

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

In the Matter of

BELMONT SCHOOL COMMITTEE

and

BELMONT EDUCATION ASSOCIATION

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Case No.: MUP-17-5825

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Date Issued: June 7, 2019

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CERB Members Participating:

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

James M. Pender, Esq. - Representing the Belmont School
Committee

Ashley Walter, Esq. - Representing the Belmont Education
Association

SUMMARY

1 The question before the Commonwealth Employment Relations Board (CERB) is
2 whether the Belmont School Committee (Employer or School Committee) violated its
3 duty to bargain in good faith under Chapter 150E (the Law) when it refused to engage in
4 successor bargaining in the presence of any individuals other than the Belmont
5 Education Association's (BEA or Union) "core" bargaining team. The BEA argues that
6 because these individuals were "silent" members of its bargaining team, whose role,
7 beyond merely observing negotiations, was to communicate with the core team during

1 caucuses and to bring information back to their buildings, the School Committee
2 violated its duty to bargain in good faith by refusing to bargain with the Union's
3 designated team and attempting to control the number, identity and role of its bargaining
4 team members. The School Committee claims that because it never agreed to allow
5 observers to attend bargaining, their presence was a bad faith attempt by the Union to
6 unilaterally implement a rejected ground rule, and that the BEA's conduct was contrary
7 to well-established policy and precedent that bargaining take place in closed session
8 unless the parties agree otherwise.

9 We dismiss the charge. As explained below, although a union has the right to
10 designate a reasonable number of bargaining unit members to serve on its bargaining
11 team in roles that need not include face-to-face bargaining, in this case, the Union never
12 informed the School Committee in advance of the bargaining session that it had taken a
13 vote to include silent representatives on its bargaining team, or that the seven or so
14 unannounced individuals in the bargaining room that day were bargaining unit members
15 who had volunteered to serve in this capacity. Under circumstances where the School
16 Committee had previously rejected the BEA's proposed ground rule to have
17 negotiations open to its bargaining unit members, the School Committee did not violate
18 the Law when it walked out of the room upon seeing the additional bargaining unit
19 members. The ambiguity of the bargaining unit members' role privileged the Employer
20 to refuse to bargain on this single occasion.

Statement of the Case

21 On February 23, 2017, the Union filed a charge with the Department of Labor
22 Relations (DLR), alleging that the School Committee had engaged in prohibited

1 practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of
2 the Law. Following an in-person investigation that took place on June 7, 2017, a DLR
3 investigator issued a Complaint of Prohibited Practice on June 28, 2017, alleging that
4 the School Committee had violated Section 10(a)(5) and, derivatively, Section 10(a)(1)
5 of the Law. On December 7, 2017, January 30, 2018 and March 8, 2018, a DLR
6 Hearing Officer conducted a hearing during which the parties received a full opportunity
7 to be heard, to examine and cross-examine witnesses, and to introduce evidence. The
8 parties also stipulated to certain facts. On May 18, 2018, the parties filed post-hearing
9 briefs. Before issuing a decision, the Hearing Officer who conducted the hearings left
10 the DLR's employ. On January 30, 2019, the parties entered into a "Decision
11 Procedure Agreement" in which they agreed that the Chair of the CERB would serve as
12 a new hearing officer to review all of the record evidence and briefs and issue
13 recommended findings of fact (RFF). The parties further agreed that they would have
14 the right to challenge the RFF, after which the CERB would then review the RFF's, any
15 challenges thereto, the parties' briefs and all of the record evidence, and issue a
16 decision in the first instance.¹

17 The Hearing Officer issued the RFF's on March 9, 2019, and the Union and the
18 School Committee filed challenges on March 29 and April 29, 2019, respectively.² We
19 adopt the Hearing Officer's findings except where modified, and summarize them below.

¹ The parties also agreed that the CERB would not consider any challenges to the Hearing Officer's RFFs that were based solely upon the demeanor of the witness upon whose testimony the finding is based.

² The Union initially failed to serve a copy of its challenges on the School Committee. When it did so on April 19, 2019, the Hearing Office confirmed that the School Committee's response was due on April 29, 2019.

STIPULATED FACTS

1. The Town of Belmont (Town) is a public employer within the meaning of Section 1 of the Law.
2. The Belmont School Committee (School Committee) is the Town's collective bargaining representative for the purpose of bargaining with school employees.
3. The Belmont Education Association (Union or BEA) is an employee organization within the meaning of Section 1 of the Law.
4. The Union is the exclusive bargaining representative for four bargaining units – Units A, B, C and D.
5. Unit A is the bargaining unit for teachers in Belmont; Unit B covers Belmont administrators; Unit C is the secretarial, clerical and technical unit; and Unit D is the paraprofessional unit.
6. The School Committee and the Union are parties to a Unit A collective bargaining agreement (CBA), which is effective by its terms for the period September 1, 2014 through August 31, 2017.
7. On or around November 29, 2016, the School Committee and the Union attended a preliminary meeting concerning negotiations for a successor contract.
8. At the preliminary meeting, the parties discussed ground rules, and both parties advanced proposed ground rules.
9. The parties were not able to agree on ground rules and so proceeded without them.
10. February 15, 2017 was the first day of negotiations for the Unit A successor collective bargaining agreement.

