The Municipal Manager’s Guide to

BARGAINING OVER LAYOFFS AND OTHER COVID-19 BUDGET REDUCTIONS

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INTRODUCTION

At the time this Guide is being written, the economic projections for Massachusetts, the nation and the world are extremely bleak. According to an article by Greg Ryan, the Law and Money Reporter, in the Boston Business Journal on April 14, 2020, Massachusetts will lose an estimated 570,000 jobs from April through June because of the coronavirus pandemic, according to new projections from the Massachusetts Taxpayers Foundation, pushing the state unemployment rate to close to 18%. Those layoffs would be on top of those that took place statewide in March, when the shutdown of restaurants, bars and other non-essential businesses started. The Foundation estimated the total number of unemployed would reach 677,000.

Municipalities will not be spared from the impact of these economic downturns. Compared with a January benchmark, the foundation forecasts a 14% decline in tax revenue for fiscal year 2021, to $26.8 billion. The declines in sales and corporate tax collections, specifically, are steeper — over 20%, in both cases — while capital gains taxes are projected to fall by 30%. For cities and towns that in addition to state “Cherry Sheets” rely on locally-imposed charges that depend on tourists, for example, the reduction in available funds could be even more significant.

The precise impact all this will have on the state’s revenue and therefore its budget and ability to assist local communities is far from certain. But, clearly, the result will mean less money and will force municipalities to implement substantial budget cuts in the next Fiscal Year, probably starting in July, with very little advance notice. Timing will be made even more difficult with most Town meetings being delayed. With so much of each municipal department’s budget assigned to personnel, simply cutting office supplies, training, travel or other “non-essential” line items will not be sufficient. Layoffs will likely be widespread.

A review of cases decided by this state’s Labor Relations Commission (now Commonwealth Employee Relations Board – CERB - and Department of Labor Relations - DLR) and Civil Service Commission (CSC) during previous financial crises is informative - especially of what a city or town SHOULD NOT DO. (In most cases, this manual will refer to any of the labor relations agencies as the “DLR” for sake of clarity.) Unless a municipal employer properly implements any layoffs, they could be faced with staggering costs associated with re-hiring laid off workers. This would have the domino effect of having to lay off far more employees and crippling municipal services at a time when a city or town could least afford to do so. And with a “rule of thumb” indicating that after factoring in the cost of unemployment, vacation and sick leave buy back, severance pay and other costs, often a municipality must lay off two workers to achieve the cost-saving of one position, the need for careful planning and adhering to the DLR’s impact bargaining rules and CS layoff procedures is apparent.

The purpose of this Guide is to provide municipal officials with suggestions as to how to implement layoffs or other reductions in services without violating the state’s labor laws. For ease of reading for non-lawyers, I have put in bold italics summaries of applicable principles, followed by the legalese backup with cases and statutes for lawyers.

Please keep in mind: no “legal advice” is being offered. Consultation with municipal labor counsel is strongly recommended.
ABOUT THE AUTHOR

Atty. John M. (Jack) Collins, of Martha’s Vineyard, Massachusetts graduated from Holy Cross College and Boston College Law School. Jack is a former Asst. District Attorney in Worcester, Massachusetts and has served as Special Labor Counsel or Town Counsel for dozens of Massachusetts cities and towns. He has negotiated hundreds of collective bargaining agreements and handled all manner of personnel issues and grievances, complaints and court actions. He served as General Counsel for the Massachusetts Chiefs of Police Association and its research and training affiliate, the Municipal Police Institute, for over 40 years. In that capacity he wrote numerous Amicus Briefs to the Supreme Judicial Court. He is the Legal Advisor for the Martha’s Vineyard Law Enforcement Council and is the General Counsel for the Dukes County Sheriff’s Office. He authors the Collective Bargaining chapter in Massachusetts Continuing Legal Education’s Municipal Law Manual. Jack is a past Chair of the Legal Officers Section of the International Association of Chiefs of Police (IACP) and co-chairs the Section’s Training Committee. He serves on the IACP’s Policy Group that is responsible for issuing sample Policies & Procedures for municipal police departments, including policies for Covid-19. He has been a frequent lecturer at seminars across the US and Canada in police, fire, management rights, labor relations, internal investigations and discipline, municipal human resources and administrative issues. He served on the Shrewsbury Board of Health for nearly 40 years, much of the time as its Chair. He is counsel for the Fire Chiefs Association of Massachusetts. He also serves as an expert witness, primarily in Federal Civil Rights cases involving police policies, procedures and investigations. He often serves as Special Town Counsel to assist local counsel with more complex disciplinary or other personnel-related cases. A private pilot, Jack keeps his Cessna Skylane in his hangar at the Worcester Airport in the winter and at Martha’s Vineyard Airport in the Spring-Fall each year. Even though Jack keeps the score card, his wife, Grace, regularly posts a lower golf score than he does!

Jack volunteers as a Reserve Police Officer one day a week in the Summer for the Chilmark Police Department on Martha’s Vineyard. He was appointed Chief of Police in Edgartown on the Vineyard several years ago while helping that community evaluate its department and select a new chief. He has taught for the Massachusetts Municipal Police Training Committee at recruit academies and in-service training programs on numerous topics for decades.

Jack has written hundreds of articles for local, national and international publications, and more than a dozen training manuals on such topics as labor relations, collective bargaining, human resources (ADA, FLSA, FMLA, etc.), civil liability, police and fire rules, regulations and policies, discipline, internal investigations, all forms of discrimination, and recruitment and hiring.
DISCLAIMER

This manual is an effort to provide municipal managers, attorneys, department heads and human resources staff members with some general guidance on how to plan for and implement reductions in staff resulting from the economic impact of the current Covid-19 State of Emergency. As with any such information, the rapidly evolving nature of the subject matter – and often daily updates or law changes - means that some suggestions, case citations and conclusions will be out of date. While municipal attorneys will be expected to verify the continuing relevance of all cases, laws and regulations cited, other municipal officials, especially department heads, should make it a point to proceed only after consultation with municipal labor counsel.

The numerous “recommendations” that appear throughout this manual reflect what I hope will be taken as common-sense suggestions that may help alert readers to areas requiring attention. They are not “legal advice.” Like so much of this manual, they are gleaned from discussions with others as well as my experience in giving advice to public safety and municipal executives over the years.
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EXECUTIVE SUMMARY

Under Massachusetts law, a public employer is required to give to employee bargaining representatives (unions) both notice and an opportunity to request bargaining before unilaterally establishing or changing policies which impact mandatory subjects of bargaining. Only when such bargaining duty is fulfilled, or when the union indicates that it does not want to bargain by either explicitly indicating so or by inaction (waiver), is the employer free to implement its proposed change. The bargaining obligation is satisfied when the matter in dispute is negotiated to the point of resolution or impasse.

The level of services a municipal employer will provide in an exclusive managerial prerogative. A vote by a Town Meeting or City Council to reduce the number of employees in any given department is a decision that is not subject to any requirement for bargaining over the decision with the union but only the impact on the bargaining unit before implementing such decision. However, where a budget does not effectively mandate the reduction in the number of employees, such as by specifying a number of positions funded, but simply reduces the amount of funding for a given department, both the decision and impact of that decision may be subject to mid-term bargaining if a timely demand to do so is made by the union. How a reduction in positions will be accomplished, such as by a combination of retirements and layoffs, as well as recall rights, inverse seniority (last hired, first fired) for layoffs, severance payments and bumping rights are often items the union will want to discuss.

Where a budget has been cut and the municipal employer seeks to live within any resulting financial constraints, layoffs may be seen as one – and possibly the only - way of achieving that. In that case, a public employer must refrain from reducing its work force by means of a layoff until it has bargained to resolution or impasse about alternative means of achieving the reduction in force and the resulting impacts on conditions of employment. As part of this bargaining obligation, where possible the employer must give notice of a layoff to the union representing its employees far enough in advance of the layoff decision to provide the union with an opportunity to bargain. Boston School Committee, 10 MLC 1501, 1510 (1984); see generally, School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 566-67 (1983) (The decision to achieve a reduction in force by means of a layoff, as well as the timing of a layoff decision and the number and identity of employees to lay off, is a mandatory subject of bargaining. ) With the compressed timelines involved this year as a result of delaying Town Meetings, for example, the requirement to defer implementation may be adjusted. So long as the employer provides the union with as much advance notice as is reasonable, the DLR and courts are likely to uphold a decision to insist on a compressed negotiation timeline with multiple meetings over a matter of days or weeks, and not months, for example. Given the facts of a given situation, it may even be possible for management to impose a deadline for implementation of the layoffs while bargaining continues over the impacts of that action.
To determine whether impasse has been reached, the DLR considers the following factors: 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 the parties concerning the state of the negotiations.\(^4\) The DLR will determine that the parties have reached impasse in negotiations only where both parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked.\(^5\) An analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise.\(^6\) If one party to the negotiations indicates a desire to continue bargaining, it often demonstrates that the parties have not exhausted all possibilities of compromise and precludes a finding of impasse.\(^7\) However, where the bargaining history shows that additional meetings would be pointless, the DLR will not require them even where one party desires to keep meeting.\(^8\)

Mid-term bargaining is often accomplished by meetings involving the municipal employer (or one of its representatives such as the City/Town Manager or a department head) and one or more union representatives, without involving attorneys or outside negotiators. Where the decision is a managerial prerogative, discussion is limited to the impact of the decision on mandatory subjects of bargaining. In fact, the union would be guilty of bargaining in bad faith were it to insist on discussing the decision itself, rather than accepting that the decision has been made and focusing on the impact of the decision.\(^9\) Should such bad faith bargaining take place, the employer is free to implement the decision without being required to discuss the matter any further. Municipal employers must exercise caution not to refuse to bargain or to stop meeting with the union without consulting municipal labor counsel.

