MLRR Commentary *January-March 2014*

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Editor's Note:

We are delighted to welcome Leo Peloquin as a commentator for *Massachusetts Labor Relations Reporter*. Mr. Peloquin will be commenting on noteworthy decisions of the Department of Labor Relations throughout the year.

Leo Peloquin has over 25 years of experience representing employers and educational institutions in all aspects of labor and employment practice. He appears before state and federal trial and appellate courts in Massachusetts, administrative tribunals, and labor arbitrators. He has represented and advised employers in all aspects of collective bargaining, including contract negotiations, mediation, factfinding, arbitration, unfair labor practices, disciplinary matters, Civil Service Commission and Labor Relations Commission hearings and court litigation. Mr. Peloquin also defends public and private employers in discrimination and other employment litigation matters.

Mr. Peloquin is also one of the commentators for our *Massachusetts Civil Service Reporter*.

Being patient and engaged and agreeing to reasonable Union requests are the keys to an Employer proving that bargaining is at an impasse

Employers trying to meet a bargaining obligation are often confronted with unions whose goal is to obstruct. Even when that strategy is clear and a frustrated Employer implements the change, the Union files a prohibited practice charge and all too often prevails even in the face of the Employer's argument that the parties were at an impasse and, therefore, the change could be implemented. The losing Employer is ordered to restore the status quo and often assessed hefty damages. Then, in a much weaker position, the Employer has to go back to the bargaining table and try again.

Two recent DLR decisions show Employers the right and wrong ways to establish that bargaining was at an impasse.

In *University of Massachusetts Medical School and National Association of Government Employees*, 40 MLRR 21 (January 14, 2014), the Employer showed that achieving an impasse involves agreeing to reasonable requests by the Union and being patient. The case involved the layoff of six employees from the UMass Public Provider Reimbursement Unit, which performed and managed medical billing and related services on behalf of 11 state agencies. It started with a discussion on November 5, 2010 about a recently completed job classifications analysis called for by the parties' collective bargaining agreement. At the same meeting, UMass announced to the Union that the amount of work at the Chelsea Soldiers Home ("CSH") simply did not justify the size of the staff and five members of the bargaining unit were going to be laid off on January 7, 2011. The other employee to be laid off worked at another site, but the reason was the same. The positions being reduced were Public Provider Reimbursement Supervisors or PPR Assistants.

The parties held five bargaining sessions between November 30, 2010 and January 19, 2011. Most of the first session was spent on the Union questioning the need for layoffs and UMass pointing out the lack of work. The Union proposed that UMass delay the layoffs, arrange a Union meeting with affected employees on work time at the facilities affected, move work from another facility to the CSH, allow the affected employees to bump junior employees in other bargaining unit positions and/or solicit voluntary layoffs instead of laying off the targeted employees.

UMass agreed to delay the date of the layoffs, without even establishing a new date. And it arranged for a Union meeting with the affected employees. But it would not agree to move work from another location to the CSH because the computer system had a firewall that, for confidentiality reasons, did not allow the sharing of the information/work from one facility to another. It rejected the bumping proposal and a voluntary layoff procedure because there were numerous positions levels and locations.

At one of the earlier sessions, UMass agreed that the affected employees could not only apply for certain other available bargaining unit positions, but it extended the application period for some of the positions and agreed to re-train the employees if they were chosen to fill an alternative position.

By the last three bargaining sessions, the parties were going in circles. The Union pressed UMass to transfer work from other facilities to the CSH and UMass continued to say no. By the last session on January 19, 2011, the discussions had turned acrimonious, with the Union accusing UMass of "surface" bargaining and UMass responding that it was not going to let the Union hold up the layoffs indefinitely. The Union stated that, "the Union would do what it needed to do, and UMass should do what it needed to do." The Union did not request another meeting and none was scheduled.

On February 11, UMass emailed notice to the Union of its intention to send layoff notices (attached to the email) to the affected employees the following week and further advised which laid off employees would be appointed to other positions. The layoff no-

tices indicated that the new layoff date was March 18. The Union did not request another meeting to discuss layoffs nor raise the issue of layoffs again prior to March 18.

Two of the laid off employees were offered and accepted alternative positions, one full time and one part time. One employee declined an offer of temporary work. Ultimately, four employees were laid off.

The Union filed a charge against UMass, including that it had not bargained in good faith. The Hearing Officer applied the basic impasse principle, i.e., that impasse occurs only when both parties have negotiated in good faith on all bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked. She considered the bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement and the contemporaneous understanding of parties concerning the state of the negotiations.

In rejecting the Union's charge, she noted that UMass listened to proposals, asked questions, discussed the issues, explained its confusion and concerns and articulated its reasons for rejecting a proposal. Further, she gave UMass credit for moving the layoff date to allow more time for bargaining. She found it was compelling that a Union witness had described the last couple of bargaining sessions as a repetitive rehashing of the same issues, with a continuing "deterioration" of the conversation. She cited the Union's statement at last meeting that Union "would do what it needed to do, and UMass should do what it needed to do"

Employer's unilateral declaration of impasse holds no weight

In contrast to how UMass handled the impact bargaining on layoffs, the City of New Bedford was found to be far less patient, reasonable and conciliatory in *City of New Bedford and AFSCME Council 93, AFL-CIO, Local* 85, 39 MLRR 51, aff'd 40 MLRR 29 (March 31, 2014). And it paid a steep price.

