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

In the Matter of	*	
TOWN OF BILLERICA	*	Case No. MUP-14-4234
and	*	Date Issued: December 26, 2017
BILLERICA MUNICIPAL EMPLOYEES ASSOCIATION	*	

Board Members Participating:

Marjorie F. Wittner, CERB Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Daniel C. Brown, Esq.	-	Representing the Town of Billerica
Gary H. Nolan, Esq.	-	Representing the Billerica Municipal Employees Association

CERB Decision on Review of Hearing Officer's Decision

Summary

On February 23, 2017, a Department of Labor Relations (DLR) Hearing Officer dismissed a complaint alleging that the Town of Billerica (Town or Employer) had violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by failing to give the Billerica Municipal Employees Association (Union or BMEA) notice and an opportunity to bargain to resolution or

impasse over the impacts of its decision to eliminate the second, third and weekend shifts in its Waste Water Treatment Plant (Plant).[1] Based on the record of the one-day hearing, the Hearing Officer found that the Employer had given the Union the requisite notice and an opportunity to bargain. He further found that, after three meetings in which the parties discussed certain impacts of the change on bargaining unit members' terms and conditions of employment, the Union made no proposals or counterproposals and never deviated from its position that the reorganization should not take place. He thus determined that the parties had bargained to impasse and that the Employer did not violate the Law when it subsequently eliminated all but the Plant's first shift in August 2014.

The Union filed a timely request for review to the Commonwealth Employment Relations Board (CERB), claiming that the Hearing Officer overlooked certain key facts and made errors of Law. Specifically, the Union argues that the facts do not support a conclusion that the parties bargained in good faith to impasse. Rather, it claims that the totality of the Employer's conduct, including, among other things, a memo that the Plant superintendent wrote to the Union in 2015, supports its contention that the Employer engaged in surface bargaining. The Employer filed a response to the request for review asserting that the decision was correctly decided.

We have reviewed the record and affirm the Hearing Officer's decision but modify his reasoning. We begin by briefly reviewing the salient facts.

[1] The Hearing Officer's decision is reported at 43 MLC 195 (2017).

Background

Notice of Shift Elimination

On August 26, 2013, Plant Superintendent Lorraine Sander (Sander) sent a memo to "All Plant Staff" informing them that there would be an article at the Fall Town meeting seeking to fund the costs necessary to run the Plant on one shift only. The Plant had previously been staffed by employees working first, second, third and weekend shifts on a 24/7 schedule. The memo stated that "given the number of things that remain to be done, it is most likely that nothing is going to change until sometime in 2014."

On October 22, 2013, Sander submitted a staffing plan to the Massachusetts Department of Environmental Services that outlined details for moving the Plant to a one-shift operation. There were a number of documents attached to the plan, including a proposed organization chart. On January 7, 2014, the Massachusetts Department of Environmental Protection (DEP) approved the plan. The next day, January 8, 2014, Town Manager John C. Curran (Curran) sent a memo to "Plant Staff" regarding "Changes to Wastewater Division" (Curran Memo). This memo stated in pertinent part:

> In accordance with MLG 150E [sic], the Town is providing notice to the Billerica Municipal Employees Association that working conditions will be impacted by changes being proposed for the Wastewater Division through this document.
>
> * * *
>
> **The Town is proposing the following changes to the Wastewater Division.**
>
> * * *
>
> The second, third and weekend shifts will be eliminated. All employees will work Monday through Friday 7:00 AM to 3:30 PM. Employees' lunch

> and break schedules remain the same as the previous day shift – a half hour lunch and two fifteen minute breaks. (Emphasis in original).

The Curran Memo then described staffing changes on the Plant's "Collections Side" (Collections) and "Plant Side" (Plant). Next, under the heading "Weekends," the memo indicated that there would be two, four-hour, overtime shifts that would be "covered by the on-call operators" and staffed in accordance with DEP requirements.[2] The second to last paragraph provided additional details about the changes to the on-call procedure, as follows:

> On-call duty will be assigned to one employee per week. This duty shall be defined by on call procedures attached to this document. It shall include but not be limited to answering alarms which can include justified overtime, monitoring activity and making process and equipment adjustments where required. This duty shall also include weekend overtime. On Call compensation shall be the same as provided by the BMEA Contract, Article 15.

