

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

TOWN OF PLYMOUTH

and

COLLECTIVE BARGAINING RELIEF
ASSOCIATION

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Case Number: MUP-19-7473

Date Issued: October 27, 2020

Hearing Officer:

Meghan Ventrella, Esq.

Appearances:

Jared M. Collins, Esq. – Representing the Town of Plymouth

John O. Killian, Esq. – Representing the Collective Bargaining Relief
Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Town of Plymouth (Town) violated Section
2 10 (a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Law Chapter 150E
3 (the Law) by creating a job description for a new bargaining unit position, and posting that
4 position without bargaining with the Collective Bargaining Relief Association (Union) to
5 resolution or impasse over the decision and the impacts of the decision on employees'
6 terms and conditions of employment.

7 I find that the Town did violate the Law.

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STATEMENT OF CASE

On July 17, 2019, the Union filed a charge of prohibited practice (Charge) with the Department of Labor Relations (DLR) alleging that the Town had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On November 12, 2019, a DLR Investigator investigated the Charge. On November 26, 2019, the Investigator issued a one-count Complaint of Prohibited Practice (Complaint) alleging that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On December 13, 2019, the Town filed its Answer to the Complaint. On June 3, 2020, I conducted a hearing by video conference during which the parties received a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On August 5, 2020, the parties filed post-hearing briefs. Based on my review of the record, including my observation of the demeanor of the witnesses, I make the following findings of fact and render the following opinion.

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STIPULATIONS OF FACT

1. The Town of Plymouth (“Town” or “Employer”) is a public employer within the meaning of Section 1 of G.L.C. 150E (“the Law”).
2. The Collective Bargaining Relief Association (“Union” or “COBRA”) is an employee organization within the meaning of Section 1 of the Law.
3. COBRA is the exclusive bargaining representative for a unit of employees, which includes employees in the Town’s Department of Public Works (“DPW”).
4. On December 31, 2018, the Director of Human Resources Marie Brinkman (“Brinkmann”) sent COBRA President Dale Webber (“Webber”) the draft job description for the recently funded HVAC Technician position.
5. On December 31, 2018, Webber notified Brinkmann of the Union’s objection to the proposed pay classification of OM6 rather than OM7 for the HVAC Technician position.

- 1 6. On January 14, 2019, Webber requested to negotiate over the HVAC
2 Technician Job Description.
- 3
- 4 7. On January 23, 2019, the parties met to discuss the HVAC Technician job
5 description.
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- 7 8. On January 24, 2019, the Town provided Webber with a revised HVAC
8 Technician Job Description.
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- 10 9. On May 7, 2019, the Town emailed Webber a revised HVAC Technician job
11 description.
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- 13 10. On May 15, 2019, Webber emailed Brinkman concerning the HVAC Technician
14 job description.
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- 16 11. On May 29, 2019, Brinkmann provided Webber with a revised HVAC
17 Technician job description incorporating some, but not all, of Webber's
18 proposed changes. The Town did not accept Webber's proposal to change the
19 pay classification for the HVAC Technician position from OM6 to OM7.
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- 21 12. On June 3, 2019, Webber emailed Brinkmann concerning the HVAC
22 Technician job description.
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- 24 13. On July 15, 2019, Brinkmann emailed Webber indicating that the Town agreed
25 to change the classification for the HVAC Technician position from OM6 to
26 OM7. Brinkmann also indicated that the Town would post the position.
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- 28 14. On July 15, 2019, in response to Brinkmann's email referred to in paragraph
29 13, Webber emailed Brinkmann as follows:
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31 Please do not post until I continue the review as indicated
32 in prior emails. Now that we have moved past the salary
33 issue, I will continue that task.
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- 35 15. On July 17, 2019, the Town posted the HVAC Technician position.
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- 37 16. Joint 2 was sent by Marie Brinkmann in a December 31, 2018, 11:28 a.m.
38 email to Dale Webber. This email is included on page one of Joint Exhibit 1.
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- 40 17. Joint Exhibit 3 was sent by Marlene McCollem in a January 24, 2019, 11:28
41 a.m. email to Dale Webber. This email included on page five of Joint Exhibit 1.
- 42
- 43 18. Joint 5 was sent [by] Marie Brinkmann in a May 7, 2019 email to Dale Webber.
44 This email is not included in the record.
- 45

1 “comply with the ‘equal pay for equal work’ requirements (position
2 responsibilities, educational requirements, supervisory functions, etc.),
3 and in an effort to maintain internal equity, we review our current
4 classification plan when new positions are created to determine the most
5 appropriate placement. Based on this process, we felt this position is most
6 closely compared to OM[-]6 positions in the current classification plan. Let
7 me know if you would like to discuss this further.”
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9 Later that day, Webber responded with the following message: “That’s just plain
10 wrong...this position is a Building Maintenance Craftsman, period. That is currently rated
11 as an OM-7 and is underpaid at that rating. The Town’s own HRS study, currently dying
12 on the vine, rates the position as OM-8! You have cut and pasted all kinds of additional
13 language that any reasonable person would reasonably conclude that a higher rating is
14 warranted. I have not completed my review as [of] yet, but this is troubling on many levels.
15 As I continue, please forward to me the job description of the Operations Manager you
16 refer to here.”