The DLR adjudicates a large number of disputes each year involving impact bargaining. The DLR has determined that even in cases where the decision was not made by the municipal employer, e.g. by some other governmental agency or branch, the employer still has a duty to bargain over the impact of the decision.\(^10\) Similarly, the duty to bargain over the impact of a decision extends to past practices. This was the case in City of Everett, where the Administrative Law Judge (ALJ) found that the new police chief’s decision to alter the practice of reducing the staff on major holidays was a “level of services” decision, and thus the City was required to bargain only over the impact of the change in the past practice.\(^11\) An employer likewise fails to bargain in good faith if it refuses to negotiate over the impact of a reduction in work hours.\(^12\) Further, even where the collective bargaining agreement contains a provision waiving the union’s right to bargain over a particular issue, this may be construed as a waiver of the right to bargain over the decision, but not necessarily the impact.\(^13\) Finally, changes which result in an increase in work for employees can create a duty on the part of the employer to bargain over the impact of the change.\(^14\)

Municipal managers should not act hastily, especially when it comes to layoffs, reductions in hours or other cost-saving changes. When management presents the union with a *fait accompli*,\(^15\) i.e., a done deal, without providing reasonable notice and an opportunity to bargain, the employer violates the Law.\(^16\)
Especially where a budget specifically shows an intent to fund fewer positions, and the means of achieving a certain reduction in expenses is not left up to the department head, for example, bargaining is limited to the impact of management’s decision to lay off workers, not the decision itself. The actual determination is usually left to the “appointing authority” which is not always a department head.

The LRC has declared the following subjects to be outside the scope of mandatory bargaining:

- abolition of positions,\(^{17}\)
- level of service decisions,\(^{18}\)
- minimum manning per shift,\(^{19}\)
- decision to reorganize.\(^{20}\)

Typical topics for so-called impact bargaining in the case of layoffs might include such things as the following:

- the role of seniority;
- recall rights;
- severance pay (OK to say “no”);
- buy-back of accrued leave; and,
- changes involving workload for remaining workers.\(^{21}\)

There are several differences between impact bargaining and decisional bargaining. Decisional bargaining involves a mandatory subject of bargaining, not an inherent managerial prerogative. Therefore, the union is free to propose not only alternative means of accomplishing the stated goal of management’s proposal, but also to recommend that the proposal be dropped entirely or even agreed to in exchange for accepting a proposal by the union (possibly on an entirely different topic).

The Union’s interest in bargaining can be outweighed by evidence that an employer has a management interest that is central to its mission as a governmental entity.\(^{22}\) As the Commission recognized in *Town of Danvers*, a public employer, like the private employer,

Must have the flexibility to manage its enterprise. Efficiency of governmental operations cannot be sacrificed by compelling the public employer to submit to the negotiating process those core governmental decisions which only have a marginal impact on employees’ terms and conditions of employment... Those management decisions which do not have a direct impact on terms and conditions of employment must not be compelled to be shared with the representatives of employees through the collective
bargaining process. Those decisions must remain within the prerogative of the public employer.\textsuperscript{23}

Abolishing a position, similar to cutting a certain number of positions from a department’s budget, is also a managerial decision that only requires bargaining over the impact of such decision. This is the case when, for example, abolishing a position or consolidating two positions into one new one.\textsuperscript{24}

\textbf{A common union tactic in order to delay mid-term negotiations is to inquire whether this will be decisional or impact bargaining, insisting it be decisional as well. Even where the employer is convinced it has the management right to proceed and limit bargaining to the impact, before refusing to meet and bogging down the process, it may be worthwhile to proceed with negotiations but under a reservation of rights. Consultation with labor counsel is appropriate.}

Many municipal employers have felt uncomfortable responding to a request to acknowledge the parties will be engaging in both decisional and impact bargaining. Often the reason stems from not being sure they understand the difference, and some have given in to such demands rather than face the prospect of a lengthy fight at the DLR. Before refusing to meet or giving the union a reason to refuse to do so, consultation with municipal labor counsel is recommended.

Even where management is convinced it has the right to make a decision, it is still often a good idea to be open to negotiations without holding up the process arguing over semantics. A dragged-out battle at the DLR, even if management ultimately prevails, is not always worth the cost. A reservation of rights letter could be helpful in preserving the employer’s ability to meet with the union and listen to any ideas or proposals rather than refusing to meet until the matter is adjudicated by the DLR, a process that can last many months or sometimes years. And an “on the record” repetition of this proviso at the start of any face-to-face sessions should suffice to preserve management’s ability to declare impasse if agreement is not reached following good faith negotiations. Something along the following lines should suffice:

\begin{verbatim}
Dear Union President _______: 

As you know, the union has been provided notice and the opportunity to demand bargaining over the city/town’s plan to lay off ___ employees in the ____ department. You have asked that we acknowledge that any such bargaining will encompass both the decision and the impact on the bargaining unit and its members. Based on my discussions with municipal labor counsel I disagree that decisional bargaining is required. However, rather than engage in a protracted battle at this time, I am willing to start negotiations and to listen to any ideas, suggestions, questions or proposals the union might have. I am doing this without waiving the city/town’s ability to assert at any time that the decision to lay off such employees is an exclusive managerial prerogative and bargaining over such decision is not required.
\end{verbatim}
CHAPTER 1 - NEGOTIATION STRATEGIES

When it comes to developing a strategy with respect to bargaining over layoffs, no two situations are identical, so consultation with municipal labor counsel is recommended. In any event, while many factors must be considered, timing is an essential consideration. The timing and contents of any notice to the union will depend to a great extent on when a municipal employer is aware of the need to conduct layoffs. Waiting until a final budget is adopted may leave less time to engage in discussions with the unions, resulting in increased anxiety and uncertainty on all sides.

As a general proposition, notice should be provided as soon as an employer has a clear picture of the scope and projected timing of any layoffs. Often, this is before a City Council or Town Meeting votes formally on the next fiscal year’s budget. As a result of the delays most communities are experiencing in the Spring of 2020 over the timing of such meetings, there is likely to be very little time between when budgets are finally adopted and the layoffs are supposed to take place.

Whether layoffs are the only option is not always clear. The wording of any budget appropriations will play a role. Where a specific line item lists the number of funded positions in a municipal department, there is less “wiggle room” for determining the number of layoffs than there would be if the vote simply approved a total amount for a department. The former would also appear to require an implementation deadline of July 1, where the latter might afford a little more time to explore with the union various alternatives for reaching the reduced appropriation.

Consideration must be given to the status of any collective bargaining agreement or negotiations. In no event should the employer submit a proposal at the bargaining table during regular negotiations aimed at layoffs in the near future. By doing so, the employer could be committing itself to a very lengthy process of negotiation, regardless of whether the JLMC or the DLR’s mediation, fact-finding services or arbitration become involved. Any proposal to the union to institute layoffs should be made on a “mid-term” basis, i.e., outside the regular contract negotiation process. This is the case regardless of whether regular negotiations are underway or soon might be. Any suggestion by the union that the matter be submitted as a municipal proposal “at the bargaining table” should be promptly and clearly rejected. This is because once a proposal is placed on the regular bargaining table, it cannot be taken back by management and bargained separately to impasse.

While nothing prevents the union from submitting a proposal during regular negotiations relative to how layoffs are conducted, municipal employers can refuse to discuss aspects left to the exclusive prerogative of management and insist on discussing only the procedures and impact of the decision. Where mid-term negotiations are underway, or even where management has provided notice to the union that layoffs are planned, municipal negotiators should make it clear that any action to usurp such separate discussions or make their outcome dependent on what happens at the regular bargaining table will not be tolerated.
Where a collective bargaining agreement contains language that specifies how layoffs are to be handled, and/or where a statute (e.g., Civil Service MGL Ch. 31) addresses the issue, these will control much of what a municipal employer must do. Before proceeding with any layoffs, municipal managers should carefully review any provisions in collective bargaining agreements that address how layoffs are to be implemented. While the decision to lay off workers is a management right, unions have the right to bargain over the procedures of carrying out such layoffs. Often this will address the role of seniority with a “last hired-first fired” requirement. Bumping rights and priority for re-hiring are also provisions in many collective bargaining agreements. Even if they are not, the union has a right to insist on discussing them during impact bargaining once layoffs are proposed.

Where a contract contains a provision specifying how layoffs are to take place, e.g., by reverse seniority, by department, by rank or assignment, etc., such language will control. This will not, however, relieve a municipal employer of the obligation to provide notice to the union and the opportunity to demand to bargain to the point of agreement or impasse (absent a very clear waiver of such impact bargaining right).

Often the union will use a variety of strategies to delay the process. These include:

- suggesting incorporating the discussions into on-going or soon to get started regular negotiations;
- asking to await the presence of the union’s attorney (who is very busy but will contact the municipality’s attorney in a few weeks!);
- making a lengthy record request designed to frustrate and overwhelm the municipal officials with the time of gathering such data (thinking incorrectly that this may suspend mid-term negotiations until the data is produced);
- cancelling scheduled meetings at the last minute and delaying efforts at rescheduling; and,
- submitting proposals of their own, often asking for financial improvements unrelated to the proposed layoffs.

Each of these should be anticipated and, except for record requests or legitimate union proposals, promptly rejected. Some can be addressed in the employer’s notice to the union. Others will require communication with the union prior to or while mid-term discussions are underway.

Once meetings take place, the union is likely to demand counter-offers to any of its proposals. Where common ground is possible, this should be explored in good faith. However, management representatives should not succumb to intimidation or threats. It is not as simple as just saying “no”, but it is OK to say “no” so long as management backs that up with sound reasoning and keeps an open mind when listening to union questions and proposals. There is no requirement that an employer agree to grant extra vacation time, raise the education incentive payments or other items already in a contract that are not related to the layoff proposal. If sufficient objection
is raised and the union persists, a notice declaring impasse and giving the union a “final notice” to avoid implementation is worth discussing with municipal counsel.

