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

In the Matter of:	*	
	*	Case Number: MUPL-19-7565
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1713	*	
	*	
and	*	Date Issued: November 15, 2021
	*	
TOWN OF HUDSON	*	

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Patrick N. Bryant, Esq.	-	Representing International Association of Firefighters, Local 1713
Kimberly A. Rozak, Esq.	-	Representing Town of Hudson

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

The International Association of Firefighters, Local 1713 (Union) appeals from a Department of Labor Relations (DLR) Hearing Officer decision holding that it violated Section 10(b)(2) and, derivatively, Section 10(b)(1) of M.G.L. c. 150E (the Law) by petitioning Town Meeting to increase minimum firefighter staffing. For the reasons stated below, we find that the Union's conduct constituted an unlawful attempt to bypass the employer's bargaining representatives and affirm the decision.

Facts

The parties agreed to certain stipulations, and the Hearing Officer made additional findings of fact based on the record, of which all but two are undisputed (see footnotes two and twelve below). We adopt those findings and summarize the findings pertinent to our decision below.[1]

The Union is the exclusive collective bargaining representative for firefighters and fire lieutenants employed by the Town of Hudson (Town or Employer) in its Fire Department (Department). At all times material herein, Jeffrey Chaves (Chaves) served as the Union president, and Thomas Moses (Moses) served as the Town's Executive Assistant and the designated bargaining representative for the Town.

The Fire Department consists of approximately twenty-four firefighters, eight lieutenants, a deputy chief, and a chief. The firefighters are divided into four groups, with approximately eight firefighters assigned to each shift at full staffing.

For many years, including from 2015-2018, the parties' collective bargaining agreement (CBA) has included a minimum staffing provision (Article 30). Article 30 states: "The Town agrees that the Chief will assign at all times six (6) firefighters to duty, and not less than two (2) firefighters to any open station."

In January 2018, the parties began negotiations for a successor contract to the 2015-2018 CBA. The Town's labor counsel, Attorney D.M. Moschos (Moschos), and Moses were the Town's designated bargaining representatives. The Union's proposals

[1] We discuss the Union's challenges in footnotes 2 and 12 below. The Union also seeks thirty-four additional findings. As we note below, we have added several of these findings for the sake of clarity. The remainder of the findings are not material to our analysis, and for this reason and without further discussion, we decline to include them.

included an increase to minimum staffing.[2] On January 29, 2018, Moschos wrote a letter to Chaves to explain its position on the Union bypassing him or Moses during negotiations and going directly to the Board of Selectman. The letter stated in pertinent part:

> For the record, the Town reiterates its position expressed . . .on January 18, 2018, that the Union does not have the right to bypass the Town's designated representatives for the negotiations [Moschos and Moses] and deal with the Board of Selectman on the negotiations. If the Union does that, it violates Chapter 150E, and the Town reserves its legal rights if the Union does so.
> * * *
> The Town notes the Union stated that it had the right to contact the Selectmen, and the Town rejected this Union position.

The record does not reflect whether this issue arose in the context of discussing the minimum staffing provision.

After three bargaining sessions, on March 30, 2018, the Town submitted a petition to the Joint Labor Management Committee (JLMC) to exercise jurisdiction. On the petition, the Town listed "Minimum Manning" as one of the issues in dispute. The Town

[2] Specifically, the Union's proposal stated, "Increase in apparatus safety staffing levels consistent with NFPA 1710 and OSH." Douglas Schaeffer (Schaeffer), a member of the Union's bargaining team, testified that the Town refused to bargain over minimum staffing. In a footnote to his finding that the Union made a proposal to increase minimum staffing, the Hearing Officer credited what he deemed "specific" testimony from Moschos that the Town did not refuse to bargain over this issue. Instead, he stated that they discussed the Union's proposal and took the position that it was not a subject over which the Union could insist to impasse. The Union claims this finding was in error because, among other things, Schaeffer's and Moschos' testimony did not conflict and because there is no evidence that the Town engaged in substantive bargaining over the Union's proposal. We need not resolve this dispute, as the pertinent and undisputed findings are that the Union made a proposal to increase minimum staffing while bargaining for a successor contract, the Town sought to eliminate Article 30 altogether, but Article 30 remained in the CBA, unmodified by the MOA.

