on the
12 facts found by the Hearing Officer.

13 Regarding the waiver issue, the Hearing Officer found that the Town first notified
14 the Union that it was eliminating the traffic supervisors' jobs on May 19, 2010.³ Prior to
15 that, the Town provided no information to the Union that it was considering that action.
16 On May 19, Cindy DePina (DePina), the Town's Human Resources Director, sent the
17 traffic supervisors a letter informing them their jobs would be eliminated on June 22 and
18 that a representative from the state Department of Unemployment Assistance and
19 Division of Career Services would meet with them on June 2. Next, on June 8, Cara
20 Winslow (Winslow), the Union staff representative for the traffic supervisors' bargaining
21 unit, sent a letter to the Town's mayor protesting the Town's failure to provide advance
22 notice of the layoffs and an opportunity to bargain. The letter stated, "Please feel free to
23 contact my office...with any concerns." DePina left a voice mail message for Winslow

³ All dates are in 2010, unless otherwise noted.

1 on June 11 concerning her June 8th letter. The Union did not respond. The record does
2 not reflect what DePina said in her voicemail message.

3 On these facts, the Hearing Officer concluded that the Town presented the Union
4 with a *fait accompli* by issuing the employees' layoff notices with a firm date when their
5 employment would end and their jobs eliminated, and by bringing in a speaker. She
6 further found that the situation had progressed to the point where further bargaining
7 would have been fruitless because the record does not reveal that, when DePina called
8 Winslow back and left her a voice mail message, DePina indicated that the notices had
9 been rescinded or that the Town was willing to bargain.

10 Relying on County of Middlesex and Mass. Nurses Assoc., 6 MLC 2056, MUP-
11 3449 (March 31, 1980), the Town contends that these facts establish that the Union did
12 not take appropriate, prompt action to protect its rights when presented with notification
13 of a "proposed unilateral change." Specifically, the Town points out that, although the
14 effective date of the layoff was June 22, 2010, the actual implementation date was not
15 until September 2010 when the next school year began. The Town thus contends that
16 the date of "actual implementation" was in September 2010, when the next school year
17 began. See id. at 2057-58 (finding April 5 notification to Union of employer's termination
18 of day care program was sufficiently in advance of late June implementation date to
19 establish union's waiver of right to bargain over decision). According to the Town, even
20 though the Union was notified more than two months prior to the actual implementation
21 of the layoffs, the Union's failure to respond to DePina's phone call denied the Town the
22 opportunity to meet with the Union to discuss the issues raised in the June 8th letter.
23 The Town further contests the Hearing Officer's conclusion that the layoffs were

1 presented as a *fait accompli* because the record reveals no evidence that DePina would
2 have refused to bargain or meet had she and Winslow actually spoken.

3 We agree with the Hearing Officer that the Town presented the Union with a *fait*
4 *accompli* when it sent the May 19th letter. First, as a factual matter, we reject the
5 Employer's waiver argument because we disagree with the Town's contention that the
6 actual date of the implementation of the layoffs was in September 2010 and not June 22
7 as was expressly stated by the Town in its May 19th notice. The Town suggests that the
8 June 22nd date was not material because September is when traffic supervisors' duties
9 would have resumed when summer vacation ended. However, the timing of the layoff
10 was significant. The June 22nd date was a triggering event that had an immediate and
11 critical impact on the traffic supervisors' eligibility for unemployment insurance and job
12 searches. In fact, the record indicates that the Town understood the June date to have
13 signaled a change in employment status as it arranged to have a representative from
14 the Division of Career Services and Department of Unemployment Assistance speak to
15 affected employees earlier in June. For purposes of this analysis, therefore, we find
16 that the positions were eliminated and the change was implemented as of June 22,
17 2010. We further find that, after DePina left a voice mail message for Winslow on June
18 11, 2010, the Town and the Union had only eleven days left to bargain about the Town's
19 decision before it was implemented, not more than two months, as the Town asserts.

20 Second, we agree with the Hearing Officer's conclusion that as of June 11, 2010,
21 the Town's conduct had progressed to the point at which a demand to bargain would be
22 fruitless. In cases like this one, where the employer notifies the union about a decision
23 after it has already been made, the Board looks at the record as a whole to determine
24 whether meaningful bargaining could still take place or whether the employer has

1 committed to a course of action. See, e.g., Scituate School Committee, 9 MLC 1010,
2 1013, MUP-4563 (May 27, 1982); City of Cambridge, 5 MLC 1291, MUP-2799
3 (September 27, 1978). Thus, in County of Middlesex, the employer sent day care
4 participants a letter in April notifying them that its summer day care program for
5 employees' children would be eliminated in July. 6 MLC at 2057. Although a union
6 official initially protested the termination of the program, she took no further action
7 before implementation. In ruling that the union had waived its right to bargain by
8 inaction, the Board found that the union had been given sufficient advance notice such
9 that the decision was not yet a *fait accompli*. Id. at 2058. The Board found it significant
10 that at the time the union learned of the change, the parties were engaged in successor
11 bargaining, and thus the union had ample opportunity to make a demand to bargain but
12 failed to do so. Id.

13 Similarly, in Scituate School Committee, the Board determined that the school
14 committee's formal vote to eliminate a paid lunch period for cafeteria employees was
15 not a *fait accompli*. 9 MLC at 1012-1013. The Board found that the school committee's
16 decision was not irrevocable for several reasons, including that the employer notified
17 the union about the decision three months before implementation, one of the school
18 committee members had expressed concern over the employees' contractual rights at
19 the time of the vote and, after the union voiced its protest in September, the school
20 committee rescinded its decision. Id. at 1013. In so holding, the Board distinguished
21 City of Cambridge, 5 MLC 1291, a case in which it found that the union had been
22 presented with a *fait accompli* because, "although the new [paid parking] plan had not
23 yet been instituted, the City had already committed itself to it and a demand to bargain

1 would have been to no avail.” Scituate School Committee, 9 MLC at 1012-1013
2 (distinguishing City of Cambridge, *supra*).

3 In this case, the May 19 letter left no room for bargaining. It was sent to
4 employees after the Police Chief and City Council had already approved an FY 11
5 budget that contained no funding for the Traffic Supervisors. Moreover, the Town’s
6 budget was consistent with earlier budgets proposed by the Police Chief and Mayor.
7 This course of action and the May 19 letter itself, with its references to those budgets
8 and to an upcoming meeting with a government representative from agencies that deal
9 with the unemployed, persuade us that, by the time the Employer sent that letter, it had
10 committed itself to the decision. In other words, a demand to bargain would have been
11 to no avail. Further, the parties were not engaged in successor negotiations and the
12 Town never gave any indication, either before or after it sent the notice, that it would be
13 willing to bargain over whether it would go forward with the layoffs. The mere fact that
14 the DePina left a voicemail for Winslow is not enough, standing alone, to persuade us
15 otherwise.

16 We therefore affirm the Hearing Officer’s conclusion that the Union did not waive
17 its right to bargain and turn to the Employer’s arguments over the nature and scope of
18 that bargaining obligation.

19 The Town’s Bargaining Obligation

20 We first consider the arguments raised by the Town of Weymouth regarding
21 Count II, the unlawful transfer of bargaining unit work. First, the Town argues that the
22 elimination of the Traffic Supervisors was a level of service decision and the Hearing
23 Officer’s decision to the contrary was error. The Town further claims that this error
24 resulted in the Hearing Officer incorrectly finding that there was an unlawful transfer of

1 bargaining unit work from the Union's members to the newly-hired crossing guards. In
2 this regard, the Town urges the Board to focus on what it claims is an illogical
3 inconsistency in the Hearing Officer findings. According to the Town, the Hearing
4 Officer's finding that the City budget contained no funding for the Traffic Supervisors
5 (i.e., that the decision was a level of service decision and not a transfer of bargaining
6 unit work) is inconsistent with her conclusion that – as the Town characterizes it, that
7 the “Town and the School Department colluded to move the school crossing services”
8 from the Police Department to the School Department.

