In the Matter of BRISTOL COUNTY SHERIFF'S DEPARTMENT

and

MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case No. MUP-01-2971

54.6112	*vision and dental benefits*
67.16	*other defenses*
67.4	*good faith test (totality of employer's conduct)*
67.41	*failure to make counter proposals*
67.44	*failure to consider proposals*
82.4	*bargaining orders*

March 13, 2003
Helen A. Moreschi, Chairwoman
Peter G. Torkildsen, Commissioner

Robert Novack, Esq.	*Representing Bristol County Sheriff's Department*
Bruce Assad, Esq.	
Joseph Fair, Esq.	*Representing Massachusetts Correction Officers Federated Union*

DECISION[1]

Statement of the Case

The Massachusetts Correction Officers Federated Union (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on April 13, 2001, alleging that the Bristol County Sheriff's Department (Employer) had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 11, 2001. The complaint alleged that the Employer had failed to bargain in good faith by engaging in surface bargaining from March 2000 to January 11, 2001 over the issue of vision and dental care benefits in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.[2] The Employer filed an answer on November 6, 2001.

On February 15, 2002 and November 1, 2002, Cynthia A. Spahl, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. On February 15, 2002, the Employer moved to sequester the witnesses, and the Hearing Officer allowed that motion. Following the hearing, the Union e-mailed a post-hearing brief on January 10, 2003. Both parties filed hard copies of their post-hearing briefs on January 13, 2003. The Hearing Officer issued Recommended Findings of Fact on January 15, 2003. The Employer filed challenges to the Recommended Findings of Fact on February 4, 2003. The Union filed an opposition to the Employer's challenges on February 12, 2003.

Findings of Fact[3]

The Employer challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact and summarize the relevant portions below.

The Union and the Employer are parties to a collective bargaining agreement in effect from July 1, 1997 to June 30, 2000. On March 27, 2000, the parties commenced negotiations for a successor collective bargaining agreement. On that date, the parties only discussed the ground rules for negotiations.

On April 14, 2000, Union attorney Matthew Dwyer (Dwyer) sent a copy of the Union's bargaining proposals to Employer attorney Michael Murray (Murray) in anticipation of the parties' next bargaining session on April 19, 2000.[4] On April 19, 2000, the parties met for approximately thirty (30) minutes but did not discuss their proposals, because a member of the Union's bargaining team could not attend.

On May 16, 2000, the parties attended another bargaining session and reviewed each other's bargaining proposals. The Union's bargaining proposal contained approximately forty (40) proposals, and the Employer's bargaining proposal contained approximately forty-two (42) proposals. One of the Employer's proposals pertained to an alcohol testing policy, and one of the Union's proposals concerned a dental and vision plan. The Union's dental and vision plan proposal provided:

> Article XV A - DENTAL AND VISION PLAN
>
> Section 1 Creation of Trust Agreement
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> The parties have established a Health and Welfare Fund under an Agreement and Declaration of Trust as drafted by the parties and executed by the Union and the Employer.[5] Such Agreement and Declaration of Trust (hereinafter referred to as the "trust agreement") provides for a Board of Trustees composed of an equal number of representatives of the Employer and the Union. The Board of Trustees of the Health and Welfare Fund shall determine in their discretion and within the terms of this Agreement and the Agreement and Declaration of Trust such health and welfare benefits to be extended by the Health and Welfare Fund to employees and/or their dependents.
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> Section 2 Funding

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 Commission dismissed the portion of the Union's charge alleging that the Employer had violated Section 10(a)(5) of the Law by failing to provide the Union with information. On October 22, 2001, the Union requested reconsideration of the Commission's decision to dismiss that portion of the charge. On January 4, 2002, the Commission affirmed its prior dismissal. On January 9, 2002, the Union filed a Notice of Appeal.