attached its proposals, which, with respect to Article 30, stated, "Delete Article 30, Minimum Manning, and reserve the Article for future use."[3]

In February 2019, the Union submitted a petition to the Board of Selectman (Board) to place the following article on the warrant for the May 6, 2019 Annual Town Meeting:[4]

> To see if the town will take from available funds the amount necessary to staff each shift in the fire department at seven personnel per shift, that being two Lieutenants and five firefighters, utilizing and maintaining the existing staff level of thirty-two line personnel and appropriating that amount to [the] FY20 Budget Fire Department Personnel line item or take any relative action thereto.

Twelve of the fifteen signatures on the petition were from bargaining unit members. The first signature on the petition was that of Kevin Werner, a bargaining unit member, but the petition was also signed by Chaves and other Union officers.

On February 25, 2019, the Board held a public meeting, a portion of which was devoted to discussing the staffing warrant article. Moses spoke first, stating that although it was properly petitioned and would appear on the warrant, it would not be binding because the subject matter of the petition was a subject for collective bargaining. Moses further stated that even if Town Meeting appropriated money, it could not force the department head to spend the money. Town Counsel Aldo Cipriano (Cipriano) also spoke, echoing Moses' statement that:

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[3] The Union submitted the Town's JLMC petition as an exhibit. We have added this finding for the sake of completeness.

[4] A petition to place an article on the warrant for the Annual Town Meeting requires ten signatures. Moses testified, and the Union does not dispute, that after verifying signatures, the Town is obligated to place a properly filed petition on the warrant unless it is withdrawn. A petitioner may withdraw a petition prior to the publication of the warrant, which occurs approximately one week before the Annual Meeting.

> What is being asked here is that the legislative body take over a function of the executive body (which is the Board of Selectmen) . . . Collective bargaining is vested and rests with the executive and you cannot bypass that - You can get the appropriation, as the Town Administrator says, but you can't put a subject of collective bargaining before the legislative body that would basically usurp the duty and responsibility of the executive.[5]

Chaves, identifying himself as the Union president, spoke next. Reading from a prepared statement, Chaves expressed the Union's support for the warrant article, which he described as "asking to increase the minimum amount of firefighters on duty per shift." Apparently concerned that the Board would not even place the article to the warrant and that it had the right to remove it if it believed that the matter was solely a matter for collective bargaining, Chaves stated that the Board should place the article on the warrant because the Town had repeatedly and consistently refused to bargain over staffing on grounds that it was a "core managerial decision," and thus, not a mandatory subject of bargaining.[6] Chaves stated that if the Board struck the article, it would leave firefighters and residents without recourse to safe staffing. Chaves explained that placing the article on the warrant was "us realizing there is something else we would have done," and trying to prevent the question of "did we do everything we could to help [residents affected by fires] hanging over our heads." He asked that if the Board had any issues about the

[5] We have added this finding at the Union's request, as it is supported by the video of the public meeting that the Union provided as UX-1.

[6] Chaves also described the various scenarios in which the CERB has held that minimum staffing was, or was not, subject to mandatory bargaining.

legality or legitimacy of the article, "we would like to be notified and the opportunity to prove otherwise."[7]

After Chaves spoke, Selectman John M. Parent (Parent) assured Chaves that the article would remain on the warrant, notwithstanding disputes over its enforceability. Selectman Joseph J. Durant (Durant) added that the Board had never intended not to include it. Durant added, however, that based on the legal opinions the Board had received, he did not want Chaves to leave the meeting thinking that, even if the article passed, the Board had any obligation to do anything with it. Parent indicated that the Board had made a "conscious decision" to mention this tonight, as opposed to at the Town Meeting, so Chaves had time to check into matters. Cipriano added that, regardless of whether the staffing decision was a "core managerial decision" or a subject for collective bargaining, the article being proposed was for the executive branch, not the legislative branch of government to determine. Cipriano added that all the legislature can do is appropriate the money once the issue is settled. As the meeting drew to a close, another member of the Selectman stated, "Let's see what the voters say in May."

