COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	Case No.: MUP-09-5623
CITY OF SPRINGFIELD	*	Date Issued: July 18, 2014
and	*	
SPRINGFIELD ORGANIZATION OF LIBRARY EMPLOYEES	*	

Hearing Officer:

Timothy Hatfield, Esq.

Appearances:

Maurice M. Cahillane, Esq.	- Representing the City of Springfield
Marshall T. Moriarty, Esq.	- Representing the Springfield Organization of Library Employees

HEARING OFFICER'S DECISION

Summary

The issues in this case are whether the City of Springfield (City) violated Section 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it: 1) unilaterally reduced the hours of work and benefits of the part-time senior clerk position; and/or 2) bypassed the Springfield Organization of Library Employees (SOLE or Union) when it hired Leslie Lewis (Lewis) and Marion Fontaine (Fontaine), and offered to recall Rose Talmont (Talmont) to employment into non-

benefitted,[1] 18.5 hour senior clerk positions. I find that the City violated the Law by unilaterally reducing the hours of work and benefits of the part-time senior clerk position and communicating directly with Talmont about recalling her to a non-benefitted 18.5 hour senior clerk position. However, the City did not violate the Law by offering to hire Lewis and Fontaine into non-benefitted, 18.5 hour senior clerk positions.

Statement of the Case

On September 17, 2009, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the City had engaged in prohibited practices within the meaning of Sections 10(a)(5) and 10(a)(1) of Massachusetts General Laws, Chapter 150E. The DLR investigated the charge on December 4, 2009, and issued a Complaint of Prohibited Practice on February 11, 2010. Count I of the two-count Complaint alleges that the City reduced the hours of work for the part-time senior clerk bargaining unit position without giving the Union prior notice and an opportunity to bargain over the decision and impact of that decision on employee terms and conditions of employment. Count II alleges that the City unlawfully bypassed the Union and dealt directly with bargaining unit members when it hired Fontaine and Lewis into no-benefit 18.5 hour senior clerk positions, and offered to recall Talmont into a no-benefit 18.5 hour senior clerk position (18.5 hour positions). The City filed an answer to the Complaint on or about February 25, 2010.

[1] In this decision, I call the 18.5 hour positions "non-benefitted" because, as described in the Findings of Fact, the City referred to them as "part time no benefit positions" in its employment offers to Lewis, Fontaine, and Talmont. However, as discussed, infra, the credible evidence demonstrates that while these positions carried no retirement or health insurance benefits, the employees in these positions received prorated sick, vacation, and personal time, as well as certain paid holidays.

I conducted a hearing on December 17, 2010, at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. The parties filed post-hearing briefs on or about February 1, 2011.[2] Based on the record, which includes witness testimony, my observation of the witnesses' demeanor, stipulations of fact and documentary exhibits, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

Stipulations of Fact

1. The City is a public employer within the meaning of the Law.

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

3. The Union is the exclusive bargaining representative for full-time and regular part-time clerical and administrative employees employed by the City in its Library Department.

4. By letter dated September 30, 2008, the City hired Leslie Lewis to fill the part-time senior clerk position at 18.5 hours per week.

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[2] The City filed a Motion and supporting affidavit on February 7, 2011 to reopen the record to submit additional exhibits. I hereby deny the Motion. The exhibits that the City proffers are: 1) a letter dated July 11, 1997 to Anne Marie Griffin, who later became the Union's president, confirming her appointment to a non-benefitted, part-time, 12 hour clerk position; and 2) an August 4, 1997 internal vacancy posting for a 12 hour part-time clerk position at the Forest Park/16 Acres branch of the Library. According to the City, these exhibits show that in 1997, the City hired employees into part-time, non-benefitted positions.

Absent extraordinary reasons, the Commonwealth Employment Relations Board (Board) will not re-open a record. AFSCME, Council 93, 31 MLC 180, 181, MUPL-4257 (June 3, 2005). A party that seeks to re-open the record must demonstrate excusable ignorance of the evidence at the time of the hearing despite the exercise of reasonable diligence. Id. The City argues that the exhibits are relevant because they show the Union's knowledge of non-benefitted part-time positions that existed prior to the first collective bargaining agreement. However, the City offers no reason why, in the exercise of reasonable diligence, it could not have discovered documents from 1997 prior to the close of the record. I find no extraordinary reason to re-open the record, and thus I decline to do so.

