NEWTON SCHOOL COMMITTEE AND NEWTON SCHOOL CUSTODIANS ASSOCIATION, MUP-2501 (6/2/78).

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Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner; Joan G. Dolan, Commissioner

Appearances:

Alan J. McDonald, Esq. - Counsel for the Newton School Custodians Association

Richard R. Murphy, Esq. and Katherine A. Hesse, Esq. - Counsel for the Newton School Committee

DECISION ON APPEAL

Statement of the Case

On May 7, 1976, the Newton School Custodians Association (Association or Union) filed with the Labor Relations Commission (Commission) a charge of prohibited practice alleging that the Newton School Committee (School Committee) committed violations of Section 10(a) of G.L. c.150E (the Law). Pursuant to Section 11 of the Law, the Commission investigated the charge and, on October 4, 1976, issued its complaint.

With its timely answer to the Commission's complaint, the School Committee filed a motion to dismiss, a motion to strike allegations, a motion to quash expedited hearing, and a motion for information. Without entertaining oral argument, the Commission prior to hearing denied each of these motions.[1]

[1]The School Committee contends that it was error for the Commission to deny these motions without argument. Neither statute nor the rules of the Commission require that oral argument be granted on such motions, or that they be ruled on prior to hearing. Except in unusual circumstances it is the practice of the Commission to refer such motions for resolution by the Hearing Officer, or for disposition with the merits of the case.

Pursuant to notice, an expedited hearing was conducted before James M. Litton, Hearing Officer, on November 12, November 22, and December 10, 1976. Briefs were submitted on March 4, 1977. On October 4, 1977, the Hearing Officer issued his decision. He concluded that the School Committee had a duty to bargain over the impact of its decision to reduce the size of its custodial force, and that this duty was not fulfilled. The Hearing Officer found the School Committee to be in violation of Sections 10(a)(5) and (1) of the Law. As part of his remedy, he ordered that certain laid-off custodians be reinstated without back pay.

Requests for a review of the Hearing Officer's Decision were filed by both parties. On October 18, 1977 the Hearing Officer submitted his statement of the case. Both parties filed supplementary statements. The record for purposes of our review shall consist of the following:[2]

1. The charge filed by the Association on May 7, 1976;

2. The complaint issued by the Commission on October 7, 1976;

3. The answer filed by the School Committee on October 12, 1976;

4. The various motions filed by the School Committee on October 12, 1976;

5. The Association's statements in opposition to the School Committee's motions;

6. The transcript of the expedited hearing;

7. The exhibits received into evidence at the expedited hearing; and

8. The decision of the Hearing Officer.

The School Committee requested that the full Commission hear further evidence in this case. The request was denied. Evidence regarding events prior to the close of the expedited hearing should have been presented to the Hearing Officer. There is no contention made that, as to pre-December 10, 1976 events, new evidence previously unavailable has come to the attention of the School Committee. Evidence concerning events after December 10, 1976 is not relevant to whether a violation of the Law occurred in the first half of 1976.

The School Committee's request for oral argument is also denied. The parties had ample time to brief the issues in the case, and submitted extensive written arguments. Further argument would not be of assistance to the Commission in reaching its decision.

[2]The School Committee seeks to have as part of the record on review all documents and letters submitted to the Commission, including material submitted during the Commission's pre-complaint investigation. Only the documents received into the record by the Hearing Officer, however, will be considered in this record review of his decision.

The Association seeks inclusion of a November 2, 1976 letter in the record. This request is denied, again because in this review the Commission will consider only the evidence as submitted to the Hearing Officer.

Findings of Fact

Unless specific findings of fact are identified as erroneous by one of the parties, the Hearing Officer's findings of fact will be accepted and the Commission will limit its review to issues of law. City of Medford, 3 MLC 1584 (1977). The School Committee has challenged certain findings of fact, which will be discussed below. Except as modified or supplemented herein, the Hearing Officer's findings of fact are adopted by the Commission.

During the fall of 1975, the Association and School Committee were in negotiations for a new collective bargaining agreement. An agreement was finally executed on December 15, 1975[3] for the period from July 1, 1975 through June 30, 1977. The Hearing Officer found that "during negotiations,...the Union received no notice from the School Committee of any proposed reduction in force." The School Committee challenges this finding of fact. In the alternative, the School Committee contends that even if it did not directly notify the Union of a proposed reduction in force (RIF), the Union prior to negotiations had actual knowledge of probable layoffs.

