COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
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DEPARTMENT OF HIGHER EDUCATION, MASSACHUSETTS COLLEGE OF ART AND DESIGN	*	Case No. SUP-12-1541
	*	
and	*	Date Issued: August 25, 2014
	*	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO	*	

Hearing Officer:

Shauna L. Spinosa, Esq.

Appearances:

Julie Marcal Mackenzie, Esq.	-	Representing the Department of Higher Education College of Art and Design
Karen Clemens, Esq.	-	Representing the American Federation of State, County and Municipal Employees, AFL-CIO, Council 93

HEARING OFFICER'S DECISION

SUMMARY

This case presents two issues: whether the Department of Higher Education Massachusetts College of Art and Design (College or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by repudiating a settlement agreement dated February 15, 1995 (1995 Agreement) between the College and the American Federation of State, County and Municipal Employees, AFL-CIO, Council 93 (Union) and/or whether the College violated

the Law by contracting out electrical work on the Kennedy 2 Project without bargaining to resolution or impasse. I do not find that the Employer violated Section 10(a)(5) of the Law by repudiating the 1995 Agreement or by failing to bargain to resolution or impasse over the impacts[1] of outsourcing of electrical work.

STATEMENT OF THE CASE

On January 31, 2012, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the Employer had violated Sections 10(a)(2), 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by dominating, interfering, and restraining the Union in its ability to represent its members, by repudiating the terms of a settlement agreement dated February 15, 1995 and unilaterally outsourcing the completion of work on Phase II of the College's Kennedy 2 Project to an outside vendor. Following an investigation, the DLR issued a complaint of prohibited practice on December 12, 2012, finding probable cause to believe that the Employer violated Section 10(a)(5) and derivatively Section 10(a)(1) of the Law by repudiating the 1995 Agreement and by unilaterally outsourcing work on the Kennedy 2 Project without bargaining to resolution or impasse. The DLR issued a partial dismissal dismissing the Section 10(a)(2) allegation. The Employer filed an answer to the complaint on January 23, 2014.

I conducted a hearing on February 14 and March 4, 2014 at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. The

[1] The Union only sought to pursue its allegation that the College failed to bargain over the impacts of its decision to outsource the work, and not the decision itself. Nevertheless, I still address both the decisional and impact obligations in my decision because Count I of the Complaint alleges an unlawful unilateral change, which includes both a decisional and impact bargaining obligation.

Employer and the Union filed post-hearing briefs on or about April 11, 2014. Based on the record, which includes witness testimony, my observation of the witnesses' demeanor, stipulations of fact, and documentary exhibits, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

STIPULATIONS OF FACT

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

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

3. The Union is the exclusive representative for tradespeople employed by the College, including electricians, carpenters, maintenance workers, licensed steam firemen and public safety personnel.

4. The Union and the Employer are parties to a collective bargaining agreement (CBA) for the period of July 1, 2011 through June 30, 2014.

5. The management rights language in the CBA has been the same since the collective bargaining agreement effective July 1, 1990 through June 30, 1993.

6. Elaine O'Sullivan (O'Sullivan) is the Human Resources Director for the College and is authorized to represent the College in collective bargaining matters.

7. Charles McGilvray (McGilvray) is Chief Steward for the Union and is authorized to represent the Union in collective bargaining matters.

8. On September 30, 2011, O'Sullivan sent McGilvray a letter marked Joint Exhibit 2.

9. Article 21 of the CBA has remained the same since at least the collective bargaining agreement effective July 1, 1990 through June 30, 1993, with the exception of the final sentence of Article 21 that appears in the current CBA.

FINDINGS OF FACT

The Parties' CBA

The parties' CBA addresses contracting out in two articles, its management rights article in Article 4 and Article 21 entitled "Contracting Out." 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...contract[ing] out work...[and] determin[ing] whether such work shall be performed by bargaining unit employees or others." Article 21 states that "[w]ithin a reasonable time prior to the College contracting out work which will result in the layoff of an employee who performs the function that is contracted out, the Union shall be notified..." and further elaborates upon the protocol when contracting out of work will result in layoffs.[2]

This language has remained in the parties' agreement since at least the June 30, 1990 to July 31, 1993 CBA. Since the 1995 Agreement, the parties have negotiated several collective bargaining agreements, but none of the negotiations have addressed or changed the relevant language in Articles 4 and 21 of the CBA or sought to change the provisions.

