

In the Matter of CITY OF MARLBOROUGH<sup>1</sup>  
and  
MARLBOROUGH POLICE PATROL OFFICERS'  
ASSOCIATION

Case No. MUP-03-3963

54.5111 *layoff*  
67.3 *furnishing information*  
67.44 *failure to consider proposals*  
67.61 *bargaining with individuals*  
91.1 *dismissal*

January 9, 2008

Michael A. Byrnes, Chairman  
John F. Jesensky, Board Member<sup>2</sup>  
Paul T. O'Neill, Board Member

Mark Hickernell, Esq. *Representing the  
Marlborough Police Patrol  
Officers' Association*  
Nicholas Anastasopoulos, Esq. *Representing the City of  
Marlborough*

### DECISION<sup>3</sup>

#### Statement of the Case

The Marlborough Police Patrol Officers' Association (Union) filed a charge with the Commission on November 25, 2003, alleging that the City of Marlborough (City) had violated Massachusetts General Laws, Chapter 150E (the Law).

Following an investigation, the Commission issued a complaint of prohibited practice on November 9, 2005. The complaint alleged that the City had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by: 1) engaging in surface bargaining with the Union (Count I); 2) dealing directly with bargaining unit members over their terms and conditions of employment (Count II); and 3) failing to provide information that was relevant and reasonably necessary to the Union's role as the exclusive collective bargaining representative (Count III).<sup>4</sup>

The City filed an answer to the complaint on November 21, 2005.

On June 13, 2006 and June 21, 2006, Susan Atwater, Esq., a duly-designated Division hearing officer (H.O.), conducted a hearing at which all parties had an opportunity to be heard, to ex-

amine witnesses and to introduce evidence. The Union and the City filed post-hearing briefs on or about November 6, 2006.

On February 28, 2007, the Hearing Officer issued Recommended Findings of Fact. Both parties filed challenges to the Recommended Findings on or about March 19, 2007.<sup>5</sup>

#### Stipulations of Fact<sup>6</sup>

Union Exhibit No. 2 is a proposal from the Union dated July 2, 2003 and hand delivered to the City on that date.

Joint Exhibit No. 13 was in effect at all times relevant to the issues in the complaint.

The City laid off the following six officers: Alain Basquiat, Christopher Christo, Brian Langelier, Frank Masciarelli, III, Elise Peters, and Robert Sibilio, Jr.

The attachments to Joint Exhibit No. 6 shall be designated as City Exhibit No. 7.

City Exhibit No. 7 was the enclosure sent to the Union with Joint Exhibit No. 6.

#### Findings of Fact

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

On January 20, 2003, Mayor William Mauro (Mayor) sent an e-mail message to all department heads, including Police Chief Mark Leonard (Chief Leonard). The Mayor's message indicated that he intended to reduce the City's FY03 and FY04 budgets and to implement certain cost-savings guidelines. On March 10, 2003, Chief Leonard received an e-mail message from City Comptroller Tom Abel (Abel) instructing him to reduce the Police Department's FY04 budget by 5%. The 5% reduction in the Police Department's budget represented approximately \$300,000.00.

Chief Leonard subsequently forwarded a letter to the Mayor advising him of the effect of a 5% budgetary reduction on the Police Department and its services. Chief Leonard's letter noted the following anticipated impacts: eliminating the DARE program at the Intermediate Elementary School; closing a Police Department substation; eliminating or reducing community programs such as Stranger Danger, CHIP programs, bicycle safety, bus safety, elder safety and domestic violence; curtailing investigations by the De-

1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." References in this decision to the Commonwealth Employment Relations Board (Board) include the former Labor Relations Commission (Commission).

2. Although John Jesensky left the Board's employ on Friday, December 21, 2007, he voted to issue this decision before his departure.

3. Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.

4. The Commission dismissed the allegation that the City unlawfully had failed to provide information regarding costs and fees in a civil action involving the City's compliance with the Fair Labor Standards Act (FLSA). The Union did not request review of the Commission's dismissal.

5. The City filed motions to strike portions of the Union's written challenges to the Recommended Findings of Fact and the Union's response to the City's written challenges. We deny both of the City's motions, because the issues that the motions address are not material to our decision.

6. The Board's jurisdiction is uncontested.

protective Unit; and halting or suspending narcotics investigations. On or about April 29, 2003, Chief Leonard submitted a Police Department line item budget to the Mayor and the City Council containing reductions in various line items, including personnel. On June 16, 2003, the City Council voted to approve the City's FY04 budget. The FY04 budget eliminated funding for six police officer positions.

