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

In the Matter of ESSEX NORTH SHORE AGRICULTURAL & TECHNICAL SCHOOL DISTRICT and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 93, LOCAL 245	Case No. MUP-20-8072 Issued: October 20, 2023

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Brett Sabbag, Esq. - Representing the Essex North Shore Agricultural & Technical School District

Justin P. Murphy, Esq. - Representing AFSCME Council 93, Local 245

CERB DECISION ON REVIEW OF HEARING OFFICER'S DECISION

SUMMARY AND STATEMENT OF THE CASE

The Essex North Shore Agricultural & Technical School District (Essex Tech, Employer or District) has appealed the decision of a Department of Labor Relations (DLR) Hearing Officer issued on November 9, 2022. The Hearing Officer held that Essex Tech violated Sections 10(a)(5) and (1) of Mass. General Laws, Chapter 150E (the Law) when

it changed bargaining unit members' summer work schedules and required them to use personal leave, vacation leave or unpaid leave on certain Fridays, without bargaining to impasse or resolution with AFSCME Council 93, Local 245 (Union) over the decisions and the impacts of the decisions and by failing to meet with the Union to continue bargaining over these changes. On appeal, Essex Tech renews the arguments that it made before the Hearing Officer and asserts that the decision to close on Fridays during the summer and reduce employees' hours accordingly was a non-bargainable level of services decision. Citing several different provisions of the parties' collective bargaining agreement, the District also asserts that the Union waived its right to bargain over the change to employees' work schedules and the requirement that employees use their paid time off (vacation and/or personal leave) to supplement their earnings during the shortened summer work weeks. In addition, Essex Tech contends that the Union waived its right to bargain by not requesting additional meetings and that it had bargained to impasse, entitling it to implement its summer furlough plan.

Upon review of the entire record and the parties' written submissions on appeal, the Commonwealth Employment Relations Board (CERB) affirms the Hearing Officer's conclusion that Essex Tech violated the Law. Specifically, we find that Essex Tech violated the Law when it failed to complete impact bargaining over its decision to close school offices on Fridays during the summer of 2020, and did not continue to bargain to resolution or impasse over the requirement that employees use their accrued vacation, personal time and/or unpaid leave to supplement their weekly pay during the shortened summer work weeks.

BACKGROUND

On June 29, 2020, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR), alleging that Essex Tech had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the summer work schedule for bargaining unit members on or about June 23, 2020. On December 8, 2020, a DLR Investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the District had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law: (1) by modifying unit members' summer work schedules without bargaining to impasse or resolution with the Union over the decision, and the impacts of the decision, on employees' terms and conditions of employment; and (2) by failing to meet with the Union to continue bargaining over the changes in summer work hours and the use of paid time off. The District filed an answer which it later amended to include additional affirmative defenses of waiver by contract, impasse, and economic exigency."[1] After a hearing, where both parties had the opportunity to present witness testimony and documentary evidence, and submit post-hearing briefs, the Hearing Officer issued a decision finding that Essex Tech had violated the Law as alleged in the Complaint.[2] The District filed a timely appeal and both parties submitted briefs on appeal.

FACTS

[1] The Hearing Officer granted the District's motion to amend its answer over the opposition of the Union.

[2] The Hearing Officer's decision is published at 49 MLC 152 (November 9, 2022).

Upon review of the transcript and the documentary evidence, the CERB adopts the Hearing Officer's findings of fact, except where noted, and summarizes the relevant facts below, reserving some details for our Opinion.

The Collective Bargaining Agreement

At all times relevant to the complaint, Essex Tech and the Union were parties to a collective bargaining agreement (CBA) that detailed the terms and conditions of employment for a bargaining unit that included "all rank and file clerical, maintenance, custodians, cafeteria, and technical support employees."[3] Article 2 of the CBA has a management rights clause which included the following language:

> B. . . . management retains the following rights: to determine the mission, budget and educational policy of the School District; to determine the organization of each unit and the School District, and the number, types or grades of employees assigned to a department, office, shift, building, work project or task; to determine whether work will be performed by bargaining unit personnel or outside contractors . . . to make all determinations involving or affecting the hiring, promotion, assignment, direction, and transfer of personnel; to lay off employees in the event of lack of work or funds or under conditions where management believes the continuation of such work would be less efficient, less productive, less economical; . . .
>
> C. The failure to exercise any management right shall not be deemed a waiver. Except as expressly provided by a specific provision of this Agreement, the exercise of the aforementioned rights shall be final and binding and shall not be subject to any further bargaining obligation.

