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

In the Matter of	*	
	*	
BOARD OF HIGHER EDUCATION	*	
	*	Case No. SUP-08-5453
and	*	
	*	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO, LOCAL 1067	*	Date Issued: February 14, 2014

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Carol Wolff Fallon, Esq.	-	Representing the Board of Higher Education
Maureen R. Medeiros, Esq.	-	Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, Local 1067

DECISION ON APPEAL

SUMMARY

The Board of Higher Education appeals from a Hearing Officer decision holding that it violated its duty to bargain in good faith by failing to bargain over the impacts of its decision to transfer bargaining unit work outside of the bargaining unit. For the reasons set forth below, the Commonwealth Employment Relations Board affirms the

decision but modifies the remedy to comport with the impact bargaining obligation found here.

Background

On June 24, 2009, a Department of Labor Relations (DLR) Investigator issued a complaint and partial dismissal in the above-referenced matter. The complaint alleged that the Board of Higher Education (Employer) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G. L. c. 150E (the Law) by failing to give AFSCME Council 93 (Union or AFSCME) prior notice and an opportunity to bargain over its decision to abolish a title in its bargaining unit, the Science Laboratory Technician II, (Tech II) and by failing to bargain over the impact of its decision to transfer the Tech II's duties to a newly-created, non-bargaining unit title, the Science Laboratory Technician (SLT). The Investigator dismissed that portion of the charge alleging that the Employer had failed to bargain in good faith over the decision to transfer bargaining unit work. The Investigator found that by agreeing to certain language in the management rights clause of its collective bargaining agreement (CBA), the Union had waived its right to bargain over this decision. The Union did not appeal from this partial dismissal.

The complaint proceeded to hearing and, on June 25, 2013, the DLR Hearing Officer issued a decision concluding that the Employer had unlawfully failed to bargain over the impacts of its decision to transfer some of the Tech II's duties.[1] As a remedy, the Hearing Officer ordered the Employer to, upon request, bargain with the Union over the impacts of its decision to transfer bargaining unit work. The Hearing Officer also

[1] The Hearing Officer dismissed that portion of the complaint alleging that the Employer unlawfully abolished the Tech II position and the Union did not file an appeal from that partial dismissal.

ordered the Employer to restore the Tech II's duties to the bargaining unit and to make all affected employees whole for any losses suffered from the date the SLT title was filled until the parties concluded their respective bargaining obligations.

The Employer timely appealed this decision to the Commonwealth Employment Relation Board (Board). On appeal, the Employer claims that the Hearing Officer "included issues in her Decision and Order that were previously dismissed" and ignored relevant Appeals Court precedent finding contract waiver based on the identical contract language. The Employer further argues that, in addition to waiving its right to bargain over the transfer by agreeing to the management rights clause, the Union failed to request bargaining over potential impacts, thereby waiving its right to engage even in impact bargaining. With respect to remedy, the Employer contends that the Order contains requirements to restore bargaining unit work to the unit that are inconsistent with the partial dismissal and Appeals Court precedent. and argues, more generally, that the Order is erroneous. The Union did not file a response to the Employer's supplementary statement.

Upon review of the hearing record and the Employer's arguments in its appeal, the Board affirms the Hearing Officer's decision on the merits, but modifies her remedy.

Facts

The Employer did not challenge any of the Hearing Officer's findings.[2] We therefore adopt them and summarize the relevant portions.

This case concerns AFSCME's bargaining unit at Roxbury Community College (College). Anthony Fuccione (Fuccione) was employed as a Tech II in that unit until the

[2] The Employer did, however, challenge the conclusions she drew from her findings. The Board addresses the Employer's arguments in its opinion.