The attached on-call procedures contained additional information including that each on-call employee would be issued a phone and iPad to allow them to monitor the Plant or Collections areas; that each on call shift would be one week long and would rotate among qualified personnel; that if the on-call employee did not respond, the phone system would contact the next person in the rotation until someone responded to the alarm; and that On-Call personnel would be "expected to monitor their area of

[2] The memo stated: "According to the DEP in order to qualify to run a shift at a grade 7 plant, this person must be a grade six or seven and must be able to demonstrate competency with plant operations. These qualifications are necessary to be eligible for weekend overtime."

responsibility via iPad during their on call shifts to assure that problems are corrected in a timely manner."

The Curran Memo concluded by stating, "These changes will result in no lay-offs, significant opportunities for advancement and elimination of 2 unfilled positions."

Meetings

The Union demanded to bargain after receiving the Curran Memo and the parties stipulated that they met on December 9, 2013, March 11, June 9 and July 1, 2015 to bargain over the proposed changes.[3] The Hearing Officer found that the parties discussed a number of topics during these meetings, including the elimination of the shifts and hours of work, the resulting non-payment of contractual shift differentials,[4] salaries, job duties/descriptions, promotional opportunities and overtime eligibility and distribution. He further found that in response to the Union's concerns about layoffs, the Town assured the Union that there would be none.

The Hearing Officer also found that over the course of the meetings, the Town altered some job duties, increased the number of promotional opportunities, changed the manner in which it began the one-shift operation and informed the Union that a dormant contract provision for on-call pay would be utilized. In response to the Union's

[3] The Hearing Officer's decision makes no reference to the December 9, 2013, meeting, but we have included it based on the parties' stipulations and because, as discussed below, the timing of the meeting is relevant to the Union's claim that the Town bargained in bad faith by not discussing the one-shift plan during successor negotiations.

[4] Article XII of the parties' collective bargaining agreement (CBA) sets forth the amount of shift differentials for the second, third and weekend shifts.

concerns about layoff, the Town informed the Union that no layoffs would occur as a result of the shift change. Critically, however, the Hearing Officer found, and the Union does not dispute, that the Union never made any proposals or counterproposals about the impacts of a one-shift Plant during any of these meetings.

Implementation

The Hearing Officer found that the Town originally intended to move to the one-shift system on July 1, 2014. After the parties met on June 9, the Union requested another bargaining meeting to discuss the matters discussed above. The meeting was scheduled for July 1. On June 18, 2014, Sander sent all Plant employees a memo stating that, "Due to problems with deliveries and other issues, we will not be going to one-shift on July 1. Right now it looks like it should be no later than August 1st, but I can be no more specific than that."[5]

The parties met on July 1, 2014, when they continued to discuss the issues previously raised. Despite being on notice that the Employer planned to implement the change on August 1, the Union did not request any further meetings or information after that date, including after July 25, 2014, when the Town notified employees that the change would go into effect August 11, 2014. The Plant went to one-shift on that date and the Union filed this charge on December 31, 2014.

[5] The June 18, 2014 memo was submitted into evidence as Joint Exhibit 12. The Hearing Officer referred to it as a June 13, 2014 memo, but this date appears to be wrong.

Opinion[6]

The question on appeal is whether the Hearing Officer correctly concluded that the Town satisfied its bargaining obligation under Section 6 of the Law before implementing the one-shift system in August 2014. Based on the Union's failure to make any proposals or counterproposals and the Town's conduct during the parties' bargaining sessions, the Hearing Officer, rejecting the Union's argument that the Employer engaged in surface bargaining, concluded that the parties had bargained in good faith to impasse during their three meetings.[7] We agree with the dismissal of the Complaint, but on different grounds.