Article 5 of the CBA concerning "Hours of Work" provides as follows:

> A. Generally
> 1. Work Day. The District retains the right to determine employees' daily schedules and shall provide at least 30 days' notice of a change in shift, except in the case of an emergency as determined by the

[3] After the completion of negotiations for a successor agreement, the parties finalized a Memorandum of Agreement (MOA) in June of 2020 that extended their existing CBA for a new three-year term, from July 1, 2019 through June 30, 2022. The terms of the MOA did not change the provisions of the underlying CBA detailed herein.

> District. During the 30 day period the District will meet with the Union to discuss the employees impacted.
>
> 2. The schedules set forth below will apply to most full time employees
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> ***
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> 3. Work Year. Specific positions may have different work years (e.g. 185 days, 195 days, etc.) . . . The District reserves the right to alter the work year of a position with reasonable notice to best meet the needs of the District.
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> ***

Section B of Article 5 details the hours of work for full-time employees and their daily schedules – which vary depending upon the type of work the employees perform. Full-time custodial, maintenance, and farm employees work five days per week from either 7:00 a.m. to 3:00 p.m. or from 2:30 p.m. to 10:30 p.m., while clerical, technology, and cafeteria employees work day shifts only and have varying start times in the morning.[4] Section F of Article 24 mandates that employees schedule any vacation time "in accordance with the operational requirements of the school . . . as determined by the Superintendent-Director or designee."

Section 22 of the CBA, entitled "Stability of Agreement," includes the following language:

> A. No agreements, practices, benefits, privileges or understandings, oral or written, benefiting an employee or the employees covered by this Agreement, shall be controlling or in any way affect the relations between the parties unless and until such agreements or understandings have been reduced to writing and duly executed by both parties subsequent to the date of this Agreement.
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> B. The failure of the School District to insist, in any one or more instances, upon performance of any of the terms or conditions of the Agreement, shall not be considered as a waiver or relinquishment of the right of the School District to future performance of any such term

[4] Clerical employees work from 7:30 a.m. to 3:30 p.m., while cafeteria workers work either from 6:00 a.m. to 2:00 p.m. or 7:00 a.m. to 3:00 p.m.

> or condition and the obligation of the Union to such future performance shall continue in full force and effect.
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> C. No amendment, alteration, or variation of the terms of this Agreement shall bind the parties unless it is made in writing and executed by the Union and the School District.

Article 23 of the CBA contains a provision entitled "Entire Agreement" which provides as follows:

> A. This Agreement, upon ratification, constitutes the complete and entire agreement between the parties and concludes collective bargaining for its term. No amendment to this Agreement shall be effective unless in writing, ratified, and executed by the parties.
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> B. . . . the Union, for the duration of the Agreement, voluntarily and unqualifiedly waives the right and agrees that the District shall not be obligated to bargain collectively with respect to any subject or matters referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Summer Hours Before 2020

During the previous three summers, Essex Tech closed its buildings on Fridays and negotiated a Memorandum of Understanding (MOU) each year with the Union concerning these summer hours. These MOUs provided that employees work four 10-hour days during the summers, with the 2019 MOU giving employees a choice to work the four 10-hour days or to work four 8-hour days and use a vacation day each Friday.

The District's Budget in Spring 2020

As a regional vocational school district, Essex Tech is governed by a School Committee comprised of members representing the seventeen communities in the region. The Committee sets the policies for the District and has authority over the campus which includes academic buildings, agricultural operations, an ice skating rink, and physical

therapy offices. Some of these facilities can be rented out to third parties and are sources of revenue for the District. In March of 2020, the Committee tentatively approved a budget for the fiscal year beginning July 1, 2020. Shortly thereafter, however, Essex Tech shut down its operations due to the onset of the COVID-19 pandemic, which resulted in a delay in finalizing the budget.

On May 2, 2020, Essex Tech Superintendent, Heidi Riccio (Riccio) emailed Union President, Debbie Campbell (Campbell) to update the Union about the status of the budget. Riccio told Campbell that the District would "be looking at the budget to determine necessary cuts" and that these cuts "may impact staffing." Riccio asked Campbell "to brainstorm" to come up with cost-saving measures to avoid impacts on staff. On May 12, 2020, the parties met to discuss the budget and Riccio followed up with an email indicating that she would be gathering additional information for the Union in the next few days. On May 21, 2020, the District sent the Union a copy of a draft budget, as well as copies of a "Plan B" and a "Plan C." Plan B proposed a furlough for all unit members, a summer furlough for certain unit members, as well as hiring freezes, position reductions, and other reductions. Plan C provided for most of the same reductions but substituted pay freezes for the unit-wide furlough in Plan B. Campbell responded to the information on May 27, 2020, and notified Riccio that the Union had additional questions about the budget and the plans. Campbell asked whether the position reductions included unit positions and inquired about the proposed summer staff furlough. She also asked Riccio whether members would be able to collect unemployment benefits.