Employer terminated him in June 2008. A few weeks later, on July 29, 2008, the College posted a vacancy for the newly-created SLT position, which it placed in the bargaining unit represented by the Massachusetts Community College Council (MCCC). Although the record reveals some differences in the duties and qualifications of the Tech II and the SLT, the Hearing Officer concluded, and the parties do not contest, that the majority of both titles' duties were the same. Those duties include maintenance and repair of laboratories and laboratory equipment, setting up experiments, and purchasing laboratory equipment and supplies.[3]

On August 8, 2008, AFSCME Chief Steward LaVerne Banks (Banks) and College Vice President of Academic Affairs Brenda Mercomes (Mercomes) attended a labor-management meeting, where the Union inquired about the SLT position. At that meeting, the College indicated that it would provide the Union with additional details about the title. Having heard nothing, Banks sent an email to Mercomes on September 11, 2008 asking about the College's plans for the SLT position. Mercomes replied the same day, informing Banks that because many other community colleges employed lab techs in the MCCC bargaining unit, the College would do the same. The College provided no more information about the SLT. At some point after the July 29, 2008 posting, the College filled the SLT position.[4]

[3] On appeal, the Employer reiterates the arguments it made to the Hearing Officer that the SLT title had greater educational and experience requirements. We agree with the Hearing Officer that these requirements do not diminish the overall similarities between the two positions.

[4] The record does not reflect the exact date the SLT position was filled. The Decision references the Employer's claim, however, that it did not fill the position until "long after" it was posted.

After Fuccione was terminated, the Union filed a grievance on his behalf and processed the grievance to arbitration. On April 23, 2010, an arbitrator issued an award ordering the Employer to reinstate Fuccione without back pay. The Employer appealed that award in Superior Court. That appeal was pending when this case was heard. The Employer did not return Fuccione to work or otherwise fill the Tech II position while the appeal was pending. It did not, however, abolish the Tech II title.

Article 4, the management rights clause of the CBA states, in pertinent part, that no provision of the agreement should be construed to "restrain the College from the management of its operations, including but not limited to…determin[ing] whether such work shall be performed by bargaining unit employees or others."

Opinion [5]

The Employer raises several arguments in its supplemental statement. Its first argument refers to several places in the Decision where the Hearing Officer states that the Employer "unlawfully transferred bargaining unit duties." The Employer contends that this proves the Decision improperly disregarded both the DLR's partial dismissal of the charge on contract waiver grounds and the Board's dismissal of a different transfer of bargaining unit work charge based on the same contract language, which was affirmed by the Appeals Court. See AFSCME, Council 93, Local 507 v. Commonwealth Employment Relations Board, No. 09-P-1143, 77 Mass. App. Ct. 1111

[5] The Board's jurisdiction is not contested.

(table), 2010 WL 2835661, (Mass. App Ct. July 21, 2010) (unpublished opinion).[6] Although not expressly argued, the Employer seems to contend that the Decision improperly found that the Employer violated the Law by failing to bargain over its *decision* to transfer the Tech II's bargaining unit work to the MCCC unit. We disagree. The decision clearly indicates in both the Summary and Conclusion sections that the Employer violated the Law when it failed to bargain in good faith with the Union over the *impacts* of the decision to transfer duties of the Tech II position without first giving the Union prior notice or an opportunity to bargain to resolution or impasse over the impacts of the decision. Moreover, consistent with the Complaint and Partial Dismissal, and citing well-established case law, the Decision makes clear that, although Article 4's management rights clause permitted the Employer to transfer bargaining unit work to non-unit personnel without engaging in decision bargaining, it did not give the Employer the right to make such a transfer without first bargaining over the impacts the decision has upon mandatory subjects of bargaining. See School Committee of Newton v. Labor Relations Commission, 388 Mass. 447, 564 (1983); Higher Education Coordinating Council, 22 MLC 1662, 1668-1669, SUP-4078 (April 11,1996); Springfield School Committee, 20 MLC 1077, MUP-7843 (July 28, 1993) (even if a decision lies outside the sphere of collective bargaining because it is determined to be a matter of public policy or a managerial decision, a public employer is still required to bargain over the impact of that managerial decision if it affects employees' wages, hours and other terms and

