In the Matter of LOWELL SCHOOL COMMITTEE

and

UNITED TEACHERS OF LOWELL, LOCAL 495, MFT/AFT/AFL-CIO

Case No. MUP- 1775

28.	*Relationship Between c. 150E and Other Statutes Not Enforced by Commission*
52.62	*matters not covered*
54.31	*impact of management rights decisions*
54.5121	*creating new position*
67.11	*contract bar*
67.15	*union waiver of bargaining rights*
67.17	*statutory changes*
67.8	*unilateral change by employer*

January 28, 2000
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Daniel R. Wojcik, Esq.	*Representing the Lowell School Committee*
Joseph R. Lettiere, Esq.	*Representing the United Teachers of Lowell*

DECISION

Statement of the Case

The United Teachers of Lowell, Local 495, MFT, AFT, AFL-CIO (Union or UTL) filed a charge with the Labor Relations Commission on February 28, 1997, alleging that the Lowell School Committee (Respondent or School Committee) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (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, on December 18, 1997, the Commission issued a Complaint of Prohibited Practice alleging that the School Committee had violated Sections 10(a)(5) and (1) by: 1) unilaterally implementing a mentor training program and mentor program without giving the Union notice and an opportunity to bargain, and 2) refusing to bargain over the programs on demand. The Commission dismissed those portions of the Union's charge alleging that the School Committee failed to bargain in good faith by dealing directly with bargaining unit members, in violation of Section 10(a)(5) and (1) of the Law. The School Committee filed an Answer to the Commission's Complaint on January 9, 1998.

The Commission scheduled a formal hearing for March 24 and 26, 1998 before Hearing Officer Susan Atwater. Subsequently, the parties agreed to submit a written, stipulated, evidentiary record in lieu of testimonial evidence. Both parties filed briefs on or about January 27, 1999. After considering the stipulated record and the arguments in the parties' briefs, the Commission makes the following findings of fact and renders the following opinion.

Findings of Fact

1. The Respondent, Lowell School Committee, is a public employer within the meaning of Section 1 of the Law.

2. The Charging party, the UTL, is an employee organization within the meaning of Section 1 of the Law.

3. Respondent and the UTL are parties to a collective bargaining agreement (CBA) effective from July 1, 1994 through June 30, 1997.

4. In the spring of 1996, a meeting was held by the Lowell School Department Superintendent, George Tsapatsaris, the Deputy Superintendent for Personnel, Helen Flanagan, the UTL President, Paul Georges, the UTL Field Representative, Jack O'Brien and the Massachusetts Federation of Teachers (MFT) Director of Organization, Annemarie DuBois.

5. During the course of this meeting, which was concerned with an unrelated topic, Dr. Flanagan mentioned to the UTL that a mentoring program would be going into effect in the Lowell school system at the commencement of the 1997-1998 school year. She stated she had learned that such a program would be required by the state of Massachusetts during her attendance, as a member, at meetings of the state's Department of Education (DOE) Steering Committee for Induction Year Programs.

6. Flanagan further advised the UTL that the DOE guidelines for mentoring programs were not complete as of that time.

7. On or about August 27, 1996, the DOE issued a draft of revised "Standards and Guidelines for the Approval of Induction Year Programs."

8. On or about September 3, 1996, without affording prior notice to the UTL, the Respondent posted throughout the Lowell schools a notice stating that a mentor teacher training program would take place at the University of Massachusetts Lowell on October 15, 1996, November 12, 1996, December 10, 1996, January 14, 1997 and February 11, 1997. Posted along with the notice was a memorandum dated September 3, 1996 from the Lowell School Coordinator of Staff Development, Mary Ann Simensen, addressed to "Lowell Teachers." In this memo, Simensen described the goals of a mentor training program and solicited Lowell teachers to participate therein by filling out and submitting an application form which was attached thereto.

9. The UTL learned of this posting on or about September 16, 1996.

10. On September 16, 1996 UTL Field Representative O'Brien contacted Superintendent Tsapatsaris and requested a meeting to discuss mentor training and the mentor program.

11. On October 3, 1996 Tsapatsaris faxed a letter to O'Brien confirming that the parties would meet on the following day, October 4, 1996, to discuss the Respondent's "proposed School District Based Mentor Program." A copy of the program was attached to this letter.

