COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of	*	
EVERETT SCHOOL COMMITTEE	*	Case No. MUP-09-5665
and	*	Date Issued:
EVERETT TEACHERS ASSOCIATION	*	August 31, 2016

CERB Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Katherine G. Lev, CERB Member

Appearances:

Matthew R. Tobin, Esq. - Representing the Everett School Committee

Nicole H. Decter, Esq. - Representing the Everett Teachers Association

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On February 16, 2016, a Department of Labor Relations (DLR) Hearing Officer issued a decision dismissing a complaint alleging that the Everett School Committee (Employer or School Committee) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) when it: (1) achieved a reduction in force by laying off ten clinical therapists, without first giving their exclusive representative, the Everett Teachers Association (Union), prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of its

decision; and (2) unlawfully transferred the clinical therapists' work outside of the bargaining unit. The Hearing Officer concluded that the School Committee had a duty to bargain over both the decision and the impacts of its decision to layoff the therapists and to transfer their work to an outside contractor. However, because she found that the parties had negotiated to impasse over these issues, she dismissed the complaint.

The Union filed a timely notice of appeal and supplementary statement with the Commonwealth Employment Relations Board (CERB) seeking to reverse the dismissal of the complaint. The essence of the Union's argument is that the School Committee bargained in bad faith by not giving it adequate notice and an opportunity to bargain, and, thus, the parties could not have reached a lawful impasse when the Employer laid off the clinical therapists and outsourced their duties. More specifically, the Union claims that, by the time the School Committee commenced negotiations regarding the layoffs, the School Committee had already "formulated, vetted and finalized" its outsourcing decision. The Union thus argues that it was presented with a *"fait accompli"* such that further bargaining would have been futile. In a similar vein, the Union argues that, given the events preceding bargaining, the Employer engaged in unlawful "surface bargaining" when it negotiated this issue with the Union. The Union finally argues that the Employer engaged in bad faith bargaining when it improperly attempted to limit its bargaining to impact bargaining, in derogation of the full decision bargaining obligation found here. The School Committee filed a timely responsive supplementary statement, claiming that the Hearing Officer correctly decided and dismissed the matter and that

the Union had failed to cite any factual or legal grounds for disturbing her decision.[1] Following our consideration of the record, the parties' supplementary statements and our review of the Hearing Officer's decision, we affirm the dismissal of the complaint for the reasons set forth below.

FACTS

The parties entered into stipulations of fact and the Hearing Officer made additional findings of fact, which neither party has challenged on appeal. We therefore adopt the stipulations and the findings and provide only the factual background necessary to an understanding of the decision. Further reference may be made to the facts set out in the Hearing Officer's decision, which is reported at 42 MLC 206 (2016) and attached to the slip opinion of this decision.

Therapy Programs and Initial Meetings with Futures

The Employer's special education programs include speech-language, occupational and physical therapy services that are provided by both bargaining unit members and personnel provided by a private vendor called Hart. As of the 2008-2009 school year, there were ten bargaining unit members and fifteen Hart employees who provided therapy services to Everett public school students. Special education services comprise a significant portion of the Employer's budget. In the 2009-2010 school year, more than seventeen percent of the Employer's students received special education services.

[1] The Employer does not contest the Hearing Officer's legal conclusion that it had a duty to bargain in good faith to resolution or impasse over its decision and the impacts of its decision to eliminate the clinical therapists' positions and to transfer their work outside of the bargaining unit.

In January 2009, the Superintendent of Schools Frederick Foresteire (Foresteire), along with other administrators, attended a presentation by representatives of Futures HealthCore, LLC (Futures), a consulting firm that advises school districts on the efficacy and accountability of its special education programs. In March 2009, the Employer engaged Futures to conduct a clinical and education services analysis that included analyzing the efficiency and effectiveness of their therapy services.

In April 2009, Futures made a PowerPoint presentation containing its assessment of the Employer's special education programs. It also proposed a variety of related cost-savings measures, including a projected savings of over $400,000 over two years if the school district entered into an agreement with Futures to outsource all of its therapy services.