The College

The College Facilities Department is responsible for the maintenance of its facilities plant and for performing trades work and short-term projects around the College on a work order basis, and for managing the larger scope capital projects at the College. The Union represents certain employees of the College, including the tradespeople working in the College's Facilities Department. The College employs 11 tradespeople: one plumber, two painters, one locksmith, two HVAC technicians, two

[2] No layoffs were involved in the instant matter.

carpenters, and three electricians. The College assigns the tradespeople trade-specific projects through work orders on the College's work order system. College officials in various departments can request work orders for work to be performed throughout the College campus. Work orders are diverse and trade-specific, but often might request certain tasks such as setting up a room for a meeting, painting, or replacing light bulbs. The electricians have the highest work order backlog of about 100-150 job requests per electrician, because they are responsible for all electrical work on the College campus. The three electricians, including McGilvray, are classified as Utility Plant Operators. The College requires that they hold the highest electrical license, a Journeyman's License, in order to perform any type of electrical work, including high-voltage electrical work and data and security wiring.

Executive Vice President Kurt Steinberg (Steinberg) runs the Facilities Department, as well as other departments of the College.[3] Under Steinberg, Executive Director of Facilities Howie Larosee (Larosee) manages the Facilities Department.[4] Larosee supervises the tradespeople, including McGilvray. McGilvray has been an electrician at the College since 1992, and has served in a Union leadership role, including his current role as Chief Steward, since 1995. McGilvray has participated on the bargaining team for contract negotiations at least three times since 1995. McGilvray has had approximately ten supervisors during his time with the College, with Larosee being his current supervisor. McGilvray has never served in a supervisory capacity.

[3] Steinberg has held this position since 2006.

[4] Larosee has held this position since 2003.

Since in or around 2007, Elaine O'Sullivan (O'Sullivan) has served as the Director of Human Resources for the College. Her responsibilities include overseeing hiring, payroll, training, benefits and labor relations. As part of her duties, she investigates grievances and conducts grievance hearings as a hearing officer. In addition, she is authorized to settle grievance cases at the College, and to impact bargain with the Union over local College-wide issues, but she does not conduct main table collective bargaining or handle labor relations matters extending beyond the College.

Contracting Out

Typically, capital projects are projects with larger scope or longer duration that are outside of the trades work order system because they encompass multiple trades. Capital projects often spread work over different departments, and because of the complexity and scope, the projects are often contracted out and performed in multiple phases.

Since at least 2006, Larosee would generally discuss upcoming and ongoing College capital projects with the tradesmen because they often required coordination between the outside contractor used, the trades, and all of the College departments impacted by the project. These discussions – which would take place both before and during projects – occurred regardless of whether the projects were completed by contractors or in-house.

Steinberg holds the ultimate decision-making authority to determine whether a capital project will be contracted out, to whom, to what extent, and at what cost. Larosee plays an instrumental role in providing information to Steinberg to make

contracting out decisions. Larosee would often gather information from multiple sources, including speaking with individual tradespeople to discern their current workload from the work order system, the time it would take them to perform additional work on a capital project, whether they have the skill set to perform the additional work, and whether their schedule could accommodate the added workload. Larosee would gather information regarding the skills, project completion time, tradespeople availability, and cost of using tradespeople versus the cost and time of contracting out the work, and present the information to Steinberg.[5] Steinberg would then consult with the relevant department heads involved in a project, Jim McDade, the College's Director of Purchasing, and Cameron Roberts (Roberts), the College's Capital Planning Consultant, to contemplate timelines, the availability and expertise of in-house tradespeople, and the financial viability of contracting out part or all of the work, to determine whether or not to contract out the work to an outside vendor. After this evaluation, Steinberg would determine whether to contract out the work or not. He has never consulted the Union in his decision-making process, nor bargained with the Union over the decision to contract out work.[6]

For smaller scale projects of a shorter duration and smaller budget, Larosee is authorized to decide whether to contract out work or assign it to the tradespeople. Larosee has repeatedly used Lan Tel, Galaxy and Besbora as outside vendors to

[5] Larosee and Steinburg testified credibly that, prior to Larosee's presentation of information to Steinburg, Steinburg had more often than not already determined whether or not to contract out the work.