12. The October 4, 1996 meeting was attended by Tsapatsaris, Flanagan, Simensen, Georges and O'Brien.

13. During the October 4, 1996 meeting Tsapatsaris presented the mentor program, as set forth in Exhibit 6, as constituting the Respondent's decisions for the design and for the implementation of both the mentor training program and the actual mentoring programs which would commence at some time after the completion of the training.

14. Georges, in response, stated that much of what was contained therein, including but not limited to mentor selection, training stipends, mentoring stipends, workload and the like, must be collectively bargained by the parties.

15. By a letter dated October 31, 1996, on behalf of the Respondent, Attorney Daniel Wojcik responded to this demand by notifying the UTL of the Respondent's refusal to bargain.

16. From September 3, 1996 to the present, and continuing, various numbers of Lowell teachers have applied for and been accepted by the Respondent into the mentor training program and the Respondent has unilaterally determined and implemented that program.

17. On or about December 16, 1996, the Respondent posted throughout the Lowell schools a notice of vacancies, a job description, salary, other terms of employment and an application form for a mentor program for nine (9) provisional teachers.

18. On or about December 16, 1996, the Respondent posted throughout the Lowell Schools a notice of vacancies, a job description, salary, other terms of employment and an application form for a mentor program for thirteen (13) advanced provisional teachers.

19. Various Lowell teachers applied for and were accepted into the mentoring programs referred to in paragraphs 17 and 18, and these programs have since then commenced on or about February 5, 1997.

20. Prior to the implementation of the above-referenced mentor training program and of the subsequent mentoring programs, there had been no such mentor training or mentoring programs in effect in the Lowell public schools.

21. On or about February 20, 1997, O'Brien sent a letter to the Committee's spokesman in successor contract bargaining, Attorney Wojcik, requesting the Respondent's agreement to bargain over the mentor training and mentoring programs. O'Brien requested an answer by February 25, 1997 and stated that failure to respond by that date would be considered a refusal of the request.

22. As of February 27, 1997, neither Wojcik nor any other representative of the Committee responded to O'Brien's letter of February 20, 1997.

23. The City of Lowell, acting through its chief executive officer, is a public employer within the meaning of Section 1 of the Law.

24.The Respondent is the representative of the City for purposes of dealing with its school employees.

25. The Union is an employee organization within the meaning of Section 1 of the Law.

26. The Union is the exclusive collective bargaining representative for all classroom teachers, and all those employees whose duties are primarily those of a teacher regardless of classification.

27. Prior to September 1996, the Respondent did not have a mentor program or a mentor training program in its school system.

28. On or about September 3, 1996, the Respondent posted a notice to teachers announcing a mentor teacher training program. The notice was accompanied by a memorandum describing the program and inviting teachers to participate.

29. The Respondent took the action described in paragraph 28, above, without giving the Union prior notice and an opportunity to bargain.

30. On or about September 16, 1996, the Union contacted the Respondent and requested to meet about the mentor program referred to in paragraph 28, above, and its training component.

31. On or about October 4, 1996, the Respondent and the Union met and discussed the mentor program. During the meeting, the Respondent gave the Union its program for designing and implementing the mentor program and its training component.

32. On or about October 11, 1996, the Union sent a written demand to bargain about the mentor program and its training component to the Respondent.

33. On or about October 31, 1996, the Respondent informed the Union in writing that its bargaining demand was "not valid because the program is mandated by the state legislature and is governed by school committee prerogative through implementation and, as such, is not a mandatory subject of bargaining."

34. Since September 1996, the Respondent has accepted and trained mentors as part of its mentor program.

35. On or about December 16, 1996, the Respondent posted a notice of vacancies, job descriptions, salaries and other terms of employment for mentors for nine (9) provisional teachers and thirteen (13) advanced provisional teachers.

36. On or about February 5, 1997, after filling the positions described in paragraph 35, above, the Respondent implemented the mentor program.

37. The Respondent took the action described in paragraphs 34, 35 and 36, above, without giving the Union an opportunity to bargain to resolution or impasse.

38. On or about February 20, 1997, the Union requested that the Respondent bargain over the mentor training program and the mentor program during bargaining for a successor collective bargaining agreement.

39. The Respondent has failed or refused to respond to the Union's request described in paragraph 38, above.

40. The mentor program and mentor training program have been repeated in the 1997-1998 school year and the School Committee intends to continue the programs in future school years using the same unilaterally determined processes.

41. The Department of Education has never adopted the standards and guidelines marked as joint exhibits 2 (induction year programs) and 12 (district-based certification year programs).