17 Shortly after Webber’s email, Brinkmann responded with the following message:
18 “The Operations Manager job description is a draft being discussed with the appropriate
19 union. When it is finalized, I’ll forward a copy to you. We see a distinction between the
20 Building Maintenance Craftsman and the HVAC Technician in the level of responsibilities
21 and supervisory functions of the positions. Other OM[-]6 positions, such as Assistant
22 Pump Station Operator and Master Mechanic seemed most similar when classifying this
23 new position.”

24 Webber emailed Brinkmann asking her to include the monetary rating range when
25 she forwarded the new Operations Manager Job description. Additionally, Webber
26 informed Brinkmann that: “as to how you rated the HVAC Tech position, it makes no
27 sense to me to have a Craftsman position rated less than existing Craftsmen. In other

1 COBRA positions ALL Craftsmen are rated the same...Carpenter, Plumber, Electrician[,]
2 and HVAC. And ALL of them pay more than the Town. (\$28.28 - \$32.18) in the 2015-
3 2018 School CBA. As opposed to the \$26.57 - \$30.66 Town CBA range for the same
4 years. I strongly oppose the diminishment of the HVAC role you have drafted while at the
5 same time increasing the administrative role of this new position, especially in the face of
6 creating yet another layer of Administration of an Operations Manager to assist the
7 Facilities Manger.”

8 By email dated January 14, 2019, Brinkmann asked Webber if he had completed
9 his review of the job description. Brinkmann informed Webber that she did not have a
10 final version of the Operations Manager Job Description, but she was hopeful that it would
11 not delay his review as the Operations Manager position was not a COBRA bargaining
12 unit position. Later that same day, Webber responded to Brinkmann with the following
13 message:

14 “COBRA opposes the format used in this Job Description. It is not similar
15 to any of the existing job descriptions and I am concerned that it is part of
16 the recommendations from the HRS Study that, as you know, is sitting on
17 a shelf somewhere collecting dust for some 17 months now. The Job
18 Description of the Operations Manager is integral to the review of this
19 matter as it is a reporting requirement of the HVAC Tech and COBRA feels
20 many of the duties that should [be] incorporated into the Operations
21 Manager[']s job description are found here in the HVAC Tech[']s job
22 description. That is unfair. Your rating system of this Job Description is
23 inaccurate and is not reflective of fundamental fairness that is accepted
24 across the Tradesman lines established within existing COBRA Job
25 descriptions. At this point, and since you and/or the Town are unwilling to
26 share the Job Description of the Operations Manager, approved and
27 funded at the October Annual Town meeting, and its content and monetary
28 rating and are unwilling to adjust the issues I have outlined, I must put the
29 Town on notice that this is a matter of Impact Bargaining and I must notify
30 you to cease and desist in any further implementation of this issue until
31 such time as you meet your obligation and bargain with the exclusive
32 representative, COBRA, to impasse or resolution. I am copying the Town
33 Manager and Assistant Town Manager on this in the hope that several

1 dates, days, and times will be provided so that I may coordinate those with
2 the COBRA team to commence bargaining.”

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4 By email dated January 17, 2019, Brinkmann asked Webber if he was available to discuss
5 the content of the HVAC job description on the Wednesday or Thursday of the following
6 week. Brinkmann informed Webber that she anticipated discussing the outside posting of
7 the Water Leadman at the same meeting. Webber responded that pending the availability
8 of Tom Nugent (Nugent), the Maintenance Steward, the Union would be available to meet
9 Wednesday, January 23, 2019.

10 On January 23, 2019, Webber, Brinkmann, Marlene McCollem (McCollem), the
11 Assistant Town Manager, Dennis Wood (Wood), the Assistant DPW Director, and Nugent
12 met at Town Hall to discuss the HVAC Technician position.² At the meeting, Webber
13 repeated his objection to the current draft of job description and expressed concerns that
14 the Town was using the HRS study for the job description format but not the monetary
15 rating. Additionally, Webber provided McCollem a copy of the Town’s job description with
16 his handwritten notes and suggested changes. After noting Webber’s objections,
17 McCollem informed Webber that the parties would be bargaining over the content of the
18 job description, not the format. Also, McCollem informed Webber that the Town would not
19 move off the OM-6 rating for the HVAC Technician position.