By letter dated May 12, 2003, City Solicitor James Golden, Jr. (Golden) advised the Union that the City was contemplating the elimination of bargaining unit positions and asked the Union to contact him if it wished to discuss the matter. Union attorney Jack Canzoneri (Canzoneri) responded to Golden's May 12 letter on May 14, 2003, expressing the Union's interest in negotiating all aspects of the proposed reductions that constituted mandatory subjects of bargaining. The Union and the City subsequently agreed to meet on June 17, 2003.

On June 17, 2003, Chief Leonard sent an e-mail message to all patrol officers that stated as follows:

This message is for ALL patrol officers (including those in specialized units):

Please send a message to Captain Naze (35TN) with your first 2 shift preferences for patrol shift assignment (12AM-8AM; 8AM-4PM; or 4PM - 12AM) by Monday June 23, 2003 at 8AM.

I anticipate several personnel changes effective July 1, 2003.

In his e-mail, Chief Leonard sought to determine whether any officers wished to transfer voluntarily out of specialist positions. Chief Leonard also sought to accommodate officers' preferences, anticipating changes among the patrol shifts. Chief Leonard's e-mail message prompted subsequent discussions between him and certain officers concerning reassignments from community service positions into patrol duty, prior to formal notification of reassignments.<sup>7</sup>

Later on June 17, 2003, the Union's negotiating team met with Golden and Personnel Director Sue Ellis (Ellis). Golden told the Union that the City was in a dire financial situation and faced a \$4 million deficit between anticipated revenues and expenses. He explained that the deficit was due to increases in health insurance costs and an anticipated reduction in state funding, among other things, and that the Mayor was cutting expenditures. Golden stated that the Police Department needed to cut costs, and that those cuts would be in personnel due to the nature of the Department's operations. He further stated that the City Council had cut funding for six bargaining unit positions, and that the City proposed to eliminate those positions by inverse order of seniority. Canzoneri told Golden and Ellis that the Union needed information pertaining to the City's financial issues to comprehend the situation and to formulate a counterproposal. Canzoneri indicated that he would re-

spond to the City's proposal after the Union's Executive Board had received and reviewed the information.

Canzoneri formalized the Union's information request by letter dated June 18, 2003 to Golden. The five-page request contained multiple subparts. Parts 3 and 6 provided as follows:

### 3. Overtime versus Compensatory Time.

a) For the period from FY1999 through FY2003, business documentation from the Police Department identifying the number of hours of compensatory time that officers used during each of those years, as well as cash overtime costs (itemized by hours and purpose, e.g., court time).

b) For each of the years from FY1999 through FY2003, what was the City's overtime cost incurred for compensation to officers for coverage of other officers' use of benefit time (e.g., vacation, sick, personal days, predicted sick leave usage)? Please provide business documentation relating to the City's historical projections in this regard and/or documentation of this sub-category of labor costs from FY1999 - FY2003.

c) How much does the City project as its overtime cost for coverage of benefit time for police officers for FY2004, assuming it cuts six positions as proposed? How much does the City project for overtime costs as a whole for FY2004, assuming such cuts? Please provide business documentation relating to any such projections.

d) With regard to the FLSA action of police officers against the City in *Lupien et al. v. City of Marlborough*, please advise and provide business documentation as to the predicted costs and attorneys fees that the City will incur when the police officers appeal the District Court's ruling (after final judgment is issued) to the First Circuit Court of Appeals.

e) Has the City accumulated any data relating to the feasibility of using a lawful comp time system in the Police Department as a way to reduce overtime expenditures, including any study of the thousands of municipalities where such system is effectively used. If so, please provide business documentation relating to the data that the City has accumulated in this regard.

### 6. Staffing/Services

a) Does the City plan to change minimum manning levels per shift, assuming that it implements its proposal of cutting six police officer positions? If so, please advise of the City's intentions in that regard.

b) Please advise of the City's intentions with respect to any reassignments that it will implement in connection with cutting six police officer positions and provide any business documentation memorializing such reassignment plans.

c) Seniority list, sorted by seniority date.

d) What services provided by the Police Department at present does the City intend to reduce or eliminate assuming that it cuts its staffing levels by 13% (six positions out of 47) as proposed? Also, please provide business documentation memorializing such projected service cuts, if any.

7. We have supplemented the findings of fact to include the timing of Chief Leonard's discussions and a provision of the relevant collective bargaining agreement between the Union and the City. Section 1 of Article IX, *Hours of Work*, provides as follows:

"Police Officers shall be scheduled to work on regular work shifts or tours of duty and each work shift or tour of duty shall have a regular starting and quitting time. All work schedules shall be posted on department bulletin boards at all times. The City reserves the right to assign each Police Officer to different work schedules during the term of this Agreement."

The parties met again on June 25, 2003, and the City gave the Union a voluminous amount of material on that date. The material included most of the information that the Union had requested in its June 18, 2003 letter. In its written response to paragraphs 3 and 6, the City indicated as follows:

3. Overtime v. Compensatory Time

- a) Chief
- b) Chief
- c) See 1a).
- d) Not relevant, any figures are unknown.
- e) Not relevant, none.