The parties met four times to try and correct an FLSA violation caused by a 42 hour a week, eight week work cycle of 10 and 14 hour shifts for EMTs and Paramedics. At the fourth meeting, on January 4, 2010, the City gave the Union a "final offer" under which the work schedule would remain the same. The City told the Union if it did not accept the proposal, the City would implement a five day, 40 hour per week schedule, which complied with the FLSA. On January 14, the Union responded with a proposal for the current work schedule but with increased benefits. On January 25, the City rejected the Union's proposal and asserted that the Union had failed to vote on the City's final offer. The notice from the City also declared that the parties were at an impasse and the City intended to implement the 40 hour schedule.

Ironically, the Union relented and, on February 4, reported to the City that it accepted the final offer from January 4. But, for the next three months, the Union was told that the now agreed-upon work schedule was being reviewed by the Mayor and subject to his final approval. Finally, in late May, the City notified the Union that it could not offer the 42-hour week, eight week cycle because of it was too costly in the wake of the City experiencing a cut in state aid. The City announced that it had decided to implement the 40-hour week schedule, but it offered to impact bargain about it.

The CERB upheld the Hearing Officer's ruling that the parties had not reached the impasse that the City had declared on January 25. It noted that the Union's counterproposal to the City's final offer showed that the Union wanted to continue to bargain and that the Union ultimately accepted the City's final offer and a City representative informed union representatives that the ratified proposal had been submitted to the Mayor for review. It also cited the fact that, for months after it declared an impasse, the City itself was advising the Union that the Union-ratified proposal was on the Mayor's desk; this waiting period itself provided an ample time period for further negotiations.

The CERB determined that the City's offer in June, 2010 to bargain about the *impact* of the change to a 40 hour work week was too little to late because, despite the City's declaration, the parties had not reached an impasse on the *decision* to change the work hours. It ordered the City to restore the prior work schedule and make the employees whole and not to change it until it had bargained over the *decision* to resolution or impasse.

Remedy is not retroactive to the date that an Employer exercises a management right to make a decision even when the Employer fails to meet an impact bargaining obligation

The Employer lost on the impact bargaining issue but the CERB gave it some measure of relief on the remedy in *Board of Higher Education and AFSCME, Council 93, Local 1067*, 39 MLRR 50, aff'd in part, 40 MLRR 25 (February 14, 2014). The remedy was limited because the Employer had a management right to make the decision at issue.

The Board abolished the bargaining unit title of Science Library Tech II ("Tech II") and transferred the duties to a newly created, non-bargaining unit job called Science Library Technician ("SLT"). A charge that the Employer failed to bargain over the decision was dismissed at the investigation stage based on language in the CBA's Management Right clause under which the Employer had the right to transfer work. (No provision of the CBA should be construed to "restrain the College from the management of its operations, including but not limited to…determin[ing] whether such work shall be performed by bargaining unit employees or others."). But the CERB upheld the Hearing Officer's decision that required the the Board to bargain to agreement or impasse over the impacts of the decision to transfer the bargaining unit work.

As a remedy, the Hearing Officer had ordered the Employer to restore the work to the bargaining unit and to make all affected employees whole for any losses suffered from the date the new job title was created until the impact bargaining obligation was fulfilled. But the CERB agreed with the Board that the Hearing Officer got the remedy wrong because ordering the Board to restore Tech II job duties to the bargaining unit and pay retroactive damages nullified the Board's management right to decide that

the work would be done outside of the bargaining unit. Therefore, CERB ruled:

> If, however, as in this case, the bargaining obligation involves only the impacts of a decision to alter a mandatory subject of bargaining, but not the decision itself, the appropriate remedy must strike a balance between the right of management to carry out its lawful decision and the right of an employee organization to have meaningful input on impact issues while some aspects of the status quo are maintained….Where the effects of an employer's decision are certain, and the union's efforts to impact bargain cannot substantially change, but only ameliorate, those effects, the Board is guided by *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). *Under this standard, employers are only required to make affected employees whole during the period of impact bargaining.*

(Emphasis supplied).

Cutting positions is not a "level of services" decision when the work is shifted to non-bargaining unit employees

In *Town of Weymouth and AFSCME Council 93*, 40 MLRR 2, aff'd 40 MLRR 27 (March 10, 2014), the Town contended that it had no obligation to bargain over the decision to lay off school crossing guards, whose job title was "traffic supervisor," in June 2010 because it was a level of services decision. The problem was that the School Committee subsequently hired non-bargaining unit "crossing guards" to do the work. Although the Town argued that the School Committee was the proper respondent in the case, the CERB upheld the Hearing Officer's ruling that section 1 of Chapter 150E made the Town and Committee a single employing entity who shared responsibility when bargaining obligations were not met. Further, the CERB found that the decision to hire non-bargaining unit employees to do the work transformed what might have initially been a level of services decision to a decision that required bargaining because the work was not eliminated but rather transferred. The remedy included hiring back all of the laid off employees, with back pay. The Town recently announced that it would comply with the decision and not appeal further.