It is important to keep detailed notes of all meetings and communications with the union. Especially when reaching impasse, it will be helpful to include a summary of what was discussed in any declaration and notice of planned implementation of layoffs. Such declaration of impasse will be closely scrutinized by the DLR should the union file a complaint that the city or town unilaterally changed a working condition without bargaining in good faith to agreement or impasse as required by Chapter 150E. And having an employer witness present at all meetings and calls is helpful when it comes to testifying at any DLR hearing. The following is an example which should be amended as appropriate to reflect what happened during mid-term negotiations:

Dear Union President. _____:

Please treat the letter a “Declaration of Impasse” in our negotiations over the planned layoff of bargaining unit members on ______ 2020.

Let me summarize the course of our discussions and why this Declaration is being issued:

- On June __, 2020 the City/Town sent the Union a notice of planned layoffs
- You sent me a letter, dated June __, 2020 demanding bargaining
- A series of meetings were held on the following dates:
  - June 23, 2020 at 1 pm (1 ½ hours)
  - June 25, 2020 at 10 am (2 hours)
  - June 27, 2020 at 2 pm (30 minutes)
  - June 28, 2020 at 9 am (lasting 4 hours)
- While we have reached agreement on some items, including layoff by inverse seniority and a 6-month recall right for laid off employees, the Union’s suggestions for severance pay and a buy-back of all accrued leave beyond what the current collective bargaining provides, have been rejected repeatedly by the City/Town.

There has been no movement on any outstanding issues during the last two sessions. When you and the Union’s negotiating team stormed out of the room at the last session saying we would hear from your lawyers, it was clear that more sessions would not be productive. That seems to satisfy all the requirements for an impasse to be declared. However, in a spirit of good faith I want to offer the Union the opportunity to continue to meet if you feel there is any real hope of reaching agreement. Unless I hear from you over the next five (5) business days, I will treat this Declaration of Impasse in effect and proceed as proposed with the addition of the items tentatively agreed upon concerning inverse seniority and 6-month recall rights.

Sincerely,
START PREPARING EARLY

A management team should be assembled to help develop not only the municipality’s annual budget but also to review the need for staff reductions and the likely impacts on jobs. Rather than waiting to the last minute, it is worth considering involving the union (as observers) as the budget process is underway. This may produce some unexpected cooperation and worthwhile ideas. It may also help minimize complaints later on that they were kept in the dark and need more time to prepare for and respond to management proposals.

Where relations between the municipality and the union indicate it might not be disruptive, consideration should also be given to meeting with the union to start layoff discussions while the municipal budget development process is underway.

The union has a right to specifics, not just vague estimates or projections before being required to demand bargaining. However, while the exact number of potential layoffs or the amount of any budget shortfall may not be known until closer to July 1st, this should not prevent management from outlining the scope of the problem to the union as soon as a good picture of the problem is available.

Communication with all employees as well as the general public may be useful. Care should be given, however, not to bypass the union and communicate directly with employees about their individual concerns.

Finally, employers should keep in mind that they need to remain flexible throughout the year. While things look bad now, some project a resurgence of the Covid-19 virus in the Fall. Additional adjustments may be required. New notice to the union would then be required if additional layoffs are needed. The whole process of mid-term negotiations would also be required. Just because impasse was reached earlier does not mean that the municipal employer is not required to meet with the union if another timely demand to bargain is made. Should the union have new ideas to discuss, unless it is a matter already covered by a contract, it is required that the parties meet with an open mind and try in good faith to find common ground.

NOTE: Readers will observe that some material is contained in more than one chapter. For example, “Mid-Term Bargaining” and “Impact Bargaining” chapters, of necessity, discuss many of the same issues. The alternative of combining them and producing a very long chapter was considered and rejected.
A municipal employer is free to lay off workers during the life of a contract. Prior to implementing the layoffs, the union is entitled to notice and the opportunity to request bargaining. As long as the negotiations proceed in good faith, in the absence of agreement between the parties, upon reaching impasse management may implement its pre-impasse position. It may also so implement whenever the union stops bargaining in good faith.

After good faith negotiations have exhausted the prospects of concluding an agreement, an employer may implement changes in terms and conditions of employment that are reasonably comprehended within its pre-impasse proposals. City of Leominster, 23 MLC 62, 66, MUP-8528 (August 7, 1996) (citing Hanson School Committee, 5 MLC 1671, MUP-2196 (February 27, 1979)).

Impasse is a word of art in labor negotiations, referring to the situation where the parties are deadlocked and collective bargaining is no longer proceeding forward. Impasse in negotiations 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.”

The existence of impasse justifying unilateral employer action is a question of fact. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 447 N.E.2d 1201 (1983). To determine whether impasse has been reached, the DLR considers the following factors:

- 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 the parties concerning the state of the negotiations.

Impasse exists only where both parties have bargained in good faith on negotiable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked. Id. An analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise. Id.

In a 2002 case involving the Boston Police Department, the Commission, while acknowledging the Commissioner’s managerial authority to decide not to fund a supervisory position, made it clear that the City still had to meet its impact bargaining obligations by bargaining with the union to agreement or impasse prior to implementing its decision. Id. Since neither side moved at all during four 1-hour bargaining sessions, the Commission concluded that impasse had been reached and dismissed the union’s unilateral change complaint.
While regular contract negotiations in the police or fire department are subject to the Joint Labor-Management Committee’s (JLMC) jurisdiction and impasse resolution procedures, mid-term bargaining is not. Thus, at impasse during mid-term bargaining in police and fire cases, management is free to implement its proposal (pre-impasse position) without being required to participate in mediation, fact-finding or arbitration.\textsuperscript{28}

Impasse will not be found after only one session. As a rule of thumb, the DLR requires more meetings where the issue is of great importance to the union. For anything but the most minor matters, and where the conduct of the sessions has not been excessively antagonistic, rarely will impasse be found unless at least a few sessions have been held.

Two LRC decisions in 2002 resulted in a dismissal of union charges that the employer had not engaged in good faith negotiations to the point of impasse. In one, the Union alleged the Commonwealth had unilaterally altered job duties and workload.\textsuperscript{29} The Commission found that there were a sufficient number of mid-term bargaining sessions and, for all practical purposes, there was no need to continue. The second case, involving the Boston Police Department, similarly concluded that further negotiations would be pointless and upheld the assignment of additional job duties to sergeant detectives.\textsuperscript{30}

Despite the absence of any statutory authority granting jurisdiction to the Joint Labor Management Committee (JLMC) in impact bargaining cases, a number of requests have been filed by unions with the Committee in what are alleged to be impact bargaining cases. Without formally voting to take jurisdiction in these cases, reportedly the Committee has assigned staff and attempted to assist the parties in resolving their disagreements.

While there is no prohibition against voluntarily agreeing to participate in such a process, a public employer is free to refuse to participate. So long as the good faith negotiations over the decision, or the impact of a management decision, on a mandatory subject of bargaining, have resulted in impasse, the public employer is free to implement its impasse position in police and fire cases.

This conclusion is consistent with the Appeals Court’s ruling in a 1990 firefighter decision. The court ruled that so long as the Town of Ludlow complied in good faith with the former LRC’s order to bargain over a health care plan, once impasse was reached the Town would be free to implement the change unilaterally.\textsuperscript{31} The Ludlow decision is consistent with the position of the LRC in a number of “unilateral change” cases.\textsuperscript{32} However, where the LRC (now DLR) has found that impasse had not yet occurred prior to the employer implementing its proposed changes, the employer is found to have made an unlawful unilateral change.\textsuperscript{33}

The following are examples where no violations were established:

- While the City did not violate the Law by reducing the number of police captains by attrition and leaving their positions unfilled, but it did violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it assigned a Lieutenant to perform the duties of an unfilled Captain’s position without first giving the Union prior notice and an opportunity to bargain to resolution or impasse over that decision and its impacts on

- Unilaterally increasing the workload of the PCIS night custodians when it required them to empty recycling totes was a violation. Plymouth School Committee, 42 MLC 124 (2015).

- Five meetings were sufficient where the evidence showed no possibility that either party would or could present a proposal that would move them toward resolution. University of Massachusetts Medical School, 49 MLC 190 (2014).

The usual remedy for unilateral action is restoration of the “status quo ante”. This can be very expensive where re-hiring laid off workers is involved.

The DLR may find that restoration of a person is not appropriate (or in some cases lawful) but may still impose a back-pay award.