[6] In its post-hearing brief, the Employer cited this decision, which was issued pursuant to Massachusetts Appeals Court Rule 1:28, by its docket number only and did not attach a copy. The Hearing Officer declined to consider the decision. The Employer did, however, attach a copy to its Supplemental Statement on appeal.

conditions of employment). Based on the plain language of these portions of the decision, we reject any claim that the actual holding of this case disregarded the impacts-only scope of the complaint.[7] We read the "unlawfully transferred" language as merely reflecting the Hearing Officer's conclusion that the transfer of bargaining unit work permitted by the management rights clause was rendered unlawful when the Employer implemented the transfer before satisfying its impact bargaining obligation.

The Employer makes two arguments in its appeal regarding its impact bargaining obligation. First, relying on the unpublished Appeals Court decision referenced above, the Employer appears to suggest that the Union waived its right to impact bargain by agreeing to the management rights clause of the CBA. We disagree for a number of reasons. First, the Appeals Court decision was issued pursuant to Appeals Court Rule 1:28, and thus, may be cited solely for its persuasive but not precedential value. Chace v. Curran, 71 Mass. App. Ct. 258, 260 n. 4 (2008). Second, we disagree that the Appeals Court's decision can be read as broadly as the Employer urges. The decision affirms the Board's[8] dismissal of a 2005 charge (Case No. SUP-05-5184) filed by a different AFSCME local against the University of Massachusetts at Dartmouth (UMD) alleging an unlawful transfer of bargaining unit work.[9] The Board dismissed the charge on grounds that the Union waived its right to bargain over these issues by agreeing to

[7] As described below, however, we reach a different conclusion as to the Hearing Officer's remedial order.

[8] References to the Board include the former Labor Relations Commission (LRC). Subsequent to this case, the Board became the LRC's successor agency. See M.G.L. c. 23, §90, as amended through St. 2007, c. 45.

[9] The Board takes administrative notice of the Board's dismissal letters and its brief to the Appeals Court in Case No. SUP-05-5184.

the same management rights language at issue in this case. However, neither the Board's original dismissal letter nor its order on reconsideration specifically addressed whether, by agreeing to this language, the Union also waived its right to bargain over the impacts of the Employer's transfer decision. The DLR's brief to the Appeals Court was also silent on this issue. The Court's only reference to impact bargaining is contained in a quote from UMD's response to the original charge of prohibited practice – that the union "'waived its opportunity to discuss the impact of [UMD's] managerial decisions.'" AFSCME Council 93, Local 507, No. 09-P-1143, slip. op. at 2 (brackets in original). The Employer cites this extract from UMD's response as if it were the Court's ultimate holding. The Appeals Court, however, never refers to impact bargaining again, and, accordingly, did not analyze the issue raised by this appeal, i.e. the distinction between decision and impact bargaining obligations and remedies in the context of a contractual waiver. We therefore decline to give the Appeals Court decision the weight the Employer urges as to the impact bargaining issue before us here.

The Employer's second argument regarding impact bargaining is simply a reiteration of the claim it made to the Hearing Officer that the Union waived its right to impact bargain because it never made this demand to the Employer. The Hearing Officer properly rejected this argument on grounds that, instead of responding to the Union's requests for more information about the SLT position, the Employer told the Union it was implementing the transfer. We agree with the Hearing Officer that this response gave the Union neither enough information nor time to formulate an appropriate bargaining demand. See Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999) (a union cannot be expected to formulate an appropriate bargaining

demand in the absence of information that is sufficiently clear for the union to respond appropriately and that is not received far enough in advance to allow effective bargaining to occur.). We therefore affirm the Hearing Officer's conclusion that the Union did not waive its right to bargain over the impacts of the transfer of bargaining unit. [10]

Conclusion

For all the foregoing reasons, we affirm the Hearing Officer's conclusion that, notwithstanding the management rights clause granting the Employer the right to determine whether work should be performed by bargaining unit members or others, the Employer was obligated to bargain over the impacts of its decision to transfer some of the Tech II's work outside of the unit. We therefore turn to the Employer's argument that the Hearing Officer's remedy is at odds with the fact that it had the managerial right to transfer bargaining unit work outside of the unit.

