

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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| In the Matter of | * | |
| | * | |
| TOWN OF WINCHESTER | * | Case No. MUP-13-3289 |
| | * | |
| and | * | Date Issued: June 1, 2015 |
| | * | |
| SERVICE EMPLOYEES INTERNATIONAL | * | |
| UNION, LOCAL 888 | * | |
| | * | |

Hearing Officer:

Zachary See, Esq.

Appearances:

| | | |
|-------------------------|---|---|
| John Magner, Esq. | - | Representing the Service Employees International Union, Local 888 |
| Laurence Donoghue, Esq. | - | Representing the Town of Winchester |

HEARING OFFICER DECISION

1 The issue in this case is whether the Town of Winchester (Employer or Town)
2 violated Section 10(a)(5) and derivatively, 10(a)(1) of M.G.L. c. 150E (the Law) by
3 failing to bargain over the impacts of unilaterally creating and filling a Service
4 Employees International Union, Local 888 (SEIU or Union) bargaining unit position. For
5 the reasons explained below, I find that the Employer did not violate the Law by creating
6 and filling the Principal Clerk II (PC II) bargaining unit position without providing the

1 Union with notice and an opportunity to bargain to resolution or impasse over impacts of
2 that decision on terms and conditions of employment.

3 Statement of the Case

4 On November 21, 2013, the Union filed a Charge of Prohibited Practice (Charge)
5 with the Department of Labor Relations (DLR), alleging that the Employer violated
6 Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith. A duly-
7 designated DLR investigator investigated the Charge and issued a Complaint of
8 Prohibited Practice on June 30, 2014, alleging that the Employer failed to bargain in
9 good faith by creating and filling the PC II position without giving the Union prior notice
10 and an opportunity to bargain to resolution or impasse over its impacts on employee
11 wages, hours, and other terms and conditions of employment. The Employer filed its
12 Answer to the Complaint on December 11, 2014.

13 I conducted a hearing on April 15, 2015, at which both parties had an opportunity
14 to be heard, to examine witnesses and to introduce evidence. The Union and the
15 Employer filed their post-hearing briefs by May 19, 2015. Based on the record, which
16 includes witness testimony and documentary exhibits, and in consideration of the
17 parties' arguments, I make the following findings of fact and render the following
18 opinion.

19 Stipulations of Fact

20 1. The Town is a public employer within the meaning of Section 1 of the Law.

1 The most senior applicant who meets the job description and qualifications
2 shall receive the promotion.

3 Article XVI, "Job Security/Transfers/Assignments," of the Agreement includes the
4 following language:

5 It is recognized that the final decision of assignments shall rest solely with
6 the employer whose decision shall be final and binding on all parties and
7 not subject to the grievance and arbitration procedure. It is further
8 recognized that employees may be temporarily assigned to other
9 assignments when the needs of the Town require said temporary
10 assignments.

11 The Town employed three bargaining unit employees in the Office of the
12 Assessor prior to May 2013: Alice Alford (Alford), a full-time PC II (grade S-27); Gina
13 Capone (Capone), a full-time PC II (grade S-27); and Beth O'Connell (O'Connell), a
14 part-time (19.5 hours) clerk (grade S-25). In May 2013, Alford retired after
15 approximately forty three years of service with the Town. Capone continued to work full-
16 time in a PC II position and O'Connell continued in her part-time position working
17 approximately 19.5 hours a week. O'Connell occasionally worked full-time to fill in when
18 Capone was out of the office on leave before and after May 2013.

19 On September 20, 2013, Union Regional Representative Bill Storella (Storella)
20 wrote Town Manager Richard Howard (Howard) requesting the status of the Senior
21 Records Clerk (grade S-27) position in the Assessor's office.¹ Storella wrote:

22 It is my understanding that there have been various vacancies in that
23 office since May of 2013. Please inform [the Union] of the Town's
24 intentions for the Assessor's office. If there are plans to deviate from the

¹ The parties refer to the PC-II (grade S-27) bargaining unit position as "Senior Records Clerk," and "Administrative Secretary II."

1 current structure, the Union reserves their right to bargain over any
2 changes of working conditions under Massachusetts General Law 150E.

3 On September 27, 2013, Howard wrote to Storella:

4 The Assessor will be filling the current vacant position on a temporary
5 basis from within the department. He will also be filling the part-time
6 position on a similar basis. Over the course of the coming months, we will
7 be evaluating the operations within this department with the possibility of
8 restructuring the positions. We will be glad to keep you updated on our
9 progress in this matter.

10 Howard and Storella also spoke on the phone around this time and reiterated their
11 written positions.

12 On October 10, 2013, the Town approved the temporary appointment of Alford to
13 the PC II position (grade S-27) on a temporary status up to 12 hours per week.
14 Capone's hours did not change as a result of Alford's appointment and there were no
15 layoffs in the bargaining unit as a result of Alford's appointment. There is no evidence
16 that Alford's re-hire impacted O'Connell's work hours.²

17 Opinion

18 A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of
19 the Law when it unilaterally changes an existing condition of employment or implements
20 a new condition of employment that involves a mandatory subject of bargaining without
21 first giving its employees' exclusive collective bargaining representative notice and an
22 opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v.