Prior Bargaining Sessions between Years 2010 and 2014

The Union has represented Units A, B, C and D for many years. In that capacity, it has negotiated a series of collective bargaining agreements with the School Committee for each of the four units. Prior to the most recent round of negotiations, the method and manner by which the parties conducted contract negotiations varied. In

1 2011, for example, the Union and the School Committee engaged in a form of hybrid
2 negotiations. Specifically, the parties agreed upon written ground rules that provided
3 that either party could, upon written notice, "withdraw from interest-based bargaining
4 and proceed with traditional or positional bargaining." Prior to commencing substantive
5 bargaining in 2014, the parties entered into written ground rules that established they
6 would utilize coalition-style, interest based bargaining. The parties' 2014 ground rules
7 also listed by name the respective members of their designated bargaining teams.

8 The 2011 and 2014 negotiations were not open to the entire bargaining unit
9 membership or the general public, nor did the parties agree that negotiations would be
10 open to "observers" from either the Union or the School Committee. In one 2014
11 negotiation session, however, the Union and the School Committee agreed to have the
12 Town Manager give a presentation regarding the Town's budget. Otherwise, there have
13 been no other non-bargaining team individuals in attendance during the parties'
14 bargaining sessions when the parties were negotiating over the terms of a successor
15 CBA.³

³ There was conflicting testimony over whether Lisa Hurtubise (Hurtubise), a former English teacher at the high school who had recently become an assistant principal, had ever observed a negotiation session. Hurtubise testified that she had never attended a negotiation session, while three Union witnesses stated they had seen Hurtubise observe a bargaining session during the parties' 2011 successor contract negotiations. However, two of the three Union witnesses indicated that they saw Hurtubise observe a training session for interest-based bargaining that both parties attended, and not an actual collective bargaining session over the substantive terms of a successor agreement. The Hearing Officer found it was therefore not necessary to resolve the dispute over whether Hurtubise attended any meetings between the School Committee and the Union's bargaining teams in 2011 in order to find, as set out above, that no non-bargaining team members other than the Town Administrator have ever observed a bargaining session during which the parties were negotiating the terms of a successor agreement.

1 Preparations for 2016-2017 Bargaining Sessions

2 Beginning in the 2015-2016 academic year, the Union took steps to prepare for
3 open session bargaining, including developing forums for members of the public to talk
4 about what was important to them in the Belmont Public Schools. The Union also
5 undertook an extensive member engagement campaign that was aimed at creating a
6 transparent process that facilitated a dialogue among members about their vision for the
7 Belmont Public Schools. The Union trained building representatives to host member
8 forums at their respective schools. After receiving the Union's training, each of the
9 building representatives then hosted member forums and members that attended those
10 forums had an opportunity to provide input about their vision. During the summer of
11 2016, the Union gathered the information collected from the member forums and
12 organized it into various "platforms" that the Union intended to present to the School
13 Committee during bargaining.⁴ The Union communicated these platforms to the entire
14 membership in the fall of 2016, and asked that members provide the Union with
15 feedback. After receiving feedback, the Union modified the "platforms" further and
16 created a package to present to the School Committee. After doing so, the Union once
17 again solicited feedback from its membership prior to advancing the package to the
18 School Committee.

19 In further preparation for the pending negotiations, in late October and early
20 November 2016, Sullivan and Mary Pederson (Pederson), the Director of Human
21 Resources for the Belmont School District, exchanged several emails that discussed,
22 among other things, scheduling the first meeting, the type of bargaining they would

⁴ Union President John Sullivan (Sullivan) testified that a "platform" is a summary of the Union's "vision or goal in bargaining certain language."

1 engage in, and ground rules. On November 3, Pederson sent Sullivan an email stating
2 that the School Committee was not interested in coalition bargaining.

3 On November 8, Pederson sent Sullivan an email confirming November 29th for
4 a negotiating session between all BEA Units and the full School Committee negotiating
5 team for the purpose of negotiating ground rules and schedules for the upcoming
6 negotiations. The email included a chart of the individuals on the School Committee's
7 bargaining teams for all four units, as well as an AFSCME unit. There were five
8 persons on each team. The persons listed for Unit A were Lisa Fiore (Fiore), Susan
9 Burgess-Cox (Burgess-Cox), John Phelan (Phelan), the Superintendent of Schools,
10 Pederson and James Pender, the School Committee's legal counsel (Pender).

