COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
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SPENCER-EAST BROOKFIELD REGIONAL SCHOOL DISTRICT	*	
	*	Case No. MUP-15-4847
and	*	Date Issued: February 27, 2017
	*	
SPENCER-EAST BROOKFIELD TEACHERS ASSOCIATION	*	

Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Kimberly A. Rozak, Esq.:	Representing the Spencer-East Brookfield Regional School District
Ryan Dunn, Esq.:	Representing the Spencer-East Brookfield Teachers Association

HEARING OFFICER'S DECISION

Summary

The issues in this case are whether the Spencer-East Brookfield Regional School District (Employer or School District) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by failing to bargain in good faith over: 1) the impacts of the decision to hire only one Before and After School Director in August 2015; 2) the decision and impacts of the decision to pay the Before and After School Director a fixed stipend instead of an hourly wage; 3) the decision and impacts of the decision to open the Before and After School Program on certain holidays;

and 4) the decision and impacts of the decision to change the job duties of the Before and After School Co-Director. Based on the record and for the reasons explained below, I conclude that the Employer failed to bargain in good faith with the Spencer-East Brookfield Teachers Association (Association) when it hired only one Director in August 2015 without providing the Association with prior notice and an opportunity to bargain over the impacts of the decision in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. I also find that the Employer failed to bargain in good faith with the Association when it changed the method of payment for Co-Directors without providing the Association with prior notice and an opportunity to bargain over the decision and the impacts of the decision in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. However, I do not find that the Employer violated the Law when it changed the holiday schedule, or when it required the Director to perform certain additional job duties, and I dismiss these allegations.

Statement of the Case

On September 30, 2015, the Association filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the Employer had engaged in prohibited practices within the meaning of Sections 10(a)(1) and 10(a)(5) of the Law. On December 15, 2015, a DLR investigator issued a four-count Complaint of Prohibited Practice (Complaint). I conducted a hearing on August 25, 2016. On August 24, 2016,

the Employer filed a Motion to Permit Testimony of Kimberly A. Rozak (Motion).[1] Without ruling on the Motion, I advised the parties prior to the hearing that I would not permit Rozak to testify on August 25, 2016, but that I would leave the record open in the event that the Employer chose to pursue the Motion after the hearing. At the close of the hearing on August 25, 2016, I informed the parties that I would forward the recording of the hearing to counsel for each party, and I also permitted Attorney Rozak until September 10, 2016 to listen to the recording and inform me whether the Employer would pursue the Motion. By letter dated September 13, 2016, after not receiving any communication from Attorney Rozak regarding the Motion, I advised the parties that there was no need for me to rule on the Motion, and I closed the record. By email dated October 2, 2016, Attorney Rozak explained that she never received the recording of the hearing, and requested an additional two weeks from receipt of the recording to determine whether the Employer would pursue its Motion. I denied Attorney Rozak's request on October 3, 2016. Thereafter, the Association and Employer each timely filed post-hearing briefs. On the entire record, including my observation of the demeanor of witnesses, I make the following findings.

Stipulations of Fact

1. The [Association] is a public employer within the meaning of G.L. c. 150E, Section 1 and is the sole agent for purposes of collective bargaining on behalf of teachers and certain other professional employees of the [Employer].

[1] The Motion requested that I allow Kimberly Rozak (Attorney Rozak), counsel for the Employer, to testify regarding statements that had been made at the in-person investigation for MUPL-15-4935. The Employer filed the motion after I had advised Rozak by email that I would not permit her to testify about the in-person investigation.

2. The [Employer] is a public employer within the meaning of G.L. c. 150E, Section 1.

3. The [Employer] has operated an after school program at the Wire Village Elementary School for which students must be separately enrolled and for which parents must pay tuition from their own funds.

4. Sometime prior to the 2015 – 2016 school year, the [Employer] employed two Co-Directors of the program. Initially, during the 2015-2016 school year, the [Employer] hired only one After School Program Director.

