COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	Case No.: MUP-14-4099
STOUGHTON SCHOOL COMMITTEE	*	
	*	Date Issued: April 22, 2016
and	*	
	*	
STOUGHTON TEACHERS ASSOCIATION, MTA/NEA	*	
	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Quesiyah Ali, Esq.	-	Representing the Stoughton Teachers Association, MTA/NEA
Joseph A. Emerson, Jr., Esq.	-	Representing the Stoughton School Committee

HEARING OFFICER'S DECISION

SUMMARY

The issue is whether the Stoughton School Committee (Committee) failed to bargain in good faith with the Stoughton Teachers Association, MTA/NEA (Association) by requiring high school guidance counselors to teach expanded guidance seminar classes and perform attendance duties without providing the Association with prior notice and an opportunity to bargain to resolution or impasse over the decisions and the impacts of those decisions on employees' terms and conditions of employment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law).

For the reasons explained below, I find that the Committee violated the Law by failing to bargain with the Association when it required high school guidance counselors to teach expanded guidance seminar classes without first providing the Association with notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. While I do not find that the Committee violated the Law by failing to bargain with the Association over the decision to require high school guidance counselors to perform attendance duties, I find that it did violate the Law when it failed to provide the Association with prior notice and an opportunity to bargain to resolution or impasse over the impacts of that decision on employees' terms and conditions of employment.

STATEMENT OF THE CASE

On October 27, 2014, the Association filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the Committee had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On December 4, 2014, a DLR Investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the Committee had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith with the Association by requiring bargaining unit members employed at the high school to teach guidance seminar classes and perform attendance duties without first providing the Association with notice and an opportunity to bargain to resolution or impasse over

the decisions and the impacts of those decisions on employees' terms and conditions of employment. On December 12, 2014, the Committee filed its Answer to the Complaint.

On September 16, 2015, the Association filed a Motion in Limine to Exclude Testimony of Respondent Witness Matthew Colantonio (Motion). On September 21, 2015, the Committee filed its Opposition to the Motion. On September 25, 2015, I issued a ruling, denying the Motion. On September 29 and 30, 2015, I conducted a hearing at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. The Association and the Committee both filed their post-hearing briefs on November 13, 2015.

STIPULATION OF FACTS

The parties stipulated to the following facts:

1. The Town of Stoughton (Town) is a public employer within the meaning of Section 1 of the Law.

2. The Committee is the collective bargaining representative of the Town for the purpose of dealing with school employees.

3. The Association is an employee organization within the meaning of Section 1 of the Law.

4. The Association is the exclusive bargaining representative for all Unit A teachers, including guidance counselors,[1] employed by the Town in the Stoughton Public Schools.

5. The Association and the Committee are parties to a collective bargaining agreement (Agreement) effective from September 1, 2014 until August 31, 2017.

FINDINGS OF FACT

The Guidance Department

[1] The bargaining unit includes all guidance counselors employed in the school district, including middle school guidance counselors and high school counselors.

At all relevant times: Barbara Regan (Regan) was the Director of Guidance for the Town's school district; Juliette Miller (Miller) was the high school principal; Matthew Colantonio (Colantonio) was the principal at the middle school; Barbara Myer (Myer) was a high school guidance counselor; Mollie O'Connell (O'Connell) was a teacher at the high school and a member of the Association's grievance and negotiation teams; and John Gunning (Gunning) was a teacher at the middle school and president of the Association.

The Guidance Counselor Position

Since at least 1995, the Committee has used one job description for the guidance counselor position, which requires all guidance counselors to report to the "Director of Guidance/Principal." The guidance counselor job description does not distinguish between counselors who are employed at the middle school or high school, and requires all counselors to fulfill the following performance responsibilities:

1. Register students new to the school and orient them to school procedures and the school's varied opportunities for learning.
2. Aid students in course and subject selection.
3. Maintain student records and protect their confidentiality.
4. Work to resolve students' educational obstacles.
5. Work to discover and develop special abilities of students.
6. Work to prevent students from dropping out of school.
7. Provide student information to colleges and other post-secondary programs as well as to potential employers according to provisions on student records.
8. Plan for visits and presentations by school and college representatives.
9. Make recommendations to colleges for admissions and scholarships.
10. Work with teachers to develop student potential.
11. Obtain and disseminate career information to students and to classes studying occupations.
12. Help students evaluate career interests and choices.

13. Work with students on an individual basis in the solution of personal problems related to such problems as home and family relations, health, and emotional adjustment.
14. Confer with parents whenever necessary.
15. Provide in-service training in guidance for teachers and student teachers.
16. Advise administrators and faculty on the matters of student discipline.
17. Assist in the orientation of new faculty members.
18. Perform other such related tasks as directed by the Director of Guidance, Administrative Principal and the Superintendent of Schools.

The Attendance Statute

On August 6, 2012, the Legislature passed Chapter 222 of the Acts of 2012 which amended G.L. c. 76, Section 1 by including Section 1B (effective July 1, 2014). That amended section states, in full:

> The school committee of each city, town or regional school district shall have a pupil absence notification program in each of its schools. The program shall be designed to ensure that each school notifies a parent or guardian of the child's absence if the school has not received notification of the absence from the parent or guardian within 3 days of the absence. Each school committee shall have a policy of notifying the parent or guardian of a student who has at least 5 days in which the student has missed 2 or more periods unexcused in a school year or who has missed 5 or more school days unexcused in a school year. The notification policy shall require that the school principal or headmaster, or a designee, make a reasonable effort to meet with the parent or guardian of a student who has 5 or more unexcused absences to develop action steps for student attendance. The action steps shall be developed jointly and agreed upon by the school principal or headmaster, or a designee, the student and the student's parent or guardian and with input from other relevant school personnel and officials from relevant public safety, health and human service, housing and nonprofit agencies.