[6] Steinburg testified credibly that this has been the practice since 2006, when he started working at the College.

perform projects, and frequently contracted out specialized electrical work such as audiovisual electrical work, lighting control work, and data and security wiring. The College often contracts out these tasks despite the fact that College electricians are capable of and licensed to perform this work. In those instances, Larosee has both decided to contract out the work or to assign the work in-house. Larosee does not discuss his decision to contract out this work with the Union or McGilvray.

Some of the smaller projects have been performed in-house by tradespeople alongside their regular work order duties. For example, the tradespeople have repurposed some of the rooms in the Kennedy Building as laboratories and as private student art spaces. In or around 1995, the College assigned McGilvray to install receptacles in a classroom for electrical art sculpting equipment. The College has assigned the tradespeople these projects after receiving approval from the necessary department heads. Then, Larosee or one of his predecessors discussed the necessary work with the employees.

On both the smaller scale and capital projects, neither Larosee, Steinberg, nor any member of the College has bargained with the Union over the decision to contract work to outside vendors. Larosee occasionally asks the electricians and carpenters to review and comment on blueprints and plans for upcoming work because the tradespeople will be involved in coordinating with the outside contractors and then taking over some of the work after the contractor has completed the project. In addition, tradespeople can identify if there are any flaws in the plans or suggest other improvements. However, the College does not involve employees in the decision as to whether work is to be performed in-house or contracted out. In the past, the Union and

the College have not reached any agreements on whether the work would be completed in-house or contracted out, nor have they sought to do so.[7]

1995 Grievance Settlement Agreement

In or around winter of 1994, the Union filed a grievance on behalf of certain bargaining unit members, including McGilvray, who were seeking to perform work on the College Registrar's Office that the College planned to contract out. At the step 2 grievance hearing on February 13, 1995, then Human Resources Director Jeanne Regan (Regan) and the Union agreed to settle the grievance. McGilvray,[8] Regan, Faye George (George), the Union Steward, Richard Aronowitz, the College's Executive Vice President, Richard McDermott, the Director of Facilities, and Deborah Keyes, the Assistant Director of Human Resources, attended the grievance hearing. At the meeting, Regan, McDermott, Dick Larson (Larson), McGilvray's direct supervisor, and McGilvray agreed that they should discuss upcoming jobs, decide which jobs should be contracted out, which jobs the tradespeople could handle, and whether the College had

[7] O'Sullivan, Larosee and Steinburg testified credibly that there has never been bargaining or agreements reached regarding the decision to contract out work. McGilvray also testified that the decisions to contract out were not bargained, but only that he would discuss the job with consultants, facility heads, or the relevant College manager about completing necessary electrical work on-campus. McGilvray did not specify whether there were any instances where he or the Union reached agreement with the College regarding the decision to contract out. There is no bargaining history or other evidence indicating that McGilvray or the Union have bargained over the decision to perform work in-house, or how the work is to be performed on overtime. There is also no evidence of agreements reached over the decision to contract out or assign work in-house. The record only reflects instances of generalized discussions with McGilvray and other tradespeople about upcoming work, either to be performed in-house or contracted out, where Larosee or another College manager would invite employees' insights and expertise on their specific trades, rather than evidence of either party seeking agreement on the decision to contract out work.

[8] McGilvray did not serve as a Union steward or representative at this time.

funding to allow the tradespeople to perform the work on overtime.[9] On February 15, 1995, Regan sent a memorandum to McGilvray, the 1995 Agreement, stating the following:

> The Step 2 Grievance Hearing was held on Monday, February 13, 1995 at 10:00AM in the Administration and Finance conference room.
>
> At the hearing, all parties agreed that any electrical jobs outside of your regular tour of duty, that the Campus Engineer felt were necessary, would be discussed with you as the Electrician here on campus.
>
> Based on this agreement, you and the Engineer should agree on what projects you would perform on an overtime basis and what projects should be completed through contracting out for services.

At the time the 1995 Agreement was reached, McGilvray was not a Union official or representative, nor did he supervise any of the tradespeople. The record is unclear as to who served in the role of Engineer. At the time of the hearing, there was no Engineer employed at the College, and there are now three electricians, including McGilvray, who all hold the same rank and title of Utility Plan Operator.