Relevant Contract Provisions

The Employer and Association are parties to a collective bargaining agreement effective July 1, 2015 – June 30, 2018 (CBA). The Recognition Clause in Article I of the CBA provides, in relevant part:

> For the purpose of collective bargaining with respect to wages, hours, and other conditions of employment, the negotiation of collective bargaining agreements, and any questions arising thereunder, the Committee recognizes the Association as the exclusive bargaining agent and representative of all professional employees (as such employees are defined in Chapter 150E of the General Laws of Massachusetts) of the Committee, excepting however, every such employee who on the effective date of the contract is, or thereafter shall be, designated by the Committee as a representative of it for the purpose of such bargaining. The term professional employees includes all classroom teachers, librarians, therapists, school psychologists, adjustment or guidance counselors and nurses holding certificates under G.L. c. 71, Sec. 38G. It does not include the Superintendent, Principals, Vice-Principals, Guidance Directors, Director of Pupil Services, Teacher Aides or Director of Academic Services and Technology.

Article XXXIV – Extra Duties provides:

> All extra duty assignments are subject to annual funding and appointment.

Page 33 of the CBA, which includes a list of extra duty positions, provides in relevant part:

* * *

AFTER SCHOOL PROGRAM POSITIONS
2015 – 2018 (0%)[2]

* * *

After School Program – Co-Directors – 221 days a year x 3 hours a day x $29 per hour = $19,227

Findings of Fact

Before and After School Program

For approximately 13 – 14 years, the School District has run an after school program at the Wire Village Elementary School for students in pre-K through 6th grade.[3] The program eventually became a before and after school program.[4] Parents must pay tuition for their children to attend.[5]

The before-school program begins at 6:30 a.m., and the after-school program ends at 5:45 p.m. In the after-school program, students have a snack and take part in structured activities, such as homework assistance, attribute blocks, tangram puzzles, dominoes, and outdoor physical education activities. The program is currently staffed by

[2] The 0% represents that there was no wage increase for those positions in 2015 – 2018.

[3] The program is also now run at the East Brookfield School, but the witnesses did not identify when this began.

[4] Paula Romano (Romano), the billing clerk for the program from approximately 2007 – 2014, testified that "at least by 2007," there was a before school component to the program.

[5] The Worcester District Attorney also provides a small grant for the program, which is spent only on supplies.

two Co-Directors, lead teachers, teacher/generalists, and other staff.[6] The Co-Directors work 221 days per year, with the duties typically beginning two weeks before school starts.[7] Before the school year starts, the Co-Director is responsible for hiring the staff that is not referenced in the CBA, purchasing supplies, and generally getting the program ready for the school year.

2015 – 2016 School Year

Donohue is currently a Physical Education teacher for Wire Village Elementary School. He is also a Co-Director for the program, a position he began during the 2013 – 2014 school year. In 2013 – 2014, Marlene O'Day (O'Day) was the second Co-Director and in 2014 – 2015, Maria Dutra (Dutra) was the second Co-Director for the program.

Approximately a week and a half prior to the beginning of the 2015 – 2016 school year, the Employer posted a Co-Director position vacancy. Donohue interviewed for the position with Crowe, who told him that she would only be hiring one Director at that time.[8] Crowe selected Donohue for the position. In or around January 2016, Crowe hired Stanley Jablonski (Jablonski) as a second Co-Director. Prior to Jablonski's hire, Donohue

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[6] High school and college students, retired teachers, and other adults who do not otherwise work for the School District also staff the program. These positions are not included in the CBA. The lead teacher and teacher/generalist positions are included in the Extra Duties section of the CBA, along with the Co-Director.

[7] Donohue began work for the program one week prior to the start of the 2015-2016 school year.

[8] Crowe initially only hired one Director because she wanted to ensure that there was sufficient enrollment and staffing for the program.

worked more than usual because he was responsible for both the Wire Village and East Brookfield locations.

At or around the time that Crowe selected Donohue for the Director position, she also informed him that he would have to assume certain responsibilities that he should have been doing from the beginning but had not been, including a monthly registration sheet of students in the program,[9] completing daily attendance sheets, and responding to parents' emails and phone calls during the school day.[10] Previously, Donohue was not responsible for the monthly registration or daily attendance sheets because they would be sent over from the billing clerk. In addition, prior to Crowe's directive, the main office would field phone calls and emails from parents during the school day and then forward the information to Donohue, who could review it at the end of the school day. Because Donohue informed Crowe at the beginning of the year that he did not have time to perform these duties as the only Director, he was not required to begin performing them until February or March 2016, after Jablonksi began working as the second Co-Director.[11]

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[9] This did not include registering students for the program, rather, Donohue would have to maintain a spreadsheet showing which students were registered for the program each month from information pulled from the school database.

[10] An example of such calls and emails includes a parent advising the school that their child should come home on the bus rather than go to the program.