As promised, the Town placed the article on the Annual Town Meeting Warrant, where it appeared as Article 46. In the Finance Committee's written preamble to the

[7] In its Answer to the Complaint, the Union denied that it submitted the February 2019 petition. In its Supplementary Statement, however, the Union does not dispute the Hearing Officer's finding that the Union (as opposed to individual bargaining unit members or Town residents) submitted this petition. We find ample evidence in the record to support this finding. In addition to the evidence discussed in footnote 16 of the Hearing Officer's decision, we find that President Chaves' use of the plural pronouns "us" and "we" during his presentation to the Board and his reference to the warrant article as "our proposal" supports the finding that he was speaking on the Union's behalf and not as an individual.

Warrant, it "unanimously recommended disapproval of Article 46," explaining that: "Without minimizing the public interest in maintaining firefighter staffing levels, the subject matter of the article would intrude on collective bargaining issues and could serve to micro-manage firefighter overtime."[8]

On or about April 3, 2019, the parties finalized a Memorandum of Agreement (MOA) that continued the terms of the 2015-2018 CBA to 2019-2021, except as set forth in the MOA. Notably, the MOA did not modify Article 30.

Hudson's Annual Town Meeting was held on May 6, 2019. Numerous firefighters attended the meeting, wearing red shirts.[9] Several firefighters spoke in favor of Article 46, and Town meeting voted in favor of it. After the meeting, the Union posted a thank you to those who attended on its public social media page. It also expressed its excitement to see the implementation of "the proposal of upping our minimum staffing from 6-7." The Town took no action after the Annual Town Meeting to implement Article 46.

[8] The Union seeks an additional finding that Article 30 does not require the Department to fill shift vacancies until staffing drops below six firefighters, and were that to occur, the Town would fill the vacancies either through voluntary overtime, or, if there are not enough volunteers, by holding working firefighters over their shift, or calling parties in. As this finding helps to explain the Finance Committee's recommendation and is further supported by the cited testimony, we adopt it.

[9] On May 6, 2019, the Union posted a reminder on its public social media page that Town Meeting was that evening. The post listed the warrant articles that the Union "agreed should be seriously considered" including Article 46. After discussing what it believed the "7 man minimum" would cost taxpayers, it urged viewers to attend Town meeting, to vote, and to wear red in support of the firefighters.

On July 2, 2019, the Board sent Chaves a letter that was signed by Moses.[10] The first line of the letter stated, "There appears to be some confusion regarding Article 46 adopted by the Town Meeting at the Fall [sic] Town Meeting." Echoing themes that the Town had raised at the February public meeting, the letter stated that while the Town, as a legislative body, had the authority to appropriate funds to the Department's budget, how to spend those funds was an executive function for the Board to perform in conjunction with administrative staff – the Executive Assistant and the Fire Chief. The letter indicated that the Town Meeting had not voted any additional funds to fund the change.[11]

Chaves emailed a response to Moses on July 3, 2019, which asked the Town what was preventing it from adopting the warrant article if the purpose of the Town's July 2 email was simply to clarify how Town Meeting worked. Chaves speculated whether it was because the warrant article did not have a specific dollar amount and then asked that, if that were the case, why hadn't the Town brought that "omission" to its attention? Finally, Chaves asked:

> If and when we submit the same article inclusive with a specified dollar amount and the town votes in favor of it in November will you adopt it then (again referring to you and the BOS) [?] Or do you have no intention of ever adopting this article regardless of what the townspeople vote for?

[10] The signature line of the letter was "Town of Hudson, By the Board of Selectmen, Joseph J. Durant, Chairman, By the Executive Assistant, Thomas Moses." Moses did not draft the letter but signed it on behalf of Durant because Durant was out of town. We have added this finding for the sake of completeness. It is supported by the record.

[11] Moses also referenced a grant that the Town Administrator had applied for that would increase the staffing per shift of the Fire Department from eight to nine. Moses further discussed the grant in his second email to Chaves, noting that he did not know if the Board of Selectmen would accept it, but he was recommending that they should. The record does not reflect whether the Town ever received the grant.