The 1995 Agreement did not come up again until a 2010 grievance hearing.[10] O'Sullivan testified that she first saw the 1995 Agreement around March 2010 in a

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[9] The Union's only evidence presented regarding the history of the 1995 Agreement and the understanding reached by those in attendance at the step 2 grievance hearing was McGilvray's statement in his hearing testimony. McGilvray testified that his understanding of the 1995 Agreement was that he and the Engineer would "decide amicably which [jobs] we should sub out, which ones we can handle, which ones we can't handle, and if they had funding we could do it on an overtime basis to get these things accomplished." McGilvray also testified that he understood the 1995 Agreement to include all trades, not just electrical work.

[10] McGilvray testified that, since 1995, he has put approximately ten (10) prior supervisors on notice of the 1995 Agreement by showing it to them and that they have all abided by the Agreement. However, McGilvray did not cite any specific instances where he showed the 1995 Agreement to prior supervisors or where it was enforced.

grievance hearing with McGilvray where he was representing the grievant as the Union steward. During the hearing, McGilvray referred to the 1995 Agreement. O'Sullivan was not aware of any agreement at this time, so McGilvray subsequently brought her a copy to review. O'Sullivan told McGilvray that she had never heard of the 1995 Agreement or seen it implemented. McGilvray provided a copy of the 1995 Agreement for informational purposes only, because the grievance did not allege a violation of the 1995 Agreement. Subsequently, O'Sullivan showed the agreement to the College's counsel. She also asked Steinberg how the College decided to outsource work instead of performing it in-house, but did not show him the 1995 Agreement at that time. O'Sullivan formed the belief that the 1995 Agreement was not valid. Because the 1995 Agreement was not at issue at the time, O'Sullivan did not have any further communication with the Union regarding this agreement until a subsequent meeting on October 31, 2011, at which she conveyed her belief that it was invalid.

Neither Steinberg nor Larosee[11] were aware of the 1995 Agreement until 2010, after the Union filed the charge in the instant matter with the DLR. At that time, O'Sullivan also asked Larosee how the College typically decides whether to outsource

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McGilvray also testified that he never perceived of a violation of the 1995 Agreement before 2010, despite the fact that the College had contracted out work of an electrical nature without consulting the Union. No grievances were filed, nor were there any instances mentioned on the record in which McGilvray showed a supervisor the 1995 Agreement prior to 2010. Conversely, Larosee, O'Sullivan, and Steinberg all testified credibly that they were not aware of the 1995 Agreement until 2010. Based on McGilvray's demeanor on the witness stand and the lack of evidence supporting his testimony, I do not credit the portion of McGilvray's testimony stating that ten prior supervisors were aware of the 1995 Agreement and enforced its terms.

[11] When the 1995 settlement was reached, Larosee was an HVAC Technician for the College.

work, and he provided her an emailed response explaining the College's decision-making process.

McGilvray believes that the 1995 Agreement requires the College to discuss projects to be contracted out or kept in-house with the Union, although he acknowledges that not all electrical projects are actually discussed with the Union. McGilvray also believes that the 1995 Agreement also covered all of the tradespeople, rather than just electricians, and, as to the electricians, the 1995 Agreement was intended only to extend to projects that the tradespeople are able to perform. However, he also believes that the 1995 Agreement excludes specialty work such as the low voltage data and security wiring which the College always contracted out to vendors such as Lan Tel without any prior discussion with the Union, even though the electricians are capable of performing the work in-house.

Kennedy 2 Project

In 2010, the College sought to remodel the first and second floors of its Kennedy Building on campus as part of its Kennedy 2 Project. To determine how to most efficiently complete the work, Steinberg asked Larosee for advice and information regarding whether to contract out the work or use in-house tradespeople for all or part of it.

Larossee consulted McGilvray, Roberts, and others to determine what information to present to Steinberg, and whether to recommend contracting out or using the College tradespeople. Larosee told McGilvray and Joe Conley (Conley), another electrician, in 2010 that he wanted to split the Kennedy 2 Project into five parts, and use the in-house electricians for three parts of the project, and contract out the remaining

work, including some electrical work. Larosee also showed McGilvray blue prints drawn up by architects for the Kennedy 2 Project to illustrate the work needing to be performed. Larosee sought bids on the work from a commonly used general and electrical contractor, Schwartz Brothers, for both the project in full and for the portion at issue in this matter.