In general, where a public employer has been found guilty of unlawfully and unilaterally changing terms and conditions of employment, the DLR orders a return to the status quo ante (i.e., position the parties were in prior to the improper action) with a “make whole” order for any employee who has suffered any monetary or other loss directly attributable to the unlawful action.34

Section 11 of the Law grants the DLR broad authority to fashion appropriate orders to remedy unlawful conduct.35 The agency has consistently recognized that remedies for violations of the Law should be fashioned to place charging parties in the position they would have been in but for the unfair labor practice.36 The traditional “make whole remedy” in unilateral change cases includes an order that the status quo ante be restored until the employer has fulfilled its bargaining obligation, and that employees who have sustained any economic loss of wages or benefits as a direct result of the unlawful unilateral change be reimbursed for those losses.37 The DLR leaves it to the parties, and barring agreement, to compliance proceedings, to determine the exact amount of back pay, if any, owed in a particular matter.38

The DLR has also fashioned remedies that reflect the distinction between an employer’s failure to bargain over a decision and its failure to bargain over the impact of a decision. For example, although later overturned by the courts on other grounds, a town’s failure to bargain over the impact of the decision to reassign prosecutorial duties was remedied by the issuance of a prospective bargaining order and a monetary award.39 Similarly, a prospective bargaining order and monetary award (but not re-hiring order) were issued to remedy a city’s failure to bargain over the impact of its decision to lay off certain employees.40

Any dispute about what would constitute restoring the status quo or about which employees suffered economic harm because of an employer’s unlawful unilateral change, is typically left to the parties to resolve, and, if not, through a compliance proceeding at the DLR.41
Occasionally an employer may set a deadline for implementation of a certain change in working conditions. Where circumstances beyond an employer’s control require it to implement a change by a particular date, the employer may set a reasonable deadline to complete bargaining prior to implementation.⁴²

Where an annual budget is involved and specific staffing levels are specified, a July 1ˢᵗ implementation date may be appropriate. In other cases, especially where the means of reducing costs are not spelled out but there is another appropriate cutoff date, if, after good faith negotiations, the parties are unable to reach agreement by a date announced by the municipal employer, the employer may implement changes that are in keeping with the most recent bargaining proposals. Thereafter, however, the employer must continue to negotiate in good faith, if the union so requests, until reaching agreement or impasse.⁴³ (While it is too early to tell, there may be a date after which some Federal or State reimbursement for Covid-19 related costs may no longer be allowed. That might provide an appropriate layoff date.)

In a 1998 decision involving the Town of Westborough and both its police and fire unions, the LRC acknowledged that the town acted lawfully when it set a date for implementing a change in its health insurance carriers.⁴⁴ That was because one of the carriers decided to stop offering coverage as of a particular date. The Commission ruled, however, that the town could not implement other changes on that date such as dropping other insurance carriers or changing the town’s percentage share of premiums.

Legislative or other changes outside the control of the municipal employer, particularly those made by some other governmental agency or branch, may still trigger an employer’s impact bargaining obligation when it moves to implement the change at the local level. City of Malden, 20 MLC 1400 (1994).

Typically, mid-term bargaining results from an employer’s proposal made while a collective bargaining agreement is in effect which involves a change in or affects a mandatory subject of bargaining. It would be a serious mistake for management to submit a proposal concerning layoffs at the regular contract negotiation “table”, especially if they had already notified the union prior to the start of regular negotiation of a plan to carry out layoffs.

During regular negotiations, an employer is not free to remove an item under discussion and separately insist on bargaining to agreement or impasse.

Once negotiations for a successor (or initial) collective bargaining agreement are underway, an employer is not free unilaterally to implement its proposal made as part of the regular contract negotiations, even if negotiations on that subject have reached impasse.

In Town of Arlington, the LRC found the employer unlawfully implemented its proposal regarding defibrillator training while regular contract negotiations were still in progress.⁴⁵ In Arlington, the parties had agreed to discuss the Fire Chief’s proposal separate from on-going contract negotiations. However, it was the union’s testimony that if such separate negotiations failed to
produce an agreement on the defibrillator issue, the matter would be incorporated into the regular contract negotiations which were then in process. Once an item has been placed on the “regular table” it cannot be removed and bargained to impasse, as was what the Fire Chief did in this case.

The Law does not prohibit either party from proposing to bargain over terms and conditions of employment separate from successor contract negotiations. However, either party’s insistence on bargaining over terms and conditions of employment apart from on-going successor contract negotiations constitutes a refusal to bargain in good faith, precluding a finding of impasse.

In a 2002 Boston Police Department case, after its attempts to persuade the Union to bargain the issue apart from the successor negotiations failed, the City elected to not implement the proposed new performance evaluation system. The LRC noted that there was no evidence that the Union pursued its April 1998 proposal about patrol officers' evaluations during any successor contract bargaining session or that the City refused to bargain over the Union's proposal. Therefore, the Commission concluded that the City had not failed to bargain in good faith with the Union by insisting on negotiating over the City's proposal to implement a new performance evaluation system negotiated between the City and the Patrolmen's Association apart from the parties' on-going contract negotiations, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Municipal employers that are interested in making changes during the life a contract are likely to find unions using delaying tactics. This is in an effort to avoid reaching impasse before regular contract negotiations set started. These union efforts are based on an incorrect interpretation of Town of Arlington, 15 MLC 1452, 1456 (1989) (management may not place an item on the table during regular negotiations and remove it in the hopes of bargaining to impasse and implementing.) If no regular contract negotiations are taking place at the time a department head or municipal manager proposes a change, mid-term bargaining may proceed until agreement or impasse is reached on that proposal.

The lack of additional decisions on the topic makes all comments speculative. However, it is reasonable to assume that the DLR would allow such separate negotiations to continue, so long as both sides were negotiating in good faith. To allow the union to extend the duration of such mid-term negotiations until regular contract negotiations got started, only to then preclude the employer from implementing the proposal for an extended period of time, would be neither logical nor fair.

This is not to say that the union is precluded from making a proposal during regular negotiations relative to the same subject. For example, where an employer’s layoff proposal impacts on a mandatory subject, and the union is limited during mid-term negotiations to discussing the impact, the union may make a proposal during regular negotiations for extra compensation, time off or other benefit to compensate its members for the effects of the change.
A typical union reply to a municipality’s notice of a proposed mid-term change, such as layoffs, is the suggestion of waiting until regular negotiations start. There is no obligation to do so. If the union is not willing to start mid-term negotiations in a timely manner, management is free to inform the union that this will be treated as a waiver (and/or a failure to negotiate in good faith), which will authorize the employer to implement its proposal.

Because the existence of impasse will be a crucial issue if the DLR is confronted with a unilateral change case, as discussed earlier the employer should maintain a “paper trail” documenting its efforts and the existence of impasse or a waiver.

In an effort to save money, in addition to layoffs some municipalities have considered contracting out traditional union work. While a municipality may contract out union work to save money or for other legitimate reasons, in most cases the DLR will require bargaining with the union to agreement or impasse.

Because “contract out” and “non-contract out” clauses constitute a waiver of a party’s respective rights, the DLR will only enforce them if they are clear and unambiguous. Bd. of Regents, 19 MLC 1248 (1992); Melrose Sc. Comm., 9 MLC 1713 (1983). Only where the waiver is reasonably ambiguous will the CERB consider the bargaining history between the parties. City of Boston, 7 MLC 2013 (1981). With regard to “contract out” provisions, the DLR has most frequently found that the clauses at issue did not sufficiently afford the employer the right to contract out work without having to bargain with the union first. See, e.g., Comm. of Mass., 21 MLC 1029 (1994); Boston School Comm., 4 MLC 1912 (1978); Town of Marblehead, 12 MLC 168 (1985). In those cases, the employers unsuccessfully sought to rely on the wording in the management right’s clause to “layoff because of lack of work or other legitimate reasons.”

The CERB (now DLR) held that the following clause is sufficiently clear:

[Management retains the right] to manage the affairs of the Town and to maintain and improve the efficiency of its operation; to determine the methods, means, processes and persons by which operations are to be conducted including the contracting out of work. Town of Acushnet, 11 MLC 1425 (1985). [Emphasis added.]

The City of Newton contended that the provisions of the Management Rights article clearly and unambiguously waived the Union’s right to bargain over the City’s imposition of the Firefighter I/II certification as a continued condition of employment. Upon review of the language of those provisions, the Hearing Officer (HO) concluded that the Union had not contractually waived its right to bargain. City of Newton, 2015 MLRC 17 (2015)

Even where the language of a Management Rights article might constitute a waiver and a contract expired, unless the parties agreed to extend the terms of a contract when a new union started representing workers, the HO found that the employer was required to bargain requiring janitors to empty recycling bins. Plymouth School Committee, 42 MLC `124 (2015)
Another cost-saving measure might include changes in employees’ work schedules. Changing work schedules also requires notice and bargaining with the union to agreement or impasse.

One way some communities may attempt to cut costs is to adjust or reduce work schedules. Careful review of any contract language or waiver is essential. The CERB overturned a Hearing Officer (HO) decision and ruled that the language of the contract gave the City of Springfield the ability to reduce the hours of work and benefits of a part-time senior clerk position. City of Springfield, 41 MLC 342 (2015). Different results were found in City of Peabody, 28 MLC 19, MUP-2073 (June 21, 2001) (contract did not expressly or by necessary implication allow the school committee to change employee work schedules by implementing an unpaid block of downtime) and Commonwealth of Massachusetts, 18 MLC 1220, SUP-3426 (November 20, 1991) (involuntary reassignments did not constitute mere transfer of employee from one work location to another, but rather, a method of implementing a reduction in force; and contractual language giving employer the right to transfer personnel did not establish a knowing, conscious, and unequivocal waiver of the union's right to bargain over the means and method of reducing the size of the workforce.)
CHAPTER 3 - IMPACT BARGAINING

Before implementing layoffs, a municipal employer must provide notice to the union and an opportunity for the employees’ representative to demand bargaining. If a timely request is made, the parties must engage in good faith negotiations to the point of agreement or impasse before the layoffs may be implemented.

A public employer is required to give to the employee bargaining representatives (unions) both notice and an opportunity to request bargaining before unilaterally establishing or changing policies which impact mandatory subjects of bargaining. City of Boston School Committee, 4 MLC 1912 (1972). Only when such bargaining duty is fulfilled, or when the union indicates that it does not want to bargain by either explicitly indicating so or by inaction (waiver), is the employer free to implement its proposed change. Id. The bargaining obligation is satisfied when the matter in dispute is negotiated to the point of resolution or impasse. Newton School Committee, 5 MLC 1016 (1978), aff’d sub nom. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983) (reduction in force); see also, Commonwealth of Massachusetts Commissioner of Administration and Finance/Department of Social Services, 25 MLC 201 (1999). (Implementing a policy that changes the level of services offered.)