[11] Before Jablonski began as the second Co-Director, Donohue oversaw the program at Wire Village and East Brookfield. After Jablonski was hired, Donohue concentrated on Wire Village and Jablonski concentrated on East Brookfield.

Prior to Donohue accepting the position, Crowe also advised him that he would be paid an hourly rate for the Co-Director position. Prior to the 2015 – 2016 school year, Co-Directors were paid a yearly stipend.[12] During the 2013 – 2014 school year, Donohue elected to take his stipend in two lump sums, while during the 2014 – 2015 school year, the stipend was paid to him biweekly.[13] Crowe advised Donohue that because of the contract language, she would have to pay the Co-Directors as they worked, and that she was limited to paying them for three hours per day, even if they worked more. Moreover,

[12] The Professional Employee Contracts for Cynthia Sprow (Sprow), a former Co-Director, dated 2007, 2008, 2009, and 2011 include the following language: "In addition to the regular teaching assignment, the following assignment(s) and salary are as follows: After School Program Co-Director - $19,227." The Professional Employee Contracts for Donohue for 2013 and 2014 include the following language, "In addition to the regular teaching assignment, the following assignment(s) and salary as follows: Before/After School Program Co-Director - $19,227." Donohue's 2015 Contract contains the following language: "In addition to the regular assignment above, the following assignment(s) and salary have also been assigned as follows: "ASP/BSP Director @ 221 DAYS/YEAR, M-F – 3 HRS/DAY @ $29/HR." Jablonski's February 3, 2016 letter of appointment to the position of Co-Director states, "The Co-Director position, 221 days per year, 3 hours per day at $29 per hour will be pro-rated to your start date of January 27, 2016." The School District did not offer any evidence to dispute this evidence that prior to 2015, Co-Directors were paid the full stipend rather than on an hourly basis.

[13] Also prior to the 2015 – 2016 school year, the School District withheld Massachusetts Teacher Retirement System (MTRS) pension contributions from the Co-Director stipend. Beginning during the 2015 – 2016 school year, the School District stopped these withholdings. This occurred after the School District requested that the MTRS determine whether the Before and After School Program stipend positions are pension-eligible. By email dated August 25, 2015, the MTRS informed the School District that the stipends are not pension-eligible. The reasons given by MTRS include the fact that the earnings are additional hourly compensation, and the services are tuition-based and not integral to the mission of the school. According to this email, affected employees have appeal rights with the MTRS.

on days that Donohue missed working at the program, such as when he was ill, he did not get paid. In the previous year, he had been paid the full stipend amount despite missing two days.

After receiving the information about the above-described changes from Crowe, Donohue called Mark James (James), Association President, to inform him of the changes.[14] James had not received notice of these changes prior to Donohue's phone call.

Prior Co-Directors

In or around 2005, Cindy Ahearn (Ahearn) and Sprow created the after-school program and served as Co-Directors. Sprow was also a teacher for the School District. In addition to being a Co-Director, Ahearn was also the principal of the Maple Street School from approximately 2007 – 2014.[15] Ahearn[16] and Sprow both ended their assignments as Co-Directors after the 2012 – 2013 school year.[17] Other than Ahearn, the Co-Directors have been School District teachers and members of the bargaining unit.

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[14] Although James was not as familiar with the program as certain other witnesses, I do not find this reason to discredit the entirety of his testimony, as suggested by the School District.

[15] According to James, at some point prior to 2015, there was a dispute about whether Ahearn, as an administrator, could also fill the Co-Director position. There is no evidence that Ahearn left the position because of this issue.

[16] As a school principal, Ahearn was not a member of the bargaining unit.

[17] James testified that Ahearn was the principal of two schools for a period of time, and also a principal and a teacher at another point, which Romano confirmed. These facts are not relevant to the issues in this case as there is no dispute that Ahearn was not a member of the bargaining unit during the time she was a Co-Director of the program.

Holidays

Prior to the 2013 – 2014 school year, the program was open on holidays that fell during a school vacation week, such as Presidents Day and Patriots Day.[18] The program was also open during school vacations.[19] Interim School Superintendent Malvey (Malvey) changed the schedule so that the program would be closed on a holiday that fell during a school vacation week, but would be open for the remainder of the vacation week. Thus, during at least part of Malvey's tenure, the program was closed on Presidents Day and Patriots Day.[20]

For the 2015 – 2016 school year, Crowe returned to the prior practice of keeping the program open on holidays that fell during a school vacation week. She made this decision based on the needs of parents.