After gathering information, Larosee presented his idea and the relevant information to Steinberg, recommending that the College use Schwartz Brothers for the bulk of the project, but use in-house tradespeople for a portion of the work. Larosee based his recommendation on his calculation of the projected for using in-house staff for parts of the work rather than outside contractors for all of the work. Steinberg subsequently discussed this information with Roberts, McDade, Larosee, and Maureen Keefe, the College's Vice President of Student Affairs, and then decided to contract out Phase II of the project, since it would be less expensive than contracting the whole project to Schwartz Brothers or another vendor. Steinberg decided to use in-house tradespeople to perform some of the work after hearing advice from Free, Roberts, and Larosee. Steinberg decided to contract out the majority of the work to a commonly-used vendor, Schwartz Brothers. Neither Larosee or McGilvray had the authority to decide to keep the work in-house.[12]

Beginning in or around June 2010, the tradespeople[13] began performing work on the Kennedy 2 Project, alongside regular work assigned from the work order system.

[12] The evidence shows that this procedure was consistent with the practice that the College had utilized in the past of determining how work would be completed, and whether it would be completed in-house or outsourced to a competitive bidder.

[13] The work on the project included all the trades, not just electrical.

The tradespeople performed the Kennedy 2 Project duties on an optional, overtime basis,[14] and also fulfilled their regular work order system duties. Initially, Steinberg was pleased with the tradespeople's progress on Phase I of the work, which they completed satisfactorily and on time, but during Phase II of the work, he began noticing the work's pace had significantly slowed and was becoming more costly in overtime. During the project, the College had lost one carpenter and one electrician. Phase II included remodeling the student gallery which housed a lounge and offices for student organizations, and the College wanted Phase II finished for the start of the 2011 school year. In late summer of 2011, Steinberg became concerned that the project would be done in time for the student organizations to utilize the space. In early September 2011, Steinberg asked Larosee to meet with Roberts and him to discuss the project's progress. After discussing the matter with Larosee, Steinberg determined that using a contractor to finish the project would be quicker and ultimately more cost-effective.

Steinberg did not consult O'Sullivan in the decision to outsource the remainder of the project, but Steinberg did ask her what obligation the College had to the Union in this regard. O'Sullivan advised Steinberg that the College needed to bargain with the Union over the impacts of outsourcing. On September 30, 2011, O'Sullivan emailed

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[14] The Union did not provide evidence of the mechanism for assigning the Kennedy 2 Project work on overtime. Nor did the Union provide evidence showing that the tradespeople performed the Kenned 2 Project work on a regular overtime basis, or evidence that a certain amount of overtime was guaranteed. In addition, the Union did not rebut the College's assertion that the overtime was only offered on an unscheduled basis. Moreover, O'Sullivan testified that one of the reasons Phase II was not progressing on schedule, in addition to the loss of workers, was that the overtime was available but the tradespeople were not signing up for it. I find her testimony credible. From this testimony, I find that the overtime was optional, and was not guaranteed or regularly scheduled.

McGilvray a letter stating that "the [C]ollege has decided to outsource the completion of MassArt's Kennedy Building project. Upon receipt of this letter please let me know if you would like to meet to discuss the impact of this proposed change."

October 31, 2011 Meeting

After O'Sullivan notified McGilvray that the College intended to outsource the remainder of Phase II of the Kennedy 2 project, the parties sought to meet to discuss the impacts of outsourcing. After some scheduling difficulty, the parties agreed to meet on October 31, 2011. O'Sullivan, McGilvray, Matt Harris (Harris), a carpenter at the College, Lisa Field (Field), a Union staff representative, and O'Sullivan attended the meeting.

At the meeting, the Union sought to understand the rationale for the College's decision to contract out the remaining work, and disagreed with its decision. Field stated the Union's position, that it was not financially feasible for the College to contract the work to a private vendor. Harris argued his own personal financial implications as the result of the loss of unscheduled overtime. McGilvray echoed Harris' sentiment. O'Sullivan explained that the progress had been slow and costly as a result of the work being completed on an overtime basis. She responded to the Union's concerns regarding their finances by stating that the College could not base its decisions on the personal financial obligations of the tradespeople.