Budget Process, FY 2010 Budget and Bargaining

During this same time period, the first quarter of 2009, the Employer was also dealing with a projected budget shortfall[2] and beginning to formulate its proposed FY 2010 budget. In March 2009, Employer and Union representatives, Foresteire, and Union President Kimberly Auger (Auger) met to discuss the potential deficit. The Employer proposed that the Union forego a three percent increase that unit members were scheduled to receive in September 2009.[3] The Union's executive board

[2] In late February, early March 2009, the Employer projected that the FY10 budget could have a $3.1 million shortfall, but as of April 21, 2009, it was facing an approximately $1.9 million shortfall.

[3] At the time of the events at issue here, the Union and the Employer were parties to a collective bargaining agreement (CBA) that was in effect from September 1, 2007 to August 31, 2010.

(Executive Board) declined the proposal, stating that it was not in its members' best interests.

On April 22, 2009, the School Committee's Sub-Committee on Finance (SubFi) met to review and discuss the proposed FY10 budget formulated by Foresteire and other school administrators. This meeting is one of the first steps in the school budget process. The meeting includes a SubFI vote to determine whether to approve each section of the Superintendent's proposed budget and whether to recommend that the nine-member School Committee (full Board) refer the proposed budget to a public hearing. If so, the full Board conducts a public hearing and votes on whether to approve the proposed budget. The goal is to have the School Committee complete this process by June 1, so that the City has enough time to approve the budget as part of its overall budgetary process. It is undisputed, however, that even after the City approves the School Committee budget as part of the municipal budget, the School Committee may still move monies around within the approved budget. For example, teachers who received non-renewal letters in June 2009 for the FY10 school year were recalled in the fall because additional monies were found. Also, several years earlier, the City approved a budget for the next fiscal year that eliminated the pre-school program. However, in mid-September of that fiscal year, the Employer reinstated the pre-school program when monies became available.

At the April 22, 2009 SubFi meeting, Foresteire indicated that the FY10 budget would have a deficit if no changes were made. He made recommendations on how and where it could be reduced, including that the Employer privatize the speech-language

and physical therapists positions. The SubFi ultimately voted to recommend to the full Board to privatize the positions.[4]

Several days later, the Employer's labor counsel, James Spencer Tobin (Tobin) telephoned Massachusetts Teachers Association consultant Charles (Buddy) Stevens (Stevens) to inform him that the Employer was going to reduce the ten therapist positions and asking whether Stevens wanted to sit down and discuss the impacts of this reduction and what could be done to save the positions. Stevens said that the parties had a contract in place and did not want to re-open the contract, but Tobin stated that the parties needed to discuss the matter and whether the Union had suggestions for saving money. Tobin originally proposed meeting on May 7, but the parties had conflicts and the meeting did not take place.

On May 4, 2009, the School Committee voted to hold a public hearing on May 18 regarding the proposed FY10 budget. Foresteire mentioned at that meeting that the proposed budget would include privatizing the clinical therapist positions. There were no other explicit references to the positions at this meeting.

On May 12, Stevens sent an email to Tobin stating:

> I know you called me about the decision to out-source these positions, but the School Committee is scheduled on Monday, May 18 to officially vote on this action, however, they have a duty to bargain with the [Union] first. I am requesting the committee to postpone their vote until they meet with the Association. At the very least they have to do impact bargaining, however, because these positions are covered by the Agreement, bargaining is called for.

[4] The SubFi voted on several other items that day, including voting on each section of the proposed budget.

Tobin notified school administrators about Stevens' email and asked them whether they could change the meeting date, but was told that it could not be changed. Tobin then notified Stevens and suggested that they could continue to discuss the possibility of preserving the therapists' jobs after the vote.

