In the Matter of HOLLISTON SCHOOL COMMITTEE

and

HOLLISTON FEDERATION OF TEACHERS, LOCAL 3275, MFT, AFT, AFL-CIO

Case No. MUP-1300

51.11	*authority of employer representative*
53.25	*conflicting legislation*
54.291	*length of work day*
54.8	*mandatory subjects*
67.15	*union waiver of bargaining rights*
67.6	*other refusal to bargain*
67.8	*unilateral change by employer*
91.1	*dismissal*

March 27, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Jeffrey W. Jacobsen, Esq.	*Representing the Holliston Federation of Teachers, Local 3275, MFT, AFT, AFL-CIO*
Nathan Kaitz, Esq.	*Representing the Holliston School Committee*

DECISION[1]

Statement of the Case

On August 14, 1995, the Holliston Federation of Teachers, Local 3275, MFT, AFT, AFL-CIO (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) alleging that the Holliston School Committee (the School Committee) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, on August 13, 1996, the Commission issued a complaint of prohibited practice, alleging that the School Committee had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) refusing to bargain on demand over a proposal to lengthen the school day at the Holliston High School; and 2) failing to give the Union an opportunity to bargain over the impacts of the School Committee's decision to lengthen the school day at the Holliston High School. On September 11, 1996, the School Committee filed its answer.

On December 3, 1996, Mark A. Preble, a duly designated administrative law judge (ALJ) of the Commission, conducted a hearing at which the parties had an opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary evidence. The ALJ held the record open for the limited purpose of accepting a certain letter from Union Local President Robert Massaro (Massaro) that had been referred to during the course of the hearing. On December 13, 1996, the Union filed a copy of that letter. On January 29, 1997, the parties filed post hearing briefs. On February 14, 1997, the ALJ issued his Recommended Findings of Fact. Neither party challenged those findings.

Findings of Fact[2]

Because neither party challenged any of ALJ's findings, we adopt those findings in their entirety and summarize them below.

At the outset of the hearing, the parties stipulated that:

> On or about May 18, 1995, the Respondent [School Committee] voted to increase the length of the school day at the high school by fifteen (15) minutes per day to comply with the Board of Education's regulation for learning time.[3]

The parties also stipulated that, because the parties subsequently resolved the issue concerning the length of the school day at the high school for the 1996-97 school year, the dispute in this case is limited to the 1995-96 school year.

The Union and the School Committee are parties to a collective bargaining agreement covering the period September 1, 1994 through August 31, 1997. Article XII of that agreement, entitled "Length of Year/Day," states in part, at section 3:

> The school day for teachers shall be sufficient in length to meet legal requirements, educational needs of students, professional growth and development of the staff, essential administrative processes, and the continuing development of the educational programs of the schools. Teachers will recognize the length of the school day includes a commitment to parents and that they should schedule meetings with parents as a fulfillment of their professional responsibilities and that such meetings should be scheduled at mutually agreeable times.

During the four years prior to June 30, 1996, the Union bargained directly with the School Committee over the terms of the parties' collective bargaining agreements as well as issues that arose during the term of those agreements. Except for one occasion where he was specifically directed to negotiate on behalf of the School Committee, then Superintendent of Schools Dr. John Drinkwater (Dr. Drinkwater) did not engage in bargaining directly with the Union. Bargaining was initiated by a written demand made by either the Union president or other designated individual (e.g. a committee chairperson) to the chairperson of the School Committee.

Following the enactment of the Education Reform Act (Act) and before April 1995, Massaro and Dr. Drinkwater began to discuss generally the changes mandated by the Act during their regular consultation meetings.[4] At a School Committee meeting on April 6, 1995, the School Committee discussed lengthening the school day at the Holliston High School by fifteen (15) minutes each day

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. Neither party challenged the Commission's jurisdiction.

