

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

EVERETT SCHOOL COMMITTEE

and

EVERETT TEACHERS ASSOCIATION

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Case No. MUP-09-5665

Date Issued: February 16, 2016

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Matthew R. Tobin, Esq. - Representing the Everett School Committee

Richard A. Mullane, Esq. - Representing the Everett Teachers Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issues before me are whether the Everett School Committee (Employer or
2 School Committee) violated Section 10(a)(5) and (1) of the Law when it: a) achieved a
3 reduction in force by laying off bargaining unit members who were speech-language and
4 occupational therapists without giving the Everett Teachers Association (Union) notice
5 and an opportunity to bargain to resolution or impasse over the decision and the impacts
6 of that decision; and b) transferred speech-language and occupational therapy duties
7 outside of the bargaining unit without giving the Union notice and an opportunity to bargain
8 to resolution or impasse. I find that the Employer did not violate the Law in the manner
9 alleged, because the parties negotiated to impasse.

Stipulated Facts³

- 1 1. The School Committee is a public employer within the meaning of Section 1 of
2 M.G.L.c.150E (the Law).
3
- 4 2. The Association is a public employer within the meaning of Section 1 of the Law.
5
- 6 3. The Association is the exclusive bargaining representative for those employees
7 identified by Article 1 of the Collective Bargaining Agreement in effect for the period
8 of September 1, 2007 through August 31, 2010, including the speech-language
9 pathologists and occupational therapists.
10
- 11 4. Frederick Foresteire is the superintendent of the Everett Public Schools and has
12 been since September 1, 1989.
13
- 14 5. Thomas J. Stella, Ed.D. is the assistant superintendent of the Everett Public
15 Schools and has been since August 7, 2006.
16
- 17 6. Charles Obremski is the assistant superintendent of business affairs for the Everett
18 Public Schools and has been since August 7, 2006.
19
- 20 7. Kimberly Auger is the president of the Everett Teachers Association and has been
21 since approximately 2006.
22
- 23 8. Charles (Buddy) Stevens is the Massachusetts Teachers Association consultant
24 to the Everett Teachers Association and has been since approximately 1999.
25
- 26 9. Annetta Kelly is the director of special education for the Everett Public Schools.
27
- 28 10. On or about June 23, 2009, the Everett School Committee notified the ten
29 therapists that their positions were terminated effective June 30, 2009. The ten
30 individuals receiving letters so indicating were: Diane Bagarella, speech-language
31 pathologist, Margaret Casey, speech-language pathologist, Nicole D’Andrea-
32 Martinez, speech-language pathologist, Christine Gagnon, speech-language
33 pathologist, Kimberly Lepke, speech-language pathologist, Patricia McCarthy,
34 occupational therapist, Eve Moura, occupational therapist, Lynn Roccio, speech-
35 language pathologist, Tracy Villarroel, occupational therapist, and Laurie Wolff,
36 speech-language pathologist. Former Everett Public School Therapists Diane
37 Bagarella, Margaret Casey, and Laurie Wolff continued to be employed in the
38 Everett Public Schools in different capacities beyond the 2008-2009 school year,
39 and therefore suffered no monetary damages.

³ The stipulated facts and findings describe positions that various individuals held when the events in question took place in 2009 and/or when the hearing took place in 2011. I make no findings as to whether the individuals noted remained in their positions past 2011.

1 11. On or about July 23, 2009, the Everett School Committee signed a contract with
2 Futures Healthcore, LLC for the delivery of speech and language, occupational
3 and physical therapy services to the Everett Public School students.
4

5 12. At the time of the June 23, 2009 reduction in force, there were a total of ten full-
6 time therapist positions in bargaining unit, identified by paragraph 3 above, and
7 held by the ten individuals in the positions listed in paragraph 10.

8 Findings of Fact⁴

9 The Employer has an enrollment of approximately seven thousand students⁵ in
10 classes from pre-kindergarten through high school. The Union is the exclusive bargaining
11 representative for approximately 550 to 570 of the Employer’s professional staff
12 members, including teachers, guidance counselors and clinical therapists. The Union
13 and the Employer were parties to a collective bargaining agreement that, by its terms,
14 was in effect from September 1, 2007 through August 31, 2010 (2007-2010 Agreement).
15 The 2007-2010 Agreement states in relevant part:

16 Article 4-Reduction in Force
17

18 Should the Committee decide to reduce the number of positions in the
19 bargaining unit for any reason, such reduction shall be consistent with the
20 General Laws of the Commonwealth, the Regulations of the Department of
21 Education, and this Agreement. There shall be excluded from the operation
22 of this sub-paragraph, substitutes, persons filling temporary vacancies or
23 persons replacing anyone on leave....
24

25 4-02 Procedure of Layoffs
26

27 Statement
28

29 For the purposes of this article, the words “Professional Teachers Status”
30 shall mean bargaining unit members who have served more than three
31 consecutive school years in the Everett Public Schools.
32

33 In the event that two teachers have the same first day [of] employment, then
34 the teacher with the superior evaluation shall be retained.

⁴ The DLR’s jurisdiction in this matter is uncontested.

⁵ The Employer’s student enrollment changes on a daily basis.

1 No PTS teacher shall be laid off if there is a non-Professional Teachers
2 Status teacher holding a position which the PTS teacher is qualified to fill.

3
4 No Professional Teachers Status teacher shall be laid off if there is another
5 PTS teacher with less seniority holding a position which he is qualified to
6 fill.

7
8 In the placement of staff into position(s) held by junior teacher(s), bumping
9 shall be accomplished to retain the most senior teacher(s) when more than
10 one teacher is qualified for the position. When multiple layoffs do not create
11 the problem of numerous placements of teachers, the most senior teacher
12 shall be placed in the position for which he is qualified that is held by the
13 most junior teacher.

14
15 4-3 Reductions in Positions

16
17 Reductions in positions may be effective only as of the first day of any
18 professional work year. Teachers to be laid off shall be notified within seven
19 (7) days after the action of the School Committee reducing the positions in
20 the unit. Under normal circumstances, all teachers shall be notified by June
21 1. ...

22 Budgetary Process

23 Each year at the end of January or in early February, the Commonwealth of
24 Massachusetts (Commonwealth) typically provides the Employer with an estimate of its
25 foundation budget⁶ for the next fiscal year as well as the possible minimum local
26 contribution⁷ by the City of Everett (City) and the amount of state aid in the form of Chapter
27 70 monies. In February and March of the particular year, Superintendent Frederick

⁶ The foundation budget is the total cost of providing an education for all students. The foundation budget is calculated by multiplying a set of education spending categories by the total number of students, as well as the number of students who are enrolled in special education programs, who are classified as English Language Learners, or whose families' incomes fall below a certain level, and then adding the total dollar amounts.

⁷ The minimum local contribution, which is based upon property valuations and residents' income levels, is the minimum amount of funds that a municipality must provide to its public schools, although a municipality can choose to exceed the minimum local contribution. The City typically makes only the minimum local contribution.

1 Foresteire (Superintendent Foresteire)⁸ and Assistant Superintendent of Business Affairs
2 and Pupil Personnel Services Charles Obremski (Obremski)⁹ begin to formulate a
3 proposed budget for the next fiscal year. In April, Superintendent Foresteire gives a
4 proposed budget to the School Committee's Sub-Committee on Finance (SubFi). The
5 SubFi members review and discuss the budget. If the proposed budget exceeds the
6 foundation budget, Superintendent Foresteire and Obremski make recommendations to
7 the SubFi about how to reduce the proposed budget. The SubFi members vote whether
8 to approve each section of the budget individually and whether to recommend that the
9 nine-member School Committee refer the proposed budget to a public hearing. The full
10 School Committee, which is commonly referred to as the full Board, then conducts a
11 public hearing on the budget. After the public hearing, the School Committee votes on
12 whether or not to approve the proposed budget. The goal is to have the School
13 Committee approve the proposed budget by June 1 of each year in order to allow the City
14 sufficient time to approve the school budget as part of its overall budgetary process.¹⁰
15 The Commonwealth usually finalizes the foundation budget and the amount of Chapter
16 70 monies that the Employer will receive by June of each year. For the FY10 budget, the
17 Commonwealth did not announce the actual amount of Chapter 70 funds that the
18 Employer would receive until July 2009.

⁸ Superintendent Foresteire has worked for the Employer since 1966 and has served as superintendent for twenty-two years.

⁹ Obremski has worked for the Employer since 1989 and became assistant superintendent in 2006.

¹⁰ The City has a bicameral legislative body, a common council and a board of alderman, which votes on the budget. The City's Mayor ultimately signs the budget.

1 In Superintendent Foresteire's testimony at the hearing, he described the
2 Employer's fiscal budget as a framework with a bottom-line dollar amount. Even after the
3 City approves the budget as part of its municipal budget, the Employer can still move
4 monies around within the budget. Several years ago, the City approved a budget for the
5 next fiscal year that eliminated the pre-school program. However, in mid-September of
6 that fiscal year, the Employer reinstated the pre-school program when monies became
7 available. The Employer moves monies around within the budget when it fills new
8 positions. Also, teachers who received non-renewal letters in June of a particular year
9 often were recalled for the next school year because monies were subsequently found.

10 Projected FY10 Budget Deficit

11 In late February, early March 2009, the Employer projected that the FY10 budget
12 could have a \$3.1 million dollar deficit. In March 2009, the Employer and the Union met
13 to discuss the possible budgetary shortfall. The Employer's representatives included
14 Superintendent Foresteire, Assistant Superintendent Thomas Stella, Ed.D. (Stella)¹¹ and
15 Obremski, while the Union's representatives included President Kimberly Auger (Auger)¹²
16 and Stevens. The Employer proposed that the Union forego a three percent raise that
17 unit members were scheduled to receive in September 1, 2009 pursuant to the 2007-

¹¹ As Assistant Superintendent, Stella's primary responsibilities are oversight of state and federal reporting requirements and of the management information systems for students and staff. Stella has worked for the Employer for thirty-eight years and has been an assistant superintendent for five years.

¹² Auger had worked for the Employer as a teacher for approximately twenty years and had been Union president since 2006.

1 2010 Agreement. The Union's Executive Board declined the proposal on the grounds
2 that it was not in the best interest of their bargaining unit members.

3 Overview of Speech and Language, Occupational Therapists

4 For approximately twenty-five years, the Employer has used the services of a
5 private vendor called "Hart" to supplement the speech-language, occupational and
6 physical therapy services that bargaining unit members provided.¹³ In 2002 or 2003, the
7 Employer ceased to employ any physical therapists who were bargaining unit personnel,
8 and Hart personnel provided all physical therapy services. Prior to 2009, the Union had
9 not objected to the Employer's use of Hart personnel to provide speech, occupational and
10 physical therapy services. As of the 2008-2009 school year, ten bargaining unit members
11 provided therapy services, including seven speech-language therapists¹⁴ and three
12 occupational therapists.¹⁵ During that school year, fifteen Hart employees provided
13 therapy services to students, which included three physical therapists, four occupational
14 therapists and nine speech-language therapists.¹⁶

¹³ Although the title of psychologist continues to be a bargaining unit position, the Employer has not actually employed any psychologists for approximately twenty years, but instead has utilized the services of outside consultants.

¹⁴ The seven speech-language therapists were: Diane Bagarella (Bagarella), Margaret Casey (Casey), Nicole D'Andrea-Martinez (D'Andrea-Martinez), Christine Gagnon (Gagnon), Kimberly Lepke (Lepke), Lynn Roccio (Roccio), and Laurie Wolff (Wolff).

¹⁵ The three occupational therapists were: Eva Moura (Moura), Tracy Villarroel (Villarroel), and Patricia McCarthy (McCarthy).

¹⁶ One Hart employee Julie Anzalone provided both occupational therapy services as a certified occupational therapy assistant and speech and language therapy services as a speech-language therapist.

1 Certain of the Hart personnel worked only part-time¹⁷ and/or for finite periods of
2 time, sometimes only for several weeks. Other Hart personnel, including Maria Hammlers
3 (Hammlers), worked for the entire school year.¹⁸ Hart employees typically provided
4 speech-language therapy and occupational therapy services when unit personnel took
5 maternity leave¹⁹ and then continued to work for the remainder of the school year, even
6 if the bargaining unit member returned to work.²⁰

7 Lepke²¹ and D'Andrea-Martinez²² estimated that since the 2002-2003 school year,
8 bargaining unit members provided eighty percent of the speech-language and
9 occupational therapy services, while Hart employees provided twenty percent of the

¹⁷ During the 2008-2009 school year, Hart employee Holly Wilson Lynch provided occupational therapy services on a part-time basis.

¹⁸ Hammlers previously worked as an occupational therapist at the Parlin School from March of 2004 until the end of the school year and for the 2004-2005 school year, while bargaining unit member Shannon Haley was on maternity leave. In 2008-2009, Hammlers provided occupational therapy services at the Parlin School and the High School

¹⁹ In March 2009, Villarroel took maternity leave and Hart employee Kori Constantian provided occupational therapy services at the Lafayette School in her absence.

²⁰ In late 2008, early 2009, unit member D'Andrea-Martinez took seven weeks of maternity leave, and Regan Andrade (Andrade), a Hart employee, was assigned to the Parlin School to provide speech-language therapy services. When D'Andrea-Martinez returned to work, Andrade was reassigned to the Administration Building where she performed student testing and to the High School.

²¹ Lepke was a speech-language therapist who had worked for the Employer since the 2002-2003 school year.

²² D'Andrea-Martinez was a speech-language therapist who had worked for the Employer since the 2003-2004 school year.

1 services.²³ I decline to adopt those specific mathematical percentages because Lepke
2 and D'Andrea-Martinez admittedly were most familiar with staffing patterns at the schools
3 at which they worked and less familiar with the Employer's other schools. Although they
4 attended monthly Department of Special Education meetings where speech-language
5 and occupational therapists discussed their caseloads, it is unclear whether all Hart
6 employees attended those meetings, as certain Hart employees only worked part-time.
7 However, I also find that bargaining unit members provided a substantial amount of the
8 speech-language and occupational therapy services to the Employer's students.

9 Lepke, D'Andrea-Martinez and McCarthy²⁴ described their job duties as: a)
10 providing services to students pursuant to the students' individualized education
11 programs (IEP's); b) consulting with those students' teachers; c) attending meetings
12 regarding those students; d) writing goals for students' IEP's; e) conducting evaluations
13 of students whom they currently service and of new students; e) testing students and
14 scoring and analyzing the results of those tests; f) writing reports and reducing to writing
15 student evaluations, and g) billing Medicaid for services that they provided.²⁵ D'Andrea-
16 Martinez and McCarthy also were members of teams that tested pre-school students and

²³ At one point, D'Andrea-Martinez stated that the breakdown was 75% bargaining unit therapists to 25% Hart employees but later amended her answer to 80% bargaining unit therapists to 20% Hart employees.