20 Throughout the meeting, the parties discussed Webber’s concerns, such as a
21 change in the licensure and supervisory job duties. At this point in the meeting, Webber
22 brought up the pay parity between the Town units and the School units. McCollem
23 explained that the Town had put a comprehensive and extensive proposal on the table in

² The parties met on January 23, 2019 for approximately 20 minutes.

1 contract negotiations that would address pay parity. McCollem explained that the Town
2 did not want to discuss one single job description, but rather address the entirety of the
3 issue at main table negotiations. At the end of the meeting, Webber requested a copy of
4 the Operations Manager job description with monetary ratings.

5 By email dated January 23, 2019, Webber asked McCollem to schedule another
6 meeting to continue the impact bargaining session on the HVAC Technician position after
7 he received the Operations Manager description. On January 24, 2019, McCollem
8 emailed Webber a revised draft of the HVAC Technician job description.³ The Town had
9 agreed to several of Webber's suggestions to the job description, but the position
10 remained at an OM-6 pay grade.⁴ Later that day, Webber informed McCollem that he

³ In the second draft of the job description, the Town made several changes based on the parties' conversation on January 23, 2019. For examples: 1) under the Summary section, the Town substituted the word 'skilled' for 'supervisory' and deleted 'other structures', 2) Under Essential Functions section, second paragraph, the Town added the word 'municipal' to public restrooms, 3) Under the Essential Function section, the Town deleted from the third paragraph "develops, plans, cost estimates, inventory controls; plans and schedules work projects. Plans and arranges for timely delivery of materialism equipment and tools requires for HVAC and repair projects." The language was replaced with "assists with coordinating work projects and schedules with HVAC contractors delivery of materials, equipment, and tools required for HVAC and repair projects." 4) Under the Essential Function section, almost the entire fifth paragraph was deleted and replaced with "maintains a log of heating, ventilation, air conditioning, and refrigeration preventative maintenance and repair records." 5) Under the Supervision Received and Exercised section, the Town deleted from the third paragraph 'carrying out' and replaced it with "assisting with" and deleted the phrase "both municipal and industrial". 6) Under the Qualifications section, subsection Ability, the Town deleted the phrase: "prepare routine and special reports." 7) Additionally, the Town deleted "ability to enter and record maintenance data into Asset Management Software" with ability to use "Asset Management software" and deleted the phrase "ability to set up and maintain", 8) Under Qualifications, Subsection Licensing Certifications, the Town added Aerial Lift Safety Certification, 9) The Town changed the section labeled "Supervision (Received and Exercised)" to "Supervision (Received/Exercised)."

⁴ Neither party testified to the exact changes made to the job description. However, the parties provided a red lined copy of the second draft of the job description.

1 could not complete his overall assessment of this position until he saw the Operations
2 Manager Job description. Additionally, Webber asked McCollem to eliminate the last
3 sentence of the paragraph titled "Ability". Webber further responded that:

4 [The Town should] [p]lease use accepted and current Job Description
5 format, not format associated with the HRS Study unless you are
6 implementing the studies recommendations of the Building Maintenance
7 Craftsman findings. All Town of Plymouth Building Maintenance
8 Craftsman need to be rated the same regardless of trade. All Building
9 Trades are Craftsman. The Town would do well to mirror this after the
10 current school department model with their Skilled Craftsman jobs. Since
11 the Town is only now getting motivated to hire skilled tradesman we should
12 follow what has worked in the school since 1990- Plumber, Electrician,
13 HVAC, Carpenter[,] and Painter (currently vacant), are all at the same pay
14 grade. Please let me know when you have the Operations Manager Job
15 Description so we can complete our review of this subject and then we
16 should absolutely meet again.
17

18 On February 13, 2019, the Town provided Webber with a copy of the Operations Manager
19 job description. Upon receiving the job description, Webber shared the document with the
20 bargaining unit members in the Building Maintenance Division.

21 Between February 13, 2019 to May 7, 2019, neither party attempted to contact the
22 other to discuss the HVAC Technician position. On May 7, 2019, the Brinkmann emailed
23 Webber the revised HVAC Technician job description.⁵ By email dated May 15, 2019,
24 Webber informed Brinkmann that the Union wanted the following changes made to the
25 HVAC Tech job description: 1) change to OM[-]7 classification, 2) eliminate paragraph 2,
26 3) under "Ability" delete the words "Asset Management Software," 4) under
27 License/certifications add "Spark Certification of welding, soldering, brazing," and 5) add

⁵ Neither party testified to what, if any, changes were made in the May 7, 2019 draft. However, the parties did provide the redlined draft of the job description that was attached to the May 7, 2019 email. The red line draft attached to the May 7, 2019 email is identical in content to the red lined draft attached to the January 24, 2019 email.