6. Staffing/Services

- a) Chief
- b) Chief
- d) Chief
- d) Chief

The City indicated that Chief Leonard would provide information in response to the items marked "Chief" at a later date.<sup>8</sup> Golden and Abel reviewed the material with the Union, answered the Union's questions and explained the City's financial condition, including the preliminary "Cherry Sheet" reports and the City's "free cash" position. Canzoneri stated that the Union needed additional time to formulate a proposal due to the complexity and volume of the material and the absence of Chief Leonard's information. The parties agreed to meet again on June 27, 2003 and concluded the meeting.

On June 27, 2003, Canzoneri suggested that the parties cancel the negotiating session scheduled that day since Chief Leonard had not forwarded the requested information to the Union. Golden and Canzoneri agreed that the City's negotiating team would meet with Union President Greg Brewster (Brewster) later that day to relay Chief Leonard's information, and they scheduled another bargaining session for July 1, 2003.

The City's negotiating team met with Brewster in the afternoon on June 27, 2003. They gave him the Police Department's compensatory time records, a letter from Chief Leonard to Canzoneri dated June 26, 2003, and a document entitled "Memorandum of Agreement" dated June 27, 2003. Chief Leonard's letter provided in pertinent part as follows:<sup>9</sup>

The following are my responses to specific questions in your letter dated June 18, 2003:

3. Overtime versus Compensatory Time

- a. I will make available to you the records we have regarding compensatory time used during the years requested.

- b. We do not keep the type of record which you have requested. I can make individual overtime slips and work schedules available to you if you would like to review them.

6. Staffing/Services

- a. The shift staffing levels will be at sufficient operational levels.
- b. One Detective position will be eliminated. That Detective will be assigned to a patrol shift.

Two Community Services Officer positions will be eliminated. Those two Community Services Officers will be assigned to patrol shifts. One of those officers, Officer Evangelous, a Community Services bicycle officer, will be assigned to the 4PM to 12AM shift on a 4 & 2 schedule. When the shift is above minimum levels, Officer Evangelous will perform Community Policing functions on bicycle patrol. Officer Evangelous volunteered for this assignment.

Patrol officers' shift assignments may change, and some will be reassigned to a different shift according to seniority and/or shift preference.

The Department's DARE program is being eliminated.

- c. A seniority list has been provided to you.

The document entitled "Memorandum of Agreement" stated in pertinent part as follows:

June 27, 2003

Proposed by the City of Marlborough

- 1. The City shall not fund the position[s] of six Patrol Officers effective July 1, 2003.
- 2. The City of Marlborough will, in the future, promptly act to notify the Marlborough Police Patrol Officers Association (MPPOA) of any funding shortages that may have an effect on its members or their positions.
- 3. The City of Marlborough agrees that it will bargain any further reduction in force with the MPPOA.

The City and the Union did not engage in any substantive discussions on June 27, 2003.

The parties met next on July 1, 2003, the first day of FY04.<sup>10</sup>

At that meeting, the Union gave the City's negotiating team a document entitled "Job Cuts Bargaining Proposal FY04 of MPPOA" that stated as follows:

MPPOA proposes the following as a package subject to ratification by its membership:

- 1. The City shall not lay off any officers through FY04.
- 2. The MPPOA agrees in advance to a 0% ATB in wage scale through FY04 in advance of contract negotiations and regardless of the duration of the contract ultimately agreed upon.
- 3. The City shall propose to Plaintiffs in *Lupien v. City of Marlborough*<sup>11</sup> a settlement that conforms with the terms and conditions outlined below:

8. Chief Leonard was on vacation at that time.

9. We have supplemented the findings of fact to note that the City did not provide any information in addition to Chief Leonard's June 26, 2003 letter in response to paragraphs 6(a) and (d) of the Union's June 18, 2003 information request.

10. We have supplemented the findings of fact to clarify the timing of the negotiation session.

11. [See next page.]

a. The City shall implement a comp time system that shall take effect upon court approval as set forth in this settlement agreement and as otherwise negotiated during the instant negotiations.

b. The City and MPPOA shall form a new committee composed of the Chief and two members of the MPPOA to review comp time use, accrual, and concerns about the administration of the system. The committee shall also have a further purpose of engaging in a study of at least 25 other police departments in the United States that have implemented a comp time system. The purpose of the study shall be to obtain information as to possible ways to improve the City's comp time system.

c. Comp time requests shall be granted so long as they are submitted 30 to 20 days prior to the date and/or the first of sequence of consecutive dates that the officer seeks to take off as comp time. Comp time shall be granted subject only to the FLSA's undue disruption standard.

d. Vacation time rules shall be modified so that the City shall have a qualified right to rescind a previously granted vacation request and/or deny a request based upon maintaining minimum manning and other factors to be negotiated. The conditions for the City to rescind an approved vacation time are subject to further negotiations and agreement between the parties before this agreement shall take effect. At this time, the MPPOA proposes that the qualifications include, *inter alia*, the following: Vacation requests may not be rescinded if they are requested more than 15 days in advance and/or if they are approved for four or more days; vacation time may be used in any increment of one hour or more.