Campbell and Riccio spoke again on June 3, 2020 regarding the draft budget and the summer staff furlough. The next day, Campbell sent Riccio an email confirming her

understanding of their discussion, delineating the issues, including the summer staff furlough. With respect to this issue, Campbell stated that she understood that any summer furlough of clerical and other AFSCME staff would be done so it did not affect people retiring within the next three years and that those affected would be able to collect unemployment. Campbell also stated that she understood that the Union would be receiving a Memorandum of Understanding (MOU) from the District's attorney, Tim Norris (Norris), regarding these plans. She also invited Riccio to let her know if she misinterpreted any of their conversation.

On June 7, 2020, Riccio responded. With respect to the summer furloughs, she confirmed the District's position and first raised the issue of having employees use vacation or personal time on Fridays during the summer while the offices were closed. Riccio prefaced her email by asking Campbell to keep in mind that the budget had not yet been approved and that it could be further impacted by the uncertainty surrounding the state budget.

On June 13, 2020, Riccio notified Campbell that while the District had decided not to implement the summer staff furloughs, it was "working on a document" that proposed a reduced summer work schedule in lieu of furloughs. She indicated that the plan would require employees to work their normal hours Monday through Thursday and take Friday as a vacation, personal, or unpaid day. She stated that the District would work with employees who were new and without earned time.

On June 15, 2020, Carol Markland (Markland), the Union's North Shore Coordinator, sent an email to Riccio requesting a meeting with her to discuss employees' re-entry into the workplace and "hours of work." On June 18, the parties met remotely on

the Zoom videoconference platform and the District set forth its plan as outlined in Riccio's June 13 email. The District also proposed that employees could borrow time not yet earned to avoid any reductions in their paychecks over the summer. The Union rejected the District's plan and proposed that employees work four ten-hour-hour days, Monday through Thursdays over the summer instead, as they had done in previous years when the school was closed on summer Fridays, without having to utilize any paid leave benefits.

In a follow-up email dated June 22, 2020, Markland informed Norris that an "MOU would be needed." She also noted the following:

- The Union is still seeking the 30 day notice but will use the date of Heidi's email which will bring the start date to July 13th.

- Knowing that the district cannot tell members/employees how or when to use accrued benefit time. Meaning give them a choice of nop[5] or use your time. We would be sharing this thought with the membership. (Heidi did say she would look at the ones with little to no time).

On June 23, 2020, Norris (responded by email, attaching a draft MOU. The draft MOU contained the following provision concerning the Friday closure plan:

> Effective June 26, 2020 and continuing until August 14, 2020, District offices and operations will be closed on Fridays. Employees with available vacation or personal leave time will be required to use leave on those days or take them unpaid. Full time farm workers will arrange a day off each week with their supervisor to ensure appropriate coverage.

On June 23, Markland responded to the draft MOU by sending an email to Norris stating that "[w]e are not in agreement with 'required'" and that "the district cannot require

[5] This refers to taking leave without pay for the day.

someone to use their time."[6] Markland also objected to the inclusion of a paragraph regarding fall furloughs in the MOU[7] and noted that the start date of June 26, 2023 did not conform with the contract's requirement that the Union be given 30 days' notice of a change in unit members' schedules. She asked Norris to give her a call to discuss. Norris responded that evening that his day "had been packed" but he could call her the next morning to discuss the matter -- if she was available. Norris's email stated in pertinent part:

> I thought we discussed all of this stuff and decided it needed to be in an MOA . . .Asking folks to use some vacation time during a low activity period after they have been able to stay home on full pay . . . does **not** seem unreasonable. Holding the Superintendent's feet to the fire in the middle of a pandemic over notice of a schedule that is a variation on a well-known summer schedule, seems unreasonable.
>
> People have a choice if they don't want to use their accrued leave – they can take the time unpaid. The Superintendent said she would work with folks who don't have leave time to come up with a solution. . .

