In the Matter of PEABODY SCHOOL COMMITTEE

and

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

Case No. MUP-2073

54.25	*work shifts*
54.8	*mandatory subject*
67.11	*contract bar*
67.15	*union wavier of bargaining rights*
67.8	*unilateral change by employer*
82.3	*status quo ante*
91.11	*statute of limitations*

June 21, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Daniel B. Kulak, Esq.	*Representing the Peabody School Committee*
Alison L. Forbes, Esq. *Wayne Soini,Esq.*	*Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO*

DECISION[1]

STATEMENT OF THE CASE

On March 23, 1998, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Peabody School Committee (School Committee) had engaged in prohibited practices in violation of Sections 10 (a)(5) and (1) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's rules, the Commission investigated the Association's charge and, on September 28, 1998, issued a two-count complaint of prohibited practice. Count I of the Commission's complaint alleges that the School Committee failed to bargain in good faith with the Union in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by changing bargaining unit members' work schedules to include downtime between 9:30 a.m. and 11:00 a.m. without giving the Union prior notice and an opportunity to bargain to resolution or impasse. Count II of the Commission's complaint alleges that School Committee failed to bargain in good faith by failing to provide the Union with information that was relevant and reasonably necessary for the Union to perform its duties as the employees' exclusive collective bargaining representative, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

On June 6, 2000, the Union withdrew Count II from its charge of prohibited practice and, therefore, Count II of the Commission's complaint is dismissed. On September 19, 2000, the parties notified the Commission that they had agreed to waive an evidentiary hearing and to file a joint stipulated record with the Commission on the issues raised in Count I of the complaint. The parties filed the joint stipulated record and certain joint stipulated exhibits with the Commission on October 3, 2000. The Commission received both parties' briefs on or before November 1, 2000. On March 29, 2001, with the filing of a joint exhibit, the parties perfected the stipulated record.

FINDINGS OF FACT

Stipulations

1. The City of Peabody is a public employer within the meaning of Section 1 of the Law.

2. The Peabody School Committee is the representative of the City of Peabody for purposes of dealing with its school employees.

3. The Union is an employee organization within the meaning of Section 1 of the Law.

4. The Union is the exclusive collective bargaining representative for certain bus drivers employed by the Peabody schools.

5. Prior to approximately September 1, 1997, the members of the bargaining unit referred to in paragraph 4, above, worked an eight-hour shift between the hours of 7:00 a.m. and 3:00 p.m.

6. Prior to approximately September 1, 1997, the schedules for members of the bargaining unit referred to in paragraph 4, above, did not include an unpaid block of time during the course of the regular workday called "downtime."

7. On approximately September 1, 1997, the Peabody School Committee changed the unit members' schedules to include "downtime," an unpaid block of time between approximately 9:30 a.m. until 11:00 a.m.

8. The Peabody School Committee took the action of instituting "downtime" without providing the Union with notice or an opportunity to bargain to resolution or impasse.

The following findings of fact are based on the parties' joint stipulated exhibits.

The School Committee and the Union are parties to two collective bargaining agreements, July 1, 1995 though June 30, 1998, and July 1, 1998 through June 30, 2001. The provisions of Article VIII *Hours of Work* and Article XI *Meal Periods* are identical in both agreements and, in relevant part, provide:

Article VIII - Hours of Work

A. Custodial and Maintenance Employees

Except as provided in Appendix B, the normal work day shall consist of eight (8) consecutive hours within the twenty-four (24)

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission issues a decision in the first instance. 456 CMR 13.02(2).

hour period. Each employee shall be scheduled to work a shift with regular starting and quitting times, except for employees who are not assigned specific buildings ("spares") and whose starting and quitting times may vary. Except for emergency situations, work schedules shall not be changed unless the changes are mutually agreed upon by the Union and the Employer.

Employees engaged in continuous operations are defined as being any employee or group of employees engaged in an operation for which there is regularly scheduled employment for twenty-four (24) hours a day, seven (7) days a week. The work week for employees engaged in continuous operations shall consist of five (5) consecutive eight (8) hour days.

B. Clerical Employees (Full-time)

The work week shall consist of five (5) consecutive seven (7) hour days, Monday through Friday, inclusive except for the secretary to the high school Principal, who shall work eight (8) hours per day. The Principal of the school or administrative supervisor to who the employee is assigned shall set the work/hour schedule in accordance with the provisions contained in this section. Except for emergency situations, work schedules shall not be changed unless the changes are mutually agreed upon by the Union and the Employer.

C. Clerical Employees (Part-time)

The clerks in the eight (8) elementary schools and the clerk in the Office of Special Education, Higgins Middle School, IMC, Office of Instruction, and Alternative High shall work six and one half (6 ½) hours per day, five (5) days per week. The school year shall be one (1) week before school opening in September to one (1) week after school recesses for the summer.

D. Cafeteria Employees

The work week for permanent full-time cafeteria employees shall consist of five (5) consecutive six (6) hour days, Monday through Friday, inclusive.