Canzoneri discussed each part of the Union's proposal, indicating that it was a package subject to ratification by the members of the bargaining unit. He explained that the Union's review of the compensatory time off (comp time) records for 2001 indicated that a comp time system could achieve \$50,000 in savings through the use of comp time rather than overtime. Canzoneri stated that the Union understood the City's concern for flexibility in the use of compensatory time due to restrictions imposed by the FLSA, and he outlined provisions in the proposal regarding notice and vacation rescission procedures that would address those concerns. Canzoneri told the City that the Union could project cost savings with more precision if it had additional data on Departmental staffing.

The City caucused after Canzoneri had presented the Union's proposal. Just before the caucus, Golden stated: "we can make this a quick one."<sup>12</sup> During the caucus, Golden solicited Chief Leonard's position on the Union's proposal, and the City's team discussed the proposal. The City was well acquainted with the issue of comp time due to the pending *Lupien* litigation. The negotiating team considered Canzoneri's statement that the creation of a comp time plan would save the City \$50,000 but did not agree that a comp time plan would achieve any cost savings. The Chief believed that

the Union's comp time proposal would be difficult to manage, because it provided for the rescission of approved vacation requests and would require negotiation of the contractual vacation provisions. The City's negotiating team members opposed the Union's proposal, because they believed that it created more time off for officers at a time when the City's fiscal position necessitated layoffs, and addressed issues affecting officers who would be retained, rather than officers who would be laid off. The short duration of the caucus, five to ten minutes, reflected the City's familiarity with the comp time issue and the City's perspective on the Union's proposal.

After the caucus, Golden addressed the items in the Union's proposal and explained why the City perceived each one to be problematic. He told the Union that the City did not agree to the Union's package proposal, because it would not save money and did not meet the Police Department's budget cuts. Responding to the first part of the proposal, Golden stated that there would be layoffs, and that there was nothing that the Union could agree to that would save the jobs. The City believed that it could not legally retain employees without a budget to support them, and that the \$300,000 budget deficit required layoffs. Golden told Canzoneri that if the Union wanted to avoid layoffs, the City needed \$350,000 in budget cuts. Golden told the Union that the second part of its proposal regarding wages was premature and should be discussed in the upcoming contract negotiations.

Regarding the comp time proposal, Golden stated that the City could not fathom why the Union proposed to give officers more time off in the midst of layoff negotiations or how the proposal would save costs. The City explained that there were costs associated with the proposal, and that it would not save money or positions. Golden explained that the City would prefer a "pay as you go" comp time system and could not manage a system with liability that increased as comp time accrued.

Canzoneri stated in response that the City had rejected the Union's comp time proposal without forming a counterproposal. He cited a United States Supreme Court case that permitted a municipality to cash out compensatory time through involuntary furloughs and stated that the Union would entertain a proposal from the City authorizing that action. Canzoneri also discussed the City's potential liability if the Union were to successfully appeal the *Lupien* decision and stated that an agreement on a comp time system could save money by limiting the City's potential exposure.

The City made no counterproposal at that time. Canzoneri asked Golden if the City had anything that it could propose or counterpropose that would save money and jobs. Golden said no, the Union had a "rich contract" and the officers had a lot of paid

11. In 2000, Stephen Lupien (Lupien) and other police officers filed a class action lawsuit against the City alleging that the City's compensatory time off system violated the FLSA. In 2002, the City admitted that its system was unlawful. The United States District Court for the District of Massachusetts enjoined the City's use of the system on February 6, 2003 and scheduled a trial on the issue of damages. After the Court had issued the injunction, the City reached an agreement (*Lupien* Agreement) with the plaintiffs over damages and attorneys' fees and paid the plaintiffs and their attorneys in accordance with the Agreement. The City held many discus-

sions with the plaintiffs and the Union over a new compensatory time off system in late 2002 and early 2003, but the parties had not agreed on a mutually acceptable policy as of July, 2003. The *Lupien* Agreement preserved the plaintiffs' right to appeal the February 2003 order, but they had not pursued the appeal prior to July 1, 2003. As of July 1, 2003, there was no compensatory time off system for police officers, and the issue was an important priority for the Union.

12. We have supplemented the findings of fact to include Golden's statement.

time off. The parties next discussed meeting the next morning at 8:15 a.m. to continue the negotiations.