The CERB will find that an impasse has occurred when "both parties have negotiated to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked." Town of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000). The analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have

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

[7] The Hearing Officer also rejected the Union's purported claim that the Employer presented it with a *fait accompli*, at least with respect to the impacts of its decision. However, the Union never argued to the Hearing Officer that the Employer presented it with a *fait accompli.* In fact, in an effort to persuade the Hearing Officer that its charge was timely, the Union claims on page 24 of its post-hearing brief that the changes proposed in the Curran Memo were *not* presented as a *fait accompli* but rather that Curran "gave prior notice of a future change and invited the Union to discuss the changes." Despite the Hearing Officer's apparent misunderstanding, and, based on the Curran Memo, we agree that the Union was not presented with a *fait accompli* as to the impacts of the decision to move to a one-shift operation.

exhausted all possibility of compromise. Id. In this case, because there is no evidence that the Union ever rejected any of the proposals contained in the Curran Memo, or expressed that further bargaining would be futile, we disagree that the parties were deadlocked and at impasse. Cf. Everett School Committee, 43 MLC 55, MUP-09-5665 (August 31, 2016) (concluding that the parties were at impasse where union failed to make any counterproposals in five bargaining sessions, did not deviate from position that change should not take place, and informed employer that it "had gone as far as it could go"). Rather, based on the Union's failure to request further bargaining or otherwise object to the announced August 2014 implementation date after the parties' last meeting on July 1, 2016, we consider the Employer's argument that it was justified in implementing its proposal as planned because the Union waived its right to bargain by inaction. For the reasons stated below, we conclude that it did.

To establish the affirmative defense of waiver by inaction, an employer must demonstrate: 1) actual notice of the proposed change, 2) reasonable opportunity to negotiate over the issue, and 3) an unreasonable or unexplained failure to bargain or to request bargaining. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 570 (1983); Commonwealth of Massachusetts, 28 MLC 351, 363, SUP-4487 (May 17, 2002); Holliston School Committee, 23 MLC 211, MUP-1300 (March 27, 1997). A waiver by inaction may be found where an employee organization did not take sufficient action after notice of a proposed change to terms and conditions of employment affecting mandatory subjects of bargaining. City of Boston, 44 MLC 56, 60,

MUP-10-5895 (August 30, 2017) (citing Revere School Committee, 3 MLC 1537, 1540, MUP-2444 (H.O. March 18, 1977)).

Because the evidence reflects that the parties met four times to discuss issues raised in the Curran Memo, we focus our attention on the Union's inaction after its final meeting on July 1, 2014, when the Union had no outstanding proposals and was on clear notice that the Employer was going to implement the one-shift plan sometime in August. The Union does not deny that it made no proposals or counterproposals after July 1, 2014, but claims that it could not do so because it still did not have all the information it needed, and because the Town's plans were "fluid." But, the Union fails to identify with any specificity what information it had requested that was still lacking as of July 1, 2014, and the record is less than clear in this regard.[8] We need not resolve this issue, however, for several reasons.

[8] The Hearing Officer made no findings regarding the Union's requests for information or the Town's responses thereto. On appeal, however, the Union claims that it requested certain information that the Town did not provide and that the Town admitted at the hearing that it still, even at the time of implementation of the one-shift, had not provided the Union with sufficient information to bargain properly. Because the Hearing Officer made no findings on this issue, the Union's claims amount to proposed findings of fact. Under the DLR's regulations therefore, it was incumbent upon the Union to "clearly identify all record evidence supporting the proposed findings." 456 CMR 13.19. Although the Union generally paraphrases certain witness testimony in support of its proposed finding, it fails to identify where in the digital audio recordings that testimony took place. This is particularly critical here, where even the Union's general description of the testimony shows that the witnesses had different recollections of the parties' meeting. See, e.g., Union Supplementary statement, p. 17, pointing to discrepancies in Sander's and Curran's testimony regarding whether the parties ever discussed wages. The CERB therefore declines to make any findings as to what information the Union requested that remained outstanding as of July 1, 2014.