OPINION

It is well-settled that public employers may not change a pre-existing condition of employment, or implement a new condition of employment, affecting a mandatory subject of bargaining without providing the exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *City of Newton*, 16 MLC 1036,1041-42 (1989). However, some managerial decisions cannot be delegated by public employers or be made the subject of collective bargaining. *Town of Dennis*, 12 MLC 1027,1030 (1985). For example, school committees have the exclusive prerogative to determine matters of educational policy without bargaining. *School Committee of Boston* v. *Boston Teachers Union*, 378 Mass. 65 (1979). Similarly, decisions determining the level of services that a governmental entity will provide lie within the exclusive prerogative of the public employer. *Town of Danvers*, 3 MLC 1554 (1977). Also, when a third party over which the employer has no control exercises its authority to change employees' terms and conditions of employment, the public employer may not be required to bargain over the decision to make that change. *Higher Education Coordinating Council*, 22 MLC 1662 (1996); *City of Malden*, 20 MLC 1400, 1405 (1994).

A public employer's ability to act unilaterally regarding certain subjects or decisions does not, however, relieve that employer of all attendant bargaining obligations. In cases where an employer is excused from the obligation to bargain over a decision made by a third party, that employer is still required to bargain with the union representing its employees over the manner in which to implement the decision, as well as the impacts of the decision on mandatory subjects of bargaining, before it implements that decision. *Higher Education Coordinating Council*, 22 MLC at 1670-1671; *see also Massachusetts Correctional Officers Federation* v. *Labor Relations Commission*, 417 Mass. 7,9 (1994). Likewise, employers must bargain the impacts of core governmental decisions, *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983), and school committees must bargain over the impacts of decisions based on educational policy, *See generally*, *Groton School Committee*, 1 MLC 1221,1224 (1974).

Initially, we conclude that the School Committee was not obligated to bargain over the decision to establish the mentoring programs. M.G.L. c.71 s.38G provides in pertinent part that:

> Each public school district seeking to hire a provisional educator must submit a provisional educator program plan to the department of education. No district shall be authorized to employ a provisional educator unless it has submitted a plan for such a program and received approval of the commissioner... Each public school district seeking to hire a provisional educator with advanced standing must submit a plan to the department of education which details how the district will supervise and support such provisional educators with advanced standing. No district shall be authorized to employ a provisional educator with advanced standing unless it has submitted a plan for such a program and received approval of the commissioner.

The DOE draft guidelines state that, as of September 1997, a district must have a mentoring program in place in order to employ beginning teachers. The guidelines also explain that the purpose of the programs is to raise teacher retention rates, ensure the delivery of high quality instruction, increase the pool of applicants for teaching positions and train teachers to address district-specific needs. These facts compel the conclusion that the decision to adopt a mentoring program and create mentor and mentor-trainee positions in conformity with statutory and DOE guidelines are non-bargainable as a matter of educational policy and because they are mandated by the Legislature and DOE. However, the School Committee remained obligated to bargain over how the mentoring programs would be implemented and the impact of these programs on bargaining unit members' terms and conditions of employment. Therefore, we must consider whether the School Committee complied with these bargaining obligations.

Because the School Committee has no obligation to bargain with the Union over the terms and conditions of employment of non-unit positions, a threshold issue is whether mentors and mentor-trainees are bargaining unit members. The School Committee argues that the recognition clause does not include mentors as a stipendiary position and cites language limiting bargaining unit membership to all employees whose duties are primarily those of a teacher regardless of classification. Although teachers perform the mentor function, the School Committee contends, it is not in their role as teachers, but rather, in the guise of helping provisional teachers achieve certification. This argument is unpersuasive. The DOE guidelines for the programs, as well as the school vacancy announcement require mentors and mentor-trainees to be teachers and one of the goals of the mentor program is to encourage the professional skill and development of the teaching staff. Mentors are not required to evaluate novice teachers but their primary duties are to support, encourage and assist novice teachers in their teaching capacities. Because a mentor must be a teacher, and the work they perform is intricately related to their role and skill as teachers, the fact that they are assisting other teachers rather than teaching students does not segregate them from the teachers' bargaining unit. Although the mentor role or function is voluntary, it can be viewed as one facet of a teacher's job. Consequently, we find that becoming a mentor-trainee and/or mentor does not affect the bargaining unit status or placement of bargaining unit members.