²⁴ McCarthy had worked for the employer since 2001.

²⁵ Lepke, D'Andrea-Martinez and McCarthy asserted that certain Hart therapists only evaluated or tested students and did not perform all of the same duties as unit therapists. Conversely, Superintendent Foresteire maintained that unit therapists and Hart therapists performed the same job duties. I need not reconcile the differences in the witnesses' testimony because it is not outcome determinative to the allegations before me.

1 Response to Intervention (RTI) Teams that met with parents and teachers often before
2 students received special education services. All three therapists regularly stayed after
3 work hours to complete paperwork and took work home with them to complete in the
4 evenings and on weekends.²⁶

5 Employer's Initial Contact with Futures

6 In January 2009, Superintendent Foresteire heard or read about
7 FuturesHealthCore (Futures), a consulting firm that advises school districts on the
8 efficacy and accountability of special education programs. Because the cost of providing
9 special education services to students comprised a significant portion of the Employer's
10 budget²⁷ and increased each year, Superintendent Foresteire wanted to become more
11 familiar with the services that Futures offered. He asked Obremski and Director of Special
12 Education Annetta Kelly (Kelly) to attend a breakfast meeting at which Futures was going
13 to make a presentation about its services. On January 27, 2009, Obremski and Kelly
14 attended a Futures presentation in Marlborough. Shortly thereafter, the Superintendent
15 and Obremski discussed the Futures presentation and agreed that it was a good
16 opportunity to have an analysis done of the special education services that the Employer
17 provided. On February 27, 2009, the Employer's representatives, Superintendent
18 Foresteire, Obremski, Stella and Kelly, met with Futures representatives Peter Bittel
19 (Bittel), the chief executive officer, Brian Edwards (B. Edwards), the chief operating

²⁶ Lepke, D'Andrea-Martinez and McCarthy also contended that Hart therapists, who completed paperwork at home, were allowed to bill the Employer for their time and could bill for services provided even when students were absent. I need not determine whether those contentions were correct because it is not material to the present case.

²⁷ In the 2008-2009 school year, more than seventeen percent of the Employer's students received special education services.

1 officer, and Herbert Levine, Ph.D., (Levine) senior consultant, to discuss hiring Futures to
2 assess the special education program. That evening, Futures sent a written proposal to
3 the Employer to conduct a clinical and educational services analysis, which
4 Superintendent Foresteire executed on March 10, 2009.

5 Terms of the Clinical and Educational Services Analysis Proposal

6 The Employer hired Futures to analyze the efficiency and effectiveness of: a) the
7 therapy and clinical services, including speech and language pathology, occupational
8 therapy, physical therapy, and psychology, b) out of district placements, and c) the
9 utilization of instructional aides. Futures would review the following information as part of
10 its analysis:

11 Therapy and Clinical Services: The schedules and assignments of
12 clinicians; the relationship between direct and indirect therapy time; the
13 utilization of indirect time; the appropriateness of the type and intensity of
14 treatment across age groups, discipline and exceptionalities; the utilization
15 of entrance and exit criteria with consequent of equality of access to
16 services; and the review of program outcomes as reflected in selected
17 IEP's.

18
19 Out of District Placements: The educational documents of the 120 students
20 in out-of-district placements.

21
22 Assignment and Utilization of Instructional Aides: The individualized
23 education plans (IEP's) of 20 students who currently receive the support of
24 instructional aides; the IEP's of five students who have received these
25 supports for three years, and, if in existence, the entrance and exit criteria
26 of instructional aide supports.

27 Futures also would perform the following activities:

28 Interviews with 20 clinicians from speech and language therapy, physical
29 therapy, occupational therapy, and psychology.

30 Interviews with 14 staff including the Director of Special Education, special
31 education and regular education staff, team leaders and building principals.

32
33 A review of: 1) 50 educational plans and a review of 15 plans that span a 3-
34 year time period for those students receiving at least one related service; 2)

1 IEP's of all 120 students in out-of-district placement; and 3) 5 three-year
2 retrospective reviews (i.e. 15 additional IEP's) of students who have
3 received instructional aide support over a three-year period.

4
5 A review of schedules, entrance/exit criteria, and outcome data.

6
7 A review of cost data, program descriptions, and organizational design.

8
9 A review of entrance and exit criteria for out-of-district programs as well as
10 for the aforementioned related services.

11
12 A review of attendance records of employed staff.

13
14 A review of all cost data related to the above-described items.

15 Also, on March 10, 2009, Kelly sent a memorandum to all of the Employer's principals
16 and assistant principals that stated in pertinent part:

17 The district has contracted with FuturesHealthCore to assess the efficiency
18 at which the district provides Special Education Services. This review will
19 be conducted through a process of data analysis of IEP's, staff interviews,
20 and program reviews. Furthermore, they will closely examine the efficiency
21 and use of Paraprofessionals in the district.

22
23 At your building level, they will need access to class rosters, staff daily
24 schedules (including Hart employees), and you will need to provide them a
25 room in which to conduct interviews with both general and special education
26 staff. Please inform staff that all interviews are confidential.

27
28 At the Central Office level, the team from FutureCore, will interview all
29 administrators, review out-of-district IEP's, and conduct analysis of about
30 150 additional IEP's. It is expected that the interviews will start to take place
31 on Thursday and Friday, March 13 and 14th at the Administrative Building.
32 I will forward interview schedules to you as they are created by the
33 FutureCore's Team. We expect to have a written report with
34 recommendations before the April vacation. ...

35
36 Futures had a fixed consultation fee of \$18,500.00. However, if the Employer
37 subsequently hired Futures to provide services at a contract level of more than
38 \$500,000.00 annually, Futures would waive the analysis fee. Futures estimated that the

1 field work, the analysis, and the written report could be completed approximately twenty
2 days from the date that the work commenced.

3 Employer's Preparation for Futures' Field Work

4 On March 11, 2009 at 11:02 AM, Edwards sent an email message to Kelly stating
5 in pertinent part:

6 For the final interviews and IEP reviews next week, here is the rest our team
7 schedules:

8
9 **IEP REVIEWS** [Emphasis in Original]

10
11 Ray Sylvain, M.Ed. ... He will be reviewing the 120 OOD [Out of District
12 Placement] IEP's. Ray is available any day next week to review IEP's and
13 should be able to do these in a day. Will the IEP's be available electronically
14 or paper? If electronic, Ray could get started and then finish up remotely if
15 he runs out of time.

16
17 Michael Neiman, Ph.D., CCC-SLP-Dr. Neiman is the project leader for
18 Everett and will be in your offices this Friday for clinician interviews. He'll
19 coordinate with you on the other 95 IEP reviews.

20
21 Herb Levine, Ed.D. (Levine) ... He will handle the interviews of any
22 remaining building principals, the Special Education Director (you), and
23 general education staff. Dr. Levine is available all day Monday and Friday
24 of next week; Wednesday after 11 am; and Thursday after 12:30 pm.

25
26 Rose Carr, M.Ed. ... Ms. Carr will interview the districts' instructional
27 aides/paraprofessionals and remaining special education staff. Rose is
28 available any day next week, but will travel with Mr. Sylvain so they would
29 be visiting the district on the same day(s).

30
31 Richard Judah, D.Ed. ... Dr. Judah is a practicing school Psychologist
32 working with Futures and will handle the interviews of the psychologists at
33 Everett. Dr. Judah is available Thursday of next week. That is his
34 preference, although he could make Friday work if necessary.

35
36 Michael Neiman, Ph.D., CCC-SLP-Dr. Neiman will coordinate with you on
37 the interviews with team leaders.

38 Kelly responded in a March 12, 2009 email message by stating:

1 In response to your email, I do have some follow-up questions and
2 responses.

3
4 I have bins containing copies of the IEP's and your other related requests.
5 The bins contain the following:

6
7 120 Out-of-District IEP's,
8
9 50 IEP's that were selected by using a random calculator,

10
11 5 IEP's for whom 1:1 paraprofessionals services were assigned for three
12 (3) consecutive years,

13
14 15 IEP's that span a 3 year period that provide for related services,

15
16 A list of all ancillary staff (both contracted and salaried) with assigned salary
17 and benefits. ...

18 Kelly then scheduled the speech-language and occupational therapists to meet
19 with Futures president Erin Edwards (E. Edwards) and vice-president of clinical programs
20 Michael Neiman, Ph.D. (Neiman) at thirty minute intervals on March 12 and March 13,
21 2009²⁸ and informed the building principals about the interview schedules. When the
22 principals informed the speech-language and occupational therapists that they needed to
23 attend the interviews, some of the therapists asked their principals about the reasons for
24 the interviews. The principals indicated that it was a study or an audit of the Special
25 Education Department.

26 The Speech-Language and Occupational Therapists' Interviews

27 E. Edwards interviewed Lepke on March 12, 2009 and D'Andrea-Martinez on
28 March 13, 2009, while Neiman interviewed McCarthy on March 13, 2009. Prior to the

²⁸ Neiman and E. Edwards interviewed fifteen speech-language and occupational therapists, including ten bargaining unit members and five Hart employees. The record before me does not show that Futures interviewed any physical therapists, all of whom were Hart employees.

1 interviews, the Employer requested that Lepke, D'Andrea-Martinez and McCarthy submit
2 their caseloads, which included a roster of their students and the frequency of the services
3 that they provided and complete an on-line survey which tracked at fifteen minute
4 intervals their work activities on a particular day. The Employer also asked them to bring
5 their schedules to the interviews. At the interviews, the clinical therapists were asked
6 about: a) their educational backgrounds, including the certifications that they held, b) the
7 nature of the challenges that students had for which they provided services, including
8 speech, language and autism, c) the evaluation tools that they used, including the
9 entrance and exit criteria that they used to determine whether a student should receive
10 speech and language and occupational therapy and when the student no longer required
11 those services; d) the service delivery models that they used, including whether they met
12 with students in groups or individually and whether they used an inclusion model, where
13 they provided students with intervention and services in the students' classrooms, or a
14 pull-out model, where they met students outside of their classrooms; and e) their opinions
15 as to whether their principals and the administration were supportive of them. At some
16 point during their interviews, Lepke, D'Andrea-Martinez and McCarthy each asked what
17 Futures would do with the information that it had compiled from the interviews, and they
18 were told that it would be included in a report that Futures would complete in April 2009.

19 Post-Interviews

20 After the interviews, Lepke and D'Andrea-Martinez²⁹ became concerned about the
21 purpose of the interviews, especially as Futures had not interviewed any special

²⁹ A third speech-language therapist Bagarella also contacted Auger with concerns about the Futures' interviews.

1 education teachers, and they contacted Auger.³⁰ Auger then contacted Stella, who
2 informed her that the Employer had hired Futures to come in and investigate the
3 Employer's special education services, which included interviewing the therapists. Auger
4 then informed D'Andrea-Martinez and Bagarella that based upon her conversation with
5 Stella, she was not alarmed about Futures interviews with the therapists.

6 April 2, 2009 PowerPoint Presentation

7 On April 2, 2009, a meeting took place between Futures' representatives, B.
8 Edwards, Bittel and Levine, and the Employer's representatives, Superintendent
9 Foresteire, Stella, Obremski, Kelly and Joseph Pedulla (Pedulla), the Employer's then
10 purchasing specialist. At that meeting, Futures made a PowerPoint presentation
11 containing its assessment of the Employer's special education program. Futures also
12 made various proposals which it contended would save the Employer \$843,817.00 in
13 FY10 and \$983,410.00 in FY11 for a total two year savings of \$1,827,227.00.

14 Therapy Services

15 While complimenting the Employer's Special Education staff on producing well-
16 written and cohesive IEP's with a trend towards diminution of services over time, Futures
17 also noted that there was an absence of entry and exit criteria for students receiving
18 therapies.³¹ Futures also pointed out that for FY09, the Employer paid approximately
19 \$1,723,000.00 in costs for therapists, which included \$905,000.00³² for unit members and

³⁰ Because Auger was an elementary general education teacher, Futures representatives had not interviewed her.

³¹ Futures' PowerPoint presentation also expressed compliments and concerns about other aspects of the Special Education Department.

³² The sum of \$905,000.00 is annualized and also reflects the cost of benefits for unit members.

1 \$818,000.00 for Hart therapists.³³ Futures described what it characterized as three
2 financial and program solutions concerning the use of unit members and Hart employees
3 to provide therapy services. The three financial and program solutions included: 1)
4 maintaining the status quo; 2) hiring Futures to manage the therapy services; and 3)
5 entering into an outsource agreement with Futures. If the Employer hired Futures to
6 manage its therapy services, the Employer would continue to utilize unit members and
7 Hart employees to provide those services. Futures would charge a fee of \$50,000.00,
8 and predicted that it would reduce therapy costs by \$100,000.00, which would result in a
9 net savings of \$50,000.00. If the Employer entered into an outsourcing agreement with
10 Futures, Futures employees would provide speech-language, occupational, and physical
11 therapies instead of unit members and Hart employees. Futures projected a two year
12 total savings of \$465,210.00 if Futures provided the personnel, which included a savings
13 of \$206,760.00 in the first year³⁴ and \$258,450.00 in the second year.³⁵

14 Other Cost-Saving Proposals

15 Futures also made certain other cost-saving proposals, which included: a) to cease
16 using monies from the Federal Special Education Entitlement Grant, referred to as the

³³ The sum of \$818,000.00 is annualized.

³⁴ Futures estimated a savings of \$206,760.00 by subtracting \$1,516,240.00, the Employer's projected cost for the use of Futures' clinical therapists in FY10, from \$1,723,000.00, the Employer's FY09 costs for clinical therapists.

³⁵ Futures estimated a savings of \$258,450.00 for FY11 by subtracting \$1,464,550.00, the Employer's projected cost for the use of Futures' therapists in FY11, from \$1,723,000.00. Ultimately, the Employer saved a total of \$620,000.00 because of its use of Futures therapists in FY10 and FY11.

1 240 grant, to pay teacher salaries; b) to hire Futures to manage the instructional aides
2 services; c) to enter into an outsourcing agreement with Futures for the instructional
3 aides; d) to hire Futures to manage an in-district program for ten students who currently
4 are in OOD placements; and e) to enter into an agreement to have Futures personnel
5 provide psychological services to students, which includes evaluating students.

