In the Matter of TOWN OF MARION

and

MARION TOWN EMPLOYEES ASSOCIATION

Case No. MUP-02-3329

54.516	***retirement***
54.589	***bargaining unit work***
67.14	***management rights***
67.15	***union waiver of bargaining rights***
67.165	***bargained to impasse***
67.82	***implementing changes after impasse***
82.11	***back pay***
82.3	***status quo ante***

August 20, 2003
Allan W. Drachman, Chairman
Helen A. Moreschi, Commissioner
Hugh L. Reilly, Commissioner

Thomas Crotty, Esq.	*Representing Town of Marion*
Gerald McAuliffe, Esq.	*Representing Marion Town Employees Association*

DECISION[1]

Statement of the Case

The Marion Town Employees Association (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on January 4, 2002, alleging that the Town of Marion (Town) had engaged in a prohibited practice within the meaning of Section 10(a)(5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on July 25, 2002. The complaint alleged that the Town had failed to bargain in good faith by unilaterally transferring bargaining unit work to non-unit personnel in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Town filed an answer on August 8, 2002.

On March 26, 2003, Cynthia A. Spahl, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Following the hearing, the Town e-mailed its post-hearing brief on April 30, 2003 and filed a hard copy on May 2, 2003. The Union filed its post-hearing brief on May 2, 2003. The Hearing Officer issued Recommended Findings of Fact on May 8, 2003. On May 22, 2003, the Town filed challenges to the Recommended Findings of Fact, whereas the Union did not do so.

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.

Findings of Fact[2]

The Town challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

The Union is the exclusive collective bargaining representative for all full-time and regular part-time clerical employees employed by the Town, including administrative clerks, the assistant assessor, clerk typists, bookkeeper/payroll clerks, principal clerks and secretaries, and excluding the town administrator, secretary to the Board of Selectmen, Council on Aging coordinator, clerk dispatchers in the Police Department and all managerial and confidential employees and all other Town employees.

Assistant Assessor

Catherine Gibbs (Gibbs) worked as an assistant assessor in the Assessor's Office from 1972 until she retired on December 31, 2001. Although Gibbs had a part-time assistant that she supervised from 1972 until 1983, she worked alone in the Assessor's Office from 1983 until late 2000 or early 2001.

From 1988[3] through December 31, 2001, Gibbs's job duties included: 1) performing motor vehicle and boat abatements; 2) providing abatement forms to the public and checking the accuracy of those forms once they had been completed; 3) providing information to the public regarding the Town's assessment policies and procedures and the determination of specific valuations, tax abatements, and exemptions; 4) examining deeds, maps, building plans and permits, personal records, and market data to obtain additional valuation data and to locate all taxable property; 5) updating changes in deeds, maps, and property values on the field cards;[4] 6) preparing tax rate documentation and preparing for state certifications; 7) identifying critical problems and bringing those problems to the assessors' attention; 8) answering the telephone; 9) assisting members of the public who came to the Assessor's Office; and 10) filing and maintaining the office records.[5] Gibbs also met with the assessors once a week. At that weekly meeting, Gibbs presented abatement information to the assessors, discussed any problems that she had, and reviewed any changes in property values that she needed to make. Gibbs wrote all data by hand on office documents and did not enter any data into a computer.[6]

In late 2000 or early 2001, Gibbs was having difficulty performing motor vehicle and boat abatements during the work day, because she spent a considerable amount of time waiting on people and answering the phone. Gibbs asked Town Administrator Ray Pickles (Pickles) if someone could assist her. Pickles approved Patricia DeCosta (DeCosta),[7] who regularly worked in the Building Inspector's Office, to work in the Assessor's Office as an assistant assessor on Thursdays from 9:00 a.m. until noon.[8] While DeCosta worked there, she primarily ran reports on the computer.[9] Sometime prior to May 4, 2001, the Town attempted to take the assistant assessor position out of the bargaining unit during a Town meeting vote. By letter dated May 4, 2001, Union attorney Gerard McAuliffe (McAuliffe) informed Town attorney Thomas Crotty (Crotty) that the parties must bargain over removing the assistant assessor position from the bargaining unit rather than vote to do so at the Town meeting. McAuliffe also told Crotty that the Union did not agree to remove any position from the bargaining unit.

Associate Assessor

On August 27, 2001, Crotty wrote a letter to Union president Barbara Mauro (Mauro) that stated in pertinent part:[10]

> This letter is to inform you that the Board of Assessors for the Town of Marion is creating a new supervisory position under the Board of Assessors. This position will be known as the associate assessor. The associate assessor will supervise the assistant assessor and oversee the daily operations of the Assessor's Office.
>
> The duties of this position are extensive. The associate assessor will perform some of the duties listed in the job description of, but not actually performed by, the current assistant assessor. The associate assessor will also be assigned a few duties currently performed by the assistant assessor. The associate assessor will have many additional duties. The bulk of the current duties performed by the assistant assessor will remain with that position.
>
> As you know, Catherine A. Gibbs is leaving the current position of assistant assessor. It is the intention of the Board of Assessors to maintain the position of assistant assessor, subject to adequate funding for both the positions of associate assessor and assistant assessor[.]

