

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

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PLYMOUTH SCHOOL COMMITTEE

Case No. MUP-14-3623

*
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and

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COLLECTIVE BARGAINING
RELIEF ASSOCIATION

Date Issued: October 20, 2015

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Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Michael J. Long, Esq.

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Representing the Plymouth
School Committee

Leslie C. Carey, Esq.

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Jack J. Canzoneri, Esq.

-

Representing the Collective

Dennis M. Coyne, Esq.

-

Bargaining Relief Association

HEARING OFFICER DECISION

SUMMARY

1 The issue is whether the Plymouth School Committee (Employer) violated
2 Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws,
3 Chapter 150E (the Law) by increasing the job duties and workload of custodians, who
4 work the night shift (night custodians) at Plymouth Community Intermediate School
5 (PCIS) when it unilaterally required them to empty recycling bins. I find that the
6 Employer violated the Law by unilaterally increasing the workload of the PCIS night

1 custodians but dismiss the allegation that the Employer unilaterally increased their job
2 duties.

3 STATEMENT OF THE CASE

4 On April 17, 2014, the Collective Bargaining Relief Association (COBRA) filed a
5 charge of prohibited practice with the Department of Labor Relations, alleging that the
6 Employer violated Sections 10(a)(5), (3) and (1) of the Law. A DLR hearing officer
7 investigated the charge on June 17, 2014. On August 19, 2014, the investigator issued
8 a complaint alleging that the Employer violated Section 10(a)(5) and, derivatively,
9 Section 10(a)(1) of the Law by unilaterally requiring PCIS custodians to empty recycling
10 bins without giving COBRA prior notice and an opportunity to bargain to resolution or
11 impasse.¹ The Employer filed its answer on September 2, 2014.

12 I conducted a hearing on April 7 and 8, 2015. Both parties had an opportunity to
13 be heard, to examine witnesses and to introduce evidence. The parties submitted their
14 post-hearing briefs on June 8, 2015. Upon review of the entire record, including my
15 observation of the demeanor of the witnesses, I make the following findings of fact and
16 render the following opinion.

17 Stipulated Facts

- 18 1. The Plymouth School Committee (Employer) is a public employer within the
- 19 meaning of Section 1 of G.L.c.150E (the Law).
- 20
- 21 2. The Collective Bargaining Relief Association (Union or COBRA) is an employee
- 22 organization within the meaning of Section 1 of the Law.
- 23

¹ The investigator dismissed the allegation that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law COBRA did not file a request for review pursuant to 456 CMR 15.04(3) of the portion of the charge that the investigator dismissed.

- 1 3. COBRA is the exclusive bargaining representative for custodians working in the
- 2 Plymouth schools.
- 3
- 4 4. Six COBRA member custodians currently work at the Plymouth Community
- 5 Intermediate School (PCIS) during the after school hours. These custodians are
- 6 called "night custodians."
- 7
- 8 5. On April 4, 2014, PCIS Principal Brian Palladino sent head custodian, Tim Anti,
- 9 an email stating: "Tim, Please have the night custodians empty the recycling bins
- 10 nightly. Thanks." Mr. Anti responded by email on that same day: "o.k., is that
- 11 classrooms only."
- 12
- 13 6. Prior to December 19, 2012, AFSCME Local 2824 (AFSCME) was the exclusive
- 14 representative for the custodians at PCIS. The collective bargaining agreement
- 15 ("CBA") between the Plymouth School Committee and the union (AFSCME)
- 16 previously representing the custodians expired on June 30, 2012. On December
- 17 19, 2012, the DLR certified COBRA as the exclusive bargaining representative
- 18 for the custodians at PCIS. In April 2014, COBRA and the School Committee
- 19 were engaged in overall negotiations for an initial collective bargaining
- 20 agreement (the previous CBA having expired in 2012 and being between the
- 21 School Committee and AFSCME).
- 22
- 23 7. On April 4, 2014, the School Committee began requiring bargaining unit
- 24 members to empty recycling materials from PCIS classrooms.
- 25
- 26 8. At each of the following Plymouth schools, both students and teachers (but not
- 27 custodians) emptied recycling bins prior to April 2012:
- 28 Plymouth Middle School
- 29 Hedge Elementary
- 30 Cold Springs Elementary
- 31
- 32 At the following school, students emptied recycling bins prior to August 2012, and
- 33 custodians also (in conjunction with students) emptied recycling bins prior to April
- 34 2014:
- 35
- 36 West Elementary
- 37
- 38 At each of the following Plymouth schools, custodians emptied recycling bins
- 39 prior to April 2014:
- 40
- 41 Manoment Elementary
- 42 Indian Brook Elementary
- 43 Nathaniel Morton Elementary
- 44 Federal Furnace Elementary

FINDINGS OF FACT²

1 Background

2 The Employer operates thirteen schools with an enrollment of nearly 8,000
3 students as well as two administrative buildings, a technology building and a training
4 building. The Facilities Services Department (Facilities) maintains the infrastructure and
5 provides services to those buildings. Facilities has eighty-one employees, which
6 includes custodians, head custodians and skilled craftspeople. For custodial staffing
7 purposes, the Employer designates the schools as small, medium or large based upon
8 their sizes. The small schools, all of which are elementary schools, typically only have
9 one custodial employee, a head custodian, assigned to each of them. Those head
10 custodians usually work from approximately 6:30 AM to 3PM on the so-called day shift.
11 The medium-sized schools³ typically only have a head custodian assigned to the day
12 shift but have several custodians assigned to work from 3 PM to 11:30 PM, on the so-
13 called night shift. The large schools have a head custodian and various custodians
14 assigned to the day shift as well as various custodians assigned to the night shift.⁴

15 All custodians, whether they work on the day, night or overnight, have the same

²The DLR's jurisdiction in this matter is uncontested.

³ The Employer refers to the medium-sized schools as satellite schools.

⁴ Plymouth North High School is the only school that has custodians who work on the overnight shift.

1 job description, which has remained unchanged since 1990. The job description lists
2 the following responsibilities:⁵

- 3 1. Ensures routine cleanliness, maintenance, repair and troubleshooting for all
4 building needs during a particular shift.
- 5
6 2. Performs routine manual labor associated with cleaning and maintaining
7 buildings and grounds including, but not limited to, sweeping, vacuuming,
8 washing, scrubbing, stripping, waxing and refinishing floors, polishing furniture,
9 dusting, cleaning windows, furniture, walls, and fixtures, shampooing carpets,
10 cleaning rest rooms and removing trash.
- 11
12 3. Ensures considerable knowledge of hand and power tools, materials, methods
13 and standard practices used in the custodial and maintenance trade.
- 14
15 4. Ensures that all sidewalks, driveways, entry areas and play areas are clean, neat
16 and free of any debris.
- 17
18 5. Performs work requiring climbing on ladders, scaffolding and extended aerial
19 platforms as appropriate.
- 20
21 6. Ensures the maintenance of assigned equipment and a safe, clean assigned
22 work area.
- 23
24 7. Demonstrate a working knowledge of occupational hazards and safety
25 precautions of the trade.
- 26
27 8. Communicates effectively with other custodial and maintenance staff, school and
28 the public as required by the role and as appropriate to assigned tasks.
- 29
30 9. Performs such other duties and assumes such other responsibilities as may be
31 designated by the Head Custodian and/or his designee.