The Attendance Duties

1. The prior practice

Prior to the 2014-2015 school year (SY), guidance counselors regularly monitored students' academic progress by checking their grades at mid-term and at the end of each full term. If a particular student's grades were low and/or that student was in danger of losing academic credit, a counselor would schedule a meeting with that student (rather than his or her parent or guardian) to discuss the matter. In preparation for such a meeting, a counselor would sometimes investigate the student's attendance record and, if their attendance warranted an intervention, make arrangements to also meet with the student's parent or guardian. Specifically, that counselor would notify high school guidance secretary Tracy Pascarelli (Pascarelli), who would then attempt to contact the student's parent or guardian. Prior to the 2014-2015 SY, Pascarelli would make all telephone calls and generate all correspondence sent to a student's parent or guardian. In addition to her general registration duties, Pascarelli would also schedule all appointments and meetings among students, parents/guardians and counselors. After concluding the meeting, the counselor would summarize their discussion and input that data into Power School.[2]

2. The 2014-15 SY

When the Legislature passed G.L. c. 76, Section 1B, it made the statute effective on July 1, 2014. By memorandum dated August 27, 2014, the Committee notified the guidance department that all high school guidance counselors must begin monitoring the attendance of students who had accumulated five (or ten) absences pursuant to the

[2] Power School is a computerized management system and the main operating system used at the high school.

statute. On a student's fifth absence, counselors had to meet with the student and make best efforts to contact their parent or guardian and resolve the issue. On the tenth absence, guidance counselors had to meet with students and their parents for the purpose of establishing three attendance action plans via "Google Docs."[3] In preparation for these tenth-absence meetings, counselors also had to generate all correspondence to parents (or guardians) and make follow-up telephone calls to schedule in-person meetings with them. Prior to issuing the August 27, 2014 memorandum, the Committee never gave the Association prior notice of the change to the attendance policy and the parties never bargained over the issue.

The Guidance Seminars

1. The prior practice

Prior to the 2014-2015 SY, high school guidance counselors were responsible for delivering guidance seminars to students in grades 9-12, covering topics such as study skills, and college and career planning. Although each guidance counselor was responsible for writing his or her own seminar curriculum, the Committee would not compensate them for that task. Although some counselors kept personal logs about their respective curriculum courses, the Committee did not require them to formally document those courses or input any seminar-related data into Power School.

There was no fixed period during which the counselors had to deliver their

[3] Google Docs is web-based software that high school guidance counselors began using in the 2014-2015 SY. It allows users to input and quantify all pertinent data related to a student's attendance record.

guidance curriculum. Instead, a counselor would contact the head of the English or History department and request that the teachers in those departments set aside one class period to schedule the seminar. Up to twice annually, counselors would present the seminar information to students in classroom or small group settings. During each seminar, a teacher could remain in the classroom during the guidance counselor's presentation; however, teacher attendance was not mandatory.[4] On instances when a teacher chose to remain in the classroom, he or she would often assist the guidance counselor by taking student attendance or executing discipline. When teachers excused themselves from the seminar, guidance counselors were responsible for administering discipline; however, taking attendance was left to the counselor's discretion.[5]

During the seminars, counselors neither tested students to measure their comprehension of the information, nor did they issue any homework assignments. Instead, they assigned certain classwork and "pre-tests" for the purpose of collecting data about the effectiveness of the seminars. At the high school, counselors would usually conduct sophomore seminars during the students' U.S. History class period in January (or February) and, once again in May. During those meetings, guidance counselors would assist students with "workplace readiness" and career planning by

[4] Neither party presented evidence showing a total amount (or percentage) of seminars conducted prior to the 2014-2015 SY where the classroom teachers would either remain in the class or excuse themselves from the presentation.

[5] Although guidance counselors regularly took student attendance during "vital" junior seminars, they did not take regular attendance for seminars delivered to freshmen, sophomores or seniors.

answering their questions, helping them to create a career portfolio via the "Career Cruising" website, and by conducting individual meetings.

2. The 2013-2014 Successor Contract Negotiations

Beginning in February of 2013 and continuing through June of 2013, the parties met to negotiate a successor collective bargaining agreement. During their negotiations, the Committee made two proposals to change the high school schedule from a seven-period school day to an eight-period day. The parties continued to meet through June of 2014, when they ultimately agreed to create an eight-period school day.

At no point during the parties' negotiations did either side ever raise the issue of changing or expanding the guidance seminars for sophomore students.

3. The Spring and Summer of 2014

At some point in the spring of 2014, High School Principal Miller became aware that if the parties agreed to create an eight-period school day, that agreement would leave a "hole" in the sophomore's course schedule. Based on this knowledge and in anticipation of changes to the school-day, Miller met with Guidance Director Regan and discussed the possibility of expanding the sophomore guidance seminars to fill the hole. At the end of their meeting, Regan agreed to meet with the high school guidance counselors to discuss the expanded sophomore curriculum. At some point, Regan met with the high school counselors and proposed expanding the seminar curriculum, to which the counselors agreed. Neither Regan nor Miller nor anyone else from the Committee notified the Association about that meeting, and no one from the Association's bargaining team was present at the meeting.