First, even assuming without deciding that the Town told the Union that it could not provide the Union with all of the information it had requested due to changing circumstances, an employer is not required to provide a union with information that it does not have. Trustees of the University of Massachusetts Medical Center, 26 MLC 149, 158, SUP-4392, 4400 (March 10, 2000). Second, the Union has failed to demonstrate how this purported lack of information prevented it from making any proposals whatsoever prior to implementation. For example, both the Charge and Complaint reference the loss of shift differential as one impact of the reorganization, yet, as the Hearing Officer pointed out, the Union never made any proposals seeking ways to mitigate this loss. Finally, even if the Union believed that it could not formulate any proposals because it did not have enough information, there is no evidence that it protested the announced August implementation date on those grounds. The Union's failure, at this point, to attempt to schedule additional bargaining sessions, make a bargaining proposal or tell the Town that it believed that the Town's information responses thus far prevented it from doing so, establishes that the Union inexplicably failed to bargain or request bargaining after July 1, 2014. See City of Boston, 44 MLC at 61 (rejecting union's defense that it could not bargain due to lack of information where, after receiving employer's information responses, union did not seek further bargaining or inform the employer that it believed the responses were inadequate prior to the announced implementation date); see also Commonwealth of Massachusetts, 28

MLC at 363 (Union waived its right to bargain by inaction when, despite requesting bargaining and meeting with Town on several occasions, it never made any proposals).

The Union also defends its inaction after July 1 on grounds that it was at that point that it realized that the Employer was engaging in surface bargaining, and that the Employer was going to implement the one-shift plan without regard to the Union's input. As explained below, the evidence does not support the Union's claim of bad faith 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-01-2971 (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 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). A failure to

make any counterproposals may also be indicative of surface bargaining. Local 466, Utility Workers of America, AFL-CIO, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981).

The Hearing Officer concluded that the Town had not engaged in surface bargaining because the Town solicited counterproposals from the Union and changed its position on certain of its proposals during the negotiations. We agree with this analysis. Further, there is no evidence that the Union made any proposals about any mandatory subjects of bargaining affected by the Town's decision to implement the one-shift plan. Because the Union never made any proposals whatsoever, there is insufficient evidence to conclude that the Town did not attempt to reach a mutually satisfactory agreement. The Town was simply not tested in this regard.

Moreover, as of July 1, even in the face of the Town's announcement that implementation would take place sometime in August, the Union had at least one month in which to make a proposal or counterproposal or seek further bargaining, and the Employer's July 24, 2014 memo postponed implementation for yet another two weeks. This was adequate time prior to implementation for the Union to engage in meaningful bargaining, especially since the parties had been meeting since the prior December. See Holliston School Committee, supra (union had ample opportunity to bargain between May, when it received actual notice of the impending change, and September implementation date). Further, given the Employer's demonstrated willingness to meet with the Union, and the fact that it had twice postponed previously-announced implementation dates, including the July 1 date, there is no basis to find that the Town

would have refused a request for future meetings or that additional impact bargaining would have been futile.

None of the Union's remaining arguments on review persuade us otherwise. Relying on Cambridge School Committee, 7 MLC 1026, MUP-3319 (May 27, 1980), the Union argues that the Town bargained in bad faith by implementing its decision while the parties were still engaged in impact bargaining. In Cambridge School Committee, however, the CERB concluded that the employer had bargained in bad faith by voting to eliminate twelve positions just one week after it had assured the union that it would bargain over the impacts of the reorganization, and by implementing other aspects of it while the parties were still bargaining and after the union protested the changes. Id. at 1027. Here, by contrast, the parties met on July 1, 2014, and the Employer did not implement the change for another six weeks. In the interim, the Union did not protest or request further bargaining. Unlike in Cambridge School Committee, therefore, the evidence fails to demonstrate that the parties were actively bargaining when the change was implemented.