Moses responded by email the same day. He did not respond to Chaves' final question directly, except to confirm that there was no legal requirement to either follow or ignore Town Meeting's vote.

On July 8, 2019, a local newspaper ran a story with the headline "Hudson Fire Department minimum staffing remains at six despite Town Meeting OK." The article quoted Chaves as stating, "The Union plans to bring forward another petition article at the fall Town Meeting that includes funding."

In August 2019, the Union petitioned the Board to insert an article in the warrant for the November 18, 2019 Special Town Meeting.[12] The proposed article was identical to Article 46 except that the first part of the first sentence added the amount of appropriation sought, i.e., "To see if the Town will take from available funds **the sum of $100,000** to staff each shift in the fire department at seven personnel per shift . . ." (Emphasis added).

[12] The Union disputes the Hearing Officer's finding that the Union submitted the Fall Special Town Meeting petition. The challenge rests solely on the ground that the number of bargaining unit members' signatures on the petition was insufficient to qualify placement on the warrant. We do not find this argument persuasive, because as the Hearing Officer reasoned, the number of bargaining unit members is far less than the 100 signatures needed to qualify a petition for placement on the warrant. Furthermore, there is ample evidence in the record to support the Hearing Officer's finding. The evidence that we find most persuasive is Chaves' email to Moses on July 3, 2019, where Chaves asked what the Town would do "if and when **we** submit the same article inclusive with a specified dollar amount" and the newspaper article following that exchange discussing the Department's minimum staffing and stating that the "Union plan[ned] to forward another petition article at the fall Town Meet that included funding." Furthermore, the Union does not challenge the Hearing Officer's finding that it submitted the May 2019 petition and, as the Hearing Officer pointed out, the only difference between the two petitions is the addition of the dollar amount referenced in Chaves' email.

The petition contained approximately 153 signatures, sixteen of which belonged to bargaining unit members.[13] The Town placed the article on the Special Town Meeting Warrant as Article 19. Chaves' signature was first on the petition, and he was listed as the lead petitioner on the Special Town Meeting Warrant. The note following Article 19 stated, "The Finance Committee recommends against the adoption of the subject matter of this article. Vote – 7-1." (Underline in original).

Approximately one month later, on September 13, 2019, the Town filed this prohibited practice charge alleging that the Union had violated Sections 10(b)(1) and 10(b)(2) of the Law by: 1) repudiating Article 30 of the parties' collective bargaining agreement (CBA); 2) attempting to get through the Town Meeting what was not obtained through contract negotiations; and 3) bypassing the Town's bargaining representative by going directly to the Town Meeting for a contract term versus negotiating with the Town's representative.

The Union did not withdraw Article 19 from the warrant after the charge was filed. Instead, at the November 18 Special Town Meeting, Chaves introduced Article 19 and spoke on its behalf. Other firefighters also spoke on its behalf and bargaining unit members again wore red.

On November 21, 2019, the DLR investigated this charge. On December 5, 2019, the Investigator issued a one-count complaint of prohibited practice and partial dismissal (Complaint). The Complaint alleged that, by petitioning the Board to insert the above-described warrant articles for both the May 6, 2019 Annual Town Meeting and the

[13] A petition to place an article on the warrant for a special Town meeting requires the lesser of 100 signatures or 10% of the registered voters.

November 18, 2019 Special Town Meeting, the Union had "bypass[ed] the Town's designated bargaining representative when it petitioned the Town Meeting to increase staffing in violation of Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law." The Investigator found that the Town's allegation that the Union violated Section 10(b)(2) by engaging in bad faith bargaining through its attempt to get through Town Meeting what it did not obtain through contract negotiation was subsumed in the bypass allegation.