6 When the Employer paid teacher salaries from the 240 Grant funds, the Employer
7 was required to make a nine percent contribution to the Massachusetts Teachers
8 Retirement System (MTRS).³⁶ Futures estimated that the Employer would save \$100,000
9 by ceasing to pay teacher salaries with the grant funds³⁷ and instead to pay private school
10 and collaborative costs with those funds.³⁸ Futures would manage the instructional aide
11 services for a fee of \$50,000.00 and predicted that it would reduce costs by \$100,000.00
12 for a net savings of \$50,000.00.³⁹ Also, Futures projected a two-year total savings of
13 \$439,517.00 if the Employer entered into an outsourcing agreement with Futures for
14 teacher aide services. Futures estimated a savings of \$275,000.00 annually if the
15 Employer entered into an agreement with Futures to manage an in-district program for

³⁶ The nine-percent contribution was in addition to the regular contribution to the MTRS that the Employer made on behalf of each teacher.

³⁷ The Employer acted upon Futures' proposal in FY10, ceased paying teacher salaries with the 240 grant, and saved approximately \$60,000.00.

³⁸ The Employer then would move monies from the private school and collaborative budget to pay the teacher salaries.

³⁹ In 2009, the Employer did not act upon Futures' proposals to manage or outsource the instructional aides in 2009. In 2010, Futures conducted a further analysis that showed that it could not save the Employer any additional funds by either managing or outsourcing the instructional aides because the instructional aide program already was relatively low cost.

1 ten students who currently are in OOD placements.⁴⁰ Finally, Futures estimated that it
2 could save the Employer \$86,250.00⁴¹ annually if the Employer entered into a contract to
3 have Futures' employees provide psychological services to students.⁴²

4 At the end of the meeting, which lasted several hours, Superintendent Foresteire
5 informed the Futures representatives that he needed to consider the proposal further and
6 would get back to them. He then instructed Obremski, Stella and Kelly to engage in
7 further talks with Futures. Approximately one month later, the Superintendent asked the
8 assistant superintendents for an update as to how the discussions were proceeding.

9 Laquanda Stewart's Facebook Posting and Her Search for SPLA's in the Everett Area

10 On April 4, 2009, Laquanda Stewart (Stewart), Futures Lead Recruiter, posted the
11 following message on Facebook:⁴³

12 The FuturesHealthCore

13

14 We are currently in need of 10 SLPA's [Speech-Language Pathology
15 Assistants] in Everett, MA (5 miles from the Boston, MA area) to work in a
16 school setting with children who have Autism, DD and MR. These are full-
17 time positions for the upcoming school year. If you are interested in
18 interviewing for the position please email your resume to

⁴⁰ The Employer ultimately decided that it did not have sufficient classroom space to have Futures manage an in-district program for any students who were in OOD placements.

⁴¹ The savings of \$86,250.00 was based upon a comparison with an increased staffing model, which Futures projected would cost \$536,250.00, and the \$450,000.00 cost of Futures services. The Employer's actual cost for psychological services was \$300,000.00.

⁴² The Employer declined Futures' proposal to provide psychological services because it did not want to make wholesale changes in its psychology services while it was working with the state Department of Elementary and Secondary Education to address issues that had arisen about those services.

⁴³ The Facebook page also contained messages from various individuals announcing or seeking vacancies for SLPA's.

1 lstewart@Futureshealth.com or fax it to ___. New grads welcome (must
2 have 20-25 hours of observation hours and if hired must apply for a MA
3 license).

4
5 At the hearing, Superintendent Foresteire denied any contemporaneous knowledge of
6 the posting.⁴⁴ He also opined there that if Stewart had consulted him before she made
7 the posting, he would not have given his approval for the posting.⁴⁵ The Union was
8 unaware of the message on or about the time that Stewart posted it.⁴⁶

9 On April 8, 2009 at 11:05 AM, Stewart sent an email message with the subject
10 heading SLPA's for MA to B. Edwards and sent copies to E. Edwards and Bittel. Stewart's
11 email message stated in relevant part:

12 Brian had asked me to conduct a search on SLPA's in the Everett, MA area.
13 I also did a search on SLPA's who are interested in relocating to MA. Below
14 I have listed the amount that I found when I went back a year. The[re] were
15 a lot that came up that were already working for us currently.

16
17 SLPA's Locally (within 12-35 miles from Everett, MA): 5 candidates
18 SLPA's willing to relocate to MA: 6 candidates
19 SLPA's that have already interviewed and currently awaiting an opportunity:
20 6 candidates [Emphasis in original].

21 Eight minutes later, E. Edwards replied by asking Stewart whether she knew who the six
22 candidates were that were awaiting a placement opportunity. Stewart sent a response
23 ten minutes later, which identified the six candidates and the states where they resided.

⁴⁴ He indicated that he became aware of the posting after the Union filed its charge of prohibited practice in October 2009.

⁴⁵ I informed the parties at hearing that I would not impute Stewart's solicitation for SLPA candidates to the Employer absent any evidence that she was acting on its behalf.

⁴⁶ D'Andrea-Martinez discovered Stewart's posting in August 2009 when she did an internet search, which included the terms "speech-language pathologist" and "Everett". She then contacted Lepke and asked her to review the message.

1 Special Education Department Meeting

2 At some point in the period between April 2, 2009 and April 22, 2009, the Special
3 Education Department held a meeting.⁴⁷ Kelly asked the colleagues of the speech-
4 language and occupational therapists to give them a standing ovation because the
5 Futures Analysis showed that the therapists were doing a great job using an educational
6 model versus a clinical model for therapy services. Kelly also added that the therapists
7 had saved her job. After the meeting ended, McCarthy and several other therapists
8 approached Kelly and asked to see a copy of the Futures report. Kelly informed them
9 that the report was for Superintendent Foresteire's eyes only.⁴⁸

10 April 21 and April 22, 2009 Meetings of the SubFi

11 As of the April 21, 2009 SubFi meeting, the Employer was facing an approximately
12 \$1.9 million dollar budget deficit, which included a reduction of \$513,000.00⁴⁹ in funding
13 as well as an increase of \$1.5 million in costs for employees' raises and step increases.

⁴⁷ The Special Education Department typically held meetings on a monthly basis.

⁴⁸ The record before me does not show that McCarthy or the other therapists' were acting as agents of the Union when they asked to see the Futures report.

⁴⁹ The decrease in revenue resulted from the Commonwealth's level funding of Chapter 70 monies, as well as an increase in the overall expenses for which the Employer reimbursed the City. Although the Employer's student population had increased by 113 students, the Employer's Chapter 70 funds for FY10 remained the same as FY09, even though the increase in students typically would trigger an increase in Chapter 70 funds. Also, although the City had increased its minimum local contribution by \$306,134.00, the payments that the Employer was obligated to make to the City for so-called City-side expenditures increased as well. The Employer's operating budget is net school spending minus City-side expenditures. City-side expenditures included the costs of: school nurses, who were employed by the City's Health Department, employees' health insurance, and retirees' health insurance as well as certain administration costs, which include portions of the auditor's and treasurer's budgets that were pro-rated in accordance with the Employer's share of the overall municipal budget.

1 Superintendent Foresteire and the two assistant superintendents had spent the seven to
2 eight weeks prior to April 21, 2009 considering ways for the Employer to save sufficient
3 money to balance the FY10 budget.

4 On April 21, 2009, the SubFi held a meeting at 6:30 PM.⁵⁰ SubFi members David
5 Ela (Ela), Robert Carreiro (Carreiro),⁵¹ and Sandro Colarusso (Colarusso) were present⁵²
6 as well as other School Committee members Chairman Richard Baniewicz (Baniewicz).
7 Lester MacLaughlin (MacLaughlin), Frank Parker (Parker), Allen Panarese (Panarese)
8 and Joseph Giuliano (Giuliano). Superintendent Foresteire,⁵³ Obremski and Stella also
9 were present. The SubFi met for twenty minutes and discussed several different matters,
10 which included voting to recommend that the full School Committee approve certain bills
11 and payrolls for FY09. The SubFi also voted to recommend to the full Board further time

⁵⁰ Although SubFi meetings are open to the public and posted at City Hall forty-eight hours in advance, no members of the public were present at the April 21, 2009 SubFi meeting. SubFi meetings are not broadcast on the local cable channel, while full School Committee meetings are broadcast on the local cable channel.

⁵¹ Carreiro is also the vice-chairman of the School Committee.

⁵² Due to a prior commitment, the ninth School Committee member Steven Smith was not present at either the SubFi meeting or the full Board meeting.

⁵³ Superintendent Foresteire acts as the official secretary for the School Committee. With the assistance of his administrative assistant, he maintains the School Committee's correspondence, drafts the agendas for meetings, and takes minutes of meetings. In the minutes, the Superintendent describes all motions that were made at meetings, as well as identifies the School Committee members who attended those meetings. However, the minutes are not a transcript and do not reflect all statements made at a full Board or subcommittee meeting.

After the full Board approves the minutes of its meetings or the subcommittee meetings, the Superintendent's secretary, who is also the clerk to the School Committee, sends copies of the minutes to City Hall, the local newspapers and the principals of various schools. Although the Superintendent indicated that he believed that the principals posted the minutes in their buildings, Auger maintained that she had not seen any minutes posted in the school where she taught.

1 on the matter of the FY10 budget. When the full School Committee met at 7:00 PM on
2 April 21, 2009, the members approved the SubFi's recommendation for further time on
3 the FY10 budget.⁵⁴

4 One day later, on April 22, 2009 at 6:30 PM, the SubFi met again for approximately
5 two hours to review and discuss the proposed FY10 budget. SubFi members Ela,
6 Carreiro and Colarusso were present as well as Giuliano. The Superintendent and the
7 two assistant superintendents also were present. Superintendent Foresteire explained
8 that the FY10 budget would have a deficit if no changes were made. He made
9 recommendations on how and where the FY10 budget could be reduced. The
10 Superintendent recommended that the Employer eliminate seven maintenance
11 positions⁵⁵ as well as send out approximately 200 non-renewal letters to mostly non-
12 tenured teachers.⁵⁶ The Superintendent also recommended that the Employer privatize
13 the speech-language and physical therapists' positions. The Superintendent and the
14 SubFi members discussed the possible savings that could be achieved from using a
15 private vendor for the therapy services and one School Committee member, who also
16 was a therapist,⁵⁷ discussed the differences and benefits of using an educational model

⁵⁴ Superintendent Foresteire as the secretary to the School Committee reports every subcommittee vote to the full Board, and the full Board must reaffirm every subcommittee vote.

⁵⁵ In FY11, the Employer subsequently filled with other employees the maintenance positions that it had eliminated in FY10.

⁵⁶ After the Employer received all of its funding sources, including federal stimulus funds, in the summer of 2009, the Employer ultimately rehired all but 40 to 45 of the non-renewed teachers for the 2010-2011 school year.

⁵⁷ The record does not identify the SubFi member and whether the SubFi member was a speech-language, occupational or physical therapist.

1 versus a clinical model for therapy services. The SubFi ultimately voted to: a) approve
2 each section of the proposed FY10 budget individually for a total of \$48,841,311.00; b)
3 increase the transportation line item by \$200,000.00; c) recommend the proposed
4 operating budget of \$48,841,311.00 plus \$2,800,000.00 for transportation to the full Board
5 May 4, 2009, for referral to the public hearing on May 18, 2009; c) to recommend to the
6 full board to privatize clinical therapist positions; d) to eliminate the plumber's position in
7 the Maintenance Department, pending verification of the plumber's license; e) to
8 recommend that Charter Schools, which have students enrolled from districts which are
9 funded below Foundation Budget for FY10,⁵⁸ will receive tuition from the sending district
10 at the same percentage the sending district is funded in comparison to their Foundation
11 Budget; and f) cancel the SubFi meeting for Thursday, April 23, 2009 as no further action
12 was necessary.

13 Tobin's Telephone Call

14 On or about April 26 or April 27, 2009, James Spencer Tobin (J.S. Tobin),⁵⁹ Esq.,
15 labor counsel for the Employer, contacted Stevens via telephone. J.S. Tobin informed
16 Stevens that the Employer was going to reduce the speech-language and occupational
17 therapist positions, the so-called clinical therapist positions, and asked Stevens whether
18 he wanted to sit down and discuss the impacts of the reduction in force and what could
19 be done to save the positions. Stevens informed him that the Union had a contract in
20 place and did not want to reopen the contract on the clinical therapists. J.S. Tobin replied

⁵⁸ For FY10, the Employer's schools were funded at only 94.5% of the foundation budget.

⁵⁹ J.S. Tobin had been the Employer's labor counsel for approximately forty-four years.

1 that the parties needed to discuss the matter and whether the Union had any
2 recommendations on how to save money. J.S. Tobin proposed a meeting for May 7,
3 2009 on the issue, but because of scheduling conflicts, the meeting ultimately did not take
4 place. In late April or early May 2009, Superintendent Foresteire and Auger spoke briefly
5 about the clinical therapists, while they attended a meeting on another matter.⁶⁰

6 May 4, 2009 SubFi Meeting

7 On May 4, 2009, the SubFi held a meeting at 6:30 PM with Ela, Carreiro and
8 Colarusso in attendance. Superintendent Foresteire, Obremski and Stella also attended.
9 The other six School Committee members MacLaughlin, Baniewicz, Giuliano, Parker,
10 Smith, and Panarese also were present. The SubFi met for twenty minutes, and
11 discussed several different matters, which included voting to recommend that the full
12 Board approve certain bills and payrolls for FY09. The SubFi also voted to recommend
13 to the full Board further time on the matter of the FY10 budget.⁶¹

14 May 4, 2009 School Committee Meeting

15 On May 4, 2009, the full Board held a meeting at 7:00 PM, which lasted
16 approximately ninety-four minutes. All nine School Committee members were present as
17 well as Superintendent Foresteire, Obremski and Stella.⁶² The School Committee's

⁶⁰ The record before me does not any details about the Superintendent's and Auger's conversation.

⁶¹ Because the full Board approved the proposed FY10 budget at the May 4, 2009 meeting, it did not act on the motion for further time.

⁶² Superintendent Foresteire testified that Auger and some of the clinical therapists were present at the May 4, 2009 meeting because Auger had received a telephone call from Kelly. However, Kelly did not contact Auger until May 5, 2009. Further, Auger and Lepke, D'Andrea-Martinez and McCarthy all testified that they typically did not attend School Committee meetings and that they did not attend the May 4, 2009 meeting. Thus, I credit

1 agenda for the May 4, 2009 meeting identified ten general subject areas, including the
2 Superintendent's Report. The full Board first reviewed and approved the minutes of its
3 April 21, 2009 meeting.⁶³ Superintendent Foresteire then presented his report, which
4 addressed sixteen different topics. Those topics were as diverse as: a presentation by
5 student finalists in the History Day competition, a recognition of the students of the month,
6 a request from the High School Football Team to conduct a pre-season camp, requests
7 from the High School band to attend summer camp and to perform at Walt Disney World,
8 a request to conduct Flag Day ceremonies, the Coordinator for Preschool Grants' request
9 to conduct a pre-school children's fair, a request to hold a school dance, the Athletic
10 Director's request to award varsity letters to student athletes, and a schedule of upcoming
11 events at the various schools, including a drama club presentation, student government
12 day, the junior and senior proms, Memorial Day services, the awards night and
13 graduation. Three of the sixteen topics that the Superintendent referenced in his report
14 are pertinent to the case before me.

