COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of
TOWN OF PLYMOUTH
and
COLLECTIVE BARGAINING RELIEF ASSOCIATION

Case No.: MUP-14-3989
Date Issued: May 4, 2016

Hearing Officer:
Whitney Eng Coffey, Esq.

Appearances:
Jason R. Powalisz, Esq. - Representing the Collective Bargaining Relief Association
David C. Jenkins, Esq. - Representing the Town of Plymouth

HEARING OFFICER’S DECISION AND ORDER

SUMMARY

1 The issue is whether the Town of Plymouth (Town or Employer) violated
2 Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General
3 Laws, Chapter 150E (the Law) by unilaterally transferring bargaining unit work to
4 non-unit personnel. For the reasons explained below, I find that the Town
5 violated the Law by transferring crossing guard bargaining unit duties to non-
6 bargaining unit personnel without providing the Collective Bargaining Relief
7 Association (COBRA or Union) with prior notice and an opportunity to bargain to
resolution or impasse over the impacts of the Town's decision on employees' terms and conditions of employment.

STATEMENT OF THE CASE

On September 12, 2014, the Union filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR), alleging that the Town had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. A duly-designated DLR investigator investigated the Charge and issued a Complaint of Prohibited Practice on January 12, 2015, alleging that the Town failed to bargain in good faith by transferring bargaining unit work to non-unit personnel without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to transfer the work and the impact of the transfer on employees' terms and conditions of employment. The Town filed its Answer to the Complaint on January 14, 2015.

I conducted a hearing on September 28, 2015, at which both parties had an opportunity to be heard, to examine witnesses and to introduce evidence. On November 12, 2015, the Union and the Town filed post-hearing briefs. Based on the record, which includes witness testimony, 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 Town of Plymouth (Town) is a public employer within the meaning of Section 1 of Massachusetts General Laws, Chapter 150E (the Law).
2. The Collective Bargaining Relief Association (Union or COBRA) is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive bargaining representative for crossing guards employed by the Town.

4. The Town and the Union are parties to a collective bargaining agreement that, by its terms, is in effect from July 1, 2012 through June 30, 2015.

5. On each school day, crossing guards work one hour in the morning and one hour in the afternoon.

**FINDINGS OF FACT**

The Union is the exclusive collective bargaining representative for all full-time and regular part-time crossing guards and meter enforcement officers employed by the Town. Prior to being represented by the Union, crossing guards were represented by the American Federation of State, County, and Municipal Employees, Council 93 (AFSCME). In or around 2012, the bargaining unit petitioned the DLR to decertify from AFSCME. The DLR certified the Union as the exclusive bargaining representative on January 30, 2014.

The Union and the Town are parties to a collective bargaining agreement (Agreement) effective July 1, 2012 through June 30, 2015. Article XI of the parties’ Agreement provides in relevant part:

Except where such rights, powers, and authority are specifically relinquished, abridged, or limited by the provision of this contract, the Town has and will continue to retain, whether exercised or not, all of the rights, powers and authority heretofore had by it, and except where such rights, powers and authority are specifically relinquished, abridged or limited by the provisions of this contract, it

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1 The DLR’s jurisdiction in this matter is uncontested.
shall have the sole rights, responsibility and prerogative of
management of the affairs of the Town and direction of the working
forces, including but not limited to the following:

Section 1: To assign non-bargaining unit personnel to fill vacancies
at crossing guard posts.

The Union and the Town are also parties to a Memorandum of Agreement (MOA)
dated September 23, 2014. The MOA provides in part:

The four (4) expired contracts between the AFSCME and the Town
shall continue in force and effect and its term, except to the extent
specifically amended as below and as otherwise amended to
substitute COBRA or the Association for AFSCME, AFSCME Local
2824 and Union, shall be incorporated with the initial four
agreements between the Town and COBRA. The collective
bargaining agreements represent the entire agreements between
the parties, and any prior memoranda or side letters with the
exception of a side letter pertaining to meal periods for police
dispatchers and any other DLR settlement agreements with
COBRA are specifically revoked and of no further effect.