The Investigator did not find probable cause to believe that by this conduct, the Union had also repudiated Article 30 of the CBA. Based on her finding that the Town was not required to change the minimum staffing level as set forth in the CBA even if the Town Meeting had voted to fund an additional firefighter on each shift, she found that the "Union's actions did not compel the Town to change the number of firefighters assigned per shift or mandate any change to Article 30 of the CBA." Accordingly, she did not find "probable cause to believe that the Union's efforts at the Town Meeting to increase staffing levels on each shift constituted a deliberate refusal to abide by the CBA in violation of the Law."[14]

Opinion[15]

[14] The Investigator also dismissed an allegation that certain statements made by bargaining unit members during the Town meetings independently violated Section 10(b)(1) of the Law. The Investigator held that the Town failed to present evidence as to what Werner said at the first meeting or what Chaves said at the second meeting. The Investigator also found that Chaves' statement at the May Town Meeting, "We need help," would not tend to restrain or coerce employees or the employer in the exercise of its Section 2 rights. The Town did not seek CERB review of the dismissed allegations.

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

In general, a union's obligation to bargain in good faith under Section 10(b)(2) of the Law mirrors an employer's good faith bargaining obligation under Section 10(a)(5) of the Law. Boston School Committee, 37 MLC 214, 221, MUPL-06-4570 (May 23, 2011) (citing North Middlesex Regional School District Teachers Association, 28 MLC 160, 163, MUPL-4153 (October 23, 2001) and further citing Town of Hudson, 25 MLC 143, 147, MUP-1714, (April 1, 1999)). In this case of first impression, we must consider whether a union violates its duty to bargain in good faith when, both before and after it executed a memorandum of agreement containing an unchanged minimum staffing provision, it petitions a town meeting to appropriate funds to increase minimum staffing beyond the contractual level. We agree with the Hearing Officer that the Union's conduct violated the Law, but we modify his reasoning.

Timeliness

We first address one of many arguments made by the Union, that the Hearing Officer erroneously concluded that the allegation concerning the Union's petition to insert an article on the warrant for the May 6, 2019 Annual Town Meeting was timely. Section 15.04 of the DLR's regulations, 456 CMR 15.04, states, "except for good cause shown, no charge shall be entertained by the Department based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Department." A charge of prohibited practice must be filed with the DLR within six months of the alleged violation or within six months from the date that the violation became known or should have become known to the charging party, unless good cause is shown. Massachusetts Teachers Association, 39 MLC 233, 237, MUPL-08-4631 (February 28, 2013). Here, the evidence shows that the Union first submitted the petition in February 2019. At the Board

meeting on February 25, 2019, the Town assured the Union that its petition would be placed on the warrant. Thus, because the Complaint alleges, and the Town argues, that the Union violated the Law by petitioning Town Meeting,[16] the Town knew or should have known of the alleged violation by February 25, 2019 at the latest. That it did not file the charge until more than six months later, on September 13, 2019 renders this aspect of the charge untimely. The fact that the Union petitioned a second time in August 2019 does not convert the first petition into a continuing violation, as the Hearing Officer's decision suggests. The impact and effect of the Union's initial submission was discrete and finite – just as the Union hoped, and the Town assured, the petition was placed on the warrant for the May Town Meeting, resulting in the matter being discussed and voted on at that time. See Wakefield School Committee, 27 MLC 9, 10, MUP-2441 (August 16, 2000) (period of limitations began when employee received suspension because that was a discrete event). The Union's filing of the August petition, while certainly related, was nevertheless a separate and discrete act. There is no dispute, however, that this aspect of the charge was timely. See Boston Police Superior Officers Federation v. Labor Relations Commission, 410 Mass. 890, 893 (1991) (charge timely filed where, "[a]lthough

[16] In its appeal, the Union argues that the Hearing Officer erred when he framed the issue as whether the Union violated the Law by petitioning Town Meeting, as opposed to petitioning the Board of Selectman. As the Hearing Officer points out in footnote 20 of his decision, the Complaint clearly alleges that the Union violated the Law by petitioning Town Meeting to increase firefighter staffing. Although the Complaint also alleges that the Union petitioned the Board of Selectmen, the facts set out above and in the Hearing Officer's decision show that a necessary precursor to petitioning Town Meeting is petitioning the Board, which is required only to perform the ministerial task of checking signatures. Furthermore, it is not as if the Union lacked notice that the issue would be framed in this manner, as two out of three of the allegations in the Town's prohibited practice charge pertained to the Union's act of petitioning Town Meeting. We therefore reject this argument without further discussion.

certain prohibited practices may have occurred more than six months before the federation filed its charge, an alleged prohibited practice occurred more recently.") It is to that allegation we now turn.