32 The above statements are intended to describe the general nature and
33 level of work being performed by employees assigned to this
34 classification. They are not intended to be construed as an exhaustive list
35 of all responsibilities⁶ and duties required of those in this classification.
36

⁵ The job description for custodian contains a heading entitled Performance Responsibilities, which then lists the duties that are reprinted above. Next to the heading is a parenthetical that states, "include but are not limited to."

⁶ The parties agreed that the custodians perform other duties in addition to the responsibilities listed in the job description.

1 Except where such rights, powers, and authority are specifically relinquished, abridged,
2 or limited by the provisions of this contract, the employer has and will continue to retain,
3 whether exercised or not, all of the rights, powers and authority heretofore had by it, and
4 it shall have the sole right[s], responsibility and prerogative of management of the affairs
5 of the schools and direction of the working forces, including but not limited to the
6 following:

- 7 A. To determine the care, maintenance and operation of the equipment and
8 property used for and on behalf of the purposes of the Town.
- 9
- 10 B. To establish or continue policies, practices and procedures for the conduct of
11 the employer’s business, and from time to time, to change or abolish such
12 policies, practices or procedures. To discontinue processes or operations or to
13 discontinue their performance by employees.
- 14
- 15 C. To select and to determine the number and types of employees required to
16 perform the employer’s operations.
- 17
- 18 D. To prescribe and enforce reasonable rules and regulations for the maintenance
19 of discipline and for the performance of work in accordance with the
20 requirements of the School Department, provided such rules and regulations are
21 made known in a reasonable manner to the employees affected by them.
- 22
- 23 E. To insure that related duties connected with school operations, whether
24 enumerated in job descriptions or not, shall be performed by employees.
- 25
- 26 F. To determine the schedule and hours of duty, and the assignment of employees
27 to work.
- 28
- 29 G. To require from each employee the efficient utilization of his services.
- 30
- 31 H. To require reasonable overtime.
- 32
- 33 I. To employ, transfer, promote or demote employees, or to lay off, terminate, or
34 otherwise relieve employees from duty for lack of work or just cause.

35 ARTICLE XLI
36 Complete Agreement
37

38 This Agreement constitutes the entire agreement of the Committee [Employer] and the
39 Union [AFSCME] arrived at as a result of collective bargaining negotiations, except such
40 amendments hereto as have been reduced to writing and signed by both parties.
41

42 The parties acknowledge that during the negotiations which resulted in this Agreement,
43 each had the unlimited right and opportunity to make demands with respect to any
44 subject matter not removed by law from the area of collective bargaining, and that the

1 understandings arrived at are set forth in this Agreement. Therefore, the Committee
2 and the Union, for the life of this Agreement each voluntarily and unqualifiedly waive the
3 right, and each agrees that the other shall not be obligated to bargain collectively with
4 respect to any subject matter referred to or covered by this Agreement even though
5 such subject or matters may not have been within the knowledge or contemplation of
6 either or both parties at the time that they negotiated, and even though they may not
7 have been mentioned during the bargaining or there may be no mention of them in the
8 Agreement. These provisions may be waived by mutual consent.

9
10 Any waiver or breach of a condition of this Agreement by either party shall not constitute
11 a precedent for future enforcement of all the terms and conditions of this Agreement
12 except to the extent that the informal grievance agreement will be enforceable for the
13 term of this Agreement as to the employee involved.

14
15 All written memoranda, oral or written agreements, policies, and employment and work
16 practices, are existent, effective and enforceable by the Union through the grievance
17 and arbitration procedure only to the extent they are expressly set forth in this
18 Agreement, however, nothing in this Agreement shall prohibit the Union from filing a
19 charge of prohibited practice with the Massachusetts Labor Relations Commission in
20 the event the Union alleges that the Committee has made a unilateral change in
21 working conditions without meeting its obligations under MGL Ch. 150E.

22 The record before me contains no information showing that COBRA and the
23 Employer agreed to extend the provisions of the 2009-2012 Agreement while COBRA
24 and the Employer engaged in negotiations for a collective bargaining agreement. On
25 April 24, 2014, COBRA and the Employer reached a tentative agreement on Article 33,
26 the Management Rights Provision, as well as certain other provisions of a Master
27 Collective Bargaining Agreement for four bargaining units, the custodians, the head
28 custodians, the skilled craftspeople and the cafeteria workers. The parties' list of
29 tentatively agreed items contained the following preamble:

30 Collective Bargaining Relief Association ("Union") and the Plymouth
31 School Committee ("Committee") have reached a tentative agreement as
32 to the following articles of the Master Collective Bargaining Agreement for
33 the four collective bargaining units (Cafeteria, Custodians, Head
34 Custodians, and Skilled Craftspeople), all such tentatively agreed items
35 being subject to the terms and conditions set forth in the Ground Rules:⁸

⁸ The parties did not introduce a copy of the ground rules into the record.

1 The tentatively agreed to Article 33⁹ contained the same language that Article
2 XXXIII of the 2009-2012 Agreement contained with certain amendments. The parties
3 added a sentence to Paragraph E stating:

4 Nothing herein is intended to add to or to subtract from the District's rights
5 in accordance with past practice to assign work performed by one group to
6 one of the other four groups.

7 Also, in Paragraph I, the parties eliminated the word terminate and inserted the words
8 suspend or discipline instead.

9 PCIS

10 The Employer classifies PCIS, which is a single-level structure that opened in
11 1984, as a large school. PCIS is divided into four pods or houses that are named
12 Ranger, Gemini, Mercury and Apollo. Each house has sixteen classrooms, two student
13 bathrooms and a teacher's lounge with two bathrooms, two offices and a common area.
14 In addition to the four houses and the rooms therein, PCIS also has a band room and a
15 room behind it, two music rooms, a theater, a library that is referred to as the IMC, two
16 bathrooms outside of the IMC, a total of fourteen classrooms outside of the IMC with
17 seven classrooms on each side, an art room, vocational technical shops, a gymnasium,
18 a weight room, a girls locker room and a boys locker room, the main office with a
19 bathroom inside the main office, two bathrooms outside the main office, a kitchen and a
20 cafeteria.