3. The Commission's jurisdiction is uncontested.

4. The record does not reflect when the Employer gave the Union its bargaining proposals.

5. The Union did not give the Employer a trust agreement with its bargaining proposal.

> The Employer agrees to contribute to the Health and Welfare Fund at the rate of $8.00 per calendar week per full-time bargaining unit employee.[6] The contributions made by the Employer to the Health and Welfare Fund shall not be used for any purpose other than to provide health and welfare benefits and to pay the operation and administrative expenses of the fund. The contributions shall be made by the Employer in an aggregate sum within forty-five (45) days following the end of the calendar month during which contributions were collected.
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> Section 3 Non-grievable
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> No dispute over a claim for any benefits extended by this Health and Welfare Fund shall be subject to the grievance procedure established in any collective bargaining agreement between the Employer and the Union.
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> Section 4 Employer's Liability
>
> It is expressly agreed and understood that the Employer does not accept, nor is the Employer to be charged hereby with any responsibility in any manner connected with the determination of liability to any employee claiming under any of the benefits extended by the Health and Welfare Fund. The Employer's liability shall be limited to the contributions indicated under Section 2 above.

After reviewing the bargaining proposals, the parties each asked questions about the other's proposals but did not bargain over them. The parties negotiated over the substance of their proposals on May 23, June 21, and June 29, 2000.[7] At the June 21, 2000 bargaining session, the Union told the Employer that it would accept the Employer's alcohol testing proposal, if the Employer accepted the Union's dental and vision plan proposal.[8] The Employer rejected that proposal but did not explain why. On June 29, 2000, the Union reiterated that it would accept the Employer's alcohol testing proposal, if the Employer accepted the Union's dental and vision plan proposal. The Employer again rejected that proposal without offering an explanation. Dwyer told the Employer that the Union had made its last best offer, and the Sheriff told the Union that the Employer had made its last best offer.[9] After the parties' June 29, 2000 negotiating session, the Union filed a petition for mediation at the Board of Conciliation and Arbitration (BCA). BCA assigned Jack Driscoll (Driscoll) as the parties' mediator. The Employer did not formally oppose the Union's petition for mediation.

The parties had their first mediation session on September 19, 2000. At that session, Driscoll communicated to the Union that the Employer would withdraw its alcohol testing proposal if the Union would withdraw its dental and vision plan proposal. The Union responded to Driscoll that, in its opinion, the Employer's alcohol testing proposal was no longer on the bargaining table, because the Employer had not made that proposal part of its last best offer on June 29, 2000.

The parties engaged in mediation on November 3, 2000, November 8, 2000, and November 29, 2000. On those dates, the Union made changes to the proposed employer-employee contribution rates for the proposed dental and vision plan and communicated those changes to Driscoll. However, the Employer rejected the Union's proposal and did not make any counterproposals pertaining to that subject. Driscoll did not tell the Union why the Employer had rejected the proposal.

At the parties' December 11, 2000 mediation session, the Employer asked Driscoll to obtain from the Union copies of the rate sheets and health and welfare trust fund agreement.[10] At some point, Driscoll gave the Employer copies of the health and welfare trust fund agreement between the Commonwealth of Massachusetts and the Union dated April 2, 1991 and the rate sheets that the Union had provided. During the January 11, 2001 mediation session, the Employer requested a copy of the health and welfare trust fund's annual audit report and made a counterproposal to the Union's proposed dental and vision plan.[11]

Opinion

Section 6 of the Law requires a public employer and a union to meet at reasonable times to negotiate in good faith over wages, hours, standards of productivity and performance, and any other terms and conditions of employment but does not compel either party to agree to a proposal or to make a concession. *Newton School Committee*, 4 MLC 1334 (H.O. 1977), *aff'd* 5 MLC 1016 (1978), *aff'd sub nom. School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Board of Trustees of University of Massachusetts*, 26 MLC 143, 144 (2000). The Commission examines the totality of the parties' conduct, including acts away from the bargaining table, to assess whether a public employer has bargained in good faith pursuant to Section 10(a)(5) of the Law. *Higher Education Coordinating Council*, 25 MLC 69 (1998); *King Phillip Regional School Committee*, 2 MLC 1393 (1976). The duty to bargain in good faith requires the parties to enter into negotiations with an open mind and a sincere desire to reach an agreement and to make reasonable efforts to compromise their differences. *Board of Trustees of University of Massachusetts*, 26 MLC at 144; *Boston School Committee*, 25 MLC 181, 187 (1999).

A party engages in surface bargaining "if, upon examination of the entire course of bargaining, various elements of bad faith bargaining are found which, considered together, tend to show that the dil-

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6. The parties never discussed how the Union derived the Employer's contribution rate.