1 HVAC acronym to sentence 3 between words 'of' and 'electronic', and delete the word
2 'Building'.

3 By email dated May 29, 2019, Brinkmann responded to Webber's proposals on
4 the job description. Brinkmann informed Webber that "This HVAC position has been
5 funded by [the] Town Meeting and that funding reflects an OM[-]6 classification.
6 Consideration of a change in classification for this position may be part of a separate
7 conversation." Brinkmann stated that the Town had not eliminated paragraph 2 as
8 requested but modified it, and the redlined draft was attached to the email. Additionally,
9 Brinkmann informed Webber that it was important to the Town to hire someone who could
10 utilize the Asset Management Software. Brinkman stated that the Town added 'HVAC' to
11 sentence 3. However, the Town needed the word 'Building' to remain in the description
12 as it was an important clarification. Finally, Brinkmann asked Webber for more information
13 on the Spark Certification as she was not familiar with the term.

14 On June 3, 2019, Webber emailed Brinkmann stating that he could not agree to
15 the OM-6 rating for the HVAC technician. "In order to complete my review of the HVAC
16 position we must agree to rate it at a[n] OM-7 Classification. Please advise me as to why
17 ALL our Building Maintenance Craftsman are OM-7 and you continue to downgrade this
18 new position to an OM-6. BTW a new HVAC position [at] the school dept finally filled after
19 4+ months of trying and they filled it at an entry level that is some \$4.00 higher rate at you
20 are assigning." ⁶ Later that day, Brinkman emailed Webber the following response: "You

⁶ At hearing, Webber testified that his review of the job description would be different depending on the rating of the pay classification for the position. Webber explained that the Union would argue the job duties of a HVAC Technician rated as OM-6 would be different than if the position was rated at an OM-7.

1 have made your position clear regarding the classification. Do you have any further
2 comments/issues on the Essential Functions, Qualifications, etc.? If so, kindly provide me
3 with specifics so they can be addressed.”

4 In the beginning of June, McCollem called Webber to set up a meeting to discuss
5 DPW issues. On June 6, 2019, Webber, McCollem, and Beder met at Town Hall to
6 discuss work being performed at the cemeteries, the 400th Town anniversary festivities,
7 floater custodians, and pay parity in certain positions.⁷

8 On June 20, 2019, Brinkmann requested an update on Webber’s review of the
9 description. On the same day, Webber emailed Brinkmann stating: “I am waiting on you
10 to change the classification rate to that of the other Building Maintenance Craftsmen, as
11 well as addressing the issue Marlene initiated with me on pay [parity] to school side
12 craftsmen. Also, to remove your objection to “must have sense of humor” prior to
13 concluding my review.” Afterwards, Brinkmann and McCollem spoke on the phone to
14 discuss the HVAC Technician position and agreed to move the classification from an OM-
15 6 to OM-7 as they felt it was the Union’s only remaining objection to the description.
16 McCollem stated that the Town had not heard back from Webber about any further
17 changes from the last red lined draft, therefore McCollem assumed the pay classification
18 was the only issue holding up posting the position. McCollem and Brinkmann did not
19 inform the Union that they assumed the only remaining issue holding up posting the HVAC
20 Technician position was the pay classification.

⁷ The parties met for approximately an hour and did not discuss in any meaningful way the job description for the HVAC Technician position.

1 On July 1, 2019, Brinkmann emailed Webber stating that she had noted his
2 comment on the classification of the position and the 'sense of humor' language.
3 Brinkmann thanked Webber for the review of HVAC job description.

4 By email dated July 15, 2019, Brinkmann informed Webber that the Town had
5 agreed to change the pay classification on this position from OM-6 to OM-7, and that it
6 would move forward with posting the position.⁸ On the same day, Webber emailed
7 Brinkmann stating that the Town should not post the position. Webber stated: "Please do
8 not post until I continue the review as indicated in prior emails. Now that we have moved
9 past the salary issue[,] I will continue that task. I also feel the time is ripe to continue the
10 [parity] issue Marlene started to get to at our last meeting before running into a prior
11 commitment."

12 On July 16, 2020, Brinkmann emailed Webber the following response: "COBRA
13 was provided the draft job description for this position on May 7, 2019. You previously
14 provided specific feedback regarding language concerns, and those concerns were
15 addressed. Now that the Town has agreed to change the classification from OM[-]6 to
16 OM[-]7, we are moving forward with posting the position." Shortly thereafter, Jaclyn
17 Gurney (Gurney), Benefits Administrator in the Town's Human Resource Department,
18 emailed Webber stating that the HVAC position would be posted in-house tomorrow.
19 Gurney attached the job description for the HVAC technician position to the
20 communication.

