COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of		
NEWTON SCHOOL COMMITTEE		
	Case No.	MUP-16-5186 MUP-16-5542
and	Date Issued:	
NEWTON PUBLIC SCHOOLS CUSTODIANS ASSOCIATION	March 14, 2018	

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Laurence J. Donoghue, Esq.:	Representing the Newton School Committee
James F. Lamond, Esq.:	Representing the Newton Public Schools Custodians Association

HEARING OFFICER'S DECISION

Summary

The issues in this case are whether the Newton School Committee (Employer or School Committee) violated Sections 10(a)(1), 10(a)(3), and 10(a)(5) of Massachusetts General Laws Chapter 150E (the Law) by 1) failing to bargain in good faith by conditioning its willingness to make economic proposals upon the Newton Public Schools Custodians Association's (Association or Union) acceptance of its outsourcing proposal; 2) bargaining in bad faith by its conduct during successor negotiations; 3) failing to timely provide

information to the Union; 4) proposing outsourcing in retaliation for the Union's protected, concerted activities; and 5) disciplining unit members in retaliation for the Union's protected, concerted activities. Based on the record and for the reasons explained below, I conclude that the School Committee failed to bargain in good faith with the Union by: 1) conditioning its willingness to make economic proposals upon the Union's acceptance of its outsourcing proposal; 2) engaging in bad faith and surface bargaining during contract negotiations; and 3) failing to timely provide information. I also conclude that the School Committee disciplined unit members in retaliation for the Union's protected, concerted activity. I dismiss the allegations that the School Committee's outsourcing proposal was part of its bad faith and surface bargaining conduct, that it made the outsourcing proposal in retaliation for the Union's protected, concerted activity, and that it bargained in bad faith by making the proposal in retaliation for the Union's protected activity.

Statement of the Case

On April 5, 2016, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the Employer had engaged in prohibited practices within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. The DLR docketed this charge as MUP-16-5186. On May 31, 2016, a DLR investigator issued a three-count Complaint of Prohibited Practice. On October 7, 2016, the Union filed a Motion to Amend the Complaint and Statement of Reasons why Motion Should be Allowed (Motion to Amend). On October 6, 2016, the Union filed a second Charge of Prohibited Practice, alleging that the School Committee violated Sections 10(a)(1),

10(a)(3), and 10(a)(5) of the Law. On October 13, 2016, the Employer opposed the Union's Motion to Amend. On October 19, 2016, the Union filed a Motion to Temporarily Continue Hearing Pending Investigation of New, Related Charge (Motion to Continue). The DLR subsequently allowed the Motion to Continue. On December 20, 2016, a DLR investigator issued a three-count complaint in MUP-16-5542. On May 24, 2017, the Investigator issued a Denial of the Union's Motion to Amend Complaint. On June 5, 2017, the Union filed a Request for Review of Denial of Motion to Amend Complaint (Request for Review). On June 13, 2017, the School Committee filed an Opposition to the Union's Request for Review. On June 30, 2017, the Commonwealth Employment Relations Board (CERB) issued its ruling on the Union's Request for Review. On July 12, 2017, the DLR investigator issued an Amended Complaint of Prohibited Practice in MUP-16-5186.

I conducted a consolidated hearing on June 20, July 25, and July 27, 2017, and the parties submitted their post-hearing briefs on October 18, 2017. By letter dated October 20, 2017, counsel for the Union advised me of his belief that the transcript contained an inadvertent erroneous entry, and requested that I either make a determination on whether the entry was incorrect and order its correction, or direct the parties to consult with the court reporter and request that she determine whether there had been an error. By letter dated September 27, 2017, the School Committee advised that it took no position on whether the court reporter erroneously reported the testimony and that it did not object to the Union's proposed course of action. By ruling dated October 30, 2017, I directed the parties to consult with the court reporter and request that she

review her audiotape of the hearing to determine if there had been an error. On November 28, 2017, the parties submitted a Stipulated Change to the Transcript, which I have included as Stipulation of Fact # 19, below.

On the entire record, including my observation of the demeanor of witnesses, I make the following findings.

Stipulations of Fact

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

2. The School Committee is the representative of the City for the purpose of bargaining for school employees.

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

4. The Union is the exclusive bargaining representative for certain employees identified in Article 1 of the 2011 – 2014 collective bargaining agreement between the School Committee and Union, which expired on June 30, 2014, including Senior Building Custodians, Permanent-Intermittent Senior Building Custodians, Building Custodians and Building Maintenance Custodians, excluding part-time and temporary workers (Junior Custodians #1).

5. On or about December 18, 2014, the School Committee and Union entered into negotiations for a successor contract to the 2011 – 2014 CBA and participated in between eight and eleven bargaining sessions, the last of which was held on March 30, 2016.

6. On December 18, 2014, the Union submitted its initial proposals for the successor agreement to the School Committee and on May 20, 2015, the School Committee submitted its initial proposals for the successor agreement to the Union.

7. On July 23, 2015, both the Union and the School Committee submitted additional proposals for inclusion in the successor agreement. Included in the School Committee's proposals was a demand that the parties delete Article XXIX, Work Jurisdiction, from the 2011 – 2014 CBA and to substitute for it language allowing the School Committee to outsource the work of all custodial positions in its discretion (Outsourcing Proposal).

8. On March 31, 2016, the School Committee filed a Petition for Mediation and Fact-Finding with the Department of Labor Relations (PS 16-5177) alleging that the parties had negotiated to impasse in successor contract negotiations concerning the 2011 – 2014 CBA.

9. On February 18, 2016, the Union orally requested that the School Committee provide it with information about the revenue that it received from use of the School Department's facilities by outside groups.

10. On April 5, 2016, the Union filed the charge in this matter.

11. By May 23, 2016, the School Committee provided the Union with the information requested on February 18, 2016.

12. Timothy Curry (Curry) is a custodian employed by the School Committee and, at all times material herein, has been the President of the Union. Ernest Peltier (Peltier) is a custodian employed by the School Committee and, at all times material herein, has been the Vice President of the Union.

13. David Fleishman (Fleishman), at all times material herein, has been the Superintendent of the Newton Public Schools. Michael Cronin (Cronin) at all times material herein, has been the Chief of Operations for the School Committee and a member of the School Committee's negotiating team. Paul [Anastasi][1] ([Anastasi]), at all times material herein, has been the Facilities Operations Manager for the School Committee.

14. At various times prior to and during the negotiations, the Union has filed grievances against the School Committee.

15. During these negotiations, the School Committee proposed that Article XXIX of the 2011 – 2014 CBA be eliminated from any successor agreement (Outsourcing Proposal). Article XXIX reads: "All work presently performed by bargaining unit employees shall continue to be performed exclusively by bargaining unit employees in all buildings used by the School Department."

16. On September 20, 2016, Curry and Peltier met with Cronin and [Anastasi] in Cronin's office to discuss possible discipline of three unit custodians.

[1] I have corrected the spelling of Anastasi's name in the parties' stipulations.

17. Following the September 20 meeting, Cronin imposed discipline upon the three unit members described in Stipulation 16 for their alleged misconduct in March of 2016.

18. The reports in Joint Exhibits N and O were produced to the School Committee in the months indicated.[2]

19. After consulting with the court reporter, the parties stipulate that the entry currently appearing in Volume 1 at page 96, line 10, that includes the passage "it was my intention..." should be changed to read as follows: "I indicated, you know, that we discussed it before, and it was not – well, my intention to do so at that time, and it wasn't at this time."

Relevant Contract Provisions

ARTICLE XXIX

Work Jurisdiction

All work presently performed by bargaining unit employees shall continue to be performed exclusively by bargaining unit employees in all buildings used by the School Department.

ARTICLE XXI

The Agreement shall be effective as of July 1, 2011 and shall remain in force and effect through June 30, 2014, and shall be considered renewed from year to year unless either party hereto shall have given at least six (6) months' (January 1) notice prior to the termination date hereof or any subsequent anniversary date during which time changes, if any, shall be negotiated. The Agreement shall remain in force and effect during negotiations until a new Agreement is reached.

[2] The parties submitted this stipulation and Joint Exhibits N and O to the record on October 16, 2017. At the close of the hearing, I kept the record open for the parties to provide these two exhibits and the related stipulation only.

Findings of Fact

Successor Contract Negotiations

The Bargaining Unit

During the relevant time period, the custodial bargaining unit was comprised of approximately 85 custodians who worked in the elementary, middle, and high schools. The unit first became organized in approximately the late 1960s or early 1970s. Currently, the custodians provide cleaning services, assist teachers and administrators in setting up for meetings, coordinate the meeting spaces, clean after meetings, and perform other general maintenance and custodial duties.

Work Jurisdiction Clause

Article XXIX of the parties' collective bargaining agreement (CBA) contains the parties' work jurisdiction clause, as set forth above. This clause has been included in the parties' contracts since the early 1990s. At that time, the School Committee considered outsourcing custodial services. Instead, the Union agreed to concessions on overtime in exchange for the work jurisdiction clause. The School Committee has not made any proposals to change the clause from the time it was agreed to in the 1990s until the negotiations at issue in this case.

Union's Requests for Successor Bargaining and Initial Meetings

By letter dated December 23, 2013, Alan McDonald (McDonald), Union counsel,[3] advised the School Committee of the Union's intent to open negotiations for a successor to the CBA. In July 2014, McDonald sent Mike Loughran (Loughran), who was the chief negotiator for the School Committee at that time, an email requesting dates for successor negotiations and for negotiations over pending grievances.[4] On August 6, 2014, McDonald emailed Loughran a reminder that he was waiting for Loughran to propose dates for negotiations. After some additional delays due to the fact that the School Committee was not yet ready to begin negotiations, the parties met on September 29, 2014 to discuss successor negotiations and pending grievances. At this meeting, the parties discussed ground rules for successor negotiations, but did not reach agreement on them. They also discussed possible resolutions to the pending grievances. The parties agreed to meet next on October 27, 2014.

At this October 27, 2014 meeting, the parties again discussed ground rules, and reached a verbal agreement on them. They also discussed the grievances, but did not make progress on resolving them. The parties agreed to meet next on November 25, 2014. However, that meeting did not occur because the parties could not agree on

[3] McDonald has served as the Union's counsel, and its chief spokesperson in contract negotiations, since 1973.

