

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

LYNN SCHOOL COMMITTEE

and

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

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Case No.: MUP-14-3539

Date Issued: July 28, 2015

Hearing Officer:

Whitney N. Eng, Esq.

Appearances:

John Mihos, Esq.

- Representing the Lynn School Committee

Erin L. DeRenzis, Esq.

- Representing the American Federation of
State, County and Municipal Employees,
Council 93, AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Lynn School Committee (School
2 Committee) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith
4 when it required Jane Doe to submit to drug testing without first giving the American
5 Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (Union)

1 prior notice and an opportunity to bargain to resolution or impasse over the decision and
2 the impacts of that decision on employees' terms and conditions of employment. I find
3 that the School Committee violated the Law as alleged.

4 STATEMENT OF THE CASE

5 On March 7, 2014, the Union filed a charge of prohibited practice with the
6 Department of Labor Relations (DLR) alleging that the School Committee had engaged
7 in a prohibited practice within the meaning of Sections 10(a)(5) and 10(a)(1) of
8 Massachusetts General Laws, Chapter 150E (the Law). The DLR investigated the
9 charge on April 28, 2014, and issued a Complaint of Prohibited Practice on May 20,
10 2014.¹ The Complaint alleged that the School Committee implemented drug testing
11 without giving the Union prior notice and an opportunity to bargain to resolution or
12 impasse over the decision and the impact of that decision on employee terms and
13 conditions of employment. The School Committee filed an Answer to the Complaint on
14 June 2, 2014.

15 The parties subsequently waived their right to a hearing with witness testimony
16 and agreed to submit evidence in the form of a stipulated record. The Union filed a post-
17 hearing brief on April 2, 2015. The School Committee did not file a post-hearing brief.
18 Based on the record, which includes stipulated facts and documentary exhibits, and in
19 consideration of the parties' arguments, I render the following opinion.

¹ The Complaint of Prohibited Practice shows the date issued as May 20, 2013; however, that date is a typographical error and the correct date of issue is May 20, 2014.

STIPULATED FACTS²

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1. The City of Lynn (City) is a public employer within the meaning of Section 1 of the Law.
2. The Lynn School Committee (School Committee) is the City's collective bargaining representative for the purpose of dealing with school employees.
3. AFSCME Council 93, (the Union) is an employee organization within the meaning of Section 1 of the Law.
4. The Union is the exclusive bargaining representative for a bargaining unit of employees including employees that work for the School Committee.
5. Jane Doe (a pseudonym) is a member of the Union's bargaining unit.
6. Prior to becoming a member of the bargaining unit, Jane Doe failed two pre-employment drug screens with a positive result.
7. Notwithstanding this fact, Jane Doe was hired by the School Committee in 2007 as a Cafeteria Helper and appointed as a permanent Civil Service employee pursuant to M.G.L. Chapter 31. A year from her date of hire, Jane Doe successfully completed her probationary period.
8. The School Committee officially appointed Jane Doe as permanent Civil Service in December of 2007.
9. In December of 2013, the School Committee received an email from the City of Lynn Retirement Board asking for a copy of Jane Doe's pre-employment physical.
10. On or about January 13, 2014, AFSCME, Local 1736 Vice President, Rich Germano became aware that the School Committee had scheduled Jane Doe for a pre-employment physical and drug test.
11. The School Committee took the action described in paragraph (10) ten without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to require Jane Doe to take drug screening tests or a physical and the impact of that decision.

² If there is a conflict between a stipulated fact and the findings in the DLR's Complaint of Prohibited Practice or the School Committee's Answer, the parties agreed to resolve such conflict in favor of the stipulated facts.

- 1 12. The Union sent a letter to Schools Business Manager, Kevin McHugh
2 indicating that Jane Doe was made permanent in 2007 and has been an
3 employee for at least seven years.
- 4
- 5 13. The Union's correspondence went on to say that as a seven year employee,
6 Jane Doe is not subject to a pre-employment physical or drug testing.
7
- 8 14. The Union demanded that the School Committee cease and desist from
9 sending Jane Doe or any other bargaining unit member to any such physical
10 or drug testing.
- 11
- 12 15. Following the Union's correspondence, the School Committee met with the
13 Union on February 26, 2014, and related its plan to order Jane Doe to submit
14 to drug testing.
- 15
- 16 16. The Union maintained its objection.
- 17
- 18 17. No bargaining took place at this meeting, referred to in paragraph 15.
- 19
- 20 18. On February 27, 2014, the School Committee directed bargaining unit
21 member Jane Doe to have a drug screening test within the next fourteen (14)
22 days.
- 23
- 24 19. The Union promptly filed the instant unfair labor practice.
- 25
- 26 20. The School Committee agreed to forego any drug testing of Jane Doe
27 pending the outcome of the instant matter.
- 28
- 29 21. The Collective Bargaining Agreement between the Union and the School
30 Committee contains no provision for drug testing or employer ordered
31 physicals.
- 32
- 33 22. Prior to January 13, 2014, members of the Union's bargaining unit were not
34 required to submit to drug testing or employer ordered physicals.
- 35

36 OPINION

37 A public employer violates Section 10(a)(5) of the Law when it implements a
38 change in a mandatory subject of bargaining without first providing its employees'
39 exclusive bargaining representative with notice and an opportunity to bargain to
40 resolution or impasse. See School Committee of Newton v. Labor Relations
41 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of

1 employment that are established through past practice as well as conditions of
2 employment that are established through a collective bargaining agreement.
3 Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000); City of
4 Gloucester, 26 MLC 128, 129, MUP-2180 (March 1, 2000); City of Boston, 16 MLC
5 1429, 143, MUP-6697 (December 19, 1989); Town of Wilmington, 9 MLC 1694, 1697,
6 MUP-4688 (March 18, 1983). To establish a unilateral change violation, the charging
7 party must show that: 1) the employer altered an existing practice or instituted a new
8 one; 2) the change affected a mandatory subject of bargaining; and 3) the change was
9 established without prior notice and an opportunity to bargain. Commonwealth of
10 Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994); City of Boston, 20
11 MLC 1603, 1607, MUP-4976 (May 20, 1994).