5. By letter dated September 30, 2008, the City hired Marion Fontaine to fill the part-time senior clerk position at 18.5 hours per week.

6. Prior to April 2009, the City employed Rose Talmont in the position of part-time senior clerk at 20 hours per week with benefits.

7. In April of 2009, the City laid off Talmont from [the] position of part-time senior clerk at 20 hours per week with benefits.

8. By letter dated July 15, 2009, the City offered to recall Talmont to the position of part-time senior clerk at 18.5 hours per week.

Findings of Fact

Background

Prior to July 1, 2003, the Springfield Library was part of the Springfield Library Museum Association, which oversaw the operation of the library system and four museums. On July 1, 2003, the Library became a City department. The Library is comprised of a Central Library and nine branches that are located throughout the City.

When the Springfield Library Museum Association governed the Library, the clerical employees were not represented by a union. On March 18, 2004, the former Labor Relations Commission[3] certified the Union as the exclusive bargaining representative of the employees in a clerical and administrative bargaining unit.[4] The bargaining unit includes the position title of senior clerk, and the City employed senior

[3] Pursuant to Chapter 145 of the Acts of 2007, the [DLR] "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board is the body within the DLR charged with deciding adjudicatory matters. References to the Board include the Commission.

[4] AFSCME, Council 93, AFL-CIO represents the librarian titles in a separate bargaining unit.

clerks in both full and part-time positions.[5] From around 1990 and continuing for approximately ten years, the Library employed 12 and 16 hour part-time clerks and librarians, and did not pay retirement and/or health insurance benefits to employees in those positions. However, from approximately 2003 until 2008, all part-time senior clerks worked in 20-hour per week, fully-benefitted positions.

From June 30, 2004 to June 30, 2009, the City was under the control of the Springfield Finance Control Board (Control Board) which oversaw all financial and personnel decisions.[6] The Control Board had established a Personnel Review Committee (Committee) which reviewed all new position requests.

The Collective Bargaining Agreements between the City and the Union[7]

After the Union's certification, the City and the Union executed a Memorandum of Agreement, which provided in pertinent part as follows: "[t]he parties agree to utilize the Agreement between the City of Springfield and AFSCME Local #1596 (Professional Librarians) for the period of July 1, 2003 to June 30, 2004 as a basis for a new collective bargaining agreement subject to revisions regarding the recognition provisions and the below agreed upon amendments...." The City/Control Board and the Union subsequently executed collective bargaining agreements that were in effect by their

[5] The bargaining unit also includes principal clerks, groundskeepers, and senior acquisition clerks.

[6] I take administrative notice of the date that the Control Board assumed control of the City's financial affairs.

[7] The record contains no evidence regarding the negotiations that led to the 2008-2011 CBA.

terms from July 1, 2005 to June 30, 2008, (2005-2008 CBA) and July 1, 2008 to June 30, 2011 (2008-2011 CBA).

The 2008-2011 CBA provides in pertinent part as follows:

Article 4 Responsibilities of Management
Section 1.
The City and the Union agree that the rights and responsibilities to operate and manage the business and the affairs of the Library Department are vested exclusively in the City subject to the specific restrictions in this Agreement. These rights and responsibilities include (by way of illustration) the right to determine, control and change work operations and practices, service quality inspections and standards, service and shift schedules, work and shift assignments, hours of work and distribution of overtime, the work week and the work day, the size and organization of the staff; to control, determine and change the manner and the extent to which the City's equipment, facilities and properties shall be operated, laid out, increased, discontinued temporarily or permanently in whole or in part, decreased or located and to introduce, operate and change new or improved methods, facilities, techniques and processes; to establish, expand, reduce, alter, combine, consolidate or abolish any department, operation or service; to select, test, train, supervise and evaluate ability and qualifications of employees; to upgrade, downgrade, change, transfer, leave unfilled or abolish particular job positions or classifications; to obtain from any source and to contract and subcontract for materials, services, supplies and equipment....The provisions of this Agreement shall not limit or be construed to limit or restrict the inherent and common law right of the City and management to control, direct, manage and make changes in the operations and the affairs of the Library Department....