[4] McDonald did not recall receiving a response to his December 23, 2013 letter or July 2014 email.

whether the meeting would be about the grievances, or for contract negotiations. The parties eventually agreed to instead meet on December 18, 2014[5] for negotiations.

December 18, 2014 Meeting

At this meeting, the parties signed the following ground rules:

1. Negotiating sessions will be closed to the general public.

2. Each side will have full authorization to make commitments and make tentative agreements only through their official spokesperson, subject to ratification by the Committee and the Union.

3. All agreements reached will be tentative, subject to an entire package being reached. At the conclusion of negotiations, a memorandum of agreement will be drawn up and signed.

4. At the conclusion of each meeting, the time and the date for the next two (2) meetings shall be determined.

5. Each side shall have the right to caucus any time for reasonable time periods.

6. Initial proposals will be submitted by the Union at the first negotiation session. Initial proposals will be submitted by the Committee at the second negotiation session. No new proposals, as opposed to counterproposals, from either side can be submitted after the third negotiation session without agreement of the other party.

7. Each session will be approximately two (2) hours in duration unless it is mutually agreed to extend the meeting.

8. There will be one official spokesperson designated by each negotiating team.

9. There will be no official minutes. Each side is free to keep its own notes.

[5] In certain cases, witness testimony regarding the dates of meetings differed from the parties' stipulations. In such instances, I have relied on the stipulations.

Also at this meeting, the Union provided the School Committee with its first set of proposals, and McDonald explained each proposal and the Union's rationale for them. The Union's first set of proposals were as follows:

NEWTON PUBLIC SCHOOL CUSTODIAN ASSOCIATION
INITIAL PROPOSALS[6]
DECEMBER 18, 2014

1. ARTICLE V, PAID HOLIDAYS, shall be amended at Section D to read:
In addition to the paid holidays listed in Section A above, each member of the bargaining unit will receive ~~one (1)~~ **two (2)** floating holidays per year to be taken between September 15 and June 30 of the school year. Requests for floating holidays shall be processed in the same manner as requests for single vacation days.

2. ARTICLE VI, CALL-BACK PAY, shall be amended at Section B to read:
B. Building checks are at the sole discretion of Management. Employees assigned to perform such building checks will be guaranteed a minimum of ~~two (2)~~ **three (3)** hours' pay at time-and-one-half their regular hourly rate of pay.

3. ARTICLE IX, SICK LEAVE, shall be amended at Section L to read:
L. Any member of the bargaining unit who uses five or fewer ~~than four~~ sick or family illness days in any contract year shall receive additional pay in accordance with the following formula:

~~0 days used~~	~~4 days' pay~~
~~1 day used~~	~~3 days' pay~~
~~2 days used~~	~~2 days' pay~~
~~3 days used~~	~~1 days' pay~~
0 days used	**8 days' pay**
1 day used	**7 days' pay**
2 days used	**6 days' pay**
3 days used	**5 days' pay**
4 days used	**4 days' pay**
5 days used	**3 days' pay**

[6] The proposal included a footnote here stating, "Proposed deletions from existing text are reflected by a ~~strike-through~~. Proposed additions are reflected by **bold type**."

4. ARTICLE X, VACATIONS, shall be amended at Section A to read:

A. All members of the bargaining unit who have been employed on a twelve-month basis shall, after eleven (11) months of service, be entitled to a **annual** paid vacation ~~of ten (10) days and annually thereafter a paid vacation of fifteen (150 days until an aggregate of ten (10) years of employment is reached, after which time the annual vacation period shall be twenty (20) days. Effective July 1, 2000, vacation shall be increased as follows: After 20 years of employment – 21 vacation days per year; after 21 years of employment – 22 vacation days per year; after 22 years of employment – 23 vacation days per year; after 23 days of employment – 24 vacation days per year; and after 24 years of employment – 25 vacation days per year~~ according to the following schedule:

After 11 months	**10 days**
After 2 years	**15 days**
After 5 years	**20 days**
After 20 years	**25 days**
After 30 years	**30 days**

5. Article XVIII, Overtime, shall be amended at Sections D and E to read:
D. Employees shall be paid a minimum of ~~three~~ **four (4)** hours' pay at time-and-one-half (1 ½ times the employee's straight time hourly rate[)] for emergency call back outside the employee's assigned working hours or shift. If the hours actually worked during such call back exceed three (3) hours, the employee shall be compensated at time-and-one-half (1 ½ times his straight time hourly rate[)] for all hours actually worked.

E. Employees shall be paid a minimum of ~~two (2) hours'~~ **three (3) hours' pay** at time-and-one-half (1 ½ times) the employee's straight time hourly rate for building (security or heating) checks performed outside the employee's assigned working hours or shift.

If the hours actually worked during such building check exceed ~~two (2)~~ **three (3)** hours, the employee shall be compensated at time-and-one-half (1 ½ his straight time hourly rate[)] for all hours actually worked.

6. ARTICLE XXVI, LEAVE OF ABSENCE WITH PAY, shall be amended at the second full paragraph to read:

From the five (5) paid absence days established primarily for death and illness in the immediate family, ~~two (2)~~ **three (3)** days shall be allowed for

urgent personal business as judged by the employer. The following six (6) items of explanation apply . . .

7. A new Article entitled Technology Pay shall be added to read:

In consideration of the increased use of computer skills and other technology, senior custodians shall receive an annual technology differential equal to three (3%) of base pay. This differential shall be part of an employee's weekly pay for all purposes. Further, the senior custodian at the Ed Center shall be paid an additional one percent (1%) stipend for handling the IT set up for night meetings. This stipend shall be part of an employee's weekly pay for all purposes.

8. Article XXV, Longevity, shall be amended by converting the existing levels of payments to percentages of base pay as follows:

Years	Current Level	Percentage
10	$1050	2.5%
15	$1700	3.5%
20	$1900	4.0%
25	$2100	4.5%
30	$2100	5.0%

9. Article XXVII, Reduction in Force – Hold for discussion on civil service status of work force.

10. APPENDIX A-5, BUILDING SERVICE EMPLOYEES SALARY SCHEDULE, shall be amended by:

(a) Increasing all salaries across the board in the following amounts:

July 1, 2014	**3%**
July 1, 2015	**4%**
July 1, 2016	**5%**

(b) Increasing the Firing Allowance to $1,200 effective July 1, 2014;

(c) Add a new step each year of the agreement that is four percent (4%) higher than the pre-existing top step.

UNLESS OTHERWISE STATED, ALL AMENDMENTS SHALL BE EFFECTIVE ON JULY 1, 2014. THE ASSOCIATION RESERVES THE RIGHT TO ADD TO, SUBTRACT FROM OR OTHERWISE MODIFY THESE PROPOSALS IN ACCORDANCE WITH LAW. THE MAKING OF ANY PROPOSAL DOES NOT CONCEDE THE ABSENCE OF THE RIGHT OR BENEFIT SOUGHT.

At the conclusion of the meeting, the parties scheduled the next bargaining meeting for February 26, 2015.[7] Two or three days prior to the meeting, Loughran informed McDonald that the School Committee had a conflict and would not be able to meet on February 26. Loughran did not propose any additional dates. McDonald then filed a charge with the DLR alleging that the School Committee was refusing to meet at reasonable times for the negotiation of a successor agreement. At the in-person investigation for that charge, the parties agreed to bargaining dates and the Union withdrew the charge.

May 20, 2015 Meeting

The parties next met on May 20, 2015. At this meeting, the School Committee changed the chief spokesperson from Loughran to Stephen Siegel (Siegel).[8] At this meeting, the School Committee made the following proposal, and Siegel explained to the Union why the School Committee was making each proposal:

[7] Although McDonald requested that the parties meet before then, the School Committee said that it was not available before that date.

[8] Matthew Hills (Hills), who was School Committee Chair from 2014 – February 2017, explained that he felt that it might not be as productive to have the attorneys serve as the chief spokespersons and wanted to instead try using a School Committee member as the chief spokesperson.

1. **Article III – Seniority and Bidding**

Delete all of Article III and rename the Article: **Vacancies**. The new Article III shall read as follows:

A. *Seniority shall not apply to the filling of any vacancies, new positions and/or differential shifts in the bargaining unit.*

B. *Pursuant to their authority under the Ed Reform Act, as may from time to time be amended, the Principal shall appoint the person s/he determines to be the most qualified person to fill any vacancy at his/her school.*

C. Filling Vacancies

1. *Notice of a vacant position shall be posted electronically and in writing in each school for not less than one week prior to the opening of applications. The notice shall indicate the name of the school, the class which the position requires, and the specific duties of the position. Custodians wishing to be considered for the position shall make electronic application as requested by the Division of Support Services.*

2. *In the event that any vacancy is not bid upon after being posted for one week, the School Department shall reserve the right to remove this vacancy from the bid list and place a person in the position. This position would not be re-bid until the person placed in the vacancy moves to another position.*

3. *Custodians must remain in their bid position for at least 6 months unless the new bid position is a promotion in a job classification.*

4. *Custodians must be in an active working status to bid for a position (for example, the person cannot be on a leave of absence or out on workers' compensation).*

5. *The School Department shall be exempt from the provisions of Chapter 31 of the General Laws, but current custodial employees who were holding civil service status on or before July 1, 2015 shall retain such status.*

2. Article IV – Work Week and Hours of Work

A. 5. Amend this section regarding the present practices of "wash-up" time and 2 daily 15-minute coffee breaks as follows: *Wash-up time shall be eliminated, and the 2 daily 15-minute coffee breaks shall continue with the understanding that the supervisor can change the timing of the coffee breaks on any day, if needed to complete the work.*

B. Evening and Night Shift Work

3. Increase the initial training period from 2 months to 6 months.

3. ARTICLE V – Paid Holidays

B. Delete this section (Article VB) and replace with the following:

In order to qualify for compensation for any such holiday, the person shall either 1) have worked on all of his last regularly scheduled work day prior to and the next regularly scheduled work day following such holiday or 2) have a Department pre-approved day off.

Thus, the employee shall be paid for the holiday if the employee actually works the work day before and the work day after the holiday or has a Department pre-approved day off. A day on jury service counts as a day actually worked. A day on sick leave does not.