15 The third topic in the Superintendent's Report was listed on the meeting agenda
16 as "Creation of the School Department's Fiscal 2010 operating budget, in the amount of
17 \$48,841,311.00 plus \$2,800,000.00, for Special Education Transportation."⁶⁴
18 Superintendent Foresteire turned the presentation over to Ela, who made a twenty-five

the testimony of Auger, Lepke, D'Andrea-Martinez and McCarthy that they were not present at the May 4, 2009 meeting.

⁶³ Although the School Committee voted to waive the reading of the minutes from the prior School Committee meeting, the members, as was their usual practice, still proceeded to review the minutes orally on the record.

⁶⁴ Superintendent Foresteire raised the third topic approximately sixteen minutes into the May 4, 2009 meeting.

1 minute PowerPoint presentation with fourteen slides. Ela discussed: a) the Employer's
2 foundation budget, b) the level funding of the Chapter 70 monies at \$33,919,780.00,
3 which was the same amount as FY09, despite the increase in the Employer's student
4 population, c) the Employer's Net School Spending for FY10 in the amount of
5 \$59,988,827.00, which is only 94.5% of the foundation budget, d) the increase in the
6 City's minimum local contribution by \$306,134.00, e) the FY10 operating budget of
7 \$48,841,311.00, f) a comparison of the FY09 operating budget of \$49,355,300.00 with
8 the FY10 operating budget of \$48,841,311.00 that showed a deficit of \$513,989.00, g) a
9 breakdown of the FY10 City-side expenses in the amount of \$11,147,516.00 that the
10 Employer needed to pay, h) the calculations that produce the operating budget,
11 specifically \$59,888,827.00 (FY10 Net School Spending) minus \$11,147,516.00 (FY10
12 City-side expenditures) equals \$48,841,311.00 (FY10 Operating Budget), i) reasons for
13 a decrease in the FY10 operating budget, j) possible federal stimulus funds, k) the
14 Employer's Municipal Contributions from FY05 through FY10, and l) concerns about the
15 FY11 budget.

16 Ela and the other School Committee members then discussed the possibility that
17 the Employer might receive federal stimulus monies and the amount that the Employer
18 might receive.

19 Approximately ten minutes later, Superintendent Foresteire referenced the fourth
20 and fifth topics in his report, which were listed on the meeting agenda respectively as
21 "Request to hold a public hearing at 6:00 p.m. on the proposed Fiscal 2010 budget prior
22 to the regularly scheduled School Committee meeting, Monday, May 18, 2009" and as
23 "Request to hold a public hearing regarding participation in the School Choice Program

1 immediately following the public hearing on the proposed FY10 budget". The School
2 Committee voted in favor of holding both public hearings with the public hearing on
3 participation in the School Choice program immediately following the public hearing on
4 the FY10 budget. The regularly scheduled meeting of the full Board would then take
5 place at 7:00 PM that evening. The entire discussion on the scheduling issues took a
6 little over one minute.

7 Approximately twenty-seven minutes later, the School Committee turned to
8 consider another one of the ten general subject areas on the agenda, specifically the
9 Subcommittee Reports, including the SubFi. On behalf of the SubFi, Ela made a motion
10 to waive the reading of the minutes and accept the minutes for the April 22, 2009 SubFi
11 meeting, a motion which was approved. Ela then made a motion to approve each section
12 of the budget individually for a total of \$48,841,311.00. The School Committee approved
13 the FY10 budget by a vote of eight to one.⁶⁵ Ela then moved to increase the Special
14 Education Transportation line item by \$200,000.00 to \$2.8 million, and another member
15 asked whether they had to vote on each line item. Superintendent Foresteire ultimately
16 stated that those items had been addressed during the portion of his report involving the
17 third topic, i.e. the Creation of the FY10 Operating Budget. Superintendent Foresteire
18 then stated in part:

19 So again ..., we're talking about what our proposed budget will be, the
20 public hearing on May 18th, privatize our clinical therapist positions, to
21 eliminate the plumber's position, pending verification of his license.
22

⁶⁵ Smith was the lone School Committee member who voted against the proposed FY10 budget.

1 The Superintendent's comments were the only explicit reference at the May 4, 2009
2 School Committee meeting to outsourcing the clinical therapist positions. Thereafter, Ela
3 renewed his motion to waive the reading and to approve the minutes from the April 22,
4 2009 full Board meeting, which was approved. The entire discussion on waiving the
5 reading and approving the minutes of the April 22, 2009 SubFi report took approximately
6 four minutes.

7 Events between May 5 and May 18, 2009

8 On May 5, 2009, Auger received a telephone call from Kelly. Kelly informed Auger
9 that something might be happening with the speech therapists and that the Union needed
10 to keep an eye on it. Kelly also noted that Kelly might want to talk to the ancillary service
11 people⁶⁶ and get them together in the future.

12 On May 12, 2009, Stevens sent the following email message to J.S. Tobin:

13 I know you called me about the decision to out-source these positions, but
14 the School Committee is scheduled on Monday, May 18 to officially vote on
15 this action, however they have a duty to bargain with the Association [Union]
16 first. I am requesting the committee to postpone their vote until they meet
17 with the Association. At the very least they have to do impact bargaining,
18 however, because these positions are covered by the Agreement,
19 bargaining is called for.

20 When J.S. Tobin informed either Superintendent Foresteire or Obremski⁶⁷ about the
21 contents of Stevens' May 12, 2009 email message, he was told that the schedule was set
22 and that it would not be changed. J.S. Tobin then notified Stevens that the School

⁶⁶ The speech-language, occupational and physical therapists are referred to as ancillary service people.

⁶⁷ J.S. Tobin could not recall whether he spoke with the Superintendent or Obremski.

1 Committee would not postpone its vote but that the parties could continue to discuss the
2 possibility of preserving the therapists' jobs even after the vote.

3 May 18, 2009 Public Hearing on the Proposed FY10 Budget

4 On May 18, 2009 at 6:00 PM, the School Committee held a public hearing on the
5 proposed FY10 budget, which lasted for approximately twenty-one minutes.⁶⁸ Baniewicz,
6 Carreiro, Colarusso, Ela, Parker, Panarese, Guiliano, and Smith were present on behalf
7 of the School Committee.⁶⁹ Superintendent Foresteire, Obremski and Stella also were
8 present.⁷⁰ Ela made a PowerPoint presentation using nine slides. He defined and
9 provided the figures for the foundation budget, the net school spending budget, and the
10 operating budget. He also noted that the FY10 budget was \$513,989.00 less than the
11 FY09 budget because: a) the Commonwealth had level-funded the Chapter 70 monies
12 for the same amount as FY09; b) the Net School Spending is short of the Foundation
13 Budget; c) City-side expenses increased by \$820,087.00 while the City's municipal
14 contribution only increased by \$306,134.00; and d) the cost of Charter School tuition had

⁶⁸ The public hearing was advertised in advance in the local newspapers and broadcast on the local cable channel.

⁶⁹ Only MacLaughlin was absent due to a prior commitment.

⁷⁰ Superintendent Foresteire testified that Auger and certain of the therapists were present at the May 18, 2009 public hearing. However, Auger and D'Andrea-Martinez, Lepke and McCarthy gave detailed testimony that they did not attend the public hearing but arrived at the May 18, 2009 School Committee meeting shortly before or during the presentation of the Golden Apple Awards to teachers and staff. Auger indicated that she attended the meeting because of a telephone call that she received the day before from either Lepke or Bagarella. Additionally, Obremski could not recall the presence of Auger and the therapists at the public hearing although he recalled that they were present sometime that night. Therefore, I credit the testimony of Auger, Lepke, D'Andrea-Marinez and McCarthy that they did not attend the public hearing.

1 increased. He then broke down the City-side expenses and did a comparison between
2 FY09 and FY10. Ela made no reference to the clinical therapists during this presentation.

3 Superintendent Foresteire then made his own PowerPoint presentation using
4 twelve slides. He described the funding sources for the budget and did a comparison of
5 the state and municipal budgetary contributions for the five year period from FY06 through
6 FY10. He also divided the FY10 budget into categories, including central administration,
7 instructional, special education, athletics, and maintenance, and described what
8 percentages of the total budget that those categories represented.⁷¹ The Superintendent
9 also noted that non-salaried items, which include textbooks, computers, and technology,
10 represented twenty-two percent of the budget, utilities represented four percent of the
11 budget, and salaries represented seventy-four percent of the budget, which represented
12 \$35,800,000.00 for salaries. Of that \$35,800,000, ninety-two percent of the amount was
13 for instructional salaries, while four percent each was for central administration salaries
14 and maintenance salaries.⁷² The Superintendent created a pie graph showing how the
15 Employer's General Expenditures were split among the following categories: central

⁷¹ The Superintendent emphasized that eighty-five percent of the FY10 proposed budget represented direct services to student for a total of \$41,400,000.00.

⁷² The total amount of instructional salaries was \$32,800,000.00 while the total amount of central administration salaries was \$1.4 million and the total amount of maintenance salaries was \$1.4 million.

1 administration (5%),⁷³ instructional (14%),⁷⁴ special education (48%),⁷⁵ athletics (4%)⁷⁶
2 and maintenance (29%).⁷⁷ He then presented a comparison of the FY09 and FY10
3 budgets for the following categories: central administration personnel services, central
4 administration general expenditures, instructional personnel services, instructional
5 general expenditures, instructional special services, special education personnel
6 services, special education general expenditures, special education tuition, vision/hearing
7 screening, athletics general expenditures, maintenance and custodial personnel services,
8 maintenance & custodial general expenditures, maintenance-water & sewer,
9 maintenance-oil, maintenance-electricity, maintenance-gas and student handbooks.
10 Superintendent Foresteire pointed out that the proposed FY10 budget reduced by certain
11 percentages the funding for the following categories as compared to the FY09 budget:
12 central administration personnel services (8%), central administration general
13 expenditures (8%), instructional personnel services (1%), instructional general
14 expenditures (5%), instructional special services (8%), special education personnel

⁷³ Five percent of the general expenditures equals \$642,000.00, which includes the cost of office supplies, police details, copier rentals, postage, and telephones.

⁷⁴ Fourteen percent of the general expenditures equals to \$1.8 million, which includes the cost of textbooks, reading supplies, music, principals' requests and computers.

⁷⁵ Forty-eight percent of the general expenditures equals \$8.3 million, which includes the cost of clinical services, evaluations of students, supplies, tuition for OOD placements, and special testing for students.

⁷⁶ Four percent of the general expenditures equals \$500,000.00.

⁷⁷ Twenty-nine percent of the general expenditures equals \$3.7 million, which includes the cost of utilities, custodial supplies, contracts with heat, ventilation, air conditioning, and elevator companies, the cleaning company for the high school, as well as projects in other schools.

1 services (8%), maintenance and custodial personnel services (2%), maintenance-water
2 & sewer (58%), maintenance-oil (30%), maintenance-electricity (14%), maintenance-gas
3 (17%). The proposed FY10 budget increased by certain percentages for the following
4 categories as compared to the FY09 budget: special education general expenditures
5 (41%), special education tuition (8%), maintenance & custodial general expenditures
6 (21%). The Superintendent explained the 41% increase in special education
7 expenditures by stating that psychological testing that the Employer has to do for
8 students, clinical services and therapists had been very expensive. He also noted that
9 maintenance custodial general expenditures had increased by 21% in the proposed FY10
10 budget because of some "big ticket" items, including the fire alarm system at the Whittier
11 School, the rental costs for garage space for the Employer's trucks, landscaping at the
12 High School, and general improvements at the Whittier and Parlin Schools. The following
13 categories continued to have the same amount of funding in the proposed FY10 budget
14 as was contained in the FY09 budget: vision/hearing screening, athletics general
15 expenditures, and the student handbook. He then presented nine other communities'
16 per-pupil expenditures⁷⁸ for FY09. He commented that if the Employer had the difference
17 between its per-pupil expenditure of \$11,329.00 and the average amount of state-wide
18 per-pupil expenditures, the Employer would have an additional \$6.7 million in funds for
19 the schools. He also pointed out that the Employer charges no user fees for any
20 extracurricular activities and ninety-seven percent of students graduate passing the
21 MCAS test. Finally, he described how the proposed FY10 budget was composed of

⁷⁸ Per-pupil expenditures are the amount of money that each community spends on each child that attends their schools.

1 56.5% of funds from the Commonwealth and 43.5% from the City. Further, if the
2 Commonwealth had not level-funded the Chapter 70 monies for FY10, the
3 Commonwealth would have paid 60 to 61% of the budget.

4 After Superintendent Foresteire concluded his presentation, Baniewicz opened up
5 the hearing to the members of the audience. He proceeded to ask three times whether
6 anybody wanted to speak on the proposed budget. No one came forward, and Baniewicz
7 adjourned the public hearing at 6:22 PM. Neither Ela nor Superintendent Foresteire
8 specifically referenced the outsourcing of the clinical therapists' positions during their
9 PowerPoint presentations.

10 May 18, 2009 Public Hearing on School Choice

11 Immediately after the adjournment of the public hearing on the budget, the
12 Employer also held a public hearing on the matter of Employer's possible participation in
13 School Choice. The meeting lasted three minutes. No one spoke in favor of School
14 Choice. A principal, an assistant principal and a vice-principal spoke in opposition to
15 participation in School Choice because of the overcrowded conditions and lack of space
16 in the Employer's schools. After asking three times if anyone else wanted to be heard on
17 the issue, Banciewicz closed the public hearing, and the hearing adjourned at 6:25 PM.

18 May 18, 2009 School Committee Meeting

19 Then a meeting of the full Board commenced. All of the School Committee
20 members but MacLaughlin continued to be present. Superintendent Foresteire, Obremski
21 and Stella also were present. First, the School Committee voted to accept as written the
22 minutes from the May 4, 2009 School Committee meeting. Then Stella presented Golden
23 Apple awards to twenty-six of the Employer's teachers, administrators and staff members.

1 Baniewicz then made a motion to accept the 2010 budget and refer it to the full
2 Board for a vote. Baniewicz also moved to refer to the full Board a motion not to accept
3 School Choice because of overcrowding, a motion that the Board approved.

