In the Matter of TOWN OF PLYMOUTH

and

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

Case No. MUP-1465

28.	*Relationship Between c. 150E and Other Statutes Not Enforced by Commission*
54.31	*impact of management rights decision*
54.51153	*drug/alcohol testing*
67.8	*unilateral change by employer*
82.12	*other affirmative action*
108.6	*bargaining to impasse*

June 7, 2000
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Andrew Waugh, Esq.	*Representing Town of Plymouth*
Angela Davidovich, Esq.	*Representing AFSCME, Council 93, AFL-CIO*

DECISION[1]

Statement of the Case

The American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (the Union) filed a prohibited labor practice charge with the Labor Relations Commission (the Commission) on March 1, 1996, alleging that the Town of Plymouth (the Town) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on December 27, 1996. The complaint alleged that the Town had unilaterally assigned a bargaining unit member to work a split-site shift (Count I)[2] and had unilaterally implemented a drug and alcohol policy (Count II) without bargaining to resolution or impasse in violation of Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law. The Town filed an answer on January 13, 1997. On November 4, 1999, the Union filed a motion for ruling on the admissibility of cassette tapes. The Town filed an opposition to the motion on November 10, 1999. Cynthia A. Spahl (the Hearing Officer), a duly-designated hearing officer of the Commission, issued a ruling denying the Union's motion on November 15, 1999.

On February 4, 2000, the Hearing Officer conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs on March 6, 2000. The Hearing Officer issued

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. Therefore, these recommended findings of fact are issued pursuant to 456 CMR 13.02 (2).

2. The Union withdrew this portion of the charge on the day of the hearing.

Recommended Findings of Fact on March 22, 2000. Both parties filed challenges to the Recommended Findings of Fact.

Findings of Fact[3]

On February 15, 1994, the U. S. Department of Transportation (DOT), Federal Highway Administration published its final rule effective March 17, 1994 on controlled substances and alcohol use and testing for persons in safety sensitive positions who are required to obtain commercial driver's licenses. 59 Fed. Reg. 7484 (February 15, 1994). The rule complied with the directive of the Omnibus Transportation Employee Testing Act of 1991 (Act) codified at 49 U.S.C. § 31306 (1995). The rule applied to employers, including state and local governments, who owned or leased commercial motor vehicles or assigned persons to operate these vehicles. The rule mandated that each employer with fifty or more drivers on March 17, 1994 implement the testing requirements beginning on January 1, 1995. 49 C.F.R. § 382.115.

As of March 17, 1994, the Union was the exclusive collective bargaining representative for certain employees in the Town's Department of Public Works including over fifty employees who possessed commercial driver's licenses. Once the Town learned about the federal mandate, it invited Jim Davis (Davis), coordinator for the drug and alcohol testing program for U.S. Department of Transportation, to meet with the Town's management team and Union leaders on August 30, 1994. The Town also disseminated information to the affected employees and, on December 5, 1994, conducted an information session for bargaining unit members. At both of the meetings and in the written materials, the Town indicated that the federal rule required the Town to implement the testing requirements on January 1, 1995.

In a memorandum dated February 16, 1995, Town Manager William Griffin (Griffin) invited President of Union Local 2824, Dale Webber (Webber), to bargain over the impacts of the Town's proposed Alcohol and Controlled Substance Use and Testing Policy for Safety-Sensitive Drivers (the Policy) that Griffin attached to the memorandum. On or about February 23, 1995, Union Staff Representative Jim Kane (Kane) wrote a letter to Personnel Director Eleanor McGonagle (McGonagle) indicating the Union desired to bargain over the impacts of the Policy.

The parties' first bargaining session occurred on March 7, 1995.[4] Following this session, McGonagle sent a memorandum to Webber dated March 20, 1995 requesting that he come prepared to discuss the Union's concerns about the Policy at the parties' next meeting. McGonagle also sent a letter to Kane dated March 31, 1995 confirming that the parties were scheduled to meet on April 10, 1995 and stating that the Policy's implementation date was January 1, 1995.