9 To begin, the Town mischaracterizes the Hearing Officer's decision as she made
10 no finding of “collusive conduct” on the part of the Town and the School Department.
11 That said, the Town's point seems to be that the record provides no evidence that the
12 Town and the School Committee were communicating regarding their respective
13 decisions and, therefore, unlike the circumstances in Town of Bridgewater, 25 MLC 103,
14 MUP-8650 (1998), there was no coordinated effort to layoff unionized traffic supervisors
15 and hire non-union employees to perform the same work. For this reason, the Town
16 contends that the Hearing Officer was wrong to find an unlawful transfer of bargaining
17 unit work.

18 We reject this argument based on the plain meaning of the Law. As the Hearing
19 Officer accurately stated, Section One of the Law defines “employer” as any “town . . .
20 acting through its chief executive officer . . . In the case of school employees, the
21 municipal employer shall be represented by the school committee or its designated
22 representative or representatives.” M.G. L. c. 150E, §1. Based on this statute, the
23 Board has repeatedly held that the School Committee is not a separate municipal
24 employer; rather, the Town and the School Committee are a single employing entity

1 under Chapter 150E who jointly share responsibility when bargaining obligations have
2 not been fulfilled. See City of Malden, 23 MLC 181, 183, MUP-9312, MUP-9313
3 (February 20, 1997) and cases cited therein.

4 Moreover, the crux of Weymouth's argument, i.e., that it has no legal
5 accountability for the School Department's hiring decision because it did not know about
6 it, was previously addressed and rejected by the Board in Town of Saugus, 28 MLC 13,
7 MUP-2343, CAS-3388 (June 15, 2001). In that case, pursuant to a grant the Saugus
8 School Committee received to address excessive student absences, a number of police
9 officers belonging to the Saugus Police Union were hired by the School Committee to
10 work extra shifts as truancy officers. Id. at 13-14. The police officer's union filed a
11 charge against the Town alleging that it had engaged in an unlawful transfer of
12 bargaining unit work to non-unit personnel in violation of section 10(a)(5) of the Law.
13 The Town of Saugus defended against the charge contending that it did not participate
14 in or endorse the School Committee's decision to hire the truant officers. The Town of
15 Saugus argued that it did not have a duty to bargain because the truant officers were
16 school department employees over whom the town had no control. See id. at 17.
17 Relying on Town of Bridgewater, supra, the Board explained that the town's liability
18 turned on its statutory status as an employer, which is unchanged even when the
19 municipal employer is "represented by the school committee or its designated
20 representative or representatives" in the collective bargaining process. M.G.L. c.
21 150E, § 1; Town of Saugus, 28 MLC at 17 (further citations omitted). The Board
22 explained that this conclusion is consistent with its policy "of not allowing bargaining
23 obligations to remain unfulfilled." Id. Thus, whether the Town of Weymouth had actual
24 knowledge of the decision of its bargaining representative, the School Committee, to

1 hire safety guards is not factually dispositive given the statutory definition of employer
2 and our case law.

3 In sum, the Town's view as to what must be established to prove that it is liable
4 for the unlawful transfer of bargaining unit work from the Union to the newly hired safety
5 guards hinges on an unduly mechanical and limited view of the scope of the Town's
6 bargaining obligation as a statutory employer under Chapter 150E. We thus affirm the
7 Hearing Officer's conclusion that the Town is a proper respondent in this matter and can
8 be held liable for the unlawful transfer of work at issue here. See id. (citing Town of
9 Bridgewater, supra; City of Malden, supra (additional citations omitted)).

10 The Town also relies on statutes unrelated to Chapter 150E to support this
11 argument. It relies on Chapter 71, sections 34 and 59 of the General Laws, which
12 establishes that the School Committee is statutorily designated to make independent
13 expenditures that may not be limited by the legislative body of the Town. The Town
14 argues that it had no duty to bargain over the transfer of bargaining unit work because it
15 was statutorily precluded from interfering with the School Committee's hiring of school
16 crossing guards by Chapter 71. The Town further contends that Chapter 71 makes the
17 decision of the School Department to hire traffic supervisors a managerial level of
18 services decision beyond the reach of the Town's control and, in these circumstances,
19 is not subject to challenge under Chapter 150E of the General Laws.

20 The Town's reliance on Chapter 71 is misplaced. The issue here is not whether
21 the Town could have or should have interfered with School Committee budgetary
22 decisions regarding staffing. Rather, the issue is whether the Town and the School
23 Committee have a shared obligation to bargain to resolution or impasse prior to making
24 any decision to transfer bargaining unit work to other employees. We therefore reject

1 the legal framework of Chapter 71 as having any impact on the Town's bargaining
2 obligations in these circumstances.

3 Finally, regarding the Town's contention that it did not know about the School
4 Committee's decision to hire the school crossing guards, we note that Section 1 of
5 Chapter 150E creates a presumption that municipalities will be knowledgeable and
6 informed when it comes to employment decisions of its agent, the school committee, at
7 least in so far as these decisions affect collective bargaining obligations. As far back as
8 1993, when Section 1 of Chapter 150E was amended by the Education Reform Act, the
9 Law expressly states that the chief executive officer of a municipality is required to
10 participate and vote as a member of the school committee, and "would necessarily be
11 involved in all of the negotiations involving school employees." See City of Malden, 21
12 MLC 1419, 1432 (November 15, 1994) *aff'd* 23 MLC 181. Given this statutory mandate,
13 it is fair to infer that there was no impediment to the Town of Weymouth becoming
14 involved in, and at minimum, informed as to, the bargaining obligations that should have
15 been fulfilled prior to School Committee hiring the crossing guards. These obligations of
16 a municipal employer as regards its bargaining agent, a school committee, set forth in
17 Section 1 of the Law, also preclude the adoption of the Town's fact-based argument that
18 it was without a bargaining obligation.

19 In sum, as correctly found by the Hearing Officer, and as further explained in the
20 Remedy section below, the Town violated its duty to bargain with the Union as set forth
21 in Count I when it laid off the traffic supervisors effective June 22, 2010 without giving
22 the Union an opportunity to bargain to resolution or impasse over the decision to
23 eliminate the position and the impacts of that decision. Further, once the Weymouth
24 School Committee decided on or about August 30, 2010 that it needed to employ school

1 guards to monitor and control traffic, the Town's decision to defund and eliminate the
2 unionized Traffic Supervisor positions was *transformed* from what may have initially
3 been a level of services decision with the more limited impact bargaining obligations, to
4 a decision that triggered the Town's statutory obligation to bargain to resolution or
5 impasse with the Union before it could layoff the traffic supervisors and transfer their
6 bargaining unit work to the non-union group of crossing guards. Thus, the appropriate
7 remedy for the Employer's course of conduct as set forth in Count I and Count II is
8 discussed below.

