In the Matter of CITY OF WORCESTER

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Case No. MUP-11-6289

67.165 bargained to impasse
67.4 good faith test (totality of the circumstances)
67.8 unilateral change by employer

March 29, 2013
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

William R. Bagley, Jr., Esq.	*Representing the City of Worcester*
John J. Mackin, Jr., Esq.	*Representing the National Association of Government Employees*

DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On November 7, 2012, a Department of Labor Relations (DLR) Hearing Officer issued her decision in this case.[1] The Hearing Officer held that the City of Worcester (City) violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of M.G.L c. 150E (the Law) by requiring Department of Public Works (DPW) mechanics to perform motor vehicle inspections on DPW vehicles without giving the National Association of Government Employees (NAGE) an opportunity to bargain over the decision and the impacts of the decision to resolution or impasse. In so holding, the Hearing Officer rejected the City's argument that it bargained to impasse with the Union and therefore lawfully implemented its last proposal.[2] On November 27, 2012, the City appealed the Hearing Officer's decision to the Commonwealth Employment Relations Board (Board) pursuant to 456 CMR 13.02 (1)(j) and 456 CMR 13.15. Both the parties filed supplementary statements. Having reviewed the record and the parties' statements, the Board affirms the Hearing Officer's decision for the reasons set forth below.

In its supplementary statement, the City argues that the Hearing Officer applied the wrong legal standard when determining that the parties had not bargained to impasse. We disagree. The Hearing Officer found that, at the parties' first bargaining session, which took place on August 8, 2010, the Union proposed that the DPW assign the inspection duties by seniority and that the City pay a $15 per week stipend to bargaining unit members performing inspection sticker duties.[3] The City rejected the seniority proposal and the Union dropped it. The City also rejected the stipend proposal on grounds it would set a "bad precedent."[4] At the parties' second and final bargaining session on October 27, 2010, the Union continued to pursue the $15 per week stipend and the City continued to reject it. At the end of this meeting, the Union's Chief Executive Officer Sean Maher (Maher) told the City's negotiator and counsel, Demetrios Moschos (Moschos) that there was no point in continuing negotiations if the City would not pay a stipend. About a week later, in a letter dated November 5, 2010, the City declared impasse, based on what it characterized as the parties' "firm" positions on the stipend issue. In the same letter, the City informed the Union that it would implement its last offer on November 15. That offer included reimbursing bargaining unit members for license and training fees but contained no stipend.

The Union responded to the City's impasse declaration on November 12 with a letter disputing the City's claim that both parties had maintained a firm position on stipends. Instead, the Union contended that during the first negotiating session, it had reduced its $15 per week stipend proposal to $10 and, therefore, that the City was the only party with a fixed position. The City responded to this letter on November 15, stating that it had no record of the Union's reducing its stipend proposal and that, in any event, it had consistently rejected the Union's request for a weekly stipend. Based on what it again characterized as the parties' firm positions on the stipend issue, the City reiterated that the parties were at an impasse.

The Hearing Officer credited the City's version of the parties' negotiations, i.e., that the Union had not reduced its stipend proposal from $15 to $10 at the first negotiating session. She nevertheless viewed Union's November 12 letter as evidence that it may have been willing to compromise further based on its claim that the City was the only party with a fixed position and what she deemed the Union's "potential" new proposal for a reduced stipend.[5] The Hearing Officer concluded that the City's failure to clarify whether the Union was making a new proposal or whether further negotiations might have been fruitful rendered its impasse declaration premature.

On appeal, the City argues that the Hearing Officer improperly and without legal authority shifted the burden to it to ascertain whether the Union's "vague and inaccurate" letter constituted a counterproposal that required the City to return to bargaining. The City asks the Board to issue a decision finding that the parties ne-

1. The decision is reported at 39 MLC 115 (2012).

2. The Hearing Officer also rejected that portion of the complaint alleging that the City engaged in bad-faith bargaining. The Union does not appeal from this portion of the Hearing Officer's decision.

3. Although the City disputes the Hearing Officer's conclusion that the parties did not bargain to impasse, it does not dispute the subsidiary facts that form the basis of this finding, which are set forth above.