On July 2, 2003, the Union changed the direction of the negotiations rather than amending its July 1 proposal. Canzoneri understood that the City faced a difficult economic situation and was trying to cut costs, and the Union proceeded from that assumption. At the beginning of the meeting, Canzoneri stated that the Union was disappointed by the City's failure to develop a new proposal or a counterproposal that would save one or more positions. Because the City had refused to negotiate cost-saving measures, Canzoneri stated, the Union accepted that there would be layoffs and would proceed in a different direction with "Plan B". Plan A, the Union's July 1 proposal, had focused on cost savings and reducing or eliminating the number of layoffs. Because the Union had accepted that the City would layoff six people, Canzoneri explained, Plan B would focus on the impact of the layoffs on the membership.

Canzoneri presented Plan B to the City's negotiating team, noting that it addressed the City's plan to downsize community services and the detective bureau and reassign officers. Plan B provided as follows:

1. Community services downsizing: detectives to be selected by soliciting volunteers in writing with 3 day notice/opportunity; if insufficient volunteers, then the positions to be eliminated shall be selected in inverse order of seniority (bargaining unit seniority: Shey first; Gaudette second).
2. Detective downsizing: detectives to be selected by soliciting volunteers in writing with 3 day notice/opportunity; if insufficient volunteers, then the position to be eliminated shall be selected in inverse order of seniority (bargaining unit seniority: Lupien first; Polymeros second).
3. Reassignments: Reassignments shall be governed [by] past practice and any applicable CBA language, e.g., all such shift changes shall be implemented by posting and bidding procedure with seniority being the governing factor (most senior bidder gets assignment; if no bidders, then assignment is made to least senior person in bargaining unit by default).

Canzoneri also requested information from the City. Specifically, he reiterated the Union's pending request for the Staffing/Service information contained in paragraph 6, sections (a) and (d) of the Union's June 18 request and, for the first time, asked the City for its final cherry sheet.<sup>13</sup>

After the Union had outlined its information request, the City caucused for fifteen minutes to discuss Plan B. When the team returned, Golden presented the City's response verbally and in writing. The City's written proposal encompassed two pages. The first page was the same proposal that the City had given to Brewster on June 27, 2003. The second handwritten page provided as follows:

Final Proposal - 7/2/03

1 & 2

1. *Downsizing* Community Services Detectives

Criteria -

1. Needs of the Department
2. Least disruptive to Department
3. Any volunteers
4. Last criteria seniority
3. Reassignments Patrol Shifts
  1. Will request preferences.
  2. Will assign by seniority *when practical*.
4. Will provide final budget Cherry Sheet figures when received.
5. Will provide (existing only) financial info monthly on over-time costs for the bargaining unit. [Emphasis in original.]

Golden stated that Chief Leonard would retain the discretion and management right to determine who would be selected for reassignment and downsizing and would do so in a manner that would be the least disruptive to the Department. Golden and Chief Leonard reiterated that, while Chief Leonard could consider seniority, he would make the decision based on his determination of the Department's best interests. The City clarified that its proposal to solicit volunteers did not encompass a written procedure. Chief Leonard told the Union that the City had solicited volunteers for reassignments on June 16 or 17, 2003 and had already determined that Officer Jim Polymeros (Polymeros) would be reassigned from the Detective Unit to patrol.

In response to the Union's information request, Golden indicated the City would give the Union the final cherry sheet and indicate whether the City had received the anticipated funding. The City could not tell the Union the monthly cost of overtime but would provide existing data on the number of hours of overtime. The City stated that it was not required to disclose any additional information on staffing, because the City had the management right to determine staffing levels.

The Union caucused for twenty minutes following the City's presentation. Canzoneri stated that the Union agreed with paragraphs 4 and 5 of the City's final proposal, and he verbally presented a Union counterproposal to paragraphs one through three. The Union countered by offering to develop and discuss reassignment criteria for Chief Leonard to use in addition to seniority, such as employee performance. The proposal invited Chief Leonard to identify criteria to use for reassignment decisions, so the Union could develop a proposal that included those criteria. Canzoneri also asked the City to explain its rationale for rejecting a written procedure for soliciting volunteers for reassignments, so the Union could formulate a response to address the identified concerns. Canzoneri, speaking of Section 3 of Plan B, told Golden that the parties could either define the past practice or negotiate the identity of the individuals who would be selected for reassignment. Golden rejected these options and stated that the City wanted to keep the management right to make reassignment decisions.

At that point, Golden stated that he wanted to make a final proposal. He reiterated the two-page proposal that the City had pre-

13. The Union wanted the final cherry sheet to determine if the City had received more state aid than anticipated and, if so, to discuss recalling laid off officers.

sented earlier in the bargaining session that day. Golden stated: “we are at an impasse, and this is what we are going to implement.” Canzoneri objected to the declaration of impasse, complained about the City’s conduct, stated that the parties had not exhausted their discussion of the issues and opined that the City had engaged in bad faith bargaining. Golden denied that the City had bargained in bad faith and complained that the Union’s proposals for time off in the context of layoff discussions reflected a failure to engage in serious negotiations. The meeting adjourned at that point.