4. ARTICLE IX – Sick Leave

A. Add the following to this section (IX A): *Employees must be in active working status to accrue sick time. They do not accrue sick time while on a leave of absence or on workers' compensation.*

E. Delete Section IX E and substitute the following: *The number of sick days earned will be capped at 15 days per year. Service days shall be eliminated.*

H. Delete Section IX H and substitute the following: *The Administration may require medical documentation at its discretion as to the necessity for a sick absence by the employees involved.*

5. ARTICLE X – Vacations

A. Add the following to Section X A: *Employees must be in active working status to accrue vacation. They do not accrue vacation while on a leave of absence or on workers' compensation.*

6. ARTICLE XV – Grievance and Arbitration Procedure

Step 3 – Add "*or designee*" after Superintendent in Step 3 of the grievance procedure.

7. ARTICLE XVIII – Overtime

C. Change overtime on Sundays and holidays from double time to time and a half (1 ½).

I. Package Overtime – Delete this section regarding the present practices associated with overtime and amend it as follows: *Overtime shall not be guaranteed by the Committee, but it may be assigned with the approval of support services.*

J. User Fee Overtime – Delete this section in its entirety.

K. Delete this section in its entirety.

8. Appendix A - Compensation[9]

Changes in compensation to be determined.

9. Appendix B – Firing License

Delete Firing License and replace it with a Building Operator License.

July 23, 2015 Meeting

At this meeting, the School Committee first provided the Union with the following supplemental proposals:

[9] Siegel explained that the School Committee was not ready to make an economic proposal at this time and would do so at a later date.

1. **Article XXX – Miscellaneous**

   B. All custodians are required to sign up for direct deposit and to provide an email address where they receive electronic vouchers for their paychecks. The travel allowance for senior custodians will be eliminated accordingly.

2. **Article XXIX – Work Jurisdiction**
   Delete this article in its entirety and replace it with the following language: The Committee may, in its sole discretion, outsource some or all of the work performed in the buildings used by the School Department, including but not limited to, any work that is currently done by bargaining unit members.

When presenting this proposal, Siegel explained that the School Committee wanted the flexibility to outsource custodial services and therefore wanted to remove the current work jurisdiction clause from the contract.

Also during this meeting, the Union caucused and McDonald prepared a handwritten proposal, which he then presented to the School Committee. The proposal includes the following, in relevant part:

The Association adds the following proposals to its bargaining agenda:

1. Article III, Seniority and Bidding

   Delete C 3, c, d, and e wherever mentioned.

2. Add a new article, Non-Discrimination, shall be added to read [sic]:

   The School Department shall not discriminate against any employee on the basis of any characteristic protected by law.

3. Add a new Section F to Miscellaneous to read:

   If the School Department requires a pool certification for appointment to any position, applicants will be given one year to achieve the certification

after appointment. The absence of the certification at the time of application will not be used to the detriment of any applicant.

4. Add a new Section G to Miscellaneous to read:

The School Department shall not assign the relative of a bargaining unit employee to supervise such employee.

August 20, 2015 Meeting

At the beginning of this meeting, Siegel proposed that the parties suspend their discussions about economic proposals until the negotiations for the teachers' unit were completed. McDonald responded that the Union was willing to wait a short time to see if the teachers settled their contract, or it became clear that they were not going to settle their contract, before scheduling another meeting. However, he also explained that the Union did not want to separate discussions of economics from discussions of the language proposals, and that it would be unfair for the Union to have to evaluate language concessions without also knowing the School Committee's economic proposals. The parties ultimately decided to hold off on further discussions.

December 21, 2015 Meeting

At this meeting, the School Committee changed its legal counsel to Attorney Timothy Norris (Norris), who was attending the negotiations for the first time.[10] The School Committee began the meeting by presenting a chart that Norris had prepared,[11]

[10] Also at this meeting, the School Committee returned to the practice of having its attorney be the chief spokesperson at the negotiations.

[11] The Union did not have a role in the preparation of the chart.

which listed all of the School Committee's proposals, all of the Union's proposals, and the School Committee's position on each Union proposal, as follows.

School District Proposals

No.	Art[icle]	Proposal/Issue	Status/Response
1	III	Vacancies: delete article and replace with new language provided on 5-20.	Awaiting response.
2a	IV-A-5	Eliminate wash-up time; scheduling of two 15 min breaks at discretion of supervisor.	Awaiting response.
2b	IV-B-3	Initial training period: increase from 2 to 6 mo.	Awaiting response.
3	V-B	Paid Holidays: Delete Section B and replace with language provided on 5-20.	Awaiting response.
4a	IX-A	Add: No sick leave accrual while on leave.	Awaiting response.
4b	IX-E	Replace: sick days capped at 15/yr; service days eliminated.	Awaiting response.
4c	IX-H	Replace with lang. provide 5-20; medical documentation required.	Awaiting response.
5	X-Z	Vacation; no accrual while on leave.	Awaiting response.
6	XV-St. 3	Step 3 – add "or designee."	Awaiting response.
7a	XVIII-C	Sundays and Holidays: 1 1/2x, not 2x.	Awaiting response.
7b	XVIII-I	Replace: Overtime shall not be guaranteed by the Committee, but it may be assigned with the approval of Support Services.	Awaiting response.
7c	XVIII-J	User Fee OT: Delete.	Awaiting response.

7d	XVIII-K	Custodian presence: Delete.	Awaiting response.
8	App A	Compensation: TBD.	Awaiting response.
9	App B	Replace Firing License with Building Operator License.	Awaiting response.
10 (7/23 #1)	XXX-B	Direct deposit; electronic paystub; eliminate travel allowance.	Awaiting response.
11 (7/23 #2)	XXIX	Work Jurisdiction: delete and replace with language permitting outsourcing of all unit work.	In the interest of moving this issue forward the District has attached additional information related to this proposal. **See Attached Preliminary Outline.**

Association Proposals

No.	**Art[icle]**	**Proposal/Issue**	**Status/Response**
1	V-D	Holidays: add floating holiday (1 → 2)	Open to discussing if there is an offset.
2	VI-B	Call Back Pay: increase building check OT minimum from 2 to 3 hours pay.	District rejects.
3	IX-L	Double sick leave incentive.	District rejects.
4	X-A	Vacation: new vacation schedule to advance the 10 year/20 days level to 5 years; advance 25 yr/25 days to 20 years; and add 6 weeks at 30 yrs.	District rejects.

5a	XVIII-D	Increase emergency call back 3→4 hours minimum.	District rejects.
5b	XVIII-E	Increase building check minimum 2→3 hours minimum.	District rejects.
6	XXVI-2nd	Increase 2→3 the family illness days that can be used as personal days.	District rejects.
7	New	Technology differential 3% for senior custodians; +1% for senior at Ed Center.	District rejects.
8	XXV	Longevity: increase amounts and change to percentage.	District rejects percentages. Open to discussing amounts.
9	XXVII	RIF: Hold for discussion on civil service; status of work force.	This is an area that the District would like to discuss in connection with broader discussion of outsourcing.
10	App A-5	Salary FY15, 16, 17: 3%, 4%, 5%; Increasing firing License $600→$1200 retro to 7/1/14.	Hold for discussion. District proposes to make increases effective on a date 30 days before ratification by all parties.
11 (7/23)	III-C-3	Eliminate all considerations except seniority.	District rejects.
12 (7/23)	New	Non-Discrimination: The School Department shall	Hold for discussion.

		not discriminate against any employee on the basis of any characteristic protected by law.	
13	XXX-F (new)	One year to obtain pool certification; no discrimination for not having it.	Hold for discussion.
14	XXX-G (new)	No assignment of a relative of employee to supervise the employee.	Hold for discussion.
15	XXX	Driving record of Pony driver.	Hold for discussion.

The School District reserves the right to modify or supplement its proposals and counterproposals at any time. All issue specific tentative agreements are subject to final agreement on the entire contract. All School District proposals are intended to be prospective from the time of ratification of agreement by the parties. No proposal is a concession by the District of any existing limitation on its rights under the collective bargaining agreement or otherwise concerning the subject matter covered by the proposal.

Norris also provided the Union with an attachment to the above chart, which set forth an outsourcing phase-in plan. It provides, as follows:

Preliminary Outline for Discussion of Outsourcing of Custodial Services
(Subject to Modification and Supplementation)

1. The District is proposing to have the right to fully outsource the work of the bargaining unit.

2. An Outsourcing Agreement (OA) will be negotiated, which will govern the process and supersede conflicting provisions of the main agreement. Wages, benefits, and terms of the main agreement, as modified through

these negotiations, and as modified by the OA, will continue in effect for those who remain employed, until a date specified in the OA.

3. We are prepared to discuss a phased approach to outsourcing. A phased approach would entail the outsourcing of particular services, activities or shifts, on dates to be determined over the course of a number of months, commencing on July 1, 2016. Under this approach the entire operation would not be outsourced at the same time.

4. Under a phased model, for each phase of outsourcing there will be:
a. An effective date which will include a reduction in force ("RIF") date for identified employees.
b. Identification of employees for RIF; obtaining waiver of Civil Service rights.
c. Process for identifying a contractor and determinations regarding the contractor's obligations to former District employees.

5. The District is also prepared to discuss these additional potential elements of an OA:
a. A severance amount to be paid to employees subject to RIF in exchange for individual releases of all claims.
b. Terms on which health insurance may be continued for employees subject to RIF.
c. Parameters for the contractor's obligations to employees subject to RIF.
d. Accessing resources to assist in transition/retraining/placement of affected employees.

After the School Committee presented the above grid, the Union caucused and then explained to the School Committee its response to certain proposals. With regard to the work jurisdiction proposal, McDonald explained that the Union did not accept the School Committee's proposal, and advised that the current language had been in the contract since 1993.[12] With regard to the School Committee's attachment to the chart,

[12] McDonald further explained that the language had been negotiated in response to the Union's concessions on overtime protection that had been included in contracts prior to 1993, and that the work jurisdiction language was intended to avoid the outsourcing of any custodial positions.

McDonald told the School Committee that it was premature because it was an impact proposal, and he believed that the Union had the right to negotiate over the decision to outsource, in addition to the impacts.[13] Norris asked McDonald if he thought the parties were at impasse on the outsourcing proposal and McDonald responded, "call it what you want," or words to that effect.