Late the following day, on June 24, 2020, Markland emailed Norris and told him she had expected a call from him and wrote that "the Union does not anticipate any changes in hours until we complete or (sic) impact bargaining and are able to ratify and mou (sic) crafted." Norris responded within the hour, stating that he had anticipated her letting him know when she was available, and that the District was willing to postpone the Friday closure to July 10 to comport with the 30 days' notice requirement. He ended the

[6]We note that in discussing the District's argument that it had satisfied its obligation to bargain, the Hearing Officer incorrectly states that this email was sent on June 30, 2020. The correct date, June 23, 2020, however, is referenced earlier in the decision. Id. at 157.

[7] The District had also included a provision concerning three furlough days during the 2020-2021 school year which was not a subject of the Complaint.

email with "[o]ther than that please let me know if the MOU is ok."[8] Markland testified that she did not propose any changes to the MOU in response to this email.

On June 29, 2020, the Union filed this charge of prohibited practice, alleging that the District unilaterally changed the summer work schedule on June 23, 2020. On June 30, 2020, Riccio sent a memorandum to the Union, which announced schedule changes that would be effective July 13, 2020 until August 21, 2020. This memorandum indicated that employees (other than facilities, farms, and grounds employees) would work from 7:00 a.m. to 3:30 p.m. Monday through Thursday, and that, as in previous years, District buildings would be closed on Fridays. The memorandum stated that during the "affected time period," employees "may" use personal or vacation time for the Friday closures. On July 1, however, Riccio sent an updated version of the memorandum stating that during the relevant time period, employees "will" use personal or vacation time for Fridays. Thereafter, from July 13, 2020 through approximately August 21, 2020,[9] the District's offices were closed on Fridays and employees used paid time off or took unpaid leave on Fridays.[10] The parties had no further discussions about this issue.

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[8] Because the emails between Norris and Markland clearly demonstrate that the parties continued to bargain after the meeting on the June 18th, we do not adopt the Hearing Officer's finding that the District failed to engage in any further bargaining after the June 18, 2020 meeting.

[9] Although the Hearing Officer found that the schedule remained in effect through August 14, the hearing exhibits (Riccio's memos and the payroll records) indicate that the schedule remained in effect through August 21.

[10] The Superintendent testified and the record evidence reflects that two unit members took some of the Fridays unpaid and the rest of the members of the bargaining unit used either vacation or personal leave. The record, however, is devoid of any evidence as to whether the employees who utilized their accrued paid leave benefits were required to do so.

OPINION[11]

In its request for review of the Hearing Officer's decision, Essex Tech begins by arguing that the decision to close on Fridays during the summer of 2020 was a non-delegable level of services decision over which it had no obligation to bargain and that it properly bargained over the impacts of the decision with the Union. Although the decision to close on Fridays is a "level of services" decision, the means and methods of implementing it are bargainable. See City of New Bedford 38 MLC 239, 247, MUP-09-5581, MUP-09-5599 (April 3, 2012), *aff'd sub. nom*. City of New Bedford v. Commonwealth Employment Relations Board, 90 Mass. App. Ct. 1103 (2016) (unpublished Rule 1:28 decision). In City of New Bedford, the CERB found that in the context of the City's decision to furlough employees as a means of implementing its level of services decision to close its offices on Friday afternoons, the City was obliged to continue bargaining to resolution or impasse after rejecting the Union's proposal that it lay off employees instead. Id. at 247. On appeal, the Court rejected the City's argument that it was not required to bargain over the *means* of implementing its level of services decision to close at noon on Fridays, including its decision to furlough employees. See also School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983) (Employer required to bargain over the decision to achieve a reduction in force by laying off custodians as well as its impacts). The Hearing Officer correctly relied upon this case law when she rejected the District's argument that it was exempt from bargaining over furloughing employees when the District closed on Fridays during the summer of 2020. Here, as in City of New Bedford, the furloughs are one means of implementing the

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

nonbargainable decision to close on Fridays and therefore must be bargained to impasse or resolution before implementation can occur.

On appeal, the District also asserts that the Hearing Officer erred when she rejected the affirmative defenses it asserted -- 1) that the Union had waived by contract the right to bargain over modification of employees' work schedules; 2) that the District had fulfilled its obligation to bargain and the Union had waived its rights by inaction; and 3) that the parties had reached an impasse.[12] We examine each of these arguments below.