4. The City was concerned that a stipend would encourage mechanics to request additional stipends for tasks that they considered more significant than performing inspections.

5. The Hearing Officer noted that because the Union's letter stated that it had already made a proposal reducing the stipend amount it sought, the proposal for a $10 stipend was not necessarily a new one.

gotiated to impasse and that a party has no obligation to continue negotiations in the absence of a valid counterproposal.

We decline to do so. Contrary to the City's claim, impasse, or the lack thereof, is not exclusively a function of whether there is an outstanding counterproposal that warrants a response. Rather, as the Board has repeatedly stated, impasse is a question of fact requiring a consideration of the totality of the circumstances to decide whether, despite their good faith, the parties are simply deadlocked. *See, e.g., City of Boston*, 29 MLC 6, 9 (2002) (citing *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 574 (1983)). This involves examining bargaining history, the good faith of the parties, the length of negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of negotiations. *Ashburnham-Westminster Regional School District*, 29 MLC 191, 195 (2003) (citing *Town of Westborough*, 25 MLC 81, 88 (1997); *Town of Weymouth*, 23 MLC 70, 71 (1996), *City of Leominster*, 23 MLC 62, 66 (1996)). The ultimate test remains whether there is a "likelihood of further movement by either side" and whether the parties have "exhausted all possibility of compromise." *City of Boston*, 28 MLC 175, 184 (2001) (quoting *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999)). Determining whether there is a likelihood of further movement by either side has, in at least two Board decisions, turned on the fact that one or both parties had not changed their position since negotiations began. *See City of Boston*, 29 MLC at 9 (no movement by either side during four negotiating sessions); *City of Boston*, 28 MLC at 185 (Union's position after eighth bargaining session was no different from its position at the first).

That is not the case here. After the first negotiating session, the Union dropped its proposal to assign sticker inspections based on seniority. Additionally, after two bargaining sessions, the Union sent the City a letter stating that it had reduced its stipend proposal by $5.00 and, therefore, had not maintained a fixed position with respect to stipends. Even if this did not constitute a firm counterproposal, it nonetheless signaled the Union's willingness to move on stipends - the key issue dividing the parties - after just two bargaining sessions. We agree with the Hearing Officer, therefore, that the letter demonstrated a potential of further movement. When this potential for further compromise is considered in light of the other criteria set forth above, i.e., the length of negotiations, the parties' good faith, the importance of the issue to the parties, the Union's stated belief that its position was not fixed, and ultimately, evidence of movement, we agree with the Hearing Officer. Having received the Union's November 12 letter, the City's continued insistence that the parties were at impasse, without further inquiry as to whether the Union was willing to compromise further, was premature.

CONCLUSION

For the reasons set forth above, the Board affirms the Hearing Officer's decision that the City failed to bargain in good faith over the decision to require DPW mechanics to perform motor vehicle inspections on DPW vehicles and the impacts of the decision on employees' terms and conditions of employment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. We therefore issue the following Order.

ORDER

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

1. Cease and desist from:

a. Failing or refusing to bargain in good faith with the Union to resolution or impasse before requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles;

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

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

a. Upon request, bargain with the Union in good faith to resolution or impasse before requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles;

b. Restore the *status quo ante* by refraining from requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles until the parties reach agreement or impasse after bargaining in good faith or unless the Union fails to request bargaining within five days of receipt of this decision or the Union subsequently fails to bargain in good faith;

c. Sign and post immediately in conspicuous places employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;

d. Notify the DLR 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.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital* v. *Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of MGL c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to MGL c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the City of Worcester (City) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith to resolution or impasse before requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles.

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

The City assures its employees that:

WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse before requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles.

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

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

Restore the *status quo ante* by refraining from requiring DPW mechanics to perform motor vehicle inspections on DPW vehicles until the parties reach agreement or impasse after bargaining in good faith or unless the Union fails to request bargaining within five days of receipt of the DLR Hearing Officer's decision or the Union subsequently fails to bargain in good faith.

[signed]
For the City

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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