At some point between July 2 and July 19, 2003, the City officially notified officers of their reassignments. The City’s reassignment of Officer Polymeros from the Detective Unit to patrol caused Polymeros to lose a five percent pay differential that had applied to his specialist position.

The City issued a “Notice of Contemplated Lay-off” to the following six officers on July 2, 2003: Alain Basquiat, Christopher Christo, Brian Langelier, Frank Masciarelli, III, Elise Peters, and Robert Sibilio, Jr. The City laid off the officers on July 19, 2003.<sup>14</sup>

The City did not provide the Union with the final FY04 cherry sheet.

#### Opinion

##### Surface Bargaining

The duty to bargain in good faith requires parties to enter into negotiations with a sincere desire to reach agreement and to make reasonable efforts to compromise their differences. *See, Bristol County Sheriff’s Department*, 32 MLC 159, 160 (2003), *citing, Board of Trustees of University of Massachusetts*, 26 MLC 143, 144 (2000). The Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. M.G.L. c. 150E, Section 6; *Town of Braintree*, 8 MLC 1193 (1981). However, the obligation to bargain in good faith requires parties to allow discussion on all proposals, to listen to each other’s arguments, and to show a willingness to consider compromise. Where a party is determined to maintain a set position, it must approach the subject with an open mind by allowing the other side to explain the reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. *Id.* at 1197.

A party engages in surface bargaining if, upon examination of the entire course of bargaining, various elements of bad faith bargaining are found which, considered together, tend to show that the dilatory party did not seriously try to reach a mutually satisfactory basis for agreement, but intended merely to shadow box to an impasse. *Bristol County Sheriff’s Department*, 32 MLC at 160-161, *citing, Newton School Committee*, 4 MLC 1334 (H.O. 1977), *aff’d*, 5 MLC 1016 (1978), *aff’d. sub nom., School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557 (1983). Failing to make any counterproposals in the course of ne-

gotiations may be indicative of surface bargaining, particularly where an employer rejects a union’s proposal, tenders its own, and does not attempt to reconcile the differences. *Bristol County*, 32 MLC at 161.

In this case, the Union argues that the City engaged in surface bargaining over the decision not to fund six patrol officer positions and the impact of that decision. Specifically, the Union asserts that Golden’s statement: “there’s nothing you can propose that will avert these layoffs” demonstrates that the City never deviated from its initial layoff proposal. As further evidence of the City’s unlawful intransigence, the Union cites the City’s failure to offer alternative cost-saving counterproposals and the City’s failure to address the Union’s efforts to retain at least one position. The Union argues that the City expended less effort to address the Union’s July 2 proposals than it did the Union’s July 1 proposals, because the City made no attempt to accommodate the Union’s articulated concerns on July 2.

Our review of the entire course of the parties’ negotiations persuades us that the City engaged in good faith, hard bargaining rather than surface bargaining. Although the City maintained its layoff proposal throughout the negotiations, the City explained the financial context for the proposal early in the negotiations, considered the Union’s alternative cost-saving proposal, detailed the rationale for rejecting each part of the Union’s package proposal, and notified the affected officers of their layoffs after concluding the negotiations. Specifically, Golden told the Union at the July 1 bargaining session that the Union’s proposal would not achieve the necessary cost savings, that a wage proposal should be discussed in successor contract negotiations, and that the Union’s compensatory time off proposal would impose costs rather than save money or positions. In view of this explanation for rejecting each part of the Union’s “no layoff” package proposal, we find that the City’s failure to make a counterproposal did not violate the Law. *Compare, Revere School Committee*, 10 MLC 1245, 1249 (1983) (employer’s categorical rejection of a union’s proposal with little discussion or comment does not comport with the duty to bargain in good faith).

Further, Golden’s statement that there was nothing that the Union could do to avoid the layoffs did not evince a complete refusal to negotiate alternatives. Golden made the statement in the course of explaining the amount of budget cuts that would be necessary to avert the layoffs and in response to the Union’s financially insufficient initial proposal. The brevity of the City caucus on July 1 is inconsequential, because the City was familiar with the compensatory time off issue that the Union had included in its proposal, and the Union’s proposal fell far short of achieving the necessary cost savings.