The parties held bargaining sessions on April 10 and April 21, 1995.[5] At the April 10 session, the Union asked numerous questions.[6] The Town answered some of the Union's questions and agreed to obtain answers to other questions. The parties also bargained on May 1 and May 16, 1995. At these sessions, the Town agreed to make certain language changes to the Policy. Some of the most significant language changes included reducing the number of days of suspension for first and second offenses, utilizing a Breath Alcohol Technician (BAT) who was not a Town employee, and adding a fair practices clause. The parties also discussed possible funding sources for stipends for bargaining unit members. Although the Town's selectmen indicated to McGonagle that they would not pay for the stipends, McGonagle agreed to consider alternate funding sources if the Union located them and to discuss these sources with the Town selectmen. After the May 16 session, McGonagle wrote to Kane requesting a complete list of the Union's bargaining issues and stating that she had invited Medical Testing Services to meet with bargaining unit members on June 1, 1995 to answer questions about testing procedures.

At a bargaining session on May 30, 1995, the Union submitted its written proposals to the Town, some of which had been negotiated previously. Some of the Union's proposals included: 1) receiving a $7.00 per hour per individual stipend using monies identified in Public Law 99-570 and the Education Reform Act;[7] 2) defining who was a BAT and providing the Union with copies of the BAT's credentials;[8] 3) instituting random testing for managers or department heads once a year; 4) adding the fair practice language from Article III of the parties' collective bargaining agreement to the reasonable suspicion portion of the Policy; 5) obtaining a second opinion from another supervisor in cases involving reasonable suspicion and requiring written reports from both supervisors on the same day as the suspected incident; 6) barring Town agents from becoming BATs; 7) paying employees at their regular rate during the testing procedures, including travel time; 8) paying overtime if an employee had to wait for test results; 9) requiring the Town to pay all costs including split specimens if requested by an employee; 10) providing the Union with copies of laboratory certifications prior to entering into a contract with the laboratory, equipment calibration certificates for each test conducted, and standard operating procedures; 11) disciplining employees for violations of the Policy consistent with the parties' collective bargaining agreement; 12) adding the fair practices language from Article III of the parties' collective bargaining agreement under the manager enforcement section of the Policy;[9] 13) temporarily refilling positions from within the Union if an employee was in

3. The Commission's jurisdiction is uncontested.

4. Although the record does not clearly reflect what occurred at the March 7, 1995 bargaining session, the record indicates that the Union did not present any proposals or counterproposals on that date.

5. The record does not clearly reflect what occurred at the April 21, 1995 bargaining session.

6. The record does not reflect what questions the Union asked at the April 10, 1995 bargaining session.

7. The Town investigated these sources and determined that the Education Reform Act monies were not available for drug and alcohol testing and the Public Law monies were only available for training.

8. Although the record does not reflect the Town's response to this proposal, the final draft of the Policy defined what a BAT was and allowed bargaining unit members to ask for the BAT's identification before testing.

9. [See next page.]

rehabilitation pursuant to the Policy; 14) allowing employees undergoing rehabilitation to use accumulated vacation and sick leave and, upon exhaustion, allowing employees to be repaid through future service or from wages and benefits due at the time of termination, if termination occurred; 15) providing unit members with Union representation during testing; 16) utilizing the parties' grievance and arbitration procedure to resolve all issues related to the Policy and making whole any employee who successfully grieved the testing procedure, including removing any references to the test from the employee's personnel file; 17) indemnifying the Union for any expenses incurred as a result of litigation arising from the Policy; and 18) notifying employees that they did not have to provide information about prescription or over-the-counter medication on the chain of custody forms.

The parties bargained over several of the Union's proposals that day. The Town rejected the Union's proposal concerning the stipend. The Town agreed to consider randomly testing managers or department heads but refused to do so once a year.[10] The Town agreed: 1) to add fair practice language to the reasonable suspicion portion of the Policy; 2) to obtain a second opinion from another supervisor in cases involving reasonable suspicion and to require reports from both supervisors on the same day as the suspected incident; 3) to bar Town agents from serving as BATs; 4) to compensate employees at the regular rate of pay while they traveled to the test site and while they were tested; 5) to pay overtime to employees who were not allowed to return to work while awaiting test results; 6) to pay all costs including split specimens if requested by an employee; 7) to provide the Union with copies of laboratory certifications, equipment calibration certificates, and standard operating procedures; and 8) to discipline employees for violations of the Policy commensurate with the terms of the parties' collective bargaining agreement.