Article 8, Hours of Work and Overtime
Section 1.
The normal work week for full time day shift employees shall consist of thirty-seven and one-half (37½) hours of work exclusive of lunch periods, but including breaks, within a calendar week beginning Sunday at 12.01 a.m. and ending Saturday at 11:59 p.m. Part time employees shall be paid at an hourly rate based upon a forty (40) hours workweek.

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Section 3.
Nothing in this Article shall be construed as a guarantee that any particular schedule or number of hours of work will be available.

Article 28 Temporary and Part-Time Employees
Section 1.
The City shall have the right to employ temporary and/or part-time employees subject to the restriction imposed in this Article.

Section 2.

Full-time temporary employees are those who are appointed to positions which are expected to be vacant for, or in the existence for, a specific time period of (3) months or less, except in cases of medical, Union, or maternity leave replacement when it shall be for the duration of such leave. Full-time temporary employees will be eligible for holiday pay on the same basis as other employees, but are not eligible for vacations or paid leaves of absence set forth in this Agreement nor for the group insurance or retirement plans except as otherwise provided for by statute.

Section 3.
Part-time employees are those who are regularly scheduled to work less than thirty (30) hour per week. Part-time employees are entitled to retirement or group insurance benefits but shall be entitled to all other benefits on a prorated basis. Part-time employees who work less than twenty (20) hours a week shall not be entitled to retirement or group insurance benefits.

New Senior clerks

In early January 2008, then Library Director Emily Bader (Bader) sought to fill a 20-hour part-time senior clerk position vacated by the retirement of employee Jacqueline Newlin (Newlin) from her 20-hour senior clerk position. Pursuant to procedures that the Control Board had implemented at that time, Bader submitted a vacancy request for a 20-hour senior clerk to the City's Personnel Department, which sent it to the Control Board's Personnel Review Committee. The Personnel Review Committee denied Bader's request, and she was told that she could not get another 20-hour position filled. Consequently, Bader submitted a new request on April 9, 2008, which stated in pertinent part: "[t]his is a request to fill a formerly 20-hr position at 18.5 hours in order to save benefit costs..." She subsequently submitted a second request to fill another 20-hour senior clerk position with an 18.5 hour position to replace employee Althea Deleveaux (Deleveaux). The second request contained the same explanation for seeking an 18.5 non-benefitted position. Both requests were subsequently approved.

Generally, after the City hires an individual into a library position, the library sends an announcement to employees by mail or email to welcome the new hire. The announcement gives the new employee's name and work location, but it contains no details about their work hours or pay. Thereafter, the Union gives the new employee paperwork to complete regarding Union membership and dues. The Union then forwards the completed paperwork back to the City to facilitate the dues deduction from their paychecks. Each week, the City gives the Union treasurer a list of all of the Union members who are paying Union dues.[8]

Leslie Lewis and Marion Fontaine

The City posted the two new 18.5 hour positions on the City's website[9] but did not notify the Union that Newlin's and Deleveaux's 20-hour, benefitted senior clerk positions had become 18.5 hour non-benefitted positions. Then Union Secretary Christine Livingston (Livingston) did not see the postings when the City posted them, and there is no evidence that any Union officer did.[10] By letters dated September 30, 2008, the City offered the two part-time senior clerk positions to Leslie Lewis (Lewis) and Marion Fontaine (Fontaine), describing both positions as "part time no benefit" 18.5 hour per week positions. Lewis and Fontaine accepted the positions and served the six-month probationary period for new hires. The City did not notify the Union that it had

[8] Although the Union has the right to ask the City annually for a list of Union members, the Union had not done so since 2009.

[9] There is no clear evidence that the vacancy announcements were also posted on the Library website or the Library bulletin boards.