11 November 29, 2016 Preliminary Meeting

12 As scheduled, the School Committee and the Union attended a preliminary
13 successor contract negotiation session on November 29th. Participating for the School
14 Committee were Fiore, Burgess-Cox, Elyse Shuster (Shuster), Andrea Prestwich
15 (Prestwich), Thomas Caputo,⁵ Pederson, and Pender. Representatives from each of
16 the Union's four units attended and included the following: Sullivan, Union Vice
17 President Denise LaPolla (LaPolla), and Field Representative Philip Katz (Katz). At this
18 session, the Union proposed the following ground rules:

- 19 1. All bargaining sessions will be held in open session.⁶
20

⁵ Shuster and Prestwich are listed on Pederson's November 8 email as part of the School Committee's Unit C bargaining team. Caputo was part of the Unit B team.

⁶ Katz testified that the Union understood the term "open session" to mean that "anyone can attend, negotiators, bargaining unit members, school committee members, the public town meeting members, anyone."

2. Meetings will be mutually scheduled four dates ahead, including starting and ending times; ending times can be extended at the meeting by mutual agreement. At least a twenty-four hour notice shall be provided when cancellation is necessary except in case of emergency. If a party will be late, it will notify the other party as soon as possible with the expectation of arrival time. Bargaining will occur concurrently and independently by bargaining unit.
3. Initial proposals shall be submitted simultaneously at the second negotiating meeting and any additional proposals shall be submitted by the fourth negotiating meeting. Proposals related to previous proposals may be submitted any time to settle an issue.
4. Each committee shall have a point person, responsible for chairing their respective committee at negotiations.
5. By the end of each bargaining session, the parties will create an agenda for the next session. They will appoint a recorder, who will type up the notes and have them available for review and approval at the next meeting. There will be no attribution of statements to specific individuals in bargaining notes.
6. Any party may call for a private caucus at any time. However, the parties agree that such caucuses should be kept as short as possible, within fifteen (15) minutes being the recommended time. If more time is required, the non-caucusing party will be notified.
7. All agreements shall be in writing and initialed. All agreements shall be tentative until a final agreement is reached. The final agreement shall be signed and then ratified in order to be executed.
8. Those present at negotiations have the authority to make agreements for their committee. Each committee has the authority to make agreements for their constituency.
9. These ground rules may be modified or amended by mutual agreement of the parties.

In turn, the School Committee presented the Union with the following proposed ground rules:

1. All negotiating sessions are closed so that only designated bargaining committee members for each party shall attend.
2. All proposals and counter-proposals shall be in writing. In the event that proposals or counter-proposals cannot be immediately presented in written form, they should be reduced in writing prior to the next bargaining session.

- 1 3. Each party shall have the right to caucus at any time for reasonable periods
2 of time.
- 3
- 4 4. Each meeting will be approximately two (2) hours in duration, unless the
5 parties agree otherwise.
- 6
- 7 5. At each meeting, the time and date of the next two meetings shall be
8 established.
- 9
- 10 6. Following the third bargaining session, exclusive of the initial meeting on
11 _____ [sic], 2016, no new proposals shall be proposed by either party,
12 absent mutual agreement. However, either party may revise its own prior
13 proposal or provide a counter-proposal to the other party's proposal/counter-
14 proposal at any session.
- 15
- 16 7. With the exception of the final form of the tentative agreement, neither party
17 will discuss any details of the negotiating process with the press or otherwise
18 divulge to the public (including social media) unless impasse has been
19 declared by either party. After impasse has been declared, both parties agree
20 to provide a minimum of 24 hours notification to the other party prior to any
21 such discussions with the press or providing information to the public. The
22 parties shall refrain from speaking publicly about what another party directly
23 said in meetings, but either party may characterize the position taken by the
24 other in such meetings. Notwithstanding the foregoing, the Union is permitted
25 to inform rank and file members of any progress during the negotiating
26 process. The school district's bargaining team is also permitted to inform the
27 School Committee of any progress during the negotiating process.
- 28
- 29 8. The respective negotiation committees are empowered to enter into tentative
30 agreements. All tentative agreements are contingent upon a final tentative
31 agreement on all proposals. When a final tentative agreement is reached, it
32 shall be subject to ratification by the Union and approval by the School
33 Committee. Nothing in these ground rules shall prevent either party from
34 altering its position on a subject tentatively agreed [sic] in order to advance a
35 comprehensive package proposal.
- 36
- 37 9. In the event the parties proceed to mediation and/or fact-finding, then the list
38 of tentative agreements will be provided to the mediator and/or fact finder.
- 39
- 40 10. Each party shall be responsible for keeping its own notes of meetings. Any
41 form of electronic recording of meetings is prohibited.
- 42

43 The parties discussed several of the proposed ground rules including, in
44 particular, the proposals concerning whether bargaining sessions would be open or

1 closed. The School Committee rejected the Union's proposal to hold all bargaining
2 sessions in open session and the Union rejected the School Committee's proposal that
3 bargaining take place in closed session. Upon hearing the School Committee's rejection
4 of the Union's open bargaining proposal, Katz modified it by proposing that bargaining
5 sessions would be open only to bargaining unit members, and not the general public.
6 The School Committee immediately verbally rejected this proposed ground rule as well.
7 At that point, Katz said words to the effect that the Union could achieve the same result
8 by designating the entire bargaining unit as a member of the bargaining team and
9 allowing them to attend in that capacity.⁷ The School Committee also rejected that
10 suggestion. At some point during those discussions, the Union also discussed its desire
11 to invite bargaining unit members to attend future sessions as silent representatives,
12 who would listen and observe the negotiations, provide feedback to their respective
13 bargaining teams, and meet with them to caucus. The Union expressed its belief that
14 this would be good for the process it had begun with its member engagement
15 campaign. After the parties discussed some scheduling issues, the meeting ended
16 without the parties reaching agreement on ground rules or the issue of silent
17 representatives.