² The parties did not submit a joint exhibit 6 listed as "appointment letter of Beth O'Connell dated October 9, 2013."

1 Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of
2 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). Decisions about the
3 nature and level of services a public employer provides lie within the exclusive
4 prerogative of management and are not mandatory subjects of bargaining.
5 Commonwealth of Massachusetts, 25 MLC 201, 205, SUP-4075 (June 4, 1999).

6 There is no dispute that the Town has a right to staff the Assessor's Office.
7 Although the Town's staffing decision does not constitute a mandatory subject of
8 bargaining, the Law requires the Town to negotiate with the Union over the impacts of
9 that decision on employees' terms and conditions of employment. School Committee of
10 Newton, 388 Mass. at 564; see also Secretary of Administration & Finance v.
11 Commonwealth Employment Relations Board (CERB), 74 Mass. App. Ct. 91, 96 (2009)
12 (stating "[w]here a non-negotiable decision may be implemented in various ways, the
13 public employer may be required to engage in impact bargaining with the union.")
14 However, where there is no evidence that a decision impacts terms and conditions of
15 employment of bargaining unit members, there is no impact bargaining duty on the
16 employer. Chief Justice for Administration & Management of Trial Court v. CERB, 79
17 Mass. App. Ct. 374, 386 (2011) (finding that the employer was not required to engage in
18 impact bargaining with the union before hiring nonunion per diem staff to address staff
19 shortage since there was no evidence that union members had lost work as a result of
20 employer's decision).

1 The issue here is whether the Town had an obligation to bargain over impacts of
2 its staffing decision on bargaining unit member's terms and conditions of employment.

3 The Union argues that the Town violated the Law by not providing an opportunity
4 to bargain over the impact of the Town's staffing decision. The Union further argues that
5 the hiring back of a retired employee had the clear effect of taking away posting and
6 bidding rights and overtime opportunities from other Union members.

7 The Town argues that the Town had the statutory and contractual right to decide
8 to hire another bargaining unit member in the Assessor's Office, and that the Town had
9 no further obligation to bargain because the Union did not identify any impacts on
10 bargaining unit members' wages, hours, or other terms and conditions of employment
11 as a result of the Town's decision to re-hire Alford.

12 I agree with the Town. The Union did not show that bargaining unit members'
13 terms and conditions of employment were impacted by the Town's decision to re-hire
14 Alford. The Union's witness, Capone, testified that her work hours in the Assessor's
15 Office did not change as a result of Alford's re-hire. The Union did not show that Alford's
16 re-hire impacted O'Connell's work hours or any layoffs in the bargaining unit. The Union
17 provided no evidence regarding Alford's seniority when the Town re-hired her in
18 October 2013 and no evidence identifying how her re-hire impacted other bargaining
19 unit members. The Union failed to show that the decision to re-hire Alford changed any
20 terms and conditions of employment obligating the Town to bargain.

1 The Union argued for the first time in its post-hearing brief that hiring back a
2 retired employee took away posting and bidding rights and overtime opportunities from
3 other Union members. However, the Union presented no evidence to show how the
4 Town's decision to re-hire Alford impacted posting and bidding rights and overtime
5 opportunities of other members. While the Union argues that through impact bargaining,
6 the Union could have influenced the hiring process, length of time the position would be
7 filled, scope of work performed by the person hired, rate of pay, amount of extra hours
8 the person hired would be allowed to work, and "many other things," the Union provided
9 no evidence to show how the decision to re-hire Alford impacted any of these terms and
10 conditions of employment.

11 The Town correctly states that the Union bears the burden of affirmatively
12 proving the impact of an employer's change in staffing and that the DLR will not infer
13 such an impact based solely on evidence that staffing has changed. Town of Seekonk,
14 14 MLC 1725, 1730-31, MUP-6131 (May 10, 1988). Hypothetical impacts do not justify
15 impact bargaining. See Chief Justice for Administration & Management of Trial Court v.
16 CERB, 79 Mass. App. Ct. at 387 (finding that a potential erosion of bargaining unit work
17 does not justify impact bargaining where no bargaining unit members lost work as a
18 result of employer's decision to hire retirees to perform work that would've otherwise
19 gone undone). Here, there is no dispute that the Town had the right to staff the Office,
20 and there is no evidence of how that decision impacted bargaining unit members' terms

1 and conditions of employment. Therefore, the Union did not prove that the employer
2 had an impact bargaining duty regarding its decision to re-hire Alford.

3 Conclusion

4 Based on the record and for the reasons stated above, I conclude that the Town
5 did not violate Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by failing to
6 provide the Union notice and an opportunity to bargain over impacts of its staffing
7 decision on terms and conditions of bargaining unit members' employment.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



ZACHARY T. SEE, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, 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.