January 2016 Meeting[14]

At this meeting, Attorney David Connelly (Connelly) took over as counsel for the School Committee.[15] Connelly had not attended any previous bargaining meetings. The Union went over the outstanding proposals and its positions to familiarize Connelly with them. When asked by the Union whether the School Committee had responses to the Union's proposals, specifically items number 10, 12, 13, 14, and 15, the School Committee replied that it was not yet prepared to respond, but would be at the next meeting. At the end of this meeting, the parties scheduled another meeting for February 18, 2016.

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[13] This meeting was the first time that the Union became aware that the School Committee wanted to phase out all custodians beginning on July 1, 2016.

[14] There was no stipulation or consistent witness testimony about the exact date of this meeting, other than that it was in January 2016.

[15] Connelly testified about his experience in negotiating outsourcing in other collective bargaining agreements. The Union requests in its brief that because of this, and because the School Committee did not explain why it changed counsel at this time, I draw the inference that the School Committee hired Connelly to help it get to the point where it could outsource the work of the bargaining unit. I decline to draw this inference as it is would not affect my analysis of the allegations in the complaint since the School Committee has not denied its interest in outsourcing the custodial work.

February 18, 2016 Meeting

At the beginning of this meeting, on behalf of the School Committee, Connelly rejected the Union's nondiscrimination proposal (item 12 on the grid), and did not make a counterproposal. He then rejected the Union's proposal 13 and said that there might be a state requirement for pool certification, and did not make a counterproposal. With regard to the Union's proposals 14 and 15, the School Committee rejected them without making counters. After this, the Union caucused and then withdraw its proposals 13, 14, and 15.

Connelly then stated that the School Committee would like to discuss its outsourcing proposal. McDonald responded that he wanted to look at the reduction in force provision of the contract to determine whether it protected the order of the custodians to be laid off, in the event that a layoff occurred. He also requested a civil service list, as some custodians had civil service protection, and he wanted to determine the order of layoffs according to civil service. McDonald also noted that the custodians' civil service status would be important even without outsourcing.

McDonald further asked to hear about the School Committee's changes to its own proposals and Connelly responded that the School Committee did not have any changes, and until the Union "[came] to grips with outsourcing, it could not make any economic proposals." McDonald then told the School Committee that even if there was outsourcing, the School Committee would have to address the economics of July 1, 2014 to February

18, 2016[16] and going forward with any outsourcing proposal. In response, Connelly stated that the School Committee would rather save its resources for the outsourcing issues. The parties then took a caucus and the School Committee gathered the civil service information that the Union had requested. The School Committee then provided and explained the information to the Union and the meeting ended.[17]

March 16, 2016 meeting

The parties next met on March 16, 2016.[18] First, the Union presented the School Committee with counterproposals to the School Committee's proposals, as follows:

> **School Committee Proposal #2A**
>
> Amend Article IV, Section 5 to provide that "Wash-up time shall be eliminated and the 2 daily 15 minute coffee breaks shall continue with the understanding that the supervisor can change the timing of the 15 minute breaks on any day if needed to work."
>
> **Association Counter**
>
> "The supervisor can change the timing of one or both of the two daily 15 minute coffee breaks provided that the first is provided no later than three hours after the beginning of the regular shift hours and the second is provided no later than two hours before the end of the regular shift hours. Notwithstanding the foregoing, if a custodian agrees to forego one or both of the two coffee breaks at the request of the supervisor, he/she will be permitted to end the shift either 15 or 30 minutes earlier, as the case may be, than the regular shift end time."

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[16] These dates correspond to the last day of the former contract through the date of this meeting.

[17] In addition to the civil service information, the School Committee also provided information about sick leave usage and costs for overtime.

[18] The parties were originally scheduled to meet on March 1, 2016, but McDonald had a conflict on that date.

School Committee Proposal #2B

Evening and Night Shift Work: Increase the initial training period from 2 months to 6 months.

Association Response

Agreed

School Committee Proposal 3

Amend Article V, Paid Holidays, at Section B to read:

"In order to qualify for compensation for any such holiday, the person shall either 1) have worked on all of his last regularly scheduled work day prior to and the next regularly schedule work day following such holiday, or 2) have a Department pre-approved day off.

Thus, the employee shall be paid for the holiday if the employee actually works the work day before and the work day after the holiday or has a Department pre-approved day off. A day on jury service counts as a day actually worked. A day on sick leave does not."

Association Counter Proposal

"In order to qualify for compensation on any such holiday, the person shall either 1) have worked on all of his last regularly-scheduled work day prior to and the next regularly scheduled work day following such holiday, or 2) have a Department pre-approved day off.

Thus, the employee shall be paid for the holiday if the employee actually works the work day before and the work day after the holiday or has a Department pre-approved day off. **A day on jury service, a vacation day, a union release day, or a paid leave of absence day count as a day actually worked. A day of sick leave also counts as a day actually worked unless the custodian at issue has had an uncontested excessive use of sick leave letter placed in his/her file within the past 12 months preceding the holiday in question.**

School Committee Proposal 4A

Amend Article IX, Sick Leave at Section A to read "Employees must be in active working status to accrue sick time. They do not accrue sick time while on a leave of absence or worker's compensation."

Association Counter Proposal

Employees do not accrue sick time while on a leave of absence, **but do accrue sick time when on worker's compensation leave.**

School Committee Proposal 4E

Delete Article IX, Sick Leave, Section E and substituting: The number of sick days will be capped at 15 days per year. Service days shall be eliminated on a prospective basis effective on the ratification of a new CBA, but those service days already accrued at that time will be honored.

Association Response

Agreed effective the beginning of January 1st following the ratification of a new CBA.

School Committee Proposal 4H

Delete Article IX, Sick Leave, Section H and substitute: The Administration may require medical documentation at its discretion as to the necessity for a sick leave absence by the employee involved.

Association Counter Proposal

In cases where there has been an absence of more than three consecutive days, **or there is reasonable cause to suspect abuse of sick leave**, the Administration may require a physician's certificate as to the necessity for sick leave absence by the employee involved.

School Committee Proposal #5

Amend Article X, Vacations at Section A to read "Employees must be in active working status to accrue vacation. They do not accrue vacation while on a leave of absence or on worker's compensation."

Association Counter Proposal

Employees do not accrue vacation while on a leave of absence, **but do accrue when on worker's compensation leave.**

School Committee Proposal #6

Amend Grievance and Arbitration Procedure by adding "or designee" after Superintendent in step 3 of the grievance procedure

Association Response

Agreed

School Committee Proposal 7

Delete Section I, Package Overtime and substitute "Overtime shall not be guaranteed by the Committee, but it may be assigned with the approval of Support Services."

Delete Section J, User Fee Overtime in its entirety.

Association Response

Open to discussion of changes to both provisions.

School Committee Proposal 9

Delete Appendix B, Firing License, and substitute a Building Operator License.

Association Counter Proposal

Grandfather current firing license payments pending the separation from service of incumbents; discussion conditions of Building Operators License.

School Committee Proposal #2 (July 23, 2015)

Delete Article XXXIX, Work Jurisdiction and substitute: "The Committee may, in its sole discretion, outsource some or all of the work performed in the buildings used by the School Department, including but not limited to, and work [sic] that is currently being done by bargaining unit members."

Association Counter Proposal

> The Association is willing to consider allowing the School Committee to hire up to 8 retired Newton custodians at any one time for hourly work, and to be paid at hourly rates mutually agreed to between the Association and the School Committee, to perform cleaning services within the School Department when other bargaining unit members are absent due to same day sick calls. These sweepers shall be considered members of the bargaining unit but shall not be entitled to any benefits contained in the CBA unless expressly agreed to between the School Department and the Association. The Current language of this article will be numbered Section 1 and the sweeper provision shall be numbered Section 2.
>
> THE ASSOCIATION'S POSITION ON SCHOOL COMMITTEE PROPOSALS REMAINS UNCHANGED EXCEPT TO THE EXTENT SET FORTH ABOVE.[19]

After receiving the proposal and caucusing, the School Committee informed the Union that it needed more time before responding. In addition, Connelly stated that the School Committee believed that the Union was going to make a counterproposal on the School Committee's phased-in outsourcing proposal.[20]

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[19] The Union's counterproposal 2B was intended to address the School Committee's concern that the buildings were not being sufficiently cleaned. Its counterproposals 3, 4A, 4E, and 4H addressed the School Committee's concern that there was too much time off for unit members, which would also save costs for the School Committee by reducing the amount of time off for unit members. The Union made its proposal to allow the School Committee to hire up to eight retired custodians who would not be eligible for benefits to also help the School Committee save on the cost of benefits, in addition to saving on the cost of overtime since the School Committee would not have to replace an absent custodian with a custodian on overtime.

[20] Although there is a dispute as to whether McDonald stated at the previous meeting that the Union would consider a phased-in approach to outsourcing, I need not determine whether or not he actually said it because it is not relevant to my analysis of the allegations at issue.

March 30, 2016 Meeting

The parties next met on March 30, 2016. Here, the School Committee presented certain counterproposals to the Union's counterproposals. Connelly also told the Union that the Union's counterproposals to the School Committee's outsourcing proposal did not "even help [the School Committee] get close to" improving efficiencies, saving money, or providing cleaner schools. Connelly explained that the School Committee already had the right to hire retirees, which it had tried in the past.[21] When questioned by McDonald, Connelly also explained that the School Committee would not withdraw any of its proposals, or make counterproposals to the Union's proposals until its outsourcing proposal had been resolved. Connelly asked the Union if it felt that it was time for mediation, and McDonald responded that it was time for the Union to file a charge against the School Committee for failure to bargain in good faith.

Events after March 30, 2016 Meeting

On March 31, 2016, the School Committee filed a Petition for Mediation and Fact-Finding with the DLR. The Union opposed the petition by letter to the DLR dated April 5, 2016, contending that the parties were not at impasse and that the School Committee had engaged in bad faith bargaining.

[21] The School Committee claimed it had this right based on past practice, to which the Union disagreed.

