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

In the Matter of	*	
	*	
TOWN OF WINCHESTER	*	Case No. MUP-13-3289
	*	
and	*	Date Issued: June 23, 2016
	*	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 888	*	
	*	

CERB Members Participating:

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

Appearances:

John Magner, Esq.	-	Representing SEIU, Local 888
Laurence J. Donoghue, Esq.	-	Representing the Town of Winchester

CERB Amended Decision on Appeal of Hearing Officer's Decision[1]

Summary

On June 1, 2015, a Department of Labor Relations (DLR) Hearing Officer issued a decision holding that the Town of Winchester (Town) did not violate Section 10(a)(5) of M.G.L. c. 150E (the Law) when it re-hired a recently-retired employee to fill a 12-hour temporary clerical position in the Office of the Assessor without first giving the Service Employees International Union, Local 888 (Union) prior notice and an opportunity to

[1] This decision was originally issued on June 20, 2016. The CERB amends it to add footnote 4, which was erroneously omitted from the original decision.

bargain over the impacts of the decision.[2] The Union filed a timely appeal of the Hearing Officer's decision and a supplementary statement. The Town filed a responsive supplementary statement.

On appeal, the Union contends that the Hearing Officer erred when he dismissed the case on grounds that the Union had failed to show that the Town's staffing decision affected bargaining unit members' terms and conditions of employment and, therefore, the Town had no impact bargaining obligation. Specifically, the Union asserts that the Town's actions impacted Union members by depriving them of posting and bidding rights and overtime opportunities. Following our consideration of the parties' supplementary statements and our review of the Hearing Officer's decision, we summarily affirm the decision for the reasons set forth below.[3]

Opinion

It is well established that if a managerial decision has an impact upon or affects a mandatory subject of bargaining, negotiation over the impact is required. City of Worcester v. Labor Relations Commission, 438 Mass. 177, 185 (2002) (citing Boston v. Boston Police Patrolmen's Association, 403 Mass. 680, 685 (1989)). Here, there was no dispute that the Town had the managerial right to make staffing decisions. Rather, the issue before the Hearing Officer was whether the Town was obligated to bargain over the impacts of its decision to approve the temporary appointment of Alice Alford (Alford) to a PC II position (grade 27) in the office of the Assessor on a temporary status

[2] The full text of the Hearing Officer's decision appears at 41 MLC 352, and is attached to the slip opinion of this decision.

[3] We adopt the factual findings of the hearing officer. With the exception of the finding discussed in footnote 4, neither party has challenged them on appeal.

up to 12 hours per week. The Hearing Officer found that the decision to re-hire Alford, who had retired as a full-time PC II (grade 27) in the Officer of the Assessor a few months earlier, had no impact on the hours of the two other bargaining unit members who worked in the Office of the Assessor or caused layoffs. The Hearing Officer further found that the Union had presented no evidence regarding Alford's seniority[4] or that the decision to re-hire Alford otherwise changed any terms and conditions of employment obligating the Town to bargain. He therefore dismissed the complaint.

On review, the Union does not dispute the Hearing Officer's finding that the decision to re-hire Alford did not impact her co-workers' hours or cause layoffs. Rather, it contends that because the parties' collective bargaining agreement (CBA) states that "the most senior applicant who meets the job applications shall receive the promotion," the Town's failure to post the new job in accordance with the CBA impacted bargaining unit members by depriving them of the opportunity to bid on a job that they might have been entitled to and might better fit their lifestyle.

The difficulty with the Union's argument is that it presumes that the Town violated the parties' CBA by not posting the position. However, whether or not the Town complied with its contractual obligations was never the issue in the case. Neither the charge nor the complaint alleges that the Town repudiated the CBA, and this issue was neither litigated before the Hearing Officer nor decided by him. Rather, the issue that

[4] The Union disputes this finding and contends for the first time on review that Alford did not retain any seniority when she retired. We decline to consider this argument because the CERB does not consider facts presented for the first time on review. Joseph R. Anderson & others v. CERB, 73 Mass. App. Ct. 908, 909, n. 7 (2009)(citing with approval CERB's policy of not considering information raised for the first time on reconsideration).

was before the Hearing Officer and which he decided was whether the Town violated the Law by not bargaining over the impacts of its decision re-hire Alford. The Hearing Officer properly concluded that the burden of proving that this decision impacted bargaining unit members' terms and conditions of employment rested with the Union and that the Union had failed to meet this burden. See Town of Seekonk, 14 MLC 1725, 1730-31, MUP-6131, 6132 (May 10, 1988). The Union's belated attempt to argue that there were bargainable impacts that flowed from a contract violation that has not even been established provides no basis to disturb the Hearing Officer's well-reasoned and well-supported decision.