Remedy

The Employer argues that the Hearing Officer's order to restore the Tech II's duties to the bargaining unit was erroneous. We agree. An order to bargain and to return the parties to the positions they would have been in if the violation had not occurred is the usual remedy when the Board determines that an employer has

[10] Although the Employer does not contend on review that there were no impacts to discuss, we note that at the time the Employer's impact bargaining obligation arose, possible impacts bargaining topics would have included what Fuccione's' duties and workload would be (other than those already transferred) in the event the arbitrator reinstated him. Cf. Chief Justice for Administration and Management of the Trial Court v. CERB, 79 Mass. App. Ct. 374 (2011) (no impact bargaining obligation existed where Court found no evidence that any bargaining unit members had lost work as a result of the transfer).

unlawfully refused to bargain before implementing a unilateral change. Town of Dennis, 12 MLC 1027, 1033, MUP-5247 (June 21, 1985). If, however, as in this case, the bargaining obligation involves only the impacts of a decision to alter a mandatory subject of bargaining, but not the decision itself, the appropriate remedy must strike a balance between the right of management to carry out its lawful decision and the right of an employee organization to have meaningful input on impact issues while some aspects of the status quo are maintained. Town of Burlington, 10 MLC 1387, 1388, MUP-3519 (February 1, 1984). Where the effects of an employer's decision are certain, and the union's efforts to impact bargain cannot substantially change, but only ameliorate, those effects, the Board is guided by Transmarine Navigation Corp., 170 NLRB 389 (1968). Under this standard, employers are only required to make affected employees whole during the period of impact bargaining. Town of Dedham, 21 MLC 1014, 1024, MUP-8091 (June 1, 1994). Accordingly, the Board distinguishes cases where the effect of the decision was not inevitable, and could have been changed by the union's efforts to impact bargain. Id. In those cases, employers must make affected employees whole retroactively. City of Boston, 31 MLC 25, 33, MUP-1758 (August 1, 2004).

Here, the Employer's managerial decision to transfer some of the Tech II's duties outside of the bargaining unit inevitably resulted in the bargaining unit losing the opportunity to perform those duties. Impact bargaining could not have substantially changed, but only ameliorated that effect. As to this issue, we agree with the Employer and find the Hearing Officer's order to restore those duties to the unit erroneous. We therefore modify the original Order by deleting Section 2(b).

As noted above, a Transmarine remedy only requires the employer to make affected employees whole during the period of impact bargaining. Id. However, Section 2(c) of the Hearing Officer's order, which requires the Employer to make affected employees whole from the date that the Employer filled the SLT position until completion of impact bargaining, is inconsistent with this requirement. [11] Although the Employer does not make any explicit arguments in its appeal contesting the make-whole remedy, its Supplemental Statement addresses this issue more generally through its claims that the Hearing Officer's "Decision *and Order*" ignored the fact that the decision bargaining allegation had been dismissed and in its challenge to the Hearing Officer's repeated references to the phrase "unlawful transfer of bargaining unit duties," a phrase that appears in Section 2(c). Thus, because restoration of the status quo ante here only requires that we order the Town to make whole affected employees for any wages and benefits they would have received during impact bargaining, see Town of Burlington, supra, we modify Section 2(c) of the Order to commence the backpay period from the date the Union requests bargaining pursuant to this decision, rather than from the date the Employer filled the SLT title. To avoid further confusion, we modify the

[11] Section 2(c) states:.