21 Prior to 2011, PCIS enrolled students in grades five through eight. The fifth
22 grade students previously attended the Indian Brook Elementary School (Indian Brook),

⁹ COBRA and the Employer used an Arabic number for Article 33 rather than the Roman numeral for Article XXXIII that AFSCME and the Employer used in the 2009-2012 Agreement.

1 a small school that only enrolled kindergarten through fourth grade students.¹⁰ PCIS
2 held classes for the fifth grade students in the fourteen classrooms that are located near
3 the IMC.¹¹ The fifth grade students subsequently attended sixth, seventh and eighth
4 grade at PCIS along with students from other elementary schools.

5 As of the 2010-2011 school year, Indian Brook's enrollment had declined
6 sufficiently that it began to hold its own fifth grade classes rather than send those
7 students to PCIS or Plymouth South Middle School. On or about that time, the
8 Employer altered its school districts, and all students in the Indian Brook district were
9 assigned to Plymouth South Middle School for grades six through eight. However,
10 those students from the Indian Brook district, who already were enrolled at PCIS, were
11 given the option to remain at PCIS until they completed eighth grade.

12 As a result of the changes to the school districts, PCIS's enrollment declined
13 approximately three hundred students to its current enrollment of nearly one thousand
14 students. To compensate for the reduced enrollment, each year PCIS began to
15 eliminate a grade in Apollo. Apollo ceased to have a sixth grade in the 2011-2012
16 school year, a seventh grade in the 2012-2013 school year,¹² and an eighth grade in the
17 2013-2014 school year.¹³

¹⁰ Plymouth South Middle School also had a fifth grade class of former Indian Brook Elementary School students.

¹¹ The IMC has seven classrooms on each side of the library.

¹² The changes in Apollo House caused the Employer to eliminate the positions of an administrator, a guidance counselor, a secretary and several paraprofessionals in the 2012-2013 school year.

¹³ In the 2010-2011 school year, PCIS served five rounds of student lunches each day. As a result of the decline in enrollment, PCIS subsequently reduced the rounds of

1 As of the 2014-2015 school year, Apollo House provided classroom space to: the
2 world languages program, various providers of specialized instruction/services, and an
3 outside entity, the Plymouth Family Collaborative. Five world language teachers had
4 classrooms there where they taught four to five classes per day with approximately
5 twenty to twenty-four students. A speech and language therapist taught between four
6 and five classes per day at Apollo with between one to three students.¹⁴ A reading
7 specialist also had a classroom at Apollo but only taught at PCIS every other day. The
8 reading specialist instructed four to five classes per day with approximately one to three
9 students in each class. A math specialist had a classroom in Apollo where she provided
10 remedial assistance to small groups of students three to four periods per day.¹⁵ An
11 English Language Learners (ELL) teacher also has a classroom there where the
12 teacher instructed classes of four to five students for four to five periods per day. Also,
13 the Plymouth Family Network used classroom(s) in Apollo two to three times per week
14 for its programs for young children.¹⁶ Finally, the Plymouth Area Collaborative¹⁷ rents
15 two classrooms in Apollo where they instruct twenty to twenty four students in life skills.

student lunches to four rounds in the 2013-2014 school year and to three rounds in the 2014-2015 school year.

¹⁴ The students receive speech and language instruction pursuant to their Individualized Education Plans (IEP's).

¹⁵ The math specialist also sometimes attends students' math classes to provide remedial assistance.

¹⁶ The record does not indicate the number of classrooms that the Plymouth Family Network uses.

¹⁷ The collaborative provides services to students on IEP's whose schools in their home communities cannot meet their needs.

1 Custodial Services at PCIS

2 As of the date of the hearing, four custodians, including a head custodian,
3 worked on the day shift at PCIS, while six custodians,¹⁸ Sean Donovan (Donovan),¹⁹
4 Ted George (George),²⁰ Phil Horn (Horn),²¹ Rich O'Keefe (O'Keefe),²² Larry Rumpka
5 (Rumpka)²³ and Brian Sullivan (Sullivan) worked on the night shift. The information
6 contained here about the duties and responsibilities of PCIS custodians is based upon
7 the testimony of Sullivan, who has worked for twenty-nine years as a PCIS night
8 custodian.²⁴ Sullivan is responsible for cleaning Apollo, the IMC,²⁵ the fourteen
9 classrooms near the IMC, the band room and the room behind the band room, several

¹⁸ During the 2014-2015 school year, the Employer promoted Sean Murray, the former team leader on the night shift, to another position in the district and appointed Donovan as the new team leader. However, the Employer did not fill Donovan's former position on the night shift due to PCIS's declining enrollment. Previously, the total number of custodians employed at PCIS had not changed since 1986.

¹⁹ Donovan is the team leader on the second shift and checks to ensure the overall cleanliness of the building. He handles questions from the public and oversees functions and events that take place in the building outside of regular school hours as well as sets up the nets for basketball games. He also is responsible for cleaning the kitchen and the art room.

²⁰ George is responsible for cleaning Gemini.

²¹ Horn is responsible for cleaning the gymnasium, the boys' and girls' locker rooms, the main office area, the main halls in front of the building, and the bathrooms in the main halls.

²² O'Keefe is responsible for cleaning Mercury.

²³ Rumpka is responsible for cleaning Ranger.

²⁴ Sullivan also has been a member of AFSCME's and COBRA's bargaining teams for collective bargaining negotiations since 2007. Although Sullivan indicated that he was not a member of every bargaining team since 2007, he did not specifically identify those round(s) of contract negotiations for which he was a bargaining team member.

²⁵ The IMC also has an office and a workroom.

1 music practice rooms, the offices in the band room, including the music teacher's office
2 and the two band room teachers' offices. Sullivan cleans twenty-two or twenty-three
3 classrooms per evening, which includes the fourteen classrooms near the IMC as well
4 as eight or nine classrooms in Apollo. Four of the sixteen classrooms in Apollo are not
5 in use, and Sullivan does not clean them on a regular basis. One classroom in Apollo is
6 in use only three days per week, while another classroom in Apollo is in use only two
7 days per week. Sullivan cleans those two classrooms only on days when the
8 classrooms are used.

9 Breakdown of Cleaning Tasks Prior to April 2014

10 Sullivan's cleaning duties included vacuuming, emptying trash barrels, cleaning
11 bathrooms and cleaning blackboards. Sullivan spent four hours per day²⁶ vacuuming
12 the twenty-two or twenty-three classrooms, the IMC and the three offices for which he
13 was responsible, including the office in Apollo and the two offices near the band
14 room.²⁷ He spent approximately two hours per day emptying trash barrels in the IMC,

²⁶ On cross-examination, Sullivan conceded that he only estimated the time that he spent on certain tasks, and that those estimates sometimes vary from night to night, especially if he needs to respond to requests from teachers or administrators.