Accordingly we affirm the decision of the Hearing Officer 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.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
TOWN OF WINCHESTER	*	Case No. MUP-13-3289
and	*	Date Issued: June 1, 2015
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 888	*	

Hearing Officer:

Zachary See, Esq.

Appearances:

John Magner, Esq.	-	Representing the Service Employees International Union, Local 888
Laurence Donoghue, Esq.	-	Representing the Town of Winchester

HEARING OFFICER DECISION

The issue in this case is whether the Town of Winchester (Employer or Town) violated Section 10(a)(5) and derivatively, 10(a)(1) of M.G.L. c. 150E (the Law) by failing to bargain over the impacts of unilaterally creating and filling a Service Employees International Union, Local 888 (SEIU or Union) bargaining unit position. For the reasons explained below, I find that the Employer did not violate the Law by creating and filling the Principal Clerk II (PC II) bargaining unit position without providing the Union with notice and an opportunity to bargain to resolution or impasse over impacts of that decision on terms and conditions of employment.

Statement of the Case

On November 21, 2013, the Union filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR), alleging that the Employer violated Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith. A duly-designated DLR investigator investigated the Charge and issued a Complaint of Prohibited Practice on June 30, 2014, alleging that the Employer failed to bargain in good faith by creating and filling the PC II position without giving the Union prior notice and an opportunity to bargain to resolution or impasse over its impacts on employee wages, hours, and other terms and conditions of employment. The Employer filed its Answer to the Complaint on December 11, 2014.

I conducted a hearing on April 15, 2015, at which both parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The Union and the Employer filed their post-hearing briefs by May 19, 2015. Based on the record, which includes witness testimony 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 Town is a public employer within the meaning of Section 1 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 certain clerical employees employed by the Town.

Findings of Fact

The Union and the Employer entered into a collective bargaining agreement (Agreement), effective from July 1, 2010 to June 20, 2013. Article I, "Recognition," Section 3 of the Agreement states:

> The Town agrees not to negotiate with any other representatives other than the Union and agrees to negotiate with the Union with respect to and prior to any changes in wages, hours, standards of productivity and performance and any other terms and conditions of employment of the members of the unit.

Article III, "Management Rights," of the Agreement, includes the following language:

> It is herein agreed that except as specifically and directly abridged by specific provision of this Agreement, the Employer and its agents, including the Department Heads, retain all rights and power that they may have or may hereafter be granted by law in managing the Departments and directing the workforce.
>
> Said rights and powers include but are in no way to be construed as limited to: . . . the right to determine the extent to which work will be performed by members of the bargaining unit; ... to determine hours for and the number of employees required at any location; ... to assign any added, lessened or differed work or responsibility to; ... and to introduce new or to change existing operational methods ...

Article XV, "Posting and Bidding," of the Agreement states:

> When the Town proposes to fill a bargaining unit position it shall cause notice thereof to be prominently posted, listing the pay, duties and qualifications of the position, such posting to be consistent with the requirements of the Town Charter. Said notices of vacancies shall also be forwarded to the Union President for review prior to posting.
>
> The most senior applicant who meets the job description and qualifications shall receive the promotion.

Article XVI, "Job Security/Transfers/Assignments," of the Agreement includes the following language:

> It is recognized that the final decision of assignments shall rest solely with the employer whose decision shall be final and binding on all parties and not subject to the grievance and arbitration procedure. It is further recognized that employees may be temporarily assigned to other

assignments when the needs of the Town require said temporary assignments.

The Town employed three bargaining unit employees in the Office of the Assessor prior to May 2013: Alice Alford (Alford), a full-time PC II (grade S-27); Gina Capone (Capone), a full-time PC II (grade S-27); and Beth O'Connell (O'Connell), a part-time (19.5 hours) clerk (grade S-25). In May 2013, Alford retired after approximately forty three years of service with the Town. Capone continued to work full-time in a PC II position and O'Connell continued in her part-time position working approximately 19.5 hours a week. O'Connell occasionally worked full-time to fill in when Capone was out of the office on leave before and after May 2013.

On September 20, 2013, Union Regional Representative Bill Storella (Storella) wrote Town Manager Richard Howard (Howard) requesting the status of the Senior Records Clerk (grade S-27) position in the Assessor's office.[1] Storella wrote:

> It is my understanding that there have been various vacancies in that office since May of 2013. Please inform [the Union] of the Town's intentions for the Assessor's office. If there are plans to deviate from the current structure, the Union reserves their right to bargain over any changes of working conditions under Massachusetts General Law 150E.

On September 27, 2013, Howard wrote to Storella:

> The Assessor will be filling the current vacant position on a temporary basis from within the department. He will also be filling the part-time position on a similar basis. Over the course of the coming months, we will be evaluating the operations within this department with the possibility of restructuring the positions. We will be glad to keep you updated on our progress in this matter.