Neither party made proposals furing the Fall, 1975 negotiations regarding lay-offs or RIFs. The School Committee did not give the Union prior to or during these negotiations specific notice that a RIF was planned. The Union certainly was aware of the new School Committee's fiscal conservatism, and knew that the School Committee had plans to shut certain schools. On the other hand, the Union was also aware of the fact that between August 27 and November 12, 1975, eight new junior custodians were hired, and that new school buildings were to be opened. The Union's officials testified that, on the basis of this information, they assumed that a RIF for custodians was unlikely to occur.

The School Committee contends that these eight new junior custodians were hired at the Union's request, so that certain provisional custodians could obtain permanent status. There is no evidence in the record to support this contention, however. Roy G. Cornelius, Jr., Director of Support Services for the Newton School system, testified without contradiction that two provisionals were hired on February 9, 1976 at the request of the Union so that other custodians could obtain permanent status. There is, however, no evidence that the eight new hires in the Fall of 1975 were similarly made at the Union's request. Based upon the eight new hires and the plans to open new buildings, the Union acted reasonably in concluding that a RIF was not about to occur.

In late January 1976, at Cornelius's suggestion, Ernest Peltier, then president of the Union, and other members of the Union's executive board began meeting with Cornelius on a biweekly basis. The purpose of these meetings was to discuss informally various matters of joint concern and to try to air problems early. At one of these biweekly meetings on February 15, 1976, a reduction in force in custodians was briefly discussed, and Cornelius informed Peltier that a layoff would be necessary. Peltier indicated the Union's desire forinput into his decision, and expressed his hope that attrition and retirement would be considered before the School Committee resorted to a layoff.

[3]The date of execution of the contract was erroneously reported as December 15, 1976 in the Hearing Officer's Decision.

During late February or early March of 1976, Cornelius prepared a tentative list of about twelve custodians to be laid off, using as criteria the information furnished on civil service forms, past performance, and the staffing requirements of various buildings. The Union was unaware of this list at this time.

On March 15, 1976, Peltier sent the following letter to Thomas P. O'Conor, Assistant Director of Personnel for the School Committee:

> It is quite possible that the custodian staff of the Newton Public Schools will be cut to comply with the School Committee mandate.
>
> We sincerely hope that most of the reduction in force will be taken care of through attrition. However, the Executive Board of Local 454 is quite concerned with the method or guidelines which will be used to decide how this reduction in force will be accomplished, and how many people this will effect.
>
> Therefore, we request a meeting be set up at your earliest possible convenience so that this matter can be discussed and perhaps an agreement be reached to the satisfaction of all concerned.

At another biweekly meeting on March 16, 1976, the Union again expressed its desire to have input in the RIF decision, and reiterated that attrition and retirement should be considered. The Hearing Officer found that

> Cornelius responded that any reduction in force was "quite a ways off," that "nothing was really committed," and that the Union would contribute input before any reduction occurred.

This finding is based upon the testimony of Tomas B. Sabetti, then vice-president of the Union. Sabetti's testimony in this regard was unspecific. It is not clear from Sabetti's testimony who is alleged to have made the statements, nor exactly what was said. Furthermore, Sabetti's credibility as a witness was questionable. His testimony often conflicted with that given by other Union witnesses. Other portions of his testimony were either deliberately evasive or very confused. The record does not support the Hearing Officer's findings regarding the statements alleged to have been made by Cornelius at the March 16 meeting and we discredit the testimony of Sabetti in this regard.

Cornelius made no mention at the March 16 meeting of the fact that a tentative layoff list had been drawn up. Cornelius testified that nothing was said to the Union because the layoff list was still tentative at that point. Although criteria for the selection of employees for layoff had been at least tentatively chosen and applied, no mention of these criteria was made.

Subsequent to the March 16 meeting, the School Committee reduced the list of custodians to be laid off from twelve to ten. The reduction was made after consideration of anticipated attrition and retirement.

