

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF BILLERICA

and

BILLERICA MUNICIPAL
EMPLOYEES ASSOCIATION

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* Case No. MUP-14-4234

* Date Issued: February 23,2017

Hearing Officer:

Brian K. Harrington, Esq.

Appearances:

Daniel C. Brown, Esq. - Representing the Town of Billerica

Gary H. Nolan, Esq. - Representing the Billerica Municipal
Employees Association

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

1 The issues in this matter are whether the Town of Billerica (Town) violated
2 Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General
3 Laws Chapter150E (the Law) by failing to bargain in good faith by deciding to
4 eliminate the second, third and weekend shifts in its Waste Water Treatment
5 Plant (Plant) without bargaining to resolution or impasse about the impacts of
6 the decision on employees' hours of work, workweek schedule and shift
7 differential pay. Based on the record and for the reasons explained below, I
8 conclude that the Town did not fail to bargain in good faith with the Billerica

1 Municipal Employees Association (Union) by failing to bargain to
2 resolution or impasse about the impacts of the decision to eliminate the second,
3 third and weekend shifts on employees' hours of work, workweek schedule and
4 shift differential pay. Thus, the Town did not violate Section 10(a)(5) and,
5 derivatively, Section 10(a)(1) of the Law in the manner alleged.

6 STATEMENT OF THE CASE

7 On January 5, 2015, the Union filed a two-count charge with the
8 Department of Labor Relations (DLR) alleging that the Town had violated Section
9 10(a)(5) and derivatively, Section 10(a)(1) of the Law.¹ Following an
10 investigation, the DLR issued a Complaint of Prohibited Practice and Partial
11 Dismissal on May 28, 2015, alleging that while the Town had not violated Section
12 10(a)(5) of the Law by changing from a three-shift operation to a one-shift
13 violation without bargaining with the Union, it did violate Section 10(a)(5) and
14 derivatively, Section 10 (a)(1) of the Law by failing to bargain with the Union to
15 resolution or impasse over the impacts of that decision. The Union did not
16 request review of the DLR's dismissal of its allegation that the Town unlawfully
17 failed to bargain over the decision to eliminate shifts. The Town filed an Answer
18 to the Complaint on April 13, 2016.

19 I conducted one day of hearing on April 14, 2016, at which both parties
20 had the opportunity to be heard, to examine witnesses and to introduce
21 evidence. The parties filed post-hearing briefs on or about July 15, 2016. Upon

¹ The Union withdrew its second count, which dealt with the starting salary rates of two Union members, at the in person investigation.

1 review of the entire record, including my observation of the demeanor of the
2 witnesses, I make the following findings of fact and render the following decision.

3 FINDINGS OF FACT

4 The Union is the exclusive bargaining representative for all employees of
5 the Town's Public Works Department, including all bargaining unit members who
6 work at the Waste Water Treatment Plant. Sometime in mid-2013, the Union
7 became aware of the Town's plan to move to a so-called "one shift" operation at
8 the Plant. Informal discussions of this matter took place between the Union and
9 Town representatives from this point until eventual implementation. The first step
10 in moving to a one-shift operation was to obtain the required approval from the
11 Massachusetts Department of Environmental Protection (DEP). DEP approved
12 the Town's one-shift plan on January 7, 2014. Negotiations for a successor
13 collective bargaining agreement between the parties had been concluded
14 through mediation with the DLR sometime prior to this date.

15 The Town announced to the Waste Water Treatment Plant staff by memo
16 dated January 8, 2014, that changes in the hours of work and workweek
17 schedules, including the elimination of 2nd, 3rd and weekend shifts would be going
18 into effect. In this memo, the Town notified the Union that employee working
19 conditions would be impacted by the change to a one-shift operation. After the
20 Town issued this memo, the Union requested to bargain over this issue.

21 The Town and the Union met on March 11 and June 9, 2014, to bargain
22 the proposed changes to the work schedule. Initially, the Union's main concern

1 was to avoid layoffs. The Town responded that no Union members would be laid
2 off as a result of the shift change. Other topics raised by one or both sides and
3 discussed at these sessions included shifts and hours of work (namely the
4 elimination of the 2nd, 3rd and weekend shifts), the resulting non-payment of shift
5 differentials, salaries, job duties/descriptions, promotional opportunities and
6 overtime eligibility and distribution methods. The Town altered some job duties,
7 increased the number of promotional opportunities and informed the Union that a
8 dormant contract provision for on-call pay would now be utilized. The Town also
9 changed the manner in which it commenced the one-shift operation due to the
10 discussions which took place during its impact bargaining sessions with the
11 Union.

12 The Town originally intended to move to the one-shift system effective
13 July 1, 2014. After the June 9 meeting, the Union requested another meeting,
14 which was scheduled for July 1, 2014. By memo dated June 13, 2014, the Town
15 notified the Union that the one-shift implementation would be delayed to
16 sometime later in the month of July.² At the July 1, 2014 meeting, the parties
17 further discussed the issues identified above. Throughout the negotiation
18 sessions, and even at the hearing, the Union took the position that the change to
19 a one-shift operation should not take place. The Union did not change its position
20 or make any proposals or counterproposals about the impacts of a one-shift

² The record is unclear whether the delayed implementation was due to the Union's request for another meeting, other operational issues or some combination of both factors.