During the meeting, McGilvray showed O'Sullivan the 1995 Agreement and told her that it demonstrated that the College and the Union had to discuss and agree upon which projects needed to be performed on overtime. O'Sullivan responded that the 1995 Agreement was not in effect, and there was no valid agreement. This was the first

time she had discussed the 1995 Agreement with the Union. The meeting ended with no progress in the impact bargaining negotiations. Neither side presented any specific proposals or ideas regarding the contracting out process.

Following the meeting, O'Sullivan relayed the Union's concerns to Steinberg. She also told him that she did not find the Union's arguments persuasive because they only addressed the employees' personal, financial implications of losing overtime, and this should not be a part of the College's considerations. Steinberg spoke with Larosee after the meeting, and then decided to go forward with outsourcing the remainder of the project to the Schwartz Brothers. Schwartz Brothers completed the project by the end of the second semester, in or around May 2012.

OPINION

Repudiation of the 2005 Settlement Agreement

The first issue in this case is whether the Colleges repudiated the 1995 Agreement by outsourcing the remainder of the work on Phase II of the Kennedy 2 Project. The Union argues that the language of the 1995 Agreement is clear and that the evidence shows that the College deliberately outsourced the work previously performed by bargaining unit members without discussing the decision to outsource with the Union in violation of the terms of the Agreement. Conversely, the College asserts that there is no valid agreement or practice of enforcing any agreement, and thus there was no repudiation. I conclude that the language of the 1995 Agreement was ambiguous, and therefore, I do not find any repudiation.

The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26

MLC 165, 168, SUP-3972 (March 13, 2000). To establish that an employer repudiated an agreement, a union must show that the employer deliberately refused to abide by the unambiguous terms of the agreement. Worcester County Sheriff's Department, 28 MLC 1, 6, SUP-4531 (June 13, 2001). If the language of the agreement is ambiguous, the Commonwealth Employment Relations Board (Board) will look to the bargaining history that culminated in the provision at issue to determine whether there was an agreement between the parties. City of Waltham, 25 MLC 59, 60, MUP-1427 (September 8, 1998). If the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, there is no repudiation because the parties did not achieve a meeting of the minds. City of Boston/Boston Public Library, 26 MLC 215, 216, MUP-2081 (May 31, 2000).

As a threshold matter, I find that the language of the 1995 Agreement is ambiguous. While the Union asserts that the Agreement clearly required discussing the decision to contract out work prior to doing so, the language does unambiguously state the College's obligation in this regard. The third paragraph of the Agreement requires McGilvray and the Engineer to agree on what projects would be done in-house, on overtime, and what projects would be completed through contracting out of services. The second paragraph of the Agreement seems to only require discussion with McGilvray after the Engineer has decided that additional electrical projects are necessary. Thus, read together, the two paragraphs are contradictory because the second paragraph requires only discussion of upcoming projects and the third paragraph appears to require agreement on what is contracted out or kept in-house, and how it is paid.

The unclear language of the Agreement does not rectify the disagreement between the conflicting interpretations proposed by the Union and the College. The language does not support the Union's contentions during the hearing that the Agreement applied to all trades work. Also, the Union contended that the terms of the Agreement were limited to certain types of electrical projects, which is not referenced in the settlement agreement's language.

Moreover, McGilvray stated that his understanding of the Agreement was that it intended for the Union and the College to decide amicably which jobs are contracted out and whether they were to be performed in-house on overtime. First, this understanding contradicted his later testimony that the 1995 Agreement only requires the College to discuss whether to contract out work or keep it in-house with the Union. Second, the Agreement does not refer to the Union, but refers only to McGilvray, as the electrician whom the February 15, 1995 memo addressed, and the Engineer,[15] which is no longer a position filled at the College.