There were no explicit references to outsourcing the clinicians' positions at the May 18 public hearing on the FY10 budget. At the full Board meeting that immediately followed the public hearing, the full Board voted eight to one in favor of the proposed FY10 budget. School Committee member Steven Smith (Smith) was the one negative vote. At the end of the meeting, a motion to notify 151 non-tenured teachers, 39 substitute teachers, 7 clerks, 5 technicians, 14 custodians and 34 teacher aides of layoffs for the 2009-2010 school year was also approved.

The School Committee met next on June 1. Among the items discussed at that meeting was a request that Smith had submitted asking for an explanation of the outsourcing of special education services. Smith said that he wanted to hear comments about what the Employer was trying to do and why. He also indicated that he was not really aware of what was going on, but that some teachers and parents had contacted him to express their satisfaction with the program. In response, Foresteire stated that the Employer had been outsourcing special education services for thirty to forty years. He stated that because of the budget crunch, it had to cut back and look for ways to save money. He also stated:

> Now. . . we have about 13 private therapists working for us because our caseload is so big . . . Now what we're looking at is that the ten therapists that work for us cost $841,000. From our investigation and meeting with people, we estimate we could do that for $400,000 and save $400,000.

Smith indicated that there were a couple of teachers present who could speak to the money-savings issue and moved to open up the meeting to a public hearing so that the teachers could speak. Another School Committee member asked if this issue belonged in a subcommittee and Foresteire replied that the matter needed to be negotiated and was not for the public. More specifically, Foresteire noted that the matter had been referred to the "Subcommittee on Negotiations" and a meeting was scheduled for June 8 at 6:30 PM.[5] The School Committee ultimately voted not to open up the meeting to a public hearing, but did vote in favor of referring the issue to the Subcommittee on Negotiations.

Other School Committee members had questions about the source and accuracy of Foresteire's estimate that $400,000 could be saved by outsourcing. One School Committee member, Parker, asked whether the next step was to talk to the teachers at the Subcommittee on Negotiations, and Foresteire answered yes. He also stated that after negotiations they would come up with a resolution. School Committee member Baniewicz asked whether the people who held the outsourced positions were going to lose their jobs. Foresteire replied that the Union could determine which ones could bump back into the teacher ranks.

On June 2, Stevens sent an email to Tobin stating that the Union was not interested in reopening the contract to discuss the removal of the positions. Tobin sent back an email stating that "the meeting scheduled for Monday [June 8, 2009] was not to reopen the contract on therapist[s] but to discuss the Committee's action on expanding the current use of contract personnel and the resulting effect and to discuss any issues

[5] As indicated below, the parties actually met at the June 8 SubFi meeting.

the [Union] has with this action or alternative suggestions to the Committee's vote." On June 3, Stevens replied to Tobin's email, stating, "OK. I didn't understand that to be the case. Thanks. We will meet on Monday."

The Monday meeting took place at a SubFi meeting on June 8, 2009. Representatives from both parties attended, including members of the SubFi, Forestèire, Tobin, Auger and a number of other Union officials and Executive Board members. At this meeting, the Employer made a presentation about the FY10 budget and a shortfall in funding and detailed the projected cost savings it would achieve by outsourcing the therapists' duties. As it had the previous March, the Employer proposed that the Union forego or delay some of the three percent contractual pay increase scheduled for September 2009. It alternatively suggested that the Union take one to three day furloughs to preserve bargaining unit positions. The Union initially responded that it was willing to place the proposals before its membership. However, when the Employer indicated that concessions would enable it to save ten bargaining unit positions but not necessarily the ten clinical therapist positions, Auger stated that she was unwilling to put the concessions for a vote to its membership unless the Employer guaranteed that the ten clinician positions would be saved. The Employer stated that it was unwilling to make that guarantee because it did not know whether it would have a greater need in the 2009-2010 school years for other positions, i.e., classroom teachers, than the clinical therapist positions. Auger then indicated that she would take the proposals under advisement and confer with the Executive Board.

After the meeting, the Union's Executive Board met and discussed the proposal. They decided not to take the proposal to the membership for a vote because the

Employer would not guarantee that the proposed concessions would save the ten clinical therapist positions.