Peltier and Sabetti attended another biweekly meeting with Cornelius on April 8, 1976. The Union's March 15 letter to O'Conor still had not been answered

at this time; in fact the Union never received a response. The Union leaders asked why the March 15th letter to O'Conor had not been answered, and they reiterated their desire for discussions which would allow Union input into the layoff plan. Although Cornelius had seen the letter, he declined to answer on behalf of O'Conor, who was the School Committee's principal bargaining spokesman with the custodians. Although layoffs were scheduled for announcement in only four days, Cornelius did not advise the Union of this fact. Cornelius indicated neither how many custodians would be laid off, the criteria for selection, the timing, nor the names of the custodians scheduled for layoff.[4]

On April 12, 1976, O'Conor distributed letters giving notice of termination effective June 30, 1976, to seven members of the bargaining unit. On the evening of April 12, the School Committee met to address several matters, including these layoffs. When it became apparent that the School Committee would vote on the custodial reduction in force that evening, Robert E. Robards, then President-Elect of the Union, brought the Union's still unanswered March 15th letter to O'Conor to the attention of the School Committee. Robards requested a postponement of the vote in order to give the Union a chance to meet with the administration and discuss the matter. When a School Committee member suggested that the layoff vote be postponed, O'Conor pointed out that the contract with the Union contained no reduction in force provisions, and he stated that nothing would be changed if the matter were to be postponed.

The School Committee contends O'Conor meant only that the number of reductions in custodial staffing would not change, even if the School Committee delayed its vote, because the size of the staff was already limited by the budget. The contention apparently is that O'Conor did not mean to suggest that there could be no change regarding the impact of a RIF, or the individuals to be laid off. However, an examination of the minutes of the April 12 meeting shows that the Sch Committee was voting on the termination of seven specific individuals, not just the general concept of a layoff. It was this matter that Selectman LeConti sought to table. When O'Conor then said nothing would change, we conclude that he meant that neither the number of custodians to be laid off, the criteria for selection, nor the individuals to be laid off would change even with a delayed vote.

The School Committee then voted to accept the administration's layoff recommendation. The Chairman of the School Committee advised the Union to utilize the contract grievance procedure if it wished to further pursue the reduction in force matter. On the next day, Peltier sent a letter to Cornelius indicating that the Union would no longer participate in the biweekly informal meetings, and that all matters would be processed instead through official channels.

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[4]The School Committee objects to the finding by the Hearing Officer of "failure of the School Committee to give the Union notice of the pending layoffs prior to the notification of the individual employees to be terminated." It is clear taht the Union had notice generally that a layoff of custodians was being considered. But it is equally clear that the School Committee failed to give the Union notice of any of the specifics of the April 12 layoffs before notifying the custodians being terminated. We assume this is what the Hearing Officer meant, and we affirm that finding of fact.

Newton School Committee and Newton School Custodians Association, 5 MLC 1016

On April 20, 1976, Sabetti, as chairman of the grievance committee, followed the suggestion of the chairman of the School Committee and filed a grievance on behalf of the custodians terminated. On April 29, Cornelius denied the grievance at step two without a hearing.[5] The Union then filed a prohibited practice charge with the Commission, and also processed its grievance to step three.

A step three hearing was held on May 11 or 12 between Superintendent Fink and representatives of the Union. Fink gave the Union officials the opportunity to express their views regarding the layoff. At this point, the Union proposed that the selection of employees for layoff be according to strict seniority. Fink asked the Union to identify individual cases where the layoff list was unfair, and said the School Committee would review the list as to those individuals. Fink subsequently denied the grievance by letter dated May 12, 1976.

On June 14, the attorney for the Union met with the School Committee to process the grievance at step four. The Union attorney was given the opportunity to express the Union's views regarding the scheduled layoff. The School Committee gave no reply at the meeting. By letter dated June 24, 1976, the School Committee gave the following response:

> Irrespective of the opinion of the Committee that the grievance, as presented, is not subject to grievance or arbitration, please be informed that it is herein denied.

On or about June 22, 1976, an impromptu meeting occurred between O'Conor and some of the Union officers. A discussion of the layoff matter ensued. This meeting left the Union officers with the impression that there was still room for discussion on this subject. Thereafter, on June 25, 1976 O'Conor sent an invitation to Peltier to "further discuss and negotiate the matter of the impact of reduction in custodial force."

Two meetings resulted from this invitation. They were held on June 29 and 30, 1976--the two days immediately prior to the scheduled layoff. O'Conor and Cornelius attended for the administration, while Peltier, Robards, and three other officers attended on behalf of the Union. Neither side was represented by legal counsel at these two meetings.

The June 29 meeting lasted for two to three hours. The Union pressed its demand for layoff by strict seniority, and requested that the layoffs be delayed to October 1 to allow for further bargaining. O'Conor responded that the date of the terminations as set by the administration was a closed matter.

