"contemplated action". Pomeroy explicitly expresses his intention to issue a directive on January 15, 1995. The Union could not then reasonably conclude that the memorandum was a directive and use that as a basis for refusing to bargain.

The Union next argues that the parties had only one full bargaining session on February 14, 1995 and, at that time, it was not clear to the Union who had the authority to bargain on behalf of the Town. That argument is equally unpersuasive. An Employer bargains in bad faith when it invests a bargaining representative with limited authority to make commitments or provides a chief negotiator with no authority to negotiate. *See Middlesex County Commissioners*, 3 MLC 1594, 1597-1602 (1977); *Watertown School Committee*, 9 MLC 1301, 1304-1307 (1982). However, a state of uncertainty with respect to the authority of the Employer's agent to bargain does not sanction a Union's categorical refusal to bargain. A more appropriate response would have been for the Union to commence bargaining while exploring Pomeroy's authority to bargain. The Union's rigid refusal to bargain was a response ill-suited to the collective bargaining process.

The collective bargaining process presupposes the parties' willingness to seek compromise through a give and take exchange of ideas. Collective bargaining is a fluid, dynamic process enhanced by the good faith of the participants. The Union's inflexible approach to these bargaining discussions hindered any meaningful negotiations. Therefore, I find that the Union waived its bargaining rights by unreasonably failing to bargain and by engaging in conduct inimical to the collective bargaining process.[6]

CONCLUSION

For the reasons stated above, I DISMISS the complaint of prohibited practice.[7]

* * * * * *

6. Even if I were not to find that the Union waived its bargaining rights, I would find the Town's arguments related to impasse equally persuasive. It was clear that the parties were deadlocked by the Union's bargaining stance and further negotiations would, therefore, have proved fruitless; moreover, in the May 17, 1995 memorandum, the Town provided its contemporaneous understanding of the state of bargaining to which the Union failed to respond or, in any way, correct. See *Town of Stoughton*, 19 MLC 1149, 1159 (1992); *Town of Arlington*, 15 MLC 1452, 1456 (1989).

7. The Union has also argued that the Town should have raised the compensatory time issue during successor contract negotiations. The Commission has held that where a particular matter was not covered by the agreement, an employer may not insist on mid-term bargaining "during the time that the parties historically [engage] in bargaining for a successor contract". *Town of Brookline*, 20 MLC 1570, 1596, n.20 (1994). However, the facts of this case may be distinguished from *Town of Brookline*. The Union's refusal to bargain was never based on a demand to bargain solely in the context of successor negotiations. Although the Union suggested in January that the Employer consider raising the issue at future, as yet unscheduled, successor contract talks, the Union never asserted that it would only bargain during successor contract negotiations. Moreover, the Union subsequently demanded to bargain over the issue and agreed to the February 14, 1995 bargaining session. At that time, the Union refused to bargain based on the nature of the Employer's proposal. By the time successor talks began in April 1995, the Union had already categorically refused to bargain.

In the Matter of TOWN OF WENHAM

and

WENHAM CALL FIREFIGHTERS ASSOCIATION

Case No. MUP-1472

32.	*Binding Effect of a Unit Determination*
35.811	*call-firefighters*
67.66	*altering bargaining unit*
67.7	*refusal to meet or delay in meeting*
82.4	*bargaining orders*
91.2	*final disposition*

September 5, 1996
Robert C. Dumont, Chairman
William J.Dalton, Commissioner
Claudia T. Centomini, Commissioner

Laurence J. Donoghue, Esq.	*Representing the Town of Wenham*
Neil Rossman, Esq.	*Representing the Wenham Call Firefighters Association*

DECISION[1]

Statement of Case

On March 11, 1996, the Wenham Call Firefighters Association (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Town of Wenham (Town) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the Union's charge and issued a Complaint of Prohibited Practice on May 20, 1996. The Commission's Complaint alleged that the Town had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by

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.

refusing to bargain in good faith with the Union. Based on the parties' stipulations and exhibits, we make the following decision.

Findings of Fact

In lieu of an evidentiary hearing, on July 15, 1996, the parties filed the following joint stipulations of fact:

1. The Town, acting through its Board of Selectmen, is a public employer within the meaning of M.G.L. c. 150E, Section 1.

2. On or about December 14, 1995, the Commission in Case No. MCR-4364 certified the Union as the exclusive bargaining representative for the call firefighters employed by the Town. A copy of the Commission's certification is attached as Exhibit 1.

3. On or about January 12 and again on or about February 13, 1996, the Union through counsel, requested that the Town commence bargaining with the Union. Copies of the Union's requests are attached as Exhibits 2 and 3.

4. On or about February 16, 1996 the Town, through counsel, responded to the Union's request, stating that the Town would decline to bargain with the Union and intended to challenge the Union certification, under appropriate legal means. A copy of the Town's response is attached as Exhibit 4.

5. Based upon the above, on or about March 11, 1996, the Union filed a charge of prohibited practice, alleging that the Town violated Section 10(a)(5) of Chapter 150E in refusing to bargain with the Union.

6. On or about May 20, 1996, the Commission issued a complaint of prohibited practice (MUP-1472) based on the charge described in Paragraph 5 above. In that complaint, the Commission alleges that the Town, in failing and refusing to bargain with the Union has violated Section 10(a)(5) and derivatively, Section 10(a)(1) of Chapter 150E.

7. The Town has, in fact, refused to bargain with the Union.

8. In response to the Union's charge as described in Paragraph 5 above, and the Commission's complaint as described in Paragraph 6 above, the Town contended, and continues to contend, that the certification of the Union was improper. Specifically, the Town contends that it was improper for the Commission to direct an election in, and certify, a unit of call firefighters. The Town's position is summarized in its May 1, 1996 response to the Union's charge, attached as Exhibit 5.