Waiver By Contract

To establish the affirmative defense of waiver by contract, the District bears the burden of proving that the parties consciously considered the situation that has arisen, and that the Union knowingly and unmistakably waived its bargaining rights. City of Boston v. Labor Relations Commission, 48 Mass. App. Ct.169, 174 (1999). See also City of New Bedford, 38 MLC at 248 (and cases cited therein). Such a waiver will not be lightly inferred and must be "clear and unmistakable." City of Taunton, 11 MLC 1334, 1336, MUP-5198 (January 17, 1985). No waiver will be found unless the contract language "'expressly or by necessary implication' confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union." Commonwealth of Massachusetts, 19 MLC 1454, 1456, SUP-3528 (October 16, 1992) (quoting Melrose School Committee, 9 MLC 1713, 1725, MUP-4507 (March 24,1983)). If the language is clear, no further inquiry is necessary. City of Worcester, 16 MLC 1327,

[12] The District did not challenge the portion of the Hearing Officer's decision that found it had not met its burden of proof with respect to its affirmative defense of economic exigency. We therefore decline to review this aspect of the Hearing Officer's decision.

1333, MUP-6810 (October 19, 1989). If the language is ambiguous, however, the CERB will proceed to review the parties' bargaining history to determine whether there was a clear intent to waive bargaining. Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986). We agree with the Hearing Officer that the District has failed to meet its burden to show waiver by contract here and address the District's arguments regarding the contract provisions below.

The District argues that Article 5 expressly establishes its right to make schedule changes provided it gives the Union 30-days' notice. Although the contract language establishes that the Union waived the right to bargain over schedule changes upon 30-days' notice, the plain language of the provision does not address the District's proposal at issue here, which is to reduce the hours of work for full-time employees during the summer. This is a distinctly different proposition than changing the daily hours of full-time employees to meet the needs of the District as it had done in prior summers. The Article 5 language does not include any mention of furloughs or reducing the hours of full-time staff. Although the District asserts that the language in its contract concerning scheduling was effectively the same as the contract language at issue in Commonwealth of Massachusetts, supra, where a waiver by contract was established, we, like the Hearing Officer, find the case and the contract language distinguishable. In Commonwealth of Massachusetts, the employer was seeking only to adjust employees' schedules, not to reduce full-time employees' weekly hours. 19 MLC at 1455-56. Further, unlike in the instant matter, the record in the Commonwealth matter contained evidence of the parties' bargaining history, including arbitration decisions, that supported the employer's interpretation of the provision. Id. at 1456. Here, the District presented no bargaining

history to support its contention that Article 5's scheduling language allowed it to reduce employees' weekly hours and paychecks. While Article 5 waives the Union's right to bargain over changes to employees' "daily" schedules upon 30 days' notice, it does not address the scope of the changes implemented here – a reduction in employees' weekly hours, effectively converting full-time employees to part-timers.[13] As such, the language cannot be used to support a finding of a waiver of bargaining over the impacts of its decision to close on Fridays and reduce employees' hours of work.

This same analysis applies to the District's arguments that the language contained in the contract provisions concerning shift assignments, length of work year, vacation scheduling, and management rights support a finding that the Union waived its right to bargain. These provisions do not contain language that would establish an unequivocal waiver of the Union's right to bargain over a plan to reduce the hours of full-time employees and require employees to use vacation and/or personal leave if they wished to be paid in an amount equivalent to having worked five days. Nor is there any bargaining history in evidence to support the District's assertion that the parties intended to waive bargaining over this issue. While the management rights clause in the parties' contract mentions the right of the District to lay off employees, it does not reference furloughs or reductions in hours and does not establish a waiver of the right to bargain over the impacts of layoffs. In City of New Bedford, the CERB found that a management rights clause, which included the right of the City to relieve employees from duty, did not

[13] Where the District also argues that the "zipper clause" in Article 23, together with the Article 5 language, establishes a clear waiver, we note that a zipper clause does not authorize an employer to unilaterally implement changes in employees' working conditions. City of New Bedford,38 MLC at 249, fn.35 (citing Town of Somerset, 31 MLC 47, 49, fn.5, MUP-01-2957 (August 12, 2004)).

constitute a waiver of bargaining over reducing employees' hours via furloughs. 38 MLC at 249. Here, without a conscious waiver by the Union, the District's decision to furlough employees, and its impacts, all require bargaining to resolution or impasse before implementation, pursuant to the reasoning set forth by the CERB and affirmed by the Appeals Court in New Bedford, supra.