²⁷ Sullivan opined that his cleaning workload increased when the Employer promoted Donovan to team leader, did not fill Donovan's prior position, and reassigned the area that Donovan previously cleaned to the other night custodians. Sullivan based his opinion on the fact that he was responsible for cleaning a larger area after Donovan's promotion. Although Sullivan testified that Donovan was promoted in the 2013-2014 school year, I credit PCIS Principal Brian Palladino's (Palladino) testimony that he promoted Donovan during the 2014-2015 school year. It is more likely that because the principal made the decision to promote Donovan, he would recall the school year when he actually made the promotion.

1 the offices and the classrooms²⁸ into a large trash barrel on four wheels. When the
2 large trash barrel had twelve or thirteen bags in it, Sullivan would take the big barrel
3 outside and empty it into the trash dumpster.²⁹ Sullivan also spent twenty minutes
4 cleaning the two student bathrooms in Apollo and ten minutes cleaning the bathrooms
5 in the Apollo teacher's lounge. Also, Sullivan cleaned the blackboards in three
6 classrooms³⁰ where teachers still used them.³¹

7 Prior History of Recycling

8 1999

9 AFSCME, the Employer and the Town of Plymouth (Town) entered into a
10 handwritten agreement dated December 13, 1999 (December 13, 1999 Agreement)
11 involving a pilot program concerning the recycling of mixed paper at the Federal
12 Furnace School. The December 13, 1999 Agreement indicated that the Employer's
13 portion of the pilot program, in which it would transport mixed paper to the transfer
14 station at South Street, would be completed on March 31, 2000. The Town's
15 Department of Public Works would then transport the mixed paper to the transfer station

²⁸ Each classroom had at least one small trash barrel near the teacher's desk and some classrooms had a second small trash barrel somewhere else in the room.

²⁹ Sullivan emptied the large trash barrel into the trash dumpster by flipping the large barrel up where it sat on the deck of the dumpster. He then reached in and pulled out the bags from the large trash barrel.

³⁰ One of the classrooms is used only three days per week.

³¹ In most of the classrooms, teachers used whiteboards.

1 at South Street from April 13, 2000 until the day after the last day of school.³² The
2 December 13, 1999 Agreement notes that: "This Agreement does not set a precedent
3 for any employee or party involved." The record before me, including the December 13,
4 1999 Agreement, does not show that the Employer assigned recycling duties to
5 custodians at any schools as a result of the pilot program.³³

6 From the end of the pilot program until 2007, the Employer did not have a
7 district-wide recycling program. At PCIS, a science teacher named Warren Phillips
8 (Phillips) had instituted a recycling program prior to 2007. Classrooms and offices had
9 totes where staff and students placed paper and plastic items for recycling. Phillips
10 and students from the advanced readiness learners class emptied the totes on
11 Tuesdays and Thursdays. The PCIS custodians had no duties that involved the
12 recycling program.

13 In 2007, the Town implemented a recycling program for paper, plastic and
14 cardboard items and signs subsequently appeared at the schools urging residents to
15 bring their recyclables to the schools. On Friday, September 21, 2007, then Assistant

³² Director of Facilities Arthur Montrond (Montrond) indicated that the pilot program involved the recycling of paper and plastic items, while the December 13, 1999 Agreement only references the recycling of mixed paper. I need not reconcile the differences in Montrond's testimony and the December 13, 1999 Agreement, because it is not pertinent to the issue before me.

³³ Montrond noted that the pilot program had expanded to other schools but did not identify the other schools or the dates when the program expanded. He also did not recall when the pilot program ended, including whether it ended on the day after the last day of school as provided for in the December 13, 1999 Agreement.

1 Superintendent for Human Resources Carol Young (Young) sent an email to principals
2 at the Employer's various schools stating:³⁴

3 Please email me and let me know if you have any recycling efforts
4 happening in your school. Also, please give me the name of anyone who
5 is heading up recycling efforts for you.

6 We received a letter from AFSCME saying that someone put up signs in
7 front of the schools encouraging the citizens of Plymouth to bring their
8 recycling to the schools. Please let me know if you have a sign such as
9 this at your school and take the sign down immediately. [Emphasis in
10 original]. We have all we can do with trying to get our own going, never
11 mind the [T]own.

12 Please let me know this information by Monday, September 24th.

14 On Wednesday, September 26, 2007, Young sent an email message to Montrond and
15 Robert Gurek (Gurek), the Employer's Business Administrator, commenting:³⁵

16 We have received another "cease and desist" letter AFSCME so it is
17 critical to move our efforts along with the [T]own. Please call Arthur
18 Douylliez³⁶ [Douyillez] to schedule our meeting to resolve this issue. I can
19 meet anytime Monday morning up to 2pm....³⁷

21 On Thursday, September 27, 2007, Gurek sent an email to Young and Montrond
22 inquiring:

23 Just to clarify...

24 The "cease and desist" letters from AFSCME are addressed to us, but are
25 filed [o]n behalf of TOWN OF PLYMOUTH DPW EMPLOYEES [emphasis
26 in original], School Department employees.

27 Is that correct?

³⁴ Young also sent a copy of the email to then Superintendent Barry Haskell (Superintendent Haskell).

³⁵ Young also copied Superintendent Haskell on the email.

³⁶ Douyillez was the DPW's Maintenance Superintendent.

³⁷ Approximately twenty minutes later, Young sent the email message again to Gurek and Montrond with a copy to Superintendent Haskell.

1 On October 4, 2007, Roger Hammond (Hammond), then the DPW's Assistant Director,
2 sent an email to Young stating:

3 Arthur Douvillez asked that I follow up with you regarding the Town's
4 proposal for the removal of mixed paper from the schools. Arthur has
5 some small bins ... that he is going to have painted and lettered for the
6 mixed paper. We only have four so we will concentrate on PNHS,³⁸
7 PSHS,³⁹ PSMS,⁴⁰ and PCIS initially.

8 Shortly thereafter, the Employer began a recycling program that was consistent with
9 Hammond's October 4, 2007 email message.⁴¹ The record before me does not show
10 that the Employer assigned custodians any duties involving the recycling program. At
11 PCIS, students continued to empty the recycling bins.

12 2012

13 On or about November of 2012, a private company approached the Employer
14 with a proposal to place bins in the schools for community members to recycle textiles,
15 including clothing and linens. On November 26, 2012, Montrond sent an email
16 message to two new AFSCME stewards and unit members Patrick McKenna
17 (McKenna) and Mark Reidel (Reidel) stating in pertinent part:

18 As you may or may not know, whenever someone proposes to bring a
19 program into the Schools that may or may not have a conflict with the
20 Union, we send it to the Union Stewards for their approval so that there
21 are no grievances if we were to move forward.
22

³⁸ PNHS is Plymouth North High School.