⁸ Brinkmann had attached the Town's final job description to the email. Except for the change from OM-6 to OM-7 pay classification, the Town's final job description was identical to the drafts sent to the Union on January 24, 2019 and May 7, 2019.

1 4784 (October 9, 2003). The employer's obligation to bargain before changing conditions
2 of employment extends to working conditions established through past practice, as well
3 as those specified in a collective bargaining agreement. Town of Wilmington, 9 MLC
4 1694, 1699, MUP-4688 (March 15, 1983). To establish a violation, a union must show
5 that: (1) the employer changed an existing practice or instituted a new one; (2) the change
6 had an impact on a mandatory subject of bargaining; and, (3) the change was
7 implemented without prior notice to the union or an opportunity to bargain to resolution or
8 impasse. Commonwealth of Massachusetts, 30 MLC 63, 64, SUP-4784 (October 9,
9 2003); Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29, 2001); Commonwealth
10 of Massachusetts, 27 MLC 11, 13, SUP-4378 (August 24, 2000).

11 The Town does not deny that the HVAC Technician was a newly created position
12 in the bargaining unit, or that the job duties for the newly created HVAC technician position
13 were a mandatory subject of bargaining. However, it denies that it posted the HVAC
14 Technician position without giving the Union prior notice and an opportunity to bargain to
15 resolution or impasse. The Town asserts that it did not violate the Law when it posted the
16 HVAC Technician position because: 1) the parties had reached a resolution when the
17 Town conceded to the OM-7 pay classification; and 2) after it changed the pay
18 classification to OM7, and the Union asserted it still had to review the job description for
19 further changes, the parties were at impasse

20 ***Resolution***

21 The Town argues that as of July 15, 2019, the only remaining issue that the Union
22 had with the HVAC Technician job description was the OM-6 pay classification. The Town
23 maintains that throughout the negotiation process, the Union had insisted that it could not

1 sign off on a job description for the HVAC Technician position unless it was designated
2 at an OM-7, not an OM-6 pay classification. Although the Union had proposed other
3 changes to the job description, the Union made it clear that the pay classification was the
4 most important issue. The Town further argues that after Brinkmann requested an update
5 on the Union's review of the job description on June 20, 2019, the Union only mentioned
6 issues with the pay classification and an objection to the phrase "must have sense of
7 humor" in the job description. The Town claims that the Union had ample time to suggest
8 any other proposed changes to the job description but choose not to do so. As such, on
9 July 16, 2019, the only remaining issue was the pay classification issue; therefore, the
10 parties had reached a resolution when the Town conceded to classify the HVAC
11 Technician position as an OM-7.

12 Although I agree with the Town that the Union's most important issue throughout
13 bargaining was the pay classification issue, I do not agree that the parties were at
14 resolution. Despite the Town's belief that the pay classification was the only remaining
15 issue, the Town did not communicate or clarify its understanding to the Union before
16 agreeing to the OM-7 pay classification and announcing that it intended to post the job
17 description. Conversely, the Union had told the Town that it could not *continue* its review
18 of the job description until the Town agreed to the OM-7 pay classification. Based on the
19 parties' communications, it was not reasonable for the Town to assume that the parties
20 were at a resolution when they agreed to the OM-7 pay classification.

21 Even if I ignore the Union's clear statement that it would continue its review of the
22 job description after the Town agreed to the OM-7 pay classification, I cannot ignore the
23 fact that the Union expressly told the Town not to post the job as it still needed to review

1 the job description. After the Town announced that it would classify the HVAC Technician
2 as an OM-7, the Union clearly and quickly expressed its opposition to posting the job
3 description and stated its intent to continue reviewing the job description. Given the
4 Union's clear communications both before and after the Town agreed to the OM-7 pay
5 classification, it was not reasonable for the Town to assume that the parties had reached
6 a resolution on the HVAC Technician position. I find that the parties had not reached
7 resolution prior to the Town posting the HVAC Technician position.

8 ***Impasse***

9 The Town argues that the parties' bargaining history, the length of negotiations,
10 the Town's concession of an issue of great importance to the Union, and the Town's
11 position that it was not likely to move any further in negotiations shows that the parties
12 had reached impasse. Accordingly, the Town asserts, the parties were at impasse when
13 it lawfully posted the HVAC job description on July 17, 2019.