At the time of the Union's inception as the exclusive bargaining
representative, the Town employed six bargaining unit members as crossing
guards. In or around fall 2014, one bargaining unit member crossing guard
retired, bringing the total number of bargaining unit member crossing guards to
five. The Town also employed three guards from a private vendor, Madsen
Security, to perform crossing guard work. Each crossing guard works 10 hours
weekly: one hour in the morning and one hour in the afternoon, five days a week.
A crossing guard's primary duty is to control street traffic at specified crossings to
ensure the safety of school children as they cross the street. Crossing guards
ensure that children use proper crossing locations and that no children are in the
street while traffic is moving.
Dale Webber (Webber) has been employed by the Town for approximately 35 years. He is currently a Special Motor Heavy Equipment Operator in the solid waste division. He is also a member of the bargaining unit and has been the Union President since 2012. In or around late August 2014, Webber received a telephone call from two crossing guard bargaining unit members. They informed him that a Madsen Security employee was performing crossing guard work during the lunch hour at Hedge Elementary School.

Butch Machado (Machado) has been employed by the Town since 1986. He is currently a Special Heavy Equipment Motor Operator and has held that position for the past six months. Machado is a member of the bargaining unit and has been the Union Vice President since the Union’s inception in 2012. He was also the Vice President for three years for the previous bargaining representative of the bargaining unit, AFSCME. As part of the Union leadership, Machado attends monthly executive board meetings and daily meetings with the Union President.

In or around fall 2014, during an executive board meeting, Machado learned that the Union had filed the present charge of prohibited practice with the DLR alleging that a Madsen Security guard was performing crossing guard work during the lunch hour at Hedge Elementary School. After the meeting, Machado informed Webber that he knew the Madsen Security guard and had seen the Madsen Security guard cross children at an intersection during the lunch hour at Hedge Elementary School. Machado later called the Madsen Security guard and
asked him how long he had been at the Hedge School. The Madsen Security
guard replied that he had been there “quite awhile.”

OPINION

A public employer violates Section 10(a)(5) of the Law when it transfers
work performed by bargaining unit members to non-bargaining unit personnel
without first giving the exclusive representative of its bargaining unit members
prior notice and an opportunity to bargain to resolution or impasse. City of
Cambridge, 23 MLC 28, 36, MUP-9171 (June 28, 1996), aff’d sub nom.,
Cambridge Police Superior Officers Association v. Labor Relations Commission,
47 Mass. App. Ct. 1108 (1999). To establish that a public employer has violated
the Law, an employee organization must demonstrate that: 1) the employer
transferred bargaining unit work to non-unit personnel; 2) the transfer of unit work
had an adverse impact on individual employees or the bargaining unit itself; and
3) the employer failed to give the employee organization prior notice and an
opportunity to bargain to resolution or impasse over the decision to transfer the
work. Lowell School Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001); City
of Gardner, 10 MLC 1218, 1219, MUP-4917 (September 14, 1983).

Bargaining Unit Work

To determine whether the Town transferred bargaining unit work, I must
first determine whether crossing guard duties are the Union’s exclusive
bargaining unit work or whether unit members shared the work with non-
bargaining unit employees. The Town first argues that there has not been a
transfer of bargaining unit work because bargaining unit members have never
performed crossing guard duties during lunch hours. The Town asserts that
bargaining unit members have only performed crossing guard duties in the
morning and in the afternoon. The Town further alleges that crossing guard work
in the mornings and afternoons remains unaffected and, therefore, there has not
been a transfer of bargaining unit work. In analyzing what constitutes bargaining
unit work, the Commonwealth Employment Relations Board (Board) focuses on
the nature of the functions performed, not the time of the performance. Town of
Norwell, 13 MLC 1200, 1207-08, MUP-5655 (Oct. 15, 1986); City of Boston, 29
MLC 123, 125, MUP-2419 (January 15, 2003). In reviewing the nature of the
functions performed by crossing guards, I find that the work being performed
during the lunch hour at Hedge Elementary School is essentially the same as the
work being performed by bargaining unit members in the mornings and
afternoons, i.e. ensuring school-children safely cross the street. Accordingly, I am
not persuaded by the Town's argument that there has not been a transfer of
bargaining unit work because bargaining unit members have never performed
crossing guard duties during lunch hours.

Next, the Town argues that crossing guard work has always been shared
work between bargaining unit members and non-unit personnel. When
bargaining unit members and non-unit employees share work, the Board has
previously determined that the work will not be recognized as belonging
exclusively to the bargaining unit. Higher Education Coordinating Council, 23
MLC 90, 92, SUP-4090 (September 17, 1996); City of Boston, 6 MLC 1117, 1125, MUP-2863 (June 4, 1979). Here, there is no dispute that bargaining unit members as well as Madison Security guards perform crossing guard duties and, therefore, those duties constitute shared work.