Also, the parties' bargaining history does not clarify the meaning of the Agreement, or explain how it was interpreted and/or enforced, if at all. The agreement that McGilvray and the College reached at the grievance hearing on February 13, 1995 was similarly vague. It does not unambiguously require the College to bargain to agreement over the decision to contract out work with the Union, and may only require the College to discuss it after the decision has been made. In addition, the language of the CBA regarding contracting out has been unaltered, and there is no evidence in the

[15] It is unclear from the record of who the Engineer was in 1995. Nor is there evidence in the record indicating that anyone currently serves in the role of Engineer any longer.

record of any proposals or attempt to change the language to reflect or incorporate the language of the 1995 Agreement.

In addition, the College's conduct was not consistent with the parties having reached an unambiguous agreement and following its terms. The only evidence of use of the 1995 Agreement's use since the 1995 overtime grievance was McGilvray's later distribution of copies of the memo to O'Sullivan and Larosee years later. They were not aware of any agreement prior to that point. There is no further evidence regarding the interpretation or enforcement of the 1995 Agreement since it was reached.

Further, there is no evidence of the College bargaining over the decision to contract out work or reaching agreement on the decision with the Union or McGilvray. There does not even appear to be a consistent practice of discussing whether to contract out work before doing so. Typically the College decided without bargaining which work was going to be completed in-house or contracted out. The College would consult McGilvray and other tradespeople about upcoming work, both work that was planned to be performed in-house or work that was to be contracted out, just as with the Kennedy 2 Project. However, the record does not demonstrate a practice of the Union and the College consistently discussing or agreeing on which work the College would contract out and/or how the work was to be completed on overtime if the tradespeople were going to perform the work in-house. While the College consulted different individuals involved in the work to be performed, nothing in the record indicates that the Union or McGilvray was involved in the decision-making on contracting out work, or involved in determining which in-house work employees were to perform on overtime.

Therefore, there is no practice of enforcing the Agreement so as to require agreement on contracting out projects and overtime utilized.

Finally, there are no other instances on the record of a past project initiated in-house and then outsourced akin to the instant matter. The language of the 1995 Agreement does not contemplate this occasion either. Therefore, there was no conduct consistent with the Union's interpretation of the 1995 Agreement to demonstrate an unambiguous interpretation of the agreement. For these reasons, I do not find that there was a clear and unequivocal repudiation of the terms of the 1995 Agreement, and I dismiss this count.

Unilateral Change[16]

A public employer violates Section 10(a)(5) of the Law when it changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. School Committee of Newton v. Labor Relations Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as by a collective bargaining agreement. Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000); City of Boston, 16 MLC 1429, 1434, MUP-6697 (December 19, 1989); Town of Wilmington, 9 MLC 1694, 1697, MUP-4688 (March 18, 1983). To establish a violation, a union must show that: 1) the employer altered an existing practice or instituted a new

[16] The parties litigated this allegation as an unlawful unilateral change. Consequently, I have analyzed it as the parties have litigated it in the hearing and in their briefs.

one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain. Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994); City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20, 1994). To determine whether a practice exists, the Board analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. Swansea Water District, 28 MLC 244, 245, MUP-2436 (January 23, 2002); Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997). A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances precipitating the practice recur. Commonwealth of Massachusetts, 23 MLC at 172.

Decisional Bargaining Obligation Waived

The College contends that the language of the CBA provided a waiver of its obligation to bargain to contract out the remainder of the Kennedy 2 Project. The Union only sought to pursue the impact bargaining obligation portion of this allegation, and did not expressly concede that the College had no decisional bargaining obligation. Consequently, I address it here. I agree that the language of the CBA constitutes a waiver of the decisional bargaining obligation here.

The Board has long held that an employer asserting contractual waiver as an affirmative defense must show that the parties consciously considered the situation that has arisen, and that the union knowingly waived its bargaining rights. Central Berkshire

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Notwithstanding, the result would be no different if I were to analyze this count as a

Regional School Committee, 31 MLC 191, 202, MUP-01-3231, MUP-01-3232, MUP-01-3233 (June 8, 2005); Commonwealth of Massachusetts, 26 MLC 228, 231, SUP-4288 (June 13, 2000); Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986). The waiver needs to be clear and unmistakable. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 569 (1983); City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 175 (1999). If the language of the contract is ambiguous, the Board will review the parties' bargaining history to determine their intent. Massachusetts Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988). In particular, the Board must analyze whether the contract language expressly, or by necessary implication, confers upon the employer the right to make a change in a mandatory subject of bargaining without first giving the union notice and an opportunity to bargain. Id.

