In the Matter of BROCKTON SCHOOL COMMITTEE

and

BROCKTON EDUCATION ASSOCIATION

Case No. MUP-9131

35.7	*supervisory and managerial employees*
54.5111	*layoff*
54.517	*seniority*
67.164	*pre-existing practice*
67.44	*failure to consider proposals*
92.51	*appeals to full commission*

July 15, 1996
Robert Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Edward F. Lenox, Jr., Esq.	*Representing the Brockton School Committee*
Mark G. Kaplan, Esq.	*Representing the Brockton Education Association*

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

On September 3, 1992, the Brockton Education Association (the Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the Brockton School Committee (School Committee) violated §10(a)(5) and, derivatively, §10(a)(1) of Massachusetts General Laws c. 150E (the Law) by insisting that certain exempt managerial employees retain their former positions on the bargaining unit's seniority lists for each teaching discipline. The Commission investigated the Union's charge and issued its complaint of prohibited practice on February 23, 1993 alleging that the School

Committee failed to bargain in good faith with the Union by refusing to bargain with the Union about the Union's proposal to change the method for determining unit members' seniority for purposes of reduction in force.

A hearing took place on February 14, 1994 before Hearing Officer Robert B. McCormack (hearing officer). The hearing officer's decision issued on August 8, 1994, finding that the School Committee violated the Law by insisting on maintaining the names of certain exempt managerial employees on the Union's seniority lists.[1] The School Committee filed a timely appeal, and both parties filed supplementary statements.

Upon our review of the hearing officer's decision and the supplementary statements of the parties on appeal, we reverse his decision for the reasons set forth below.

Findings of Fact

We adopt the hearing officer's findings of fact, with one modification as noted below, and summarize the relevant facts as follows.[2]

The Union represents two (2) bargaining units of employees in the Brockton public schools. These two units are Unit A, comprised of administrators, and Unit B, comprised of teachers. Presently, there are about 930 teachers and 130 administrators represented by the Union. These numbers have varied over the years. The Union and the School Committee are parties to a collective bargaining agreement that covers bargaining Units A and B. The School Committee and the Union were parties to a collective bargaining agreement for the period of September 1, 1989 through August 31, 1992. In February 1992, the parties began negotiating for a successor contract and, on November 22, 1993, the parties entered into a memorandum of agreement. This memorandum of agreement extended the terms of the parties' 1989-1992 contract for one year and established the terms and conditions for a new collective bargaining agreement between the parties that would cover the period from September 1, 1993 through August 31, 1996.

Article XLI of the parties' collective bargaining agreement is a "Reduction In Force" (RIF) clause that establishes the layoff and recall procedures for the teachers' and administrators' bargaining units. The RIF clause is frequently used as reflected by the recent fluctuations of the total number of teachers and administrators in the Brockton Public Schools. Union President Joseph O'Sullivan (O'Sullivan) testified about how the RIF clause works in Brockton.

The RIF clause uses the seniority lists for the different subject disciplines in Unit B and Unit A. A discipline list is a list with the names of teachers who have taught that subject in the order of their seniority. Each teacher selects the one discipline list on which the teacher's name will appear. Each teacher may choose to have their name placed on either the discipline list for the subject area in which the teacher was teaching at the time of the selection or the discipline list for any other subject area in which the teacher had previously taught at the Brockton Public Schools. Teachers' names appear on the discipline lists that they select in the order of their "total number of years of continuous service in the Brockton School System." For example, a teacher with ten years of service as an English teacher and five years of service as a social studies teacher who chooses to be placed on the seniority list for social studies teachers would be credited with the full fifteen years of service in the Brockton School System on the social studies seniority list.

The School Committee decides the subject areas where reductions in force will be made, and it lays off employees from the bottom name on the seniority list for that discipline. Pursuant to the applicable provisions of Chapter 71 of the Massachusetts General Laws, tenured teachers have a statutory right to bump a non-tenured teacher.[3] Teachers who are laid off from the seniority lists that they selected do not have the right to bump less senior teachers in other subject areas or disciplines for which they may be certified or otherwise qualified.

The names of administrators in Unit A appear on the seniority list for the administrative discipline in which they are employed. Similarly, their names appear in the order of their total number of years of continuous service in the Brockton Public Schools, including their service in Unit B. If there is only one person in an administrative position, there is no seniority list for that discipline because there is only one person to lay off if the position is abolished. Reductions in administrative classifications where there are multiple positions take place in the same way as Unit B, starting from the bottom name on the list.

In the years following the creation of the seniority lists in 1982, all of the administrative assistant positions were excluded from bargaining Unit A because they were assigned additional responsibilities and became managerial and/or confidential employees. These employees, along with the School Department's comptroller and two special projects coordinators, maintained their positions on the discipline seniority lists for bargaining Unit B even after their current status was determined to be managerial and/or confidential and excluded from Bargaining Unit A. At present, every one of the exempt managerial positions in the Brockton Public Schools, including those listed above, is occupied by a former member of Unit B who continues to have the right to bump back into a teaching position if their upper level managerial position is reorganized or otherwise eliminated because they have remained on the discipline seniority list for Unit B.