14 After good faith negotiations have exhausted the prospects of concluding an
15 agreement, an employer may implement changes in terms and conditions of employment
16 that are reasonably comprehended within its pre-impasse proposals. City of Leominster,
17 23 MLC 62, 66, MUP-8534, MUP-8535 (August 7, 1996) (citing Hanson School
18 Committee, 5 MLC 1671, MUP-2196 (February 27, 1979)). Factors considered in
19 determining whether impasse has been reached include: bargaining history, the good
20 faith of the parties, the length of negotiations, the importance of the issues to which there
21 is disagreement, and the contemporaneous understanding of the parties concerning the
22 state of negotiations. Ashburnham-Westminster Regional School District, 29 MLC 191,
23 195, MUP-01-3144 (April, 9 2003) (citing Town of Westborough, 25 MLC 81, 88, MUP-

1 9779, MUP-9892 (June 30, 1997); Town of Weymouth, 23 MLC 70, 71, MUP-8959, MUP-
2 8960 (August 16, 1996), City of Leominster, 23 MLC at 66 MUP-8534, MUP-8535 (August
3 7, 1996)). Impasse exists only where both parties have bargained in good faith on
4 negotiable issues to the point where it is clear that further negotiations would be fruitless
5 because the parties are deadlocked. Ashburnham-Westminster Regional School District,
6 29 MLC at 195, MUP-01-3144 (April 9, 2009)(citing Commonwealth of Massachusetts,
7 25 MLC 201, 205, SUP-4075 (June 4, 1999); Town of Brookline, 20 MLC 1570, 1592,
8 MUP-8426, MUP-8475, MUP-8479 (May 20, 1994)).

9 a. Bargaining History

10 The Town argues that the parties' bargaining history supports its position that the
11 parties reached impasse when it posted the HVAC Technician position on July 17, 2019.
12 Specifically, the Town argues that it was the only party to move negotiations along, and
13 that the Union was non-responsive throughout the process. I disagree. Both parties
14 consistently communicated with one another from the end of December 2018 to the end
15 of January 2019. After the parties met in person on January 24, 2019, the Union asked
16 the Town to schedule another meeting after it provided the Operations Manager's job
17 description. On February 13, 2019, the Town gave the Union the Operations Manager's
18 job description. Subsequently, neither party attempted to schedule a meeting, and neither
19 party attempted to contact the other side to discuss the HVAC Technician position until
20 May 7, 2019. The Town cannot fault the Union for failing to participate in the negotiation
21 process but ignore its own lack of communication. The absence of communication on
22 both sides does not show that the parties were at impasse at the time the Town posted
23 the HVAC Technician position.

1 Additionally, the Town argues that the parties' bargaining history demonstrates that
2 the Town had been clear on its expectations of the HVAC technician position from the
3 onset, and that it did not plan on changing the pay classification from OM-6 to OM-7.
4 However, on July 15, 2019, the Town changed its position and agreed to classify the
5 HVAC Technician position at an OM-7. Even if the parties' negotiations were stagnant
6 prior to July 15, 2019, the Town's decision to change the pay classification to OM-7
7 changed the circumstances of the negotiations and opened the possibility of further
8 bargaining.

9 Furthermore, Webber informed the Town that the Union would continue its review
10 of the description only after it made the HVAC Technician position an OM-7 pay
11 classification, thereby putting the Town on notice that the Union wanted to continue its
12 review should the Town make the position an OM-7.

13 b. Length of Negotiations

14 The Town argues that the length of the parties' negotiations demonstrates that the
15 parties were at impasse at the time the Town posted the HVAC Technician position.
16 According to the Town, the Union had more than six months to raise any issues or
17 proposed changes it may have had with the job description. However, on June 3, 2019
18 and June 20, 2019, the Union informed the Town of its position that if, or when, the Town
19 changed the grade classification to OM-7, it would then continue its review of the job
20 description and bargaining would continue. Once the Town choose to change the HVAC
21 Technician position to an OM-7, the Union followed through on its position that it would
22 continue its review of the job description.

1 At the hearing, the Union asserts that it would evaluate an OM-6 HVAC Technician
2 job description differently than it would evaluate an OM-7 job description. The Union
3 argues that it would have agreed to different job duties depending on the pay classification
4 of the position. The Town argued that even if the evaluation of an OM-7 job description
5 would have been different from that of an OM-6 position, the Union had ample time to
6 suggest to the Town its ideal OM-7 job description.

7 I agree with the Union that the job duties of the position designated at a lower pay
8 classification may be different than the same position designated at a higher pay
9 classification. I do not agree with the Town that the Union was obligated to submit an
10 ideal HVAC Technician job description classified as an OM-7 before the Town agreed to
11 that classification. Given that the Town was adamant that the HVAC Technician position
12 was appropriately classified at an OM-6, the Union had no reason to believe that
13 submitting a proposed OM-7 job description would have been fruitful.