E. Transportation Employees

The work week for transportation employees shall consist of five (5) consecutive days, eight (8) hours a day, Monday through Friday, inclusive. The School year shall be five (5) working days prior to the opening of school and, if needed, five (5) working days after school closes for the summer.

Article XI - Meal Periods

All employees shall be granted a meal period of not less than thirty (30) minutes duration during each work shift. Whenever possible the meal period shall be scheduled at the middle of the shift. The Employer shall grant reasonable time off to any employee who is requested to and does work two (2) hours beyond his regular shift to partake of a meal. This Article shall not apply to the cafeteria employees.

OPINION

The issue here is whether the School Committee failed to bargain in good faith by changing bargaining unit members' work schedules to include downtime, an unpaid block of time between approximately 9:30 a.m. until 11:00 a.m., without giving the Union notice and an opportunity to bargain to resolution or impasse. To establish a violation, the Union must show that: 1) the School Committee altered an existing term or condition of employment, or instituted a new one; 2) the change affected a mandatory subject of bargaining; and, 3) the School Committee implemented the change without giving the Union prior notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989).

It is undisputed that the School Committee changed certain bus drivers' work schedules to include an unpaid block of time between approximately 9:30 a.m. until 11:00 a.m. without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the change in employees' work schedules. Further, as provided in Section 6 of the Law, wages and hours of work are mandatory subjects of bargaining. *Holyoke School Committee*, 12 MLC 1443, 1450 (1985); *City of Boston*, 10 MLC 1189, 1193 (1983). Therefore, all three elements of the Commission's unilateral change analysis are satisfied.

The School Committee first argues that the Union's charge is untimely. Section 15.03 of the Commission's rules provide that "[e]xcept for good cause shown, no charge will be entertained by the Commission based upon any prohibited practice occurring more than six months prior to the filing of the charge with the Commission." Because the allegation that a charge is untimely is an affirmative defense, the School Committee has the burden of showing that the Union knew or should have known of the change in schedule prior to September 23, 1997. See, *City of Boston*, 26 MLC 177, 181 (2000); see also, *Miller* v. *Labor Relations Commission*, 33 Mass. App. Ct. 404, 408 (1992) (six month period of limitation begins when charging party knew or should have known of the alleged violation).

Here, although the parties stipulated that the School Committee changed the schedule "[o]n approximately September 1, 1997," that stipulation, without more is insufficient to establish that the Union knew or should have known of the change prior to September 23, 1997. Therefore, we reject the School Committee's argument that the Union's charge is untimely.

The School Committee next argues that no statutory bargaining obligation attached because the parties' collective bargaining agreement permitted the change. In the School Committee's view, because Article VIII *Hours of Work*: 1) prohibits changes in custodial and maintenance and full-time clerical employees' work schedules unless the parties agree; and, 2) provides for a work day of eight (8) consecutive hours for custodial and maintenance employees, the absence of similar language for transportation employees should be interpreted to permit the change at issue here. We disagree.

Where an employer raises the affirmative defense of waiver by contract, it bears the burden of demonstrating that the parties consciously considered the situation that has arisen and that the

union knowingly waived its bargaining rights. *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988) *citing*, *Town of Marblehead*, 12 MLC 1667, 1670 (1986). If the language clearly, unequivocally, and specifically permits the public employer to make the change, no further inquiry is necessary. *City of Worcester*, 16 MLC 1327, 1333 (1989) (citations omitted). If the language is ambiguous, the Commission will review bargaining history to ascertain the parties' intent. *Town of Marblehead*, 12 MLC at 1670.

After examining Article VIII *Hours of Work* , we find that the parties' agreement does not expressly or by necessary implication allow the School Committee to change certain bus drivers' work schedules to include an unpaid block of time without first bargaining with the Union to resolution or impasse over the change. Further, absent bargaining history demonstrating that the parties mutually intended to permit the School Committee to implement an unpaid block of time for certain bus drivers, we decline to find that the Union knowingly and unequivocally waived its right to bargain over the September 1997 change in work schedules. *Springfield School Committee,* 20 MLC 1077, 1082 (1993); citing, *Melrose School Committee,*, 3 MLC 1299 (1976); *Town of Marblehead*, 12 MLC 1667, 1670 (1986)

CONCLUSION

For the reasons stated, we conclude that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by changing certain bus drivers' work schedules to include an unpaid block of time between approximately 9:30 a.m. and 11:00 a.m. without giving the Union prior notice and an opportunity to bargain to resolution or impasse over employees' work schedules.