The School Committee of Newton case, where a budget reduction but not a specification of the number of staff to be cut was involved, made several points clear:

- The means of achieving a reduction in a school committee's custodial force and the impact of the school committee's decision on the terms and conditions of employment were, under C. 150E, section 6, mandatory subjects for collective bargaining.
- A school committee had a duty to bargain collectively over its decision to reduce custodial services through layoffs, and over the impact of that decision, where these subjects were not covered by the applicable collective bargaining agreement and had not been discussed during contract negotiations, notwithstanding the fact that the school committee's decision did not change any existing practice.
- A union had not waived its right to bargain collectively over a school committee's decision to reduce its custodial force through layoffs, and over the impact of that decision, by reason of language in the "management rights" provision of the applicable collective bargaining contract.
- Substantial evidence supported the Labor Relations Commission's determination that a union had not, either by "inaction" or by its conduct in light of information available to it, waived its right to bargain collectively over a school committee's decision to reduce its custodial force by layoffs, or over the impact of that decision.
- The Labor Relations Commission's determination that a school committee had violated Section 10 (a) (5), by refusing to make itself available for negotiations and by refusing to bargain in good faith before reducing its custodial force through layoffs of certain employees, was supported by substantial evidence and was otherwise lawful.
The Labor Relations Commission had authority to order full payment of back wages to school custodians who had been laid off following the refusal of a school committee to bargain collectively over both the decision to implement a staff reduction by layoffs and the impact of that decision.

The following passages from the SJC decision in Newton (where the exact number of layoffs were not included in the approved budget and the means of reducing casts were left open to the parties to discuss) are worth noting:

The means of achieving a reduction in force, by layoffs or otherwise, and the impact of that decision on the terms and conditions of employment are matters which, as a matter of policy, can be made the subject of collective bargaining. There are some subjects which, as a matter of policy, this court has said cannot be delegated by a school committee or made the subject of collective bargaining. We agree with the parties that the decision to reduce the level of janitorial services is an exclusive school committee prerogative. See School Comm. of Braintree v. Raymond, 369 Mass. 686, 687-689 (1976); School Comm. of Hanover v. Curry, 369 Mass. 683, 684-685 (1976). However, as numerous cases show, the means of implementing such a nondelegable decision may properly be the subject of an enforceable collective bargaining agreement. We thus reject the school committee's argument that bargaining over the decision to reduce the force by layoffs and over the impact of that decision would be improper or impermissible.

The basic issue is not the permissibility of bargaining over the means of achieving a reduction-in-force decision or over the impact of that decision on the terms and conditions of employment. It is whether there is a duty to so bargain. Certainly, G. L. c. 150E, § 6, by its terms, imposes such an obligation. The question is whether general grants of discretion to a school committee to lay off employees take precedence over the duty stated in § 6.

Because we hold that the school committee's decision to achieve a reduction in force by layoffs is a mandatory subject of bargaining, it follows that the timing of any decision to lay off employees, the number of employees to lay off, and which employees to lay off are also mandatory subjects of bargaining.

The duty to bargain under G. L. c. 150E is a duty to meet and negotiate and to do so in good faith. G. L. c. 150E, § 6. Neither party is compelled, however, to agree to a proposal or to make a concession. Id. "Good faith" implies an open and fair mind as well as a sincere effort to reach a common ground. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960) (collective bargaining presupposes a desire to reach ultimate agreement); Commonwealth of Mass., 8 M.L.C. 1499, 1510 (1981) (good faith requires an open and fair mind, a sincere purpose to find a basis of agreement and to make efforts to compromise differences). The quality of the negotiations is evaluated by the totality of conduct. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-154 (1956) (good faith or lack thereof depends on the particular circumstances of each particular case); Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956, 959 (9th Cir. 1981); Glomac Plastics, Inc. v. NLRB, supra at 98.

In the absence of impasse, unilateral action by an employer concerning mandatory subjects of bargaining violates the duty to bargain in good faith. See NLRB v. Katz, 369 U.S. 736, 741-742 (1962); Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 64 (2d Cir. 1979). Cf. Hanson School

NOTE: Had the budget in Newton included a line item of the number of employees in a given department, and not just a figure for personnel, as noted below, the result in this case might have been very different.

Where a Town Meeting or City Council approves a budget that eliminates one or more positions, there is no duty to bargain the decision to lay off workers.

The Appeals Court addressed this issue in Town of Wakefield v. Labor Relations Commission, 45 Mass.App.Ct. 630 (1998). Distinguishing this case from School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983), the Appeals Court noted that not only was there no need to bargain the decision to layoff custodians, as the Town Meeting had cut all appropriations for the positions, but that impact bargaining was nearly useless by explaining:

... it is difficult to imagine on the facts of this case what remained to be bargained about after the town meeting. The administrative law judge did not indicate what she had in mind. The commission suggested that perhaps they might have bargained about recall rights, although these were fully covered by the collective bargaining agreement; or bumping rights, although it is hard to see what application this could have when [the employee’s] whole department had been eliminated, and the comparable positions in the public works department were protected by the collective bargaining agreement for their separate bargaining unit; or, finally, layoff rights, which in context seem to be a euphemism for ignoring the vote of the town meeting. We see no escape from the proposition that the town meeting vote made the termination of [this individual’s] position inevitable. The selectmen could not legally continue to employ [this person] after the appropriation funding his position had run out. See Board of Educ. v. Boston, 386 Mass. 103, 111, 434 N.E.2d 1224 (1982); Somerville v. Somerville Mun. Employees Assn., 418 Mass. 21, 24-25, 633 N.E.2d 1047 (1994); County of Suffolk v. Labor Relations Commn., 15 Mass. App. Ct. 127, 131-132, 444 N.E.2d 953 (1983). This case is not like the single authority cited by the commission, School Committee of Newton v. Labor Relations Commission, 388 Mass.at 563, 566-567, in which the decision to achieve a reduction in force in the janitorial ranks, itself beyond collective bargaining, left open for bargaining
the means of achieving that reduction, e.g., by layoffs or by a reduction in hours, and the effect on the scope of custodians' duties.

The DLR adjudicates a large number of disputes each year involving impact bargaining. For example:

- An employer fails to bargain in good faith if it refuses to negotiate over the impact of a reduction in work hours. R.E.A.D.S. Collaborative, 21 MLC 1251 (1994).
- It was a violation where a town transferred bargaining work outside of the firefighters’ bargaining unit without providing required notice and bargaining to agreement or impasse. Town of Cohasset, 2015 MLRC Lexis 6 (2015).
- Changes that result in an increase in work for employees can create a duty on the part of the employer to bargain over the impact of the change. City of Fall River, 19 MLC 1114 (1992).
- Refusal to bargain over the impacts of a reorganization of enrollment management services was a violation. Higher Education Coordinating Council, 23 MLC 16 (1996).

**Where a Declaration of Emergency is in place, an employer may be able to raise the Economic Exigency Defense.**

An employer relying on an economic exigency defense has the burden of establishing that: 1) circumstances beyond its control require the imposition of a deadline for negotiations; 2) the bargaining representative was notified of those circumstances and the deadline; and 3) the deadline imposed was reasonable and necessary. Cambridge Public Health Commission, d/b/a Cambridge Health Alliance, 37 MLC 47 (2010). As the DLR found in its Ruling on the MNA’s Motion for Summary Decision, the Alliance was afforded the same opportunity to defend its actions here, where a Section 9 petition has been filed, as would any other employer who is alleged to have violated Section 10(a)(5) of the Law. See, New Bedford School Committee, 8 MLC 1472, 1477-1480 (1981).

The case of City of New Bedford, 38 MLC 239 (2012) which involved layoffs following substantial cuts in state aid is informative of the interplay of impact bargaining and regular contract negotiations. The Union and the City were parties to a collective bargaining agreement that was effect from July 1, 2006 through June 30, 2009 (CBA). The CBA contained a duration or "evergreen" clause that continued the terms in effect from year to year until either party notified the other that it wished to modify the agreement. The parties believed the terms of this CBA to be in effect during the successor negotiations that began in the course of this dispute.

In addition to filing prohibited practice charges and a Section 9 petition with the DLR, on August 28, 2009, AFSCME filed a complaint in Bristol Superior Court alleging two causes of action.
The DLR found the parties were not at impasse when the City implemented the furloughs. First, the City proposed the furloughs as part of its successor negotiations. Having proceeded in this manner, it was obligated to refrain from implementing any changes to bargainable terms and conditions of employment until it bargained to impasse or resolution on all the outstanding issues in successor negotiations. See Cambridge Public Health Commission, d/b/a Cambridge Health Alliance (CHA) (appeal pending), 37 MLC 39, 45 (2010) (citing City of Leominster, 23 MLC 62, 66 (1996)). Moreover, since these outstanding issues necessarily included the impact issues the City conceded it had to bargain over, as well as other issues still on the table, the City's assertion that the parties were at impasse was found to be without merit.

Furthermore, at the single bargaining session at which furloughs were discussed, after the City rejected the Union's layoff counterproposal, the City declared its managerial right to impose furloughs by the end of the month, thereby cutting off further discussion over the means and methods of implementing the City's proposal. This single bargaining session was "not the kind of exchange and discussion of substantive views required by Sections 6 and 10(a)(5)."

By holding that the City did not fulfill its bargaining obligations before acting unilaterally, the DLR noted that it was mindful of the City's frustration with not being able to implement cost-savings measures promptly and before completing successor bargaining. It pointed out that the Law, does provide, however, a course of action for employers who believe they are facing exigent economic circumstances, even in the context of the Section 9 mediation process. CHA, 37 MLC at 46. However, according to the DLR, the City failed to take well-established steps that would have positioned it to lawfully assert an economic exigency defense either before or after the Union filed its Section 9 petition with the Department.