9 Remedy

10 We begin by addressing the Employer's argument that the Hearing Officer's
11 remedy was in error because it called for reinstatement and full backpay. More
12 specifically, the Town contends that the elimination of the Traffic supervisors was a level
13 of services decision that should have limited the remedial order to impact bargaining
14 only. In this regard, the Employer relies on Town of Wakefield v. Labor Relations
15 Commission, 45 Mass. App. Ct. 630 (1998) (finding reinstatement and full backpay
16 improper when layoffs inevitably result from a level of services decision). As explained
17 above, we reject this legal framework as unduly static, and to mechanically apply it
18 here ignores the course of conduct of the Town and its bargaining agent. We thus
19 agree with the Hearing Officer's legal conclusion that, when considered in its full factual
20 context, the layoff of the traffic supervisors and the subsequent transfer of their
21 bargaining unit work to lower-paid, non-union employees requires a make-whole
22 remedy. Accordingly, the proper approach to remedy requires that we address the
23 Town's bargaining obligations as of August 30, 2010, the date the Weymouth Schools
24 sent out an email announcing openings for the new position of safety guard. In our

1 analysis, this is also the date the Town, through its bargaining agent, the School
2 Committee, decided to hire non-union employees to perform work previously belonging
3 to the traffic supervisors' bargaining unit.

4 Considered in this context, the remedy for the Town's failure to bargain over the
5 decision to transfer bargaining unit work properly includes a full status quo remedy, i.e.,
6 an order to bargain to resolution or impasse over the decision to eliminate the traffic
7 supervisors' positions and the decision to transfer the bargaining unit work, to restore
8 the work to the bargaining unit, and to make whole all bargaining unit members who
9 suffered a monetary loss as result of the Town's layoff and transfer decisions. See
10 Town of Bridgewater, 25 MLC at 104-105. Accordingly, the Employer's core challenge
11 to the remedy, i.e., that the layoff of the traffic supervisors was an inevitable outcome
12 flowing from a level of services decision, completely ignores the fact that after the layoff,
13 the non-union safety guards were hired and the traffic supervisors' work was transferred
14 to them. Thus, the Hearing Officer's remedy is proper and we adopt it in its entirety

15 CONCLUSION

16 For the foregoing reasons, the Board affirms the Hearing Officer's legal
17 conclusions and remedy and issues the following Order.

18 ORDER

19 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town
20 shall:

21 1. Cease and desist from:

- 22
- 23 a) Failing and refusing to bargain in good faith with the Union by unilaterally
24 eliminating the traffic supervisors' positions.
 - 25
 - 26 b) Unilaterally transferring bargaining unit work from the traffic supervisors to
27 non-unit personnel, the safety guards, without first giving the Union notice

1 and an opportunity to bargain to resolution or impasse about the decision
2 and the impacts of that decision
3

- 4 c) In any like manner, interfering with, restraining and coercing its employees
5 in any rights guaranteed under the Law.
6

7 2. Take the following action that will effectuate the purposes of the Law:
8

- 9 a) Bargain to resolution or impasse with the Union over: a) the decision to
10 eliminate the traffic supervisors' jobs and the impact of that decision on
11 unit members' terms and conditions of employment; and b) the
12 concomitant decision to transfer bargaining unit work from the traffic
13 supervisors to the safety guards and the impact of that decision on the
14 traffic supervisors' terms and conditions of employment.
15

- 16 b) Immediately offer reinstatement to the traffic supervisors without prejudice
17 to their seniority or other rights and privileges;
18

- 19 c) Restore to the bargaining unit the duties of the traffic supervisors that
20 were transferred to the safety guards.
21

- 22 d) Make the traffic supervisors whole for any economic losses that they have
23 suffered as a direct result of the Town's decision to eliminate their jobs
24 and/or its decision to transfer bargaining unit work outside of the
25 bargaining unit, plus interest on any sums owed at the rate specified in
26 M.G.L.c.231, Section 6I.
27

- 28 e) Post immediately in all conspicuous places where members of the Union's
29 bargaining unit usually congregate, or where notices are usually posted,
30 including electronically, if the Town customarily communicates with these
31 unit members via intranet or email and display for a period of thirty (30)
32 days thereafter, signed copies of the attached Notice to Employees.
33
34

- 1 f) Notify the Board in writing of steps taken to comply with this decision
- 2 within ten (10) days of receipt of this decision.
- 3
- 4 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
BEFORE THE 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 Weymouth (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: a) failing to provide AFSCME Council 93, AFL-CIO (the Union) with prior notice and an opportunity to bargain to resolution or impasse over the decision to eliminate the traffic supervisors' jobs and the impacts of that decision on unit members' terms and conditions of employment; and b) failing to provide the Union with notice and an opportunity to bargain to resolution or impasse over the decision to transfer bargaining unit work from the traffic supervisors to non-bargaining unit personnel, the safety guards, and the impacts of that decision on unit members' terms and conditions of employment.

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; 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 in good faith by unilaterally eliminating the traffic supervisors' jobs.

WE WILL NOT fail to bargain in good faith by unilaterally transferring bargaining unit work from the traffic supervisors to non-bargaining unit personnel, the safety guards.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1. Immediately offer reinstatement to the traffic supervisors.
2. Restore to the bargaining unit the duties of the traffic supervisors that were transferred to the safety guards.
3. Bargain to resolution or impasse with the Union over: a) the decision to eliminate the traffic supervisors' jobs and the impact of that decision on unit members' terms and conditions of employment; and b) the decision to transfer bargaining unit work from the traffic supervisors to the safety guards and the impacts of that decision on the traffic supervisors' terms and conditions of employment.
4. Make the traffic supervisors whole for any economic losses that they have suffered as a direct result of the Town's decision to eliminate their positions and/or its decision to transfer their bargaining unit work to non-unit personnel, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 61.

Town of Weymouth

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, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF WEYMOUTH

and

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
COUNCIL 93

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Case No. MUP-10-6020

Date Issued: July 12, 2013

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Joseph A. Emerson, Jr., Esq. - Representing the Town of Weymouth

Maureen Medeiros, Esq. - Representing the American Federation
Joseph L. DeLorey, Esq. - of State, County & Municipal
Employees, Council 93

HEARING OFFICER DECISION

SUMMARY

The issue in this case is whether the Town of Weymouth (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Chapter 150E (the Law) by: a) unilaterally eliminating the traffic supervisors' jobs; and b) unilaterally transferring bargaining unit work to non-unit personnel. I find that the Town violated the Law in the manner alleged.

STATEMENT OF THE CASE

1 On September 24, 2010, the American Federation of State, County & Municipal
2 Employees, Council 93 (AFSCME or Union) filed a charge of prohibited practice with the
3 Department of Labor Relations (DLR) in Case No. MUP-10-6020, alleging that the Town
4 had violated Sections 10(a)(5) and (1) of the Law. A DLR hearing officer conducted an
5 investigation of the matter on July 14, 2011. On August 19, 2011, the investigator
6 issued a complaint alleging that the Town violated Section 10(a)(5) and, derivatively,
7 Section 10(a)(1) of the Law by: 1) eliminating the traffic supervisors' positions without to
8 bargaining to resolution or impasse over the decision and the impacts of that decision
9 on employees' terms and conditions of employment (Count I); and 2) transferring
10 bargaining unit work without providing notice and an opportunity to bargain to resolution
11 or impasse. The Town filed an answer to the complaint on September 8, 2011 (Count
12 II).

13 I conducted a hearing on April 17, 2012 and August 10, 2012, at which time all
14 parties had the opportunity to be heard, to examine witnesses and to introduce
15 evidence. The parties submitted their post-hearing briefs postmarked on October 10,
16 2012. Upon review of the entire record, including my observation of the demeanor of
17 the witnesses, I make the following findings of fact and render the following decision:

Stipulated Facts

- 18
- 19 1. The Traffic Supervisors and the Town of Weymouth were parties to a collective
20 bargaining agreement effective July 1, 2009 through June 30, 2010.
21
 - 22 2. The Town of Weymouth eliminated the position of Traffic Supervisor effective
23 June 22, 2010.
24
 - 25 3. The employees were notified of the elimination of the Traffic Supervisor position
26 due to recent budget cuts.

1 4. The Weymouth public schools posted the position of school safety guard on or
2 about August 30, 2010.