4 Ela moved to suspend the regular order of business and take up the minutes from
5 the May 18, 2009 Public Hearing on the Proposed FY10 budget. The School Committee
6 approved Ela's motion to waive the reading and accept as written the minutes of the May
7 18, 2009 Public Hearing on the Proposed FY10 budget. Ela sought to reaffirm
8 Baniewicz's motion to accept the proposed FY10 budget. The full Board voted eight to
9 one in favor of the proposed FY10 budget with Smith casting the negative vote.

10 Ela made a resolution to refer to the Massachusetts Association of School
11 Committee's (MASC) Resolution Committee for acceptance at their annual business
12 meeting a resolution seeking to have Charter Schools, whose students are enrolled from
13 districts which are funded below the Foundation Budget for FY10, and in any future fiscal
14 years, because the Commonwealth is unable to meet its Chapter 70 commitment, will
15 receive tuition from the sending district at the same percentage the sending district is
16 funded in comparison to its Foundation Budget.

17 Ela made a motion to suspend the regular order of business and take up the
18 minutes from the May 18, 2009 SubFi meeting, which had taken place earlier at 5:00
19 PM.⁷⁹ After the minutes were introduced into the record, Ela moved to waive the reading

⁷⁹ Ela, Carreiro and Colarusso were present at the May 18, 2009 SubFi, as well as Superintendent Foresteire, Obremski and Stella. Baniewicz, Guiliano, Parker, Smith, Panarese also were present. The Financial Operations Statement was distributed, which reflected the Employer's operations as of April 30, 2009. The SubFi also voted to recommend to the full Board the approval of bills and payrolls in the amount of \$724,827.55. The SubFi did not discuss the proposed FY10 budget at this meeting.

1 and accept the minutes as written, which the Board voted to approve. Ela moved to pay
2 bills and payroll in the amount of \$727,827.55, which Baniewicz, Carreiro, Colarusso, Ela,
3 Guiliano, Panarese, Parker and Smith voted to approve. Ela then made a motion to
4 suspend the regular order of business and take up the minutes on the public hearing on
5 School Choice. After the minutes were entered into the record, Carreiro moved to waive
6 the reading and accept as written the minutes of the public hearing on school choice,
7 which the Board voted to approve. Carreiro moved to have the Employer not participate
8 in School Choice for the 2009-2010 school year because of lack of space and crowded
9 conditions, which the Board voted to approve.

10 The meeting then returned to the regular order of business. Carreiro moved to
11 notify 151 non-tenured teachers, 39 substitute teachers, 7 clerks, 5 technicians, 14
12 custodians and 34 teacher aides of layoffs for the 2009-2010 school year, and the motion
13 was approved. Superintendent Foresteire notified the School Committee and the public
14 of the City Council's FY10 budget hearing, which was scheduled for Thursday, May 28,
15 2009 at 6:00 PM at the City Council Chambers in City Hall. The Board then voted to allow
16 the scheduling of various events in the schools, to accept a monetary donation to the High
17 School from a local credit union, to elect Ela as the voting delegate to the MASC Annual
18 business meeting and to refer back to the City Council a request to reconsider funding
19 the school crossing guard program. The meeting adjourned at 7:00 PM without any
20 specific reference at the meeting to the outsourcing of the clinical therapists.

21 Mid to Late May Meeting

22 In mid to late May 2009, the Superintendent, J.S. Tobin, Auger and Stevens met
23 to discuss a possible leave of absence for a teacher. During that meeting, Stevens

1 indicated that the clinical therapists had been contacting Auger with their concerns about
2 outsourcing and that the Employer and the Union needed to meet about the issue. The
3 Employer agreed to meet.

4 June 1, 2009 School Committee Meeting

5 The full Board next met on Monday, June 1, 2009 at 5:30 PM.⁸⁰ When the meeting
6 commenced, Baniewicz, MacLaughlin, Carreiro, Colarusso, Ela, Parker, Panarese and
7 Guiliano were present. Superintendent Foresteire, Obremski and Stella also attended.
8 The remaining School Committee member Smith arrived at approximately 5:45 PM.

9 The minutes of the May 18, 2009 School Committee meeting were entered into the
10 record, the reading of the minutes was waived and the minutes approved. Superintendent
11 Foresteire then presented his report on eight different issues, including the presentation
12 of the students of the month, an update on renovations at the Parlin School, a request
13 from the Chief Procurement Officer to go to bid on student insurance coverage, the
14 athletic and catastrophic accident insurance policy and the refinishing of the
15 Administration Building's floors, an acceptance of an integrated technology model grant
16 in the amount of \$5,180.00, a request for continued participation in the Tri Tec Inc.
17 Program, a request from the Executive Director of For Kids Only Afterschool Inc. to use
18 the High School Cafeteria on the evening of June 23, 2009, School Committee minutes
19 regarding the Madeline English School, and the upcoming schedule of events. Various
20 School Committee members made motions during the report to approve the requests that
21 the Superintendent had described.

⁸⁰ The full Board meeting was scheduled earlier than usual that evening, because the Student Awards Night was scheduled for 6:30 PM that evening.

1 The full Board then considered two items that the School Committee members had
2 submitted. The first item was Parker's request that a letter of recognition and
3 congratulations be sent to the students and staff of the Crimson Tide Percussion
4 Ensemble on a successful season. The second item was Smith's request that
5 Superintendent Foresteire explain the outsourcing of special education services. Smith
6 indicated that several weeks before, the Board had discussed the outsourcing of special
7 needs teachers. He indicated that he was not really aware of it but that he had some
8 teachers and some parents contact him and that they were happy with the way the
9 program currently was working. He wanted to hear comments about what the Employer
10 was trying to do and why. Superintendent Foresteire replied that the Employer has been
11 outsourcing special education services for thirty or forty years. He noted that because
12 there are students with unique special needs whom the Employer cannot serve in its
13 schools, the Employer spent five million dollars per year sending those students to private
14 institutions, hospitals or schools. He also commented that the City has opted to outsource
15 the transportation for special education because it is cheaper.

16 The Superintendent then added that because of the budget crunch, the Employer
17 had to cut back and find ways to make up for the loss of money. He noted that one of
18 the biggest costs that the Employer faced was the \$1,700,000.00 in raises for teachers.
19 He commented that one of the things that the Employer wanted to do was continue the
20 privatization of the therapists' positions. Superintendent Foresteire then stated:

21 Now ... we have about 13 private therapists working for us because our
22 caseload is so big that we've had to outsource that service and they've been
23 doing that for years. Now what we're looking at is that the ten therapists
24 that work for us cost \$841,000.00. From our investigation and meeting with
25 people, we estimate we could do that for \$400,000.00 and save
26 \$400,000.00.

1 Smith then said that there were a couple of teachers present who would like to speak to
2 the issue. When two other School Committee members noted that it was not a public
3 hearing, Smith indicated that he would make a motion to allow the teachers to speak
4 because the teachers were concerned. He noted that the teachers believed that
5 outsourcing would not save money and that other communities have done outsourcing
6 and then returned to using their own employees. When another School Committee
7 member asked if the issue belonged in a subcommittee, Superintendent Foresteire
8 replied that it did and that it was a matter that needed to be negotiated and was not for
9 the public. He also commented that he wanted to know what communities had tried
10 unsuccessfully to outsource. When Smith responded that the teachers possibly could
11 speak to that issue, Superintendent Foresteire stated:

12 Well, they can when we meet with them, because we've got a meeting with
13 the leadership of their union next week, and so they'll be able to give us
14 some of those examples.

15 Baniewicz then took a roll call vote on Smith's motion to open up the meeting to a public
16 hearing. Because the vote was seven to two⁸¹ against the motion, the teachers did not
17 address the School Committee. Superintendent Foresteire noted that the matter had
18 been referred to the Subcommittee on Negotiations and that a meeting was scheduled
19 for Monday, June 8, 2009 at 6:30 PM. The School Committee then voted in favor of the
20 referral.

21 Guliano wanted confirmation as to how much in-house clinical therapists cost the
22 Employer, and the Superintendent replied that it cost \$841,000.00 for ten in-house
23 therapists and about \$650,000.00 for the thirteen Hart therapists. Guiliano asked how

⁸¹ Smith and Guiliano voted in favor of the motion.

1 much money outsourcing all the clinical therapists would save, and the Superintendent
2 answered \$400,000.00. Guiliano expressed concern that the private vendor would save
3 the Employer money for one year with a low number and that every subsequent year the
4 private vendor would put in a new bid with a higher price. Superintendent Foresteire
5 replied that the Employer would move to another company if a private vendor did increase
6 the price that way. Parker asked whether outsourcing was just a proposal, and that the
7 Employer had not gone out to bid for the services. The Superintendent replied that it was
8 not something that would go to bid because the Special Education Department can just
9 enter into the service and that the Employer wanted to talk with the Union about why it
10 was outsourcing.

11 Parker asked for the basis of the estimate of saving \$400,000.00 by outsourcing.
12 The Superintendent replied that it was a combination of he and his staff and one of the
13 companies that they had worked with that had done an evaluation. Parker then asked
14 whether the next step was to talk to the teachers at the Subcommittee on Negotiations,
15 which the Superintendent answered affirmatively. Parker then inquired whether the next
16 step would be determined by what happened at the Subcommittee on Negotiations. The
17 Superintendent stated that after the Employer met with the Union and went through the
18 process, they would come up with a resolution. Smith then asked for a copy of the
19 evaluation. The Superintendent replied that there was nothing in writing and Obremski
20 added that none existed. Superintendent Foresteire further commented:

21 It's just ... us going through what we have with our special ed leadership
22 team and with these consultants, because they're not here evaluating the
23 work of these people. We don't question that they do a good job and they're
24 valued employees. Some of them have been with us a long time. That is
25 not even the question. The question here is where do we get four or five
26 thousand dollars to keep it going the way it is.

1 Baniewicz then asked whether the people that the Employer was going to
2 outsource or the people that the Employer already has outsourced were they going to
3 lose their jobs. Superintendent Foresteire replied that the Union would determine which
4 ones can bump back into the teacher ranks.

5 Stella then noted that the total cost of the thirteen Hart speech-language,
6 occupational and physical therapists, who then worked in the Employer's schools, would
7 increase beyond the cited figure of \$650,000.00 because the number was based upon
8 the cost as of May 15, 2009 and there was still another seven weeks in the school year.
9 Stella estimated that the cost would increase by another seventy or eighty thousand
10 dollars. Superintendent Foresteire then noted that the Employer was spending \$1.6
11 million on clinical therapy services and that it needed to get a handle on the costs.
12 Baniewicz then asked whether outsourcing all clinical therapy services would affect the
13 Employer's reimbursements from Medicaid for the services. Superintendent Foresteire
14 answered negatively and said that if it did, the Employer would not outsource.

15 Panarese asked whether the projected savings from outsourcing all clinical therapy
16 services included current employees' benefits, etc. The Superintendent answered
17 affirmatively that the cost reflected the employees' benefits. He noted that the Employer
18 would eliminate the costs of the employees' medical insurance. Guiliano then inquired
19 whether the Employer had any idea how many laid-off special education personnel could
20 bump into other positions. Superintendent Foresteire replied that the Union would make
21 the decision not the Employer, although the Union would need to run the decision by the
22 Employer to make sure that everyone is qualified and has the necessary certifications

1 and years of service. The entire discussion involving the clinical therapists took
2 approximately eleven minutes.

3 The full Board then considered various subcommittee reports, bills and payrolls,
4 and various other matters of new and unfinished business. The meeting adjourned at
5 6:02 PM.

6 June 2 and June 3, 2009 Email Exchange between J.S.Tobin and Stevens

7 On Tuesday, June 2, 2009, Stevens sent an email message to J.S. Tobin stating:

8 The ETA [Union] is not interested in opening the Contract at this time, to
9 discuss the removal of those [t]herapist positions.

10 J.S. Tobin replied on Wednesday, June 3, 2009 at 6:39 AM by stating:

11 Your message is unclear-the meeting scheduled for Monday is not to
12 reopen the contract on therapist[s] but to discuss the Committee's action on
13 expanding the current use of contract personnel for the therapist position
14 and resulting effect and to discuss any issues the Association has with this
15 action or alternative suggestions to the Committee's vote-I will call you this
16 morning.

17 Stevens responded via email approximately three hours and twenty minutes later by
18 noting:

19 Ok. I didn't understand that to be the case. Thanks. We will meet on
20 Monday.

21 June 8, 2009 SubFi Meeting⁸²

22 On June 8, 2009, the SubFi held a meeting at 6:30 PM, which lasted for
23 approximately one hour and forty-five minutes. Carreiro, Ela and Colarusso were present
24 as well as Baniewicz, Smith, Parker, and Panarese. Superintendent Foresteire, Stella

⁸² Although at the June 1, 2009 School Committee meeting, School Committee members referenced meeting with the Union about the clinical therapists during the Subcommittee on Negotiations, the Employer and the Union actually met during the SubFi.

1 and J.S. Tobin also attended.⁸³ The Union also had representatives present, including:
2 Stevens, Auger, Elaine Zaino, the vice-president, Stacy Schiavo, the treasurer, and two
3 Executive Board members Fred Ungaro and Denise Hanlon. Ela made an oral
4 presentation about the status of the FY10 budget, including the shortfall in funding. Ela
5 pointed out the cost of the unit clinical therapists, including monies spent on sick days
6 and health insurance. Superintendent Foresteire detailed the projected cost savings by
7 outsourcing all the clinical therapists. The Union stressed that: its bargaining unit
8 members were long-term employees, who provided additional services for the Employer
9 besides therapy services, i.e. lunch duty, filling in for teachers for brief periods, etc., and
10 that the Union really wanted them to stay employed. The Employer indicated that the
11 Union needed to make monetary concessions to preserve those positions. The Employer
12 then reminded the Union that in the prior March, the Employer had asked whether the
13 Union would be willing to forego or delay the implementation of some or its entire 3%
14 raise that unit members were scheduled to receive on September 1, 2009, but the Union
15 had declined.⁸⁴ The Employer now asked again whether the Union would be willing to
16 forego or delay some or its entire upcoming 3% raise.

17 Smith also asked whether unit members would be willing to take furloughs of
18 between one and three days. He estimated that if unit members took three furlough days
19 it would save approximately \$600,000 or ten positions. After a caucus,⁸⁵ Auger indicated

⁸³ Obremski was out of the office on June 8, 2009 and did not attend the SubFi meeting.

⁸⁴ The Employer would save between \$250,000.00 and \$270,000.00 if unit members were willing to forego one percent of their upcoming raise.

⁸⁵ Both the Union and the Employer took other caucuses during the meeting, although the timing of those caucuses is not contained in the record.