In support of its argument, the College cites University of Massachusetts, 33 MLC 78, SUP-05-5184 (September 27, 2006), where the Board found the same contract language to have constituted a waiver of the University's obligation to bargain over the transfer of bargaining unit work. However, in the Board's decisions in Massachusetts Board of Regents, Id. at 1269, and in Board of Higher Education, 40 MLC 233, SUP-08-5453 (February 14, 2014), both involving the same management rights language as the language in Article 4 here and both involving unlawful transfer of bargaining unit work allegations, the Board found in both cases that the language was insufficient to establish that the Union had clearly and consciously waived its right to bargain about the impacts of the decision to transfer the bargaining unit work, but did

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transfer of bargaining unit work case.

waive the obligation to bargain over the decision. The Board's reasoning is persuasive here, and I find that the decisional bargaining obligation was waived.

No Impact Bargaining Obligation[17]

The Board's reasoning is similarly persuasive here that the language of the CBA does not constitute a waiver of the College's impact bargaining obligation. Although Article 4 of the CBA provides the College the ability to determine whether work is to be performed by bargaining unit employees or others, the CBA does not clearly and unmistakably contemplate the waiver of the College's impact bargaining obligation. While Article 21 outlines the impact bargaining protocol regarding contracting out regarding in layoffs, there is no comparable provision regarding contracting out of work initially assigned to unit members. Similar to University of Massachusetts, the CBA is silent on the College's obligation to bargain when contracting out does not result in layoffs. See Id. Moreover, there is no bargaining history presented to sustain the College's burden of demonstrating that the CBA contemplated the situation of contracting out work previously assigned to bargaining unit members and waived the obligation to impact bargain. Accordingly, I find that the contract did not waive the impact bargaining obligation.

Although Article 4's management rights clause permits the College to contract out work without engaging in decision bargaining, it does not give the Employer the right

[17] The College also maintains that the Complaint does not specifically address impact bargaining in paragraph 9 and thus the Union only can only pursue a claim for a decisional bargaining obligation. However, I find this contention meritless. Paragraph 8 of the Complaint specifically alleges that the impacts are a mandatory subject of bargaining here, and thus encompasses the allegation that the Employer failed to bargain over mandatory subjects, which explicitly includes both the decision and

to transfer work 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 conditions of employment). However, the Appeals Court has held that a reduction in employees' ability to perform unscheduled overtime is not a mandatory subject of bargaining. Town of West Bridgewater, 10 MLC 1040, MUP-4470 (July 7, 1983), aff'd West Bridgewater Police Assn. v. Labor Relations Commission, 18 Mass. App. Ct. 550 (1984). Here, the Union identified only overtime as an impact requiring bargaining.[18] Overtime is considered unscheduled when employees have no assurance that the employer will make a certain amount of overtime available to them. Town of Billerica, 8 MLC 1957, 1963, MUP-4000, MUP-4122 (March 19, 1982). In the instant matter, there is no contention or evidence that the overtime opportunities for the Kennedy 2 Project were regularly scheduled or guaranteed. Moreover, there was no dispute that either the CBA or any regular practice of the College has guaranteed or regularly provided

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impacts of the outsourcing. Further, the Investigator did not dismiss the impact bargaining violation mentioned in Count I.

[18] Nothing in the record suggests that the nature of the individual tradespeople's duties changed, only that they had the ability to work extra hours on overtime on their relevant trade work in the Kennedy Building. In addition, the Union did not contend or provide evidence indicating that the extra work on Phase II of the Kennedy 2 Project was bargaining unit work, or that they lost any of their regular work order duties.

overtime to the tradespeople in the past. Therefore, I find that the College did not violate the Law by failing to bargain over the impacts of outsourcing because it had no impact bargaining obligation, and I dismiss the remaining count of the Complaint.

CONCLUSION

Based on the record and for the reasons explained above, I conclude that the College did not violate the Law by repudiating the February 15, 1995 Agreement when it outsourced the remainder of Phase II of the Kennedy 2 Project, or by failing to bargain over the impacts of its decision to outsource the project.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

SHAUNA L. SPINOSA, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.