3 FINDINGS OF FACT¹

4 Background

5 Section 4-208(c)(1) of the Town's Code of Ordinance states:

6 (c)The following services shall be contained within the Police Department
7 and be subject to the general supervision and oversight of the Chief of
8 Police:

9
10 1. School Traffic Supervisors²-The Chief of Police may appoint School
11 Traffic Supervisors to handle school traffic. The duties of the School
12 Traffic Supervisors shall be to control the flow of traffic by stopping,
13 starting and directing such traffic. Any operator of any motor vehicle not
14 obeying the hand signals of the School Traffic Supervisors on active
15 duty shall have their registration number taken and turned in to the
16 Chief of Police, or Head of the Traffic Division within the Police
17 Department.

18 Prior to June 2010, the Town employed fourteen traffic supervisors, who helped
19 students to safely cross streets and parking areas near the Town's eleven public
20 schools and three parochial schools. The traffic supervisors worked two hours per day,
21 8:30 AM to 9:30 AM and 2:45 PM to 3:45 PM, and their work schedule coincided with
22 the school calendar. The traffic supervisors wore a badge that bore the title traffic
23 supervisor and a uniform, including a hat, a shirt, navy blue pants and black shoes.
24 They also wore green fluorescent vests displaying the slogan "traffic." They reported
25 directly to the head of the police traffic division, Sergeant John Concannon (Sgt.
26 Concannon), who also was responsible for their training.

¹ The DLR's jurisdiction in this matter is uncontested.

² The Town had employed traffic supervisors for more than forty years.

1 The Town assigned the traffic supervisors to specific locations, which they bid on
2 based upon seniority. They stopped traffic by utilizing handheld stop signs in order that
3 students could cross streets and parking areas near the schools and buses could enter
4 and exit the schools' driveways. They also prevented motor vehicles from blocking
5 crosswalks near the school and ensured that the schools' driveways were clear. They
6 activated and deactivated warning lights, which indicated that the speed limit was
7 twenty miles per hour at certain times of day. The traffic supervisors also reported any
8 suspicious individuals or activities that they observed near their assigned schools and
9 prevented unleashed dogs from wandering into the school buildings.

10 Parties' Collective Bargaining History

11 The traffic supervisors were members of a bargaining unit that AFSCME
12 represented for the purposes of collective bargaining. The last fully integrated collective
13 bargaining agreement between the Town and AFSCME was, by its terms, in effect from
14 July 1, 1999 through June 30, 2002 (1999-2002 Agreement). The 1999-2002
15 Agreement contained provisions for paid leave, including personal, sick and
16 bereavement leave, a uniform allowance, a cleaning allowance and a sick leave
17 buyback provision. The 1999-2002 Agreement also contained a two-step wage scale,
18 with the last year of the agreement, in effect from July 1, 2001 through June 30, 2002,
19 containing daily wages of \$32.41 at step one and of \$33.06 at step two. On September
20 12, 2003, AFSCME and the Town subsequently entered into a Memorandum of
21 Agreement for the period July 1, 2002 through June 30, 2004 (2002-2004 Agreement),
22 which continued the provisions of the 1999-2002 Agreement, but provided for a 3%
23 increase in the daily wage rate effective July 1, 2002 and a 3% increase in the daily

1 wage rate effective June 30, 2003. On March 25, 2005, the parties entered into a
2 Memorandum of Agreement for the period July 1, 2004 through June 30, 2007 (2004-
3 2007 Agreement), which increased the daily wage rate by: 2% effective July 1, 2004,
4 3% effective July 1, 2005 and 4% effective July 1, 2006, and also introduced an annual
5 longevity payment for unit members with fifteen years or more of service.

6 In April of 2010, AFSCME and the Town entered into a Memorandum of
7 Agreement that, by its terms, was in effect for the period July 1, 2009 through June 30,
8 2010 (2009-2010 MOA). The 2009-2010 MOA was in effect when the events that form
9 the basis of Count I of the Complaint took place. The 2009-2010 MOA stated in
10 pertinent part:

11 Whereas, the Town and the Union are parties to a collective bargaining
12 agreement for the period July 1, 2004 through June 30, 2007; and
13

14 Whereas the Town and the Union have, pursuant to Massachusetts
15 General Laws Chapter 150E negotiated the terms of a successor
16 agreement.
17

18 Now, therefore, in consideration of mutual promises, the parties agree as
19 follows:
20

21 The terms and conditions of employment set forth in the Collective
22 Bargaining Agreement for the period July 1, 2007 through June 30, 2009³
23 shall remain in full force and effect for the period July 1, 2009 through
24 June 30, 2010, except as amended herein.
25

26 Wage Salaries and Job Classifications: Effective January 1, 2010,
27 increase the salary schedule in effect on December 31, 2009 by two and
28 one-half (2.5%) percent.

³ The parties did not submit into evidence a copy of the Memorandum of Agreement that was in effect from July 1, 2007 through June 30, 2009.

Fiscal Year 2011 Police Department Budget

1 On or about late February, early March of 2010, Police Chief Richard Grimes
2 (Chief Grimes)⁴ submitted the Police Department's proposed FY2011 budget⁵ to the
3 Mayor's Office. In early to mid-March 2010, Mayor Susan Kay (Mayor Kay) informed
4 Chief Grimes that the Police Department's proposed FY2011 budget needed to be
5 reduced by \$453,000.⁶ Chief Grimes then made certain reductions to the proposed
6 FY2011 budget, which included no longer seeking to fill four vacant police positions⁷
7 and ceasing to pay for certain conferences and memberships in organizations. Even
8 with those reductions, Chief Grimes still needed to reduce the proposed FY2011 budget
9 by \$100,000. The proposed 2011 budget contained a line item of \$114,000 to pay for
10 the cost of the traffic supervisors. Chief Grimes was considering whether to eliminate
11 the traffic supervisor positions in order to make the \$100,000 reduction in the proposed
12 budget. Chief Grimes believed that the only alternative cost-saving measure was to
13 eliminate two additional police officer positions, which he declined to do.

14 However, before Chief Grimes made a final decision about whether or not to
15 abolish the traffic supervisor positions, he wanted an estimate of how many students
16 crossed streets and parking areas near the schools with the assistance of the traffic
17 supervisors. He then directed Sgt. Concannon to compile that information. On April 27,

⁴ Chief Grimes had become police chief in October 2009.

⁵ The proposed Police Department budget was \$9.7 million and was level funded from the FY2010.

⁶ Mayor Kay had notified all of the department heads that their proposed departmental budgets for FY2011 needed to be reduced.

⁷ The vacancies were for a lieutenant, a captain and two patrol officers.

1 2010, Sgt. Concannon sent a memorandum to Chief Grimes with the requested
 2 information. The memorandum stated in pertinent part:

3 Recently, the department⁸ conducted a student count at the [T]own's 14
 4 crossings where crossing guards are stationed. When man power
 5 permitted, we did a morning and afternoon count two days in a row. The
 6 following is a summary of those counts.

7

8 April 7, 2010 Wednesday 70 degrees⁹

9

10 Academy Ave School	AM-24	PM-28
11 Bridge at Green	AM—0	PM-0
12 Wessagussett School	AM-13	PM-9
13 Lower Jackson Square	AM-2	PM-3
14 Park Ave. and Pleasant	AM-3	PM-[Blank]

15

16 April 8, 2010 Thursday 60 degrees

17

18 Academy Ave. School	AM-41	PM-67 ¹⁰
19 Bridge at Green	AM-0	PM-0
20 Wessagussett School	AM-10	PM-16
21 Lower Jackson Square	AM-2	PM-3
22 Park Ave at [and] Pleasant	AM-11	PM-[Blank]

23

24 April 12, 2010 Monday 60 degrees

25

26 West at Mill	AM-4	PM-6
27 Seach School	AM-1	PM-13
28 Middle at Washington	AM-0	PM-2
29 Pingree School	AM-17	PM-42
30		to[o] many to count
31		numerous kids from
32		Chapman

33

34 April 14, 2010 Wednesday 60 degrees

⁸ Some of Sgt. Concannon's subordinates in the Traffic Division, including motorcycle officers and other police officers, conducted the count.