Toward the end of the spring 2014, the Committee implemented the expansion of the sophomore guidance curriculum by listing "Guidance Seminar" as one of the course selections for sophomore students in the upcoming 2014-2015 SY. During the summer of 2014, Miller notified the guidance counselors that they would become the sophomore seminar "teacher of record" for the 2014-2015 SY. Miller also expected counselors to evaluate the students by giving them a "pass-fail" grade based on their completion of class assignments and class participation. Miller further instructed the counselors to input seminar data into Power Teacher.[6] Based on these changes, the Committee approved compensation for the high school guidance counselors who needed time during the summer months to develop new curriculum for the sophomore seminars—paying them at a rate of five hours per day for three days of curriculum writing.

At some point in or about May of 2014, Regan spoke with high school teacher O'Connell and mentioned the possibility of expanding the sophomore seminars. Approximately one month later in June of 2014, a prospective sophomore student also approached O'Connell and inquired about the new sophomore "Guidance Seminar" listed in the course schedule for the 2014-2015 SY. O'Connell responded to the student that she did not know anything about the course.

4. The 2014-2015 SY

Beginning in September of 2014, the high school guidance counselors began teaching the expanded sophomore seminars. They taught the course for two short

[6] As a subcomponent of Power School, Power Teacher is an electronic grade book into which counselors would input data related to the guidance seminars, beginning with the 2014-2015 SY.

class-periods and one long-period (at about 180 minutes or 3 hours) per week, totaling an average of 16-17 classes taught during three out of the four academic terms. In late September or early October of 2014, the counselors notified Association President Gunning about the Committee's changes to the sophomore guidance curriculum.

OPINION

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, SUP-4784 (Oct. 9, 2003), aff'd Secretary of Administration and Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). Increases in work load and job duties are mandatory subjects of bargaining. Town of Lakeville, 38 MLC 219, MUP-09-5590 (H.O. Mar. 22, 2012), aff'd 38 MLC 290 (May 23, 2012) (citing Medford School Committee, 1 MLC 1250, 1252-53 MUP-690 (Jan. 20, 1975)).

1. The Attendance Protocols

The Association argues that the Committee unilaterally implemented new high school attendance protocols on or about August 27, 2014, which required guidance counselors to monitor and intervene with all students who had accumulated five or more absences in a school year. The Association argues that this decision changed high

school counselors' job duties because, prior to the 2014-2015 SY, counselors did not have to monitor students based on absences, but only intervened based on low academic grades. Beginning with the 2014-2015 SY, the Association contends that on top of monitoring each student for attendance, high school guidance counselors also had to: contact a student's parent or guardian and schedule a meeting after the student's fifth absence; develop three individualized action plans to improve the student's attendance record; and input all of the student's attendance-related data into Google Docs. The Association contends that these new attendance protocols affected mandatory subjects of bargaining because they increased the counselors' workload and changed their job duties.

The Committee argues that when it implemented the attendance protocols on or about August 27, 2014, there was no change because prior to the 2014-2015 SY, counselors were already monitoring student attendance and inputting that data into Power School as part of their regular job duties. Further, the Committee argues that the guidance counselor job description has always required counselors to monitor student attendance and perform necessary intervention responsibilities, including: "work to resolve students' educational obstacles; work to prevent students from dropping out of school; and confer with parents whenever necessary." In the alternative, even if there were changes in the high school counselors' job duties, the Committee asserts that those changes were de minimis because during the 2014-2015 SY, they constituted only a slight departure from the attendance duties that counselors were already performing. Additionally, the Committee maintains that because it has a managerial

prerogative to comply with Chapter 222 of the Acts of 2012, which amended G.L. c. 76, section 1B, it was exempted from bargaining with the Association over the decision and the impacts of the decision to implement the attendance protocols in September of 2014.

a. Educational Policy and Core Management Rights

Once G.L. c. 76, Section 1B became effective on July 1, 2014, the Legislature mandated that the Committee comply with the changes outlined in the statute by implementing new educational policy related to student attendance. Specifically, the language of G. L. 76, Section 1B stated that, "[e]ach school committee shall have a *policy* of notifying the parent or guardian of a student who has at least 5 days in which the student has missed 2 or more periods unexcused in a school year or who has missed 5 or more school days unexcused in a school year," and that "[t]he notification *policy* shall require...a reasonable effort to meet with the parent or guardian of a student who has 5 or more unexcused absences to develop action steps for student attendance." [Emphasis added.] The statute does not specifically require the Committee to assign guidance counselors to perform these new attendance duties. However, I find that the Committee's decision to delegate these duties to its high school guidance counselors was a non-bargainable decision because it lies within the Committee's core managerial prerogative and relates directly to Committee's exclusive right to establish educational policy and decide how best to deliver educational services to its students. Taunton School Committee 28 MLC 378, 388, MUP-1632 (June 13, 2002) (citing Lowell School Committee, 26 MLC 111, MUP-1775 (Jan. 28, 2000) (school

committees have the exclusive prerogative to determine matters of educational policy without bargaining)). Furthermore, I find that the Committee was not required to bargain over the decision because a third party over which the Committee had no control (i.e., the Legislature) exercised its authority to change employees' terms and conditions of employment via the Acts of 2012 which amended G.L. c. 76 by requiring the new attendance protocols. See Higher Education Coordinating Council, 22 MLC 1662, 1668, SUP-4078 (April 11, 1996).