The School Committee brought forward a proposal of its own at the June 29 meeting. This proposal initially consisted of eight parts: final performance evaluations for the custodians laid off; assistance for a three-month period in finding new employment for those custodians; reviewing the impact of retirements through September 1976; giving full consideration during a three-month period to the rehiring of laid-off custodians if openings should occur, while

[5]Step one of the grievance procedure involved an internal review of the grievance by the Union.

also utilizing any available civil service list; discussing a reduction in force clause in negotiations for the next contract; and the Union's dropping its prohibited practice charge. The other two items on the original list of eight were unrelated to the reduction in force dispute.[6] There was contradictory testimony regarding whether the Employer's proposal was offered as a total, non-severable package. We assume for purposes of this decision that the various parts of the School Committee's proposal were severable.

At the all-day June 30 meeting, the Union rejected the administration's proposal, which by then included a ninth item concerning the institution of quarterly evaluations of provisional custodians. The Union witnesses acknowledged that they were without authority at the June 29 and 30 meetings to agree to anything less than layoffs by straight seniority. Cornelius had authority to agree that when performance factors were equal, seniority would control, but he did not make that proposal to the Union. He testified that he did not do so because the Union representatives had already indicated at these meetings that they had authority only to agree to strict seniority. The Union officials indicated that at the end of the June 30 meeting they were at a stalemate.

On July 1, the seven bargaining unit members were laid off.

Opinion

The Union does not contend that the School Committee was obligated to bargain with it regarding the basic decision to reduce the size of the custodial force. A level of service decision of this type may be made without submitting it to the bargaining process. Town of Danvers, 3 MLC 1559 (1977). While the level of service decision may be unilaterally determined by the public employer, the employer is nevertheless obligated to negotiate over the impact of such a decision on terms and conditions of employment. Lawrence School Committee, 3 MLC 1304, 1310 (1976). As a threshhold matter in this case, we must clarify which aspects of the School Committee's RIF decision constituted mandatory subjects of bargaining. In making this determination, the Commission must balance competing interests:

> Is the predominant effect of a decision directly upon the employment relationship, with only limited or speculative impact on core educational policy? Or is the predominant effect upon the level or types of education in a school system, with only a side effect upon the employees? Boston School Committee, 3 MLC 1603, 1607 (1977).

If an employer determines that a RIF is to occur, it must then decide how best to reach the specified level of services. A layoff is one possibility. Reliance on atrition and routine or early retirement may be, however, at least

[6] The Hearing Officer found that the Employer's proposal was contained in a written document that was discussed on June 29, but that copies of the document were not provided to the Union until June 30. The School Committee challenges this finding. We find it unnecessary to resolve this issue. The School Committee's proposal was aired on both days. Whether copies of the document were actually provided to the Union on June 29 is immaterial.

a partial alternative. Part-time schedules for bargaining unit personnel or other work-sharing techniques may be more attractive to the parties than a layoff. This question of how to reach a specified level of services is a matter of profound consequence to the bargaining agent, since the job security of each employee is directly involved. On the other hand, requiring an employer to bargain on how to accomplish a RIF will not unduly infringe upon the employer's right to make the core governmental decision of what the level of services should be. Balancing these considerations, we conclude that the question of how to accomplish a reduction in services constitutes a mandatory subject of bargaining.

If it is determined that a layoff of employees is necessary, the question of how to select the employees to be laid off arises. In addition, issues of recall or re-hire rights, continued seniority, and severance pay may arise. We conclude that these issues are even farther removed from the level of services decision than the issue of how to accomplish a RIF. At the same time, decision on these issues will directly affect the employment relationship in a substantial way. We conclude that these matters constitute mandatory subjects of bargaining. See NLRB v. Frontier Homes Corp., 371 F.2d. 974, 64 LRRM 2320, 2323 (8th Cir. 1967).

Absent waiver, a public employer may not unilaterally change the wages, hours, standards of productivity nad performance, or any other terms and conditions of employment of its organized workers without first negotiating with their union. Boston School Committee, 3 MLC 1603, 1605 (1977). To prove an unlawful unilateral change, a union must show some pre-existing practice which has been unilaterally changed by the employer. In the instant case, the Hearing Officer found that there was no past practice regarding the method for accomplishing a reduction in force, nor for deciding which custodians would be terminated in a layoff situation. He therefore rejected the Union's unilateral change arguments.