12 In determining whether a binding past practice exists, the Commonwealth
13 Employment Relations Board (Board) analyzes the combination of facts upon which the
14 alleged practice is predicated, including whether the practice has occurred with
15 regularity over a sufficient period of time so that it is reasonable to expect that the
16 practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436, MUP-
17 2456 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-
18 3586 (January 30, 1997). The Board inquires whether employees in the unit have a
19 reasonable expectation that the practice will continue and looks to whether the practice
20 is unequivocal, has existed substantially unvaried for a reasonable period of time, and is
21 known and accepted by both parties. Commonwealth of Massachusetts, 34 MLC 143,
22 146, SUP-04-5052 (June 17, 2008). A condition of employment may be found despite
23 sporadic or infrequent activity where a consistent practice that applies to rare

1 circumstances is followed each time that circumstances preceding the practice recur.
2 Commonwealth of Massachusetts, 23 MLC at 172.

3 Here, the parties stipulated that, prior to January 13, 2014, the School Committee
4 did not require bargaining unit members to submit to drug testing. Jane Doe is a
5 member of the bargaining unit. The School Committee hired Jane Doe in December
6 2007, and she completed her probationary period in or around December 2008. It is
7 undisputed that, in or around January 2014, the School Committee ordered Jane Doe to
8 submit to a pre-employment drug screening test and physical. When the School
9 Committee ordered her to undergo a drug test, Jane Doe had been a bargaining unit
10 member for approximately seven years. The stipulated facts disclose that the parties'
11 collective bargaining agreement does not contain a provision for drug testing or
12 employer ordered physicals. Therefore, by ordering Jane Doe to undergo a drug
13 screening test, the School Committee altered the parties' past practice.

14 The parties also stipulated that the School Committee scheduled Jane Doe for a
15 drug screening test without giving the Union prior notice and an opportunity to bargain
16 to resolution or impasse over the decision to require Jane Doe to take a drug screening
17 test and a physical and the impacts of that decision. Thus, the question to be decided is
18 whether the School Committee is obligated to bargain with the Union over its decision to
19 require Jane Doe to undergo a drug test.

20 To determine whether a matter is a mandatory subject of bargaining, the Board
21 balances the interests of employees in bargaining over a particular subject with the
22 interests of the public employer in maintaining its managerial prerogatives, and
23 considers factors like the degree to which the issue has a direct impact on terms and

1 conditions of employment, whether the issue concerns a core governmental decision, or
 2 whether it is far removed from terms and conditions of employment. Commonwealth of
 3 Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999). Permissive subjects of
 4 bargaining involve the type of governmental decision which should be reserved for the
 5 sole discretion of the elected representatives. Town of Danvers, 3 MLC 1559, 1577,
 6 MUP-2292, 2299 (April 6, 1977). The Board has long held that drug testing is a
 7 condition of employment that constitutes a mandatory subject of bargaining. See Town
 8 of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000)(finding that drug testing is a
 9 mandatory subject of bargaining). Therefore, the School Committee's requirement that
 10 Jane Doe submit to a drug test is a change to a mandatory subject of bargaining.

11 CONCLUSION

12 Based on the record and for the reasons stated above, I conclude that the School
 13 Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law
 14 when, on February 27, 2014, it ordered Jane Doe to take a drug test without giving the
 15 Union prior notice and an opportunity to bargain to resolution or impasse over the
 16 decision and the impacts of that decision on employees' terms and conditions of
 17 employment.

ORDER

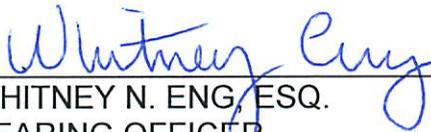
WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT the Lynn
 School Committee shall:

1. Cease and desist from;
 - a) Unilaterally ordering bargaining unit members to take a drug test;
 - b) Failing or refusing to bargain collectively in good faith with the Union about ordering bargaining unit members to take drug tests;

- c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.
2. Take the following action that will effectuate the purposes of the Law:
- a) Restore the past practice of not requiring bargaining unit members to take drug tests;
 - b) Upon request, bargain in good faith with the Union to resolution or impasse about ordering bargaining unit members to take drug tests;
 - c) Post immediately in all conspicuous places where members of Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the School Committee customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
 - d) Notify the DLR in writing of the 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



WHITNEY N. ENG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties



**THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS**

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE DEPARTMENT OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Department of Labor Relations has determined that the Lynn School Committee (School Committee) violated Sections 10(a)(5) and, derivatively, (a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by requiring that a bargaining unit member take a drug test.

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 require bargaining unit members to take drug tests.

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

WE WILL, upon request, bargain in good faith with the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO to resolution or impasse about requiring bargaining unit members to take drug tests.

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