An employer relying on an economic exigency defense has the burden of establishing that: 1) circumstances beyond its control require the imposition of a deadline for negotiations; 2) the bargaining representative was notified of those circumstances and the deadline; and 3) the deadline imposed was reasonable and necessary. Id.

In this case, the DLR concluded that the City had not established justification for waiting until August 17 to place the furlough option on the bargaining table given that the record indicated that it had known that a large FY10 deficit had been looming since January 2009. In any case, the City's sudden announcement and setting a date of August 30 to furlough did not meet the exigency defense's requirement that the employer notify the union of circumstances and announcement a deadline before taking action. Thus, although the Union may have been aware of the City's fiscal condition, there is no evidence that the City gave the Union advance notice of a deadline for negotiating about the proposed furlough. And, when the City finally announced that furloughs were the only option to maintain service levels, it also proclaimed that it would move to make this change pursuant to the management rights clause. The DLR noted, however, reliance on the CBA's management rights clause was misplaced and did not excuse its failure to comply with the exigency defense's notice requirements.
Given the DLR's agreement with the Hearing Officer on the second prong of the exigency defense standard, it also affirmed her conclusion as to the third prong, that the imposed deadline was reasonable and necessary. The Law does not permit an employer to satisfy the third prong of the exigency standard where it fails to demonstrate either a commitment to fully maximize the time available for negotiations, or the necessity of choosing a particular date for cutting off the negotiation process. *New Bedford School Committee, 8 MLC 1472, 1479 (1981).* In this case, according to the DLR the City's claim that it could not have meaningfully bargained over economic matters before it received the final cherry sheet figures is belied by the layoff and wage reduction proposals it made on July 20 and July 27, before those figures were released. Moreover, although the City made these proposals, it never proposed a date certain to conclude bargaining over its situation, either in July or earlier. Had the City notified the Union on July 20 or 27 that it needed to conclude bargaining by the end of August to avoid further reductions in service, it would have doubled the amount of time for bargaining over the implications of the looming FY10 budget deficits, and, at a minimum, satisfied the second prong of the exigency defense. Instead, even after it received the cherry sheets on July 30, the City waited over two weeks before sitting down with the Union, never once notifying them that it needed to conclude bargaining swiftly to address the deficit. This delay shows that the City did not commit to fully maximize the time available for negotiations. Further, the City did not give the Union any advance notice of a deadline to complete negotiations over the means and methods of implementing the service cuts. Under these circumstances, the DLR agreed with the Hearing Officer that the City has failed to establish economic exigency under the Board's well-established standards.

The conclusion was that the City violated section 6 of the Law by implementing furloughs during the pendency of a petition filed pursuant to Section 9 of the Law. Section 9 states in pertinent part:

> After a reasonable period of negotiations over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse.

* * *

Upon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact-finding or arbitration, if applicable shall have been completed and the terms and conditions of employment shall continue in effect until the collective bargaining process, including mediation, fact finding or arbitration, if applicable shall have been completed.

The City argued that, because the CBA did not address work hours, its changes were non-contractual and, therefore, that Section 9's prohibition against unilateral changes does not even apply. However, in *Cambridge Health Alliance, 37 MLC 168 (2011)*, the DLR held that the duty to
refrain from implementing unilateral changes after Section 9 petition is filed includes changes to both contractual and non-contractual terms and conditions of employment. Id. at 169-170 (citing Massachusetts Community College Council MTA/NEA, 302 Mass. 352, 354 (1988)). It therefore rejected this argument.

As previously noted, in CHA, the DLR recognized that economic exigency can permit an employer to make unilateral changes by a date certain despite a union's filing of a petition pursuant to Section 9 of the Law. 37 MLC at 46. However, because it affirmed the Hearing Officer's conclusion that the City did not comply with the requirements of the affirmative defense of economic exigency, specifically by providing advance notice of the August 30 furlough implementation, the DLR also affirmed her conclusion that the City violated Section 10(a)(6) of the Law by implementing the furloughs before the conclusion of the collective bargaining process.

In retrospect, the City might have been able to accomplish its goals if it had handled mid-term negotiations separately from regular negotiations.

The “make whole” order was VERY expensive!

*Even though a municipal employer has the management right to decide what level of services it will provide, it must bargain with the union over the impact of the proposed layoff.*

Even where employer action is authorized unilaterally (e.g., where a management right is involved), and unless there has been an unequivocal waiver, an employer must bargain upon request with the union over the impact of such change upon mandatory subjects of bargaining prior to implementing the change. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); Commonwealth of Massachusetts, 30 MLC 63 (2003), aff'd sub nom. Secretary of Administration and Finance v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). A public employer's prerogative to make certain types of core managerial decisions without prior bargaining does not relieve the employer of all attendant bargaining obligations. City of Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004); Town of Natick, 43 MLC 178 (2017). An employer may still be required to bargain with the employee representative over the manner in which to implement a decision, as well as the impacts of a decision on mandatory subjects of bargaining, before implementing a decision. Id.; School Committee of Newton v. Labor Relations Commission, 388 at 563.

*Where the decision is a managerial prerogative, discussion is limited to the impact of the decision on mandatory subjects of bargaining.*

A union would be guilty of bargaining in bad faith were it to insist on discussing the decision itself, rather than accepting that the decision has been made and focusing on the impact of the decision. See City of Worcester, 4 MLC 1378 (1977) (union was found to have violated G.L. c. 150E by submitting a nonmandatory subject of bargaining to a fact-finder).

There are situations where mid-term bargaining is not required. For example, where a contract
provision allows management to change employees’ schedules, no violation occurred when officers were reassigned to attend a training program on four day-shifts to coincide with the training, and the following three days off to complete the officers’ work week. City of Malden, 43 MLC 130 (2016).

Even in cases where the decision was not made by the municipal employer, e.g. by some other governmental agency or branch, or possibly even a state or federal law, the employer still has a duty to bargain over the impact of the decision. City of Malden, 20 MLC 1400 (1994). Similarly, the duty to bargain over the impact of a decision extends to past practices. This was the case in City of Everett, where the ALJ found that the new police chief’s decision to alter the practice of reducing the staff on major holidays was a “level of services” decision, and thus the City was required to bargain only over the impact of the change in the past practice. City of Everett, 22 MLC 1275 (1995).

Even where the collective bargaining agreement contains a provision waiving the union’s right to bargain over a particular issue, this may be construed by the DLR as a waiver of the right to bargain over the decision, but not necessarily the impact. Weymouth Housing Authority, 14 MLC 1098 (1987) (collective bargaining agreement containing provision allowing employer to lay off employees for lack of work or funds constituted a waiver of right to bargain over alternatives to layoffs, but not waiver of right to bargain over impact.) Layoffs may mean that the remaining employees have an increased workload. Changes which result in an increase in work for employees can create a duty on the part of the employer to bargain over the impact of the change. City of Fall River, 19 MLC 1114 (1992).

If the collective bargaining agreement contains a provision waiving the union’s right to bargain over a particular issue, it may be construed as a waiver of the right to bargain over the decision, but not necessarily the impact. Weymouth Hous. Auth., 14 MLC 1098 (1987) (collective bargaining agreement containing provision allowing employer to lay off employees for lack of work or funds constituted a waiver of right to bargain over alternatives to layoffs, but not waiver of right to bargain over impact).

Impact bargaining is often accomplished by face to face meetings between the municipal employer (or one of its representatives such as the police chief or other department head) and one or more union representatives, without involving attorneys or outside negotiators.

Where a union refuses to bargain in good faith, management is free to implement its pre-impasse position.

A union would be guilty of bargaining in bad faith were it to insist on discussing the decision itself, rather than accepting that the decision has been made and focusing on the impact of the decision. See City of Worcester, 4 MLC 1378 (1977), where union was found to have violated c. 150E by submitting a non-mandatory subject of bargaining to a factfinder. Should such bad faith bargaining take place, the employer is free to implement the decision without being required to discuss the matter any further.
Before laying off bargaining unit members, a municipal employer must provide the union with notice and opportunity to bargain to resolution or impasse. Where notice was vague or not made to the union, the DLR may find management violated the Law and order a restoration of the status quo ante.

The exclusive bargaining representative (union) is entitled to reasonable notice of the proposed change and sufficient time to determine whether bargaining should be requested. Notice in writing is preferred, and, whichever the method of delivery, should be provided to a union officer or representative. Rumors or notice to members of the bargaining unit are not sufficient.

The information conveyed to the union must be sufficiently clear to make a judgment as to an appropriate response, and far enough in advance of implementation to allow for effective bargaining. Taunton School Committee, 28 MLC 378 (2002). The employer’s duty is not satisfied by presenting the change as a fait accompli, where the employer’s conduct has progressed to a point that a demand to bargain would be fruitless, and then offering to bargain. Town of East Bridgewater, 38 MLC 164 (2012); Town of Hudson, 25 MLC 143 (1999). When management presents the union with a fait accompli, i.e., a done deal, without providing reasonable notice and an opportunity to bargain, the employer violates the law. G.L. c. 150E, § 10(a)(1), (5); Ware Sch. Comm., 19 MLC 1107 (1992). Absent exigent circumstances, an employer’s duty to notify the union of a potential change before it is implemented is not satisfied by presenting the change as a fait accompli and then offering to bargain. City of Newton, 35 MLC 296, 298, MUP-04-4265 (May 27, 2009); Town of Hudson, 25 MLC 143, 148, MUP-1715 (April 1, 1999) (citing City of Everett, 2 MLC 1471, MUP-2126 (May 5, 1976)). Under such circumstances, the Union need not request bargaining even though it did so in City of Somerville, 42 MLC 170 (2015). Practice Note: The term fait accompli is a word of art in collective bargaining. The literal meaning of the term is “accomplished deed.” In the context of bargaining it means that management has already implemented the new policy.