On or about August 30, 2001, McAuliffe responded to Crotty's August 27, 2001 letter by stating that the Union wanted to include the associate assessor position in its bargaining unit by agreement of the parties. However, the Town refused to do so.

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2. The Commission's jurisdiction is uncontested.

3. The record does not reflect what job duties Gibbs performed prior to 1988. The Union became the exclusive bargaining representative for the Town's clerical employees that year.

4. Field cards contain basic information about real estate located in the Town.

5. Gibbs performed motor vehicle and boat abatements exclusively. The assessors occasionally performed Gibbs's other job duties if she was busy or out of the office. However, Gibbs performed those other job duties a majority of the time.

6. The Town contracted with a company called Vision Appraisal to enter data into a computer.

7. DeCosta was a member of the Union's bargaining unit and served as Union president.

8. Since 1991, DeCosta had covered for Gibbs while Gibbs was on vacation.

9. For example, the Town's Finance Committee might want to know which residential properties in the Town were valued under $135,000. DeCosta programmed the computer with that criterion and generated a report with the homeowners' names, mailing addresses, and property values.

10. The Hearing Officer's Recommended Findings of Fact stated that Mauro succeeded DeCosta as Union president at some point. However, the Town challenged that finding on the grounds that Mary Ann Ashe (Ashe) succeeded DeCosta as Union president, and Mauro succeeded Ashe as Union president. Although the record does not support the Town's challenge, we modify the finding as follows: At some point, Mauro became Union president.

When Gibbs retired on December 31, 2001, the assistant assessor position became vacant. DeCosta became associate assessor in January 2002. In addition to performing all of the job duties that Gibbs performed as assistant assessor, DeCosta: 1) performs real estate inspections; 2) attends tax classification hearings[11] and budget meetings with the assessors; 3) attends department head meetings; 4) represents the Assessor's Office at Appellate Tax Board hearings; 5) enters building permits and changes on deeds in the computer; and 6) administers the computer programs and data.[12] Although the assistant assessor's position is still in the Union's bargaining unit, that position was unfilled as of the date of the hearing.

Successor Contract Negotiations

The Union and the Town are parties to a collective bargaining agreement in effect from July 1, 1999 through June 30, 2002 (Agreement). Article XV of the Agreement provides for a pay scale from TH-1 through TH-6.[13] Pursuant to that article, the senior administrative clerk position is classified at the TH-6 pay scale level,[14] and the senior clerk/bookkeeper position is classified at the TH-5 pay scale level.[15]

At some point, the parties began to negotiate for a successor collective bargaining agreement to the Agreement.[16] During those negotiations, the parties bargained over the assistant assessor's work, although the Union reserved the right to bring the transfer of unit work issue to the Commission. The Town proposed to take the difference between the annual wages at the TH-5 and TH-6 pay scale levels, which was about $2,000, and divide that amount among all of the bargaining unit's members as an across-the-board pay raise totaling approximately $125 per unit member.

The Union's counterproposal was to: 1) add a six percent step increase in pay after five years and a six percent step increase in pay after ten years;[17] and 2) include any future newly-hired employees performing clerical work in the Union's bargaining unit. Although the Town agreed to the Union's second counterproposal, the Town rejected the Union's first counterproposal, because that proposal was too costly. The Town repeated its proposal to provide an across-the-board pay increase of $125 per unit member.

The Union next proposed that the Town divide the annual salary of the TH-6 position, which was about $34,000, among unit members. That calculation amounted to approximately $2,600 per unit member. However, the parties ceased their negotiations on February 12 and are currently in mediation.[18]

Opinion

Section 10(a)(5) of the Law requires a public employer to give the exclusive bargaining representative notice and an opportunity to bargain with the union before transferring work traditionally performed by bargaining unit employees to personnel outside the unit. *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998), *citing City of Quincy*, 15 MLC 1239 (1988); *Town of Danvers*, 3 MLC 1559, 1576 (1977). To prove that a public employer has failed to fulfill its bargaining obligation before transferring bargaining unit work, a union must demonstrate the following elements: (1) the employer transferred bargaining unit work to non-unit personnel; (2) the transfer of work had an adverse impact on individual employees or on the bargaining unit; and (3) the employer did not provide the exclusive bargaining representative with notice and an opportunity to bargain prior to making the decision. *Town of Bridgewater*, 25 MLC 103, 104 (1998); *Board of Regents of Higher Education*, 19 MLC 1485, 1488 (1992).