The parties held another bargaining session on June 13, 1995. The Town agreed to temporarily refill positions from within the Union if an employee was receiving treatment pursuant to the Policy. On or about June 27, 1995, Kane wrote a letter to McGonagle confirming that any tentative agreement had to be ratified by unit members and objecting to the Town's repeated statements during the parties' bargaining sessions that the Town intended to declare impasse to implement the Policy.

The parties held bargaining sessions on July 11, July 27,[11] and August 10, 1995.[12] On August 10, the parties reached a tentative agreement subject to ratification by the Union's bargaining unit. McGonagle made the agreed-upon changes to the Policy and disseminated copies of it to unit members prior to the ratification vote.

The Union's bargaining unit members met on September 21, 1995 and a majority of them voted to reject the tentative agreement. During the ratification meeting, unit members raised nine issues to bring back to the bargaining table. These issues included: 1) establishing a medical leave bank if an employee had to undergo rehabilitation and had exhausted all sick leave; 2) stipends;[13] 3) obtaining quality assurance and control of laboratories; 4) obtaining certifications of laboratories prior to the Town signing a contract; and 5) obtaining operating procedures for calibration of equipment.[14]

By letter dated September 22, 1995, Kane informed McGonagle of the outcome of the vote and invited her to contact him to schedule a new date to continue bargaining. On or about September 27, 1995, McGonagle wrote to Kane and asked him to provide her with the specific reason or reasons for the rejection by October 6, 1995 in order to proceed with bargaining. By letter dated September 29, 1995, Kane responded that the Union would discuss its concerns with the Town once negotiations continued and asked McGonagle to contact his office with suggested bargaining dates. McGonagle wrote a letter to Kane on or about October 12, 1995 and again requested that he provide her with written reasons. McGonagle set a deadline of October 19, 1995 for the Union to comply and indicated that, if the Union did not respond by this date, she would conclude that the parties were at impasse. By letter dated October 17, 1995, Kane responded that the Union would not negotiate by U.S. mail and again asked McGonagle to contact his office to schedule new bargaining dates. When Kane did not provide McGonagle with written reasons, McGonagle wrote to Kane on or about November 3, 1995 and declared impasse.

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9. Although the record does not reflect the Town's response to this proposal, the final draft of the Policy added language providing that all managers would be expected to enforce the Policy consistent with its terms and conditions, and any manager found ignoring the Policy would be subject to the Town's disciplinary procedure.

10. The record reflects that the Town ultimately agreed to invite supervisors to participate in random testing on a voluntary basis; however, it does not indicate during which bargaining session this occurred.

11. Webber and Kane testified that Webber gave the Town's bargaining team written counterproposals at the July 27 bargaining session. However, McGonagle and Assistant Town Manager Eleanor Beth (Beth) testified that Webber did not give them written counterproposals at that session. The Hearing Officer credited McGonagle's testimony because she had the clearest recollection of the bargaining sessions. Also, the record does not indicate that the parties ever bargained over the subjects listed in the written counterproposals regardless of whether the document had been given to the Town's negotiating team.

12. The record does not clearly reflect what bargaining occurred on these dates. However, the record indicates that, by August 10, the Town: 1) refused to pay employees using accrued vacation and/or sick leave or repaying them through future service or from wages and benefits if they were terminated during rehabilitation; 2) agreed that unit members were entitled to Union representation during testing; 3) refused to subject issues related to the Policy to the grievance-arbitration procedure; 4) refused to indemnify the Union for any expenses incurred as a result of litigation arising from the Policy; and 5) refused to notify unit members that they did not have to provide information about prescription or over-the-counter medication on chain of custody forms. Further, the Town challenged this finding on the ground that it omitted that the only outstanding issue at the parties' August 10, 1995 bargaining session was the stipend. The record supports the Town's challenge, and we have modified the finding accordingly.

13. The record does not reflect whether the stipends raised by unit members at the ratification meeting differed from the Union's stipend proposal presented in writing to the Town at the May 30, 1995 bargaining session.

14. The record does not reflect what the remaining issues were that the unit members wanted to bring back to the bargaining table.

On November 10, 1995, the Town implemented the Policy including the changes agreed to with the Union during impact bargaining. Since implementing the Policy, bargaining unit members have been suspended and terminated in accordance with the Policy.