Note: While individual employees may file charges under certain parts of Section 10(a), only an employee organization can file a prohibited practice charge under Section 10(a)(5). Quincy Street Employees Union, H.L.P.E., 15 MLC 1340 (1989), aff’d sub nom., Pattison v. Labor Relations Comm’n, 30 Mass. App. Ct. 9, 24 n.18, 565 N.E.2d 801, 810 n.18 (1991).

In City of Lowell, 25 MLC 33 (1998), the City argued that it fulfilled its duty to bargain by meeting with the Union on eighteen occasions, and actually exceeded its obligation by offering retraining and placement assistance to the affected workers. The City contended that its changing workforce clearly indicated that unskilled laborers would not be a part of its future workforce and that the Union failed to heed the warning signs. The Law, as the Hearing Officer noted, does not require unions to divine warning signs. Rather, it requires employers to give notice of proposed action; notice which is definite enough to enable the union to formulate an appropriate response; Boston School Committee, 4 MLC 1912,1915 (1978), and early enough to permit effective bargaining to take place. City of Everett, 2 MLC 1471 (1976). The City's May 18 notice
to the Union in this case was too late to facilitate meaningful bargaining and its earlier statements regarding the pending reorganization did not specify that the City was contemplating a layoff of DPW workers.

Although the City notified the Union of the pending reorganization as early as 1995, the City failed to notify the Union that it intended to lay off DPW laborers until May 18, 1996. Four days later, on May 22, 1996 the City notified the affected individuals that their positions would be abolished on June 7. According to the HO, this action was premature because the Union demanded to bargain over the layoffs on May 17, and the parties had not yet bargained to resolution or impasse over such issues as alternatives to layoffs, the timing of the layoff, the number of employees to layoff and which employees to layoff. See Revere School Committee, 10 MLC 1245 (1983); Watertown Housing Authority, 10 MLC 1066,1070 (1983).

Further, the HO found that the City's March 28 bargaining proposal regarding the elimination of laborer positions was insufficient notice that the City proposed to layoff the sixteen DPW laborers. First, the City offered the March 28 proposal prior to receiving Powers & Sullivan's recommendation in May, and the record revealed that the layoff decision followed receipt of the recommendation. Consequently, the proposal could not be interpreted as proposing to layoff the DPW laborers. Second, the proposal lacked specificity because it did not indicate that it concerned DPW laborers, and the City employs laborers in its cemetery and parks departments. Also, the proposal stated that certain existing positions could be "grandfathered"; thereby suggesting that some of the positions would be retained.

The Union demanded to bargain over the layoffs as soon as it received notice of the City's plan to layoff DPW laborers, and thus the Union did not waive its bargaining rights. According to the HO, there is no evidence that the parties reached impasse or resolution prior to the City's implementation of its layoff decision. Accordingly, she found that the City violated section 10(a)(5) and derivatively, (a)(1) of the Law by failing to bargain in good faith with the Union before effecting the layoff of the sixteen DPW workers. She ordered the reinstatement of 16 DPW workers more than two years after they were laid off.

**The employer must notify the union of potential changes before they are implemented.**

Specifically, the information conveyed to the union must be sufficiently clear to make a judgment as to an appropriate response, and far enough in advance of implementation to allow for effective bargaining. Taunton School Committee, 28 MLC 378 (2002).

**Occasionally an employer may set a deadline for implementation of a certain change in working conditions.**

When circumstances beyond an employer’s control require it to implement a change by a particular date, the employer may set a reasonable deadline to complete bargaining prior to implementation. New Bedford Sch. Comm., 8 MLC 1472 (1981). If, after good faith negotiations, the parties are unable to reach agreement by that date, an employer may implement changes
that are in keeping with the most recent bargaining proposals. Thereafter, however, the employer must continue to negotiate in good faith, if the union so requests, until reaching agreement or impasse. New Bedford Sch. Comm., 8 MLC 1472 (1981); Boston Sch. Comm., 4 MLC 1912 (1978).

The employer should be prepared to justify a defense based on an externally imposed deadline. Cambridge Public Health Commission, d/b/a Cambridge Health Alliance, 37 MLC 47 (2010) (changing retiree health insurance benefits of bargaining unit members). Where a July 1 date was established by the City Council or Town Meeting for the start of certain budget cuts, the DLR may not find such deadline sufficiently “externally imposed,” thereby requiring the municipal employer to find another basis to justify not reaching impasse with the union before implementing layoffs.

**DLR will fashion remedy to fit the facts of the case. Where layoffs were inevitable, the DLR may not necessarily order the rehiring of workers.**

The DLR has discretion to fashion the most satisfactory remedy possible under the facts of each case. Town of Brookfield v. Labor Relations Commission, 443 Mass. 315, 326 (2005) (Section 11 broadly commits the design of appropriate remedies to the DLR's "discretion and expertise"). Thus, in cases involving impact bargaining, although the DLR will traditionally order restoration of the status quo ante applicable only to those affected mandatory subjects, rather than to the decision itself, see, e.g., Commonwealth of Massachusetts, 26 MLC at 121-122, the DLR does not apply this principle rigidly. Rather, it considers other factors, including whether the impacts over which the union sought to bargain were an inevitable consequence of the managerial decision, i.e., whether bargaining could only have ameliorated, but not changed, the impacts of the managerial decision, see, e.g., City of Somerville, 42 MLC 170, 172, MUP-13-2977 (December 30, 2015), and whether it is possible to separate the impact issues from the decision issues, see, e.g., Commonwealth of Massachusetts, 26 MLC at 121-122.

- Where town selectmen engaged in prohibited practice by failing to engage in impact bargaining with union after town meeting eliminated mechanic’s position and administrative law judge ordered bargaining to commence, Labor Relations Commission erred in its view that termination of mechanic was not inevitable and in ordering reinstatement of mechanic and back pay; remedy as ordered by administrative law judge reinstated. Town of Wakefield v. Labor Rels. Comm’n, 45 Mass.App.Ct. 630, 700 N.E.2d 546 (1998).
- Remedy for failure to bargain over impacts of changes in staffing of inmate housing area was to order bargaining with union to resolution or impasse over impacts on bargaining units members’ safety; traditional remedy of restoration of status quo would necessarily interfere with department’s managerial prerogative in staffing cell block area to which officer in inmate housing area had been reassigned. Commonwealth of Massachusetts/Commissioner of Administration and Finance and Massachusetts Correction Officers Federated Union (2008), 34 MLC 143.
A department head or municipal employer should avoid posting notices or issuing orders containing the words “effective immediately”.

Rarely will the LRC find that a change is so small (called “de minimus”) that no notice or bargaining is required. Unless the employer is certain that the matter neither involves nor impacts on mandatory subjects of bargaining, it is better to list a future date when the change will become effective. This will afford the union the opportunity to review the matter and request bargaining if it is so inclined.

While a Town Meeting held near the end of June 2020 might leave very little time before the start of a new fiscal year to notify and engage in impact negotiations with all unions, a municipal employer should consider giving notice to the union as soon as it is reasonably clear that the budget the Gown Meeting will consider might result in layoffs.

If bargaining is requested, the employer is usually required to postpone the implementation of the change until good faith negotiations result either in agreement or impasse. An exception may be made when an externally imposed deadline is involved or where exigent circumstances are present.

In Everett School Committee, 43 MLC 55 (2016), the DLR dismissed the union’s complaint that the employer had failed to negotiate to agreement or impasse before transferring unit work of therapists outside of the bargaining unit. The Hearing Officer relied in particular on the fact that the Union never wavered from its position that all ten therapists needed to be reinstated, and the Union's statements on two occasions that it had nowhere to go and that it had gone as far as it could with respect to the Employer's proposal. The case is also instructive as to how much time an employer must supply. The DLR noted that its case law reflects that it is not a per se violation of the Law for an employer to give a union notice and an opportunity to bargain after the budget process is complete. Rather, in cases where, as here, bargaining does not begin until after a budget is formulated, the CERB looks at the record to determine whether meaningful bargaining could nevertheless still take place or whether the employer has committed to a course of action. Town of Weymouth, 40 MLC 253, 254, MUP-10-6020 (March 10, 2014) (citing Scituate School Committee, 9 MLC 1010, 1013, MUP-4563 (May 27, 1982); City of Cambridge, 5 MLC 1291, MUP-2799 (September 27, 1978)). Here, we agree with the Hearing Officer that the following facts in the record demonstrate that meaningful bargaining could have taken place, despite the Employer’s discussions with Futures and the April 22 and May 18 budget votes. The most compelling basis for this conclusion is the uncontested evidence showing that the Employer retained flexibility to move money around within its budget even after receiving School Committee and municipal approval. The following factors are persuasive as well.

First, even though the Employer had been considering outsourcing since February 2009, it was not until the end of July 2009 that it actually entered into a contract with Futures to do so. This was three months after the Employer first notified the Union on April 27 that it was considering outsourcing and asked to meet to consider ways to save the positions. Second, as of April 22, the SubFi had only voted to recommend to the full School Committee that the positions be
outsourced; the School Committee had yet to vote. Third, just five days after the April 22 SubFi vote, the Employer's counsel reached out to the Union to bargain and specifically asked what could be done to save the positions. The Employer reiterated this request for a proposal or counterproposal from the Union on three more occasions in June 2009 before issuing the layoff letters on June 23 but received no response. The DLR rejected the Union's argument that, by its statements at the June 1 meeting and its actions at the June 8 negotiation session, the Employer unlawfully tried to limit its bargaining to impacts only. Again, there were ample indications in the record that the Employer was willing to engage in substantive discussions about alternatives to its decision to outsource the clinical therapist positions but the Union chose not to engage in any discussions when it failed to make any suggestions or counterproposals after the parties' June 8 meeting.
SAMPLE MID-TERM BARGAINING OFFER NOTICE FORMS

TO: Union President

FROM: Department Head, Appointing Authority or Bargaining Representative

DATE:

RE: Proposed Layoff(s)

Be advised that effective June 30, 2020 the City/Town intends to lay off the employees on the attached list with the indicated job title and department name.

