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Bargaining Obligations

Employers must provide unions with notice and an opportunity to bargain before implementing a change to terms and conditions of employment and cannot declare impasse and implement a change if the union has requested to continue bargaining

A public employer may not make a unilateral change to established terms and conditions of employment without providing the employees' exclusive representative with advance notice **and** an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment established through a collective bargaining agreement as well as conditions established through custom and past practice. *City of Boston*, 16 MLC 1429 (December 19, 1989).

Thus, in *Commonwealth of Massachusetts*, 50 MLC 87 (November 6, 2023), the CERB found that the Commonwealth of Massachusetts, acting through the Massachusetts Emergency Management Agency ("MEMA"), violated the Law when it revoked an employee's stand-by pay without giving the Union prior notice and an opportunity to bargain to resolution or impasse over its decision and the impacts of its decision on the employee's terms and conditions of employment.

Even where an employer provides the union with advance notice and an opportunity to bargain over its decision to change terms and conditions of employment, the employer is required to continue bargaining with the union until the parties reach resolution or impasse. The CERB considers a number of factors in determining whether the parties are at impasse, including bargaining history, the parties' good faith in negotiations, the length of the negotiations, the importance of the issues in disagreement, the contemporaneous understanding of the parties as to the state of negotiations, the likelihood of further movement by either party, and whether the parties have exhausted all possibility of compromise. *New Bedford School Committee*, 8 MLC 1472 (November 6, 1981), *aff'd sub nom. School Committee of New Bedford* v. *Labor Relations Commission*, 15 Mass. App. Ct. 172 (1983). Impasse does not exist where one of the parties indicates that it wishes to continue bargaining and that its position is flexible. *City of Worcester*, 39 MLC 271 (March 29, 2013).

In *Essex North Shore Agricultural School District*, 50 MLC 76 (October 20, 2023), the CERB affirmed a Hearing Officer decision finding that the District unilaterally changed employees' summer work schedules and required them to use paid or unpaid leave on certain Fridays without first bargaining to resolution or impasse with the Union. After the District notified the Union of its intent to close on Fridays and require employees to use paid or unpaid leave, the Union requested to bargain over the schedule changes and whether the employees would be mandated to use paid leave on Fridays. The Union also expressed its desire to enter into a memorandum of understanding ("MOU") regarding the changes. The Union objected to several provisions of the District's draft MOU, including the date when the schedule changes would take effect. The District responded that it would change the implementation date and asked the Union to confirm whether the MOU was otherwise okay. The Union did not respond. Six days later, the District announced its plan to the bargaining unit. The CERB rejected the District's claim that the parties had reached impasse where the District had time to continue bargaining but artificially shortened bargaining by presenting its plan as a fait accompli after only one meeting and a few days of bargaining via email, despite the Union's repeatedly expressed interest in continuing to bargain over the details of the District's decision to close on Fridays on three separate occasions, including over whether employees would be mandated to use paid leave. The CERB also rejected the District's claim that Union waived its right to continued bargaining after it failed to respond to District's request that the Union confirm whether its draft MOU was okay. The CERB concluded that although the Union did not respond, it had previously requested on multiple occasions to continue to bargain, particularly over the paid leave issue, and to enter into an MOU. Thus, the parties were not at impasse when, less than six days later, the District announced its plan to the bargaining unit without warning and without suggesting further bargaining or preparing a revised MOU that incorporated its proposed modifications.

In contrast, in *City of Methuen*, 50 MLC 60 (October 5, 2023), a hearing officer held that the City was not required to provide the Union with notice and an opportunity to bargain to resolution or impasse before rescinding an MOU that provided dispatchers additional leave and scheduling accommodations during the COVID-19 pandemic because the parties' bargaining history demonstrated that the Union and the City had agreed that the Police Chief could rescind the MOU if/when he deemed it necessary. In *Springfield School Committee*, 50 MLC 64 (October 20, 2023), a hearing officer held that the School Committee was not required to provide the Union with notice and an opportunity to bargain when it prohibited Union representatives from conducting "walkabouts" during the school day seeking impromptu meetings with teachers. Although the Union claimed that there was a long-standing past practice of allowing Union representatives to do so, the hearing officer credited the former Union president's testimony that no such practice existed and, each time a Union representative conducted such a walkabout during the new Union president's

tenure, the superintendent warned the Union against this conduct because it disrupted teaching and learning for the students.

Interference, Restraint or Coercion

Although motivation and actual effect are not material, alleged interference with employees' protected activity must be supported by credible evidence and the DLR will not consider employees' unwillingness to testify, on its own, as evidence of unlawful coercion

Section 2 of the Law provides that employees have the right to "form, join or assist any employee organization for the purpose of bargaining collectively through representatives of their choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion." A public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to interfere with, restrain, or coerce employees in the exercise of their rights under Section 2 of the Law. The Law prohibits any employer action, regardless of motivation, that reasonably could have a chilling effect on the exercise of employee rights, including the expression of employer anger, criticism, or ridicule directed to an employee's protected activity. *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (March 20, 1989).

In *City of Everett*, 50 MLC 85 (October 27, 2023), the City admitted that the Fire Chief unlawfully interfered with, restrained and coerced bargaining unit members in the exercise of their Section 2 rights when he loudly denigrated the Union in front of bargaining unit members by blaming the Union president and the Union's labor counsel for a probationary employee's termination. However, in *Commonwealth of Massachusetts*, 50 MLC 97 (November 27, 2023), the hearing officer dismissed a complaint alleging that the Employer engaged in unlawful interference by telling bargaining unit members supporting a coworker during termination proceedings to "stay out of it," concluding that the Union witness's testimony in this regard was not credible. The hearing officer also rejected the Union's argument that the bargaining unit employees' refusal to testify during the grievance procedure should, standing alone, sufficiently support a finding of unlawful interference, restraint, or coercion in violation of the Law.