[10] Livingston testified that she did not search the City's website for new position postings, in part, because she did not have a home computer. She also testified that the Union had no records of Lewis's and Fontaine's positions.

offered these positions to Lewis and Fontaine, and the Union understood at that time that senior clerks worked no less than 20 hours per week. Although the evidentiary record[11] does not establish when Lewis and Fontaine separated from employment at the Library, they were no longer employed by December 17, 2010, the date of the hearing.

Rose Talmont

Prior to April of 2009, the City employed Rose Talmont (Talmont) in a 20-hour, fully benefitted senior clerk position. In April of 2009, the City laid Talmont (and certain other employees) off, but Talmont retained contractual recall rights.

Employee Hope Gamble (Gamble) subsequently retired, and the Library processed a vacancy request to the Personnel Review Committee on July 2, 2009 to fill the opening created by Gamble's retirement. The Personnel Review Committee advised Library Business Manager Carol Leaders (Leaders) at the Committee meeting that it would not fill a 20-hour position, but would fill it at 18.5 hours per week. Leaders then called Talmont, the most senior in the group of employees who had been laid off, and offered to recall Talmont to a senior clerk position at 18.5 hours per week. Leaders explained that, because it was an 18.5 hour position, Talmont would not receive any retirement or health benefits, but would also not waive her contractual right to be recalled to another position. Talmont initially declined the position, but accepted it the next day. The City communicated its offer in writing by letter dated July 15, 2009, describing the position as a "part time no benefit" position at 18.5 hours per week.

[11] The Union suggested in its opening statement and brief that Lewis and Fontaine were laid off in or around April of 2009.

The City did not notify the Union that it planned to offer or had offered Talmont an 18.5 hour position without benefits, and it did not post the position. However, the Union learned on or about July 17, 2009 that the City had recalled Talmont to a non-benefitted position when the Union Secretary spoke to Talmont about her return to work. When Livingston, who at this point was the Union's president, learned of the reduction in hours and benefits, she directed the Union's lawyers to file an unfair labor practice charge, which they did on September 17, 2009.

20 Hour vs. 18.5 hour positions

Employees holding 18.5 positions receive holiday pay if they work on a holiday. They also receive prorated personal, sick, and vacation time.[12] However, they do not receive credit toward retirement or health insurance benefits. At the time that it created the 18.5 hour positions, the City estimated that the cost of health insurance and retirement benefits was approximately $15,000 per position.

Opinion

Unilateral Change

A public employer violates Sections 10(a)(5) and 10(a)(1) of the Law when it unilaterally alters a condition of employment involving a mandatory subject of bargaining without first bargaining with the union to resolution or impasse. School Committee of

[12] Livingston testified that, based on her understanding of the contract, employees working 18.5 hour positions did not receive vacation, personal and sick leave. I credit the contrary testimony of Springfield City Library Director Molly Fogarty (Fogarty). Fogarty's testimony was consistent with the 2008-2011 CBA, which provides in Article 28, Section 3 that: "[p]art-time employees are entitled to retirement or group insurance benefits, but shall be entitled to all other benefits on a prorated basis. Part-time employees who work less than twenty (20) hours a week shall not be entitled to retirement or group insurance benefits."

Newton v. Labor Relations Commission, 388 Mass. 557 (1983). To establish a violation, a union must demonstrate that there was a pre-existing practice, that the employer unilaterally changed that practice, and that the change impacted a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528, MUP-2541 (April 15, 1977). Here, the City does not dispute the reduction in hours and benefits or argue that those topics are not mandatory subjects of bargaining. See M.G.L. c.150E, Section 6, Holyoke School Committee, 12 MLC 1443, 1450, MUP-5124, (December 20, 1985) (hours of work); Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1534, UP-2496 (February 3, 1988) (retirement benefits), Town of Dennis, 28 MLC 297, 301, MUP-2634 (April 3, 2002)(health insurance benefits). Instead, the City argues that the Union waived any bargaining rights that it had by contract and inaction.[13]