> Make any affected employee whole for any losses suffered as a result of the Employer's unlawful transfer [of] bargaining unit work outside of the bargaining unit, plus interest on any sums owed at the rate specified in G.L. c. 231, Section 6I from the date that the Employer filled the [SLT] position until the earliest of the following conditions are met:
>
> > i. The Union and the Employer reach agreement over the impacts of the decision to transfer the [Tech II] duties to non-unit personnel; or
> > ii Good faith bargaining results in a bona fide impasse.

wording to remove all references to the Employer's "unlawful transfer of bargaining unit work" and rephrase it as the "Employer's unlawful refusal to bargain over the impacts of its decision."

Any uncertainty over which, if any, bargaining unit members suffered economic losses as a result of the Employer's refusal to engage in impact bargaining can be resolved by the parties themselves or through a compliance proceeding.[12] The attached Notice to Employees has been modified accordingly.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that Employer shall:

1. Cease and desist from:

    a. Failing to bargain collectively in good faith to resolution or impasse with the Union about the impacts of the decision to transfer bargaining unit work to non-unit personnel on mandatory subjects of bargaining.

    b. In any like or similar manner, interfere with, restrain, or coerce any employees in the exercise of their rights guaranteed under the Law.

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

    a. Upon request, bargain in good faith with the Union to resolution or impasse over the impacts of the decision to transfer bargaining unit work to non-bargaining unit personnel on mandatory subjects of bargaining.

[12] The Employer does not argue on appeal that no employees suffered losses as a result of the violation found here. In this case, affected employees could include those individuals, if any, who lost the opportunity to perform the Tech II's duties when those duties were transferred outside of the bargaining unit before the Employer satisfied its impact bargaining obligation. As noted above, any disputes regarding this matter can be raised on compliance.

b. Make any affected employee or employees whole for any losses suffered as a result of the Employer's unlawful refusal to bargain over the impacts of its decision to transfer bargaining unit work to non-bargaining unit employees on mandatory subjects of bargaining, plus interest on any sums owed at the rate specified in G.L. c. 231, Section 6I from the date the Union requests impact bargaining until the earliest of the following conditions are met:

   i. The Union and the Employer reach agreement over the impacts of the decision to transfer the Tech II duties to non-unit personnel; or
   ii. Good faith bargaining results in a bona fide impasse;

c. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, including but not limited to the Employer's intranet or email system, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and

d. Notify the DLR within thirty (30) days of receipt of this Decision and Order of the steps taken to comply with it.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

_____
MARJORIE F. WITTNER, CHAIR

_____
ELIZABETH NEUMEIER, BOARD MEMBER

_____
HARRIS FREEMAN, BOARD MEMBER

THE 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 (CERB) has determined that the Board of Higher Education (Employer) has failed to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by transferring Science Laboratory Technician II unit work to non-bargaining unit personnel without first giving the American Federation of State, County and Municipal Employees Council 93, Local 1067 (Union) notice and an opportunity to bargain to resolution or impasse over the impacts of that decision on mandatory subjects of bargaining.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

to engage in self-organization; to form, join or assist any union;
to bargain collectively through representatives of their own choosing;
to act together for the purpose of collective bargaining or other mutual aid or protection; and
to refrain from all of the above.

WE WILL NOT fail to bargain in good faith over the impacts of the decision to transfer bargaining unit work to non-bargaining unit personnel on mandatory subjects of bargaining.

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

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

- Upon request, bargain in good faith with the Union to resolution or impasse over the impacts of our decision to transfer bargaining unit work to non-bargaining unit personnel on mandatory subjects of bargaining.

- Make any affected employee or employees whole for any losses suffered as a result of the Employer's unlawful refusal to bargain over the impacts of its decision to transfer bargaining unit work to non-bargaining unit employees on mandatory subjects of bargaining, plus interest on any sums owed at the rate specified in G.L. c. 231, Section 6I starting on the date the Union requests impact bargaining until we satisfy our bargaining obligation.

_____ _____

Board of Higher Education 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, Boston MA 02114 (Telephone: (617) 626-7132).