18 December 2016 Emails Discussing Open Session Bargaining

19 By email dated December 1, 2016 to Katz, Pender wrote to "follow up on our
20 preliminary meeting on Tuesday night regarding upcoming successor contract
21 negotiations for the four BEA bargaining units – Units A, B, C, and D." Pender
22 continued in pertinent part:

⁷ On cross-examination, Katz admitted to saying words to that effect, stating that it sounded like something "snarky" that he would say.

1 The BEA has proposed ground rules, including one that bargaining take
2 place in open session so that any interested bargaining unit members
3 could attend and observe negotiations. The School Committee did not
4 agree to that ground rule, wanting to maintain the traditional and common
5 bargaining practice of only having the designated bargaining teams
6 present.

7
8 You then said that, absent agreement on that proposed ground rule, the
9 BEA could achieve the same result by designating all bargaining unit
10 employees as members of the respective BEA unit's bargaining team such
11 that any or all of those bargaining unit members could attend negotiations.
12 As I indicated in response, that type of circumventing tactic by BEA would
13 constitute bargaining in bad faith. We left it that you and I would
14 subsequently discuss the matter.

15
16 The School Committee remains ready and willing to proceed with
17 negotiations for all BEA bargaining units, provided that negotiations occur
18 between designated bargaining teams only, which are reasonable in size
19 and consistent in composition. The School Committee's bargaining teams
20 will each have 5 designated people (with varying School Committee
21 members depending upon the bargaining unit in question). In prior rounds
22 of negotiations between the parties, apart from coalition interest-based
23 bargaining (IBB) in the last round, the BEA's bargaining teams have
24 ranged in size between approximately 5 (for Unit B, C, & D bargaining
25 teams) and 10 people (for Unit A). We would expect similarly-sized BEA
26 bargaining teams for these negotiations as well. Any significant increase in
27 a BEA bargaining team would indicate an improper effort by the BEA to
28 unilaterally implement its rejected proposed ground rule to allow any
29 bargaining unit members to attend negotiations.

30
31 Katz replied on December 8, 2016, stating in pertinent part:

32 The BEA finds it unfortunate that we could not come to an agreement on
33 ground rules so that we could have a mutual understanding of how we will
34 be bargaining. Absent ground rules, we will likely disagree on what
35 constitutes bargaining in good and bad faith – both regarding the make-up
36 of our respective teams and the timelines for bargaining the various
37 contracts.

38
39 While you provided specifics on team make-ups of the past, Belmont has
40 rarely bargained in the traditional sense in recent memory. Last time
41 around the parties bargained using an interest-based bargaining protocol
42 in coalition bargaining with all the units, before that a hybrid of traditional
43 and interest-based[,] before that back to interest-based, sometimes in
44 coalition, sometimes not. (If you noticed our proposed ground rules, we
45 attempted to reconstitute the hybrid approach with statements of intent,

1 mutual note-takers and establishing agendas ahead of each session.) The
2 BEA finds your attempt to dictate the size and composition of our
3 bargaining teams as interference in our duty to represent our members.
4 While we originally proposed to hold bargaining in open sessions, we are
5 no longer requesting that. However, absence [sic] ground rules to the
6 contrary, the size and composition of our negotiations teams within these
7 closed sessions is a union matter and not open for discussion. For
8 transparency sake, however, we outline our intent as follows, which we
9 believe this [sic] will not interfere with good faith negotiations:

- 10 • Each bargaining unit have [sic] a core set of representatives who
11 will speak at negotiations. I will forward you those lists later.
- 12 • The BEA may bring other representatives to speak who have
13 specific experiences or expertise to share.
- 14 • The BEA may bring other representatives, who may be not be [sic]
15 consistent, to observe only during negotiations and to consult with
16 the core representatives during caucuses.

17 By email dated December 13, 2016 to Katz, Pender stated that:

18 The BEA is solely responsible for the composition of its own bargaining
19 teams and there was no suggestion otherwise. **We are simply**
20 **reaffirming our position that no bargaining unit (or any other)**
21 **observers should attend bargaining.** The BEA's proposed ground rule
22 seeking to allow observers to attend bargaining was rejected by the
23 School Committee and it cannot be unilaterally implemented by the BEA.