3. This stipulation is taken from the Complaint at ¶13.

4. Consultation meetings were scheduled monthly and attended by Massaro, Union Local Vice President Tom Carey, and Dr. Drinkwater.

to comply with the changes mandated by the Act, but took no action. Massaro later spoke with Massachusetts Teachers Federation Field Representative Jay Porter (Porter) about the matter and requested him to attend a meeting that had been scheduled for May 17, 1995. Massaro also sent letters to certain members of the high school staff seeking interested people to form a committee to discuss the possibility of extending the length of the high school day and informing them of the May 17, 1995 meeting. The Union made no written demand to bargain over the increase in the length of the school day for 1995-1996 school year.

On May 17, 1995, Massaro, Porter, and two high school teachers met with Dr. Drinkwater and Assistant Superintendent Dr. James O'Connell (Dr. O'Connell). At that meeting, the parties discussed the length of the school day at the high school. Dr. Drinkwater reviewed the Act and explained that certain categories of time had been eliminated from the definition of instructional time. At some point, the Union requested to be compensated for the planned additional fifteen minutes per day at the high school. Dr. Drinkwater and Dr. O'Connell left the meeting for a short time. When they returned, Dr. Drinkwater responded by stating that he did not negotiate, but rather negotiating was a school committee function.[5]

On May 18, 1995, Massaro was present at a School Committee meeting. During the meeting, the School Committee voted to increase the length of the school day at the high school by fifteen minutes for the 1995-1996 school year and the elementary, middle and high schools for the 1996-1997 school year, but did not discuss additional compensation to high school teachers. Between May 18, 1995 and September 1995, when the School Committee's decision to lengthen the school day at the high school was implemented, there were no further discussions between the parties concerning the length of the school day or the Union's request for additional compensation.

In a letter dated October 27, 1995 to School Committee Chairperson Michael Gilbert (Gilbert), Massaro demanded to bargain over the School Committee's decision to increase the length of the school day for the elementary, middle, and high school for the 1996-1997 school year. Thereafter, the parties agreed to certain beginning and ending instructional times for each of the schools in the department and also resolved the matter concerning the length of the school day at the high school for the 1996-97 school year.

Opinion

1. Refusal to Bargain on Demand

Section 10(a)(5) of the Law requires a public employer to bargain on demand with the exclusive collective bargaining representative of its employees over wages, hours, standards of productivity and performance, and other terms and conditions of employment. *See, Boston School Committee*, 11 MLC 1219, 1225 (1984); *City of Beverly*, 20 MLC 1166 (1993). However, to trigger a bargaining obligation, the exclusive representative must establish that it made a sufficient demand to bargain. Here, after learning that the School Committee intended to increase the length of the high school day by fifteen minutes, the Union requested to be compensated for the additional time. However that request was made to Dr. Drinkwater, who immediately informed the Union that he did not bargain, but rather that bargaining was a School Committee function. Moreover, Dr. Drinkwater's comment was consistent with the parties' practice during Dr. Drinkwater's four-year tenure as superintendent: demands to bargain were made in writing and directly to the chairperson of the School Committee. Following that meeting, the Union neither requested to meet with the School Committee nor directed a demand to bargain to the School Committee. Therefore, we find that, because the Union has failed to establish that it made a sufficient demand to bargain on the School Committee, the School Committee did not refuse to bargain on demand as alleged in Count I of the complaint. Accordingly we dismiss Count I of the complaint.[6]

2. Unilateral Change in the Length of the School Day

A public employer violates Section 10(a)(5) of the Law when it unilaterally changes wages, hours or other terms and conditions of employment without first bargaining to resolution or impasse with the employees' exclusive bargaining representative. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Town of Arlington*, 21 MLC 1125 (1994). Here, the School Committee does not contest that it had an obligation to bargain over the length of the school day, and we have held that the length of the school day is a mandatory subject of bargaining. *See, Holyoke School Committee*, 12 MLC 1443 (1985). Rather the gravamen of the School Committee's argument is that, even if it had an obligation to bargain prior to changing the length of the school day for the 1995-1996 school year, the Union waived its right to bargain, either by inaction or by contract.