We agree that there was no past practice regarding the accomplishment of a RIF in the custodial staff in the Newton Schools. The situation had never occurred in the past. This does not mean, however, that an employer reducing the size of its work force for the first time may unilaterally determine how to reduce the workforce or who to lay off. An employer has an obligation to provide the exclusive bargaining representative of its employees with an opportunity to bargain before the employer establishes new wages, hours or terms or conditions of employment for its employees. Melrose School Committee, 3 MLC 1299 (1976). Melrose involved the establishment of initial wage rates for certain new bargaining unit positions. While the employer could unilaterally decide to create these new positions, it was obligated to bargain with the union regarding wages for these new employees. Here, the employer was entitled to unilaterally decide to reduce the level of custodial services in the Newton Schools. However, as in Melrose, absent a waiver, the School Committee was obligated to bargain with the Union regarding the impact of this core governmental decision.

The Employer contends that the Union waived its right to bargain regarding a reduction in force because the Union failed to raise that issue during negotiations in the fall of 1975. Once a union is on notice that an employer is contemplating the creation of a new condition of employment, that union must make a prompt demand for bargaining or it will be found to have waived its right to negotiate. Boston School Committee, Case No. MUP-2611, 4 MLC 1912 (1978). In

the instant case, the Union did have information that the new School Committee was fiscally conservative and that certain school closings were planned. But the Union also was aware of eight newly hired custodians and of plans to open new buildings. The Union was

> not required to respond to rumors of proposed changes, speculation, or proposals so indifinite that no response could be formulated. Boston School Committee, Case No. MUP-2611 at p. 7.

We conclude that the Union here did not have sufficient knowledge in December, 1975 of an impending RIF to compel it to demand bargaining at that time, nor did the Union waive its right to demand bargaining on that topic.

The School Committee further contends that the Union waived its bargaining rights by agreeing to the following management rights clause contained in the collective bargaining agreement executed on December 15, 1975:

> Except as specifically abridged, delegated, granted or modified by this Agreement, or any supplementary agreements that may hereafter be made, all of the rights, powers, and authority the Employer had prior to the signing of this Agreement are retained by the Employer, and remain exclusively and without limitation within the rights of management.

The Hearing Officer correctly concluded that this broadly framed management rights clause is entirely too vague to provide a basis for inferring a clear and unmistakeable waiver by the Union concerning bargaining over layoffs, especially as the subject was not explored in the negotiations. Town of Andover, 3 MLC 1710, 1716-18 (H.O. 1977) aff'd 4 MLC 1086, 1090; City of Everett, 2 MLC 1471 (1976).

On February 15, 1976 the School Committee informed the Union that a layoff was likely. The Union immediately expressed its desire for input into the layoff matter. The Employer was obligated thereafter to provide the Union with a reasonable opportunity to negotiate over those aspects of the RIF decision that constitute mandatory subjects of bargaining. Boston School Committee, Case No. MUP-2611, 4 MLC ____ (1978).

To fulfill its bargaining responsibility, the School Committee was obligated to: 1) make itself available at reasonable times and places for the purpose of negotiating over the RIF matter, City of Chelsea, 3 MLC 1169 (H.O. 1976), aff'd 3 MLC 1384 (1977); 2) participate in such negotiations in good faith, King Philip Regional School Committee, 2 MCL 1393 (1976); and 3) refrain from unilaterally establishing RIF policy until impasse had been reached on all mandatory aspects of the RIF decision. Melrose School Committee, 3 MLC 1799 (1976). A review of the School Committee's actions from February 15 through April 12, 1976 leads us to the conclusion that the Committee failed to make itself available for negotiations over the RIF issue, although the Union made repeated requests for bargaining. This failure to meet and negotiate constituted a violation of Section 10(a)(5) of the Law, regardless of the Employer's good or bad faith. City of Chelsea, supra. In addition, we conclude from a review of the chronology of events during this period that the School Committee did not have the intention of attempting to solve its differences regarding a RIF with the Union at the bargaining table and for this reason, the Employer refused to

bargain in good faith in violation of Section 10(a)(5) of the Law.