We further find that the City’s response to the Union’s July 2 “Plan B” proposal complied with its obligation to bargain in good faith.<sup>15</sup> After the Union had presented its downsizing and reassignment

14. We have supplemented the findings of fact to note the date that the City issued notices of contemplated layoff.

15. The Union argues that it did not waive any bargaining rights by refocusing the negotiations on July 2, 2003. We need not address this issue, because the Union’s

determination to offer different proposals on July 2 is not material to our decision. However, the City’s failure to make a counterproposal on July 2 to the Union’s July 1 proposals is not surprising in view of the new focus of the Union’s July 2 proposals.

proposal, the City caucused to discuss the proposal. After concluding the caucus, the City presented a verbal and written counterproposal addressing the criteria that the Union had proposed to guide the selection process. The City's counterproposal outlined the criteria that would govern the selection of officers for downsizing and reassignment. The counterproposal indicated that Chief Leonard would retain discretion in the selection process, yet his criteria would involve two factors that the Union had included in its proposal: volunteers and seniority. Golden explained the City's counterproposal and clarified the City's position regarding the solicitation of volunteers. The Union responded to the City's counterproposal seeking to further define and negotiate the criteria for reassignment decisions. Golden rejected this proposal, reiterating the City's desire to give Chief Leonard discretionary authority over the process. Although the City did not deviate significantly from its initial proposals, the City considered and responded to each of the Union's proposals. An employer is not required to compromise a position so long as it listens to the union's proposals with an open mind and explains its reasons for rejecting the proposal. *Town of Braintree, supra*. The City's failure to caucus prior to its final rejection of the Union's last response was inconsequential, because its response reemphasized the position it had previously taken.

Finally, neither the expedited nature of the negotiations nor the lack of agreement on any of the proposals requires a contrary result. The City notified the Union in May of 2003 that the City was contemplating the elimination of bargaining unit positions. The City advised the Union of its fiscal difficulties at the June 17<sup>th</sup> negotiation session and continued the negotiations into the first day of FY2004. There is no evidence that the City delayed the bargaining schedule. In the absence of persuasive evidence that the City bargained in bad faith, the parties' differing positions at the conclusion of the negotiations reflects their commitment to their proposals rather than unlawful conduct. Accordingly, we dismiss this allegation of the complaint.

#### *Direct Dealing*

The duty to bargain collectively with the employees' exclusive collective bargaining representative prohibits employers from bypassing the union and dealing directly with bargaining unit members regarding mandatory subjects of bargaining. *Town of Ludlow*, 28 MLC 365, 367 (2002), citing, *Service Employees International Union, AFL-CIO, Local 509 v. Labor Relations Commission*, 431 Mass. 710 (2000). Direct dealing is impermissible, because it violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative, and because it undermines the employees' belief that the union actually possesses the power of exclusive representation that the statute prescribes. *Suffolk County Sheriff's Department*, 28 MLC 253, 259 (2002).

It is well-settled that employee work hours and shift assignments are mandatory subjects of bargaining, *City of Boston*, 10 MLC 1189, 1193 (1983), and it is undisputed that Chief Leonard contacted each officer directly to request new shift preferences. However, Chief Leonard's actions did not constitute unlawful direct dealing, because the parties' collective bargaining agreement

states that the City "reserves the right to assign each Police Officer to different work schedules during the term of this Agreement." This language expressly and unequivocally permits the City to determine work schedules without bargaining with the Union. See, *Boston School Committee*, 27 MLC 121, 123 (2001); *Commonwealth of Massachusetts*, 19 MLC 1454, 1456 (1992). Accordingly, the City did not violate the Law on June 17, 2003, when Chief Leonard solicited the officers' preferences for new shift assignments.

#### *Refusal to Provide Information*

An employer's duty to bargain in good faith includes a duty to supply the union, upon request, with information that is relevant and reasonably necessary to the union's task of performing its responsibilities as the exclusive collective bargaining representative. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1139 (1981). An employer's obligation to supply information to the exclusive collective bargaining representative of its employees arises in the context of contract negotiations and administration. *Boston School Committee*, 10 MLC 1501, 1513 (1984).

As noted above, the City provided much of the information that the Union had requested. The dispute in this case concerns the City's failure to provide the FY2004 cherry sheet as well as the information regarding planned cuts in services and changes in minimum staffing levels. The City does not argue that it provided the staffing and service information that the Union had requested. Rather, the City argues that it was not required to provide information beyond what Chief Leonard had disclosed on June 27, 2003, because the City had no duty to provide information on a permissive subject of bargaining.

The National Labor Relations Board (NLRB) addressed an employer's obligation to provide information on a nonmandatory subject of bargaining in *Pieper Electric, Inc., PPC Holdings, Inc. and International Brotherhood of Electrical Workers, Local 494, AFL-CIO*, 339 NLRB 1232 (2003). In *Pieper Electric*, the NLRB held that an employer did not violate the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA), by failing to provide the names of employees who were involved in the employer's employee stock purchase plan, because the requested information concerned a permissive subject of bargaining. *Pieper Electric*, 339 NLRB at 1235. Reasoning that an employer's duty to furnish information stems from its statutory duty to bargain in good faith over mandatory subjects of bargaining, the NLRB stated that there is no duty to furnish information concerning a nonmandatory subject of bargaining. *Id.* at 1234-1235.