Based on this evidence, I find that the Committee was exempted from bargaining with the Association over its decision to implement new attendance duties at the high school because the decision was a core managerial prerogative not subject to decisional bargaining. Secretary of Administration and Finance, 74 Mass. App. Ct. at 97-98 (citing School Committee of Newton, 388 Mass. at 566.

b. Impact Bargaining

Although I recognize that the Committee's decision to comply with the legislative mandate to implement a new attendance policy was not a bargainable subject, I do not agree with the Committee's contention that the statutory mandate also exempted it from bargaining with the Association over the impacts of that decision.

Even if a decision lies outside the sphere of collective bargaining as a matter of public policy or a managerial decision, the Commonwealth Employment Relations Board (Board) still requires a public employer to bargain over the impact of that managerial decision if it affects employees' wages, hours, and other terms and conditions of employment. Taunton School Committee, 28 MLC at 388-89; School

Committee of Newton v. Labor Relations Commission, 388 Mass. at 564; Higher Education Coordinating Council, 22 MLC at 1668. Thus, in cases where an employer is excused from the obligation to bargain over a decision made by a third party, that employer is still required to bargain with the union representing its employees about how to implement the decision, as well as the impacts of the decision on mandatory subjects of bargaining, before it implements that decision. Taunton School Committee, 28 MLC at 388-89; Lowell School Committee, 26 MLC at 113 (citing Higher Education Coordinating Council, 22 MLC at 1670-71). Likewise, employers must bargain over the impacts of decisions based on core governmental decisions, and school committees must bargain over the impacts of decisions based on educational policy. See School Committee of Newton, 388 Mass. at 564; see also Groton School Committee, 1 MLC 1221, MUP-702 (Dec. 17, 1974).

Here, the attendance changes impacted unit members' workload and job duties because they significantly increased the time and resources spent by high school guidance counselors identifying and monitoring students' attendance, contacting and meeting with students' parents/guardians, and developing individual action plans to improve future attendance. Town of Lakeville, 38 MLC at 219 (citing Medford School Committee, 1 MLC at 1252-53). It is undisputed that the Committee never provided the Association with prior notice or an opportunity to bargain to resolution or impasse over the changes to the attendance policy, and nothing in the record exempts the Committee from bargaining with the Association over the impacts of that decision. See Secretary of Administration and Finance, 74 Mass. App. Ct. at 95-98 (where a non-negotiable

decision may be implemented, a public employer must still engage in impact bargaining with the union) (citing City of Lynn v. Labor Relations Commission, 43 Mass. App. Ct. 172, 179-80 (1997)). Therefore, I find that the Committee was not exempted from bargaining with the Association over the impacts of its decision to implement new attendance protocols during the 2014-2015 SY. Id. at 95-98.

c. De Minimis Changes

Generally, the Board will not find an unlawful change to employees' terms and conditions of employment where the action complained of is only a slight departure from what is normally required. See Town of Danvers, 3 MLC 1559, 1576-77, MUP-2292 and MUP-2299 (April 6, 1977). However, where the change is more than a slight departure and, where it amounts to a material increase in workload and job duties, the Board will not find the complained of action to be de minimis. See Chief Justice of Administration and Management of the Trial Court (CJAM), 35 MLC 230, 235, SUP-04-5126 (April 14, 2009).

The Committee argues that prior to its implementation of the new attendance protocols, the high school counselors were already performing attendance-related tasks, and that any changes to those tasks during the 2014-2015 SY were de minimis in nature because they represented only a slight departure from the counselors' established attendance duties pursuant to prior practice and to their job description. Specifically, the Committee contends that prior to the 2014-15 SY, high school guidance counselors were already meeting with students whose attendance records were potentially impacting their academic performance, and they were inputting attendance-

related data from those meetings into Power School prior to September of 2014. The Association argues that the changes were not de minimis because they significantly increased counselors' workload by requiring counselors to specifically: monitor and identify students for unauthorized absences on top of screening them for academic performance; generate all correspondence and schedule all attendance meetings with students' parents/guardians; input attendance related data into Google Docs; and develop individual action plans.

Here, nothing in the record shows that the Committee required high school guidance counselors to monitor student attendance prior to the 2014-2015 SY. Nor did the Committee require those counselors to generate parent/guardian correspondence, schedule attendance meetings, input attendance-related data into Google Docs or develop individual action plans. Instead, the evidence demonstrates that before September of 2014, high school counselors regularly monitored students' academic progress, and if a particular student was in danger of losing academic credit, the counselor would investigate that student's attendance record and schedule a meeting with the student (rather than with the student's parent or guardian) to discuss possible solutions. If the counselor believed that further intervention was warranted, then he or she would ask high school guidance secretary Pascarelli to contact the student's parent or guardian for an in-person meeting. After conducting all necessary meetings, the counselor would document those meetings by inputting relevant data (including attendance and academic information) into Power School. After September of 2014, high school counselors continued to meet with students on attendance-related matters,

except now the Committee required them to meet on a student's fifth (or tenth) absence and input all attendance-related data into Google Docs.

A. Student Meetings and Data Input

Based on this evidence, I find that the changes requiring high school counselors to meet with students on attendance-related matters and input data obtained from those meetings into Google Docs are de minimis and not significant enough to reflect a material increase in workload or job duties. Town of Danvers, 3 MLC at 1576-77 (where employer required unit members to include more specified data on their time slips, that change was "too insignificant" to be subjected to mandatory collective bargaining). I base my findings on the facts that prior to the 2014-2015 SY, high school counselors were already meeting with students whose attendance records were potentially impacting their academic performance, and they were also inputting attendance-related data from those meetings into Power School. Consequently, the Committee's decisions to require unit members to meet formally with students about their attendance and to input attendance-related data into an upgraded electronic database—that is, from Power School to Google Docs—do not warrant mandatory bargaining. Id.