1 operation at any of the three meetings. At the conclusion of the July 1, 2014,
2 session the Union did not request another meeting date. On July 25, 2014, the
3 Town notified the Union that the one-shift operation would commence on August
4 11, 2014. The Union did not request any further bargaining.

5 OPINION

6 The issues in this matter are whether the Town violated Section 10(a)(5)
7 and, derivatively, Section 10(a)(1) of the Law by failing to bargain with the Union
8 to resolution or impasse over the impacts of the decision to move to a one-shift,
9 Monday through Friday schedule from a twenty-four hour/seven day a week work
10 schedule. The specific question is whether the Union and the Town were at
11 impasse upon the conclusion of their three meetings on the subject.

12 The Commonwealth Employment Relations Board (CERB) has
13 consistently held that impasse in negotiations occurs only when "both parties
14 have negotiated in good faith on all bargainable issues to the point where it is
15 clear that further negotiations would be fruitless because the parties are
16 deadlocked." Town of Plymouth, 26 MLC 222, 223, MUP-1465 (June 7, 2000).
17 The ultimate test remains whether there is a likelihood of further movement by
18 either side and whether the parties have exhausted all possibilities of
19 compromise. City of Boston, 28 MLC 175, 184, MUP-1087 (November 21, 2001).

20 I confine my analysis of whether the parties reached impasse in this matter
21 to the narrow question of bargaining over the impacts of the decision to move to a
22 one-shift operation. Although the fact that the parties had met only three times

1 could demonstrate that the parties had engaged merely in surface bargaining, the
2 circumstances of this case lead me to no such conclusion.

3 Here, I rely on the Union's failure, at any point during the three meetings, to
4 change its position or make any proposals or counterproposals about alternative
5 means or methods regarding the impacts of a one-shift operation. Everett School
6 Committee, 43 MLC 55, MUP-09-5665 (August 31, 2016). The Union defends
7 this action by claiming that the decision to move to a one-shift operation was
8 presented as a *fait accompli*. It is correct in this claim, however the investigator in
9 this matter dismissed the Union's claim that the decision to move to a one-shift
10 operation imposed a bargaining obligation upon the Town. Where there is
11 already a ruling that the Town's decision was not in violation of the Law since no
12 bargaining obligation attached, the Union's contention is misplaced. Additionally,
13 I do not find that the impacts of the decision were imposed as a *fait accompli* as
14 well.

15 Moreover, the Union was free in the course of the bargaining sessions to
16 make proposals regarding the impacts of the one-shift operation regardless of
17 whether it genuinely believed them to be decisional or impact bargaining
18 sessions. For example, the Union could have offered to take a reduced value of
19 the now unpaid shift differential benefit and transfer that to another contract item
20 which would benefit some or all members. The Union's failure to propose a
21 single alternative solution points to the conclusion that the parties were at
22 impasse.

1 The Union next contends that the Town was merely engaged in surface
2 bargaining. A party engages in surface bargaining "if, upon examination of the
3 entire course of bargaining, various elements of bad faith bargaining are found,
4 which considered together, tend to show that the dilatory party did not seriously
5 try to reach a mutually satisfactory basis for agreement, but intended to merely
6 shadow box to an impasse." Bristol County Sheriff's Dep't, 32 MLC 159, 160-161,
7 MUP-09-2971 (March 13, 2003) (citing Newton School Committee, 4 MLC 1334,
8 MUP-2501 (H.O., October 4, 1977), *aff'd*, 5 MLC 1016 (June 2, 1978), *aff'd sub nom.*
9 School Committee of Newton v. Labor Relations Commission), 388 Mass. 557
10 (1983)(internal citations omitted)).

11 When a public employer rejects a union's proposal, tenders its own, and does
12 not attempt to reconcile the differences, it is engaged in surface bargaining. Bristol
13 County Sheriff's Dep't, 32 MLC at 161; Town of Saugus, 2 MLC 1480, 1484, MUP-
14 591 (May 5, 1976) (additional citations omitted). A categorical rejection of a
15 union's proposal with little discussion or comment does not comport with the good
16 faith requirement. Revere School Committee, 10 MLC 1245, 1249, MUP-5008
17 (September 29, 1983). Also, a failure to make any counterproposals may be
18 indicative of surface bargaining. Local 466. Utility Workers of America, AFL-CIO,
19 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981). Here, the Town solicited
20 counterproposals from the Union throughout the process, and it changed its
21 position on certain proposals during the negotiations. For example, the Town
22 altered some job duties, increased the number of promotional opportunities,

1 revived a dormant contractual on-call pay provision, and changed the manner in
2 which it began the one-shift operation. Conversely, the Union failed to make
3 any suggestions or counterproposals after the parties' July 1 meeting. Thus, the
4 evidence demonstrates that the Town did not engage in surface bargaining, but
5 bargained in good faith to impasse over the impacts of the decision to change to
6 one-shift operation.

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CONCLUSION

Based on the record and for the reasons explained 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 bargain to resolution or impasse with the Union over the impacts of its decision to move to a one-shift operation.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



BRIAN K. HARRINGTON, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.19, 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.