Waiver by Contract

An employer asserting contractual waiver as an affirmative defense must show that the parties consciously considered the situation that has arisen, and that the union knowingly waived its bargaining rights. Central Berkshire Regional School Committee, 31 MLC 191, 202, MUP-01-3231, MUP-01-3232, MUP-01-3233 (June 8, 2005). A waiver will not be lightly inferred, City of New Bedford, 38 MLC 239, 248, MUP-09-5581, MUP-09-5599 (April 3, 2012)(appeal pending), and there must be a clear and

[13] The City argues that the exhibits at issue in the Motion to Reopen the Record are relevant to the Union's knowledge of no benefit part-time positions existing prior to the first collective bargaining agreement. However, the fact that the City maintained part-time non-benefitted positions prior to the Union's certification is not material because the existence of those positions does not alter the fact that in 2008, four years after the Union was certified, the City changed the long-standing practice of employing senior clerks in 20 hour benefitted positions.

unmistakable showing that a waiver occurred through the bargaining process or the specific language of the agreement. Id. If the language of the contract is ambiguous, the Board will review the parties' bargaining history to determine whether the union intended to waive its rights. Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988).

The City argues that the language of the contract could not be more clear. Article 4, §1 gives the City control over service and shift schedules, work and shift assignments, hours of work, the work week, the size and organization of the staff, the right to make changes in operations, and the right to upgrade, downgrade or change job descriptions. Article 8, §3, which states that there is no guarantee that a number of hours of work will be available, and Article 28, which gives the City the right to employ part-time employees (Section 1) and provides for those who work less than 20 hours per week (Section 3) would be meaningless if the City could not unilaterally create 18.5 hour positions. Therefore, its argument goes, the City has already bargained for and obtained the right to employ non-benefitted workers for an 18.5 hour week. I am not persuaded by the City's arguments.

The contractual language clearly establishes the City's right to employ employees in part-time positions – even positions working less than 20 hours per week – and deny retirement and health insurance benefits to employees who work less than 20 hours per week. However, the contractual language does not clearly and unambiguously give the City the unilateral right to do what it did here: convert a pre-existing fully benefitted position into a position without health insurance or retirement benefits by reducing the hours of work below the level at which the City is contractually

required to provide health insurance and retirement benefits. This action differs materially from simply adjusting or reducing an employee's work hours, work day, or work schedule. Instead, it eliminates hours for the specific purpose of eliminating retirement and health insurance benefits and reducing costs. While this action may have comported with the Control Board's intended role and function, there is no evidence that the parties consciously considered this scenario at the bargaining table, and that the Union knowingly waived its right to bargain over the decision and the impact of the decision to convert positions with health insurance and retirement benefits to non-benefitted positions by the reduction of hours. Accord, City of Peabody, 28 MLC 19, MUP-2073 (June 21, 2001) (contract did not expressly or by necessary implication allow the school committee to change employee work schedules by implementing an unpaid block of downtime); Commonwealth of Massachusetts, 18 MLC 1220, SUP-3426 (November 20, 1991) (involuntary reassignments did not constitute mere transfer of employee from one work location to another, but rather, a method of implementing a reduction in force; and contractual language giving employer the right to transfer personnel did not establish a knowing, conscious, and unequivocal waiver of the union's right to bargain over the means and method of reducing the size of the workforce.) At best, the contract language is ambiguous with respect to the City's right to change a benefitted position to a non-benefitted position by reducing its work hours, and there is no bargaining history that illuminates the parties' intent.[14] I am not persuaded that the Union's agreement to language regarding changes in work hours and schedules, no

[14] The fact that the parties initially used a contract between AFSCME and the City as a basis for their initial MOA does not clearly and unmistakably show that the Union waived its bargaining rights over the change at issue.

guaranteed minimum number of hours, and the employment of part-time employees necessarily shows that it waived its right to bargain over a decision to strip a position of health insurance and retirement benefits by reducing work hours. Accordingly, I find that the City did not meet its burden to show that the Union knowingly and unmistakably waived its bargaining rights.