B. Student Monitoring, Parent Meetings and Individual Action Plans

Conversely, I find that the remaining changes to the high school counselors' attendance duties during the 2014-2015 SY are not de minimis but amount to significant increases in their job duties and workload because prior to that time, high school counselors had the discretion of determining whether to contact a student's parent or guardian and schedule an in-person meeting regarding that student's attendance

record. CJAM, 35 MLC at 235. If a counselor needed to meet with the student and their parents or guardians, then Ms. Pascarelli would make all necessary contact to effectuate that meeting. However, beginning in September of 2014, the Committee changed this practice by creating three new duties for counselors: (1) monitoring students' attendance, in addition to their already established duty of monitoring students' academic progress; (2) identifying students who had accumulated five or more absences (regardless of the student's academic record) to create individual action plans; and, (3) contacting each student's parent or guardian by telephone or correspondence to schedule appointments and meetings related to attendance. These changes were more than de minimis in nature because they significantly increased the time spent by counselors on issues related to student attendance—where, prior to the 2014-2015 SY, attendance issues were incidental to academic matters. Id. Consequently, because the Committee unlawfully implemented these changes without providing the Association with prior notice and an opportunity to bargain to resolution or impasse over the impacts of the decision, I find that these actions violate Section 10(a)(5) of the Law. See Town of Lakeville, 38 MLC at 219, aff'd 38 MLC at 290 (citing Medford School Committee, 1 MLC at 1252-53).

2. The Guidance Seminars

The Committee argues that there was no change to the high school guidance counselors' workload or job duties as they related to the tenth grade guidance seminars. Specifically, the Committee contends that prior to the 2014-15 SY, counselors were already teaching a sophomore seminar curriculum where they were responsible for

taking attendance and disciplining students, if necessary. Further, the Committee asserts that it expected counselors to continue performing these duties in September of 2014 based on their job description which specifically required them to "work to resolve students' educational obstacles," and to "advise administrators and faculty on the matters of student discipline." On the matter of how many seminar courses the counselors delivered each year, the Committee concedes that prior to the 2014-15 SY, counselors only taught up to two seminars annually. While the Committee also concedes that prior to the 2014-15 SY it never required counselors to grade students on a pass-fail basis or input data into Power Teacher, the Committee contends that it expected counselors to perform these duties in September of 2014 based on their job description which required them to "perform other such related tasks as directed by the Director of Guidance, Administration Principal and Superintendent of Schools." Even if these new duties constitute unlawful action, the Committee maintains that the changes were de minimis because they represent only a slight departure from the prior practice of requiring counselors to deliver seminar curriculum to all high school students, including sophomores. The Association argues that the Committee's decision to change the sophomore seminars during the 2014-2015 SY was unlawful because it significantly increased the number of annual seminars delivered by the counselors (i.e., from up to twice per year to up to 17 times per year). The Association also argues that the change increased the guidance counselors' job duties because the Committee now required them to: take attendance, administer discipline, issue grades and input data via Power Teacher. In support of its

argument that the changes represented a significant increase in workload, the Association points to the additional pay (i.e., five hours per day for three days) that the Committee authorized during the summer of 2014 to compensate counselors for developing new curriculum for the sophomore seminars.

A. Pass-fail grading

Here, it is undisputed that prior to the 2014-2015 SY, counselors instructed students to complete pre-tests and class work during the sophomore seminars. While the Committee never required counselors to grade students on a pass-fail basis prior to the 2014-2015 SY, the evidence demonstrates that it implemented this requirement as a more efficient way for counselors to document students' completion of the seminars. See generally Town of Wayland, 5 MLC 1738, 1741-42, MUP-2294 (March 29, 1979). Specifically, the new pass-fail grading system neither required counselors to assess students' comprehension of the material, nor required them to assign homework. Instead, counselors' merely graded each student on a scale of "0" for incomplete classwork or "10" for completed classwork. This work is similar to the duties performed by high school guidance counselors prior to September of 2014 in terms of collecting data on how to improve future seminars. Therefore, I find that the new pass-fail requirements were de minimis and not significant enough to show a material increase in workload or job duties. Id. at 1741-42 (Board found no violation where town implemented new procedure that merely measured the same performance criteria which it had measured in the past); Town of Danvers, 3 MLC at 1576-77.

B. Classroom Attendance and Discipline

It is also undisputed that prior to the 2014-2015 SY, high school guidance counselors were already taking attendance and administering student discipline whenever the classroom teacher excused his/herself from the seminar. The Association contends that requiring unit members to perform these duties beginning in September of 2014 amounted to an unlawful change because the Committee expected high school guidance counselors to carry out these duties regardless of teacher cooperation. However, there is insufficient evidence to support this contention. Rather, the record shows that since at least 1995, the Committee has expected all counselors to "work to resolve students' educational obstacles," and to "advise administrators and faculty on the matters of student discipline." Since that time, the Committee has also expected counselors to "perform other such related tasks as directed by the Director of Guidance, Administration Principal and Superintendent of Schools." Thus, when the Committee instructed counselors to take regular attendance and administer necessary discipline during their sophomore seminars in the 2014-2015 SY, these instructions were nothing more than a slight departure from what the Committee had already been requiring from its high school guidance counselors for decades. See Town of Danvers, 3 MLC at 1576-77. Accordingly, I find no unlawful change concerning these duties. See Town of Wayland, 5 MLC at 1741-42.