The Union also claims that the Hearing Officer erroneously failed to give any weight to a memo that Sander wrote to the Union on February 13, 2015, which described "the history of moving to one-shift from [Sander's] point of view." That memo stated in pertinent part:

> This change was discussed with BMEA over several months. . . . No notes or minutes were ever produced from these meetings and no negotiations ever took place.

> As you can see in the attached letter from John Curran, he felt these changes were within the right of the Town. These meetings were held to make the union aware of the changes and to answer any questions.

The Union contends that Sander's own words establish that the Town engaged in surface bargaining. However, the issue of whether or not a party has bargained in bad faith requires an examination of the "entire course of bargaining." Bristol County Sheriff's Dep't., 32 MLC at 160. Here, after a hearing at which both Curran and Sander testified under oath, subject to cross-examination, the Hearing Officer reviewed the Town's actual conduct from January 9 – July 1, 2014, and concluded that the Town had not engaged in surface bargaining. Under these circumstances, the Hearing Officer did not err when he failed to give any weight to a memo written six months after the parties' last meeting, containing Sander's subjective opinion as to whether negotiations had occurred and what Curran believed were the Town's bargaining rights. Cf. City of Worcester, 16 MLC 1327, 1332 at n. 7, MUP-6810 (October 19, 1989) (City officials' belief as to whether ordinance had been incorporated into contract was not probative; issue was a question of law rather than fact to which witnesses could attest). Even if the Hearing Officer had given any weight to the memo, Sander's belief that no negotiations had taken place does not inexorably lead to the conclusion that the Town engaged in surface bargaining. Rather, such observations could be attributed to the fact that the Union did not make any proposals or counterproposals during these sessions.

The Union finally points to the timing of the Employer's request to negotiate as additional evidence of bad faith. The Union claims that the parties were engaged in

successor bargaining from August 2013 until January 2014, and that Curran deliberately and in bad faith did not offer to bargain with the Union over the one-shift plan until the parties reached agreement on a successor contract in January 2014. We disagree for two reasons.

First, the Town sent the Curran Memo on January 8, 2014, which was the day after the DEP gave the Town approval to go forward with its plan. The timing of the Curran Memo is therefore not as suspicious as the Union would have us believe.

Second, the CERB will find an unlawful refusal to bargain only when one party insists on keeping a bargainable issue separate from successor contract negotiations. City of Leominster, 23 MLC 62, 65, MUP-8258, et. al. (August 7, 1996). Here, the parties' stipulations reflect that the parties first met to discuss the one-shift change on December 9, 2013, which is when the parties were still engaged in successor negotiations. However, there is no evidence, and the Union does not claim, that it ever protested the issue being raised apart from their successor negotiations. Under these circumstances, there is no basis to conclude that the Employer unlawfully insisted upon keeping the issue separate from their ongoing negotiations or that the Employer otherwise violated the Law by first broaching the topic after receiving DEP approval of

its plan.[9]

Conclusion

Based on the above, we find that the Town gave the Union the requisite notice and an opportunity to bargain over the impacts of its decision to move to a one-shift system at the Plant, but that the Union waived its right to bargain over the proposed changes. We therefore conclude that the Town therefore did not violate Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law when it implemented the one-shift plan on August 11, 2014 and we affirm the dismissal of the Complaint.

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

JOAN ACKERSTEIN, CERB MEMBER

[9] In both its post-hearing brief and supplementary statement to the CERB, the Union argued that the Employer's conduct also repudiated certain provisions of the parties' collective bargaining agreement (CBA). The Hearing Officer did not address this argument and neither do we. Neither the Charge of prohibited practice nor the Complaint contained a repudiation allegation, and the Union never filed a motion to amend the Complaint to add one. The Employer's post-hearing brief is equally silent on this issue. In the absence of evidence that the Employer was on notice that this unpled issue was "emphasized to such a point that would have placed the Employer on notice that it was an issue to be litigated," we will not consider it. See Commonwealth of Massachusetts, 42 MLC 49, 52, SUP-10-5606 (July 31, 2015) (citing Whitman-Hanson Regional School Committee, 10 MLC 1606, 1608, MUP-5429 (May 17, 1984)).

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.