Contract Negotiations and Other Extra-Duty Positions

During the time that James has been Association President, he has negotiated several collective bargaining agreements, and the issue of extra-duty positions has been

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[18] The program is also open on holidays that do not fall during a school vacation week, but such holidays are not at issue here.

[19] The program was closed the day after Christmas, but open the remainder of the school vacation. There is no evidence that Crowe changed this.

[20] It is unclear exactly how long Malvey was interim Superintendent, but the evidence shows that he made the above-referenced changes to the holiday schedule while Donohue was Co-Director, which was from 2013 – present, and Crowe began at the start of the 2015 – 2016 school year. Thus, the changes to the holiday schedule made by Malvey occurred for two school years at most, i.e., 2013 – 2014 and 2014 – 2015.

a subject of such negotiations. Typically, the issues involve the amount of the stipends or cost of living increases, and the parties have included negotiated stipends in the CBA. Recently, the Association bargained the Junior High Music Director, which is a new extra-duty position, into the CBA. During the last cycle of successor negotiations, the School District proposed making changes to the steps for the athletic coaching positions, which are also extra-duty positions, but the proposals were not included in the final agreement.

Extra-duty positions have not been strictly designated for unit members. For example, a number of the athletic coaches are not otherwise employed by the School District and are not unit members.[21] According to the current practice, the positions are posted and if the School District is unable to find a qualified unit member for the position, it will then look outside the bargaining unit to fill the position.

Opinion

The Co-Director is in the Bargaining Unit

As a threshold matter, I must determine whether the Co-Director is a bargaining unit position for which the School District had an obligation to bargain over the alleged unilateral changes. The School District argues it is not a unit position because: 1) the position is not in the CBA's recognition clause; 2) the Association has stated that all extracurricular positions listed in the CBA are not bargaining unit positions; 3) non-

[21] Although such positions are filled by non-unit members, James considers the work to be bargaining unit work because the positions and stipend amounts have been bargained into the parties' contract. The Association has never filed a grievance or prohibited practice charge over non-unit members filling these positions.

bargaining unit members have historically held this position; 4) the duties performed by the Co-Director are not similar to those of a bargaining unit member; 5) the program operates outside of the contractual work day of bargaining unit members; and 6) the program is not integral to the School District's operations.

Although the position is not specifically referenced in the recognition clause of the CBA,[22] it is included in the CBA as an "Extra Duty" position.[23] Further, for at least the ten years that James has been Association President, the School District has negotiated over the wages for the position. During the most recent contract negotiations, the School District made a proposal regarding the extra-duty positions. Thus, both the Association and School District have treated the positions as unit positions by including them in the CBA and in contract negotiations.

[22] The recognition clause does not specifically exclude the Co-Director of the Before and After School Program from the unit, as it does other positions, such as Guidance Directors and the Director of Pupil Services. In addition, while the recognition clause lists positions that are included in the unit, such as classroom teachers and librarians, it does not include any language that limits the unit to these positions.

[23] The CBA references only the After School Program, rather than the Before and After School Program. James credibly testified that this was an oversight.

The School District, however, relies on James' statement at the in-person investigation for MUPL-15-4935 that the extra-duty positions are not unit positions.[24] However, James' opinion on the matter is not dispositive, just as the opinion of School District representatives would not be dispositive. More significant is the fact that both parties have bargained over the positions for at least ten years, including as recently as the latest successor negotiations. Further, contrary to the School District's argument that the Association cannot take that position in MUPL-15-4935 in order to win that case, and take the opposite position in this case, the Association did not prevail in MUPL-15-4935 because of James' statement, or because the investigator determined that the positions were not unit positions. In MUPL-15-4935, the School District alleged that the Association repudiated the CBA by instructing its membership in the Fall of 2015 not to apply for the posted stipend positions.[25] The investigator dismissed the School District's charge[26] for the following reasons:

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[24] At the request of the School District, I took administrative notice of the dismissal letter for MUPL-15-4935. In that case, the Employer alleged that the Association had violated the Law by instructing its membership to not apply for extra-duty positions, and by withholding services. Footnote 3 of that dismissal provides, "The [Association] stated during the investigation that the positions are not [Association] positions, and explained that although the [Association] negotiates for the extra duty positions, bargaining unit members receive no preferential treatment to fill the positions. The Employer previously was unaware of the [Association's] position." James was the Association witness that made the referenced statement at the in-person investigation.