⁹ Sgt. Concannon also listed the temperature on the observation days.

¹⁰ Certain schools had significantly higher student counts than other locations because parents would drop students off on a small side street or an adjacent park and the traffic supervisors would help the students to safely cross the street or driveway into the schools.

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Seach School	AM-3	PM-7
Middle at Washington	AM-0	PM-1
Pingree School	AM-11	PM-[Blank]

to[o] many to count
as numerous kids from
Chapman

April 26, 2010 Tuesday 50 degrees

Union Street School	AM-3	PM-3
Ralph Talbot School	AM-5	PM-22
Murphy School	AM-8	PM-12
Sacred Heart School	AM-2	PM-[Blank]

NOTE: [At] [m]ost schools such as the Union Street School, Seach School, and Ralph Talbot School the parents drive to the school and park on the road. They then walk their children to the school. Because of time constraints, we were unable to do the Chapman School. In the past, we have found that most of the kids crossing on Middle Street are crossing to get in the cars that are parked on the east side of the street.

At the end of April or the beginning of May 2010, Chief Grimes sent Mayor Kay a revised, proposed police department budget for FY2011 that contained no funding for the traffic supervisors. The Mayor then sent a comprehensive budget for all departments to the City Council, which also contained no funding for the traffic supervisors. The City Council subsequently approved the Mayor's budget.

On May 19, 2010, Cindy DePina (DePina), the Town's Human Resources Director, sent each of the traffic supervisors, including the local union president Rose "Bonnie" Hayes (Hayes),¹¹ a copy of the following letter:¹²

I am writing this letter to officially inform you that due to recent budget cuts in the Town of Weymouth your position will be eliminated effective June 22, 2010.

¹¹ Hayes had been a traffic supervisor since July 1989.

¹² The heading of the letter contained each traffic supervisor's name and address.

1 Attached please find a complete summary of all benefits offered by the
2 Town of Weymouth. Please feel free to contact Human Resources at 781-
3 340-5010 to discuss the impact of this layoff on your benefits.
4

5 Please note that on June 2, 2010, we will have John Murray, Rapid
6 Response Coordinator, conducting two sessions in chambers for all
7 affected employees. John represents the Division of Career Services &
8 the Department of Unemployment Assistance. Additional information
9 regarding John's visit will follow.
10

11 I would also like to take this opportunity to thank you for your service and
12 dedication to the Town of Weymouth. I regret the necessity of this action
13 and wish you well in your future endeavors.

14 The Town previously had not notified Hayes or any other Union representative that it
15 planned to lay off the traffic supervisors.

16 On June 8, 2010, Cara Winslow (Winslow), the Union staff representative for the
17 traffic supervisors' bargaining unit, sent the following letter (June 8, 2010 letter) to

18 Mayor Kay:

19 It has come to my attention that the Town has issued layoff notices to all
20 members in the Traffic Supervisors bargaining unit. As you are aware, the
21 affected employees are represented by AFSCME Council 93, specifically
22 myself.
23

24 AFSCME Council 93, as the exclusive bargaining agent for Local 1395
25 Weymouth Traffic Supervisors expects the Town to respect the law and
26 follow proper notification procedures, prior [emphasis in original] to the
27 implementation of any changes. To date you have failed to notify me of
28 this layoff nor have you bargained the impact of this layoff.
29

30 I will be filing a charge with the Division of Labor Relations for your failure
31 to bargain this issue.
32

33 Please feel free to contact my office at ___ if you have any concerns.
34 Thank you.

35 On June 11, 2010, DePina left a voice mail message for Winslow concerning the June
36 8, 2010 letter but Winslow did not call her back. On June 22, 2010, the Town laid off
37 the traffic supervisors. Thereafter, Hayes questioned both Mayor Kay and mayoral aide

1 Mike Gallagher (Gallagher) whether there was any way that the Town could reinstate
2 the traffic supervisors to their former positions.¹³

3 In Summer of 2010, Chief Grimes and Concannon met with representatives from
4 the Weymouth Schools (school representatives), including Superintendent Mary Jo
5 Livingstone (Superintendent Livingstone), Assistant Superintendent Mathew Ferron
6 (Assistant Superintendent Ferron), Robin Howard (Howard), Director of Transportation,
7 and Thomas Slattery to discuss concerns about students' safety in light of the layoffs of
8 the traffic supervisors. When the school representatives asked the Police Chief whether
9 adults could be present at street crossings to assist students, he responded
10 affirmatively. Chief Grimes said that there was nothing to prevent parents or other
11 adults from monitoring the crosswalks and informing the students when it was safe to
12 cross. He also stated that, unlike like the traffic supervisors, those adults would not
13 have any legal authority to control traffic. Chief Grimes also reminded the school
14 representatives that pursuant to M.G.L.c.89, §11, motorists must stop for pedestrians in
15 crosswalks.

16 In late August 2010, Jane Campbell (Campbell), a former traffic supervisor¹⁴ as

¹³ DePina claimed that she had a three or four minute telephone conversation with Hayes on or about June 12, 2010. During that conversation, Hayes allegedly stated that because the Town had reduced the police department's budget, DePina should not bother discussing the layoffs with Winslow. However, Hayes denied that this conversation with DePina ever took place. I credit Hayes' testimony on this point. It is unlikely that Hayes told DePina not to bother contacting Winslow but that Hayes later questioned both Mayor Kay and Gallagher whether there was any way that the Town could reinstate the traffic supervisors.

¹⁴Campbell had been a traffic supervisor for eighteen years.

1 well as a paraprofessional¹⁵ in the Weymouth schools, received an email message from
 2 the Weymouth Schools concerning openings for the new position of safety guard.¹⁶ The
 3 email message had two attachments.¹⁷ The first attachment was a memorandum dated
 4 August 30, 2010 (August 30, 2010 memorandum) from Superintendent Livingstone to
 5 all interested parties. The memorandum stated in pertinent part:

6 Applications are invited for the following positions for the 2010-2011
 7 school year:

8	9 <u>Schools</u>	10 <u>Position</u>	11 <u>Hrs/Day</u>
12	Weymouth High School	Safety Guard	2
13	Chapman Middle School	Safety Guard	2
14	Adams Middle School	Safety Guard	2
15	Hamilton Primary School	Safety Guard	2
16	Academy Ave. Primary School	Safety Guard	2
17	Nash Primary School	Safety Guard	2
18	Seach Primary School	Safety Guard	2
19	Murphy Primary School	Safety Guard	2
20	Wessagusset Primary School	Safety Guard	2
21	Pingree Primary School	Safety Guard	2
22	Talbot Primary School	Safety Guard	2
23	All Schools	Substitute Safety Guard	TBD

24 **Details:**

- 25
- 26 ■ \$30 per day (regular and sub rate)
- 27 ■ Anticipated start date-9/7/10

28
 29 Application forms may be picked up at the Administration Building,
 30 111 Middle Street, Weymouth, MA 02189.

31
 32 The email message that Campbell received also had a second attachment, which was
 33 entitled Weymouth Public Schools Job Description for the title of School Safety Guard

¹⁵ Campbell has been a paraprofessional for sixteen years.

¹⁶ Several weeks earlier, Hayes had seen an article in the local newspaper about the possible use of volunteers to help students travel safely to and from school.