August 2019 Warrant Article

The Hearing Officer's determination that the Union violated the Law by petitioning Town Meeting was premised on his conclusion that minimum staffing, although not a mandatory subject of bargaining, was nevertheless a "proper" or permissive subject of bargaining as to which the parties could and did strike a legally binding agreement. See City of Lawrence School Committee, 3 MLC 1304, 1311, MUP-2287 (December 7, 1976); Town of Danvers, 3 MLC 1559, MUP-2292 (April 6, 1977). On this basis, he distinguished the decisions that the Union relied on to argue that a party only violates its duty to bargain in good faith by petitioning town meeting/bypassing the executive branch regarding mandatory subjects of bargaining. See NAGE v. Labor Relations Commission, 17 Mass. App. Ct. 542 (1984); Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990). Instead, the Hearing Officer concluded that the Union's conduct in taking the minimum staffing issue directly to Town Meeting amounted to a prohibited bypass of the Town's bargaining representative in derogation of the Law.

The Union challenges this conclusion on appeal by reiterating many of the arguments that it made to the Hearing Officer. In particular, it claims that the Hearing Officer erred by extending the duty to bargain in good faith or the duty to deal with designated representatives to permissive subjects of bargaining. We need not dwell on these arguments, however, because they ignore the critical fact that the April MOA that the parties entered into before the Union filed its second petition contains a minimum

staffing provision. It is well-established that, "[a]lthough a shift manning provision may not be a mandatory subject of bargaining, it is a subject upon which the City may choose to commit itself through collective bargaining." City of Chelsea, 13 MLC 1144, 1150-1151, MUP-6211 (September 22, 1986). Thus, while the courts have held that a municipality has a right to determine the size of its work force on a yearly basis, and thus, that minimum staffing provisions are unenforceable against the municipality beyond the first fiscal year absent the town's legislative body appropriating the necessary funds, see Town of Billerica v. International Association of Firefighters, Local 1495, 415 Mass. 692 (1993), they have nevertheless held that towns have an obligation under the Law to seek funding for the negotiated provision before town meeting for each year the contract is in effect. Id. at 696; accord Local 1652, International Association of Firefighters v. Town of Framingham, 442 Mass. 463 469-470 (2004) (and cases cited therein). In other words, once a minimum staffing provision is negotiated into a CBA, its permissive or mandatory status is irrelevant to the employer's obligation to seek funding for the provision, and, if funded, to comply with its terms.

Thus, in City of Chelsea, the City, citing an inability to pay additional overtime and without seeking supplemental funding, directed its fire chief not to expend further overtime funds. As a result, shift staffing levels fell below the contractual minimum. Id. at 1148-1149. The CERB held that the City's conduct violated its duty to bargain in good faith by repudiating the minimum manning provision and by failing to take all steps necessary to comply with the contractual staffing level, including, if necessary, seeking supplemental appropriations. In so holding, the CERB acknowledged the non-mandatory nature of the staffing provision but noted that it was part of the collective bargaining agreement and

thus, "inextricably related to all other terms and conditions of employment in the contract." Id. at 1150. As the CERB stated, holding the parties to the "totality of their bargain promotes more stable and predictable labor relations in the Commonwealth" because "[b]oth parties to the agreement may negotiate with the assurance that any deal to which they ultimately agree cannot be unilaterally altered by one party's renouncement of part of the package of compromises." Id. at 1150-1151.