We next consider whether G.L. c.71 s.38G or the DOE draft guidelines establish the wages, hours and all terms and conditions of employment for mentors and mentor-trainees. Without citing any specific section of the guidelines, the School Committee argues that all mandatory subjects of bargaining, except wages, are included in the DOE draft guidelines. Conversely, the Union contends that nothing in that statute dictates the wages, hours or terms and conditions of employment for mentors or mentor-trainees.

The statute requires school districts to submit and receive DOE approval for a provisional educator plan and requires the plan to comply with guidelines established by the DOE. It specifies that

the plan must demonstrate joint sponsorship or collaboration of programs with various approved entities, and contains provisions regarding observation and evaluation of provisional educators. The statute similarly provides that the DOE shall approve plans for the support and evaluation of provisional educators with advanced standing. DOE issued draft standards and guidelines in July and August 1996 that contain standards required for program approval and guidelines for optimal benefit. The standards for district-based certification programs include requirements pertaining to the teaching candidates, and the guidelines suggest, *inter alia*, mentor duties, qualifications, the timing of certain workdays and mentor training requirements. Similarly, the standards for approval of induction-year programs include minimum standards in such areas as: mentor compensation, selection criteria, mentor assignment, beginning teacher orientation, release time for mentors and beginning teachers and observation opportunities. The guidelines include suggested forms of compensation, mentor selection criteria, a specified amount of release time, and a schedule of appropriate intervals for mentor and beginning teacher observation. Although the draft guidelines address some mandatory subjects of bargaining in general terms, neither the statute nor the guidelines set requirements that preclude bargaining about the impacts of a mentor program or working condition. Therefore, the School Committee is required to bargain over the implementation and impact of the programs, including the terms and conditions of employment of mentors and mentor- trainees.

The third issue to consider is whether the School Committee is required to bargain over the issue of wages. The School Committee contends that the collective bargaining agreement specifies the wages for mentors in Article V, Section 1, "Hourly Compensation." This provision provides in pertinent part that:

> "Effective July 1, 1994, the hourly rate of compensation for employees covered by the agreement shall be $25.00 per hour for approved professional planning, study, training and development activities that fall outside the normal school day/year. However, if a person works a full day during a vacation period he/she shall receive per diem pay. A full day is defined as more than four (4) hours.

There is no language in the agreement regarding mentors or specifying that this language applies to mentors or mentor-trainees, nor is there any evidence of bargaining history in the stipulated record indicating that the parties intended this language to apply to mentors or mentor-trainees. There is also no evidence that the School Committee is paying the mentors and mentor-trainees consistent with the rate specified in this provision of the Agreement. Therefore, there is no contractual or evidentiary support for the School Committee's contention that this provision applies to the mentor programs and precludes bargaining over the issue of wages.

Finally, the School Committee argues that it has the exclusive managerial prerogative to determine unilaterally all aspects of the mentor and mentor-trainee positions because it has historically mandated the selection process, creation of position, work duties, training, hours and all other conditions of employment for all stipendiary positions listed in the recognition clause without bargaining. Assuming, without deciding, that the School Committee's contention is factually correct, we find that its argument is not meritorious.[1]

Although a union may refrain from contesting a particular instance of unilateral employer action, its inaction does not prevent it from opposing recurrences of that action. *Town of Randolph*, 8 MLC 2044, 2052 (1982). Therefore, even if the Union has previously failed to contest the School Committee's unilateral action concerning newly-created positions, its acquiescence on prior occasions should not prevent it from asserting its bargaining rights in this instance. *See also, Commonwealth of Massachusetts*, 9 MLC 1387, 1396 (H.O. 1982), *aff'd.* 9 MLC 1824 (1983).

Lastly, the parties' stipulations establish that the School Committee refused to bargain on demand with the Union over the mentor program and the mentor training program. The Union first demanded to bargain over the mentoring programs on October 4, 1996. By letter dated October 31, 1996, the School Committee, through its attorney, notified the Union that it refused to bargain over the program. The Union demanded to bargain again on February 20, 1997 and stated in a letter that a failure to respond to the demand by February 25 would be considered a refusal of the request. The School Committee failed to respond to the Union's letter by February 25, 1997. Refusing to meet and bargain on demand over mandatory subjects of bargaining is a separate violation of Section 10(a)(5) of the Law. *See, Everett School Committee*, 9 MLC 1308 (1984).

Conclusion

The School Committee violated Section 10(a)(5) and, derivatively, (a)(1) of the Law by unilaterally implementing a mentor program and a mentor training program, and by refusing to bargain on demand over the implementation and impact of those programs on wages, hours and terms and conditions of employment.