It's not the name of the position, but the job duties at issue that determine a unilateral transfer of bargaining unit work

As in *Town of Weymouth,* a Hearing Officer took the Town of Cohasset to task for transferring duties to a non-bargaining unit position with a different name than any position in the bargaining unit. *Town of Cohasset and Cohasset Permanent Firefighters, Local 2804, IAFF*, 40 MLRR 28 (March 14, 2014). In this instance, the Town created the position of Assistant Fire Chief and filled it with a Captain from the bargaining unit who continued to perform many of the same job duties he had performed as Captain. She ordered the work returned to the bargaining unit and the unit to be made whole.

Cell phone policy that goes beyond safety considerations must be bargained

Does a Town have a managerial right, not subject to bargaining, to control personal and Town cell phone use during work hours? The answer is a resounding "no" when the policy goes beyond purely safety considerations. *Town of Plymouth and AFSCME Council 93*, 40 MLRR 7, aff'd 40 MLRR 23 (January 30, 2014). Citing a balancing test that the DLR had endorsed for a cell phone policy that was unsuccessfully challenged by a correctional officers Union in a 2002 decision, the Town asserted that its core managerial interest in preventing deadly accidents caused by distracted employees greatly outweighed the union's right to bargain over implementation of the policy. CERB distinguished the correctional officers case on the basis that it involved specialized safety concerns inherent in prison work. Further, CERB noted that Plymouth's policy went well beyond addressing safety considerations. Besides prohibiting cell phone use while operating Town vehicles or equipment, it disallowed the possession or use of cameras/camera phones in the workplace without specific authorization, limited the use of Town-issued phones for personal business, and limited the making or taking of personal calls at work, with a violation of any part of the policy carrying with it discipline, up to and including discharge. CERB wrote, "Under these circumstances, the Board declines to parse portions of the Cell Phone Policy or to separately analyze fragments, such as the ban on use of Town-owned cell phones while operating Town-owned vehicles, to determine whether application of the balancing test would require a different result had the Town issued a policy more limited in scope and targeted to these safety considerations."

Commonwealth agency's obligation to seek funding for a newly negotiated collective bargaining agreement is the same as that of a municipality

A Hearing Officer rejected the Commonwealth's argument that, as a matter of law, it was not held to the same standard as cities and towns when it comes to seeking funding—in this case, from the Legislature—for a new collective bargaining agreement, but he noted that the Governor always retains the power to veto an act of the Legislature. *Commonwealth of Massachusetts/Commissioner of Administration and Finance and Massachusetts Correction Officers Federated Union and Coalition of Public Safety*, 40 MLRR 23 (January 31, 2014). The new CBAs were with bargaining units in Administration and Finance. The funding request letter to the Legislature from the Secretary of A & F read in pertinent part:

> These line items provide for collective bargaining salary increases similar to contracts that were not funded during calendar year 2009. We have worked with the MCOFU and COPS leadership to reach agreement on contracts similar to those signed by other unions for this fiscal year and have failed to reach an agreement. Funding of these items will trigger a reopener in collective agreements that the Legislature recently did fund only because they contained delays in the salary increases.

The Legislature rejected the funding "request." The Hearing Officer cited the long standing principle that an Employer is obligated to to support and take all necessary steps to secure funding for the agreement and not just perform the ministerial act of submitting a funding article to the Legislature. He found that the letter did not meet the standard because:

- It failed to show any support for or attempts to persuade the Legislature fund the agreement.
- It actually highlighted why the Legislature should reject the Agreement because it reminded the Legislature that the Commissioner had failed in his attempt to get the Unions to approve salary increases similar to the Contracts the Commonwealth had with other unions, and warned that approving of the funding would trigger a reopener clause and would require new rounds of negotiation with other unions.

The Commonwealth argued that the obligation under Section 7(b) of Chapter 150E to sponsor and support a negotiated CBA didn't apply to the Commonwealth because it infringed on the Governor's role as the "supreme executive magistrate" of the Commonwealth. The Hearing Officer found that there was no infringement because the Governor could simply veto the legislation authorizing the funding. The Hearing Officer also rejected the argument that section 3 of MGL Chapter 29 required that the letter contain the type of information it contained, noting that the statute required that fiscal information be provided but did not mandate information about the parties' bargaining history, future bargaining obligations or previous funding requests.

The Union tried, unsuccessfully, to convince the Hearing Officer that it should get back wages called for by the negotiated CBA as part of the remedy. But the remedy ordered was the standard one of requiring the Commissioner to make a new funding request that met the legal standard under Chapter 150E. ■