Waiver by Inaction

In the alternative, the District asserts on appeal that it met any obligation it had to bargain over the impacts. It justifies implementing its decision to furlough employees on Fridays on grounds that the Union waived its right to bargain over this issue by inaction when, after June 24, it did not make any new counterproposals or request to meet again to discuss the summer furloughs.

To establish the affirmative defense of waiver by inaction, the District bears the burden of showing that the Union had actual knowledge of the change, a reasonable opportunity to negotiate over the change, and that there was an unreasonable or unexplained failure on the part of the Union to bargain or request bargaining. School Committee of Newton, 388 Mass. at 570 (citing Boston School Committee, 4 MLC 1912,1915, MUP-2611 (April 27,1978)). See also City of Haverhill, 42 MLC 273, 276, MUP-13-3066 (May 24, 2016); City of New Bedford, 38 MLC at 250 (citing City of Boston, 31 MLC 25, 33, MUP-1758 (August 2, 2004)). As with waivers by contract, such a waiver will not be lightly inferred. City of Haverhill, 42 MLC at 276 (citing Town of Natick, 2 MLC 1086, 1092, MUP-2098 (1975)).

There is no dispute that the District provided the Union with prior notice and an opportunity to bargain over its plan to close on Fridays during the summer of 2020, and

have certain unit members work their regular schedules Monday through Thursday and use their accrued vacation/personal leave or take an unpaid day off during the Friday closures. The District first informed the Union that it was considering Friday furloughs and four-day weeks via an email sent on June 7, 2020. On June 13, 2020, the Superintendent told the Union President about this plan. On June 15, 2020, Markland requested a meeting to discuss bargaining unit members' return to school following the pandemic closure and "hours of work." This led to the only face-to-face bargaining session that the parties had on this issue, a Zoom call on June 18, 2020.

On June 22, 2020, Markland made clear that the parties had not reached agreement at that meeting by sending an email to Norris notifying him that the Union was still seeking a 30-day notice regarding the proposed change to work hours and the use of leave and stating that an MOU would be needed. The next day, June 23, Norris sent Markland a copy of a draft MOU that indicated that, starting on June 26, District offices would be closed on Fridays in the summer and employees with available vacation or personal leave would be required to use leave on those days or take them unpaid. That same day, Markland responded that the Union "disagreed" with the draft MOU, including the requirement that members use their vacation or personal leave and questioned why the District was mixing the summer hours issue with the school year furloughs. She also noted that the MOU did not provide for 30-days' notice as required by the contract. Norris replied that employees would have the choice of using paid leave benefits or taking the day unpaid and suggested that the Union was being unreasonable regarding the notice period, given the budget issues and the District's decision to continue to pay employees who were not able to work during the pandemic closure.

On June 24, 2020, Markland notified Norris that the Union "did not anticipate any changes in employees' hours until impact bargaining was completed, and the MOU ratified." Later that day, Norris informed Markland that the District was willing to postpone the Friday closures such that they would not start until July 10, more than 30 days after the Superintendent first informed the Union President of the plan. Norris also asked Markland to confirm whether the MOU was okay.

Although the Union did not respond with any new proposals or request another meeting after June 24, in earlier emails on three consecutive days, June 22, 23 and 24, it affirmatively indicated a desire to continue to bargain and to enter into an MOU, as had been the parties' practice, before the changes were implemented. On two of those days, the Union made substantive objections to the draft MOU. Although Norris's emails addressed the Union's objections pertaining to the notice date and the use of paid versus unpaid leave, he did not address the issue of having separate MOUs to address furlough issues. Nor did he address the repeated request to keep bargaining, a request that was not unreasonable given that the parties had only had one meeting and exchanged a couple of follow-up emails. Under these circumstances, we cannot find that the Union unreasonably or inexplicably refused to bargain when it did not immediately respond to Norris' June 24 email asking Markland to confirm that the MOU was okay. She had previously told him that it was not and requested additional bargaining, but the District never agreed to meet again, instead announcing implementation of the furloughs just six days later.