14 Additionally, the Town argues that six months of bargaining is adequate for
15 negotiating a newly created position and any longer period of time would eviscerate the
16 Town's ability to determine the level of services necessary to provide for the Town's
17 residents. However, the parties did not engage in extensive and exhaustive negotiations
18 over this six-month period. The parties only met once in person to negotiate the HVAC
19 Technician position and exchanged a handful of emails.¹⁰ Furthermore, both the Town
20 and the Union allowed the negotiations to fall by the wayside from February 13, 2019 to
21 May 7, 2019. The Town has not established that the length of negotiations demonstrated

¹⁰ Both Town and Union witnesses testified that the parties met for a second time in May of 2019. Based on the testimony of all witnesses, I conclude that the topic of the HVAC Technician was not discussed in the May meeting in any meaningful way.

1 that the parties had reached impasse when the Town posted the HVAC Technician
2 position.

3 b. Town's Concession

4 The Town argues that the parties were clearly at impasse at the time it posted the
5 HVAC Technician position because it had conceded on the Union's main point of
6 contention: the pay classification change to OM-7. More importantly, the Town asserts
7 that it only agreed to change the HVAC Technician pay classification to an OM-7 to
8 resolve the negotiations and post the job description. However, as stated above, the Town
9 never communicated to the Union that it would change the pay classification of the
10 position if that would completely settle the matter.

11 If one party to the negotiations indicates a desire to continue bargaining, it
12 demonstrates that the parties have not exhausted all possibilities of compromise and
13 precludes a finding of impasse. Commonwealth of Massachusetts, 25 MLC 201, 205,
14 SUP-4075 (June 4, 1999). As previously noted, the Union clearly stated that it would
15 *continue* its review after the Town agreed to change the HVAC Technician position to an
16 OM-7. After the Town chose to change the pay classification, the Union clearly stated its
17 intention to continue to bargain over the HVAC Technician job description.¹¹

18 Although the Town eventually agreed to the Union's proposed pay classification,
19 which was the main obstacle at that point in the negotiations, the parties still could

¹¹ By email dated July 15, 2019, Brinkmann informed Webber that the Town had agreed to change the pay classification on this position from OM-6 to OM-7, and that it would move forward with posting the position. On the same day, Webber emailed Brinkmann stating that the Town should not post the position. Webber stated: "Please do not post until I continue the review as indicated in prior emails. Now that we have moved past the salary issue[,] I will continue that task. I also feel the time is ripe to continue the [parity] issue Marlene started to get to at our last meeting before running into a prior commitment."

1 negotiate other areas of the job description. Even if the parties had reached impasse prior
2 to the Town's concession, when the Town conceded the issue of pay classification, the
3 duty to bargain was revived when the Union expressed an interest in continuing
4 negotiations after it reviewed the job description. City of Boston, 21 MLC 1350, MUP-
5 8372 (October 17, 1994). Thus, the Town's concession on the pay classification does not
6 demonstrate that the parties were at impasse at the time the Town posted the HVAC
7 Technician position.

8 c. The Town was not likely to make further movement

9 The Town argues that the parties were at impasse at the time it posted the HVAC
10 Technician position because it was unlikely to make any further movement in negotiations
11 with the Union. An analysis of whether the parties are at impasse requires an assessment
12 of the likelihood of further movement by either side, and whether they have exhausted all
13 possibility of compromise. Ashburnham-Westminster Regional School District, 29 MLC
14 at 195 (citing Town of Plymouth, 26 MLC 220, 223, MUP-1465 (June 7, 2000); Woods
15 Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529-1530
16 (1988)). After the Union stated that it wanted to continue to review the job description on
17 July 15, 2019, the Town asserts that it conveyed its position that it was not likely to move
18 any further and could not offer more concessions. However, Brinkmann's email dated
19 July 16, 2019 does not expressly mention that the Town was unwilling to make any further
20 concessions.¹²

¹² Between the June 6, 2019 meeting and July 17, 2019, Brinkmann testified that the emails represent the extent of the parties' conversations surrounding the posting as there were no in person meetings or phone calls on this topic.

1 Even if the Town had communicated that it was not willing to make any further
2 concessions, the parties still would not have been at impasse. At this point, the Town did
3 not know what, if any, further changes to the job description the Union would propose,
4 therefore it could not know whether it would have agreed to any further changes. Section
5 6 of the Law does not compel either party to agree to a proposal or to make a concession
6 but only to bargain in good faith. See Town of Plymouth, 33 MLC 88, MUP-4391
7 (November 29, 2006). Although neither party is obligated to agree to proposals or make
8 concessions, both the Town and the Union are obligated to consider the other side's
9 respective proposals. Even after conceding to the OM-7 pay classification, the Town was
10 obligated to consider the Union's further proposed changes to the job description.