[25] The Co-Director position was not one of the stipend positions at issue in MUPL-15-4935.

[26] The School District did not appeal the dismissal of MUPL-15-4935.

> Here, the [CBA] does not contain explicit language requiring the [Association] to encourage or not discourage bargaining unit members from applying for the stipend positions, or requiring the [Association] to fill the stipend positions. Rather, the Agreement merely contains a list of compensation for stipend positions. Standing alone, the list establishes nothing more than pay rates. Even assuming that the list of compensation rates for stipend positions could be construed as ambiguous, the record is devoid of evidence of the parties' bargaining history with respect to these positions. Therefore, I dismiss the Employer's allegation that the [Association] repudiated the agreement in violation of Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law.[27]

Thus, the investigator's determination was not based on whether or not the positions at issue were unit positions, but rather on the fact that there was no contract language or bargaining history requiring the Association to encourage its members to apply for the positions.[28]

Next, the fact that Ahearn, a non-unit member, held the position for a number of years, is also not dispositive. Rather, as stated above, the parties' treatment of the position is the most important factor, and both parties historically have negotiated for the

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[27] The School District also alleged in that case that the Association unlawfully withheld services, which is further discussed below.

[28] Moreover, hearing officer dismissal letters have no precedential value. City of Boston, 38 MLC 201, MUP-08-5253 (March 9, 2012); see also, City of Taunton, 38 MLC 96, 98-99, n. 7, MUP-06-4836, MUP-08-5150 (November 2, 2011). Just as the issuance of a complaint reflects only the DLR's determination that there is probable cause to believe that the alleged conduct could violate the Law and not that the alleged conduct does violate the Law, the DLR's dismissal of a charge reflects only that the evidence presented at the investigation was insufficient to establish probable cause to believe the Law had been violated. Id. (citing Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1368, n. 54, MUPL-2883, MUP-6037 (January 24, 1989), aff'd sub nom. Pattison v. Labor Relations Commission, 309 Mass. App. Ct. 9, (1991).

days/hours and wages in the contract. Moreover, with the exception of Ahearn, the position has always been filled by unit members, unlike other positions in the program which are filled by non-unit members, such as high school and college students. These non-unit positions are not included in the CBA.

I am similarly not persuaded by the School District's arguments that the Co-Director's duties are not similar to those of a unit member; the program operates outside of the contractual work day of unit members; and that the program is not integral to the School District's operations. The bargaining unit includes not only teachers, but also librarians, therapists, school psychologists, adjustment or guidance counselors, and nurses. The School District has not established that the duties of all of these positions "involve either direct academic teaching or services supplementing the students' academic day." Further, although the Co-Director does not teach the students in the program, the program provides homework assistance[29] and organized activities, such as tangrams puzzles and physical education activities. Lastly, I do not agree with the School District that the fact that the program operates outside of the contractual work day of unit members, and that the program is not integral to the School District's operations, even if accurate, affects whether the Co-Director is a unit position.

[29] I disagree with the Employer's position that homework assistance provided by a teacher is no different than assistance provided by a sibling or parent.

For the above reasons, I conclude that the Co-Director position is in the bargaining unit.[30]

Voluntary Position

The Employer also argues that the Co-Director position is a voluntary position, and because voluntary work does not create a condition of employment, it had no obligation to bargain over changes to the work. As support, it cites the following language from the dismissal in MUPL-15-4935:

> Duties of employment include those duties specifically mentioned in an existing or recently expired collective bargaining agreement, and also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a period of sustained time. Lenox Education Association, 7 MLC 1761, 1775, MUP-3229 (December 10, 1980), aff'd sub nom. Lenox Education Association v. Labor Relations Commission, 393 Mass. 284 (1984). However, voluntary work, even when continuously done by bargaining unit members, does not create a condition of employment. City of Newburyport, 8 MLC 1373, 1374, SI-141 (October 14, 1981).