³⁹ PSHS is Plymouth South High School.

⁴⁰ PSMS is Plymouth South Middle School.

⁴¹ Montrond testified that the 2007 recycling program also involved plastic items and cardboard, while Hammond's October 4, 2007 email only referenced mixed paper. I need not reconcile the differences between Montrond's testimony and Hammond's October 4, 2007 email as it is not material to the outcome of the case.

1 Please see the attached proposal for textile recycling at our Schools and
2 let me know if we can move forward with this opportunity for our Students.

3 In a November 28, 2012 reply, McKenna stated:

4 I received the word today that the union has no issues with the textile
5 recycling program and I will come to the office tomorrow to sign off on it.
6 Thank you for your patience.

7 Thereafter, the Employer implemented the textile recycling program district-wide.
8 Community members put their unwanted textiles in recycling bins at the schools, and a
9 private company removed the recycled textiles from the schools. The Employer did not
10 assign the custodial staff any duties involving the textile recycling program.⁴²

11 2014

12 Prior to April 2014, PCIS custodians did not have any duties involving the
13 school's recycling program. At some point between 2007 and 2014, Phillips retired.
14 The Employer then converted the recycling program into the Going Green Club, an after
15 school activity in which students would empty paper and plastic recyclables from the
16 totes in the classrooms and offices into two-wheel bins. The Going Green Club
17 subsequently did not attract a sufficient number of students to perform those duties.
18 The students in PCIS's basic skills program then began to empty the recycling totes
19 during the school day as a life-learning skill.⁴³ Because the students were only

⁴² Neither AFSMCE nor the Employer introduced any proposals concerning recycling at successor contract negotiations in the period from 1986 through 2012.

⁴³ The students in the Basic Skills Program also performed other duties around the school, including mail delivery.

1 available for a limited period of time each day, they were unable to empty all the totes
2 that were full.⁴⁴

3 In late March or early April 2014, Palladino held a meeting with his administrative
4 staff, his secretary and the head of special education. At that meeting, one of the
5 administrators relayed complaints that the administrator had received about recycling
6 totes not being emptied. Palladino indicated that he would investigate how other
7 schools handled the recycling of paper and plastic items. Palladino contacted then
8 Pamela Gould (Gould), Assistant Superintendent for Human Resources, who suggested
9 that he raise the issue at the next meeting of the Employer's principals, coordinators
10 and directors, the so-called PCD meeting, which usually occurred every two or three
11 weeks. At that meeting, Palladino asked other attendees how recycling was done at
12 their schools. From the answers that he received, Palladino became aware of
13 differences in how the schools' operated their recycling programs, which included
14 schools at which the custodians emptied the recycling totes. After subsequently
15 speaking with Gould, Palladino decided to assign the PCIS custodians to empty the
16 recycling totes and bins. On Friday, April 4, 2014, Palladino sent an email to Anti
17 stating:

18 Please have the night custodians empty the recycling bins nightly.

19 Anti then ordered the custodians to do so.

20 COBRA's Response

21 When COBRA president Dale Webber became aware of Palladino's April 4, 2014
22 email to Anti, he consulted with COBRA's legal counsel Jack Canzoneri (Canzoneri)

⁴⁴ Pursuant to state educational requirements, the students could only spend a finite amount of time outside of the classroom.

1 about the matter. On April 7, 2014, Canzoneri sent an email message to Employer's
2 counsel protesting the Employer's order that night custodians empty the recycling
3 containers and seeking a rescission of that order and a restoration of the status quo that
4 night custodians not perform this duty.⁴⁵

5 Recycling Duties After April 4, 2014

6 In Sullivan's assigned area, the classrooms, the IMC and the band room all had
7 two recycling totes for paper and plastic items, including water bottles and juice
8 bottles.⁴⁶ When Sullivan emptied the trash barrels in those areas, he also checked the
9 recycling totes.⁴⁷ Typically, the recycling totes are approximately two feet long,
10 eighteen inches wide and eight or nine inches deep and made of hard plastic.⁴⁸ When
11 the recycling totes were approximately fifty percent full, he emptied them into bins that
12 were segregated for paper or plastic recyclables. He emptied five totes per night into
13 large barrels referred to as bins. Bins were three to four feet high with two wheels, a
14 handle and a lid, and Sullivan placed plastic liners in those bins that were used for
15 plastic recyclables. Sullivan spent approximately ten to fifteen minutes per night

⁴⁵ Neither COBRA nor the Employer introduced any proposals regarding recycling during negotiations for the parties' first collective bargaining agreement.

⁴⁶ Sullivan's assigned work area had thirty-six recycling totes, which included twenty in the classrooms, fourteen in the IMC, and two in the band room.

⁴⁷ Sullivan and the other night custodians do not sort recyclables as the paper and plastic items already are segregated in the totes. If an individual puts a non-recyclable item in a tote, Sullivan will take it out of the recycling tote and put it in a trash barrel.

⁴⁸ There is some variation in the size of the recycling totes. Many recycling totes are blue in color, while some of the totes, which the Town of Plymouth supplied, are green in color.

1 emptying the contents of the totes into the bins.⁴⁹ When the bins became seventy-five
2 percent full, Sullivan wheeled them outside to the dumpsters that held paper and plastic
3 recyclables, which were located near the kitchen. Sullivan emptied the bins into the
4 recycling dumpsters once or twice per week, and spent approximately fifteen minutes
5 taking the bin from the building, emptying its contents in the dumpster and returning the
6 bin.⁵⁰ Sullivan slid open one of the three doors on each side of the dumpsters, lifted the
7 bin up to the lip of the door, moved aside any recyclables in the dumpster obstructing
8 the door, pushed the bin inside the dumpster, lifted up the bin and shook it against the
9 roof of the dumpster to loosen the recycling materials inside of the bin. When he
10 returned the bin inside the school, he placed a clean liner in the bin.

11 Sullivan cleaned the bins by bringing them to the pot room near the kitchen,
12 inverting them and placing them inside the barrel-cleaning machine. Sullivan cleaned
13 bins in the barrel-cleaning machine two times per month and spent five to ten minutes
14 cleaning each barrel. Sullivan also cleaned one to three totes per week by washing
15 them in the slop sink in the custodian's Facility Room and letting them dry. He spent
16 five to six minutes cleaning each tote. Prior to April 2014, Sullivan had not cleaned
17 totes during the school year. In prior summers, the custodians had washed out all of
18 the totes and continued to do so in the summer of 2014.