24 Consistent with the School Committee's position, we do not agree with
25 your stated intent to bring observers during negotiations; we will not
26 bargain with observers in the room. Like I noted before, the School
27 Committee is ready and willing to bargain with the BEA-designated
28 bargaining team only, consistent with traditional bargaining. The
29 bargaining teams can mutually agree to allow an outside individual to
30 attend a particular bargaining session for the purpose of presenting on a
31 specific topic.

32 From prior e-mail communications with John Sullivan, it was our
33 understanding that the BEA had already determined its bargaining teams
34 and that all BEA bargaining team members were present at the initial
35 meeting on November 29 ...

36 In an email dated December 18, 2016, Katz replied:

37 Hi Jim,

1 It appears that the BEA and BSC will disagree about what is bargaining in
2 good faith.

3
4 While reserving our rights to modify, our core teams for each bargaining
5 unit are as follows.

6
7 Unit A

8
9 Denise LaPolla [LaPolla]
10 Benjamin DeLorio [B. DeLorio]
11 Tracie Lockwood-Santiago [Lockwood-Santiago]
12 Cliff Galant [Galant]
13 Leon Dryer [Dryer]
14 Meghan McGovern [McGovern]
15 Craig McMahan [McMahan]
16 John Sullivan
17 Philip Katz⁸

* * *

18 At the end of the email, Katz confirmed February 15 and March 2, 2017 as the dates of
19 the first two Unit A bargaining sessions.

20 January 2017 Union Vote to Alter Composition of Bargaining Team

21 The Union holds monthly meetings of its building representative council. At the
22 monthly meeting that took place in January 2017, the elected members of the Union's
23 bargaining teams discussed the School Committee's rejection of its proposal for open
24 bargaining. The bargaining team members recommended that the bargaining team
25 include silent representatives. They made a motion to that effect, and the motion
26 passed. The Union did not inform the School Committee about this vote.

27 The Union solicited volunteers to serve in this role. Building representative Lindi
28 DeLorio (L. DeLorio),⁹ the wife of elected bargaining team member B. DeLorio, was one
29 of the building representatives who volunteered to attend.¹⁰

⁸ Katz and Sullivan were listed as members of all four bargaining teams.

February 15, 2017 Bargaining Session

The first Unit A bargaining session took place on February 15, 2017 at the Chenery Middle School. Negotiations were scheduled to begin at 4:30 p.m. About one-half hour before negotiations were about to begin, the Union held a prep session with the bargaining unit members who had volunteered to attend the session as silent representatives. The Union explained their role to them – they were to remain absolutely quiet, and listen and take notes; they were not to engage in any way with the process; they were supposed to provide the core bargaining team with feedback when the team caucused; and they were supposed to bring information back to their building. According to Sullivan, this last task would enable the bargainers to focus on bargaining at the table, and not on communicating with the members about what was going on.

The School Committee also met for its own prep session that day in an anteroom adjacent to the community room. When the School Committee's bargaining team opened the door of the anteroom and entered the larger community room at 4:30, they noticed at least seven¹¹ bargaining unit members sitting in chairs at the back of the room, in addition to the Union's designated Unit A bargaining team members, who were seated at a table positioned in the center of the room. Pender informed the Union that the School Committee was both surprised and disappointed that the Union had decided to bring bargaining unit observers and that, consistent with what he had previously

⁹ At the Union's request, we have corrected the spelling of L. DeLorio's first name.

¹⁰ The record does not reflect the names of the other volunteers.

¹¹ Phelan and Pederson respectively estimated that there were between eight and ten, or eight and twelve bargaining unit members in the back of the room. Both Katz and Sullivan testified that there were seven.

1 conveyed to Katz via email, the School Committee would not engage in bargaining with
2 observers in the room. In response, Katz retorted that the Union had never said it
3 would *not* bring them.¹² The School Committee's bargaining team then returned to the
4 adjacent anteroom where it had previously prepared for the bargaining session.

5 After the passage of several minutes, Katz knocked on the door of the adjacent
6 anteroom and asked if the School Committee would be willing to bargain if the Union
7 instructed the silent representatives¹³ to leave the bargaining room. The School
8 Committee immediately answered that it would be willing to bargain with the Union if the
9 observers left the bargaining room. Katz then informed the School Committee that the
10 Union reserved the right to file a charge at the DLR. However, when the School
11 Committee's bargaining team returned from the anteroom, the same bargaining unit
12 representatives were still in the larger community room, seated in the same place.
13 Pender remarked to Katz that the observers were still present in the room and that their

¹² At the Union's request, we have modified a number of findings that use the term "observer" to describe the non-core "silent" bargaining representatives present at the February 17, 2017 bargaining session. Because the Union voted to include these individuals as part of its bargaining team, and because they had a role to play in bargaining beyond merely observing the negotiations, we agree that the term "silent representative" is a more apt description. Nevertheless, while the Union most often described these individuals as "silent representatives" or simply "representatives," both during the hearing and in its briefs, its nomenclature was not entirely consistent. On at least one occasion during the hearing, Union counsel used the term "silent observers." Moreover, as to the exchange described in the text accompanying this note reflects, the record reveals that in response to Pender's statement to Katz that the School Committee had already told the Union that it would not bargain with observers in the room, Katz replied that the Union had never stated it would not bring "them." Thus, as we discuss below, during that exchange, the Union did not make clear to the Employer that they were representatives and not just observers. We have modified the finding accordingly. We will continue to use the word "observer" when the record testimony reflects that this was the term used by either the Employer or the Union.