The above excerpt is in relation to the Employer's allegation in MUPL-15-4935 that the Association withheld services in violation of Section 9A(a) and 10(b)(1) of the Law by discouraging unit members from filling the extra-duty positions, and by unit members failing to fill the positions. The Investigator determined that the Association did not violate the Law because the work is voluntary, and voluntary work does not create a condition of

[30] Although the Association contends that the Co-Director is in the bargaining unit because it is a "professional" position, I need not consider this argument as I have found the position is in the unit for other reasons. Further, my decision is limited to the Co-Director position, and I make no determination as to whether the other extra-duty positions are in the bargaining unit because that question is not before me.

employment. However, the issue in the instant case is not whether or not unit members are filling the extra-duty positions, but rather the changes that have occurred once the unit member has filled the position. Once a unit member is offered and accepts the position, the duties are no longer voluntary, but a required part of the position for which there is an obligation to bargain over any changes to the terms and conditions.[31] Similarly, the cases cited by the Investigator in support of her dismissal all involve unit members who refused to accept voluntary overtime or additional assignments, and not changes that were made to such voluntary assignments.[32] For these reasons I am not persuaded by the Employer's argument that it had no duty to bargain over changes to the Co-Director position.

[31] In addition, the Co-Director assignment has been included in the professional employment contracts of the Co-Directors. This is further evidence that, once the Co-Director position is offered and accepted, it is not voluntary.

[32] To use such cases as a hypothetical example, if an employer had changed the rate of pay for voluntary detail work without providing the union representing the employees that filled the details with prior notice and an opportunity to bargain, the employer would have violated the Law (assuming it did not have a valid defense, such as a waiver by inaction on the part of the union).

Because I have determined that the Co-Director position is a unit position, and that the Employer was obligated to bargain over changes to the position, I now must consider each of the Association's allegations.[33]

Hiring One Director

The Association alleges that the Employer violated Section 10(a)(5) of the Law when it hired only one Director for the first half of the 2015 – 2016 school year without providing the Association with prior notice and an opportunity to bargain over the impacts of the decision. An employer is obligated to provide the exclusive representative an opportunity to negotiate before changing an existing condition of employment or implementing a new condition of employment involving a mandatory subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989). The employer's obligation to bargain extends to working conditions established through past practice as well as those specified in a collective bargaining agreement. Town of Burlington, 35 MLC 18, MUP-04-4057 (June 30, 2008), aff'd sub nom. Town of Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120 (2014). To establish a violation, a union must demonstrate the following: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a

[33] The Employer also generally argues that because the Complaint alleges in each unilateral change count that the Employer made each change without providing the Association with prior notice and an opportunity to bargain to impasse or resolution over the decision or impacts of the decision on *employees'* terms and conditions of employment, and that the evidence relates only to *one employee's* terms and conditions, the allegations should be summarily dismissed. I reject this argument of form over substance.

mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain. Town of Shrewsbury, 28 MLC 44, MUP-1704 (June 29, 2001). To determine whether a practice exists, the Commonwealth Employment Relations Board (CERB) 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. Commonwealth of Massachusetts, 23 MLC 171, SUP-3586 (January 30, 1997).

While an employer is not obligated to bargain over its level of services decisions, such as its decision to hire only one Director of the program, it must bargain over the impacts of such a decision on employees' terms and conditions of employment. Commonwealth of Massachusetts, 25 MLC 201, SUP-4075 (June 4, 1999). The School District does not dispute that it did not provide the Association with prior notice and an opportunity to bargain over the impacts of its decision to hire only one Director. Further, the evidence shows that Donohue was impacted by the decision because he had an increased workload during the time he was the only Director since he was responsible for both the Wire Village and East Brookfield locations. I therefore conclude that the School District violated the Law as alleged.[34]

[34] The School District did not make any arguments that pertain specifically to this allegation. Rather, its general arguments that pertain to all allegations are addressed above.

Method of Pay

The Complaint alleges that the School District unlawfully changed the method of pay for Co-Directors beginning during the 2015 – 2016 school year without providing the Association with prior notice and an opportunity to bargain over the decision or the impacts of the decision.[35] The School District does not dispute that it changed the method of payment of wages for the Co-Director position, or that it did not provide the Association with prior notice or an opportunity to bargain over the change. The School District also admits in its answer to the Complaint that wages are a mandatory subject of bargaining. However, in addition to the general arguments above, the School District argues that it changed the payment method to hourly because of the clear and unambiguous contract language, which provides:

> After School Program – Co-Directors – 221 days a year x 3 hours a day x $29 per hour = $19,227

The School District further argues that even if the language is not unambiguous, the Association has not established that there was an established past practice for paying Co-Directors.