1 that the Union was willing to place the Employer's proposals before its membership for
2 approval.

3 The parties also discussed whether any of the therapists had the necessary
4 certification and seniority to bump into a classroom teaching position pursuant to Article
5 4.02 of the 2007-2010 Agreement. The parties ascertained that two therapists could
6 bump into teaching positions, while a further clarification needed to be made about a third
7 therapist's certification. The remaining seven therapists were unable to bump into
8 teaching positions.

9 As the meeting was ending, the Union asked the Employer to confirm that the
10 positions of the ten speech-language and occupational therapists would be saved if the
11 membership voted in favor of a furlough. The Employer indicated that it was willing to
12 save ten bargaining unit positions but not necessarily the speech-language and
13 occupational therapist positions. Stevens replied that he did not think it was going to
14 work. Auger replied that the Union's concern was about the ten clinical therapist positions
15 and that she was not willing to ask her members to vote on concessions unless the
16 Employer was willing to guarantee that the clinical therapist positions would be saved.
17 The Employer stated that it was unwilling to make that guarantee, because it did not know
18 whether it would have a greater need in the 2009-2010 school year for other positions,
19 i.e. classroom teachers, than the clinical therapist positions. Auger then indicated that
20 the Union would take the proposals under advisement and that she needed to meet with
21 the Union's Executive Board. The meeting ended without the parties exchanging any
22 other proposals.

1 Shortly thereafter, the Union's Executive Board met and discussed the Employer's
2 proposal. The Executive Board members decided not to place the Employer's proposals
3 before the membership for a vote, because the Employer would not guarantee that the
4 proposed concessions would save the ten clinical therapist positions.

5 June 15, 2009

6 On June 15, 2009, the Union and the Employer met to discuss grievances that the
7 Union had filed on behalf of certain teachers who were challenging the performance
8 evaluations that they had received. Superintendent Foresteire, Obremski and J.S. Tobin
9 were present on behalf of the Employer,⁸⁶ and Auger and Stevens attended on behalf of
10 the Union. During the meeting, Superintendent Foresteire inquired about the status of
11 the Employer's June 8, 2009 proposals. Auger responded that because the Union's
12 Executive Board had determined that it was not in its members' best interests to grant the
13 concessions that the Employer sought, the Executive Board had not put the proposals
14 before the membership for a vote. Superintendent Foresteire then responded that the
15 Employer was going to have implement a lot of the cuts that it had previously talked about
16 with the Union. The Union indicated that it had gone as far as it could go and that it
17 needed the Employer to maintain all ten clinical therapists' positions. The Employer and
18 the Union did not exchange any additional proposals that day concerning the ten clinical
19 therapist positions or schedule any additional meetings.

20 Also, on June 15, 2009, the full Board held a meeting at 7:00 PM that evening.
21 Baniewicz, MacLaughlin, Carreiro, Colarusso, Ela, Parker, Panarese, Guliano and Smith

⁸⁶ Stella was not present at the June 15, 2009 meeting between the Union and the Employer.

1 all were present. The School Committee members entered the minutes of the June 8,
2 2008 SubFi meeting into record and then waived the reading and accepted the minutes
3 as written. Other than the entry of the June 8, 2005 SubFi minutes into the record, the
4 School Committee made no reference to the outsourcing of the ten clinical therapist
5 positions at the June 15, 2009 meeting, which lasted for approximately one hour and
6 fifteen minutes. No Union representative attended the School Committee meeting.

7 June 16 through June 22, and June 23, 2009

8 The Union and the Employer met again between June 15 and June 23, 2009 to
9 discuss grievances that certain teachers had filed concerning their evaluations. The
10 Superintendent, Obremski, Stella and J.S. Tobin were present on behalf of the Employer,
11 while Auger was present⁸⁷ on behalf of the Union. The Employer inquired whether the
12 Union had a change in its position regarding the ten clinical therapists and whether the
13 Union had proposals for the Employer. Auger's response was that the Union's position
14 was unchanged and that all ten clinical therapists needed to be reinstated. The Union
15 and the Employer did not exchange any proposals regarding the clinical therapists at the
16 meeting, and the Union did not request any additional meetings or discussions.

17 On June 19, 2009, J.S. Tobin contacted Stevens via telephone to inform him that
18 the Employer was going to issue the non-renewal letters on June 23, 2009. J.S. Tobin
19 asked Stevens if anything had changed. Stevens affirmed that the Union needed all ten
20 clinical therapists to be reinstated. J.S. Tobin stated that it was not going to happen.
21 Stevens then replied that the Union had no place to go.

⁸⁷ It is unclear whether Stevens was present at this meeting.

1 On June 23, 2009, Superintendent Foresteire sent letters to Bagarella, Casey,
2 D'Andrea-Martinez, Gagnon, Lepke, McCarthy, Moura, Roccio, Villarroel, and Wolff at the
3 various schools where they worked. The letters, which were identical except for the first
4 line that identified the recipient as either a speech-language therapist or an occupational
5 therapist, stated:

6 This is to notify you that your position of ___ is terminated as of June 30,
7 2009, and you are laid off on that date, unless you are certified for a position
8 held by a teacher with less seniority.

9
10 The School Committee's Sub Committee on Finance voted on Wednesday,
11 April 22, 2009, to recommend to the School Committee the elimination of
12 the therapist positions from the FY2010 budget. The School Committee on
13 Monday, May 18, 2009, voted the FY2010 budget containing the elimination
14 of therapist positions, along with several additional cost savings.

15
16 The School Committee subsequently met with the Everett Teachers
17 Association and entered into discussions with the specific goal of reinstating
18 the therapist positions. Cost-saving suggestions proposed by the School
19 Committee were considered by the Everett Teachers Association, but
20 rejected. No alternative ideas were presented by the Association.

21
22 In accordance with Article 4, Reduction in Force, you are entitled to certain
23 rights and suggest you review that article.

24
25 Please contact Mr. Joseph Nicotera, Payroll Manager, at __, for information
26 on maintaining your insurance benefits.

27
28 This action is taken in accordance with Massachusetts General Law[s], c.7.

29 Also, on June 23, 2009, the Union filed a grievance protesting:

30 [O]ut servicing Occupational Therapists, Physical Therapists, and Speech
31 and Language Therapists. The Union deems this action as a direct violation
32 of the Current Agreement as well as Chapter 150E of the M.G.L. This is
33 agreed to Unit A work and must not be out-sourced to a non-Unit A entity.⁸⁸

⁸⁸ The record before me does not reveal what further action, if any, that the Union took on the grievance.

1 On June 30, 2009, the 2008-2009 school year ended.⁸⁹

2 The Employer operates a summer program for students who receive services from
3 the special education program. The summer program runs for two two-week periods and
4 the staff includes teachers, clinical therapists, teacher aides, college students and high
5 school students. The Employer solicits volunteers⁹⁰ to staff the summer program, and
6 teachers and clinical therapists work thirty hours per week and earn \$30 per hour.⁹¹ In
7 the summer of 2009, three clinical therapists worked for four weeks and one clinical
8 therapist worked for two weeks. All of the clinical therapists were unit members, who
9 previously received termination letters on June 23, 2009.

10 Employer's Discussions with Private Vendors regarding the Clinical Therapy Services

⁸⁹ Auger testified that she made requests on behalf of the Union to meet with the School Committee in the summer of 2009 regarding the clinical therapists but that she was told that the School Committee did not hold meetings in the summer. She could not recall how many times that she made the request, when she made the requests, or to whom she made the requests, although she believed that it was either Superintendent Foresteire or Obremski.

Superintendent Foresteire could not recall whether Auger requested to meet with the School Committee in the summer of 2009, but noted that the School Committee had met with the Union in prior summers, even though the School Committee is not scheduled to meet during the summer. Obremski flatly denied that Auger had made a request to him to meet with the School Committee over the summer.

I need not determine whether Auger actually made the requests because it is not material to the outcome of the case. Auger never stated that she told the Superintendent or Obremski that the Union wanted to meet with the School Committee because it wanted to make proposals or counterproposals or because the Union had changed its position. She also never even used the word bargaining when describing her requests to meet.

⁹⁰ Article 7.02 of the 2007-2010 Agreement describes the manner in which the Employer will announce and fill openings for the summer program. Each spring, the Employer sends a notice announcing openings for the summer program, which unit members must sign thereby acknowledging receipt of the notice.

⁹¹ The hours that teachers and clinical therapists work as part of the summer program were not considered creditable service for retirement purposes.

1 In December 2008, January 2009, Superintendent Foresteire directed Pedulla⁹² to
2 investigate whether the Employer could reduce the cost of its therapy services.

3 Hart

4 On or about that time, Pedulla began to work with Dick Incerto (Incerto), Hart's
5 Chief Executive Officer, to determine whether Hart could reduce the cost of the therapy
6 services that it provided to the Employer.⁹³ For the next three to five months, Pedulla met
7 with and exchanged emails with Incerto in an attempt to understand Hart's cost structure.
8 Pedulla reviewed Hart's roster of employees who provided services to the Employer's
9 schools, their wages and benefits, and their work schedules.

10 In late May, early June, the Employer solicited an offer from Hart to take over all
11 of the Employer's clinical therapy services. Hart made an offer that with salary and
12 benefits would have cost the Employer approximately \$110,500.00⁹⁴ per therapist, which
13 actually increased the cost of the Hart therapists from the 2008-2009 school year. On or
14 about July 1, 2009, Superintendent Foresteire and Pedulla met with Incerto to discuss
15 whether Hart could reduce its projected costs to approximately \$76,818.00⁹⁵ per
16 employee. On July 9, 2009, Pedulla again went over financial data with Incerto, but
17 ultimately Hart was unable to produce the cost savings that the Employer was seeking.

⁹² Pedulla described his duties as purchasing specialist as securing products and services on behalf of the Employer that were the most cost effective and had the best value.

⁹³ At that time, the Employer was not seeking to have Hart take over all therapy services.

⁹⁴ The \$110,500.00 reflected a base salary of \$85,000.00 for each therapist plus \$25,000.00 to cover the cost of the employee's health insurance, liability insurance and travel costs.

⁹⁵ The \$76,818.00 reflected a base salary of \$66,967.00 for each employee plus \$9,851.00 in administrative overhead.

1 Kaleidoscope

2 Also, beginning in late Spring 2009, Pedulla communicated a half-dozen times via
3 telephone or email with representatives from Kaleidoscope, a staffing service that
4 provides clinical therapists, as well as nurses and teacher aides to schools. On June 18,
5 2009, Joshua Hartshorne, an account manager for Kaleidoscope, sent an email message
6 to Pedulla that stated in pertinent part:

7 Thank you for speaking with me today. I have attached our general
8 information and an overview of our services. I understand that the agency
9 that you working with now does your OT/PT/ST openings. But do they cover
10 everything that you may need including teacher aides, social workers and
11 nurses? If they do not, then we could possibly be your resource for those
12 type of professionals, and when you have emergencies. Please contact me
13 with any questions that you may have. ...

14 Soon thereafter, the Employer decided that the range of services that Kaleidoscope
15 offered were too broad for the Employer's needs. The Employer subsequently did not
16 engage in any further discussions with Kaleidoscope about providing clinical therapy
17 services.

18 Futures

19 Additionally, beginning in January or February 2009 and continuing for the next
20 five to six months, Pedulla exchanged emails with or met with Futures representatives
21 on a weekly basis about how to reduce the cost of therapy services. Pedulla provided
22 Futures with employee rosters and payroll information. During that five to six month
23 period, Pedulla and the Futures representatives discussed the terms of a possible
24 services contract that the Employer would enter into with Futures (Futures contract),

1 including the length, price, a provision precluding escalation increases, and monies set
2 aside as guaranteed savings.⁹⁶

3 As part of those continuing discussions, Pedulla in a May 26, 2009 email message
4 to Superintendent Foresteire referenced a possible Futures contract when he stated:

5 Although I have not yet heard back from Peter Bittel of The
6 FuturesHealthCore I have consulted the procurement statute of [C]hapter
7 30[B] where it is made very clear that *“the provision of special education*
8 *pursuant to chapter 71b* (Title XXII-Education of Children with Special
9 *Needs)” is exempt from the rule of 30b section 1(b)(8).* [Emphasis in
10 original].

11
12 The service, therefore does not have to go out for public bid, we are free to
13 negotiate the best possible deal with this company.

14
15 What remains is the larger part of clearly understanding 1) the services that
16 are being offered to the district, 2) the terms of the proposal and 3) the
17 financial guarantees. We have the signed “consultation proposal: and that
18 gives us a basic understanding of what the company will do for the District.
19 However, no details are offered in the document. We do not know of the
20 service quality that they plan to provide to students, the schedule and ratio
21 of therapist-to-student, therapy goals, entry and exit criteria and more. The
22 next steps involve 1) speaking with Peter Bittel and 2) other school districts
23 that are using the services of this company and 3) review the company’s
24 boilerplate agreement. I will keep you posted.

25 The next day Pedulla sent an email message to B. Edwards scheduling a meeting for
26 Tuesday, June 2, 2009 at 10:00 AM. B. Edwards confirmed his attendance at the
27 meeting along with Levine on June 1, 2009. The June 2, 2009 meeting then took place
28 as scheduled. On June 3, 2009, Pedulla sent the following email message to B.
29 Edwards.

30 Hi Brian,
31 It was nice meeting you and Dr. Levine yesterday. I felt the meeting was
32 very productive in terms of gaining a mutual understanding of our
33 organizations’ objectives and in the formulation of our next task. Although

⁹⁶ Pedulla provided briefings to Superintendent Foresteire about his discussions with Futures throughout the five to six month period.

1 it is very clear that your proposal guarantees \$465,210 in savings over a
 2 two-year period, this is based on an expense budget and does not take in
 3 consideration the possible revenue loss from the Medicaid and Circuit
 4 Breaker reimbursements. We know that your plan can reduce expenses;
 5 we now need to know the impact that the use of less-clinical hours will have
 6 on the funding of our program. The determination of the revenue impact
 7 can only be done by comparing and measuring the number of
 8 clinical/therapy hours and competency level that we are providing currently
 9 to the total number of clinical/therapy hours and competency level that your
 10 company is planning to provide. This is very critical since the delta between
 11 the two numbers will be a determining factor in evaluating your proposal.
 12 [Emphasis in original].
 13

14 I agree with you that the establishment of "Entry/Exit" criteria will have a
 15 positive financial impact. However, the value of such strategy would have
 16 to be measured against the possible negative social and political impact of
 17 consequence with the families of the Special Education Student and the
 18 community regardless of the time when the "Entry/Exit" plan is presented to
 19 the family.