¹³ See note 12, above.

1 presence was contrary to the School Committee's understanding of the earlier
2 discussion with Katz. In return, Katz stated, "Oh, you want me to ask them to leave?" or
3 words to that effect.¹⁴

4 The Union eventually asked the silent representatives¹⁵ to leave the room. Once
5 they left, the parties engaged in substantive bargaining on the terms and conditions of
6 employment regarding Unit A. After the silent representatives left, and during the initial
7 bargaining session, the School Committee reintroduced the possibility of the parties
8 entering into ground rules. The Union rejected establishing ground rules, and the parties
9 proceeded to bargain without them.

10 Subsequent Bargaining Sessions and Tentative Agreement

11 The parties negotiated over the Unit A contract for several months until they
12 ultimately reached agreement on a successor Unit A contract. Apart from the initial
13 February 15 bargaining session, the Union did not attempt to bring in silent
14 representatives to any subsequent Unit A bargaining session or to any of the collective
15 bargaining sessions involving the three other bargaining units – Units B, C and D. The
16 parties ultimately reached a tentative agreement on the Unit A CBA in mid-2017.

¹⁴ The Union seeks an additional finding that it was due to a "miscommunication" that the silent representatives remained in the bargaining room after the School Committee stated that it would be willing to bargain if they left. We decline to modify the finding. Because the School Committee never filed a prohibited practice charge against the Union, the reason that the silent representatives remained in the room is irrelevant to the issue of whether the School Committee violated the Law by refusing to bargain *unless* they left. We note, however, that the Union's claim that the silent representatives remained in the room due to a "miscommunication" is consistent with our conclusion that the Union's communications with the Employer during this period were unclear.

¹⁵ See note 12, above.

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The Employer on the other hand argues that finding for the Union here would effectively create a workaround of longstanding precedent that the norm for bargaining is “closed” sessions and that “parties should not be permitted to scuttle bargaining by insisting otherwise.” *Holbrook School Committee*, 5 MLC 1491, 1494-1495, MUP-2973

17

(December 11, 1978). The School Committee urges the CERB to consider the policy considerations underlying this precedent, as expressed in Town of Norton, 3 MLC 1140, 1141-1142, MUP-2449 (September 21, 1976):

Through the collective bargaining process, the negotiators for both the Public Employer and the Union seek to reach an agreement that reflects the common interests of their respective constituency. Many of the people represented by either party, however, have diverse personal concerns in the issues discussed at the bargaining table. The presence of members of the town's and union officials' constituencies distract those officials from concentrating their efforts toward a solution of the issues before them and dampen their willingness to make compromises that affect the personal interests of some of the people they represent.

The School Committee contends that permitting the Union to grant "unfettered entry to bargaining by its members, without limitation, over the explicit objection of the School Committee" would violate these principles and "negatively impact the parties' bargaining relationship and ability to reach agreement."

In addition to the CERB decisions cited above, both parties cite to a number of National Labor Relations Board (NLRB) and federal appeals court rulings and decisions arising under the National Labor Relations Act (Act).¹⁷ In support of its claim that an employer's duty to bargain persists even where a union's negotiating team is comprised of unconventional members, the Union points to General Electric. Co., supra and Dilene Answering Service, Inc., 257 NLRB 284 (1981). Those cases are distinguishable from the matter before us, however, because in both of them, the employer refused to bargain despite having clearly been told by the union that the individuals at issue were members of the union's bargaining team.

¹⁷ Although NLRB precedent is not binding on the CERB, it can provide useful guidance. Alliance, AFSCME, SEIU and Luther E. Allen, Jr., 8 MLC 1518, SUPL-2024, 2025 (November 13, 1981).

1 Thus, in Dilene Answering Service, the NLRB Board affirmed an Administrative
2 Law Judge (ALJ) decision holding, among other things, that the employer unlawfully
3 refused to meet and negotiate with the union when it protested the presence of four
4 employees whom the union had clearly identified to the employer as union
5 representatives. 257 NLRB at 291. The ALJ emphasized that although the employer
6 claimed to believe otherwise, once the union told the employer that these employees
7 were in fact union representatives, absent a question that the unit employees were
8 disqualified by reason of ill will or conflict of interest, the employer was “foreclosed from
9 further inquiry.” Id.