First, I do not find the contract language clear and unambiguous evidence that the Co-Directors should be paid hourly, as it references both $19,227, which is the full amount

[35] Although both parties in their post-hearing briefs argued their positions on this allegation as both a repudiation and a unilateral change in past practice, I am analyzing it only as a unilateral change as alleged in the Complaint. Even if I were to consider a repudiation allegation, there is insufficient evidence to find a violation of the Law as the language at issue is not clear and unambiguous, as described below, and the parties did not submit any evidence of bargaining history on this issue.

of the stipend, as well as the number of days and hours per day to reach that amount. I also disagree that the Association has not established a prior past practice of the Employer paying Co-Directors the full stipend amount, rather than hourly pay. Up until 2015, the Professional Employment Contracts provided to the Co-Directors that were entered into evidence reference a "salary" of $19,227 for the Co-Director assignment, and there were no references to an hourly wage. Beginning during the 2015 – 2016 school year, Donohue's Employment Contract, and Jablonski's letter of appointment to the Co-Director position, referenced the $29 per hour wage. The School District did not offer any testimony or documentary evidence to dispute the evidence that the Co-Directors were paid the full $19,227 stipend prior to 2015.[36] For these reasons, I conclude that the School District violated the Law when it changed the payment method for the Co-Director assignment from the full stipend to an hourly payment.[37]

Holidays

The Association argues that the School District violated the Law when Crowe changed the holidays that the program operated. As described above, an employer is

[36] Although the Association established that School District had an established past practice of paying the full stipend, it did not establish that there was a practice of permitting Co-Directors to take the payment in two lump sums, rather than biweekly. The only evidence of this particular payment schedule was for Donohue during the 2013 – 2014 school year.

[37] Although the Association contends that this change caused the MTRS to determine the stipend cannot be included in retirement earnings, the evidence shows that the payment method is just one factor the MTRS considers. Further, I have no jurisdiction over the MTRS or its decisions regarding pension contributions.

obligated to provide the exclusive representative an opportunity to negotiate before changing an existing condition of employment or implementing a new condition of employment involving a mandatory subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989). There is no dispute that days off are a mandatory subject of bargaining.

The Association specifically contends in its post-hearing brief that before Crowe became superintendent, the program was closed on holidays and school vacations, and that Crowe now requires that the program operate on those days. However, this is not what the evidence establishes. Rather, prior to Malvey's time as Superintendent, the program was open on holidays that fell during school vacations, such as President's Day and Patriot's Day, and also remained open the remainder of the vacation week. Malvey made the decision to close the program on such holidays.[38] Although the evidence does not establish the exact timeframe during which Malvey made this change, it was at most during the 2013 – 2014 and 2014 – 2015 school years, as the change occurred while Donohue was a Co-Director. At the start of the 2015 – 2016 school year, Crowe returned to the practice of keeping the program open on holidays that fell during a school vacation week. The Association has therefore failed to establish that there was an unequivocal and unvaried practice of closing the program on such holidays. Accordingly, the School District did not violate the Law when it decided to keep the program open on those

[38] There was no evidence that the program was ever closed the remainder of the school vacation weeks.

holidays, and I dismiss this allegation. See, City of Boston, 41 MLC 119, MUP-13-3371 (November 7, 2014) (Board dismisses unlawful unilateral change allegation because there was no established past practice regarding the promotional exam where employer had used both a written test and an assessment center test over several years).

Additional Duties

The Association alleges that the School District violated the Law when Crowe required Donohue to perform additional duties beginning in the 2015 – 2016 school year without providing the Association with prior notice and an opportunity to bargain. Specifically, the Association alleges that Donohue is now responsible for responding to phone calls and emails from parents regarding the program while previously, the central office would take the calls and emails and relay the messages to Donohue at the end of the day. In addition, Donohue is now responsible for monthly registration sheets and daily attendance sheets.

In addition to its general arguments already addressed, the School District argues that although Donohue was informed in August 2015 that he would be required to perform these duties, he was not actually required to perform them until after Jablonski was hired in early 2016, but the Association did not demand bargaining in the interim. To succeed on a waiver by inaction defense, the School District must establish that the Association: 1) had actual knowledge or notice of the proposed change; 2) had a reasonable opportunity to negotiate over the subject; and 3) unreasonably or inexplicably failed to bargain or request bargaining. Town of Watertown, 32 MLC 54, MUP-01-3275 (June 29,

2005). The doctrine of waiver by inaction should not be applied where the union is presented with a fait accompli. In such cases, the union is not required to make a demand to bargain in order to preserve its rights. Ashburnham-Westminster Regional School District, 29 MLC 191, MUP-01-3144 (April 9, 2003).