¹⁷ The two attachments were also present on the Weymouth Schools' website.

1 (Safety Guard Job Description). The Safety Guard Job Description stated in pertinent
2 part:

3 General Duties:
4

5 Under the supervision of the building principal, Safety Guards are
6 expected to provide supervision on and around school property and
7 crosswalks to ensure student safety during arrival and dismissal of school.
8

9 Required Qualifications:
10

- 11 ▪ Valid MA Driver's License
- 12 ▪ Acceptable CORI report
- 13 ▪ Ability to lift and move 10 pounds.
14

15 Specific Duties:
16

- 17 ▪ Will assist students crossing parking areas and streets before and after
18 school.
- 19 ▪ Will activate and de-activate "20 MPH warning lights" at designated times.
- 20 ▪ Will monitor parking lots and property to ensure school procedures are
21 followed.
- 22 ▪ Other duties as assigned by the building principal.
23

24 Schedule:
25

- 26 ▪ AM: 30 minutes before school starts-1 hour shift.
- 27 ▪ PM: 30 minutes before school ends-1 hour shift.
- 28 ▪ Reports all days school is in session.
- 29 ▪ Coverage schedule modified for half-days and special events.
30

31 School Safety Guards will be provided with a fluorescent vest and cap¹⁸
32 and will be trained before starting work.

33 Shortly thereafter, Campbell applied to be a safety guard, and the Weymouth
34 Schools subsequently appointed her and eight other applicants as safety guards. The

¹⁸ The record before me does not show that the Weymouth Schools ever actually issued caps to the safety guards.

1 Weymouth Schools assigned those safety guards to locations near the Town's eleven
2 public schools.¹⁹

3 In September 2010, before the students returned to classes, Campbell attended
4 a meeting for safety guards at the Weymouth Schools administration building. Also
5 present were: Howard, who had become the supervisor of the safety guards, Officer
6 Barry (Officer Barry), the police department's safety officer, and Sgt. Concannon. Sgt.
7 Concannon stated that any former traffic supervisors²⁰ should not wear their traffic
8 supervisor uniforms while working as safety guards but instead should wear the solid
9 green vests over their own attire. He also informed the safety guards not to step into
10 traffic and direct the motorists to stop as the traffic supervisors did. Rather, he
11 instructed them to hold up their stop signs,²¹ wait for the motorists to stop, and then to
12 "shepherd" the students across the street.

13 After classes began in September of 2010, Officer Barry²² came to the location
14 where Campbell worked as a safety guard and showed her how to "shepherd" the
15 students while crossing the street or parking area. Officer Barry told Campbell to
16 gather the students around her while she held the stop sign and then to lead them

¹⁹ The Weymouth Schools did not assign safety guards to locations near the Town's three parochial schools.

²⁰ At that time, Campbell was the only safety guard who previously worked as a traffic supervisor. Another former traffic supervisor, Marie Solowin, applied to be a safety guard but ultimately was never hired.

²¹ The stop signs were the traditional red color and octagonal shape but with a handle on the end.

²² Although Chief Grimes indicated that he did not direct anyone in the police department to provide training to the safety guards, he also acknowledged that it would be within the realm of Officer Barry's duties as safety officer to provide such training.

1 across the street or parking area. The safety guards have continued to work for the
2 Weymouth Schools each school year since September 2010.

3 Opinion

4 The issues before me are whether the Town violated Section 10(a)(5) and (1) of
5 the Law when: a) the Town eliminated the traffic supervisors' jobs without providing the
6 Union with notice and an opportunity to bargain over the decision to eliminate the
7 positions and the impacts of that decision on employees' terms and conditions of
8 employment (Count I); and b) the Town, acting through its bargaining agent the School
9 Committee, unilaterally transferred certain job duties from the traffic supervisors to the
10 school safety guards (Count II).

11 Count I-Failure to Bargain Over the Elimination of the Traffic Supervisors' Positions

12 A public employer violates Section 10(a)(5) of the Law when it implements a
13 change in a mandatory subject of bargaining without first providing its employees'
14 exclusive bargaining representative with notice and an opportunity to bargain to
15 resolution or impasse. See School Committee of Newton v. Labor Relations
16 Commission, 338 Mass. 557 (1983). When determining what constitutes a mandatory
17 subject of bargaining, the Commonwealth Employment Relations Board (Board)
18 balances the public employer's interest in maintaining its managerial prerogative to
19 effectively govern against the employees' interest in bargaining about subjects that
20 directly affect wages, hours, standards of productivity and performance and other terms
21 and conditions of employment. Town of Danvers, 3 MLC 1559, 1577 (1977).

22 It is well established that decisions determining the level of services that a
23 governmental entity will provide lie within the exclusive managerial prerogative of the

1 public employer. Town of Danvers, 3 MLC 1554 (1997). However, the means by which
2 the employer achieves that reduction in force, by layoffs or otherwise, and the manner
3 in which those involuntary furloughs directly affect unit members' hours of work and
4 their wages are mandatory subjects of bargaining. School Committee of Newton at 563.

5 The Town contends that its decision to lay off the traffic supervisors was a level
6 of services decision over which it had no obligation to bargain. However, for reasons
7 that I will discuss at greater length as part of the analysis of Count II of the Complaint,
8 this was not a level of services decision because the Town did not cease to have
9 employees assisting students to safely cross streets and parking areas near the Town's
10 eleven public schools. Instead, the Town assigned those duties to other newly hired
11 employees, the safety guards.

12 The safety guards' work schedule is the same as the work schedule that the
13 traffic supervisors had. Specifically, the safety guards work one hour in the morning
14 and one hour in the afternoon each day when the schools are open. However, the
15 safety guards daily pay rate of \$30 is significantly less than the daily pay rate of the
16 traffic supervisors, and the safety guards do not receive the same contractual benefits,
17 including paid leave, longevity pay, clothing allowance and cleaning allowance, which
18 the traffic supervisors received. When a public employer continues to have the same
19 work performed but at a lower cost, the decision to transfer bargaining unit work is not a
20 level of services decision exempt from collective bargaining, but an economically
21 motivated decision particularly suitable to collective bargaining. City of Fall River, 27
22 MLC 47, 51 (2000) (citing Commonwealth of Massachusetts, 26 MLC 161, 163 (2000)
23 (City had duty to bargain before transferring fire dispatch duties to civilian dispatcher);

1 Accord City of Boston, 26 MLC 144, 146 (2000) (decision to have the same work of
2 policing municipal housing authorities performed, but by employees who will cost the
3 City less money is a mandatory subject of bargaining).

4 Having decided that the Town had an obligation to bargain over the decisions to
5 eliminate the traffic supervisors' jobs and to lay off the incumbents in those positions, I
6 turn to consider whether it did so. The facts before me show that prior to May 19, 2010,
7 the Town never notified the Union that it was considering the elimination of the traffic
8 supervisors' jobs. On May 19, 2010, the Town notified the traffic supervisors, including
9 the local Union president Hayes, that their jobs would be eliminated effective June 22,
10 2010 and that a representative from the state Division of Career Services and
11 Department of Unemployment Assistance would be meeting with them on June 2, 2010.
12 In a June 8, 2010 letter, Winslow, the Union's business agent, protested the Town's
13 failure to provide the Union with advance notice of the layoffs and an opportunity to
14 bargain and told DePina, the Town's human resources director, to contact her if she had
15 concerns. DePina left a voice mail message for Winslow on June 11, 2010, concerning
16 Winslow's June 8, 2010 letter.