10 Similarly, in General Electric, the union expressly told the employer that it had
11 added seven non-voting members to its bargaining committee who were present to aid
12 it in negotiations. 412 F.2d at 515. On these facts, and absent any finding of bad faith,
13 ulterior motive on the part of the union, or other unusual or exceptional circumstances,
14 the Court concluded that the employer had a duty to negotiate with the unions’
15 bargaining committees even in the presence of what the Court deemed “temporary
16 representatives.” Id. at 517.

17 The three NLRB cases that the Employer relies on for the proposition that a
18 union cannot force an employer to bargain in the presence of observers are also
19 distinguishable because, unlike here, the individuals at issue in each of those cases
20 were *not* part of the union’s bargaining team, and the cited decisions rely in whole or at
21 least in part on that distinction. See BHC Northwest Psychiatric Hospital, LLC, 365
22 NLRB No. 79 (2017); Canterbury Villa of Alliance District 1199, Service Employees
23 International Union, NLRB Advice Memorandum from Barry J. Kearney, Associate Gen.

1 Counsel, Div. of Advice , 32 NLRB AMR 59, 32 NLRB Advice Mem. Rep. 59, 2004 WL
2 6016856 (March 31, 2004); and Primeflight Aviation Services, Inc., 2018 WL 683831
3 (NLRB Div. of Judges) (January 9, 2018)(pending Board decision).

4 Thus, in BHC Northwest, the ALJ held that the employer did not unlawfully refuse
5 to bargain when it cancelled a bargaining meeting to which the union had brought
6 observers, because, among other things, the observers were not member of the union's
7 bargaining team. 365 NLRB slip op. at 5.¹⁸ Similarly, in Canterbury Villa, the NLRB
8 Division of Advice held that the union violated Section 8(b)(3) of the Act by insisting on
9 bargaining in the presence of bargaining unit members who were not part of the union's
10 bargaining team or otherwise present to assist in bargaining. 2004 WL 6066856 at 3 –
11 4. Explicitly finding that this case was “unlike situations where an employer refuses to
12 deal with designated members of a union's negotiating team,” the Division of Advice
13 opined that the union's conduct did not implicate the right of employees to designate
14 and be represented by representatives of their own choosing. Id. (distinguishing Dilene
15 Answering Service, supra.).

16 Likewise, in Primeflight Aviation Serv., 2018 WL 683831 (NLRB Div. of Judges)
17 (January 9, 2018)(pending Board decision), the ALJ found that the employees at issue
18 were not part of the bargaining committee, and thus noted that “their entitlement to stay

¹⁸ In affirming the ALJ on this point, the NLRB relied solely on the fact that the employer subsequently agreed to meet with the union in the presence of the observers and the fact that subsequent bargaining was not affected by their presence. Contrary to the employer's claims, therefore, BHC does not stand for the proposition that an employer does not have to bargain in the presence of observers.

1 in the meeting [was] far different from being designated as bargaining representatives
2 for the [u]nion.” 2018 WL 683831 at 14.¹⁹

3 Here, although the silent representatives were members of the Union's
4 bargaining team, which under the decisions cited by both parties would generally have
5 obligated the BHE to bargain in their presence, we nevertheless conclude that the BHE
6 did not violate the Law here because the Union did not clarify their status, either before
7 or after the BHE walked out of the bargaining room.

8 Although the Union contends that Katz's December 8, 2016 email to Pender put
9 the School Committee on notice that the Union would be bringing bargaining unit
10 members to negotiations to serve as silent representatives, when viewed in context, we
11 find that this email was insufficient to put the School Committee on notice that the silent
12 bargaining unit members in the bargaining room that day were, in fact, members of the
13 Union's bargaining team, with a role to play in negotiations beyond mere observing.
14 The December 8 email stated only that the Union “may” bring “other representatives” to
15 bargaining who may not be consistent, to observe only during negotiations, and to
16 consult with core representatives during caucuses. The email did not state that the
17 Union would actually do so or clarify the term “other representatives.” Ten days later,
18 the Union sent the Employer a list of its core bargaining teams. Sometime in the next
19 month, in January 2017, the Union conducted an internal Union vote to include silent
20 representatives, and solicited and obtained volunteers to serve in this role. However,
21 despite the fact that the first Unit A bargaining session was still over a month away, and

¹⁹ The ALJ in Primeflight Aviation also dismissed the refusal to bargain allegation against the employer partly because the employer had not foreclosed future bargaining in the presence of non-bargaining team observers. 2018 WL 683831 at 15-16 (citing BHC, supra).

1 that the Union had already told the Employer who its core bargaining team would be,
2 the Union never told the Employer about this vote or that silent representatives would
3 actually be attending negotiations. When these facts are viewed in light of the fact that
4 the Employer had previously rejected a series of proposed ground rules relating to
5 bargaining unit members observing negotiations, the Employer was justifiably surprised
6 to see a group of bargaining unit members at the back of the bargaining room on the
7 first day of bargaining.