Here, I agree with the School District and find that the Association waived its right to bargain by inaction. Although the School District provided notice of the additional duties in August 2015, Donohue was not compelled to perform them until February or March of 2016. There is no evidence that the Association requested to bargain over the duties at any time between August 2015 and the date that Donohue began performing the additional duties.[39] Accordingly, this allegation is dismissed.

Conclusion

Based on the record and for the reasons explained above, I find that the School District failed to bargain in good faith with the Association when it hired only one Director in August 2015 without providing the Association with prior notice and an opportunity to bargain over the impacts of the decision in violation of Section 10(a)(5) of the Law. I also find that the School District failed to bargain in good faith with the Association when it changed the method of payment for Co-Directors without providing the Association with prior notice and an opportunity to bargain over the decision and the impacts of the

[39] The School District also argues that there was no change in duties, as Donohue always had to be aware of calls and emails from parents. In addition, according to the School District, Donohue was not responsible for creating an attendance spreadsheet, but rather sorting and printing the spreadsheet. Because I have dismissed the allegation for other reasons, I need not address these arguments.

decision in violation of Section 10(a)(5) of the Law. However, I do not find that the School District violated the Law when it changed the holiday schedule, or when it required Donohue to perform certain additional duties, and I dismiss these allegations.

Remedy

In its post-hearing brief, the Association requests that I order the School District to make both Donohue and Jablonski whole for the full amount of the Co-Director stipend. However, this remedy is unreasonable as it pertains to Jablonski as he only worked in the Co-Director position for approximately half of the 2015 – 2016 school year. Instead, the School District must prorate the stipend beginning on the date that Jablonski began in the position in 2016 through the end of the 2016 school year. Jablonski should then be made whole for any wages that were deducted from the prorated stipend due to his being paid on an hourly basis.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the School District shall:

1. Cease and desist from:

    a) Unilaterally hiring only one Director for the Before and After School Program;

    b) Unilaterally paying the Before and After School Program Co-Directors on an hourly basis instead of a yearly stipend;

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

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

a) Return to the practice of paying a yearly stipend to the Before and After School Program Co-Directors;

b) Upon request, provide the Association with an opportunity to bargain over the impacts of its decision to hire only one Director for the Before and After School program;

c) Upon request, provide the Association with an opportunity to bargain over the decision and impacts of the decision to pay Co-Directors of the Before and After School Program on an hourly basis instead of a yearly stipend;

d) Make whole Donohue for any economic loss suffered as a result of the School District's decision to pay the Co-Directors on an hourly basis instead of a yearly stipend beginning in the 2015 – 2016 school year;

e) Make whole Jablonski for any economic loss suffered as a result of the School District's decision to pay the Co-Directors on an hourly basis instead of a yearly stipend beginning in the 2015 – 2016 school year, with the yearly stipend prorated from Jablonski's date of appointment to the Co-Director position in January 2016;

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

g) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Kerry Bonner

KERRY BONNER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.19, 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.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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 Spencer-East Brookfield School District (School District) has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by: 1) unilaterally hiring only one Director for the Before and After School Program (Program) in August 2015 without providing the Spencer-East Brookfield Teachers Association (Association) with prior notice and an opportunity to bargain over the impacts of the decision; and 2) unilaterally paying the Co-Directors of the program on an hourly basis instead of a yearly stipend without providing the Association with prior notice and an opportunity to bargain over the decision and impacts of the decision.

The School District posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights: to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by unilaterally hiring only one Director for the program or by unilaterally paying the Co-Directors on an hourly basis instead of a yearly stipend;

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

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

- Return to the practice of paying a yearly stipend to the Co-Directors;
- Upon request, provide the Association with an opportunity to bargain over the impacts of the decision to hire only one Director;
- Upon request, provide the Association with an opportunity to bargain over the decision and impacts of the decision to pay Co-Directors on an hourly basis instead of a yearly stipend;
- Make whole Kevin Donohue for any economic loss suffered as a result of the decision to pay the Co-Directors on an hourly basis instead of a yearly stipend;
- Make whole Stanley Jablonski for any economic loss suffered as a result of the decision to pay the Co-Directors on an hourly basis instead of a yearly stipend, with the yearly stipend prorated from Jablonski's date of appointment to the Co-Director position in January 2016.

_____ _____

SPENCER-EAST BROOKFIELD SCHOOL DISTRICT 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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).