The same reasoning applies here. Just as an employer may not lawfully refuse to seek funding for a minimum staffing clause from Town Meeting in subsequent years, the Union should not be permitted to achieve its failed bargaining goals through Town Meeting. Not only is this inherently destabilizing, but it also interferes with Chapter 150E's statutory scheme by involving the legislative body in the collective bargaining process in matters that are exclusively reserved to the executive. As explained in Anderson v. Wrentham, once an agreement is negotiated, the only role that the legislative body plays is that of funding the agreement. Permitting the Union to involve Town Meeting in other ways "would render the bargaining process an empty formality." 406 Mass. at 512, n 8. See also Town of Swampscott, 2 MLC 1531, 1532, MUP-2286, MUP-2290 (June 7, 1976) (cited with approval in Local 1652, IAFF v. Town of Framingham, 442 Mass. at 472-473 (deeming school committee's petitioning to put funding decision before voters after town meeting had already appropriated funds to implement a collective bargaining agreement with the police department an "unfortunate disregard for the spirit if not the letter of G.L. c. 150E" and an "unwonted interference with the orderly process of collective bargaining")).

This principle is also reflected in Chapter 150E itself, in Section 7(d) of the Law, which renders any by-laws enacted by a legislative body a nullity if there is a collective bargaining agreement containing conflicting terms. Id. at 475-476 (summarizing Section 7(d)). This statutory subordination of local legislative action to the provisions contained in a finalized CBA is further support for the conclusion reached here – that the Union's conduct violated its duty to bargain in good faith by attempting to seek through the legislative body that which it could not obtain at the bargaining table. Once the MOA was finalized, the Union was obliged to live by its terms. As with any other provision in a CBA, and consistent with the bargaining duty that we have repeatedly imposed on employers, if the Union wished to change its terms, it was obliged to do so through bargaining and not by unilaterally taking other steps to effectuate the change. Anderson v Wrentham, 406 Mass. at 512, n. 8; cf. Boston School Committee, 37 MLC at 221 (holding that union's unilateral imposition of additional steps in negotiated pilot school conversion process an unlawful unilateral change). And, as explained above, this is the case even if the provision at issue was incorporated in the agreement through permissive, not mandatory, bargaining. Once the provision was bargained, it was, subject to funding, enforceable against both parties.

That the employer would have had the right to refuse any mid-term request to bargain does not justify the Union's conduct. It is well established that a party to a collective bargaining agreement need not bargain during the term of that agreement over subjects that were part of the bargain when the parties negotiated the agreement. Town of Westborough, 25 MLC 81, MUP-9892 (June 30, 1997) (citing City of Salem, 5 MLC 1433, 1436-1437 (1978)). As explained above, a contrary rule would be antithetical to

the maintenance of stable and harmonious labor relations embodied in the myriad of Chapter 150E's "dos and don'ts." We thus affirm the Hearing Officer's decision that the Union violated its duty to bargain in good faith when it bypassed the Town's bargaining representative in August 2019 and petitioned Town Meeting to increase firefighter minimum staffing.

We briefly address the Union's remaining arguments. First, the Union asserts that the Hearing Officer erroneously ruled and made a "false claim" when stating that the violation was that the Union sought to change a term of the CBA. The Union points out that when dismissing the repudiation claim, the Investigator found that the "Union's actions did not compel the Town to change the number of firefighters assigned per shift or mandate any change in Article 30." However, the Hearing Officer's and the Investigator's statements do not conflict. The Hearing Officer's focus in each of the statements cited by the Union was the Union's *attempt t*o change the term by petitioning Town Meeting[17] instead of through the collective bargaining process. The fact that the Union may have been unable to do so is beside the point, as it is the means that the Union chose to achieve its goal, not the outcome of its efforts that is at issue in this

[17] The Union's assertion that the Hearing Officer never showed when or how the Union bypassed the Town's representatives is meritless. The Union's argument is premised on the fact that the only time and place that such bypass occurred was at Town Meeting itself. It asserts that because the Investigator dismissed the Town's allegations that certain statements made by bargaining unit members at Town Meeting did not violate the Law, there was no basis for the Hearing Officer's finding that the Union bypassed the Town's representatives. As we have repeatedly stressed, however, it is the Union's conduct in taking the matter directly to Town Meeting that violated the Law. The Hearing Officer's well-supported findings that the warrant article was placed on the Special Town Meeting Warrant at the Union's behest in August 2019, coupled with its presence on that warrant and evidence that the article was discussed at Town Meeting more than suffices to demonstrate the bypass found here.

proceeding. See Local 1462, AFSCME, 9 MLC 1315, 1321, MUPL-2483 (H.O. October 6, 1982) (cited with approval in Anderson v. Wrentham, 406 Mass. at 513, n. 9) (union's *conduct* in seeking to change health insurance premium contribution rates by seeking an appropriation at town meeting is a prohibited bypass of the town's bargaining representatives in derogation of the Town's bargaining rights).