This situation is therefore unlike that in Town of Billerica, where the CERB held that the union had waived its right to bargain by inaction when it did not make any

proposals or counterproposals over four bargaining sessions and made no further requests to bargain in the seventeen days between when the change was announced and when it would be implemented. Town of Billerica, 44 MLC 106, MUP-14-4234 (December 26, 2017).[14] Here, the Union made its objections to the draft MOU clear on multiple occasions, and less than six days after Norris' last communication with the Union, Riccio, without warning and without suggesting further bargaining or preparing a revised MOU that incorporated its proposed modifications, sent out an email notifying bargaining unit members that the Friday furloughs would go into effect on July 13th. Because the District had previously entered into MOUs with the Union regarding changed summer hours and the Union had specifically asked that it do so in 2020, we treat Riccio's June 30/July 1 announcements as fait accomplis, as to which the Union was not required to make any further bargaining demands. See generally, Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999) (a fait accompli exists where "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point where a demand to bargain would be fruitless") (citations omitted); Town of Dennis, 12 MLC 1027, 1032, MUP-5247 (June 21, 1985) (union presented with a fait accompli was not

[14] In its post-hearing brief, the Employer cites the Hearing Officer's decision in Town of Billerica, 43 MLC 195, 196, MUP-14-4234 (H.O. February 23, 2017) in support of its assertion that it could implement a proposed elimination of a shift because the parties were at impasse. In Town of Billerica, the parties met four times to discuss the change, but the union never changed its position or made a proposal or counterproposal. The Hearing Officer in that case held that that the parties were at impasse and dismissed the complaint on those grounds. On appeal, the CERB affirmed the decision but disagreed that the parties were at impasse because there was no evidence that the union had ever rejected any of the employer's proposals or expressed that further bargaining would be futile. 44 MLC at 108. Instead, the CERB found that by not making any proposals or counterproposals, the union had waived its right to bargain by inaction. Accordingly, the District's cite to Town of Billerica is inapposite. Further, as explained above, on the waiver by inaction issue, the facts of this case are distinguishable from those in Billerica.

required make a bargaining demand to preserve its right to an adjudication or unlawful conduct or remedial relief).

Ultimately, although the District may have been impatient with the Union and the process, it could not take matters into its own hands and effectively end all bargaining by announcing the change before reaching resolution or impasse. Although the summer had begun, there is no evidence that bargaining could not have continued for another few days or a week given the District's decision to postpone the implementation of the closures until July 13th. Thus, once the Union made its demand to bargain after receiving notice of the proposed change, it was the District's responsibility under the Law to ensure that bargaining to impasse or resolution occurred before the change was implemented. See Town of Norwell, 13 MLC 1200, 1209, MUP-5655 (October 15, 1986) (citing Town of Dennis, 12 MLC at 1033; City of Cambridge, 5 MLC 1291, MUP-2799 (September 27, 1978)).

Impasse

The District has argued that regardless of any waivers by the Union, the parties were at an impasse, entitling it to implement its Friday closure plan without further bargaining. To determine whether parties have reached impasse, the CERB assesses the likelihood of further movement by either side and whether they have exhausted all possibility of compromise. Ashburnham-Westminster Regional School District, 29 MLC 191, 195, MUP-01-3144 (April 9, 2003). In determining whether the parties are at an impasse in bargaining, the CERB examines the totality of the circumstances surrounding the negotiations. Commonwealth of Massachusetts, 8 MLC 1499, 1513, SUP-2508 (November 10, 1981). If one party to the negotiations indicates a desire to continue

bargaining, it demonstrates that the parties have not exhausted the possibility of compromise. Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999). The issue of impasse is a question of fact. School Committee of Newton, 388 Mass at 575.

An examination of the facts here leads us to conclude that the parties were not at impasse. While the nature of the issue (Friday closures during the summer) provided an implicit deadline for completing negotiations, the District announced its decision more than two weeks before the date the District indicated that the summer schedule would commence. The District thus had some additional time to complete the bargaining process but artificially shortened it by presenting its plan as a fait accompli after only one meeting and a few days of bargaining via a flurry of emails. The District's actions were not dissimilar from that of the employer's in Newton School Committee, where the court upheld the Labor Relations Commission's conclusion that there was no impasse over the issue of custodial staff layoffs after two days of bargaining. Id. Here, the Union, on three separate occasions, clearly expressed its interest in continuing to bargain over the details surrounding the decision to close on Fridays, including whether employees with accrued leave would be required to use it, and its desire to execute an MOU. This desire was seemingly shared by the District, which transmitted a draft MOU before abruptly abandoning the process without once communicating that it believed that the parties had reached an impasse or that it intended to implement the MOU unless it heard back from the Union by a date certain. Under these facts, there is clearly no evidence of any contemporaneous understanding by either party that negotiations were exhausted.