Core Management Services Report

Hills has been on the School Committee since January 2010. He was Vice-Chair in 2012 – 13 and Chair from 2014 – February 20, 2017. Hills also became a member of the School Committee's collective bargaining subcommittee (subcommittee) in January 2010 and remained on it through the time of hearing in this case. The subcommittee is responsible for negotiating contracts and side agreements and addressing grievances with the unions that represent school employees. Since at least January 2010, the subcommittee heard the grievances brought to the School Committee.

The subcommittee began preparing for contract negotiations with the Union in the summer of 2014. At that time, the subcommittee included Hills, who was chair of the subcommittee, Siegel, and Ellen Gibson (Gibson). In late 2014 or early 2015, the subcommittee began discussing outsourcing because they believed that they had a chance to significantly increase the amount of cleaning and service, and that there was the potential for saving a meaningful amount of money that could be re-deployed into teaching students. After internal discussions with the Superintendent, Assistant Superintendent, Vice-President of Finance, the head of Human Resources, and Cronin, the School Committee put out an RFP for an examination of the custodial operations and opportunities for improvement. As a result, Core Management Services was selected for the project, and it prepared a report that included projected cost savings if the School Committee were to outsource the operations.

The School Committee received an initial report in July 2015. Following questions about the projected cost savings and the methodology that the consultant used for its calculations,[22] a revised report was issued in March 2016.[23]

Cafeteria Unit

The Union also represents a unit of cafeteria workers that were employed by the School Committee until approximately early 2011. At that time, the Union and School Committee agreed to outsource the unit to a contractor. The unit members who remained employed after the outsourcing remained represented by the Union, which has negotiated contracts with the contractors that employ the cafeteria workers. The cafeteria workers' unit did not have a work jurisdiction clause in its contract with the School Committee in 2011.

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[22] The parties dispute whether the questions about the cost savings methodology in the initial report were initially raised by the Union or the School Committee. I do not find it necessary to resolve this issue as it is not relevant to my decision.

[23] The initial consultant's report includes projected cost savings for a variety of outsourcing scenarios, such as outsourcing all the custodial services with the employees transferring to a new employer but operating under the same CBA, or operating under a new CBA, with a different projected savings for each option. The parties did not clarify which option the School Committee was relying on when it analyzed the cost savings associated with its outsourcing proposal. However, McDonald's undisputed testimony was that the initial consultant's report projected a savings of approximately $3 million, while the revised and final report reduced the projected savings to approximately $1 million. Further, the revised report includes cost saving figures specific to outsourcing all custodial services and oversight, but does not include the various scenarios referenced in the initial report, with a projected total annual savings of $1,078,055.

Grievances

From January 2010, when Hills joined the School Committee, through March 2016, when the Union filed the current charges, Hills was involved in one grievance meeting with the custodial unit, which was held on November 19, 2015 and was Step IV of the grievance process. Cronin, legal counsel, the head of HR, and another School Committee member were also present for at this meeting. Six grievances were addressed at this meeting,[24] five of which involved a promotional bypass of the most senior candidate.

Information Request

During the February 18, 2016 bargaining meeting, the Union verbally requested that the School Committee provide it with information about the revenue that it received from the use of the School Department's facilities by outside groups (i.e., "user fees"). The Union made this request in response to the School Committee's proposal to eliminate the user fee overtime clause of the contract so the Union could evaluate how much money would be saved and how the savings might be used in a way that would produce even

[24] Originally, nine grievances were to be presented at the grievance meeting, but the Union withdrew three grievances.

greater savings for the School Committee.[25] The School Committee provided the information in an email dated May 20, 2016.[26]

Executive Board Meeting with Superintendent

At the end of the summer of 2016, Tim Curry (Curry), a Senior V Custodian and President of the Union, requested that the Newton School Superintendent, David Fleishman (Fleishman), meet with him and other members of the Union's executive board because the Union needed his support. Curry explained to Fleishman that Cronin[27] was not supporting them. Fleishman agreed to meet with the Union members and they scheduled it for a date in September 2016 (September 2016 meeting).

On the scheduled date, Curry met with Fleishman and Hurley. Also at this meeting were Peltier, Sheila Ernst, and John Griffin, who were all members of the Union's executive board.[28] At this meeting, Curry discussed a number of issues that he and the

[25] McDonald explained that this contract provision was first added in the 1993 negotiations, and allowed the School Committee to decide when the fees paid by outside groups using school facilities for custodial overtime would be paid directly to the custodians or put in a pool to cover other overtime costs, which in turn defrayed the School Committee's costs for overtime that it had previously been paying out of its budget.

[26] Connelly credibly testified that the School Committee did not provide the information sooner because the request "fell through the cracks."

[27] Although Anastasi oversees the custodial staff, Curry would also deal with Cronin about issues in the buildings and issues within the bargaining unit, such as grievances. Cronin reports to Fleishman and Liam Hurley (Hurley), the CFO.

[28] Curry testified that Jose Filimino, also an executive board member, was likely also at the meeting, but he was not certain.

Union were having with Cronin and their belief that Cronin did not support them.[29] Fleishman mainly listened to the unit members at the meeting, but he also told them that he appreciated the work that they did.

Discipline of Three Custodians

In or about May 2016, Cronin learned that three custodians had been involved in potential misconduct at Newton North High School. Specifically, Dave Stickney (Stickney), Manager of Facilities, showed Cronin short sections of video that showed one custodian riding a scooter in the building, one custodian riding a skateboard in the building, and a third custodian moving technology equipment without authorization to enhance the cable TV service in the custodian's lounge.[30]

Newton North Meeting

On September 20, 2016, Curry was asked to attend a meeting with Cronin about the incidents involving the three custodians described above. Anastasi was also in attendance at the meeting. The three custodians were waiting outside of the meeting

[29] Curry's testimony about this meeting was long and at times confusing, but it was clear that the purpose of the meeting was for the executive board to voice their concerns about Cronin and ask Fleishman for his support on the outsourcing issue in negotiations.

[30] The evidence shows that video was initially reviewed because the administration believed that computers were missing. In an effort to determine what happened to the computers, Cronin's department was asked to look at the building's surveillance video. There were no allegations that these custodians were involved in the missing computers and, in fact, it was subsequently determined that the computers were not missing. However, while reviewing the video, the above-described incidents were observed.

room.[31] When the meeting began, Fitzsimmons was brought in and a video was played. The video showed Fitzsimmons on a skateboard inside Newton North High School putting a sign into a closet. Curry asked Cronin why he was having this meeting now because the incident happened months ago, and the three custodians had already been disciplined.[32] Fitzsimmons also stated that he had already been disciplined because Anastasi and Timmy Keefe had verbally disciplined him.[33] Cronin responded that there was nobody in the computer center during the summer, but Curry stated that he used to work in the computer center, and that there is always someone around if you need something.[34] Cronin also explained that the principal and vice-principal were pushing for

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[31] The three custodians were David Fitzsimmons (Fitzsimmons), David Mucci (Mucci), and Al Hernandez (Hernandez).

[32] Curry also testified that Fitzsimmons said that his vice-principal told him that she had seen the video around the time when the incident took place. I am not crediting any of Curry's testimony about what Fitzsimmons said that the vice-principal said as it is too attenuated to be reliable.

[33] Anastasi confirmed in his testimony that he told Fitzsimmons in April 2016 that this was inappropriate conduct, and that he might have raised his voice when he did so. He also told Fitzsimmons that he would have to bring the incident to Cronin's attention. Timmy Keefe was not identified.

[34] Cronin testified that he did not immediately address the incident with the three custodians in the spring because he first asked Stickney to put the video snippets "together a little more tightly so we can show a movie." To do this was time-consuming because there were clips from several cameras that had to be matched by timeframe and seamed together into a movie. Cronin requested that the IT Department do this at the end of the school year, but the particular IT employee who handled it works only ten months and does not work in the summer. Therefore, the movie was not made until August. I do not credit this testimony as the reason why Cronin waited so long to address this issue because it does not adequately explain why Cronin first needed a movie made in order to discipline the custodians.

discipline and that it was not him.[35] After Fitzsimmons left the room, Curry again asked Cronin why he was doing this months after the incident. In response, Cronin said that Curry went to the Superintendent and "you know how this works." Curry stated that he only went to the Superintendent for support. Cronin also stated that the Union's grievances were a "big reason why the School Committee wants to get rid of the Union," and that the "Cheryl Jassett grievance[36] was an embarrassment."[37]

Following Fitzsimmons, the other two custodians were also separately brought into the room and shown the video.

After the meeting, Cronin issued a letter of reprimand to each of the three custodians. The letter to Fitzsimmons states in relevant part:

> This letter of reprimand is documentation of a written warning presented to [Fitzsimmons], Third Shift Custodian at Newton North High School, for incompetency. We met with you on Tuesday, September 20, 2016, to inquire about the areas of your position where you are not meeting expectations.

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[35] Curry testified that after this meeting Fitzsimmons told him that he talked to the vice-principal and she told him that she did not ask Cronin to do this. As explained above, I do not credit this testimony.

[36] The Cheryl Jassett grievance was pending at the time of this conversation and involved the School Committee bypassing a unit member for a promotion and instead selecting a less-senior individual who Curry claims was later removed from the position.

[37] In addition, Curry testified about conversations he had with Fleishman about the Union's grievances where Fleishman commented that the Union "grieves everything," and, at another time, said that the Union would get a "world's record" for all the grievances it has. Curry did not specify when, where, or in what context these conversations took place, therefore, I am not considering them in my analysis.

> Outlined below are examples of how you are not currently meeting the expectations of this position:
>
> - Riding a skateboard inside the building during shift,
> - Setting a bad example to the rest of your crew,
> - Allowing a junior custodian to ride a scooter in the building,
> - Assisting in manipulating the technology infrastructure at Newton North High, and
> - Wearing a Bruins shirt and not your regular uniform.
>
> You are responsible for the safety of yourself and your staff. This unacceptable behavior is in clear contrast with your responsibility as senior custodian.
>
> The goal of this letter is to provide you with notice to assist you in ways to improve your position. We will meet with you on Friday, January 6, 2017 at 7:30 AM to discuss your progress. This letter is going to be placed in your file. This letter is notice that there must be immediate improvement in this area; however, this is to advise you that if any of these unacceptable actions persist, there is a possibility of further disciplinary action. Please use this to improve your practice immediately.[38]

Witness Credibility

Curry, Cronin, and Anastasi all testified about the meeting with the three custodians and, for the most part, each witness' testimony was inconsistent with the others' testimony.[39] I have decided to credit Curry's testimony, with the exceptions explained above, based on his demeanor at the hearing and the fact that he had the best recall of what occurred at the meeting. Cronin, on the other hand, did not deny, but did

[38] The letters to Fitzsimmons and the other custodians are essentially the same except they outline some different examples of not meeting expectations, and only Fitzsimmons' letter includes the third paragraph.