19 Other Schools

⁴⁹ Sullivan's assigned area had five bins in total, including one bin in the IMC, one bin in the hall outside the IMC, and three bins in Apollo's common area.

⁵⁰ When there was snow on the ground, Sullivan needed an additional five to eight minutes to bring the bins outside, to empty them, and to return them to the building.

1 Prior to April 2014, certain schools had teachers, students, custodians or a
2 combination of those groups emptying recycling bins. Both teachers and students but
3 not custodians emptied recycling bins at the Plymouth South Middle School, the Hedge
4 Elementary and the Cold Springs Elementary. Both students and custodians emptied
5 recycling bins at the West Elementary School. Custodians emptied recycling bins at the
6 following elementary schools: Manomet, Indian Brook, Nathaniel Morton and Federal
7 Furnace.

8 OPINION

9 The issue before me is whether the Employer unilaterally required PCIS
10 custodians to empty recycling bins in violation of Section 10(a)(5) of the Law. A public
11 employer violates Section 10(a)(5) of the Law when it implements a change in a
12 mandatory subject of bargaining without first providing its employees' exclusive
13 bargaining representative with notice and an opportunity to bargain to resolution or
14 impasse. See School Committee of Newton v. Labor Relations Commission, 338 Mass.
15 557 (1983). The duty to bargain extends to both conditions of employment that are
16 established through a past practice as well as conditions of employment that are
17 established through a collective bargaining agreement. Town of Burlington, 35 MLC 18,
18 25, MUP-04-4157 (June 30, 2008), aff'd sub nom. Town of Burlington v. Commonwealth
19 Employment Relations Board, 85 Mass. App. Ct. 1120 (2014); Commonwealth of
20 Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To establish a unilateral
21 change violation, the charging party must show that: 1) the employer altered an existing
22 practice or instituted a new one; 2) the change affected a mandatory subject of
23 bargaining; and 3) the change was established without prior notice and an opportunity

1 to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20, 1994);
2 Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

3 Here, the facts before me show that prior to April 4, 2014, custodians at PCIS did
4 not empty recycling totes of paper or plastic items or perform any other recycling duties,
5 except clean the recycling totes on an annual basis during the summer. Further, on
6 April 4, 2014, the Employer's agent PCIS Principal Palladino sent an email to Anti, the
7 head custodian, ordering night custodians to empty the recycling bins on a daily basis.
8 Thus, the Employer instituted a new practice whereby PCIS night custodians must
9 empty recycling bins each shift.

10 COBRA contends that this new practice increased both the job duties and
11 workload of the PCIS night custodians. Both job duties (see Town of Danvers, 3 MLC
12 1559, 1576, MUP-2292, 2299 (April 6, 1997)) and workload (see Commonwealth of
13 Massachusetts, 27 MLC 70, 72, SUP-4503 (December 6, 2000)) are mandatory
14 subjects of bargaining. For the reasons set forth below, I conclude that the PCIS night
15 custodians did not perform new job duties as a result of the assignment but that their
16 workload increased.

17 Job Duties

18 The custodian's job description indicates that incumbents in the position perform
19 routine manual labor associated with the cleaning and maintaining of the Employer's
20 buildings and grounds, including trash removal. Sullivan, a long-time PCIS night
21 custodian, described how the classrooms, offices and other sites contained small trash
22 barrels, which he subsequently emptied into large wheeled barrels. When the large-

1 wheeled barrels became full, he emptied the large wheeled barrels into a freestanding
2 receptacle outside of the building but on school grounds.

3 PCIS schools emptied the recycling totes in a similar manner. When Sullivan
4 emptied the small trash barrels, he also checked on the recycling totes in the various
5 rooms. If the totes for paper or plastic recyclables were half-full, he emptied the
6 recycling totes into large wheeled bins that held only paper or plastic recyclables. When
7 those bins became seventy-five percent full, he took them outside of the building and
8 emptied them into freestanding receptacles for paper or plastic items, which were on the
9 school grounds. PCIS night custodians were not responsible for sorting recyclables,
10 which arguably would be an additional job duty, because the paper and plastic items
11 were already segregated in separate totes in the rooms.⁵¹

12 Furthermore, trash and recyclables are both types of refuse. I am not persuaded
13 by COBRA's argument that the emptying of trash is different from the emptying of
14 recyclables akin to the differences in teaching children and adults. There are
15 pedagogical differences in the teaching of children and adults. At PCIS, there are no
16 differences in the manner in which custodians empty small trash barrels and the way
17 that they empty recycling totes. On the facts as presented here, the emptying of the
18 recycling bins is a duty that is subsumed in the duty of trash removal. Because trash
19 removal already was a job duty of custodians, I conclude that the requirement that PCIS
20 custodian empty recycling totes did not constitute a change in their job duties.

21 Workload

⁵¹ If an individual inadvertently put an item in the recycling totes that was not paper or plastic, Sullivan would remove it.

1 Relying upon Sullivan's testimony, COBRA contends that custodians now spend
2 between one and one-half and three hours per week on recycling duties, depending on
3 whether custodians needed to wash their bins that week, a duty that each night
4 custodian performed about two times per month. Conversely, the Employer argues that
5 even if there was a change in the PCIS night custodians' workload, it was de minimis,
6 because the night custodians still successfully completed all of their other duties despite
7 the requirement that they empty the recycling totes. A review of the facts before me
8 shows that at minimum, PCIS night custodians spend an additional ten to fifteen
9 minutes each evening emptying recycling bins as well as more time when they empty
10 the big bins into the recycling dumpsters, clean the big bins, etc. This additional
11 expenditure of time is more than de minimis, because it is in addition to the night
12 custodians other work obligations. See City of Boston, 35 MLC 289, 291, MUP-04-4077
13 (May 20, 2009) (requiring a principal account clerk to watch a courier count a bank
14 deposit each day was not de minimis, because it took time out of the employee's day
15 that the employee otherwise would have devoted to other work duties).

16 Also, the Employer argues that the PCIS custodians' workload has actually
17 decreased over the years as the student population has decreased, and, thus the
18 addition of recycling duties could not possibly have increased their workload. The
19 Employer argues that the reduction in the number of student lunch periods is proof of a
20 reduction in the custodians' workload, because student lunch periods are allegedly labor
21 intensive. However, because the PCIS day custodians oversee student lunch periods,
22 a reduction in those lunch periods does not impact the workload of the night shift
23 custodians. Also, in the 2014-2015 school year, the Employer chose not to fill a night

1 custodian vacancy at PCIS, which resulted in the other night custodians being assigned
2 additional areas to clean, which potentially offset the reduction in the student population.
3 Moreover, the decrease in the student population is a separate issue from whether the
4 requirement that night custodians empty recycling bins increased their workload.