Remedy

When a party refuses to bargain the usual remedy includes an order to bargain and to return the parties to the positions they would have been in if the violation had not occurred. *Town of Dennis*, 12 MLC 1027,1033 (1985). If the bargaining obligation involves only the impact of a decision to alter a mandatory subject of bargaining, a bargaining order restoring the economic equivalent of the *status quo ante* for a period of time sufficient to permit good faith bargaining to take place, is appropriate. *City of Malden*, 20 MLC 1400,1406 (1994). The appropriate remedy must also balance the right of management to carry out its lawful decision and the right of the employee organization to have meaningful input on impact issues while some aspects of the status quo are maintained. *Town of Burlington*, 10 MLC 1387,1388 (1984).

In this case, the School Committee was obligated to bargain with the Union over the impact and implementation of the mentoring programs beginning on October 11, 1996, the date of the Union's

1. The stipulated record contains no evidence of past practice.

first demand. If the parties had begun bargaining at that time, they might have been able to resolve the impact and implementation issues prior to September 1997, when the induction year programs became mandatory. Instead, the School Committee ignored the window of opportunity that existed in 1996 and 1997. We recognize that an order requiring the School Committee to suspend the mentoring programs pending bargaining may jeopardize the programs and the employment of some teachers. However, this predicament is largely the result of the School Committee's refusal to bargain these issues prior to implementing the program. Therefore, our order is crafted to preserve the program through the remainder of the 1999-2000 school year, to protect the Union's bargaining rights, and to place the parties in the position they would have been in but for the School Committee's unlawful act.

Therefore, we direct that the School Committee shall bargain in good faith with the Union over implementing the mentor programs and any impacts on bargaining unit members' terms and conditions of employment, but shall be permitted to maintain the existing mentor program for the balance of the 1999-2000 school year. However, if the parties have not completed their negotiations by the end of the 1999-2000 school year, the School Committee shall suspend the existing mentor program at that time and refrain from implementing any mentor programs until it has bargained with the Union to impasse or resolution about the impacts on working conditions. *See generally*, *City of Gardner,* 10 MLC 1218,1222 (1983); *City of Gardner*, 26 MLC ___ (slip. op. issued Jan. 5, 2000). In addition, the School Committee must restore the economic equivalent, if any, of the *status quo ante* during bargaining.[2]

ORDER

WHEREFORE, WE HEREBY ORDER THE EMPLOYER TO:

1. Cease and desist from:

a. Failing and refusing to bargain collectively in good faith with the Union over the implementing the mentoring programs and the impact of the programs on bargaining unit members' terms and conditions of employment.

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

2. Take the following affirmative action which will effectuate the policies of the Law:

a. Bargain in good faith to impasse or resolution with the Union over implementing the mentoring programs and the impact on bargaining unit members' terms and conditions of employment.

b. If the parties have not completed their negotiations over the mentoring programs by the beginning of the 2000-2001 school year, refrain from implementing the program for the 2000-2001 school year until the parties have bargained to impasse or resolution.

c. Sign and post the attached Notice to Employees in all places where employees usually congregate and where notices to employees are usually posted, and leave it posted for a period of thirty (30) consecutive days; and,

d. Notify the Commission within thirty (30) days from receipt of this decision of the steps taken to comply with this order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission (Commission) has determined that the Lowell School Committee has violated Sections 10(a)(5) and (1) of General Laws, Chapter 150E, the Public Employee Collective Bargaining Law when it failed to bargain with the United Teachers of Lowell, Local 495 MFT/AFT/AFL-CIO (Union) over implementing the mentor and mentor-trainee programs and the impact of these programs on bargaining unit members' terms and conditions of employment.

WE WILL NOT refuse to bargain in good faith with the Union over the implementation and impacts of the mentoring programs on employees' terms and conditions of employment.

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

WE WILL offer to bargain in good faith with the Union over the implementation and impacts of the mentoring programs on employees' terms and conditions of employment.

WE WILL restore economic equivalent of the *status quo ante*, if any, during bargaining.

WE WILL refrain from implementing the mentoring programs for the 2000 – 2001 school year if the parties have not completed bargaining at that time, and suspend implementation of the programs until the parties have bargained to impasse or resolution.

[signed]
LOWELL SCHOOL COMMITTEE

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2. The Union has asked the Commission to order the School Committee to "commence retroactive successor contract bargaining" over these matters. Because our remedy orders the School Committee to commence bargaining, this aspect of the Union's proposed remedy is unnecessary.