8 The ensuing events did not clarify matters. Rather, in response to Pender's
9 statement that he was surprised to see observers in the room, Katz replied, "we never
10 stated we would not bring them." This statement, which was characterized as having
11 been made "tongue and cheek" by the School Superintendent, who took
12 contemporaneous notes documenting this exchange, did nothing to clarify that these
13 employees were designated members of the Union's bargaining team whose role
14 included more than merely observing the negotiations. Had the Union done so, we
15 would agree with the Union that the Employer's continued refusal to bargain would have
16 brought this case more squarely in line with the cases it cites for the proposition that a
17 union has a right, within reason and without interference by the employer, to designate
18 members of its own bargaining team and to determine their role in bargaining. We find
19 this line of cases persuasive, and, at least with respect to the SJC's holding in Southern
20 Worcester Regional Vocational School District v. Labor Relations Commission, that the

1 selection of a union's bargaining team is an internal matter that cannot justify a refusal
2 to bargain, we are bound to follow it. 377 Mass. at 904.²⁰

3 In this case, however, where the Union had previously proposed opening up
4 bargaining to all unit members without limitation, the single email that the Union sent
5 indicating that it "may" bring other representatives to bargaining was insufficient to
6 clarify the status and role of the unannounced individuals in the back of the room of the
7 February 15, 2017 session.

8 This lack of clarity renders this matter analogous to Saint-Gobain Abrasives, Inc.,
9 which held that an employer may be privileged to refuse to bargain with a union until it
10 removes any ambiguity as to the identity of purported bargaining representatives.
11 Advice Memorandum From Barry J. Kearney, 31 NLRB AMR 17, 31 NLRB Advice Mem.
12 Rep. 17, 2003 WL 26072083 (July 30, 2003). There, the employer and the union
13 agreed to ground rules that specifically limited negotiations to bargaining committee
14 members and designated resource people. The employer subsequently refused to
15 meet and bargain at a scheduled bargaining session to which the union had brought a
16 French trade delegation and elected officials. The Division of Advice ruled that by first
17 describing the French trade delegation and elected officials as "guests" who would not
18 be entitled to attend bargaining, and then attempting to designate them as "resource"
19 persons, the union created "confusion" as to whether its "guests" were in fact guests or

²⁰ This statement is limited to the facts before us, where approximately seven silent representatives were present. We need not and expressly do not reach the issue of whether the principles enunciated in those decisions would apply if a significantly larger number of bargaining unit members volunteered to serve as silent representatives and showed up at the bargaining session.

1 resources people. 2003 WL 26072083 at 5. The Division of Advice thus held that
2 because the parties had expressly agreed to exclude the former, and the union never
3 explained to the employer how the members of the French delegation might serve as
4 resource people, the employer was justified in refusing to bargain in the presence of the
5 outsiders until the union clarified their roles. Id. See also Canterbury Villa, 2004 WL
6 6016856 at 4 (finding violation of Section 8(b)(3) where, inter alia, union did not explain
7 to employer how the additional unannounced union members attending negotiating
8 sessions would be assisting in bargaining rather than as mere observers).

9 Here, although the parties did not agree to ground rules specifically limiting
10 bargaining to bargaining team members, the cases cited above that deem bargaining
11 under Chapter 150E closed unless the parties agree otherwise, essentially achieve the
12 same result. Holbrook School Committee, 5 MLC at 1494; Town of Norton, 3 MLC at
13 1141-1142. We therefore hold that where the Union failed to notify the Employer that
14 the silent representatives were going to attend, and where the record fails to disclose
15 that, after the Employer left the room, the Union clarified that they were members of its
16 bargaining team, or otherwise attempted to disabuse the Employer of the notion that
17 they were simply observers with no other role to play in bargaining, the Employer's
18 refusal to bargain with the Union on this single occasion did not amount to an unlawful
19 refusal to bargain.

20 In so holding, we do not suggest that the Union was obligated to provide the
21 Employer with advance notice of the names of the silent representatives who would be
22 attending the February 15, 2017 bargaining session. It is well-established that an
23 employer may not insist on knowing the names of bargaining team members in advance

1 of negotiations. Southern Worcester Regional Vocational School District, 377 Mass. at
2 904. Nor do we hold that the Union somehow acted in bad faith by not providing this
3 information to the School Committee.²¹ We hold only that under the circumstances of
4 this case, and the nature of the communications throughout the early stages of the
5 parties' negotiations, the Union would have been well-advised to clearly notify the
6 Employer that silent representatives would attend the February 15th session and the role
7 that they would play in bargaining. Having failed to do so, the Employer's refusal to
8 bargain on a single occasion was not a violation of the Law.

9 Conclusion

10 For the reasons set forth above, the CERB dismisses the Complaint.

11 **SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE S. WITTNER, CHAIR


KATHERINE G. LEV, CERB MEMBER


JOAN ACKERSTEIN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

²¹ Indeed, given our holding here, and the fact that the Employer never filed a prohibited practice charge against the Union, we need not address the Employer's allegations of Union bad faith at all.