The Union further contends that the Hearing Officer improperly ignored the Town's conduct that enabled or permitted it to file the complained of action. The gist of this argument pertains to the Board's conduct after the Union filed the first petition, including never advising the Union that it believed that the Union's conduct was an unfair labor practice or asking it to withdraw the petition; never asking it to bargain; and statements such as those made by a selectman at the February 2019 public Board meeting that, "we will see what the voters say in May." Even generously construing that statement as tacit permission for the Union to go forward with the petition, the Union's argument ignores the discussion that preceded it, in which the Board members and Town counsel emphasized that the petition was not enforceable because only the executive had the right to determine staffing levels. It further ignores that, regardless of what the Board believed regarding the warrant article's enforceability, once the Board approved the signatures, it had to place the article on the warrant. Most importantly, however, the Union's argument ignores that within a month of the Union filing the second petition, the Town filed this charge. The Union contends that by then, it was too late to avoid a violation. However, the Union still had two months before Town Meeting took place to withdraw the petition, which would have prevented the article from being discussed at Town Meeting. Although the Union acknowledges that it had the ability to withdraw its petition up to a week before

the Town Meeting, it did not do so. Its failure to act at that point forms the basis of the allegation before us. Notably, the Union does not cite, and we are unaware of, any decision treating a party's failure to advise another party that its conduct constitutes an unfair labor practice as a viable defense to a subsequent charge. As to the Union's claim that the Town never requested bargaining on the issue, we note that the first petition was filed at a time when the parties were actually engaged in successor negotiations, and the second was filed after negotiations concluded, when, as discussed above, the Town was under no obligation to bargain mid-term over items contained in the CBA.

Finally, the Union reiterates its claim that the Hearing Officer's decision failed to avoid constitutional issues or speech issues. However, as the Hearing Officer notes, the Investigator dismissed the Section 10(b)(1) allegation concerning statements made by individual bargaining unit members during Town Meeting. Further, the Hearing Officer's decision does not limit the Union or its bargaining unit members to publicize its positions on safety and manning issues in a manner that does not require Town Meeting action. Nor does it prevent the Union from supporting local political candidates whom they believe will be more responsive to their concerns. For all the reasons set forth above, however, permitting a union to achieve its bargaining goals relating to a provision in a collective bargaining agreement through a petition to the Town's legislative body rather than through the statutory collective bargaining process constitutes a violation of Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law.

Conclusion

For the foregoing reasons, we conclude that the Union violated the Law with respect to its petition to increase minimum staffing at the November 2019 Special Town Meeting and issue the following Order.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Union shall:

1. Cease and desist from:

   a. Failing to bargain in good faith by bypassing the Town's bargaining representative and petitioning the Town Meeting to increase firefighter staffing.

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

   a. Bargain in good faith with the Town by dealing only with its designated bargaining representatives on matters of collective bargaining.

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

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

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____

MARJORIE F. WITTNER, CERB CHAIR

Joan Ackerstein

_____

JOAN ACKERSTEIN, CERB MEMBER

_____

KELLY STRONG, 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.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

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

The Commonwealth Employment Relations Board has held that the International Association of Firefighters, Local 1713 (Union) violated Section 10(b)(2) and, derivatively, Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by bypassing the Town's bargaining representative and petitioning the Town Meeting to increase firefighter staffing.

The Union posts this Notice in compliance with the CERB's Order.

WE WILL NOT fail and refuse to bargain in good faith with the Town by bypassing its bargaining representative and petitioning the Town Meeting to increase firefighter staffing.

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

_____ _____
IAFF, Local 1713 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, 2 Avenue de Lafayette, Boston, MA 02111 (Telephone: (617) 626-7132)).