[39] Cronin and Anastasi were sequestered for the hearing.

not recall a discussion about the Union members meeting with the Superintendent,[40] or a discussion about grievances.[41] Anastasi also did not deny, but did not recall, that Cronin said anything about the Union's grievances being the reason that the School Committee wanted to outsource the custodial work or that there was a discussion about the Union's grievances or the Cheryl Jassett grievance. He did recall a discussion about the Union's meeting with the Superintendent, but testified that Curry brought it up and that Cronin only acknowledged Curry's comment.

The Union asks that I draw a negative inference from the fact that the School Committee did not call the Superintendent as a witness to testify about whether he informed Cronin that the unit members had met with him. Conversely, the School Committee asks that I draw a negative inference from the fact that the Union did not call Peltier as a witness to testify about the Newton North meeting with the custodians. I decline to draw either negative inference as parties need not call every individual who

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[40] Cronin testified that he did not know that the unit members had met with Fleishman because he was out of state at the time. I do not find this credible as there are several ways by which he could have learned about the meeting while he was out of state, such as by email or a phone call. Further, even if he did not learn of it at the time, he could have learned of it when he returned from his trip.

[41] Although Cronin denied making the statements about the grievances and outsourcing, I do not credit this testimony since he could not recall whether conversations about these topics occurred, and because I have determined that Curry's testimony about this meeting is credible. In addition, Anastasi testified that he did not recall Cronin saying anything about the Union's grievances being the reason for the outsourcing proposal and that he "did not hear" Cronin say that the Union had gone to Fleishman and Curry "knew how that worked," in response to Curry's question about why Cronin was now disciplining the three custodians. I do not find Anastasi's testimony to be a convincing reason to credit Cronin's denials.

was present for a conversation to avoid having a negative inference drawn. Instead, I have made my credibility and factual findings for the reasons explained above.

Opinion

Section 10(a)(5) Allegation: Unlawful Preconditioning

The Complaint alleges that the School Committee has failed to bargain in good faith by conditioning its willingness to make economic proposals upon the Union's acceptance of the School Committee's outsourcing proposal in violation of Section 10(a)(5) of the Law. Good faith bargaining requires the parties to negotiate with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences. King Philip Regional School Committee, 2 MLC 1393, MUP-2125 (February 18, 1976). Each party must acknowledge and treat the other as a full partner in determining the employees' conditions of employment, and it is a prohibited practice for an employer or union to bargain with any lesser degree of commitment. Town of Hudson, 25 MLC 143, MUP-1714 (April 1, 1999). It is well-settled, and the School Committee does not dispute, that outsourcing of unit work is a mandatory subject of bargaining. City of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28, 1996), aff'd sub nom., Cambridge Police Superior Officers Association v. Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999).

The Union cites to Town of Greenfield in support of its position. 36 MLC 54, MUP-07-5091 (H.O. October 2, 2009).[42] In that case, the school committee was found to have violated the Law when the mayor provided the school committee with a model contractual health insurance provision with the message, "the language that will be acceptable is the language attached hereto." The model provision specified the town's percentage contribution rate and employee co-payment rates for office visits, hospital inpatient admissions, and outpatient surgical and emergency room visits. The mayor also stated that no new agreement would be legally enforceable unless the health insurance language had been agreed to by the mayor's office. The hearing officer reasoned that "by dictating the terms of the agreement prior to the commencement of the negotiations, prohibiting the School Committee from negotiating or deviating therefrom without express permission from the Town, and conditioning a new or extended agreement on the adoption of the Town's health insurance provision, the Town has imposed acceptance of its health insurance provision as a precondition to the parties successor contract negotiations."

On the other hand, the School Committee contends that it never conditioned bargaining on the acceptance of outsourcing. Rather, Connelly expressed that the proposal was important and that the School Committee wanted to discuss it. The School Committee argues that Connelly expressed that he would like to "talk about" the proposal,

[42] The case is an unappealed hearing officer decision, which is binding precedent only on the parties involved in that case.

and that he "implied" that the School Committee would not make any new proposals until the outsourcing issue had been resolved. It further points out that while its July 23, 2015 proposal would allow for complete outsourcing immediately, its December 2015 proposal involved a plan to negotiate an outsourcing agreement that would include a phased approach, as well as benefits for unit members such as severance, health insurance continuation, and outplacement/retraining assistance.

The School Committee argues that the facts of this case are akin to Woburn School Committee, 43 MLC 84, MUP-15-4575 (H.O. September 8, 2016).[43] In this case, the mayor stated that a new contract must include concessions on health insurance. According to the School Committee, the hearing officer distinguished the facts of the case from Town of Greenfield by recognizing the difference between insisting that a contract must include specific *language* and demanding that a contract must address a specific *subject*.

Here, I conclude that the School Committee did unlawfully precondition its willingness to make economic proposals on the Union's acceptance of outsourcing. Although the School Committee was willing to discuss the proposal and did not insist that the Union must accept it "as is," it was also unwilling to make economic proposals until the outsourcing issue was resolved. This is unlike the employer in Woburn School Committee, in which the employer continued to make revised economic proposals and

[43] This case is also an unappealed hearing officer decision.

concessions before the union accepted a health insurance proposal. Thus, in essence, the School Committee was not willing to meaningfully proceed with bargaining until the Union accepted the School Committee's outsourcing proposal in some form.[44] I conclude that this amounts to unlawful preconditioning.

Section 10(a)(5) Allegation: Surface Bargaining and Bargaining in Bad Faith

The Complaint alleges that the School Committee has engaged in surface bargaining and bad faith bargaining in violation of Section 10(a)(5) of the Law by proposing to delete the Work Jurisdiction clause from the parties' CBA and replace it with the outsourcing proposal, by rejecting the Union's proposals without making any substantive counterproposals, and by simultaneously refusing to withdraw any of its proposals from its initial bargaining agenda.

The duty to bargain is a duty to meet and negotiate and to do so in good faith. G. L. c. 150E, Section 6. Neither party is compelled, however, to agree to a proposal or to make a concession. Id. "Good faith" implies an open and fair mind as well as a sincere effort to reach a common ground. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960) (collective bargaining presupposes a desire to reach ultimate

[44] Although I have concluded below that the School Committee's outsourcing proposal is not part of the surface bargaining violation in part because the School Committee showed a willingness to discuss the proposal and offered possibilities for implementation, such as a phased approach, I do find that it unlawfully preconditioned bargaining about other subjects on the Union's acceptance of outsourcing. Thus, my decision is not based on the fact that the School Committee was insisting on specific language, but that it insisted on acceptance of outsourcing, in whatever form that may have eventually taken after negotiations, before it would bargain about other subjects.

agreement); Commonwealth of Mass., 8 MLC 1499, 1510, SUP-2508 (November 10, 1981) (good faith requires an open and fair mind, a sincere purpose to find a basis of agreement and to make efforts to compromise differences). The quality of the negotiations is evaluated by the totality of conduct. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-154 (1956) (good faith or lack thereof depends on the particular circumstances of each particular case); Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956, 959 (9th Cir. 1981); Glomac Plastics, Inc. v. NLRB, 592 F2d 94 (2nd Cir. 1979).

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." Everett School Committee, 43 MLC 55, MUP-09-5665 (August 31, 2016) (quoting Bristol County Sheriff's Department, 32 MLC 159, 160-161, MUP-19-2971 (March 13, 2003) (additional 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. Id. A categorical rejection of a union's proposal with little discussion or comment does not comport with the good faith requirement. Id. Also, a failure to make any counterproposals may be indicative of surface bargaining. Id.

The facts show that the Union made its initial proposals on December 18, 2014, with additional proposals on July 23, 2015. The School Committee made its initial proposals on May 20, 2015, and supplementary proposals on July 23, 2015. On

December 21, 2015, the School Committee provided its responses to some of the Union's proposals, which for the most part were either a rejection of the Union's proposals, or an indication that it would hold them for discussion. On this date, the School Committee also presented a proposal for a phased approach to outsourcing, and the Union provided its responses to certain of the School Committee's proposals, which included a rejection of the outsourcing proposal. At its January 2016 meeting, the Union asked the School Committee if it had responses to certain outstanding Union proposals, but the School Committee was not ready with responses. At the next meeting on February 18, 2016, the School Committee rejected four Union proposals and made no counterproposals; in response the Union withdrew three of the rejected proposals. The Union also expressed its concern that the School Committee still had not made any economic proposals, to which the School Committee responded that the parties had to resolve the outsourcing issue before they could address other issues. On March 16, 2016, the Union made counterproposals to the School Committee's proposals, attempting to find alternative means to outsourcing to achieve cost savings. On March 30, 2016, which was the parties' last bargaining session, the School Committee presented counterproposals to the Union's counterproposals. It also explained that the Union's proposals did not provide enough cost savings for the School Committee to withdraw its outsourcing proposal, and that the School Committee would not withdraw any of its proposals or make counterproposals until the outsourcing issue was resolved.

The School Committee, therefore, essentially rejected almost all of the Union's proposals, tendered its own, and did not attempt to reconcile the differences by making counterproposals to the Union's proposals. For example, the December 21, 2015 chart shows that out of sixteen Union proposals, the School Committee outright rejected eight of them without making any counterproposals, and indicated that it would discuss the remaining 8, but did not make any actual counterproposals. Further, when the Union presented alternative means to outsourcing to achieve cost savings, the School Committee simply rejected the Union's proposals and suggested filing for mediation at the DLR without first engaging in any discussions to consider alternatives to outsourcing.[45] It also refused to make any economic proposals until the outsourcing proposal was resolved. For the most part, the counterproposals it did make were to the Union's counters to School Committee proposals, and not to Union proposals.