Both parties have stipulated to the fact that the Union did not submit any proposal to remove the School Committee's exempt managerial employees from the RIF seniority lists during the 1989 negotiations. When the parties began negotiations for the successor agreement that would take effect on September 1, 1992, the Union presented the School Committee with a proposal to remove the names of the exempt managerial employees from the

1. The full text of the hearing officer's decision is reported at 21 MLC 1165.

2. The Commission notes that the findings of fact in this decision are supported by the record and are not derived specifically from the parties' briefs.

3. This case arose before the Legislature enacted the Education Reform Act of 1993, M.G.L. c.71, Section 59 (1993).

discipline lists that are used to determine the order of layoff in a reduction in force. The proposal read:

> No names shall appear on any of the discipline lists other than the names of current members of either Unit A or Unit B. Upon acceptance of an exempt central administrative position, a teacher's name will be stricken from his discipline list(s) and he will no longer retain any seniority rights under this Article or under the contract.

The Union presented this proposal at the first negotiating meeting for the new contract in February 1992. According to Claire Murphy (Murphy), the parties discussed this proposal at more than one meeting. Murphy agreed with the School Committee's attorney that the parties had probably discussed this proposal about five (5) times prior to mediation and continued to discuss the proposal in mediation sessions. Murphy also acknowledged that the School Committee never refused to discuss the issue with the Union.[4]

Opinion

The School Committee argues on appeal that the hearing officer erred in finding that the School Committee violated the Law by insisting on bargaining over permissive subjects of bargaining. The School Committee responds that the Union's proposal addressed a mandatory subject of bargaining, not a permissive subject, and that the School Committee complied with its obligation to bargain over that proposal. Moreover, the School Committee argues that the parties have negotiated the seniority language in the reduction in force clause, and that the Union may not unilaterally insist on removing the article from the contract. *City of Chelsea*, 13 MLC 1144, 1151 (1986).

To determine whether the hearing officer erred in finding that the School Committee insisted on bargaining a permissive subject of bargaining, we must first analyze whether the issues raised by the Union's proposal were permissive or mandatory subjects of bargaining. The Commission has found that the method for calculating seniority is a mandatory subject of bargaining. *Saugus School Committee*, 7 MLC 1849 (1981); *Medford School Committee*, 1 MLC 1250 (1975).

The hearing officer's decision was based on the finding that the terms and conditions of employment of non-bargaining unit members are not mandatory subjects of bargaining, and employees who leave the bargaining unit are no longer bargaining unit members. *Chelmsford School Administrators Association*, 8 MLC 1515, 1516, 1517 (1981). In *Chelmsford School Administrators Association*, we found that the obligation to bargain extends only to the terms and conditions of employment of the employer's employees in the unit appropriate for such purposes which the union represents. 8 MLC at 1516-17.

Here, however, we find that the Union's proposal over the seniority lists involved a mandatory subject of bargaining. The language of the Union's proposal stated that "...Upon acceptance of an exempt central administrative position, a teacher's name will be stricken from his discipline list(s) and he will no longer retain any seniority rights under this Article or under the contract." The Union's seniority proposal suggests that the parties were bargaining over seniority issues affecting bargaining unit members, not simply benefits for non-unit members. The Union's proposal concerned the criteria that would be used to calculate the relative seniority of bargaining unit members while they are still part of the bargaining unit, and was not limited to defining the seniority of employees after they left the bargaining unit, which was the case in *Chelmsford School Administrator's Association*. *Id.* at 1516-17. Moreover, this proposal would influence bargaining unit members' decisions about leaving the bargaining unit. Therefore, we find that the proposal affects bargaining unit members' seniority rights and is a mandatory subject of bargaining. *Id.* at 1516-17.

We must then consider whether the School Committee refused to bargain with the Union over a mandatory subject of bargaining. *Town of Danvers*, 3 MLC 1559, 1563 (1977). The duty to bargain does not compel either party to agree to a proposal or make a concession but it requires that parties enter into discussion with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences. *Holbrook Education Association*, 14 MLC 1737, 1740 (1988); *Commonwealth of Massachusetts, Commissioner of Administration and Finance*, 8 MLC 1499, 1510 (1981).

Here, the evidence in the record and the testimony of the Union's witness reflect that the School Committee did not refuse to bargain with the Union, and fulfilled its obligation to bargain about seniority. Murphy testified that the School Committee never refused to discuss the issue with the Union. Murphy also agreed with the School Committee's attorney that the parties had discussed the issue about five times prior to mediation. Therefore, the record supports the School Committee's position that it was willing to bargain with the Union about its proposal, did not refuse to bargain about that seniority proposal, and met with the Union several times to discuss the issue. In addition, the parties discussed the matter during mediation proceedings. The fact that the School Committee did not agree with the Union's proposal or make a concession does not, without more, demonstrate that it has refused to bargain in violation of its duty under the Law. *Commonwealth of Massachusetts, Commissioner of Administration and Finance*, 8 MLC at 1510.

Based on these facts, we find that the Union's seniority proposal was a mandatory subject of bargaining and that the School Committee did not refuse to bargain with the Union regarding that proposal, even though it did not agree to the proposal.

Conclusion

For the foregoing reasons, we find that the School Committee did not violate §10(a)(5) and, derivatively, §10(a)(1) of the Law. Accordingly, the Complaint is hereby DISMISSED.

SO ORDERED.

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4. Although the hearing officer's decision did not make this finding, the School Committee raises this fact in its objection to the hearing officer's finding that the School Committee refused to bargain, and we find that it is reflected in Murphy's testimony. Therefore, we modify the findings of fact accordingly.