5 Next, the Employer argues that if recycling did not exist at PCIS, the night
6 custodians would need to dispose of the paper and plastic recyclables that would be in
7 the trash, and thus, their workload has not increased but simply shifted. However, the
8 employer's argument ignores the approximately ten year period from 2004 to 2014
9 when recycling took place at PCIS but was not done by custodians. The night
10 custodians' workload increased in April 2014 not because the Employer instituted a new
11 recycling program at PCIS but because the night custodians took over the responsibility
12 of emptying the recycling bins from the students.

13 Therefore, the change in the PCIS night custodians' workload triggered the
14 Employer's statutory bargaining obligation.

15 Waiver by Contract

16 The City contends that no statutory bargaining obligation attached because
17 certain provisions of the 2009-2012 Agreement between AFSCME and the Employer,
18 including Article XXXIII, the management rights clause, and Article XLI, the complete
19 agreement clause, constitute waivers of COBRA's right to bargain. For the reasons
20 discussed below, I decline to find that either of the two disputed provisions constitutes a
21 waiver of COBRA's right to bargain.

22 Turning to the management rights clause, the Employer relies on Paragraphs B
23 and E of that provision stating:

1 B. To establish or continue policies, practices and procedures for the
2 conduct of the employer's business, and from time to time, to change or
3 abolish such policies, practices or procedures. To discontinue processes
4 or operations or to discontinue their performance by employees.

5
6 E. To insure that related duties connected with school operations, whether
7 enumerated in job descriptions or not, shall be performed by employees.

8 As a threshold issue, I must decide whether the purported waiver language in the
9 management rights clause was in effect in April 2014 when the Employer ordered unit
10 members to empty the recycling bins. On December 19, 2012, COBRA succeeded
11 AFSCME as the exclusive bargaining representative for the custodians. The record
12 before contains no information showing that the Employer and COBRA agreed to
13 extend the provisions of the 2009-2012 Agreement while COBRA and the Employer
14 engaged in negotiations for a collective bargaining agreement. Thus, the 2009-2012
15 Agreement was no longer in effect in April 2014.⁵²

16 Further, I do not find that the alleged waiver language in the management rights
17 clause continued as a term and condition of employment after the 2009-2012
18 Agreement expired. In order to identify the terms and conditions of employment that
19 were in effect when a contract expires, the Commonwealth Employment Relations
20 Board (CERB) examines the relevant provisions of the expired contract and the
21 established practice between the parties. Bristol County Sheriff's Dep't, 33 MLC 41, 44,
22 MUP-03-3769 (September 13, 2006) (citing Town of Chatham, 28 MLC 56, 58, MUP-
23 9186 (June 29, 2001)). However, the CERB previously has stated that it is questionable
24 whether a contractual waiver of bargaining rights would survive the expiration of a

⁵² The record before me is silent as to whether the 2009-2012 Agreement lapsed on June 30, 2012, the last day of the contract, or whether the contact continued pursuant to Section 3 of Article XLII, until COBRA became the successor bargaining representative.

1 collective bargaining agreement. Commonwealth of Massachusetts, 9 MLC 1355, 1361,
2 SUP-2585 (October 22, 1982). Turning to decisions of the National Labor Relations
3 Board (NLRB) for further guidance,⁵³ it is well settled under NLRB case precedent that
4 any purported waiver of a union's right to bargain in a management rights clause, does
5 not survive the expiration of the agreement, absent evidence of the parties' intention to
6 the contrary. Long Island Head Start Child Development Services, 345 NLRB 973
7 (2005), Ironton Publications, 321 NLRB 1048 (1996).

8 The record is devoid of any evidence showing that COBRA and the Employer
9 intended that the purported waiver in the management rights provision would outlive the
10 expiration of the 2009-2012 Agreement. Here, COBRA and the Employer tentatively
11 agreed to a revised version of the management rights clause on April 24, 2014, which
12 had similar language to the management rights provision in the 2009-2012 Agreement.
13 However, the facts before me do not show that in the absence of the parties
14 successfully negotiating an entire collective bargaining agreement, the parties agreed
15 that this provision would go into effect immediately or would apply retroactively.

16 Were I to reach the issue of whether the management rights clause amounted to
17 a waiver of COBRA's right to bargain over the increase in unit members' workload, I
18 would conclude that it did not constitute a waiver of COBRA's right to bargain. Where
19 an employer raises the affirmative defense of waiver by contract, it bears the burden of
20 demonstrating that the parties consciously considered the situation that has arisen and
21 that the union knowingly waived its bargaining rights. Massachusetts Board of Regents,

⁵³ The decisions of the NLRB and the federal courts provide useful guidance in interpreting state law. See Greater New Bedford Infant Toddler Center, 12 MLC 1131, 1155, n.42, UP-2493 (H.O. August 8, 1985), aff'd 13 MLC 1620 (April 17, 1987).

1 15 MLC 1265, 1269, SUP-2959 (November 18, 1988); Town of Marblehead, 12 MLC
2 1667, 1670, MUP-5370 (March 28, 1986). The initial inquiry focuses on the language of
3 the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (August 4, 1998). If the
4 language clearly, unequivocally and specifically permits the public employer to make the
5 change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-
6 6810 (October 19, 1989). If the language is ambiguous, the CERB will review the
7 parties' bargaining history to determine their intent. Peabody School Committee, 28
8 MLC 19, 21, MUP-2073 (June 21, 2001); Town of Marblehead, 12 MLC at 1670.

9 Even assuming, as the Employer maintains, that Paragraphs B and E of the
10 2009-2012 Agreement permit the Employer to establish or change practices and
11 procedures and to insure that employees perform certain duties related to school
12 operations, the disputed language makes no reference to employee workload. COBRA
13 cannot clearly and unambiguously have waived its right to bargain over a subject that is
14 not even referenced in the plain language of the relevant portion of the management
15 rights clause. Silence on an issue, without more, does not constitute a waiver. See City
16 of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 176 (1999);
17 Commonwealth of Massachusetts, 5 MLC 1097, 1099, SUP-2149 (June 26, 1978).
18 Alternatively, even if the management rights clause was found to be ambiguous, the
19 record contains no specific information about the bargaining history to clarify the
20 ambiguous language. Town of Marblehead, 12 MLC at 1670 (using bargaining history to
21 clarify ambiguous language concerning an alleged waiver).

22 Zipper Clause

1 The Employer also contends that Article XLI of the 2009-2012 Agreement
2 between the Employer and AFSCME, a so-called “zipper clause”, constitutes a waiver
3 of COBRA’s right to bargain over the increase in the PCIS night custodians’ workload.
4 First, the language in Article XLI states, in part, that:

5 The Committee [Employer] and the Union [AFSCME], for the life of this
6 Agreement each voluntarily and unqualifiedly waive the right, and each
7 agrees that the other shall not be obligated to bargain collectively with
8 respect to any subject matter referred to or covered in this Agreement, or
9 with respect to any subject matter not specifically referred to or covered in
10 this Agreement even though such subject or matters may not have been
11 within the knowledge or contemplation of either or both parties at the time
12 that they negotiated, and even though they may not have been mentioned
13 during the bargaining or there may be no mention of them in the
14 Agreement....