11 The Town argues that the Union had not proposed any further changes for the
12 OM-7 classified HVAC Technician position. Impasse, or lack thereof, is not exclusively a
13 function of whether there is an outstanding counterproposal that warrants a response.
14 City of Worcester, 39 MLC 271, MUP-11-6289 (March 29, 2013). The Commonwealth
15 Employment Relations Board (Board) has stated that impasse is a question of fact
16 requiring a consideration of the totality of the circumstances to decide whether, despite
17 their good faith, the parties are simply deadlocked. See, e.g., City of Boston, 29 MLC 6,
18 9 MUP-2413 (June 6, 2002) (citing School Committee of Newton v. Labor Relations
19 Commission, 388 Mass. 557, 574 (1983)). Determining whether there is a likelihood of
20 further movement by either side has, in at least two Board decisions, turned on the fact
21 that one or both parties had not changed their position since negotiations began. See City
22 of Boston, 29 MLC at 9 (no movement by either side during four negotiating sessions);

1 City of Boston, 28 MLC at 185, MUP-1087 (November 21, 2001) (Union's position after
2 eighth bargaining session was no different from its position at the first).

3 That is not the case here. The parties may have been deadlocked during most of
4 the negotiations on the pay classification issue. However, once the Town changed its
5 position on the pay classification, the parties were no longer deadlocked. After the Town
6 changed the pay classification, the Union communicated that it would now continue to
7 review the job description. Although not formally a counter-proposal, the Union's
8 statement nonetheless signaled that the Union wanted to continue the negotiations on
9 other areas of the job description. Again, the Town had an obligation to consider in good
10 faith any further proposed changes by the Union. In this case, the Town did not afford the
11 Union the opportunity to present further counterproposals on the job description after the
12 Town's concession on the pay classification. Without considering the Union's potential
13 counterproposals, the Town cannot state that it would not have made any further
14 movement. Therefore, the Town did not establish that the parties had exhausted all
15 possibility of compromise and were at impasse.

16 Conclusion

17 Based on the record and for the reasons explained above, the Town failed to
18 bargain in good faith by creating a job description for a new bargaining unit position, and
19 posting that position without bargaining with the Union to resolution or impasse over the
20 decision and the impacts of the decision on employees' terms and conditions of
21 employment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

22 Order

23 WHEREFORE, based on the foregoing, it is hereby ordered that the Town shall:
24

- 1 1. Cease and desist from:
2
3 a. Failing or refusing to bargain in good faith with the Union to resolution or
4 impasse before creating and posting job descriptions for new bargaining unit
5 positions;
6
7 b. In any like or similar manner interfering with, restraining or coercing employees
8 in the exercise of their rights protected under the Law.
9
- 10 2. Take the following affirmative actions that will effectuate the purpose of the Law:
11
12 a. Upon request, bargain with the Union in good faith to resolution or impasse
13 before posting job descriptions for newly created bargaining unit positions;
14
15 b. Restore the status quo ante by retracting the HVAC Technician job posting
16 until the parties reach agreement or impasse after bargaining in good faith, or
17 unless the Union fails to request bargaining within five days of receipt of this
18 decision or the Union subsequently fails to bargain in good faith;
- 19 c. Sign and post immediately in conspicuous places employees usually
20 congregate or where notices to employees are usually posted, including
21 electronically, if the Employer customarily communicates to its employees via
22 intranet or e-mail, and maintain for a period of thirty (30) consecutive days
23 thereafter signed copies of the attached Notice to Employees;
24
- 25 d. Notify the DLR within ten (10) days after the date of service of this decision
26 and order of the steps taken to comply with its terms.

27 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MEGHAN VENTRELLA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 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 Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.



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 (DLR) has held that the Town of Plymouth (Town) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to bargain in good faith by creating a job description for a new bargaining unit position, and posting that position without bargaining with the Union to resolution or impasse over the decision and the impacts of the decision on employees' terms and conditions of employment.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse before creating and posting job descriptions for new bargaining unit positions;

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights protected under the Law.

WE WILL take the following affirmative actions that will effectuate the purpose of the Law:

- Upon request, bargain with the Union in good faith to resolution or impasse before posting job descriptions for newly created bargaining unit positions;
- Restore the status quo ante by retracting the HVAC Technician job posting until the parties reach agreement or impasse after bargaining in good faith, or unless the Union fails to request bargaining within five days of receipt of this decision or the Union subsequently fails to bargain in good faith;
- Refrain from interfering with, restraining or coercing employees in the exercise of their rights under Section 2 of the Law.

Town of Plymouth

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, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617- 626-7132).