A finding that the parties were not at impasse is further supported by the contents of the memoranda notifying the employees and Union of the District's Friday closure plan effective July 13, 2023. While the first memorandum, issued on June 30, 2020, indicated that employees "may" use their accrued paid leave, the amended version issued the following day indicated that employees with leave "must" use it – a requirement in conflict with the District's assurances during the parties' exchange of emails that no one would be required to use their leave. The Union had repeatedly sought to bargain over whether or not the District would mandate that employees use their accrued leave on Fridays – the Employer's apparent uncertainty over its own position on this issue demonstrates that there was still room to bargain over this issue and thus, that the parties were not at impasse when the Employer issued the June 30/July 1 memos stating the Friday closure plan would be implemented on July 13.

CONCLUSION

For the foregoing reasons, we affirm the Hearing Officer's conclusion that the District violated Sections 10(a)(5), and derivatively, Section 10(a)(1) of the Law by implementing the summer Friday closure plan without bargaining to impasse or resolution and by failing to continue bargaining with the Union over the matter.

REMEDY

When a hearing officer or the CERB concludes that a party has violated the Law, it orders that party to take certain actions designed to restore the situation as nearly as possible to that which would have existed but for the unfair labor practice. Commonwealth of Massachusetts, 41 MLC 186, 187, SUP-12-1829 (January 15, 2015). In this case, we have found that the Employer implemented its requirement that employees work an eight-

hour day/four day work week, Monday through Thursday and use personal or vacation leave on certain Fridays or take unpaid days during the summer months of 2020 without bargaining to resolution or impasse over the decision and its impacts. Therefore, restoring the status quo ante here requires making employees who took unpaid leave whole for their lost wages, or, for the employees who used accrued leave, restoring any accrued personal or vacation time that they used but which they *would not otherwise have taken* during the applicable time period in the summer of 2020. We have modified the Hearing Officer's Order accordingly.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Essex North Shore Agricultural and Technical School District shall:

1. Cease and desist from:

   a) Reducing employees' summer hours and mandating that they use paid or unpaid leave instead, including requiring employees to work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months without bargaining to resolution or impasse over that decision and its impacts;

   b) Refusing to bargain collectively in good faith with the Union over the requirements that employees work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months;

   c) Interfering with, restraining, or coercing employees in the exercise of their rights under Section 2 of the Law;

2. Take the following affirmative action:

   a) Upon request, bargain collectively with the Union over reductions to employees' summer hours and requiring them to use paid or unpaid leave instead including requiring employees to work an eight-hour

day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months;

b) Make whole all affected employees who worked an eight-hour day/four-day workweek, Monday through Thursday, and who either took unpaid days during the summer of 2020 or used personal or vacation leave that they had not planned to take before the School Committee announced the four-day workweek, for all losses suffered, with interest compounded quarterly at the rate specified in G.L. c. 231, Sec. 6I;

c) Post immediately, signed copies of the attached Notice to Employees in all conspicuous places where members of the Union's bargaining unit usually congregate or where notices are usually posted, including electronically if the District customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter; and

d) Notify the DLR in writing of the steps taken to comply with this Order within thirty (30) days of its receipt.

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____

MARJORIE F. WITTNER, CHAIR

Kelly B Strong

_____

KELLY B. STRONG, CERB MEMBER

Victoria B. Caldwell

_____

VICTORIA B. CALDWELL, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has affirmed the decision of a Department of Labor Relations Hearing Officer holding that the Essex North Shore Agricultural and Technical School District (District) has 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 with AFSCME, Council 93, Local 245 (Union) when it changed unit members' work schedules and required them to use of personal leave or vacation leave or take unpaid days on certain Fridays during the summer of 2020. The District also violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith when it failed to meet with the Union to continue bargaining over these changes.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; 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. Based on these rights, the District assures its employees that:

WE WILL NOT require employees to work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over these decisions and its impacts;

WE WILL NOT, in any like manner interfere with, restrain or coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL, upon request, bargain collectively in good faith with the Union over changes to employees' summer hours, including requirements that employees work an eight-hour day/four-day workweek, Monday through Thursday, and use personal or vacation leave on certain Fridays or take unpaid days during the summer months;

WE WILL make whole all affected employees who worked work an eight-hour day/four-day workweek, Monday through Thursday, and who either took unpaid days during the summer of 2020 or used personal or vacation leave that they had not planned to take before the School Committee announced the four-day workweek, for all losses suffered, with interest compounded quarterly at the rate specified in G.L. c. 231, Sec. 6I;

_____ _____

Essex North Shore Agricultural and Technical School District 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 Labor Relations, 2 Avenue de Lafayette, Boston, MA 02111-1750 Telephone: (617) 626-7132.