Sometime after the February 15 meeting, Cornelius prepared his tentative list of twelve custodians to be laid off. There was no Union involvement prior to the creation of this list, although the Union had requested input into the RIF decision. On March 15, the Union by letter to O'Conor repeated its demand for bargaining. This letter was never answered by the employer. On the next day, the parties met for another of their biweekly meetings. The Union again asked for input into the RIF decision. There is no evidence that any meaningful negotiations regarding the proposed RIF occurred at this meeting. Cornelius did not mention that a tentative layoff list had been prepared, nor did he mention the criteria being applied for the selection of employees for layoff. He did not indicate the numberof employees being considered forlayoff.

On April 8, the parties again met for a biweekly meeting. The Union repeated its demand for input into the RIF matter. There is no evidence that negotiations concerning the RIF issue occurred at this time. Cornelius did not indicate that layoffs would be announced in four days. He indicated neither how many custodians would be laid off, the criteria for selection, the timing, nor the names of the custodians scheduled forlayoff.

On April 12, the School Committee sent out its layoff notices. That evening, the School Committee was asked to ratify this layoff. When the Union requested to have this matter tabled so that it could bargain with the employer, O'Conor indicated to the Committee that nothing would change, even if the Committee vote were postponed. The School Committee then ratified the layoff schedule.

We conclude that throughout this period from February 15 through April 12, the employer had no intention of negotiating in good faith to impasse with the Union regarding the RIF matter, although repeated demands for bargaining were made. Instead, the employer unilaterally decided to accomplish the RIF through a layoff, and determined which employees to terminate. The employer notified these individuals and the entire plan was ratified, all without prior Union involvement. By so proceeding, the Employer unilaterally established new terms or conditions of employment and violated Section 10(a)(5) of the Law. Melrose School Committee, 3 MLC 1299 (1976); City of Everett, 2 MLC 1471 (1976).

The question remains whether the Employer by its actions after April 12 somehow corrected its refusal to bargain prior to April 12. At the April 12 School Committee meeting, the Union was told to file a grievance if it continued to be dissatisfied with the Committee's RIF decision. Soon thereafter, the Union terminated the informal biweekly meetings that had been taking place. On April 20, a grievance concerning the RIF was filed. The School Committee argues that the Union waived its bargaining rights by terminating the informal meetings. We disagree. These meetings had not been a forum for negotiation regarding the RIF issue. The Employer never participated in good faith bargaining over the RIF issue at any of these meetings. Even if the Employer had, the Union merely followed the suggestion of the School Committee and sought to utilize the regular grievance procedure.

We further conclude that the Employer's failure to bargain in good faith was not cured by the grievance meetings concerning the RIF issue and that the School Committee's refusal to bargain in good faith continued through June 14. At

Step two of the grievance procedure, the RIF grievance was denied without a hearing. At steps three and four, the Employer listened to the Union's view, made no substantive response, and denied the grievance as not raising a contractual issue. This is not the kind of exchange and discussion of substantive views required by Sections 6 and 10(a)(5) of the Law.

On June 29 and 30, the parties met for two days of substantive discussion on the RIF issue. Both sides explained their positions and had the opportunity to ask questions regarding the other's position. As a result of the impromptu meeting on June 22, the Union representative felt that there was room for discussion at these June 29 and 30 meetings. At the end of the June 30 meeting, the Union representatives felt they were at a stalemate.

We need not determine whether the School Committee came to these final two days of meetings with the purpose of attempting to solve the RIF dispute through the negotiating process.[7] Even if the School Committee had such a purpose at this point, this period of bargaining was artificially abbreviated.

> An employer may not artificially shorten the time available for the bargaining process to operate by delaying announcement or notice of proposed changes until the last minute. Boston School Committee, Case No. MUP-2611, slip opinion p. 9, 4 MLC 1916 (1978).

The School Committee could not refuse to bargain for a period of over four months, negotiate for two days prior to implementation of a change, and then contend that it had fulfilled its bargaining obligation.

It is true that on June 29 and 30 the Union officials were authorized to agree only to strict seniority. Given a reasonable period of time for bargaining however, the Union membership might have given its negotiators greater flexibility. The School Committee concedes that it already had authority to agree to layoff byseniority, qualifications being equal. This suggests that negotiations for a more reasonable period of time might have been fruitful. Thus, we do not consider the "stalemate" on June 30 to be a final "impasse" permitting the employer to take unilateral action with respect to mandatory topics.