C. Data Input and Seminar Frequency

Last, the parties do not dispute that prior to the 2014-2015 SY, the Committee did not require high school guidance counselors to formally input seminar-related information into the Power Teacher database. The Committee asserts that this

requirement was not a new job duty but an expansion on unit members' long-established duty of gathering data to improve future seminar curriculum. Contrary to the Committee's assertion, the evidence shows that requiring high school guidance counselors to input seminar-related data into Power Teacher beginning with the 2014-2015 SY data input did represent a new duty because prior to that school year, there was no formal requirement that counselors maintain that data. While some counselors did keep personal logs about their respective guidance seminars, there is no evidence that the Committee required any of them to document that information into Power School or any other centralized database prior to September of 2014. Likewise, counselors had only offered one or two seminars per academic year, but beginning in September of 2014, the Committee increased that number to 16-17 per year. This change significantly impacted the counselors' workload because they were now spending at least 3 hours a week (for three terms each academic year) delivering up to 17 sophomore seminars annually when, prior to the 2014-15 SY, they only delivered those seminars no more than twice in January (or February) and in May of a given academic year. Compare Burlington School Committee, 7 MLC 1273, 1274, MUP-3606 (Sept. 10, 1980) (where committee instituted a new evaluation form that included 62 specific performance criteria—replacing forms that included no more than six performance criteria—Board found committee was obligated to bargain over the change).

Based on the record, I find that the Committee's decisions to expand the sophomore guidance seminars by requiring high school counselors to deliver 16 to 17

seminars annually and to input seminar data into Power Teacher beginning with the 2014-2015 SY, represented a material increase in unit members' workload and job duties, and therefore were not de minimis. CJAM, 35 MLC at 235; see also Burlington School Committee, 7 MLC at 1274.

Waiver by Inaction

In the alternative, the Committee argues that it provided the Association with notice of the expanded seminar curriculum in May of 2014, and that the Association waived its right to bargain over the change. The Association asserts that it never received adequate notice of the change and that the Committee expanded the seminars as a fait accompli because President Gunning only became aware of the change in or about October of 2014, one month after the Committee had already implemented the expanded curriculum.

Where a public employer raises the affirmative defense of waiver by inaction, it bears the burden of proving by preponderance of the evidence that the union had: (1) actual knowledge or notice of the proposed change; (2) a reasonable opportunity to negotiate prior to the employer's implementation of the change; and (3) unreasonably or inexplicably failed to bargain or to request bargaining. Town of Watertown, 32 MLC 54, 56-57, MUP-01-3275 (June 29, 2001); City of Boston, 31 MLC 25, 30-31, MUP-1758 (Aug. 2, 2004) (citing Town of South Hadley, 27 MLC 161, 163-64, MUP-1834 (June 12, 2001)); see also Bristol County Sheriff's Department, 33 MLC 41, 46, MUP-03-3769 (Sept. 13, 2006); School Committee of Newton, 388 Mass. at 570.

The Board does not infer a union's waiver of its statutory right to bargain without

a "clear and unmistakable" showing that a waiver occurred. Commonwealth of Massachusetts, 28 MLC 36, 40, SUP-4345 (June 29, 2001). Nor will it apply the doctrine of waiver by inaction in cases where a union is presented with a fait accompli. City of New Bedford, 38 MLC 239, 250-51, MUP-09-5581 and MUP-09-5599 (April 3, 2012) (appeal pending). A fait accompli exists where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." See generally Massachusetts Port Authority, 36 MLC 5, 14, UP-04-2669 (June 30, 2009) (citing Holliston School Committee, 23 MLC 211, 212-13, MUP-1300 (Mar. 27, 1997)).

The Committee argues that it provided the Association with notice about the change in May of 2014, when Guidance Director Regan informed high school teacher and unit member O'Connell that principal Miller wanted to expand the sophomore seminars to possibly fill a "hole" in the sophomore's course schedule that would be opened by the parties' tentative agreement to create an eight-period school day. The Committee asserts that the Association was put on notice again, in June of 2014, when a prospective sophomore student approached O'Connell and inquired about the new "Guidance Seminar." Conversely, the Association argues that neither Regan, nor Miller nor anyone else from the Committee ever notified O'Connell about the proposed changes to sophomore seminar curriculum in May and June of 2014. Instead, it contends that Regan's conversation with O'Connell did not constitute sufficient notice of the proposed change because the parties were still engaged in successor bargaining over the issue of creating an eight-period day, and neither party raised the issue of

expanding the sophomore seminar at the successor bargaining table. The Association also contends that even if a prospective student informed O'Connell about a sophomore seminar class that principal Miller had listed in the 2014-2015 course schedule, that information does not constitute sufficient notice for purposes of establishing the affirmative defense of waiver by inaction because the message came from someone who was neither employed by the Committee nor acting as its agent.

Here, the record demonstrates that the Committee expanded the sophomore seminar curriculum after the parties agreed to create an eight-period school day. When Regan spoke with O'Connell in May of 2014 about Miller's desire to implement the expanded curriculum, the parties were still engaged in successor bargaining over the eight-period schedule. This evidence shows that the issue of an expanded sophomore curriculum did not materialize until after the parties agreed to establish an eight-period school day in or about June of 2014. Although the Committee argues that it gave notice to the Association about changing the sophomore seminars, it does not dispute that the parties never bargained over those changes.