The School Committee contends that because most of the Union's proposals were economic in nature, including a wage increase, it would not be fruitful to address them until they resolved the outsourcing issue. In that regard, according to the School Committee, it bargained in good faith as it made recurring efforts to engage the Union in a discussion of outsourcing and requested responses from the Union. In turn, the Union did not respond to the proposal at all until the March 16, 2016 meeting, when it made a

[45] The Union, in turn, refused to discuss the School Committee's outsourcing proposal, as discussed below.

proposal for the School Committee to hire retired custodians, which the School Committee argued would increase costs for the School Committee.

While it is true that many of the Union's proposals were economic in nature, it is also true that the School Committee outright rejected many of them, such as proposals regarding callback pay, vacation, and the building check minimum, rather than placing them on hold pending the resolution of the outsourcing issue. Further, just as the School Committee contends that it would need to know the result of the outsourcing issue before making economic proposals, the Union would be interested in learning the School Committee's economic proposals before making a decision involving outsourcing.[46] I also note that the School Committee originally declined to discuss economics until the teachers' contract was complete, and the Union agreed to delay all negotiations as it did not want to separate economics from the other issues. Once the teachers' contract was finalized, the School Committee then wanted to delay an economic discussion until outsourcing was resolved. Thus, over the course of approximately one year and eight substantive meetings, the School Committee refused to discuss economics. These actions evidence that the School Committee was not seriously trying to reach a mutually satisfactory basis for agreement. I therefore find that the School Committee's actions described above constitute bad faith bargaining and surfacing bargaining in violation of Section 10(a)(5) of the Law.

[46] And as noted by the Union, even if outsourcing were to occur, the School Committee would have to address the economics of the time period from the current contract to the present, as well as the going forward with outsourcing.

I must also decide if the School Committee's outsourcing proposal, when taken in totality with the other elements of bad faith and surface bargaining discussed above, constitutes an element of the violation. Outsourcing/subcontracting is a mandatory subject of bargaining. City of Boston, 26 MLC 144, MUP-1085 (March 10, 2000). Therefore, standing alone, an employer does not violate the Law by making a proposal concerning subcontracting. However, the Union argues that the School Committee's proposal, when combined with the conduct described above, is indicative of bad faith and surface bargaining. In analyzing the totality of the School Committee's conduct, I may consider the proposal "not to determine [its] intrinsic worth but instead to determine whether in combination and in the manner proposed [it] evidence[s] an intent not to reach agreement." Coastal Electric Cooperative, 311 NLRB 1126, 1127 (1993); see also, King Phillip Regional School Committee, 2 MLC 1393, 1397, MUP-2125 (February 18, 1976) (finding that the relevant inquiry for the CERB is an examination of conduct exhibited at the bargaining table and the nature of the bargaining rather than the terms or merits of the parties' proposals.)

The Union has relied on several National Labor Relations Board (NLRB) cases for support.[47] In Reichold Chemicals, Inc., 288 NLRB 69 (1988), although the NLRB held that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith, it will not decide whether particular proposals are

[47] In the interest of efficiency, I will not individually address each of the many NLRB cases the Union cites as support in its brief since they are not precedent for the CERB.

"acceptable" or "unacceptable," but rather whether a demand is clearly designed to frustrate agreement on a contract. In this case the NLRB found that the employer did not demonstrate an insistence on extreme proposals that would frustrate the collective bargaining process, in part because it made some movement on its comprehensive management rights and no-strike proposals. Here, the School Committee never indicated that its proposal was its final offer. Instead, it supplemented the proposal with suggestions for bargaining a phased approach to outsourcing with potential benefits for unit members who would eventually be laid off, including severance and obligations of the eventual contracting company to those employees. It also continued to attempt to engage the Union in discussions about the outsourcing proposal and reach an agreement, to which the Union simply refused to consider the proposal and instead would only offer alternatives to outsourcing.[48] The School Committee explained why it was making its outsourcing proposal, and it explained why it was rejecting the Union's counterproposal.

In finding that the employer did not bargain in bad faith, the NLRB also noted in Reichold Chemicals that a sister union's contract included a provision similar to the no-strike provision proposed by the employer at issue in that case. Similarly, the Union's cafeteria unit was fully outsourced in 2011, after reaching agreement with the Union. Although the Union argues that the proposal here is more egregious because the

[48] Although the Union frames its proposal to allow the School Committee to hire retirees under certain circumstances, who would be part of the bargaining unit but not entitled to certain contractual benefits, as an "alternative outsourcing" proposal, I do not consider hiring additional bargaining unit members to perform the work to be "outsourcing."

custodial unit's contracts have included the work jurisdiction clause since the 1990s, and the cafeteria unit's contract contained no such clause, I find this argument unpersuasive. The fact that a contract contains a certain clause on a mandatory subject of bargaining should not preclude the employer from making proposals to eliminate the clause in future contracts. See, e.g., Charlie's Oil Co., 267 NLRB 764 (1983) (employer's proposal to eliminate contract language that it "shall not at any time subcontract any bargaining unit work" was not made in bad faith as the employer attempted to negotiate the issue at several bargaining meetings). I also find the fact that the cafeteria unit eventually agreed to such a proposal as evidence that the School Committee would not consider it so extreme that it would frustrate the collective bargaining process.

In addition, the NLRB in Reichold Chemicals distinguished A-1 King Size Sandwiches by noting that in that case, the employer "presented a comprehensive package of proposals that sought to negate the union's fundamental representational role and, if accepted, would have left the union and employees with substantially fewer rights and protection than they would have had if they had never gone to the bargaining table, but rather had relied on the union's certification." In the instant case, there is only one proposal at issue, not a "comprehensive package of proposals."

I similarly am not persuaded by the other cases relied on by the Union as they mainly involve multiple contract proposals and/or more egregious bargaining conduct, as opposed to the one proposal at issue here. For example, the court held in Public Employee Service Company of Oklahoma v. NLRB, 318 F3d 1173 (2003), that "the

Company's rigid adherence throughout negotiations *to a battery of contract proposals* undermining 'the Union's ability to function as the employees' bargaining representative' demonstrated it 'could not seriously have expected meaningful collective bargaining.'" (Emphasis Added). Similarly, in Hardesty Co., Inc., 336 NLRB 258 (2001), the employer's proposals that were considered to be part of a surface bargaining violation included substantial reductions in wages and other economic benefits, a regressive vacation proposal, in addition to a management rights clause that included the right to subcontract. And in Regency Service Carts, 345 NLRB 671 (2005), the NLRB held that the employer's proposals were consistent with the overall evidence of surface bargaining where the proposals included a management rights clause that granted the employer unfettered discretion in the creation of workplace rules and regulations and in decisions to discharge and discipline employees; the discretion to award seniority, to grant leaves of absences, to grant merit wage increases, and to subcontract unit work; a grievance and arbitration clause that excluded from arbitration any grievance about the employer's exercise of rights retained in the management rights clause; and a very broad no-strike clause.

The obligation to bargain in good faith requires parties to allow discussion on all proposals, to listen to each other's arguments, and to show a willingness to consider compromise, but the Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. City of Marlborough, 34 MLC 72, 77, MUP-03-3963 (January 9, 2008). Clearly, the School Committee felt strongly about outsourcing, as was its right. Although it did not concede its position, it supplemented the proposal

with proposed benefits for affected members and attempted to engage in discussions with the Union over the proposal. In summary, I conclude that the School Committee's outsourcing proposal was not so patently unreasonable as to stall negotiations, nor did it constitute an effort to stall negotiations. Cf. Framingham School Committee, 4 MLC 1809, MUP-2428 (February 27, 1978) (employer offered a proposal that was less than what the union had previously rejected).[49]

For the above reasons, I find that the School Committee engaged in bad faith bargaining and surface bargaining when it rejected the Union's proposals without making any counterproposals, refused to withdraw any proposals from its initial bargaining agenda, and refused to discuss economic proposals until the outsourcing proposal was resolved in violation of Section 10(a)(5) of the Law. However, I do not find that the School Committee's outsourcing proposal is included in its unlawful bargaining behavior.[50]

Section 10(a)(5) Allegation: Failure to Provide Information

The Complaint alleges that the School Committee violated Section 10(a)(5) of the Law by failing to timely provide the Union with information about the revenue that the

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[49] Although I have concluded that the School Committee's outsourcing proposal itself was not part of its bad faith bargaining conduct, it could not lawfully insist on resolving the outsourcing issue before bargaining about other subjects, especially economics, as detailed above.

[50] I also must note the unique necessity for a public employer to be able to consider the outsourcing of bargaining unit work, and laying off employees, as a means to improve the quality and cost of services provided to the public. Such considerations are not the same in the private sector, and the obligation to the public should not be limited by finding such a proposal unlawful.

School Committee received from the use of school facilities by outside groups for approximately three months, which the Union verbally requested on February 18, 2016. The School Committee provided the information on or about May 23, 2016.

If a public employer possesses information that is relevant and reasonably necessary to an employee organization in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the employee organization's request. City of Boston, 32 MLC 1, MUP-1687 (June 23, 2005) (citing Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997)). The employee organization's right to receive relevant information is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. Id.

The standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. Board of Trustees, University of Massachusetts (Amherst), 8 MLC 1139, 1141, SUP-2306 (June 24, 1981). Generally, a union has a right to information that may explain a public employer's proposals and to assist it in formulating reasoned counterproposals. Boston School Committee, 25 MLC 181, 186, MUP-13-3371 (May 20, 1999). Therefore, I find that the information requested was relevant as it was related to the School Committee's proposal regarding user fee overtime.

An employer may not unreasonably delay furnishing requested information that is relevant and reasonably necessary. Boston School Committee, 24 MLC 8, 11, MUP-

1410, 1412 (August 26, 1997). In determining whether a delay in the production of information is unreasonable, the CERB considers a variety of factors including: 1) whether the delay diminishes the employee organization's ability to fulfill its role as the exclusive representative, Id.; 2) the extensive nature of the request, UMass Medical Center, 26 MLC 149, 158, SUP-4392, 4400 (March 10, 2000); 3) the difficulty of gathering the information, Id.; 4) the period of time between the request and the receipt of the information, Higher Education Coordinating Council, 23 MLC at 269; and 5) whether the employee organization was forced to file a prohibited practice charge to retrieve the information. Board of Higher Education, 26 MLC 91, 93, SUP-4509 (January 11, 2000).