The parties next discussed the issue on June 15, 2009, when the parties met to discuss some unrelated grievances. Foresteire inquired about the status of the proposals. Auger told him that the Executive Board had voted not to take the proposal to its membership because it had determined that it was not in its members' best interest to grant concessions. Foresteire told the Union that it was then going to have to make a lot of cuts that it had previously talked about. The Union replied that it had gone as far as it could go and that it needed the Employer to maintain all ten clinical therapist positions.

At some point between June 16 and June 23, the parties met again to discuss grievances. The Employer again inquired whether the Union had changed its position regarding the ten clinical therapists or whether the Union had any proposals. Auger replied that the Union's position was unchanged: that the clinical therapists needed to be reinstated. The parties exchanged no proposals at this time and no further meetings were scheduled.

On June 19, 2009, Tobin told Stevens that the Employer was going to issue non-renewal letters to the clinical therapists on June 23, 2009. When Tobin asked Stevens if anything had changed, Stevens replied that the Union needed the clinical therapist positions to be reinstated. Tobin said that it was not going to happen. Stevens replied that the Union had no place to go.

The FY10 budget received final municipal approval on June 22, 2009. By notices dated June 23, 2009, the Superintendent informed the ten bargaining unit therapists

that, effective June 30, 2009, their positions were being terminated and they were being laid off subject to bumping rights based on seniority.[6] The letter explained that the School Committee had voted a FY10 budget on May 18, 2009 that contained the elimination of the therapist positions, along with several additional cost savings. The next paragraph of the letter then stated:

> The School Committee subsequently met with the [Union] and entered into discussions with the specific goal of reinstating the therapist positions. Cost-saving suggestions proposed by the School Committee were considered by the Everett Teachers Association but rejected. No alternative ideas were presented by the Association.

From late December 2008 to July 2009, the Employer had discussions with three different companies that provided therapist staffing services, about reducing the costs of its therapy services, including Futures and Hart. As of July 9, 2009, the Employer was still talking to representatives of both Futures and Hart about cost savings, but finalized the contract with Futures on July 23, 2009.

The Employer and the Union spoke one more time about this issue in September or October 2009, but neither party made any proposals or counterproposals. The Union filed this charge in October 2009.

Opinion[7]

We have consistently held that impasse in negotiations occurs only when "both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked."

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[6] Three of the therapists exercised their bumping rights and worked for the Employer as teachers in the 2009-2010 school year.

[7] The CERB's jurisdiction is not contested.

Town of Plymouth, 26 MLC 222, 223, MUP-1465 (June 7, 2000). The ultimate test remains whether there is a likelihood of further movement by either side and whether the parties have exhausted all possibilities of compromise. City of Boston, 28 MLC 175, 184, MUP-1087 (November 21, 2001).

Here, the Hearing Officer found that the parties had reached impasse based on the Union's failure, after five meetings, to change its position or make any proposals or counterproposals about alternative means to save money rather than laying off the therapists and outsourcing their duties. In concluding that the parties were deadlocked and that there was no likelihood of further movement, the Hearing Officer relied in particular on the fact that the Union never wavered from its position that all ten therapists needed to be reinstated, and the Union's statements on two occasions that it had nowhere to go and that it had gone as far as it could with respect to the Employer's proposal.

The Union does not dispute the facts leading to this conclusion, nor does it claim that there was still an opportunity for further bargaining beyond that date. Rather, repeating many of the arguments it made to the Hearing Officer, it claims that the Employer engaged in bad faith bargaining because, by the time the parties actually sat down to bargain, the decision to outsource was a *fait accompli* and, at most, the Employer was willing to discuss the impacts of its decision, but not the decision itself. [8]

[8] The doctrine of *fait accompli* is most often employed by a union as a defense to an employer's affirmative defense that the union has waived its right to bargain by its inaction. See, e.g., Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999). In its supplementary statement, the Employer clarifies that it does not raise that defense here. Nevertheless, the Union argues that the Employer presented it with a *fait accompli* as part of its overall contention that the Employer bargained in bad faith, i.e., by seeking to bargain only after the decision to change employees' terms and conditions was made.