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 16 MLC 1429 (1989). A public employer need not bargain decisions outside of its control. However, the impacts of those decisions on mandatory subjects of bargaining must be bargained. *City of Worcester*, 25 MLC 169, 170 (1999), *citing School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 557. Drug testing is a mandatory subject of bargaining. *City of Fall River*, 20 MLC 1352, 1358 (1994). Here, it is undisputed that the Town implemented the Policy on November 10, 1995 in an effort to comply with the federal rule. It is also undisputed that the agreement reached by the parties on August 10, 1995 was tentative because it was subject to ratification by the Union's bargaining unit. *See*, *Suffolk County House of Correction, South Cove*, 22 MLC 1001 (1994), *aff'd Suffolk County House of Correction, South Cove* v. *Labor Relations Commission*, 40 Mass. App. Ct. 1123 (1996). However, the parties disagree about whether they had reached impasse.

To determine whether impasse has been reached, the Commission considers the following factors: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations. *Town of Hudson*, 25 MLC 143, 147 (1999), *citing Town of Weymouth*, 23 MLC 70, 71 (1996); *Town of Westborough*, 25 MLC 81, 88 (1997), *citing Commonwealth of Massachusetts*, 8 MLC 1499 (1981). The Commission will determine that the parties have reached impasse in negotiations only where both parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked. *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999); *Town of Brookline*, 20 MLC 1570, 1594 (1994). An analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise. *Commonwealth of Massachusetts*, 25 MLC at 205; *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518, 1529-1530 (1988). If one party to the negotiations indicates a desire to continue bargaining, it demonstrates that the parties have not exhausted all possibilities of compromise and precludes a finding of impasse. *Commonwealth of Massachusetts*, 25 MLC at 205, *citing City of Boston*, 21 MLC 1350 (1994).

Here, the parties met on ten occasions between March 7, 1995 and August 10, 1995 to bargain over the impacts of the Policy. The parties reached a tentative agreement on August 10, 1995 that was subject to ratification by the Union's bargaining unit members. On September 21, 1995, a majority of the Union's bargaining unit members voted to reject the tentative agreement. Kane wrote to McGonagle on September 22, 1995 and asked her to contact him to schedule new bargaining sessions because the unit had not ratified the tentative agreement. In response to McGonagle's September 27, 1995 letter asking for the reasons for the rejection vote in order to proceed with bargaining, Kane's September 29, 1995 letter indicated that the Union would identify its concerns after negotiations resumed and again asked McGonagle to provide him with proposed bargaining dates. Although McGonagle wrote to Kane on October 12, 1995 to establish a deadline for the Union to provide her with written reasons for the rejection vote, Kane wrote to McGonagle on October 17, 1995 refusing to negotiate by mail and reiterating his desire to schedule new bargaining sessions. The Union's repeated requests to continue bargaining indicate that the parties did not exhaust all possibilities of compromise. *Compare*, *Town of Somerset*, Case No. MUP-1979 [26 MLC 132] (slip op. March 7, 2000). Further, because Kane's September 29, 1995 letter to McGonagle indicated that the Union had concerns it wished to address in negotiations, the Town was obligated to postpone implementation and to bargain over those concerns. *See*, *Commonwealth of Massachusetts*, 26 MLC 116, 121 (2000); *Commonwealth of Massachusetts*, 25 MLC at 206; *Commonwealth of Massachusetts*, 22 MLC 1039 (1995).

The Town nevertheless asserts that the parties reached impasse following the ratification meeting because their exchange of correspondence constituted additional impact bargaining. The Town points out that it requested the written reason or reasons for the rejection vote in letters dated September 27, 1995 and October 12, 1995 and communicated its intention to declare impasse in the October 12, 1995 letter unless the Union provided those written reason or reasons. The Town argues that it was entitled to declare impasse when the Union failed to respond to the Town's requests. However, even if the parties' letters could be characterized as impact bargaining, the Union expressed a desire to continue bargaining over the impacts of the Policy. Therefore, the parties' correspondence illustrates the Union's attempts to bring the Town back to the bargaining table and the Town's attempts to avoid further negotiations. Further, the record does not support the Town's assertion that the Union failed to respond to its letters. The evidence demonstrates that the Union answered the Town's September 27, 1995 and October 12, 1995 letters by requesting further negotiations and by refusing to bargain by mail.