When work is shared by bargaining unit members and non-unit employees, the work will not be recognized as exclusively bargaining unit work. *Town of Saugus*, 28 MLC 13, 17 (2001), *citing Higher Education Coordinating Council*, 23 MLC 90, 92 (1996). In shared work cases, the employer is not obligated to bargain over every incidental variation in job assignments between unit and non-unit employees. *Id.*, *citing Town of Bridgewater*, 25 MLC at 104. Rather, bargaining must occur only if there is a calculated displacement of bargaining unit work. *Higher Education Coordinating Council*, 23 MLC at 92. Therefore, if unit employees traditionally have performed an ascertainable percentage of the work, a significant reduction in the portion of work performed by the unit employees coupled with a corresponding increase in the work performed by non-unit employees may demonstrate a calculated displacement of unit work. *Town of Saugus*, 28 MLC at 17.

Here, the Town initially argues that the decision to create the new position of associate assessor is a managerial prerogative and a statutory right pursuant to M.G.L. c. 41, §§ 1, 25A, and 28. However, that issue is not before us. Rather, the sole question is whether the Town unilaterally transferred bargaining unit work to non-unit personnel, which is a mandatory subject of bargaining. *Town of Andover*, 3 MLC 1710 (1977); *Town of Danvers*, 3 MLC at 1559. Therefore, the Town's argument lacks merit. We turn to examine the elements of the Union's transfer of bargaining unit work claim and the Town's defenses.

Transfer of Unit Work

Despite the Town's contention that non-unit personnel performed a fair amount of the assistant assessor's work, the evidence establishes that the assistant assessor exclusively performed motor ve-

11. At those hearings, the selectmen determine the property tax rates.

12. After DeCosta became associate assessor, the Town stopped contracting with Vision Appraisal, because DeCosta enters all data into the computer herself and does not write any data by hand.

13. TH-6 is the highest pay level.

14. Gibbs's position as assistant assessor was the only position ever classified at the TH-6 pay scale level.

15. The TH-5 pay scale level is one step lower than the TH-6 pay scale level.

16. The record does not reflect when the parties began successor contract negotiations or the dates on which the parties bargained.

17. The Agreement provides for three step increases. The Union's counterproposal effectively created two additional step increases.

18. The record does not reflect the year in which the parties stopped negotiating.

hicle and boat abatements. Moreover, after Gibbs retired and the assistant assessor position became vacant, the associate assessor immediately began to perform all of the assistant assessor's job duties, including motor vehicle and boat abatements. Thus, the record shows that the Town transferred exclusive unit work to non-unit personnel.

The record also demonstrates that, although the assistant assessor's other job duties were not exclusive unit work, there was a calculated displacement of those other job duties. In particular, before Gibbs's retirement, the assessors occasionally performed the assistant assessor's other job duties if she was busy or out of the office. However, the assistant assessor performed those shared duties most of the time. As mentioned in the preceding paragraph, the associate assessor began to perform all of the assistant assessor's job duties after Gibbs retired and her position became vacant. Because a unit member no longer performs the shared job duties, there was a significant reduction in unit work. Further, there was a corresponding increase in non-unit work, because the associate assessor now exclusively performs the shared job duties. *Cf.*, *City of Boston*, 28 MLC 194 (2002) (hiring of a non-unit employee to perform work that was previously shared by unit and non-unit members neither increased nor decreased the portion of the work that belonged to the union's bargaining unit). Accordingly, the Union has established the first element of its transfer of bargaining unit work claim.

Adverse Impact

The Town argues that neither the bargaining unit nor its members suffered an adverse impact when the Town created the associate assessor's position. The Town concedes that the assistant assessor's job is currently unfilled but contends that fact alone does not demonstrate an adverse impact. The Town points out that the vacancy in the assistant assessor's position resulted from Gibbs's retirement and not from any action taken by the Town. The Town further asserts that the assistant assessor position remains in the Union's bargaining unit. However, a transfer of bargaining unit work, even accompanied by no apparent reduction in bargaining unit positions, constitutes a detriment to the bargaining unit, because it could result in an eventual elimination of the bargaining unit through a gradual erosion of bargaining unit opportunities. *See*, *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998), *citing City of Gardner*, 10 MLC 1218, 1221 (1983). Consequently, the Union has proven the second element of its transfer of unit work claim.