For all the reasons stated in the decision, we agree with the Hearing Officer that the Union was not presented with a *fait accompli* when the parties first met to bargain on June 8, 2009. In making this argument, the Union relies on the series of steps that the Employer took prior to that date regarding the FY10 school budget, including the April 22 SubFi meeting and the May 18 full Board meeting approving a budget that reflected cost savings from outsourcing the therapists. However, our case law reflects that it is not a per se violation of the Law for an employer to give a union notice and an opportunity to bargain after the budget process is complete. Rather, in cases where, as here, bargaining does not begin until after a budget is formulated, the CERB looks at the record to determine whether meaningful bargaining could nevertheless still take place or whether the employer has committed to a course of action. Town of Weymouth, 40 MLC 253, 254, MUP-10-6020 (March 10, 2014) (citing Scituate School Committee, 9 MLC 1010, 1013, MUP-4563 (May 27,1982); City of Cambridge, 5 MLC 1291, MUP-2799 (September 27, 1978)). Here, we agree with the Hearing Officer that the following facts in the record demonstrate that meaningful bargaining could have taken place, despite the Employer's discussions with Futures and the April 22 and May 18 budget votes. The most compelling basis for this conclusion is the uncontested evidence showing that the Employer retained flexibility to move money around within its budget even after receiving School Committee and municipal approval. The following factors are persuasive as well.

Because this would constitute bad faith bargaining if the facts supported this assertion, it is in this context that we address the Union's argument that the Hearing Officer incorrectly concluded that it was not presented with a *fait accompli* when bargaining began on June 8, 2009.

First, even though the Employer had been considering outsourcing since February 2009, it was not until the end of July 2009 that it actually entered into a contract with Futures to do so. This was three months after the Employer first notified the Union on April 27 that it was considering outsourcing and asked to meet to consider ways to save the positions. Second, as of April 22, the SubFi had only voted to *recommend* to the full School Committee that the positions be outsourced; the School Committee had yet to vote. Third, just five days after the April 22 SubFi vote, the Employer's counsel reached out to the Union to bargain and specifically asked what could be done to save the positions. The Employer reiterated this request for a proposal or counterproposal from the Union on three more occasions in June 2009 before issuing the layoff letters on June 23, but received no response.

This outreach stands in sharp contrast to the cases the Union relies upon, Town of Weymouth, 40 MLC at 254, and City of Cambridge, 5 MLC at 1291-1292, whose facts do not reflect that the employer made any effort to negotiate with the union once it announced its decision. Rather, the circumstances of this case more closely parallel those in Scituate School Committee, where, in concluding that the employer's decision to eliminate a paid lunch period was not irrevocable even after the school committee voted in favor of eliminating the program, the CERB took into account the fact that a school committee member expressed concerns over employees' contractual rights after the vote was taken. 9 MLC at 1012-1013 (distinguishing City of Cambridge, 5 MLC 1291).

City of Weymouth is also distinguishable in terms of timing. There, the CERB found that there were only eleven days between the time that the union was notified

about layoffs of the traffic supervisors and the date they took effect, thereby contradicting the employer's claim that it had over two months to bargain this issue with the union. 40 MLC at 254. Here by contrast, there were over two months between the time the Union first received notice of the layoffs and the date the layoff letters were sent out. The timing of this case is therefore comparable to the timing in County of Middlesex, 6 MLC 2056, 2058, MUP-3449 (March 31, 1980), where an employer's announcement that it was eliminating a summer daycare program was not yet a *fait accompli* where it was announced three months in advance of the actual implementation of the decision.