Consequently, I do not find that Regan's conversation with O'Connell in May of 2014 constituted sufficient knowledge to put the Association on notice that the Committee was considering a change to the sophomore curriculum in the 2014-2015 SY. See Commonwealth of Massachusetts, 28 MLC at 40-41 (no waiver where employer fails to convey sufficiently clear notice for union to respond appropriately). Nor do I find that Regan's meeting with the high school guidance counselors in the spring of 2014 constituted sufficient notice because none of the counselors at that meeting were

members of the Association's bargaining team. Town of Watertown, 32 MLC at 56-57. Rather, the record reveals that the Committee failed to provide the Association with notice that it was going to implement changes to the sophomore seminar curriculum beginning in the 2014-15 SY, and implemented those changes as a fait accompli in September of 2014—one month prior to the Association first becoming aware of the expanded curriculum. See City of New Bedford, 38 MLC at 250-51 (citing Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999) (where an employer implements a decision that changes a mandatory subject of bargaining without first engaging in any meaningful bargaining with the union, the employer presents the union with a fait accompli, leaving it without any bargaining options).

Because the Committee has failed to establish that the Association had actual knowledge or notice of the change or a reasonable opportunity to negotiate prior to the change, it cannot show that the Association clearly and unmistakably waived its right to bargain over the decision to implement the expanded sophomore guidance curriculum during the 2014-2015 SY. Commonwealth of Massachusetts, 28 MC at 40. Further, because the Committee implemented the change as a fait accompli, its affirmative defense of waiver by inaction must fail. City of New Bedford, 38 MLC at 250-51; Bristol County Sheriff's Department, 33 MLC at 46. Accordingly, I find that the Committee changed its established practice of assigning guidance counselors to teach sophomore seminar curriculums up to twice yearly without having to formally document any seminar-related data, and unlawfully implemented new changes by increasing the number of annual seminars to 16-17 and requiring mandatory data input into Power

Teacher, beginning in September of 2014, without first giving the Association notice and an opportunity to bargain to resolution or impasse over those decisions and the impacts of the decisions in violation of Section 10(a)(5) of the Law.

CONCLUSION

For the reasons stated above, I find that the Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain with the Association by requiring high school guidance counselors to teach expanded sophomore seminar classes (from 1-2 courses to 16-17 courses) and inputting seminar data in Power Teacher without first providing the Association with notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment. However, I do not find that the Committee's decisions requiring unit members to grade students on a pass-fail basis, administer discipline and take attendance amount to a violation because those changes were de minimis in nature.

Concerning the attendance protocols, I do not find that the Committee violated the Law by failing to bargain to resolution or impasse with the Association over the decision to change attendance duties performed by high school guidance counselors because that was a core managerial decision to implement educational policy pursuant to G.L. c. 76, Section 1B. However, I do find that the Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the Association with prior notice and an opportunity to bargain to resolution or impasse over the impacts of the decision to change certain attendance duties on employees' terms

and conditions of employment, specifically, identifying and monitoring students' attendance, contacting and meeting with students' parents/guardians, and developing individual action plans.

REMEDY

Section 11 of the Law grants the Board broad authority to fashion appropriate orders to remedy a public employer's unlawful conduct. Labor Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979). When an employer refuses to bargain, the usual remedy includes an order to bargain, and to return the parties to the positions they would have been in if the violation had not occurred. Town of Dennis, 12 MLC 1027, 1033, MUP-5247 (June 21, 1985). While Section 11 of the Law grants the DLR broad authority to fashion appropriate orders to remedy unlawful conduct, that authority does not extend to speculative financial harm. Town of Marion, 30 MLC 11, 15, MUP-02-3329 (Aug. 20, 2003).

The Guidance Seminars

Here, the Association seeks restoration of the status quo ante and a make whole bargaining order for any economic losses suffered by unit members as a result of the Committee's changes to the sophomore seminars during the 2014-15 SY. However, the Association has failed to present evidence showing that the high school guidance counselors actually suffered an economic loss as a result of the Committee's decision to change that curriculum. Town of Marion, 30 MLC at 15. Instead, when the Committee changed the counselors' duties by expanding the sophomore seminar program, it compensated those counselors for developing new curriculum in the summer of 2014.

While the counselors' workload increased during the 2014-2015 SY due to the sophomore expansion, the Association cannot show that the increase actually resulted in an economic loss to the counselors. Id. Consequently, absent evidence of financial harm, I am unable to order a make whole remedy on this violation because doing so would be speculative. Id.; see also Commonwealth of Massachusetts, 26 MLC 165, 169, SUP-3972 (March 13, 2000).

To effectively restore the status quo ante in this case, I order the Committee to stop requiring unit members to teach the expanded seminars and input seminar-related data into Power Teacher until it satisfies the obligation to bargain with the Association to resolution or impasse over the decision and the impacts of the decision to change guidance counselors' workload and job duties as they relate to the expanded sophomore seminars. Town of Dennis, 12 MLC at 1033.

The Attendance Protocols

When a public employer's 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 (Feb. 1, 1984). In cases where an employer's refusal to negotiate is limited to the impact of a managerial decision, the Board traditionally orders restoration of the status quo ante applicable to those affected mandatory subjects rather than to the decision itself. Commonwealth of Massachusetts,

26 MLC 116, 121-22, SUP-4158 (Feb. 15, 2000). This remedy attempts to restore the parties to their bargaining and economic positions that existed prior to the unlawful conduct. City of Malden, 20 MLC 1400, 1406-07, MUP-7998 (1994).