In shared work cases, the Board focuses on the pre-existing pattern of shared work and the impact that any changes in that pattern may have on the allegedly aggrieved party. See City of Boston, 26 MLC 144, 147, MUP-1085 (March 10, 2000), aff'd sub nom.; City of Boston v. Labor Relations Commission, 58 Mass. App. Ct. 1102 (2003); Town of Natick, 11 MLC 1434, 1438, MUP-5319 (February 19, 1985). An employer may not unilaterally alter a pre-existing pattern of shared work. See City of Boston, 28 MLC at 195; City of Quincy, Quincy City Hospital, 15 MLC 1239, 1241, MUP-6490 (November 9, 1988); City of Boston, 6 MLC at 1125-1126. An employer is not obligated to bargain over every incidental variation in job assignments between unit and non-unit employees. Town of Saugus, 28 MLC 13, 17, MUP-2343, CAS-3388 (June 15, 2001); City of Somerville, 23 MLC 256, 259, MUP-8160 (May 2, 1997). Rather, the employer is only required to bargain if there a calculated displacement of unit work. Town of Bridgewater, 23 MLC 103, 104, MUP-8650 (December 30, 1998). To determine whether a calculated displacement of unit work has occurred, the Board examines how the work has been shared in the past. If unit employees traditionally have performed an ascertainable percentage of the work, a significant reduction in the portion of work performed by unit employees with a
corresponding increase in the work performed by non-unit employees may
demonstrate a calculated displacement of unit work. Commonwealth of
Massachusetts, 27 MLC 52, 56, SUP-4091 (November 21, 2000); City of New

Here, the Town argues that the Union has not established a clear pattern
of assignment or a calculated displacement of bargaining unit work. Upon review,
the record reveals that crossing guard duties have traditionally been shared by
bargaining unit members and non-unit employees. Since at least 2012, the Town
has employed a total of nine crossing guards: six bargaining unit members
performing approximately 67% of the crossing guard work and three non-unit
Madsen Security guards performing approximately 33% of the crossing guard
work. In or around August 2014, the number of non-unit members performing
crossing guard work increased to four when the Town assigned a Madsen
Security guard to perform crossing guard duties at Hedge Elementary School.
The new non-unit Madsen Security guard works for one hour each day, five days
a week, thereby increasing the percentage of crossing guard work performed by
non-unit personnel to 37% and decreasing the percentage of work performed by
bargaining unit members to 63%.\(^2\) Focusing on the percentages, it is clear that

\(^2\) It is undisputed that concurrent to the Town assigning a Madsen Security guard
to perform crossing guard duties at Hedge Elementary School, a bargaining unit
member crossing guard retired, bringing the total number of bargaining unit
members performing crossing guard duties to five. Neither the Town nor the
Union argued or presented any evidence that the new Madsen Security guard
replaced the retired bargaining unit member’s position. Since the retirement
occurred roughly around the same time as the Town hired an additional non-unit
there has been a calculated displacement of bargaining unit work. Additionally, by increasing the number of non-unit employees performing crossing guard duties and assigning a Madsen Security guard to Hedge Elementary School during the lunch hour, the Town changed the pre-existing pattern of shared work.

Adverse Impact

To establish the second element of its prima facie case, the Union must show that the transfer of unit work to non-unit personnel had an adverse impact on individual employees or the bargaining unit as a whole. City of New Bedford, 15 MLC at 1737. Here, the Town argues that the Union failed to establish that its members performed an "ascertainable percentage of the work" because the Union did not provide any evidence that its members have ever performed crossing guard duties during lunch hours, and the crossing guard work performed in the mornings and afternoons, which is shared work, remains unaffected by the Town's decision. However, as discussed above, I do not find the Town's argument that bargaining unit members have never performed lunch hour crossing guard work and, therefore, there has been no transfer of bargaining unit work persuasive because the work being performed during the lunch hour at Hedge Elementary School is essentially the same as the work being performed by bargaining unit members in the mornings and afternoons. Additionally, as employee to perform crossing guard duties and the Town could still potentially fill the now vacant bargaining unit crossing guard position, I do not consider the retirement in my analysis. However, even taking into account the retired bargaining unit member, the overall percentage of work performed by non-unit personnel after the Town assigned a Madsen Security guard to perform crossing guard duties at Hedge Elementary School still increased.
discussed above, when a fourth non-unit employee began performing crossing
guard duties at Hedge Elementary School, there was an increase in the work
performed by non-unit employees.