15 As was discussed above, because the 2009-2012 Agreement had expired, the
16 zipper clause also was not in effect. Furthermore, the CERB previously has decided
17 that a waiver of bargaining rights during the term of a contract does not constitute a
18 perpetual waiver for future contracts. Board of Trustees of Lowell University, 4 MLC
19 1972, 1977, SUP-2083 (May 24, 1978).

20 Were I to reach the issue of whether the zipper clause amounted to a waiver of
21 COBRA’s right to bargain, I would conclude that the zipper clause does not constitute a
22 waiver of COBRA’s right to bargain. A zipper clause preserves the terms of the
23 collectively bargaining agreement by relieving the parties of their obligation to bargain
24 prospectively about certain matters during the term of the agreement. See City of
25 Westfield, 25 MLC 163, 166, MUP-9694 (April 20, 1999). However, although it is
26 possible for a zipper clause to relieve the parties of their obligation to bargain
27 prospectively about new subjects during the term of the contract, the waiver does not
28 authorize an employer to unilaterally implement changes in working conditions. See

1 Commonwealth of Massachusetts, 18 MLC 1220, 1227, n.10, SUP-3426 (November 20,
2 1991) (citing Jacobs Mfg. Co., 91 NLRB 1214 (1951), aff'd, 196 F.2d 680 (2d Cir. 1952);
3 ACF Industries, Inc. v. NLRB, 592 F.2d 422, 100 LRRM 2710 (8th Cir. 1979)).
4 Furthermore, the zipper clause in the present case contains specific language
5 maintaining the exclusive bargaining representative's right to file a charge with the DLR
6 in the event that the Employer made a unilateral change in working conditions without
7 meeting its obligations under Chapter 150E. On the facts here, the Employer's
8 unilateral change in the PCIS night custodians' workload would trigger the exception to
9 the waiver language in the zipper clause.

10 Waiver by Inaction

11 The Employer also asserts that COBRA waived by inaction its right to seek
12 bargaining because it did not request to bargain after Palladino ordered the night
13 custodian to empty the recycling totes. A union waives its right to bargain by inaction if
14 the union had: 1) actual knowledge or notice of the proposed action; 2) a reasonable
15 opportunity to negotiate about the proposed action; and 3) unreasonably or inexplicably
16 failed to bargain or request bargaining. Ashburnham-Westminster Regional School
17 District, 29 MLC 191, 194, MUP-01-3144 (April 9, 2003). The CERB will not apply the
18 doctrine of waiver by inaction where the union is presented with a fait accompli, where,
19 "under all the attendant circumstances, it can be said that the employer's conduct has
20 progressed to a point that a demand to bargain would be fruitless." Town of Hudson, 25
21 MLC 143, 148, MUP-1714 (April 1, 1999); Holliston School Committee, 23 MLC 211,
22 212-213, MUP-1300 (March 27, 1997) (citing Scituate School Committee, 9 MLC 1010,
23 1012, MUP-4563 (May 27, 1982)). Here, COBRA was not obligated to demand

1 bargaining, because it was presented with a fait accompli.⁵⁴ Palladio testified that he
 2 had made the decision to require the night custodians to empty the recycling bins after
 3 speaking with Gould and before he even sent his April 4, 2014 email. Palladino’s April
 4 4, 2014 email merely announced his decision rendering a demand to bargain as futile.
 5 See Ashburnham-Westminster School District, 29 MLC at 194 (finding that a demand to
 6 bargain was futile where a letter to employees only announced a previously-made
 7 decision to change prescription drug benefits).

8 Conclusion

9 Based on the record and for the reasons stated above, I conclude that the
 10 Employer violated the Law by unilaterally increasing the workload of the PCIS night
 11 custodians when it required them to empty recycling totes, but dismiss the allegation
 12 that the Employer unilaterally increased their job duties

13 Order

14 WHEREFORE, based upon the foregoing, it is hereby ordered that the Employer shall:

- 15 1. Cease and desist from:
- 16
- 17 a. Unilaterally requiring PCIS night custodians to empty recycling
- 18 totes without first giving COBRA prior notice and an opportunity to

⁵⁴ I also am not persuaded by the Employer’s claim that the bargaining unit waived by inaction its right to challenge any matter involving recycling because AFSCME had notice of a pilot program for mixed paper recycling, a program that subsequently ended, and entered into a December 13, 1999 settlement agreement concerning the pilot program. The Employer acknowledges that the December 13, 1999 settlement agreement had language stating that it did not set a precedent for any of the parties. COBRA has not waived its right to bargain over a change in the PCIS custodians’ workload merely because the predecessor bargaining representative had notice of a tangential but different issue fifteen years earlier. See Town of Dennis, 28 MLC 297, 303, MUP-2634 (April 3, 2002) (union did not waive by inaction its right to bargain over increases in health insurance copayments, even if the union had waived its right to bargain over earlier changes in terms and costs of health insurance benefits).

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bargain to resolution or impasse over the increase in workload resulting from this requirement.

b. In any like or related manner, interfering with, restraining and coercing its employees in the exercise of their rights guaranteed under the Law.

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

a. Refrain from requiring the PCIS night custodians to empty recycling totes until the Employer has bargained with COBRA to resolution or impasse about the increase in the employees' workload.

b. Bargain in good faith to resolution or impasse with COBRA about the increase in the workload of the PCIS night custodians resulting from the requirement that they empty recycling totes.

c. Post immediately in all conspicuous places where members of COBRA's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Employer customarily communicates with these bargaining 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 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 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



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

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held that the Plymouth School Committee (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally increasing the workload of the night custodians at Plymouth County Intermediate School (PCIS), who are members of the Collective Bargaining Relief Association (COBRA's) bargaining unit.

Section 2 of Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Employer assures its employees that:

WE WILL NOT fail and refuse to bargain in good faith with COBRA by unilaterally requiring the PCIS night custodians to empty recycling totes.

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

WE WILL take the following affirmative action that will effectuate the purpose of the Law:

1. Refrain from requiring the PCIS night custodians to empty recycling totes until the Employer has bargained with COBRA to resolution or impasse about the increase in the PCIS custodians' workload.
2. Bargain in good faith with COBRA to resolution or impasse over the increase in the PCIS night custodians' workload resulting from the requirement that they empty recycling totes.

For the Plymouth 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).