The usual remedy for a failure to bargain over the impacts of a decision involving a managerial prerogative is a prospective order to bargain to resolution or impasse over the impacts of the decision on mandatory subjects of bargaining. See Town of Burlington, 10 MLC at 1389. 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), and only requires employers to make affected employees whole during the period of impact bargaining. Town of Dedham, 21 MLC 1014, 1024, MUP-8091 (June 15, 1994). 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. at 1024.

Here, the Association again seeks restoration of the status quo ante and a make whole bargaining order for any economic losses that unit members may have suffered as a result of the Committee's changes to the high school attendance protocols. I find that such an order is not appropriate here.

1. No Economic Loss

Even though the Committee's decision to change the attendance protocols increased the high school guidance counselors' workload by requiring them to identity and monitor students for attendance, contact and meet with students'

parents/guardians, and develop individual action plans, the Association failed to show that those counselors suffered any economic loss as a result of their increased workload. Absent such evidence, I decline to issue a make whole remedy on this violation. See Town of Marion, 30 MLC at 15; see also Commonwealth of Massachusetts, 26 MLC at 169.

2. No Status Quo Ante

In balancing between the right of the Committee to carry out its decision to implement the attendance protocols and the right of the Association to have meaningful input on impact issues, I also decline to order a return to the status quo ante. The record shows that the Committee's failure to negotiate with the Association was limited to the impacts of its decision to implement the attendance protocols during the 2014-2015 SY. Id. at 1389. This is because the Committee's decision stemmed directly from its core managerial prerogative to establish educational policy in compliance with G.L. c. 76, Section 1B. However, because the effects of the Committee's decision to implement new attendance duties were certain to occur based on statutory requirements of Section 1B, and because the Association's efforts to impact bargain over that change would not have substantially altered—but only ameliorated—the effects of that decision, I refrain from issuing a retroactive status quo remedy. See Taunton School Committee, 28 MLC at 391 (Board declined to restore status quo ante and, instead, ordered school committee to stop implementing further changes until satisfying its impact bargaining obligation).

Instead, I order the Committee to bargain prospectively and in good faith to

impasse or resolution with the Association over the impacts of the decision to implement new attendance protocols at the high school that require bargaining unit members to identify and monitor students' attendance, contact and meet with students' parents/guardians, and develop individual action plans to improve future attendance. Town of Burlington, 10 MLC at 1389.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Stoughton School Committee shall:

1. Cease and desist from:

   a. Failing and refusing to bargain in good faith with the Association over the decisions to assign bargaining unit members to teach expanded sophomore seminar curriculum and input expanded seminar data into the Power Teacher database, and the impacts of those decisions on bargaining unit members' terms and conditions of employment.

   b. Failing and refusing to bargain in good faith with the Association over the impacts of the decisions to implement new attendance protocols at the high school that require bargaining unit members to monitor and identify students who accumulate five or more absences, to contact and meet with students' parents or guardians when a student accumulates five or more absences, and to develop individual action plans on bargaining unit members' terms and conditions of employment.

   c. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

   a. Restore the prior practice of offering a non-expanded sophomore seminar curriculum.

   b. Upon request of the Association, bargain in good faith to impasse or resolution with the Association over the decisions to assign bargaining unit members to teach expanded sophomore seminar curriculum and input

expanded seminar data into the Power Teacher database, and the impacts of that decision on bargaining unit members' terms and conditions of employment.

c. Upon request of the Association, bargain prospectively in good faith to impasse or resolution with the Association over the impacts of the decisions to implement new attendance protocols at the high school that require bargaining unit members to monitor and identify students who accumulate five or more absences, to contact and meet with students' parents or guardians when a student accumulates five or more absences, and to develop individual action plans on bargaining unit members' terms and conditions of employment.

d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the Committee customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;

e. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) of the steps taken by the Committee to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, 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.

THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Stoughton School Committee (Committee) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by failing to bargain in good faith with the Stoughton Teachers Association (Association) by not providing the Association with prior notice and an opportunity to bargain to resolution or impasse over the decision and impacts of the decision to change the guidance seminars, and over the impacts of the decision to change attendance protocols at Stoughton High School.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. The Committee assures its employees that:

- WE WILL NOT fail or refuse to bargain in good faith with the Association over the impacts of the decisions to implement new attendance protocols at the high school that require bargaining unit members to monitor and identify students who accumulate five or more absences, to contact and meet with students' parents or guardians when a student accumulates five or more absences, and to develop individual action plans on unit members' terms and conditions of employment;
- WE WILL NOT fail or refuse to bargain in good faith with the Association over the decisions to assign bargaining unit members to teach expanded sophomore seminar curriculum and input expanded seminar data into the Power Teacher database and the impacts of those decisions on unit members' terms and conditions of employment;
- WE WILL NOT in any like manner, interfere with, restrain and coerce employees in any right guaranteed under the Law.
- WE WILL restore the practice of offering a non-expanded sophomore seminar curriculum.
- WE WILL upon request, bargain with the Association in good faith to resolution or impasse before assigning bargaining unit members to teach expanded sophomore seminar curriculum and input expanded seminar data into the Power Teacher database, and the impacts of those decisions on unit members' terms and conditions of employment.
- WE WILL upon request, bargain prospectively with the Association in good faith to resolution or impasse over the impacts of the decisions to implement new attendance protocols at the high school that require bargaining unit members to monitor and identify students who accumulate five or more absences, to contact and meet with students' parents or guardians when a student accumulates five or more absences, and to develop individual action plans on unit members' terms and conditions of employment.

_____ _____

Stoughton School Committee Date

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

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