The Union argues that the School Committee's vote on May 18, 1995 was a *fait accompli*, and, therefore, it was not required to make a demand to bargain. However, a *fait accompli* exists only where "under all the attendant circumstances, it can be said that the

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5. The ALJ found that Massaro believed that Dr. Drinkwater's response indicated that he would present the Union's request to the School Committee. However, the ALJ also found that, because the parties likely had different opinions about the nature of the meeting, they also had different interpretations of Dr. Drinkwater's comment and, therefore, although Massaro may have believed that Dr. Drinkwater would present the Union's request to the School Committee, Dr. Drinkwater merely stated that bargaining was a School Committee function. The Union did not challenge that finding and, absent a clear preponderance of relevant evidence to indicate that the ALJ's credibility determination was incorrect, we will not overrule that determination. *See, Town of Clinton*, 12 MLC 1361 (1985) and cases cited.

6. We note that, as a general matter, a union would be reasonable in believing that a demand to bargain made to a superintendent of schools would be sufficient to create an obligation in the School Committee to bargain in good faith, including an obligation to maintain the status quo until the parties have either bargained to resolution or impasse. However, here Dr. Drinkwater specifically informed the Union that he was not responsible for bargaining on behalf of the School Committee. Therefore, under the narrow facts presented in this case, we find that the Union's request to Dr. Drinkwater was insufficient to create a bargaining obligation in the School Committee.

employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Scituate School Committee*, 9 MLC 1010, 1012 (1982). Here, despite its vote on May 18, 1996, there is no evidence to suggest that the School Committee did not have an open mind or that bargaining would have been futile. *See, Holyoke School Committee*, 12 MLC 1483 (1985). Therefore, we find that the School Committee vote on May 18, 1995 was not a *fait accompli*, but rather it was a proposal over which the parties could have bargained.[7]

The affirmative defense of waiver by inaction must be supported by evidence that the union had actual knowledge and a reasonable opportunity to negotiate over the proposed change, but unreasonably or inexplicably failed to bargain or to request to bargain. *Commonwealth of Massachusetts*, 8 MLC 1894 (1982). Here, the Union had notice of the School Committee's intent to change the length of the school day at the high school for the 1995-1996 school year. Massaro attended a School Committee meeting on April 6, 1995 when the School Committee first discussed the matter and again on May 18, 1995, when the School Committee took its vote. Further, the Union had ample opportunity to bargain between April 6, 1995 or May 18, 1995 and the beginning of the 1995-1996 school year.

An employer who argues that, due to factors beyond its control, it had no choice but to implement its proposed change by a particular time has the burden of establishing that the union was put on notice that the change would be implemented at a particular time and that the deadline was reasonable under all the circumstances. *New Bedford School Committee*, 8 MLC 1472 (1981). Here, the School Committee's imposed deadline was based on a mandate by the Department of Education that required an adjustment to meet the amended standards for learning time for the 1995-1996 school year. Therefore, we find that, because the School Committee informed the Union that it intended to increase the length of the school day well in advance of the planned implementation date and the deadline was based on a regulatory requirement, the School Committee's actions were reasonable under all the circumstances. However, as explained above, the Union failed to make a sufficient demand to bargain over the School Committee's intended change. Even if we were to consider the filing of the charge as a demand to bargain, because the Union filed its charge more than four months after learning of the intended change and less than one month prior to the planned implementation date, we find that the filing of the charge in this case was not sufficient to rebut the School Committee's argument that the Union waived its right to bargain by inaction. *Cf., Amesbury School Committee*, 11 MLC 1049 (1984). Accordingly, we find that the Union waived its right to bargain by inaction and dismiss Count II of the complaint.

Because we find that the Union waived it right to bargain by inaction, we need not consider whether it waived its right to bargain by contract.

Conclusion

For the reasons set forth above, we dismiss the complaint of prohibited practice.

SO ORDERED.

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7. We note that on May 18, 1995, the School Committee voted to increase the length of the school day at the high school by fifteen minutes for the 1995-1996 school year and at the elementary, middle, and high schools for the 1996-1997 school year. However, after the Union presented the chairperson of the School Committee with a written demand to bargain over the change for the 1996-1997 school year, the parties subsequently bargained to resolution.