Strikes

CERB finds insufficient evidence that Union President induced, encouraged, or condoned strike

Section 9A(a) of the Law prohibits public employees and employee organizations from engaging in, inducing, encouraging, or condoning any strike, work stoppage, slowdown, or withholding of services. In *Andover Education Association*, 50 MLC 94 (November 9, 2023), the CERB concluded that the Union was about to engage in an unlawful strike after taking a strike vote on November 9, 2023. The CERB dismissed the School Committee's petition with respect to the Union President, however, because the only evidence the School Committee submitted in support of its allegation against the Union President was a grainy news photo that did not clearly show the Union President participating. ■

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BARGAINING OBLIGATION

Hearing Officer Finds That Springfield School Committee Did Not Violate Law When It Ordered Union Representatives To Meet With Bargaining Unit Members In The Teachers' Lunchroom Instead Of Freely Walking Around The Schools To Speak With Unit Members In Any Area Of Their Choosing

In *Springfield School Committee*, 50 MLC 64 (October 20, 2023), Hearing Officer Kathleen Goodberlet found that the Springfield School Committee ("School Committee") did not violate the Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E when it changed the manner and location in which Springfield Education Association ("Union") representatives may meet with bargaining unit members.

The Union meetings at issue in this case involve unscheduled, informal, school visits whereby the current Union President would go around schools during the school day to meet with teachers in any area of their choosing. None of the meetings at issue were pre-arranged or staff meetings. The Union argued that a long-standing practice existed whereby Union representatives would sign in at the school's front desk and then be granted unlimited access to all areas at the schools before, during or after hours. It further argued that Union representatives have the right to walk throughout the school to speak with bargaining unit members in any area of their choosing and that included unlimited access to those members during their lunch period or classroom to discuss Union business. The Union claimed that the School Committee changed this practice without bargaining when it ordered Union representatives to meet with their members in the teachers' lunchroom and not any other areas.

Hearing Officer Goodberlet find no evidence that would indicate that there was a binding practice whereby the Union representatives freely walked throughout schools during the school day looking to meet with members in their classrooms or another area of their choosing regarding Union business. The evidence in fact showed that, for at least two decades, the former Union President would only walk freely throughout the schools before or after the school day to meet with teachers, but not during the school day.

Hearing Officer Goodberlet rejected the Union's argument that the current Union President's visits to the schools during the school day in a 4-month period whereby she met with teachers in their classrooms and other areas established a binding practice. First, she found that the School Superintendent objected to that practice because it disrupted learning for students and directed the current Union President to meet with members in the teachers' lunchroom. In addition, she found that a 4-month practice of such visits was not long enough to show that it is a binding practice. She noted that the practice created by the former Union President in the past two decades was more relevant to her past practice analysis.

Hearing Officer Goodberlet also dismissed the Union's allegation that the School Committee interfered with the employee's protected rights when the School Superintendent and School Principals directed Union representatives to meet with teachers during the school day in the teachers' room/lunchroom. She found no evidence that would indicate that the school officials imposed those requirements to discriminate against the Union or unit members for exercising their rights under the Law.

UNLAWFUL STRIKES

Andover Teachers Go On Strike Again Less Than Four (4) Months After A CERB Order Requiring Andover Teachers To Cease And Desist From Further Inducing, Encouraging or Condoning Teacher Strikes

As you may recall from our commentary back in 2020, the Commonwealth Employment Relations Board ("CERB") held that the Andover Teachers engaged in an unlawful strike by refusing to participate in mandatory annual professional development training inside of the classroom in defiance of the Superintendent's directives. In that decision, the Andover Teachers were ordered by the CERB to cease and desist from engaging in any future strikes. Clearly, that decision did not deter them from engaging in an unlawful strike less than (4) years later as evidenced by the following CERB decision.

In *Andover School Committee*, 50 MLC 94 (November 9, 2023), the Andover School Committee ("School Committee") filed a petition with the Department of Labor Relations ("DLR") for a strike investigation because it had reason to believe that the Andover Teachers intended to hold a strike vote for two (2) of their bargaining units on November 9, 2023, and planned to go on strike the following day. After holding a strike investigation, the CERB issued a decision on November 9 ordering the Andover Teachers to cease and desist from further engaging in, inducing, encouraging, or condoning a strike. In its decision, the CERB found undisputed evidence that the Andover Teachers were planning a strike and had in fact held a strike vote on November 9 to go on strike immediately.

The Andover Teachers went on strike on November 10 in violation of the CERB Order. The CERB immediately sought to enforce its Order by seeking a temporary injunction in Superior Court, which was granted by the Court. In addition, the Superior Court judge set an initial fine of $50,000 (https://www.cbsnews.com/boston/news/judge-slaps-striking-andover-teachers-with-50) for the Andover Teachers for their unlawful conduct and the fine was scheduled to increase $10,000 each additional day they continued to defy the Court Order.

Despite several efforts taken by School Districts and the DLR to deter and/or prevent unlawful strikes by teachers, including by taking appropriate legal action in court, the Teachers Unions re-

main undeterred. Worse yet, the Teachers' Unions continue with their efforts to try to repeal the law that currently prohibits public employees from engaging in strikes. *See* MGL c. 150E § 9(a) ("No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.") Currently, there is a pending bill (H. 1845/S. 1217) being considered by the state legislature that would allow public employees (excluding public safety personnel) to strike after six (6) months of unsuccessful negotiations with their employers. ■