The Town further argues that the Union failed to establish that the
assignment of a Madsen Security guard to lunch duty at the Hedge Elementary
School resulted in a reduction in work of its bargaining unit members. The Board
has consistently held that a transfer of bargaining unit work, even if accompanied
by no apparent reduction in bargaining unit positions, constitutes a detriment to
the bargaining unit because it could result in an eventual elimination of the
bargaining unit through gradual erosion of bargaining unit duties. City of Holyoke,
26 MLC 97, 99, MUP-1801 (January 14, 2000) (citing Commonwealth of
Massachusetts, 24 MLC 116, 119, SUP-4050 (June 10, 1998)). Similarly, the
Board has held that losing the opportunity to perform unit work in the future is a
sufficient detriment to the unit to trigger a bargaining obligation. Town of Saugus,
29 MLC 208, 210, MUP-2621 (May 14, 2003).

Here, the Town's assignment of lunch hour crossing guard duties at
Hedge Elementary School to a Madsen Security guard denied individual unit
members the opportunity to perform lunch hour crossing guard duties, and
reduced the opportunities for bargaining unit members to perform this work in the
future. See City of Boston, 28 MLC 369, 377, MUP-2267 (May 31, 2002). In
Town of Norwell, supra, the town decided to expand its level of fire protection
services by staffing fire stations at night, and assigned the newly-created work to
call fire fighters, rather than permanent fire fighters. Rejecting the town's argument that the assignment did not adversely affect individual employees or the bargaining unit as a whole, the Board held that once the town decided to expand its operations, the unit members had the right to bargain over their performance of the new work and that it was adversely effected by the loss of potential new positions or overtime work. Town of Norwell, 13 MLC at 1208. The Norwell rationale is equally applicable in this case, where the Town similarly expanded its crossing guard operations and unilaterally assigned the newly-created work to non-unit employees. Once the Town decided to enhance its crossing guard presence at Hedge Elementary School, it was obligated to bargain with the Union over the unit members' performance of that work, and its failure to do so adversely impacted unit members and the unit as a whole.

Notice and Opportunity to Bargain

To establish the third element of its prima facie case, the Union must show that the Town failed to give it notice and an opportunity to bargain to resolution or impasse over the decision and its impacts. Lowell School Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001).

Waiver by contract

The Town contends that the Union waived by contract any right to bargain over the Town’s ability to use non-unit crossing guards. The Town argues that it had no obligation to bargain over the decision to transfer crossing guard duties at Hedge Elementary School to a Madsen Security guard because Article XI of the
parties' Agreement constitutes a waiver of the Union's right to bargain over the
decision. Article XI provides in relevant part:

Except where such rights, powers, and authority are specifically
relinquished, abridged, or limited by the provision of this contract,
the Town has and will continue to retain, whether exercised or not,
all of the rights, powers and authority heretofore had by it, and
except where such rights, powers and authority are specifically
relinquished, abridged or limited by the provisions of this contract, it
shall have the sole rights, responsibility and prerogative of
management of the affairs of the Town and direction of the working
forces, including but not limited to the following:

Section 1: To assign non-bargaining unit personnel to fill vacancies
at crossing guard posts.

Where an employer raises the affirmative defense of waiver by contract it
bears the burden of demonstrating that the parties consciously considered the
situation that has arisen, and that the union knowingly and unmistakably waived
App. Ct. 169, 174 (1999); City of New Bedford, 38 MLC 239, 248, MUP-09-5581
and MUP-09-5599 (April 3, 2012); Massachusetts Board of Regents, 15 MLC
1265, 1269, SUP-2959 (Nov. 18, 1988); Town of Marblehead, 12 MLC 1'667,
1670, MUP-5370 (Mar. 28, 1986). A waiver by contract will not be lightly inferred.
There must be clear and unmistakable showing that such waiver occurred
through the bargaining process or the specific language of the agreement. City of
New Bedford, 38 MLC at 248 (citing City of Taunton, 11 MLC 1334, 1336, MUP-
5198 (Jan. 17, 1985)).

Here, a plain reading of the relevant language of the parties' Agreement
indicates that the Union agreed that the Town can assign non-bargaining unit
personnel to perform crossing guard duties without first bargaining to resolution
or impasse over the decision to transfer the duties. Accordingly, I find that the
Union waived by contract its right to bargain over the Town's decision to transfer
crossing guard duties to non-unit personnel.