The Employer knew in mid-February, 1976 that the Union wanted input into the RIF matter. Between that time and April 12, the Employer failed to bargain with the Union, unilaterally determined all details of the RIF, notified the individuals to be laid off, and ratified the entire arrangement. The Employer continued to refuse to bargain in good faith through late June. There was no justification for the Employer's allowing for only two days for bargaining to take place, even if the Employer genuinely hoped to solve the RIF problem at these two days of discussion. We conclude that by this course of action the Newton School Committee violated Sections 10(a)(5) and (1) of hte Law. Boston School Committee, supra.

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[7]The Employer contends that the Hearing Officer improperly excluded certain evidence regarding the question of the School Committee's open mind. But self-serving statements of School Committee witnesses would have been of no value in determining the true intent of the School Committee's agents. We affirm the Hearing Officer's exlcusion of such statements.

The Remedy

The normal remedy for the unilateral creation of new working conditions is to order bargaining following restoration of the status quo ante. Boston School Committee, Case No. MUP-2611, 4 MLC ____ (1978). Restoration of the status quo ante includes compensating members of the bargaining unit for economic losses they have suffered due to the employer's unlawful conduct. Town of Andover, 4 MLC 1086, 1090 (1977); City of Everett, 2 MLC 1471 (1976); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). Accordingly, we will order that the seven bargaining unit members who were laid off be reinstated with back pay.[8]

Order

WHEREFORE, pursuant to the authority vested in the Commission by Section 11 ofthe Law, it is hereby ORDERED that the Newton School Committee shall:

1. Cease and desist from:

   a. failing and refusing to bargain collectively in good faith with the Newton School Custodians Association over the impact of the School Committee's reduction in force decision.

   b. in any like or similar manner interfering with, restraining, or coercing any employees in the exercise of their rights guaranteed under General Laws Chapter 150E.

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

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

   b. Offer Donald Carmichael, John Carvelli, Frank DiStephano, Timothy Morris, Stephen J. O'Brian, Kenneth Thibault, and Lawrence Walsh immediate and full reinstatement to their former positions or, if any of those positions no longer exist, to substantially simila positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of their unlawful termination by payment to them of such sums equal to those which they normally would have

[8]The School Committee contends that this case is moot, and that reinstatement of these seven custodians is no longer appropriate. But the Union has never had the opportunity to bargain without the disadvantage of an already-established work rule. They must be given the opportunity now. Furthermore, delays in this decision can be attributed in substantial part to extensions or postponements granted to the School Committee at various steps in the proceedings. The School Committee cannot now complain that disposition of the case should have been faster.

earned absent their unlawful terminations from the date of their terminations on July 1, 1976 to the date of the Employer's offer of reinstatement, less net earnings during such period, with back pay computed on a quarterly basis, plus interest at the rate of seven per cent (7%) interest per annum.

c. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of back pay due under this Order.

d. Upon request by the Union, bargain collectively in good faith over the impact upon wages, hours, and conditions of employment of any decision to reduce the workforce in the bargaining unit represented by the Union.

e. Notify the Commission in writing, within ten (10) days of the service of this Decision and Order, of the steps taken in compliance therewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

James S. Cooper, Chairma-
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

Chapter 150E of the General Laws gives public employees the following rights:

To engage in self-organization.
To form, join or assist any union.
To bargain collectively through representatives of their own choosing.
To act together for the purpose of collective bargaining or other mutual aid or protection.
To refrain from any and all of these activities.

WE WILL NOT do anything that interferes with, restrains or coerces employees in their exercise of these rights.
More specifically,

WE WILL offer Donald Carmichael, John Carvelli, Frank DiStephano, Timothy Morris, Stephen J. O'Brien, Kenneth Thibault, and Lawrence Walsh immediate and full reinstatement to their former positions or, if any of these positions no longer exist, to substantially similar positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of earnings suffered as a result of their unlawful termination, by payment to them of such sums equal to those which they normally would have earned absent their unlawful terminations, from the date of their terminations on July 1, 1976 to the date of the employer's offer of reinstatement, less net earnings during such period with back pay computed on a quarterly basis and at the rate of seven percent (7%) interest per annum.

WE WILL upon request by the Newton School Custodians Association bargain collectively in good faith over the impact upon wages, hours, and conditions of employment of any decision to reduce the workforce in the bargaining unit represented by the aforesaid union.

CITY OF NEWTON

DATED_____ By:_____
Honora Kaplan, Chairman
Newton School Committee