The Town next argues that, even if the Commission determines that the parties did not negotiate to agreement or impasse, the Town should still prevail because this case falls within the Commission's narrow exception to the rule prohibiting unilateral changes in employees' working conditions. The exception applies when circumstances beyond the employer's control require immediate action, so bargaining after the imposition of a change may satisfy the employer's bargaining obligation. *Town of Brookline*, 20 MLC at 1595-1596; *New Bedford School Committee*, 8 MLC 1472, 1478

(1981). An employer who relies on this exception has the burden of demonstrating that circumstances beyond its control require the imposition of a deadline for negotiations, the deadline imposed was reasonable and necessary, and the union was on notice that the change would be implemented on a certain date. *Id.*

Here, the Town contends that it met the burden of proving exigent circumstances because the federal rule required it to randomly test a certain percentage of its employees for drug and alcohol use starting with the 1995 calendar year, the deadline was reasonable, and the Union knew about the deadline. However, the federal rule clearly provided that each employer with fifty or more drivers as of March 17, 1994 had to implement the testing requirements beginning on January 1, 1995. Because the Town had over fifty employees who possessed commercial driver's licenses in its Department of Public Works as of March 17, 1994, the federal rule required the Town to implement the testing requirements on January 1, 1995. Nevertheless, the Town did not implement the Policy until November 10, 1995, ten months after the date mandated by the federal rule. Therefore, it is illogical for the Town to argue that circumstances beyond its control required it to implement the Policy before reaching resolution or impasse when the Town did not implement the Policy until eleven months after the deadline established by the federal rule had passed. Accordingly, the Town has not met its burden of establishing that this case falls within the exception to the Commission's rule prohibiting unilateral changes.

Conclusion

We conclude that the Town implemented the Policy without bargaining to resolution or impasse with the Union over the impacts of the Policy in violation of Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law.

Remedy

In cases where an employer's refusal to negotiate is limited to the impact of a managerial decision, the Commission traditionally orders restoration of the *status quo ante* applicable to those affected mandatory subjects rather than to the decision itself. *Commonwealth of Massachusetts*, 26 MLC at 121-122, *citing Town of Dennis*, 12 MLC 1027, 1033 (1985). This remedy attempts to place the parties in the position they would have been in absent the employer's unlawful conduct. *City of Malden*, 20 MLC 1400, 1406-1407 (1994).

Here, the Town failed to bargain to resolution or impasse with the Union over the impacts of the Policy prior to implementing it. In recent cases involving similar issues, the Commission ordered certain respondents to refrain from implementing policies until they satisfied their impact bargaining obligations. *See, e.g., Commonwealth of Massachusetts*, 26 MLC at 121-122; *See also, Lowell School Committee*, 26 MLC 111, 114-115 (2000). However, the federal rule in this case preempts any state law, except those state laws related to criminal conduct, to the extent that complying with the state requirement either is not possible or is an obstacle to the accomplishment and execution of any requirement under the federal rule. 49 C.F.R. § 382.109. Thus, we will not order the Town to refrain from implementing the Policy until it satisfies its impact bargaining obligations. Rather, we order the Town: 1) to bargain with the Union upon request over the impacts of the Policy; 2) to refrain from implementing those portions of the Policy not required by the federal rule 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 Commission's decision or the Union subsequently fails to bargain in good faith; and 3) to make whole any bargaining unit member who lost wages or other benefits as a result of the Policy. This remedy restores the parties' *status quo* while they bargain over the impacts of the Policy.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Town of Plymouth shall:

1. Cease and desist from:

   a. Failing to bargain collectively with the Union over the impacts of the Policy;

   b. In any like manner, interfere with, restrain, and coerce any employees in the exercise of their rights guaranteed under the Law.

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

   a. Upon request, bargain in good faith to resolution or impasse with the Union over the impacts of the Policy;

   b. Restore the *status quo* by refraining from implementing those portions of the Policy not required by the federal rule 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 Commission's decision or the Union subsequently fails to bargain in good faith

   c. Make whole any bargaining unit members who lost wages or other benefits as a result of the Policy, plus interest on any sums owing at the rate specified in M.G.L. c. 231, Section 6B compounded quarterly from November 10, 1995;

   d. 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, the attached Notice to Employees;

   e. Notify the Commission in writing within thirty (30) days of service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

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