- 20 • Please base your analysis on the following information that you requested:
- 21 • Reimbursement from Medicaid for last year = \$1.4M
- 22
- 23 • Reimbursement from Circuit Breaker for last year = \$1.4M (this will be
 24 significantly reduced this year to probably 30% of the \$1.4M)
- 25
- 26 • Special Education Participation Census as of June 1, 2009 = 1045 and
 27 regularly increasing at an annual rate of 6.6% (January 1 of this year we
 28 had 1011 Spec. Ed. Students March 1 we had 1028)⁹⁷

29 As of June 3, 2009, Pedulla estimated that the Employer and Futures had progressed
 30 seventy percent towards completion of a contract.

31 Bittel and Pedulla subsequently had a conversation on Monday, June 8, 2009 on
 32 certain issues that Pedulla raised in his June 3, 2009 email message. On June 9, 2009,
 33 Bittel sent an email message to Pedulla stating:⁹⁸

⁹⁷ Pedulla's June 3, 2009 email bore the subject line: "The FuturesHealthCore Proposal to the Everett Public Schools."

⁹⁸ Bittel's June 9, 2009 email message bore the subject line: "240 grant and [M]edicaid".

1 To follow up on two parts of our conversation yesterday, please let's get
2 deeper in the 240 grant as well as the Medicaid revenue discussion.

3
4 The 240 grant revenue
5 Rich Labrie is available to run numbers on the 240 grant which will clarify
6 the savings we discussed. He will go over the grant expenditure report and
7 identify the actual income changes and savings that are available. Please
8 email him to work out a time when you both can talk.

9
10 Medicaid Revenue
11 Our Medicaid consultant, Lori Oiler, is available to be there tomorrow or next
12 Tuesday-please let me know what will work in order to complete a revenue
13 snapshot, we will need the following information: 1. List of all students
14 receiving sped services inclusive of first name, last name, dob, gender; 2.
15 grid report for all students receiving sped services. Let me know when it
16 will work for Ms. Oiler to be in the district.

17
18 I am optimistic that we can make better sense for both our needs and thank
19 you for your cooperation.

20 As of June 9, 2009, Pedulla estimated that the Employer and Futures had progressed an
21 additional five percent to be within seventy-five percent of completion of the contract.

22 Thereafter, in the ensuing weeks, Pedulla and Bittel discussed various additional
23 topics including: a) Futures' contribution of funds towards the Employer's purchase of
24 software to facilitate Medicaid reimbursements, b) Futures' guarantee that the Employer
25 would save a certain amount of funds, c) a cap on the total cost of Futures services, even
26 if there was an increase in the number of students requiring services from Futures, and
27 d) Futures' waiver of its caseload analysis fee. On Thursday, July 2, 2009, Bittel sent
28 Pedulla an email message stating in pertinent part:

29 Please see attached first draft of the contract we had discussed awaiting
30 your comments and revisions.

31
32 We suggest that the following two items be handled in a separate letter
33 from Futures to your office:

- 34
35 1. The \$18,500 fee for the caseload analysis will be waived once the contract
36 is signed consistent with the agreement we had previously entered into[.]

1
2 2. Futures will equally share the costs of the software that will improve EPS
3 access to state list of Medicaid eligible children in the district. We
4 understand that the total cost of the software is approximately \$3,500.
5
6 I will contact Mrs. Kelly on Monday to obtain the census number that will
7 allow us to formulate the per capita rate....
8
9 I hope you have a restful and relaxing weekend and I look forward to your
10 thoughts and comments.

11 Pedulla then reviewed the first draft of the Futures contract and noted where he believed
12 that additions or deletions needed to be made. At that point, Pedulla characterized the
13 deal as “starting to gel.” During the long July 4th holiday weekend, Pedulla and Bittel had
14 many telephone conversations and spoke for hours about possible changes to the first
15 draft of the Futures contract. In the week thereafter, Pedulla and Bittel continued to
16 discuss proposed terms of the contract and to exchange suggested language. On July
17 14, 2009, B. Edwards sent an email message to Pedulla that stated in pertinent part:

18 Good morning, Joe. It sounds like we are very close to putting this
19 agreement to bed which is terrific. Attached for your review is a final
20 contract draft that incorporates the changes you and Peter worked through
21 yesterday. Peter is looking forward to connecting with you at 1:30 pm today
22 to finalize the document. We’re very much looking forward to working with
23 Everett.

24 Upon review of the July 14, 2009 contract draft, Superintendent Foresteire requested
25 certain language regarding the Employer’s discretion to renew the Futures contract. On
26 Thursday, July 16, 2009, Pedulla sent an email message⁹⁹ to B. Edwards stating:

27 Thank for your contribution yesterday. I believe we have accomplished a
28 significant mission. Looking forward to see you when you visit Everett:
29

30 CONTRACT DURATION

⁹⁹ Pedulla’s July 16, 2009 email message bore the subject heading: “Contract Duration language”.

1
2 This contract is for a one (1) year period renewable at the
3 discretion of the Everett Public School Department for an
4 additional four (4) one-year periods.

5 On July 23, 2009, Baniewicz on behalf of the School Committee and Bittel on behalf of
6 Futures executed the contract.¹⁰⁰ On July 24, 2009 at 9:40 AM, Pedulla sent Bittel an
7 email message noting:

8 Superintendent Foresteire wants to add the additional language to the
9 contract, which if you agree, we can do with an "Addendum" that I will
10 prepare and send to you. I do not believe this is anything major. Here it is:

11
12 *FuturesHealthCore shall assume defense of and shall*
13 *indemnify and hold the City and its agents harmless from all*
14 *suits and claims against FuturesHealthcore arising from the*
15 *use of any invention, patent right, labor or employment, or*
16 *from any act of omission or neglect of the Company, his*
17 *agents, employees or any subcontractor in performing the*
18 *service, under this contract.*

19
20 *FuturesHealthCore agrees to provide services as may be*
21 *requested by the Everett School Department in the areas of*
22 *Language, Testing, Speech, Occupational and Physical*
23 *Therapies. [Emphasis in Original].*

24
25 As a clarification point for the billing process, I wanted to outline the
26 following. At the end of each month, Futures will produce an invoice (11
27 times per year) for services rendered and for the agreed amount and mail it
28 before the 8th of the following month to

29
30 For example, between the 1st and the 5th of September the ESD will receive
31 the invoice for the previous month of August. This invoice will be paid by
32 September 20. We should follow this cycle. By doing so your company will
33 be paid within 20 days from the receipt of this invoice. Please keep in mind,
34 that by state law, we are not allowed to pay for services ahead of time.
35 Services must be received before a payment is made. Please let me know
36 if bullets #1 and 2 are okay with you and I will prepare the Addendum.
37 Thank you and have a great weekend.

¹⁰⁰ Obremski, as assistant superintendent for business affairs, opined that if the Employer had not reached an agreement with Futures, the Employer would have recalled as many of the ten clinical therapists as possible.

1 On that same day, Pedulla and B. Edwards discussed the proposed addendum, including
2 certain modifications that B. Edwards was seeking, and ultimately concluded their
3 negotiations by agreeing upon a contract. At 4:08 PM on July 24, 2009, Pedulla sent an
4 email message to B. Edwards stating:

5 I have made the modifications you requested. The only text I did not include
6 was the one pertaining to the Futures indemnification. That language was
7 already part of the main Document-Page 3, Section 7. Please have Peter
8 sign it and e-mail back to me. Thank you.

9 On July 27, 2009, Bittel executed an addendum to the contract, which contained the
10 same language as was contained in Pedulla's July 24, 2007 proposed addendum. On
11 that same date, B. Edwards then emailed a copy of the signed addendum to Pedulla.
12 On August 3, 2009, Mayor Carlo DeMaria Jr. executed the Futures contract on behalf of
13 the City. The fully executed contract, which was for the eleven-month period from August
14 1, 2009 through June 30, 2010,¹⁰¹ guaranteed that the Employer would save
15 \$233,274.00 in the first year and set aside \$100,000.00, which Futures would pay the
16 Employer if the Employer did not realize \$233,274.00 in cost savings in the first year.
17 The Employer would pay Futures \$1,498,000.00 for year one for any number of students
18 to whom Futures provided services and would pay Futures \$1,488,000.000 in year two
19 for any number of students. Futures set aside savings of \$50,000.00 for year two.

20 August and September 2009

21 Between August 4, 2009 and September 1, 2009, which was the date when
22 students returned to school from summer vacation, Futures personnel arrived at the
23 Employer's schools to review student records and to become familiar with the layouts of

¹⁰¹ The Future contract provided that its employees would provide clinical services to the Employer's summer program.

1 those schools. Because Futures personnel provided all of the clinical therapy services
2 for the Employer's students for the 2009-2010 school year, the Employer did not hire any
3 Hart therapists or rehire any of the ten unit members as clinical therapists. Three former
4 therapists, Bagarella, Casey and Wolff, exercised their contractual bumping rights, and
5 worked for the Employer as teachers during the 2009-2010 school year.

6 In September or October 2009, the Employer and the Union met again to discuss
7 the layoffs of the clinical therapists and the outsourcing of their duties. The
8 Superintendent, Obremski and Stella represented the Employer, while Auger and
9 Stevens represented the Union. Neither party made any proposals or counterproposals.
10 Thereafter, on October 20, 2009, the Union filed the prohibited practice charge in the
11 present case.

12 Opinion

13 The issues before me are whether the Employer violated Section 10(a)(5) and (1)
14 of the Law when: a) the Employer implemented layoffs for the clinical therapists without
15 giving the Union notice and an opportunity to bargain to resolution or impasse over the
16 layoff decision and the impacts of that decision on employees' terms and conditions of
17 employment (Count I); and b) the Employer transferred the duties of the speech-language
18 and occupational therapists outside of the bargaining unit without giving the Union notice
19 and an opportunity to bargain to resolution or impasse (Count II).

20 Count 1-Failure to Bargain over the Elimination of the Clinical Therapists' Positions

21 Section 6 of the Law requires public employers to give employees' exclusive
22 collective bargaining representative prior notice and an opportunity to bargain to
23 resolution or impasse before implementing a change in a mandatory subject of

1 bargaining. See School Committee of Newton v. Labor Relations Commission, 388 Mass.
2 557 (1983). When determining what constitutes a mandatory subject of bargaining, the
3 Commonwealth Employment Relations Board (CERB) balances the public employer's
4 interest in maintaining its managerial prerogative to effectively govern against the
5 employees' interest in bargaining about subjects that directly affect wages, hours,
6 standards of productivity and performance and other terms and conditions of
7 employment. Town of Danvers, 3 MLC 1559, 1577, MUP-2292, 2299 (April 6, 1977).

8 It is well established that decisions determining the level of services that a
9 governmental entity will provide lie within the exclusive managerial prerogative of the
10 public employer. Town of Danvers, 3 MLC at 1573-1574 (locking the employer into a
11 certain level of firefighting service is an intrusion into a discretionary governmental
12 decision). However, the means by which the employer achieves that reduction in force,
13 by layoffs or otherwise, and the manner in which those involuntary layoffs directly affect
14 unit members' hours of work and their wages are mandatory subjects of bargaining.
15 School Committee of Newton at 563. Here, it is undisputed that the Employer had an
16 obligation to bargain over the decision to lay off the ten clinical therapists and the impacts
17 of that decision. The controversy before me concerns whether the Employer provided
18 the Union with sufficient notice and an opportunity to bargain to resolution or impasse.
19 Because Counts I and II involve the same bargaining history, I will consider first whether
20 the Employer transferred bargaining unit work and thus, triggered its statutory bargaining
21 obligation, before I consider whether the Employer satisfied its statutory bargaining
22 obligation for both allegations.

23 Count 2-Transfer of Unit Work

1 A public employer violates Section 10(a)(5) of the Law when it transfers work
2 performed by bargaining unit members to non-bargaining unit personnel without first
3 giving the exclusive representative of its bargaining unit members prior notice and an
4 opportunity to bargain to resolution or impasse. City of Cambridge, 23 MLC 28, 36, MUP-
5 9171 (June 28, 1996), aff'd sub nom., Cambridge Police Superior Officers Association v.
6 Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999). To establish that a public
7 employer has violated the Law, an employee organization must demonstrate that: 1) the
8 employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit
9 work had an adverse impact on individual employees or the bargaining unit itself; and 3)
10 the employer failed to give the employee organization prior notice and an opportunity to
11 bargain to resolution or impasse over the decision to transfer the work. Lowell School
12 Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001); City of Gardner, 10 MLC 1218,
13 1219, MUP-4917 (September 14, 1983). When a public employer continues to have the
14 same work performed but at a lower cost, the decision to transfer bargaining unit work is
15 not a level of services decision exempt from collective bargaining, but an economically
16 motivated decision particularly suitable to collective bargaining. City of Fall River, 27 MLC
17 47, 51, MUP-1961 (November 21, 2000) (citing Commonwealth of Massachusetts, 26
18 MLC 161, 163 SUP-3835 (March 13, 2000)) (employer had duty to bargain before
19 transferring fire dispatch duties to civilian dispatchers).

20 It is undisputed that the duties of the speech-language and occupational therapists
21 were shared work that both unit members and non-bargaining unit Hart employees
22 performed. In shared work cases, the analysis focuses on the pre-existing pattern of
23 shared work and the impact that any changes in that pattern may have on the allegedly

1 aggrieved party. See City of Boston, 26 MLC 144, 147, MUP-1085 (March 10, 2000), aff'd
2 sub nom., City of Boston v. Labor Relations Commission, 58 Mass. App. Ct, 1102 (2003);
3 Town of Natick, 11 MLC 1434, 1438, MUP-5319 (February 19, 1985). The CERB
4 previously has determined that an employer may not unilaterally alter a pre-existing
5 pattern of shared work. See City of Boston, 28 MLC 194, 195, MUP-2185 (January 4,
6 2002); City of Quincy, Quincy City Hospital, 15 MLC 1239, 1241, MUP-6490 (November
7 9, 1988); City of Boston, 6 MLC 1117, 1125-1126, MUP-2863 (June 4, 1979). An
8 employer is not obligated to bargain over every incidental variation in job assignments
9 between unit and non-unit employees. Town of Saugus, 28 MLC 13, 17, MUP-2343,
10 CAS-3388 (June 15, 2001); City of Somerville, 23 MLC 256, 259, MUP-8160 (May 2,
11 1997). Rather, the employer is only required to bargain if there is a calculated
12 displacement of unit work. Town of Bridgewater, 23 MLC 103, 104, MUP-8650 (December
13 30, 1998). Accordingly, if unit members had performed an ascertainable portion of the
14 work, a significant reduction in the portion of the work performed by unit members with a
15 corresponding increase in the work performed by non-unit employees may demonstrate
16 a calculated displacement of unit work. Commonwealth of Massachusetts, 27 MLC 52,
17 56, SUP-4091 (November 21, 2000); City of New Bedford, 15 MLC 1732, 1737, MUP-
18 6488 (May 31, 1989). Here, the Employer contends that the Union did not perform an
19 ascertainable percentage of the work of providing speech-language and occupational
20 therapy services to students. However, prior to and as of the 2008-2009 school year, unit
21 members continued to perform a substantial amount of the therapy services, because
22 certain Hart therapists only provided services for finite periods of time, including maternity
23 leaves, or on a part-time basis. The record before me contains no affirmative evidence

1 showing that Hart employees provided most or even the majority of the speech-language
2 and occupational therapy services. Thus, the pattern of shared work consisted of unit
3 members providing a substantial amount of services, while Hart employees provided the
4 remaining services.