7. The record does not reflect specifically what the parties discussed at the May 23, 2000 bargaining session.

8. Before the Union made that proposal, the parties had some discussion about the Employer's alcohol testing proposal, including whether to use a reasonable suspicion or a probable cause standard, but had not discussed the substance of the Union's dental and vision plan proposal.

9. Although the parties did not discuss every proposal contained in their bargaining proposals before making their last best offers, they did communicate the terms of their last best offers to each other.

10. Prior to that date, the Employer had not requested any information from the Union regarding the proposed dental and vision plan.

11. Prior to that date, the Employer had not made any counterproposals regarding the dental and vision plan. The record does not reflect what the Employer's counterproposal was.

atory party did not seriously try to reach a mutually satisfactory basis for agreement, but intended merely to shadow box to an impasse." *Newton School Committee*, 4 MLC at 1343-1344 n.4, *citing Stonewall Cotton Mills*, 36 NLRB 240, 263 (1941), *enf'd as modif'd on other grounds* 129 F.2d 629 (5th Cir. 1942), *cert. den'd* 317 U.S. 667 (1942); *See, Framingham School Committee*, 4 MLC 1809, 1812-1813 (1978) (going through the motions of collective bargaining rather than concluding a collective bargaining agreement is evidence of bad faith). When a public employer, for example, rejects a union's proposal, tenders its own, and does not attempt to reconcile the differences, it is engaged in surface bargaining. *Town of Saugus*, 2 MLC 1480, 1484 (1976), *citing A.H. Belo Corp.*, 170 NLRB 1558 (1968); *See, Revere School Committee*, 10 MLC 1245, 1249 (1983) (the categorical rejection of a union's proposal with little discussion or comment does not comport with the good faith requirement). Further, failing to make any counterproposals may be indicative of surface bargaining. *See, Local 466, Utility Workers Union of America, AFL-CIO*, 8 MLC 1193, 1197 (1981); *City of Boston*, 8 MLC 1583, 1587 (1981).

Here, the Employer argues that it did not engage in surface bargaining. In support of that argument, the Employer contends that the Union failed to bring the specifics of its vision and dental plan proposal to the bargaining table for discussion until the mediator did so at the December 11, 2000 mediation session. The Employer points out that the only mention of the Union's vision and dental plan proposal during the June 2000 bargaining sessions was the Union's attempt to link that proposal to the Employer's alcohol policy proposal, and that there was no substantive discussion about the Union's proposal. The Employer emphasizes that it did not reject the substance of the Union's proposal but rather the "linkage concept" (i.e., conditioning the Union's acceptance of the Employer's alcohol proposal on the Employer's acceptance of the Union's vision and dental plan proposal). The Employer asserts that it agreed to discuss the Union's vision and dental plan proposal as soon as the mediator raised that issue on December 11, 2000 and immediately requested information about that proposal. The Employer alleges that the Union frustrated the bargaining process by at first refusing and then delaying providing the requested information. The Employer also argues that the Union frustrated the bargaining process by refusing to participate in the bargaining and mediation processes and, instead, insisting on going to fact finding.

Contrary to the Employer's assertions, the Union first provided the Employer with the details of its vision and dental plan proposal or about April 14, 2000, when the Union sent the Employer all of its bargaining proposals. In particular, the vision and dental plan proposal contained specifics about creating a trust agreement, funding the trust, the non-grievability of trust benefits, and the Employer's liability for trust benefits. Although the Employer had an opportunity to ask questions about that proposal during the May 16, 2000 bargaining session, the record does not reflect that the Employer did so.

The evidence further demonstrates that, on June 21 and June 29, 2000, the Employer rejected the Union's offer to accept the Employer's alcohol testing proposal in exchange for the Employer accepting the Union's dental and vision plan proposal. Despite the Employer's contention that it rejected the "linkage concept" rather than the substance of the Union's proposal, which the parties admittedly did not discuss, the record shows that the Employer never explained its reasons for rejecting the Union's proposals on those dates. Moreover, the Employer failed on those dates to make any counterproposals after it had rejected the Union's vision and dental plan proposals. The Employer also rejected the proposals made by the Union during three mediation sessions in November 2000 regarding the employer-employee contribution rate for the proposed dental and vision plan without providing an explanation for doing so or making a counterproposal. Indeed, the Employer waited until January 11, 2001 to make its first counterproposal to the Union's proposed dental and vision plan.