The School Committee argues that it responded to the vast majority of Union information requests, which were extensive, in a timely manner. I find this irrelevant, as the other information requests are not at issue, and the School Committee has not argued that it was delayed in responding because of the extensive nature of this particular request. In fact, it admits that the request "fell through the cracks." The School Committee also contends that the delay did not diminish the effectiveness of the Union in fulfilling its role because the information requested was not directly relevant, from its perspective, to the primary issue in negotiations, which was outsourcing. However, the information was made in response to a School Committee proposal to eliminate user fee overtime.[51] In addition, I agree with the Union's argument in its brief that information

[51] I also note that outsourcing was the primary issue because the School Committee refused to bargain about most other subjects.

about the School Committee's revenue could be useful in formulating proposals, even with respect to outsourcing. Lastly, the School Committee did not provide the information until after the Union filed a charge that included an allegation regarding the information request. For these reasons, I conclude that the School Committee unreasonably delayed responding to the Union's information request, in violation of Section 10(a)(5) of the Law.

Section 10(a)(3) Allegation: Retaliation for Filing Grievances

The Complaint alleges that the School Committee made its outsourcing proposal in retaliation for the Union filing grievances in violation of Section 10(a)(3) of the Law. Section 2 of the Law guarantees employees the right to form, join or assist any employee organization and to engage in lawful, concerted activities for the purpose of bargaining collectively or other mutual aid or protection. A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Worcester Reg. Voc. School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. (1996). To establish a prima facie case of a Section 10(a)(3) violation, a charging party must show that: (1) the employee engaged in concerted activity protected by Section 2 of the Law; (2) the employer knew of the concerted, protected activity; (3) the employer took adverse action against the employee; and (4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June

30, 2008) (citing Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000).

In its brief, the School Committee does not dispute that the Union engaged in concerted, protected activity when it filed the grievances described above. It also does not dispute that it knew of the grievances. I therefore will focus on the remaining elements of the Union's retaliation claim.

In order to find that the Union made a prima facie case of retaliation, I must find that the School Committee's outsourcing proposal was an adverse action. The CERB has held that an adverse action is an adverse personnel action taken by the employer, such as a suspension, discharge, involuntary transfer, or reduction in supervisory authority). Town of Dracut, 25 MLC 131, 133, MUP-10-1397 (February 17, 1999). The Union has cited no cases that hold that a bargaining proposal can be considered an adverse action, and I decline to reach such a conclusion. In addition to the fact that the School Committee made a proposal on a mandatory subject of bargaining, which it is legally required to do before making a change to terms and conditions of employment, making the proposal has not adversely affected any unit members' working conditions.[52]

[52] The School Committee cites Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1517, 1540, UP-2496 (February 3, 1998) in support of its argument that a collective bargaining proposal cannot be an adverse action. While I agree with the School Committee's position that its proposal was not an adverse action, I am not relying on this case, as it holds that a bargaining proposal cannot be a *per se* violation of the Law, without other evidence of discriminatory animus, when made in response to the filing of grievances.

However, even if I were to find that the outsourcing proposal was an adverse action, I would not be persuaded that the School Committee made the proposal in retaliation for the Union's grievances for the following reasons. To support a claim of unlawful motivation, the charging party may proffer direct or indirect evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December 13, 2006) (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), aff'd sub nom., Town of Brookfield v. Labor Relations Commission, 443 Mass. 315 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable, or at least a highly probable inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 667 (2000) (quoting Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). "Unlawful motivation also may be established through circumstantial evidence and reasonable inferences drawn from that evidence." Town of Carver, 35 MLC at 48 (citing Town of Brookfield, 28 MLC at 327-328). Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity. Town of Carver, 35 MLC at 48. Timing alone is insufficient to establish unlawful employer motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March 20, 1979).

Here, there is direct evidence of the School Committee's improper motivation. Specifically, Cronin told Curry at the custodian's disciplinary meeting that the Union's grievances were a "big reason why the School Committee wants to get rid of the Union," and that the "Cheryl Jassett grievance was an embarrassment." Once the charging party has established through direct evidence a prima facie case of retaliation, the burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive. City of Easthampton, MUP-04-4244 (April 23, 2009).

The evidence shows that the collective bargaining subcommittee of the School Committee began discussing outsourcing as a way to save money and increase services in late 2014 or early 2015. After putting out an RFP, it obtained an initial consultant's report in July 2015. This report included a projected cost savings of approximately $3 million if the School Committee were to outsource custodial operations. A revised report was issued in March 2016, with an adjusted projected total savings of approximately $1 million per year. I therefore conclude that the School Committee would have made and pursued the outsourcing proposal even if the Union had not filed and processed the grievances due to the cost savings that outsourcing would provide. Although the projected cost savings decreased from $3 million to $1 million annually after the consultant issued a revised report, this is still significant savings in providing public services. Accordingly, I dismiss this allegation.

Section 10(a)(5) Allegation: Bargaining in Bad Faith by Making Bargaining Proposal in Retaliation for Filing Grievances

The Complaint alleges that the School Committee violated Section 10(a)(5) of the Law by bargaining in bad faith by making its outsourcing proposal in retaliation for the Union filing grievances. As explained above, I have determined that the School Committee made the outsourcing proposal because of the cost savings that outsourcing would provide, and not because of the Union's grievance activity. I therefore dismiss this allegation.

Section 10(a)(3) Allegation: Discipline against Unit Members in Retaliation for Meeting with Superintendent

The Complaint alleges that the School Committee disciplined three unit members in retaliation for Curry and other Union executive board members meeting with the Superintendent in violation of Section 10(a)(3) of the Law.[53] In its brief, the School Committee does not dispute that the executive board members were engaged in protected, concerted activity when they met with the Superintendent or that the discipline issued to the three unit members was an adverse action. Rather, it argues that Cronin was not aware that the executive board members met with the Superintendent, and that there is no evidence that it was improperly motivated when it disciplined the unit members.

Regarding the School Committee's contention that Cronin was not aware of the meeting with the Superintendent, I have credited Curry's testimony that Cronin referenced the executive board's meeting with the Superintendent in the September 2016 disciplinary

[53] The elements of a Section 10(a)(3) violation are described above.

meeting as a reason why he was disciplining the unit members at that time. Thus, the Union has satisfied the third prong of a prima facie case.

Turning to motivation, the Union contends that Cronin's statement to Curry and Peltier at the September 2016 meeting referencing the executive board's meeting with the Superintendent and that "you know how it goes" in response to Curry's question as to why discipline was now happening, is direct evidence of unlawful motivation. There is no other reasonable way to interpret Cronin's statement except to mean that he was disciplining the three unit members, months after the incidents at issue occurred, because Curry and the executive board members had gone to the Superintendent to ask for his support and discuss their issues with Cronin.

The School Committee contends that it disciplined the three custodians because they were engaged in conduct worthy of discipline, and the written warnings that were issued were not disproportionate to the offenses committed. However, I am not persuaded that the School Committee would have disciplined the custodians for these reasons standing alone. First, Curry did not call a meeting to discipline the custodians until several months after the events at issue occurred. I do not find it plausible that he would need a "movie" of the events before issuing discipline. In addition, Cronin himself essentially admitted to Curry that the meeting with the Superintendent was the reason why the custodians were being disciplined. I therefore conclude that the School Committee disciplined the three custodians in retaliation for the Union's protected, concerted activity in violation of Section 10(a)(3) of the Law.

Conclusion

Based on the record and for the reasons explained above, I find that the School Committee failed to bargain in good faith with the Union by: 1) conditioning its willingness to make economic proposals upon the Union's acceptance of its outsourcing proposal; 2) engaging in bad faith and surface bargaining during contract negotiations; and 3) failing to timely provide information. I also conclude that the School Committee disciplined unit members in retaliation for the Union's protected, concerted activity. I dismiss the allegations that the School Committee's outsourcing proposal was part of its bad faith and surface bargaining conduct; that it made the outsourcing proposal in retaliation for the Union's protected, concerted activity; and that making the proposal in retaliation for the Union's protected activity was bad faith bargaining.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the School Committee shall:

1. Cease and desist from:

   a) Failing or refusing to bargain in good faith with the Union by setting unlawful preconditions on its willingness to make economic proposals during bargaining for a successor contract;

   b) Failing or refusing to bargain in good faith with the Union by engaging in surface bargaining;

   c) Failing or refusing to timely provide relevant and reasonably necessary information to the Union;

   d) Disciplining unit members in retaliation for the Union's protected, concerted activity;

e) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

a) Bargain in good faith to resolution or impasse with the Union for a successor contract by making counterproposals and economic proposals in conjunction with any outsourcing proposal;

b) Rescind the disciplinary letters issued to Fitzsimmons, Mucci, and Hernandez;

c) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the School Committee 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;

d) 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

Kerry Bonner

KERRY BONNER

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.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Massachusetts Department of Labor Relations has held that the Newton School Committee (School Committee) has violated Sections 10(a)(3), 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by: 1) failing to bargain in good faith with the Newton Public Schools Custodians Association (Union) by setting unlawful preconditions on its willingness to make economic proposals during bargaining for a successor contract; 2) failing to bargain in good faith with the Union by engaging in surface bargaining; 3) failing to timely provide information to the Union; and 4) disciplining unit members in retaliation for the Union's protected, concerted activity.

The School Committee posts this Notice to Employees in compliance with the hearing officer's order.

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 fail to bargain in good faith by setting unlawful preconditions on our willingness to make economic proposals during successor contract negotiations;

WE WILL NOT fail to bargain in good faith by engaging in surface bargaining;

WE WILL NOT fail to bargain in good faith by failing to timely provide information to the Union;

WE WILL NOT discipline unit members in retaliation for the Union's protected, concerted activity; and

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law;

WE WILL take the following affirmative action to effectuate the purposes of the Law:

- Bargain in good faith to resolution or impasse with the Union for a successor contract by making counterproposals and economic proposals in conjunction with any outsourcing proposal.
- Rescind the disciplinary letters issued to unit members Fitzsimmons, Mucci, and Hernandez.

_____ _____

NEWTON SCHOOL COMMITTEE 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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).