17 The City now asserts that because Winslow did not return DePina's June 11,
18 2010 voice mail message, the Union waived by inaction its right to seek bargaining.
19 The Board will not apply the doctrine of waiver by inaction where the union is presented
20 with a fait accompli, where, "under all the attendant circumstances, it can be said that
21 the employer's conduct has progressed to a point that a demand to bargain would be
22 fruitless." Town of Hudson, 25 MLC 143, 148 (1999); Holliston School Committee. 23
23 MLC 211, 212-213 (1997); quoting Scituate School Committee, 9 MLC 1010, 1012

1 (1982); City of Everett, 2 MLC 1471 (1976). Here, the Town presented the Union with a
2 fait accompli by issuing the employees layoff notices with a firm date when their
3 employment would end and bringing in a speaker to inform them about their eligibility for
4 unemployment benefits and retraining. Additionally, the record does not reveal that
5 when DePina left a voice mail message for Winslow, she rescinded the May 19, 2010
6 layoff letters or that she gave the Union any indication that the Town was willing to
7 bargain with the Union over the layoffs. Accordingly, I find that the Town violated
8 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by eliminating the traffic
9 supervisors' jobs without giving the Union prior notice and an opportunity to bargain to
10 resolution or impasse over the decision to eliminate the jobs and the impacts of that
11 decision.

12 Count II-Transfer of Bargaining Unit Work

13 Town as the Respondent

14 As a preliminary issue, I must consider whether the Town is the proper
15 respondent to the unlawful transfer of unit work claim. The Town asserts that the
16 School Committee is a separate employer over which the Town has no control and,
17 therefore, the Town is not responsible for the School Committee's actions. Section 1 of
18 the Law defines "employer" as: any "town ... acting through its chief executive officer....
19 In the case of school employees, the municipal employer shall be represented by the
20 school committee or its designated representative or representatives." The School
21 Committee, therefore, is not a separate municipal employer but the Town and the
22 School Committee are a single employing entity under Chapter 150E and jointly share
23 responsibility when bargaining obligations have not been fulfilled. See City of Malden,

1 21 MLC 1419 (1994), aff'd 23 MLC 181 (1997). See also, Anderson v. Town of
2 Wrentham, 406 Mass. 508, 512 n.7 (1990) (the Town's bargaining agent is the school
3 committee or its representative); Lawrence School Committee, 19 MLC 1167, 1170 n.4
4 (1992); Town of Brookline, 20 MLC 1570, 1598 n.22 (1994). Here, I find that the Town
5 and the School Committee are a single entity for the purpose of determining whether
6 non-bargaining unit personnel assumed certain duties that traffic supervisors previously
7 had performed. See Town of Bridgewater, 25 MLC 103, 104 (1998) (finding that Town
8 unlawfully transferred bargaining unit work when school employees, including school
9 administrators and custodians, took over crossing guard functions after the crossing
10 guards were laid off). Accordingly, I conclude that the Town is the proper respondent in
11 this case.

12 Merits

13 A public employer violates Section 10(a)(5) of the Law when it transfers work
14 performed by bargaining unit members to non-bargaining unit personnel without first
15 giving the exclusive representative of its bargaining unit members prior notice and an
16 opportunity to bargain to resolution or impasse. City of Cambridge, 23 MLC 28, 36
17 (1996), aff'd sub nom. Cambridge Police Superior Officers Association v. Labor
18 Relations Commission, 47 Mass. App. Ct. 1108 (1999). To establish that a public
19 employer has violated the Law, an employee organization must demonstrate that: 1) the
20 employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit
21 work had an adverse impact on individual employees or the bargaining unit itself; and 3)
22 the employer failed to give the employee organization prior notice and an opportunity to

1 bargain to resolution or impasse over the decision to transfer the work. Lowell School
2 Committee, 28 MLC 29, 31 (2001); City of Gardner, 10 MLC 1218, 1219 (1983).

3 I turn first to consider the job duties that the traffic supervisors performed before
4 they were laid off at the end of the 2009-2010 school year. The traffic supervisors
5 worked at assigned posts near the Town's eleven public and three private schools.
6 They helped students to safely cross streets and parking areas and enabled school
7 buses to enter and exit the schools' driveways by stepping into traffic and utilizing
8 handheld stop signs. They ensured that motor vehicles did not block crosswalks and
9 that school driveways were clear. They activated and deactivated speed limit warning
10 lights. They reported any suspicious individuals or activities that they observed near
11 their assigned schools.

12 A review of the safety guards' job duties, which they began to perform at the start
13 of the 2010-2011 school year, shows that they perform many of the same duties as the
14 traffic supervisors. They also work at posts near the Town's eleven public schools,²³
15 where they assist students in crossing streets and parking areas near the schools.
16 They activate and de-activate the 20 MPH warning lights near the schools. Also, they
17 monitor parking lots and school property to ensure school procedures are followed.

18 However, the Town attempts to distinguish between the job duties of the traffic
19 supervisors and the safety guards by emphasizing that the traffic supervisors were
20 authorized under the Town's Code of Ordinance to direct motorists to stop before the

²³ The unlawful transfer allegation only concerns the assignment of the safety guards to the Town's eleven public schools purportedly to perform duties that the traffic supervisors previously performed. The Union does not claim that the Town has assigned safety guards to perform bargaining unit work at the three parochial schools in Town. Rather, it is undisputed that the Town has not assigned safety guards to those schools.

1 students crossed streets or parking areas and to take down the registration numbers of
2 those motorists who refused to stop. The Town notes that the safety guards must raise
3 their stop signs, wait for motorists to stop, and then shepherd the students across the
4 street. The Town also points out that the safety guards report to Howard, the Director of
5 Transportation, while the traffic supervisors reported to Sgt. Concannon. Although the
6 traffic supervisors and the safety guards may have different techniques for stopping
7 traffic and report to different supervisors, both jobs clearly have the same primary
8 function, which is to assist students to safely cross streets and parking areas near the
9 Town's schools. Thus, the safety guards have taken over certain of the traffic
10 supervisors' job duties, even if the safety guards also perform certain additional duties
11 that the building principals may assign to them, which are referenced in a catchall
12 provision in the job description for the safety guard position. See Commonwealth of
13 Massachusetts, 26 MLC 228, 232 (2000) (assigning bargaining unit duties to a new title
14 is a transfer of unit work, even though the new position also performs duties that the
15 bargaining unit members never performed).

16 An employer must bargain about a transfer of unit work if the transfer results in
17 adverse impact on individual employees or the bargaining unit as a whole. City of New
18 Bedford, 15 MLC 1732, 1737 (1989). The traffic supervisors were adversely impacted
19 by the transfer of unit work, because the Town laid them off. Moreover, the bargaining
20 unit was adversely impacted, because it was completely eliminated. Even assuming
21 that the layoffs were caused by an independent factor, i.e. reductions in the proposed
22 FY2011 police department budget, the transfer of unit work still detrimentally impacted
23 the laid off unit members. Here, the Town determined that it was going to provide the

1 services that the traffic supervisors previously performed but to have non-unit personnel
2 provide those services. There is a significant detriment where employees already laid
3 off are deprived of work opportunities because the union is denied any opportunity to
4 bargain about recalling them to perform unit work. See City of Gardner, 10 MLC at
5 1220-1221 (finding that laid off refuse workers suffered a detriment when City did not
6 bargain about recalling them to perform trash collections). Accordingly, the Town's
7 transfer of the work previously performed by the traffic supervisors to the safety guards
8 had an adverse impact on individual bargaining unit members and to the bargaining unit
9 as a whole, which triggered the Town's statutory obligation to bargain to resolution or
10 impasse with the Union prior to transferring that work. However, the Town did not notify
11 the Union that it planned to transfer unit work to non-unit personnel or bargain with the
12 Union prior to transferring the work at issue. Rather, the Town insisted that it had no
13 obligation to bargain with the Union because the School Committee was a separate
14 employer, a defense which I rejected above.