Waiver by Inaction

A union waives its right to bargain by inaction if the union had: 1) actual knowledge or notice of the proposed action; 2) a reasonable opportunity to negotiate about the proposed action; and 3) unreasonably or inexplicably failed to bargain or request bargaining. Ashburnham-Westminster Regional School District, 29 MLC 191, 194, MUP-01-3144 (April 9, 2003). Although the City does not argue that it gave the Union notice before reducing the hours and benefits of the part-time senior clerk position, and concedes in its opening statement that it cannot prove the Union's actual knowledge of the change, it nevertheless contends that the Union waived any bargaining rights that it may have had by failing to act when the City hired Lewis and Fontaine in 2008. According to the City, it did not conceal its decision to hire employees into the 18.5 hour positions, and the Union had access to information by which it could have learned of the change. Further, it was not the City's responsibility, it says, to anticipate that the Union would interpret the collective bargaining agreement to prohibit the disputed actions and notify the Union that it is hiring someone on certain terms. I am not persuaded by these arguments either.

First, to satisfy the burden of proof for a waiver by inaction defense, an employer must show that it notified the union of a proposed change or that the union had actual

knowledge of the change. Town of Milford, 15 MLC 1247, 1252, MUP-6670 (November 9, 1988). Here, the City has not established either factor. The City did not notify the Union of the changed hours and benefits for the part-time senior clerk position and acknowledges that the Union had no actual knowledge of it. Although the City suggests that the Union had an ample opportunity to discover the new 18.5 hour positions from the Library practice of announcing new hires by email, providing the Union with an employee list, and posting new positions on the internet, its argument that the Union should have pieced the puzzle together and demanded bargaining does not satisfy its burden. A union is not required to demand bargaining when the only available information consists of rumors or speculation. City of Gardner, 10 MLC 1218, 1222, MUP-4917 (September 14, 1983). There is no evidence that the City actually posted Lewis's and Fontaine's positions on the Library website and bulletin boards, and even if it did, no evidence that Union officials saw the postings. Livingston did not search the City website, the Union had no records of Lewis's and Fontaine's new positions, and did not know at that time that any senior clerk was working less than 20 hours per week. Thus, the City's defense fails because there is no evidence that the City notified the Union that it was changing the hours and benefits of the part-time senior clerk position

or that the Union knew of the change.[15]

Finally, there is no merit to the City's contention that it had no duty to notify the Union of the changes to the part-time senior clerk position because it could not have anticipated the Union's response. As previously noted, there is no contractual provision that clearly and unambiguously allows the City to unilaterally convert a benefitted position to a non-benefitted position by reducing its hours. Moreover, eliminating health insurance and retirement benefits from a part-time position is a significant change that the Union would likely protest. Thus, I reject as baseless the City's argument that it had no duty to notify the Union of the change because the Union's reaction was wholly unexpected.

Direct Dealing[16]

The duty to bargain collectively with the employees' exclusive representative necessarily entails the duty to refrain from circumventing the union by dealing directly with bargaining unit members on mandatory subjects of bargaining. Town of Ludlow, 28

[15] In the last sentence of its brief, the City also contended that the Union's charge was untimely. DLR Rule 15.03, 456 CMR 15.03 provides that: [e]xcept for good cause shown, no charge shall be entertained by the [DLR] based upon any prohibited practice occurring more than six months prior to the filing of a charge with the [DLR]." To be timely, a charge of prohibited practice must be filed with the DLR within six months from the date the violation became known or should have become known to the charging party, unless good cause is shown. Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1982). As discussed above, the evidence shows that the Union did not actually know of the hours and benefit changes to the part-time senior clerk position. Without receiving a new position posting or being told about the new hours and benefits, the differences between the Newlin/Deleveaux's 20 hour benefitted positions and Lewis/Fontaine's 18.5 hour non-benefitted positions were probably unnoticeable to the Union. Consequently, there is no reason that the Union should have known of the change. I therefore find that the charge was timely filed.

[16] The City's brief did not address the direct dealing allegations.