For all of these reasons, we agree with the Hearing Officer that the Employer did not present the decision to layoff and outsource the ten clinical therapists as a *fait accompli.* We now turn to the Union's remaining arguments, that the Employer engaged in surface bargaining and improperly limited its bargaining to impacts only.[9]

Surface Bargaining

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 to merely shadow box to an impasse." Bristol County Sheriff's Dep't, 32 MLC 159, 160-161, MUP-09-2971 (March 13, 2003), (citing Newton School Committee, 4 MLC 1334, MUP-2501 (H.O.) (October 4, 1977), *aff'd*, 5 MLC 1016 (June 2, 1978), *aff'd sub nom.* School Committee of Newton v. Labor

[9] Although the Union did not specifically make these arguments to the Hearing Officer, they are very closely related to the Union's *fait accompli* arguments and we address them as part of the Union's overarching contention that the Employer bargained in bad faith.

Relations Commission), 388 Mass. 557 (1983)(internal citations omitted). When a public employer, for example, rejects a union's proposal, tenders its own, and does not attempt to reconcile the differences, it is engaged in surface bargaining. Bristol County Sheriff's Dep't, 32 MLC at 161; Town of Saugus, 2 MLC 1480, 1484, MUP-591 (May 5, 1976)(additional citations omitted). A categorical rejection of a union's proposal with little discussion or comment does not comport with the good faith requirement. Revere School Committee, 10 MLC 1245, 1249, MUP-5008 (September 29, 1983). Also, a failure to make any counterproposals may be indicative of surface bargaining. Local 466, Utility Workers of America, AFL-CIO, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981).

The Union's surface bargaining argument flows directly from its *fait accompli* argument. Again relying on the April 22 SubFi vote and the actions taken and statements made at the May 18 and June 1 School Committee meetings, the Union argues that because the Employer had already made its mind up to outsource the positions, its offers to bargain after that date were "hollow."

We reject the Union's arguments with respect to the April 22 and May 18 meetings for the reasons set forth above. We also reject the Union's argument that Foresteire and School Committee members made representations to those assembled at the June 1 meeting that the decision to outsource therapy services did not require bargaining. Although Foresteire told School Committee members that the outsourcing decision would not have to go out to bid and that the Union would decide which outsourced positions could bump back into teachers' ranks, he repeatedly indicated, without caveat, that the outsourcing issue should and would be referred to a

negotiations subcommittee. Further, the June 1 meeting marked the first time that the Superintendent had discussed the outsourcing plan in any detail with the School Committee, and the discussion was initiated by a School Committee member for the purpose of learning more about the program. It is not surprising, therefore, that many of the questions and answers were couched in terms of what would happen if the outsourcing were to occur.

We also reject the Union's claims that the Employer's refusal to guarantee that concessions would save clinical therapist positions once the parties sat down to negotiate, demonstrates that the Employer was engaging in what the Union refers to as "bait and switch" tactics, i.e., promising to engage in decision bargaining but then refusing to do so. First, the record does not show that the Employer unequivocally refused to retain these positions; rather it refused to issue any guarantees because it did not know whether it would have a greater need in the 2009-2010 school year for other positions. Second, we decline to treat this response as a categorical rejection of the Union's proposal or an effort to "shadow box to impasse" where the Employer asked the Union on three subsequent occasions if it had changed its mind and solicited counterproposals, but received none. Bristol County Sheriff's Department, 32 MLC at 160-161. For these reasons, after examining the entire course of bargaining, we are not persuaded by the Union's claim that the Employer did not seriously try to reach agreement.

Impact Bargaining

For similar reasons, we reject the Union's argument that, by its statements at the June 1 meeting and its actions at the June 8 negotiation session, the Employer

unlawfully tried to limit its bargaining to impacts only. Again, there were ample indications in the record that the Employer was willing to engage in substantive discussions about alternatives to its decision to outsource the clinical therapist positions but the Union chose not to engage in any discussions when it failed to make any suggestions or counterproposals after the parties' June 8 meeting.

Conclusion

For the foregoing reasons, and those stated in Hearing Officer's decision, we affirm the decision and dismiss the complaint.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, CERB MEMBER

KATHERINE G. LEV, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.