15 Remedy

16 Section 11 of the Law grants the Board broad authority to fashion appropriate
17 orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7
18 Mass. App. Ct. 826 (1979); Millis School Committee, 23 MLC 99 (1996). The usual
19 remedy when an employer fails to bargain to resolution or impasse over the decision(s)
20 to eliminate a position and/or to transfer bargaining unit work and the impacts of those
21 decisions on unit members' terms and conditions of employment is an order requiring
22 the employer to return to the status quo while bargaining and to make affected
23 individuals whole for any economic losses that they suffered as a direct result of the

1 employer's unlawful conduct. The Town challenges the imposition of such a remedy in
2 the present case by claiming that the expiration of the 2009-2010 Agreement on June
3 30, 2010²⁴ relieved the Town of its obligation to restore the status quo and limited any
4 financial liability that the Town had incurred. The Town argues that a contrary remedy
5 would violate Section 7(a) of the Law and the finding in Boston Housing Authority v.
6 National Conference of Firemen and Oilers, Local 3 (Boston Housing), 458 Mass. 155
7 (2010). In the Boston Housing case, the Supreme Judicial Court found that Section 7(a)
8 of the Law²⁵ revealed a clear legislative intent to limit the term of a collective bargaining
9 agreement to not more than three years. Boston Housing Authority, 458 Mass. at 163.²⁶
10 However, the Town's argument fails to differentiate between its statutory and
11 contractual obligations. Any remedy that I order here is in response to the Town's
12 failure to satisfy its statutory obligation and does not compel the Town to continue the
13 2009-2010 Agreement beyond its expiration date. Cf. School Committee of Newton v.
14 Labor Relations Commission, 388 Mass. 557, 576 (1983) (rejecting the employer's
15 argument that an order requiring back pay dictates an agreement between the parties).

²⁴ The facts before me do not show that the 2009-2010 MOA contained any language extending the terms of the agreement beyond June 30, 2010.

²⁵ When the Boston Housing case issued, Section 7(a) of the Law stated in pertinent part:

Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years, ...

²⁶ Pursuant to Chapter 198 of the Acts of 2011, Section 1, the Legislature amended the language in Section 7(a) of the Law, referenced in footnote 25, by adding the statement:

[P]rovided, however that the employer and the exclusive representative through negotiations may agree to include a provision in a collective bargaining agreement stating that the agreement's terms shall remain in full force and effect beyond the 3 years until a successor agreement is voluntarily negotiated by the parties.

1 Additionally, the Town argues that the Board should adhere to the remedy in
2 Town of Wakefield, 45 Mass. App. Ct. 630 (1998). In the Wakefield case, the Appeals
3 Court upheld the hearing officer's decision (see Town of Wakefield, 20 MLC 1279
4 (1993)) not to reinstate a laid-off master mechanic and to order back pay for a limited
5 period only from the date of the decision until the parties bargained to resolution or
6 impasse. Id. at 632.²⁷ The Wakefield case is distinguishable from the present matter.
7 The Board previously has recognized a distinction between cases in which full back pay
8 is warranted because of an employer's failure to bargain over both a decision to make a
9 change and the impacts of that change, and cases in which the employer only failed to
10 bargain over the impact of a decision that the employer properly could make unilaterally.
11 Newton School Committee, 8 MLC 1538, 1545, 1546 (1981); aff'd sub nom. School
12 Committee of Newton, 388 Mass. at 557. Because the Wakefield case was an "impacts
13 only" bargaining case, the hearing officer ordered the traditional remedy in cases where
14 an employer's refusal to negotiate is limited to the impacts of a managerial decision.
15 See Town of Burlington, 10 MLC 1387, 1388 (1984) (ordering a remedy that strikes a
16 balance between the right of management to carry out its lawful decision and the right of
17 an employee organization to have meaningful input on impact issues while some
18 aspects of the status quo are maintained). Conversely, in the present case, as was
19 discussed supra, the Town had an obligation to bargain over the decisions to eliminate
20 the traffic supervisors' jobs and to transfer bargaining unit work and the impacts of both
21 decisions on terms and conditions of employment.

²⁷ The Appeals Court reversed the former Labor Relations Commission's decision that ordered a remedy reinstating the master mechanic and compensating him for economic losses that he incurred from the date of the layoff. See Town of Wakefield, 22 MLC 768, 1770-1771(1996).

ORDER

1 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town

2 shall:

3 1. Cease and desist from:

4
5 a) Failing and refusing to bargain in good faith with the Union by
6 unilaterally eliminating the traffic supervisors' positions.

7
8 b) Unilaterally transferring bargaining unit work from the traffic
9 supervisors to non-unit personnel, the safety guards, without first
10 giving the Union notice and an opportunity to bargain to resolution
11 or impasse about the decision and the impacts of that decision

12
13 c) In any like manner, interfering with, restraining and coercing its
14 employees in any rights guaranteed under the Law.

15
16 2. Take the following action that will effectuate the purposes of the Law:

17
18 a) Bargain to resolution or impasse with the Union over: a) the
19 decision to eliminate the traffic supervisors' jobs and the impact of
20 that decision on unit members' terms and conditions of
21 employment; and b) the decision to transfer bargaining unit work
22 from the traffic supervisors to the safety guards and the impact of
23 that decision on the traffic supervisors' terms and conditions of
24 employment.

25
26 b) Immediately offer reinstatement to the traffic supervisors without
27 prejudice to their seniority or other rights and privileges;

28
29 c) Restore to the bargaining unit the duties of the traffic supervisors
30 that were transferred to the safety guards.

31
32 d) Make the traffic supervisors whole for any economic losses that
33 they have suffered as a direct result of the Town's decision to
34 eliminate their jobs and/or its decision to transfer bargaining unit
35 work outside of the bargaining unit, plus interest on any sums owed
36 at the rate specified in M.G.L.c.231, Section 6I.

37
38 e) Post immediately in all conspicuous places where members of the
39 Union's bargaining unit usually congregate, or where notices are
40 usually posted, including electronically, if the Town customarily
41 communicates with these unit members via intranet or email and

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display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

- f) Notify the DLR in writing of steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

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 ten days, the 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 Massachusetts Department of Labor Relations has held that the Town of Weymouth (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: a) failing to provide AFSCME Council 93, AFL-CIO (the Union) with prior notice and an opportunity to bargain to resolution or impasse over the decision to eliminate the traffic supervisors' jobs and the impacts of that decision on unit members' terms and conditions of employment; and b) failing to provide the Union with notice and an opportunity to bargain to resolution or impasse over the decision to transfer bargaining unit work from the traffic supervisors to non-bargaining unit personnel, the safety guards, and the impacts of that decision on unit members' terms and conditions of employment.

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 in good faith by unilaterally eliminating the traffic supervisors' jobs.

WE WILL NOT fail to bargain in good faith by unilaterally transferring bargaining unit work from the traffic supervisors to non-bargaining unit personnel, the safety guards.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1. Immediately offer reinstatement to the traffic supervisors.
2. Restore to the bargaining unit the duties of the traffic supervisors that were transferred to the safety guards.
3. Bargain to resolution or impasse with the Union over: a) the decision to eliminate the traffic supervisors' jobs and the impact of that decision on unit members' terms and conditions of employment; and b) the decision to transfer bargaining unit work from the traffic supervisors to the safety guards and the impacts of that decision on the traffic supervisors' terms and conditions of employment.
4. Make the traffic supervisors whole for any economic losses that they have suffered as a direct result of the Town's decision's to eliminate their positions and/or its decision to transfer their bargaining unit work to non-unit personnel, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I.

Town of Weymouth

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, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).