5 Additionally, the Employer contends that its hiring of Futures to perform therapy
6 services was only an incidental variation in the pattern of how unit members and Hart
7 employees previously shared the therapy duties and did not result in a calculated
8 displacement of unit work. Contrary to the Employer's argument, unit members have
9 gone from performing a substantial amount of therapy services to providing no therapy
10 services. Concurrently, the portion of therapy services that non-unit personnel perform
11 has increased from Hart's performance of some of the therapy duties to Futures'
12 performance of all therapy duties. The Employer is not simply transferring work to Futures
13 that already was outside of the bargaining unit, i.e. the share of the therapy services that
14 Hart performed. See City of Boston, 26 MLC 144, 147, MUP-1085 (March 10, 2000) (not
15 restricting an employer from re-allocating a portion of work already being performed by
16 non-unit personnel). Thus, a transfer of unit work has taken place.

17 Alleged Adverse Impacts

18 An employer must bargain about a transfer of unit work, if the transfer results in
19 adverse impacts on individual employees or the bargaining unit as a whole. City of New
20 Bedford, 15 MLC at 1737. The clinical therapists, who were bargaining unit members,
21 were adversely impacted by the transfer of unit work because the Employer laid them off.
22 Moreover, the bargaining unit as a whole was adversely impacted by the loss of ten
23 positions, see Commonwealth of Massachusetts, 26 MLC 228, 232, SUP-4288 (June 12,

1 2000) (losing unit members due to a transfer of unit work had an adverse impact on the
2 unit as a whole), and the opportunity to have unit members perform therapy services in
3 the future. See City of Boston, 28 MLC 369, 373, MUP-2267 (May 31, 2002) (losing future
4 opportunities to perform disputed work adversely impacted the bargaining unit).
5 Accordingly, the City's transfer to Futures of the speech language and occupational
6 therapy duties that unit members previously performed had an adverse impact on
7 individual bargaining unit members and on the bargaining unit as a whole, which triggered
8 the Employer's statutory obligation to bargain to resolution or impasse with the

1 Union prior to transferring the work.¹⁰²

2 Notice

3 I turn now to consider whether the Employer provided the Union with notice and
4 an opportunity to bargain to resolution or impasse over both the decision to lay off the
5 therapists and the impacts of that decision and the transfer of bargaining unit work to
6 Futures. First, the Union contends that the Employer failed to provide it with adequate
7 notice about the layoffs and transfer of unit work. The information conveyed to the Union
8 must be sufficiently clear for the union to make a judgment as to an appropriate response.
9 Boston School Committee, 4 MLC 1912, 1915, MUP-2611 (April 27, 1978). Information
10 about a proposed change acquired by union officers or agents will be imputed to the
11 union. City of Cambridge, 5 MLC 1291, 1293, MUP-2799 (September 27, 1978). The
12 record before me contains credible, unrebutted testimony from J.S. Tobin that he notified
13 Stevens on April 26 or April 27, 2009 about the layoffs of the speech-language and
14 occupational therapists, who were bargaining unit members. Contrary to the Union's
15 claims that J.S. Tobin's testimony was "vague", J.S. Tobin clearly testified that he told
16 Stevens that the Employer wanted to discuss with the Union how to save the therapists'
17 positions and whether the Union had any recommendations on how to save money.
18 Stevens, in a May 12, 2009 email message to J.S. Tobin, also notes in part that, "I know

¹⁰² I am not persuaded by the Employer's claim that the Union waived by inaction is right to challenge the transfer of the speech-language and occupational therapists' duties to Futures because the Union previously did not protest the transfer of some of those duties to Hart. The Union's failure to protest the transfer of some of the duties outside of the bargaining unit does not preclude it from challenging the transfer of all those duties outside the bargaining unit. Cf. Town of Dennis, 28 MLC 297, 303, MUP-2634 (April 3, 2002) (union did not waive by inaction the 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).

1 you called me about the decision to out-source these positions.” Tobin’s testimony and
2 Stevens’ email message demonstrates that the Employer had provided the Union with
3 actual notice of the layoffs and the outsourcing.¹⁰³

4 Insufficient Time to Bargain

5 The Union also contends that the Employer failed to bargain in good faith by
6 providing it with insufficient time to bargain after notice of the layoffs and outsourcing was
7 given. Here, the Employer’s notice to the Union about the layoffs and the outsourcing
8 was provided approximately two months before the Employer issued the layoff letters to
9 the clinical therapists and approximately three months before the Employer executed the
10 contract with Futures. The record before me is devoid of any facts showing that the
11 Employer delayed or declined to schedule bargaining sessions or any particular reasons
12 why the two and three month periods were not sufficient. Compare City of Lowell, 28 MLC
13 304, 306, MUP-1540 (April 11, 2002) (notifying Union three days before issuing layoff
14 letters was insufficient) with County of Middlesex, 6 MLC 2056, 2058, MUP-3449 (March
15 31, 1980) (notifying Union nearly three months before of termination of summer day care
16 program allowed sufficient time for meaningful bargaining). Therefore, the Union has

¹⁰³ The Employer also contended that the Union had notice of the layoffs and outsourcing of work in March 2009 when the parties discussed the potential FY10 budgetary shortfall. However, while the Employer referenced the potential for layoffs of unit personnel, the Employer did not specifically reference the ten clinical therapists or the possibility of outsourcing those positions.

Additionally, the Employer argued that the Union had notice of the layoffs and the therapists because of the subjects that were discussed at the May 4, 2009 School Committee meeting, the May 18, 2009 Public Hearing and the May 18, 2009 School Committee meeting. Because I have found that J.S. Tobin gave Stevens actual notice about the layoffs and the outsourcing, I need not reach the Employer’s arguments about possible other sources of notice to the Union.

1 failed to establish that the Employer failed to bargain in good faith by providing it with
2 insufficient time to negotiate.

3 Fait Accompli

4 The Union next argues that even if the Employer provided it with notice, the
5 Employer had presented it with a fait accompli. An employer's duty to notify the union of
6 a potential change before it is implemented is not satisfied by presenting the change as
7 a fait accompli and then offering to bargain. Massachusetts Port Authority, 36 MLC 5, 13,
8 UP-04-2669 (June 30, 2009). A fait accompli exists where, "under all the attendant
9 circumstances, it can be said that the employer's conduct has progressed to a point that
10 a demand to bargain would be fruitless." Town of Hudson, 25 MLC 143, 148, MUP-1714
11 (April 1, 1999); Holliston School Committee, 23 MLC 211, 212-213, MUP-1300 (March
12 27, 1997) (citing Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May 27,
13 1982)). Specifically, the Union claims that the Employer made its layoff and outsourcing
14 decisions at the April 22, 2009 SubFi meeting, which is four or five days before Tobin's
15 telephone call to Stevens. The Union is correct that on April 22, 2009, the SubFi had
16 discussed the possible savings that could be achieved from laying off the clinical
17 therapists and privatization of their duties as well as voted to recommend privatization to
18 the full Board. However, when Tobin notified Stevens of the layoffs and outsourcing four
19 or five days later, he informed him that the Employer wanted to sit down and discuss what
20 could be done to save the positions. Thus, the Employer still expressed the possibility
21 that the clinical therapist positions could be saved even after the April 22, 2009 SubFi
22 meeting.

1 Further, Superintendent Foresteire gave unrebutted testimony that even after a
2 budget is approved for a fiscal year, the Employer has flexibility to make changes within
3 the framework of that budget. Several years before, the Employer had approved a budget
4 that eliminated pre-school classes, but the Employer reinstated pre-school classes in
5 September of that fiscal year when additional funds became available. Also, in FY10, the
6 Employer ultimately recalled all but forty or forty-five of the teachers to whom it sent non-
7 renewal letters. Additionally, at the June 1, 2009 School Committee meeting, which took
8 place two weeks after the School Committee approved the proposed FY10 budget,
9 certain School Committee members stressed the need to meet and negotiate with the
10 Union concerning the layoffs and outsourcing of the clinical therapist positions. Compare
11 Scituate School Committee, 9 MLC at 1013 (finding that School Committee's vote to
12 eliminate a paid lunch period for cafeteria employees was not irrevocable, especially in
13 light of a school committee's members concerns about employees' contractual rights).

14 Furthermore, as of April 26 or 27, 2009 when the Employer gave notice to the
15 Union about the layoffs and outsourcing, the Employer was still speaking with three
16 private vendors of therapy services, Futures, Hart, and Kaleidoscope, and had not
17 reached agreement with any of them. Superintendent Foresteire and Pedulla, the
18 purchasing agent, met with Hart on July 1, 2009, while Pedulla simultaneously was
19 engaged in discussions with Futures. Also, Pedulla stated that the possible deal with
20 Futures did not gel until the weekend of July 4, 2009. Even after that date, Pedulla and
21 Futures still were exchanging substantive proposals and draft contracts. The Employer
22 and Futures ultimately executed an agreement on July 23, 2009. Also, Obremski had
23 noted that if the Employer were unable to reach a deal with Futures, it simply would have

1 recalled as many laid off clinical therapists as possible to work in September 2009.
2 Because the facts before me do not show that the Employer's conduct had rendered
3 bargaining futile, I decline to find that a fait accompli existed concerning either the
4 Employer's decision to lay off the clinical therapists or to outsource their positions.

5 Impasse

6 As neither party contends that they bargained to resolution, the next question that
7 I must consider is whether the parties negotiated to impasse. Impasse in negotiations
8 occurs only when "both parties have negotiated in good faith on all bargainable issues to
9 the point where it is clear that further negotiations would be fruitless because the parties
10 are deadlocked." Town of Plymouth, 26 MLC 222, 223, MUP-1465 (June 7, 2000);
11 Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999); see also
12 School Committee of Newton, 338 Mass. at 574 (describing impasse as a question of fact
13 that requires a consideration of the totality of the circumstances to decide whether despite
14 their good faith, the parties are simply deadlocked). To determine whether impasse has
15 been reached, the CERB considers the following factors: bargaining history, the good
16 faith of the parties, the length of negotiations, the importance of the issues to which there
17 is disagreement, and the contemporaneous understanding of the parties concerning the
18 state of the negotiations. Id.

19 Although the CERB has considered a union's unilateral expression of desire to
20 continue bargaining as evidence that the parties may have bargained to impasse, see
21 e.g. Commonwealth of Massachusetts, 25 MLC at 206; City of Boston, 21 MLC 1350,
22 1361, MUP-8372 (October 17, 1994), the ultimate test remains whether there is a
23 likelihood of further movement by either side and whether the parties have exhausted all

1 possibility of compromise. City of Boston, 28 MLC 175, 184, MUP-1087 (November 21,
2 2001). Determining whether there is a likelihood of further movement by either side has,
3 in at least two CERB decisions, turned on the fact that one or both parties had not
4 changed their position since negotiations began. See City of Boston, 29 MLC 6, 9, MUP-
5 2413 (June 27, 2002) (no movement by either side during four negotiation sessions); City
6 of Boston, 28 MLC at 185 (union's position after eighth bargaining session was no
7 different from its position at the first).

8 Here, the Union argues that the parties could not have negotiated to impasse
9 because they only met for one session on June 8, 2009 for approximately one hour and
10 forty-five minutes. However, upon review of the facts before me, the parties actually
11 discussed the outsourcing and layoffs of the clinical therapists on five different occasions.
12 In-person meetings took place on: June 8, 2009, June 15, 2009, in the period between
13 June 16 and June 23, 2009, and a meeting in September or October 2009. J.S. Tobin
14 also had a telephone conversation with Stevens about the issues on June 19, 2009.

15 At the June 8, 2009 SubFi meeting, the Employer made a presentation about the
16 FY10 budget, including the shortfall in funding. The Employer detailed the projected cost
17 savings by outsourcing the therapists' duties and indicated that the Union needed to make
18 monetary concessions to save the therapists' positions. The Employer proposed that the
19 Union forego or delay some of their three percent pay increase that was scheduled to
20 take place on September 1, 2009 or that the Union take furloughs of between one and
21 three days. The Union responded that it was willing to place the proposals before its
22 membership for a vote. However, when the Employer indicated that the monetary
23 concessions would save ten unit positions but not necessarily the ten speech-language

1 and occupational therapists, Auger stated that she was unwilling to put the concessions
2 before the membership for a vote unless the Employer was able to guarantee that those
3 positions would be saved. Auger then indicated that the Union would take the proposals
4 under advisement and that she would confer with the Executive Board. The Union made
5 no proposals at that meeting.

6 The Employer and the Union also discussed the impacts of the Employer's
7 decision to lay off and outsource the positions when they agreed that two and potentially
8 three of the therapists could bump into the teacher positions pursuant to Article 4.02 of
9 the 2007-2010 Agreement. The Union made no proposals regarding the impacts of the
10 Employer's decision to layoff the clinical therapists and outsource their duties on their
11 terms and conditions of employment.

12 On June 15, 2009, the Superintendent, Obremski, and J.S. Tobin met with Auger
13 and Stevens regarding grievances that certain unit members had filed protesting their
14 evaluations. During that meeting, the Employer asked about the status of its proposals.
15 Auger responded that the Executive Board had determined that it was not in the best
16 interest of the membership to place the proposals before them for a vote. The Union
17 indicated that it had gone as far as it could go and that it needed the Employer to maintain
18 all ten positions.

19 During a meeting that took place between June 16 and June 23, 2009, whose
20 purpose was for the parties to discuss certain teachers' grievances challenging their
21 evaluations, the Employer inquired whether the Union had a change in its position
22 regarding the clinical therapists and whether the Union had proposals for the Employer.
23 The Union's responded that its position remained unchanged and that all ten therapists

- 1 transferring work outside of the bargaining unit because the Employer and the Union had
- 2 negotiated to impasse.

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 ten days, the decision shall become final and binding on the parties.