Although the Employer contends that the Union frustrated the bargaining and mediation processes, there is no evidence in the record to support that contention. Rather, after considering the totality of the parties' conduct, the record evidence demonstrates that the Employer engaged in surface bargaining from May 16, 2000 through January 11, 2001 by making no effort to reach an agreement with the Union on the issue of the proposed vision and dental plan.[12] *See, Newton School Committee*, 4 MLC at 1343 n.4, *citing Wheeling Pacific Company*, 151 NLRB 1192 (1965) ("belated bargaining which finally occurs after an extended period of refusal to bargain in good faith may be held to be only 'surface bargaining' rather than good faith bargaining").

Conclusion

Based on the record before us, we conclude that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith by engaging in surface bargaining from May 16, 2000 to January 11, 2001 over the issue of vision and dental benefits.

Order

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

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the Union by engaging in surface bargaining over the issue of dental and vision benefits.

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

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

   a. Upon request, bargain in good faith with the Union over dental and vision benefits.

12. May 16, 2000 is the date on which the parties first reviewed and discussed their bargaining proposals after exchanging them, and January 11, 2001 is the date on which the Employer first made a counterproposal to the Union's proposed dental and vision plan.

b. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.

c. Notify the Commission within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has determined that the Bristol County Sheriff's Office has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith by engaging in surface bargaining from May 16, 2000 to January 11, 2001 over the issue of vision and dental benefits.

WE WILL NOT fail and refuse to bargain collectively in good faith with the Massachusetts Correction Officers Federated Union over the issue of dental and vision benefits.

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

WE WILL, upon request, bargain in good faith with the Massachusetts Correction Officers Federated Union over dental and vision benefits.

[signed]
Bristol County Sheriff's Department

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In the Matter of CITY OF FALL RIVER

and

FALL RIVER EMERGENCY MEDICAL TECHNICIAN EMPLOYEES ASSOCIATION

and

AFSCME, COUNCIL 93, LOCAL 3177

Case No. MCR-05-5124

32.	*Binding Effect of a Unit Determination*
34.93	*severance*
35.511	*emergency medical technicians*

March 8, 2006
John F. Jesensky, Chairman
Allan W. Drachman, Commissioner

Gary Howayeck, Esq. *Frank Sullivan*	*Representing the City of Fall River*
Scott Lang, Esq. *Gigi D. Tierney, Esq.*	*Representing the Fall River Emergency Medical Technician Employees Association*
Wayne Soini, Esq.	*Representing AFSCME, Council 93, Local 3177*

DECISION[1]

Statement of the Case

On January 31, 2005, the Fall River Emergency Medical Technician Employees Association (EMT Association) filed a petition with the Labor Relations Commission (Commission) seeking to sever Emergency Medical Technicians and Paramedics (collectively referred to as EMTs) from a bargaining unit of non-professional employees represented by Local 3177 of AFSCME, Council 93 (Council 93) in the City of Fall River (City).[2] On March 3, 2005, Council 93 filed an unopposed and timely motion to intervene along with a motion to dismiss the petition.[3] Neither the City nor the EMT Association responded to the motion to dismiss. On April 22, 2005, the Commission denied Council 93's motion to dismiss the petition.

The Commission investigated the issues raised in the petition and, on November 4, 2005, provided the parties with a summary of the information adduced during the investigation. Further, because it did not appear that any material facts were in dispute, the Commission requested the parties to show cause why it should not resolve the representation issue based on the information summary. On

1. Pursuant to the Notice of Hearing, the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. On June 2, 2005, the EMT Association notified an agent of the Commission that it does not seek the position of Director/Supervisor of Emergency Medical Services or Principal Paramedic because of their alleged supervisory responsibilities. Both of these positions are currently included in the bargaining unit. The EMT Association, however, is willing to accept the Commission's determination of an appropriate unit, if the Commission deems the petitioned-for unit to be inappropriate.

3. Council 93 had previously filed these motions on February 14, 2005, but it did not provide the Commission with a certificate of service regarding the motions until March 3, 2005.