ORDER

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the Peabody School Committee shall:

1. Cease and desist from:

a. Unilaterally implementing an unpaid block of time between approximately 9:30 a.m. and 11:00 a.m. in certain bus drivers' work schedules without giving the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO prior notice and an opportunity to bargain in good faith to resolution or impasse over a proposed change;

b. Failing and refusing to bargain in good faith with the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO over changing certain bus drivers' work schedules to include an unpaid block of time between approximately 9:30 a.m. and 11:00 a.m. without giving the Union prior notice and an opportunity to bargain to resolution or impasse over employees' work schedules;

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

2. Take the following affirmative action which will effectuate the policies of the Law:

a. Reinstate the bus drivers' work schedules that were in effect immediately prior to approximately September 1, 1997 of an eight-hour shift between the hours of 7:00 a.m. and 3:00 p.m. without an unpaid block of time during the course of the regular work day;

b. Make whole the affected bargaining unit members for all economic losses, including lost wages, and all other economic and contractual benefits, if any, they would have received had the City of Peabody School Committee not changed employees' work schedules to include an unpaid block of time between approximately 9:30 a.m. until 11:00 a.m., plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly;

c. Upon request by the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, bargain collectively in good faith to resolution or impasse prior to changing any mandatory subject of bargaining, including employees' work schedules to include an unpaid block of time;

d. Post in conspicuous places where employees represented by the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;

e. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has issued a decision finding that the Peabody School Committee committed a prohibited practice in violation of Sections 10(a)(5) and (1) of the Massachusetts General Laws, Chapter 150E, the Public Employee Collective Bargaining Law, by changing certain bus drivers work schedules to include an unpaid block of time between approximately 9:30 a.m. and 11:00 a.m., without first giving the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) notice and an opportunity to bargain to resolution or impasse. In compliance with the Labor Relations Commission's order,

WE WILL NOT fail or refuse to bargain with the Union over changing certain bus drivers' work schedules to include an unpaid block of time between approximately 9:30 a.m. and 11:00 a.m. without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT change certain bus drivers' work schedules to include an unpaid block of time between 9:30 a.m. and 11:00 a.m., without giving the Union prior notice and an opportunity to bargain in good faith to resolution or impasse over any proposed change.

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

WE WILL reinstate the bus drivers' work schedules that were in effect immediately prior to approximately September 1, 1997 of an eight-hour shift between the hours of 7:00 a.m. and 3:00 p.m. without an unpaid block of time during the course of the regular work day.

WE WILL make whole the affected bargaining unit members for all economic losses, including lost wages, and all other economic and contractual benefits, if any, they would have received had the

Peabody School Committee not changed employees' work schedules to include an unpaid block of time between 9:30 a.m. and 11:00 a.m., plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly;

WE WILL upon request by the Union, bargain collectively in good faith to resolution or impasse prior to changing any mandatory subject of bargaining, including certain bus drivers' work schedules to include an unpaid block of time.

[signed]
For the Peabody School Committee

* * * * * *

In the Matter of AFSCME, COUNCIL 93, AFL-CIO, LOCAL 3556

and

DIANE CALVANESE, MARY HOGAN, ANNA CALVANESE, and MARGARET RANNENBERG

Case Nos. ASF-4862, ASF-4863, ASF-4864, ASF-4865

71.3	*agency service fee*
91.13	*mootness*
91.47	*motion to dismiss*
92.481	*motion for judgment*

June 21, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Wayne Soini, Esq.	*Representing AFSCME, Council 93, AFL-CIO, LOCAL 3556*
Bruce N. Cameron, Esq.	*Representing Diane Calvanese, Mary Hogan, Anna Calvanese, and Margaret Rannenberg*

RULING ON MOTIONS AND DECISION[1]

Statement of the Case

On May 13 and 15, 1997, Diane Calvanese, Mary Hogan, Anna Calvanese, and Margaret Rannenberg (collectively, the Charging Parties) filed charges with the Labor Relations Commission (the Commission) alleging that AFSCME, Council 93, AFL-CIO (the Union) had violated Section 10(b)(1) of M.G.L. c.150E (the Law).[2] Following an investigation of the Charging Parties' charges, the Commission issued separate complaints of prohibited practice on September 22 and October 21, 1997 alleging that the Union had violated Section 10(b)(1) of the Law by making invalid demands for the payment of an agency service fee.[3] Specifically, the complaints alleged that the Union's demands did not include: 1) a copy of the Commission's agency fee regulations; 2) a statement about the Union's rebate procedure; or 3) a statement about the consequences for failing to pay the fee or other information required by 456 CMR 17.05. The Union filed identical answers to the complaints, essentially admitting the factual allegations but arguing that, because: 1) the Commission's regulations are public record; 2) the collective bargaining agreement (as to consequences of non-payment) is and was available; and 3) the Union's rebate procedure is both publicized by the Union generally and on a basis of need (when requested or utilized), the Charging Parties were not prejudiced because the Union failed to include the items in its demands. On October 27, 1997, the Union filed a Motion to dismiss the matters on the ground that the demands had been

1. Pursuant to 456 CMR 13.02 (1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The charges in case Nos. ASF-4862 and ASF-4863 were filed on May 13, 1997 and the charges in case Nos. ASF-4864 and ASF-4865 were filed on May 15, 1997.

3. The complaints in case Nos. ASF-4864 and ASF-4865 were issued on September 22, 1997 and the complaints in case Nos. ASF-4862 and ASF-4863 were issued on October 21, 1997.