Prior Notice and Opportunity to Bargain

The Town first argues that it provided the Union with notice about the Town's decision to create the associate assessor's position, but the Union never demanded to bargain over the alleged transfer of unit work. The Commission has consistently held that a union waives its right to bargain by inaction if the union: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining. *Town of Dennis*, 26 MLC 203, 204 (2000); *Town of Hudson*, 25 MLC 143, 148 (1999). The employer must prove those elements by a preponderance of the evidence, as the Commission does not infer a union's waiver of its statutory right to bargain without a "clear and unmistakable" showing that a waiver occurred. *Holyoke School Committee*, 12 MLC 1443, 1452 (1985), *citing City of Everett*, 2 MLC 1471, 1476 (1976), *aff'd sub nom. Labor Relations Commission* v. *City of Everett*, 7 Mass. App. Ct. 826 (1979). The Commission will not apply the doctrine of waiver by inaction where the union is presented with a *fait accompli*, where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Town of Hudson*, 25 MLC at 148; *Holliston School Committee*, 23 MLC 211, 212-13 (1997); *Scituate School Committee*, 9 MLC 1010, 1012 (1982); *City of Everett*, 2 MLC at 1471.

Here, the Union was not required to demand bargaining, because it was presented with a *fait accompli*. Specifically, Crotty's August 27, 2001 letter to Mauro announced that the incumbent in the newly created associate assessor position would "be assigned a few duties currently performed by the assistant assessor." Because the Town had already made the decision to transfer some of the assistant assessor's job duties to the associate assessor, a demand to bargain would have been fruitless. Therefore, the preponderance of the evidence demonstrates that the Union did not clearly and unmistakably waive its right to bargain by inaction.

In the alternative, the Town asserts that it bargained to impasse with the Union over the transfer of unit work. 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 Westborough*, 25 MLC 81, 88 (1997); *City of Leominster*, 23 MLC 62, 66 (1996). The Commission will determine that the parties have reached impasse in negotiations only where both parties have bargained in good faith on negotiable 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. *Town of Plymouth*, 26 MLC 220, 223 (2000); *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, it is unclear from the record whether the parties' successor contract negotiations constituted pre-implementation bargaining over the transfer of unit work or post-implementation settlement discussions over that issue. *See*, *generally*, *Town of Plymouth*, 26 MLC at 223-224 (post-implementation negotiations may satisfy employer's bargaining obligation only if there are circumstances beyond employer's control requiring immediate implementation). Even if the parties had bargained prior to implementation, however, the Union entered into negotiations with the Town over the

transfer of unit work with the express understanding that the Union had reserved the right to bring that issue to the Commission, regardless of the outcome of their negotiations. Because the record does not reflect that the Town opposed the Union from doing so, the Town cannot raise bargaining to impasse as a defense now. Accordingly, the preponderance of the evidence shows that the Town failed to give the Union prior notice and an opportunity to bargain, establishing the final element of the Union's transfer of unit work claim.

Conclusion

Based on the record before us, we conclude that the Town unlawfully transferred bargaining unit work from the unit represented by the Union to non-unit personnel in violation of Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law.

Remedy

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct. *Labor Relations Commission* v. *City of Everett*, 7 Mass. App. Ct. 826 (1979); *Millis School Committee*, 23 MLC 99 (1996). Here, the Union argues that the Commission's remedy should include a make whole order. In support of that argument, the Union asserts that unit members lost the opportunity to perform the assistant assessor's job duties on an overtime basis after Gibbs retired and her position became vacant. However, the record is devoid of any evidence showing that unit members would have performed the assistant assessor's job duties on an overtime basis, if the Town had not transferred those duties to the associate assessor. Because it is speculative for us to conclude that unit members were financially harmed as a result of the Town's actions, we decline to issue a make whole order as part of our remedy.

Order

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

1. Cease and desist from:

   a. Unilaterally transferring the assistant assessor's job duties to non-unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision.

   b. In any like manner, interfering with, restraining, and coercing its employees in any right 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 with the Union to resolution or impasse concerning the decision to transfer the assistant assessor's job duties to non-unit employees.

   b. Restore to the bargaining unit the assistant assessor's job duties that were transferred to non-unit employees in January 2002.

   c. 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, a Notice to Employees.

   d. Notify the Commission in writing within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has determined that the Town of Marion (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by transferring the duties of the assistant assessor to non-unit personnel, without first giving the Marion Town Employees Association (Union) notice and an opportunity to bargain to resolution or impasse over the transfer of unit work.

WE WILL NOT unilaterally transfer work traditionally performed by employees in the bargaining unit represented by the Union without first giving the Union notice and an opportunity to bargain to resolution or impasse.

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

WE WILL restore to the bargaining unit represented by the Union the duties formerly performed by the assistant assessor.

WE WILL upon request, bargain with the Union to resolution or impasse over the decision to transfer the duties of the assistant assessor to personnel outside the bargaining unit represented by the Union.

[signed]
Town of Marion

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