The Board has never held that an employer's duty to provide information is limited to mandatory subjects of bargaining. See, *Higher Education Coordinating Council*, 22 MLC 1662, 1672 n. 9 (1996) (Board declines to determine whether the employer was obligated to supply information regarding an optional retirement plan in the absence of a bargaining obligation). Nor has the Board consistently followed the NLRB's interpretation of an employer's duty to provide information. See, *Boston School Committee*, 13 MLC 1290, 1295 (1986) (Board rejects NLRB's *per se* rule regarding providing witness statements). However, the Board has addressed



an employer's obligation to provide requested information regarding staffing levels and staffing agreements. In *Boston School Committee*, 22 MLC 1365 (1996), the union asked the school committee to provide information concerning the effect of a hiring freeze on negotiated staffing levels. Although the Board found that the school committee had not violated the Law because it did not possess the requested information, the Board noted that the information was relevant and reasonably necessary to the union's duty as the exclusive bargaining representative. *Boston School Committee*, 22 MLC at 1379. Similarly, the Board required an employer to provide information concerning non-unit employee service contracts in *Commonwealth of Massachusetts*, 18 MLC 1220, 1228 (1991), reasoning that a union facing a proposed reduction in bargaining unit staffing levels had a legitimate and continuing interest in monitoring the retention of bargaining unit work.

The Union requested the information at issue to inform its proposals and the negotiations over employee layoffs. Here, as in *Boston School Committee* and *Commonwealth of Massachusetts*, the Union faced a loss of bargaining unit positions and had an interest in monitoring the retention of bargaining unit positions and work. Moreover, Chief Leonard's June 26, 2003 letter indicated that the City's minimum staffing levels would affect the City's reassignment decisions, an issue that the parties were addressing in the negotiations. Although the City had no obligation to bargain over decisions to set minimum staffing levels and to determine the services that it intended to provide to the community, see, *Town of Dennis*, 12 MLC 1027 (1985), *Town of Danvers*, 3 MLC 1559, 1573 (1977), the information that the Union requested regarding these subjects was relevant and reasonably necessary to the Union's ability to understand and negotiate the impacts of the City's decision to reduce its workforce. See, *City of Boston*, 29 MLC 165, 167 (2003) (employer required to provide information regarding temporary appointments under Civil Service Law due, in part, to its impact bargaining obligation). Accordingly, the City violated the Law by failing to provide the requested information.<sup>16</sup>

Finally, we are not persuaded by the City's argument that it did not unlawfully fail to provide the FY2004 cherry sheet to the Union, because the cherry sheet figures had not been finalized at the time of the negotiations. The City stated in its July 2, 2003 proposal that it would provide the final cherry sheet figures upon receipt. Having offered to provide the information at a later date, the City cannot legitimately argue that it was not statutorily obligated to comply with its agreement.

#### Conclusion

For the reasons stated above, we conclude that the City did not engage in surface bargaining or direct dealing in violation of Sections 10(a)(5) and 10(a)(1) of the Law. However, we find that the City did violate its obligation to provide information to the Union that is relevant and reasonably necessary to the Union's duties as the exclusive collective bargaining representative.

#### Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City of Marlborough shall:

#### 1. Cease and desist from:

a. Refusing to bargain collectively in good faith with the Union by failing to provide in a timely manner information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative; and

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

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

a. Provide the Union with the City's FY2004 cherry sheet and the information that the Union requested in paragraphs 6(a) and (d) of the Union's June 18, 2003 letter.

b. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,

c. Notify the Board in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

#### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE  
DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division of Labor Relations, 19 Staniford St., 1<sup>st</sup> Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

The Commonwealth Employment Relations Board (Board) has issued a decision finding that the City of Marlborough (City) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by failing to provide certain requested information that was relevant and reasonably necessary for the Marlborough Police Patrol Officers' Association to perform its duties as the police patrol officers' exclusive collective bargaining representative.

16. The Chief's statement in his June 26, 2003 letter regarding the shift staffing levels provided an insufficient response to the Union's question regarding whether the City planned to change its minimum staffing levels.



The City of Marlborough posts this Notice to Employees in compliance with the Board's Order.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under Chapter 150E.

WE WILL NOT refuse to bargain collectively in good faith with the Marlborough Police Patrol Officers' Association by failing to provide information that is relevant and reasonably necessary for the Marlborough Police Patrol Officers' Association to perform its duties as the police patrol officers' exclusive collective bargaining representative.

[signed]  
City of Marlborough

\* \* \* \* \*