Obligation to bargain

The Town also argues that it does not have an impact bargaining
obligation with respect to its decision to transfer crossing guard duties to a
Madsen Security guard at Hedge Elementary School because there was no
impact on the bargaining unit. However, as discussed above, there was an
impact on the bargaining unit. "If a managerial decision has impact upon or
affects a mandatory topic of bargaining, negotiation over the impact is required."


Therefore, although the Town's decision to transfer crossing guard duties to non-
unit personnel is outside the scope of negotiations, the Law requires the Town to
negotiate with the Union over the impacts of that decision on employees' terms
and conditions of employments.

I next consider whether the Town satisfied its bargaining obligation to give
the Union prior notice and an opportunity to bargain before implementing its
decision. Here, the evidence demonstrates that the Union only became aware of
the transfer in or around August 2014 when two bargaining unit crossing guards
informed the Union President that a Madison Security employee was performing
crossing guard work during the lunch hour at Hedge Elementary School. The
H.O. Decision (cont'd.)

Town did not argue or present any evidence indicating that it fulfilled its bargaining obligation prior to transferring crossing guard duties to a non-unit employee at Hedge Elementary School. Accordingly, I find that the Town failed to satisfy its obligation to notify the Union that it intended to transfer crossing guard duties to non-unit personnel and to bargain over the impacts of its decision prior to transferring crossing guard duties to a Madsen Security guard at Hedge Elementary School.

CONCLUSION

Based on the record, and for the reasons stated above, I conclude that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring crossing guard duties from bargaining unit members to non-unit personnel without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the impacts of the decision on employees' terms and conditions of employment.

REMEDY

The Board fashions remedies for violations of the Law by attempting to place charging parties in the positions they would have been in but for the unfair labor practice. Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). The traditional remedy where a public employer has unlawfully refused to bargain is an order to restore the status quo ante until the employer has fulfilled its bargaining obligation, and to make all affected employees whole for any economic losses they may have suffered.
Commonwealth of Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10, 2008). If the bargaining obligation only involves the impacts of a decision to alter a mandatory subject of bargaining, the appropriate remedy is a bargaining order restoring the economic equivalent of the status quo ante for a period of time sufficient to permit good faith bargaining to take place. Lowell School Committee, 26 MLC 111, 115, MUP-1775 (January 28, 2000); City of Malden, 20 MLC 1400, 1406, MUP-7998 (February 23, 1994).

Here, the Town failed to bargain to resolution or impasse over the impacts of the decision to assign a non-unit employee to perform crossing guard duties during the lunch hour at Hedge Elementary School. Thus, to effectively restore the status quo ante in this case, I order the Town to bargain in good faith with the Union over the impacts of its decision to transfer lunch hour crossing guard duties at Hedge Elementary School to a non-unit Madsen Security guard. In addition, the Town must restore the economic equivalent of the status quo ante during bargaining.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town of Plymouth shall:

1. Cease and desist from:

   a. Failing and refusing to bargain in good faith with the Union by unilaterally transferring bargaining unit work from bargaining unit crossing guards to non-bargaining unit employees without first giving the Union notice and an opportunity to bargain to resolution or impasse over the impacts of the decision on bargaining unit members’ terms and conditions of employment;
In any like or similar manner, interfering with, restraining, or coercing 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 Town's decision to transfer crossing guard duties from bargaining unit members to non-unit personnel on bargaining unit members' terms and conditions of employment;

   b. Restore the economic equivalent of the status quo ante during bargaining;

   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 electronically, if the Town customarily communicates with Union employees via intranet or email, and display 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
DEPARTMENT OF LABOR RELATIONS

WHITNEY ENG COFFEE, ESQ.
HEARING OFFICER
APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.
A hearing officer of the Massachusetts Department of Labor Relations has determined that the Town of Plymouth (Town) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it transferred bargaining unit work to non-bargaining unit personnel without giving the Collective Bargaining Relief Association (Union) prior notice and an opportunity to bargain over the impacts of the decision to transfer the work on bargaining unit members' terms and conditions of employment.

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.

The Town hereby assures its employees that:

WE WILL NOT unilaterally transfer bargaining unit work from bargaining unit member crossing guards to non-unit personnel without first giving the Union notice and an opportunity to bargain in good faith to resolution or impasse over the impacts of the decision on employees' terms and conditions of employment;

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

WE WILL, upon request, bargain with the Union over the impacts of the decision to transfer crossing guard duties to a non-bargaining unit employee.

WE WILL, restore the economic equivalent of the status quo ante during bargaining.

______________________________    ____________
Town of Plymouth                      Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston MA 02114 (Telephone: (617) 626-7132).