9. The parties stipulate and agree that the issues raised in the Commission complaint described in Paragraph 6 above may be capable of determination without the necessity of an evidentiary hearing. Specifically, the parties agree to submit, as part of the record in the instant proceeding, the record in Case No. MCR-4364. Said record shall include the following:

   a. the Union's petition;

   b. the stipulation and supplemental stipulation, dated March 13 and July 31, 1995, respectively;

   c. Letters from counsel for the Town dated March 20 and August 3, 1995, and counsel for the Union dated June 30, 1995 setting forth the respective legal positions of the parties with respect to the petition;

   d. The Commission's decision and direction of election; and

   e. The Commission's certification of the Union.

10. The parties agree that all facts stipulated to in Case No. MCR-4364 may be deemed stipulated to or admitted in this matter.

11. In entering into this stipulation, the Town and the Union waive any right to an evidentiary hearing in Case No. MUP-1472, provided however that the Commission, if it deems it necessary, may schedule a hearing.

12. In entering into this stipulation in lieu of a hearing, the Town and Union shall be deemed to have exhausted Commission administrative remedies with respect to Case No. MUP-1472.

OPINION

The Town refuses to bargain with the Union and argues that it was inappropriate for the Commission to direct an election and certify a unit of call fire fighters. The Town contends that the work of the call fire fighters is too sporadic and casual to be regulated by collective bargaining. We considered the Town's arguments in our decision in *Town of Wenham*, 22 MLC 1237, and we determined that Wenham call fire fighters who responded to a minimum of thirty-three percent of all alarms sounded in the preceding year had a sufficient continuity of employment to entitle them to collective bargaining rights.

When an employer seeks to test the recent certification of a Union by refusing to bargain, the representation proceeding and the prohibited practice proceeding are treated as one case. *City of Lawrence*, 13 MLC 1087, 1092 (1986). Therefore, the Commission's long-standing policy is that a party may not relitigate issues in an unfair labor practice proceeding that have been litigated or could have been litigated in the prior representation proceeding between the parties. *Id.*; *See*, *also*, *City of Worcester*, 4 MLC 1373, 1374 (1977). We can discern no reason to depart from that policy, here. Moreover, the Town has raised no new issue that would warrant reconsidering or require reversing our previous decision. Therefore, because all of the issues concerning the bargaining unit of call fire fighters certified by the Commission was fairly litigated in Case No. MCR-4364, we will not disturb our certification of the Wenham Call Firefighters Association as the exclusive bargaining representative for a unit of call fire fighters of the Town of Wenham who respond to a minimum of thirty-three percent of all alarms sounded in a year's time.

The duty to bargain collectively imposed by Section 6 of the Law requires the employer and the exclusive bargaining representative to meet at reasonable times to negotiate in good faith about wages, hours, standards of productivity and performance, and any other terms and conditions of employment. This obligation is enforced through Section 10(a)(5), which provides that it shall be a prohibited practice for a public employer to refuse to bargain collectively in good faith with the exclusive representative as required by Section 6 of the Law. *City of Beverly*, 20 MLC 1166, 1170 (1993).

It is uncontroverted that, on February 16, 1996, the Town declined the Union's request to commence bargaining over the wages, hours, and working conditions of the call fire fighters in the bargaining unit certified by the Commission in Case No. MCR-4364. Therefore, we conclude that the Town refused to bargain with the Union in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

CONCLUSION

For the reasons stated above, we conclude that the Town of Wenham has refused to bargain in good faith with the Wenham Call Firefighters Association over the wages, hours, and working conditions of the call fire fighters in the bargaining unit certified by the Commission in Case No. MCR-4364 in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that:

1. The Town of Wenham shall cease and desist from:

(a) Refusing to bargain in good faith with the Wenham Call Firefighters Association.

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

2.The Town of Wenham shall take the following affirmative action that will effectuate the purposes of the Law.

(a) Upon request, bargain in good faith with the Wenham Call Firefighters Association.

(b) Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the Notice to Employees.

(c) Notify the Commission in writing within thirty (30) days of the service of this decision and order of the steps taken in compliance therewith.

SO ORDERED.

* * * * * *

In the Matter of CITY OF PEABODY

and

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

Case No. CAS-3045

33.	*Consent Agreements and Stipulations*
34.2	*community of interest*
34.91	*accretion*
35.4	*other non-professionals*

September 11, 1996
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Daniel Kulak, Esq.	*Representing the Town of Peabody*
Louise Moses, Esq.	*Representing the American Federation of State,County and Municipal Employees, Council 93, AFL-CIO*

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On June 30, 1993, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (AFSCME) filed a petition with the Commission seeking to accrete the position of school health aide to its existing city wide bargaining unit in the City of Peabody (City). The Commission investigated the petition and a hearing was conducted before Hearing Officer Ann Moriarty (hearing officer) on December 3, 1993. Both parties filed post hearing briefs. On April 14, 1994, the hearing officer issued her decision (hereafter, "Decision"), allowing the position of school health aide to be accreted into the city wide bargaining unit.

On April 28, 1994, the City filed a timely notice of appeal and a supplementary statement in support of its position. On May 6, 1994, AFSCME filed its responsive supplementary statement. We have reviewed the hearing officer's decision and the record, as well as the supplementary statements of both parties. For the reasons set forth below, we affirm the decision of the hearing officer.

Findings of Fact:

The two parties stipulated to the facts of this case.[1] Those stipulated facts may be summarized as follows:

The City and AFSCME were parties to a collective bargaining agreement covering the period January 1, 1973 through June 30, 1975. The recognition clause of the 1973-75 agreement provides,

1. A full accounting of the stipulated facts can be found in the hearing officer's original decision at 20 MLC 1423.