Howard and Storella also spoke on the phone around this time and reiterated their written positions.

On October 10, 2013, the Town approved the temporary appointment of Alford to the PC II position (grade S-27) on a temporary status up to 12 hours per week. Capone's hours did not change as a result of Alford's appointment and there were no layoffs in the bargaining unit as a result of Alford's appointment. There is no evidence that Alford's re-hire impacted O'Connell's work hours.[2]

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment that involves a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). Decisions about the nature and level of services a public employer provides lie within the exclusive prerogative of management and are not mandatory subjects of bargaining. Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999).

There is no dispute that the Town has a right to staff the Assessor's Office. Although the Town's staffing decision does not constitute a mandatory subject of bargaining, the Law requires the Town to negotiate with the Union over the impacts of that decision on employees' terms and conditions of employment. School Committee of Newton, 388 Mass. at 564; see also Secretary of Administration & Finance v.

[1] The parties refer to the PC-II (grade S-27) bargaining unit position as "Senior Records Clerk," and "Administrative Secretary II."

Commonwealth Employment Relations Board (CERB), 74 Mass. App. Ct. 91, 96 (2009) (stating "[w]here a non-negotiable decision may be implemented in various ways, the public employer may be required to engage in impact bargaining with the union.") However, where there is no evidence that a decision impacts terms and conditions of employment of bargaining unit members, there is no impact bargaining duty on the employer. Chief Justice for Administration & Management of Trial Court v. CERB, 79 Mass. App. Ct. 374, 386 (2011) (finding that the employer was not required to engage in impact bargaining with the union before hiring nonunion per diem staff to address staff shortage since there was no evidence that union members had lost work as a result of employer's decision).

The issue here is whether the Town had an obligation to bargain over impacts of its staffing decision on bargaining unit member's terms and conditions of employment.

The Union argues that the Town violated the Law by not providing an opportunity to bargain over the impact of the Town's staffing decision. The Union further argues that the hiring back of a retired employee had the clear effect of taking away posting and bidding rights and overtime opportunities from other Union members.

The Town argues that the Town had the statutory and contractual right to decide to hire another bargaining unit member in the Assessor's Office, and that the Town had no further obligation to bargain because the Union did not identify any impacts on bargaining unit members' wages, hours, or other terms and conditions of employment as a result of the Town's decision to re-hire Alford.

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[2] The parties did not submit a joint exhibit 6 listed as "appointment letter of Beth O'Connell dated October 9, 2013."

I agree with the Town. The Union did not show that bargaining unit members' terms and conditions of employment were impacted by the Town's decision to re-hire Alford. The Union's witness, Capone, testified that her work hours in the Assessor's Office did not change as a result of Alford's re-hire. The Union did not show that Alford's re-hire impacted O'Connell's work hours or any layoffs in the bargaining unit. The Union provided no evidence regarding Alford's seniority when the Town re-hired her in October 2013 and no evidence identifying how her re-hire impacted other bargaining unit members. The Union failed to show that the decision to re-hire Alford changed any terms and conditions of employment obligating the Town to bargain.

The Union argued for the first time in its post-hearing brief that hiring back a retired employee took away posting and bidding rights and overtime opportunities from other Union members. However, the Union presented no evidence to show how the Town's decision to re-hire Alford impacted posting and bidding rights and overtime opportunities of other members. While the Union argues that through impact bargaining, the Union could have influenced the hiring process, length of time the position would be filled, scope of work performed by the person hired, rate of pay, amount of extra hours the person hired would be allowed to work, and "many other things," the Union provided no evidence to show how the decision to re-hire Alford impacted any of these terms and conditions of employment.

The Town correctly states that the Union bears the burden of affirmatively proving the impact of an employer's change in staffing and that the DLR will not infer such an impact based solely on evidence that staffing has changed. Town of Seekonk, 14 MLC 1725, 1730-31, MUP-6131 (May 10, 1988). Hypothetical impacts do not justify

impact bargaining. See Chief Justice for Administration & Management of Trial Court v. CERB, 79 Mass. App. Ct. at 387 (finding that a potential erosion of bargaining unit work does not justify impact bargaining where no bargaining unit members lost work as a result of employer's decision to hire retirees to perform work that would've otherwise gone undone). Here, there is no dispute that the Town had the right to staff the Office, and there is no evidence of how that decision impacted bargaining unit members' terms and conditions of employment. Therefore, the Union did not prove that the employer had an impact bargaining duty regarding its decision to re-hire Alford.

Conclusion

Based on the record and for the reasons stated above, I conclude that the Town did not violate Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by failing to provide the Union notice and an opportunity to bargain over impacts of its staffing decision on terms and conditions of bargaining unit members' employment.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

/s/
ZACHARY T. SEE, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.