MLC 365, 367, MUP-2422 (May 17, 2002) (citing Service Employees International Union (SEIU), AFL-CIO, Local 509 v. Labor Relations Commission, 431 Mass. 710 (2000)). Direct dealing is impermissible for at least two reasons. First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. Suffolk County Sheriff's Department, 28 MLC 253, 259, MUP-2840 (January 30, 2002) (citing SEIU, Local 509, 431 Mass. 710 (2000)). Second, direct dealing undermines the employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it. Id.

In Frick, Vass, & Street Inc. and International Brotherhood of Painters, 270 NLRB 459 (1984), the employer contacted two employees on layoff status and offered them a chance to return to work if they were willing to take a pay cut. Both employees accepted the offer and returned to work. The NLRB held that the employer engaged in unlawful direct dealing by discussing wage changes outside the union's presence. See also Hotel Bel-Air and Unite Here Local 11, 358 NLRB No. 152 (2012) (employer engaged in unlawful direct dealing with employees who were laid off and retained a reasonable expectation of recall from layoff). Here, Leaders knew that Talmont had recall rights from her former position when Leaders discussed the new 18.5 hour non-benefitted position with her. Hours of work and the benefits of health insurance and retirement are mandatory subjects of bargaining. Thus, the City could not bypass the Union and negotiate directly with Talmont directly over the reduced hours and benefits of the new position and the conditions under which she could return to work. See City of Lowell, 28 MLC 157, MUP-2478 (October 15, 2001) (employer unlawfully dealt directly

with employee over his return to work on a decreased schedule from an injured-on-duty leave).

I reach a contrary conclusion concerning the allegation that the City dealt directly with Lewis and Fontaine. Lewis and Fontaine were applicants for hire rather than employees when the City communicated its offer of employment to them on September 30, 2008. They were not in the bargaining unit at that time, nor did the Union represent them. Consequently, the City did not violate the Law by extending offers of employment in the 18.5 hour positions to them. See generally, Boston School Committee, 3 MLC at 1608 (the exclusive representative has no right under Section 5 to bargain on behalf of applicants for hire).

Conclusion

The City violated Section 10(a)(5) and, derivatively 10(a)(1) of the Law by unilaterally reducing the hours and benefits of the part-time senior clerk position and by dealing directly with employee Rose Talmont about the conditions under which it would recall her to a part-time senior clerk position. However, the City did not unlawfully deal directly with Lewis and Fontaine when it offered them employment in 18.5 hour positions.

Remedy

The Board has the discretion to fashion the most satisfactory remedy possible under the facts of each case. Town of Dedham, 21 MLC 1014, 1024 MUP-8091 (June 15,1994). Generally, the Board fashions remedies for violations of the Law by attempting to place charging parties in the positions they would have been in but for the unfair labor practice. Natick School Committee, 11 MLC 1387, 1400, MUP-5157

(February 1, 1985). Here, the City's unlawful decision to reduce the hours and benefits of the part-time senior clerk positions caused Lewis, Fontaine, and Talmont to suffer a loss of wages, health insurance benefits, and retirement credit and benefits. Thus, the City is obligated to make them whole for their lost wages and benefits. See generally, City of Malden, 23 MLC 181, MUP-9312, MUP-9313, (February 20, 1997) (lost health insurance benefits); Wood's Hole, 14 MLC at 1534 (lost pension benefits), including payment of any costs that Lewis, Fontaine, and Talmont incurred to maintain health insurance while employed in the 18.5 hour positions, as well as reimbursement for any out of pocket medical expenses that would have been covered by the City's health insurance.

Additionally, the City must petition the Springfield Retirement Board to restore the affected employees' lost retirement credit, and pay all applicable City monetary contributions. If the Retirement Board is unable to restore the affected employees' retirement credit, the City must make them whole for the value of their lost retirement benefits. Wood's Hole, 14 MLC at 1534 (because the value of the lost retirement coverage can be quantified, the employer could compensate employees for their lost retirement benefits and to restore them to the same economic position they would have enjoyed but for the employer's unlawful conduct). This can occur in multiple ways, [17]

[17] One option that may be available would be payment to employees of the full value of all pension benefits that would have been credited to them but for the City's action, plus payment to them of a sum equivalent to the value of future pension benefits which would have been earned by the affected employees; or institution of an equivalent pension or annuity benefit package that fully compensates employees for the value of all pension benefits that would have been credited to employees but for the City's action, and which continues to provide to employees a monetary benefit equivalent to the value of the retirement benefits.

and I leave to the parties' agreement, or failing that, to a subsequent compliance proceeding, determination of the details of the compensation.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED THAT the City of Springfield shall:

1. Cease and desist from;

    a) Unilaterally changing a 20 hour fully-benefitted position to an 18.5 hour position without health insurance or retirement benefits by reducing work hours below the contractual minimum for receipt of health insurance and retirement benefits;

    b) Failing or refusing to bargain collectively in good faith with the Union about changing a 20 hour fully-benefitted position to a 18.5 hour position without health insurance or retirement benefits through a reduction in work hours;

    c) Dealing directly with bargaining unit employees over mandatory subjects of bargaining;

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

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

    a) Restore the part-time senior clerk position to a 20 hours per week position with retirement and health insurance benefits;

    b) Upon request, bargain in good faith with the Union to resolution or impasse about changing a fully-benefitted 20 hour position to an 18.5 hour position without health insurance or retirement benefits through a reduction in work hours;

    c) Make Lewis, Fontaine, and Talmont whole for any wages and health insurance benefits lost as a result of the unlawful reduction in hours and benefits, including payment of any costs that Lewis, Fontaine, and Talmont incurred to maintain their health insurance and reimbursement for out of pocket medical expenses incurred while employed in their 18.5 hour positions, plus interest on any sums

owed at the rate specified in M.G.L. c.231, s.6I, compounded quarterly;

d) Petition the Springfield Retirement Board to restore Lewis's, Fontaine's and Talmont's lost retirement credit and pay all applicable City monetary contributions. If the Retirement Board is unable to restore their retirement credit, the City must make them whole for the value of their lost retirement benefits;

e) Post immediately in all conspicuous places where members of Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

f) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

TIMOTHY HATFIELD, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE DEPARTMENT OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Department of Labor Relations has determined that the City of Springfield (City) violated Sections 10(a)(5) and, derivatively, (a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: 1) unilaterally changing a fully-benefitted 20 hour part-time position to an 18.5 hour position by reducing work hours below the contractual minimum for receipt of health insurance and retirement benefits bypassing the Union; and 2) bypassing the Springfield Organization of Library Employees (SOLE) and dealing directly with a member of SOLE's bargaining unit over mandatory subjects of bargaining.

Section 2 of M.G.L. Chapter 150E 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; and to refrain from all of the above.

WE WILL NOT unilaterally change a fully-benefitted 20 hour part-time position to an 18.5 hour position by reducing work hours below the contractual minimum for receipt of health insurance and retirement benefits;

WE WILL NOT bypass the Springfield Organization of Library Employees (SOLE) by dealing directly with a member of SOLE's bargaining unit over mandatory subjects of bargaining;

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

WE WILL, upon request, bargain in good faith with SOLE to resolution or impasse about changing a fully-benefitted 20 hour part-time position to an 18.5 hour position by reducing work hours below the contractual minimum for receipt of health insurance and retirement benefits;

WE WILL restore the part-time senior clerk position to 20 hours per week with health insurance and retirement benefits;

WE WILL make Leslie Lewis, Marion Fontaine, and Rose Talmont whole for any wages and health insurance and retirement benefits lost as a result of the unlawful reduction in hours and benefits, including payment of any costs that Lewis, Fontaine, and Talmont incurred to maintain their health insurance while employed in the 18.5 hour positions, reimbursement of out of pocket medical costs paid during the time that they would have been covered by the City's health insurance, and restoration of any lost retirement credit, plus interest on any sums owed at the rate specified in M.G.L. c.231, s.6I, compounded quarterly.

_____ _____

City of Springfield Date

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 Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston MA 02114 (Telephone: (617) 626-7132).