If you would like to negotiate the impact of such action on members of your bargaining unit, please let me know -- in writing -- within five (5) days of receipt of this notice. I would appreciate receiving any questions, suggestions or proposals in advance of such meeting.

The following dates are available:

Please select one (or more) date(s) and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than __________, 2020.

If I have not received a written request for bargaining within five (5) days, I will consider this a waiver and implement the proposed rule/practice/policy.

Note: If any position is under Civil Service, the required notice and hearing specified in MGL c. 31, s. 41 will be provided to the affected individual.
TO: Union President

FROM: Department Head, Appointing Authority or Bargaining Representative

DATE:

RE: Proposed Layoff(s)

As you may know, the City/Town anticipates a serious shortfall in revenues in the coming fiscal year. While it is too early to determine exactly how many will be involved, I anticipate that layoffs will be required.

The union is welcome to participate in discussions being held by various municipal boards and committees. Ultimately, the decision on next year’s budget will be made by the City Council/Town Meeting, probably in June. That would give us very little time to discuss the impact of any layoffs on your members before the start of the new fiscal year. That is why I am extending this offer at this time.

Your questions and suggestions would be appreciated. If the union would like to participate, please let me know -- in writing -- within five (5) days of receipt of this notice. I will then provide you with a list of boards and committees and their schedules so you may attend and make the union’s position known, if you are so inclined.

Regardless of whether you accept this offer to participate, be assured that you will be provided formal notice once a decision about layoffs has been made, at which time we will engage in impact bargaining with the union if a timely demand is made.
CHAPTER 4 - CONTRACTUAL WAIVER

The DLR is reluctant to find a contractual waiver of a union’s right to bargain the impacts of the exercise of a management right on mandatory subjects of bargaining. In nearly all cases, employers will have to engage in impact bargaining if the union makes a timely request to do so. Claims that a union has waived such right are unlikely to succeed at the DLR (to date, no such claim has been upheld.) Employers must be able to demonstrate that a union consciously considered and waived its right to bargain over the decision as well as the impacts of layoffs.

The amount of time and effort required to litigate a claim that a union waived its right to bargain over the impact of layoffs, combined with the almost certainty of an adverse DLR ruling, should convince any responsible municipal manager to honor a union’s demand to engage in impact bargaining over proposed layoffs.

Contractual waiver is an affirmative defense. As the Appeals Court noted in City of Boston v. Labor Relations Commission, 48 Mass.App.Ct. 169 (1999): "In order to assert contractual waiver as an affirmative defense to a failure to bargain before changing employee wages, hours or working conditions, an employer has the burden of proving that the contract clearly, unequivocally and specifically authorizes its actions." Commonwealth of Massachusetts, 18 M.L.C. 1403, 1405 (1992). See School Committee of Newton v. Labor Relations Commission, 388 Mass. at 569 ("waiver must be shown clearly, unmistakably, and unequivocably"). See generally The Developing Labor Law 305-313 (Neighbors et al. eds., 3d ed. 1998).

When an employer raises the affirmative defense of contract waiver, it must show that the subject was consciously considered by the parties, and that the union knowingly and unmistakably waived its right. Town of Mansfield, 25 MLC 14, 15 (1998). Massachusetts Board of Regents, 15 MLC 1265, 1269 (1988) citing Town of Marblehead, 12 MLC 1667, 1670 (1986). Town of Andover, 28 MLC at 270, citing Town of Mansfield, 25 MLC 14, 15 (1998); Central Berkshire Regional School Committee, 31 MLC 191, 202, MUP-01-3231, MUP-01-3232, MUP-01-3233 (June 8, 2005). The initial inquiry focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (August 4, 1998). A waiver must be knowing, conscious, and unequivocal. Commonwealth of Massachusetts, 28 MLC 308 (2002); Melrose School Committee, 3 MLC 1299 (1976). The employer must show that the matter waived was fully explored and consciously yielded. City of Newton, 29 MLC 135 (2003). The DLR must determine whether the contract language "expressly or by necessary implication" confers upon the employer the right to implement the change in the mandatory subject of bargaining without negotiating with the union. Melrose School Committee, 9 MLC 1713, 1725 (1983).

of Newton v. Labor Relations Commission, 388 Mass. at 569 (a waiver must be shown clearly, unmistakably, and unequivocally and cannot be found on the basis of a broad, but general, management rights clause). Town of Andover, 28 MLC at 270 (citing City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. at 174.

The absence of a provision does not prove waiver. Bristol County Sheriff’s Office, 31 MLC 6 (2004). Where the parties’ agreement is silent on an issue, it must be shown that the matter allegedly waived was fully explored and consciously yielded. Commonwealth of Massachusetts, 5 MLC 1097, 1099, SUP-2149 (June 26, 1978) (citing City of Everett, 2MLC1471, 1475, MUP-2126 (May 5, 1976)).

While a union may waive its right to bargain over proposed changes by the provisions of the collective bargaining agreement, a waiver will not be lightly inferred. City of New Bedford, 38 MLC 239, 248, MUP-09-5581, MUP-09-5599 (April 3, 2012). The DLR is reluctant to find such a waiver in the absence of clear contract language. Town of Andover, 28 MLC 264 (2002).

In Town of Stoneham, 39 MLC 1 (2012), although the parties’ contract language addresses the assignment of civilian employees to dispatching duties, the DLR did not find that Article XVIII of the CBA clearly and unambiguously grants the Town the right to unilaterally assign dispatch duties to civilian employees "without limitation" as the Employer asserts. City of Newton, supra, provides a useful counterpoint to illustrate when we will find contract waiver based on an unambiguous management rights clause. At issue was whether the Newton Police Association had waived its right to bargain over the criteria used to determine overtime eligibility and for disciplining an officer by denying him overtime duty. 29 MLC at 136-137. The Board rested its determination that the Union waived its right to bargain over this issue on the management rights clause of the parties' CBA, which it found to be neither "broad [n]or general." Id. at 138. This clause expressly gave the City of Newton the right to "employ, transfer, promote or demote employees, or to lay-off, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons when it shall be in the best interests of the City or the Department." Id. at 136. The clause also granted the employer the right to "prescribe and enforce reasonable rules and regulations for the maintenance of discipline . . ." Id. The Board held that, when read together, these portions of the management rights clause established waiver because it "preserved the City's right" ("subject to any clause in the contract to the contrary") to impose discipline for a violation of a written order by removing an officer from the overtime rotation without first having to bargain to resolution or impasse. Id.

The DLR will not find waiver unless the contract language "expressly or by necessary implication confers upon the employer the right to implement the change in the mandatory subject of bargaining without bargaining with the union." Commonwealth of Massachusetts, 19MLC1454, 1456, SUP-3528 (Oct. 16, 1992) (quoting Melrose School Committee, 9MLC1713, 1725, MUP-4507 (Mar. 24, 1983)). If the language clearly, unequivocally and specifically permits the public employer to make the change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the contract language is ambiguous, the DLR reviews the parties' bargaining history to determine their intent. Peabody School Committee, 28 MLC 19, 21,
MUP-2073 (June 21, 2001); Commonwealth of Massachusetts, 5 MLC 1097, 1099 (1978), citing City of Everett, 2 MLC 1471, 1475 (1976); Press Co., Inc., 121 NLRB 976, 42 LRRM 1493 (1958); Central Berkshire Regional School Committee, 31 MLC 191 (2005); Massachusetts Board of Regents/UMASS Med. Ctr., 15 MLC 1265, 1269, SUP-2959 (Nov. 18, 1988) (citing Town of Marblehead, 12 MLC at 1670).

In Town of Stoneham, 29 MLC 208 (2003) the DLR concluded that the Town therefore had a duty to give notice to the Union and bargain before transferring the duties traditionally assigned to employees within the unit outside of the unit without giving the Union notice and an opportunity to bargain. Because the Town admittedly failed to do so, it violated Section 10(a)(5) of the Law. See City of Haverhill, 11 MLC 1289, 1290 (1984) (distinguishing between an employer's duty to bargain over level of services decision and employer's duty to bargain before transferring bargaining unit work and requiring bargaining over latter); compare Revere School Committee, 10 MLC 1245 (1984) (layoffs resulting from a level of services decision) with City of Gardner, 10 MLC 1218, 1219 (1983) (layoffs resulting from subcontracting).

In Commissioner of Administration and Finance and NAGE, 26 MLC 228 (2000), the Board held that the employer did not violate its duty to bargain when it unilaterally decided to use layoffs as the means of reorganizing the Department of Procurement and General Services (DPGS). The clause stated that in the event of a reduction in force, the "least senior employee in the title within the region of the department/agency in which the employee works shall be laid off." Id. at 231. The Board construed the clause as unambiguously granting the employer both the right to layoff employees and to establish the order in which those layoffs would occur, i.e., by region and least senior employee in the title. Id. at 231. The contract clause added an additional level of specificity by defining the term, "region." Id.
A strongly worded Management Rights article may specify that one of the rights the municipal employer has is the ability to lay off workers (sometimes with the caveat of “in the event of a lack of work, funding or other legitimate reason.”) Even in the absence of a Management Rights article that enumerates the ability to do so, a municipal employer has the inherent right to decide how many workers to employ. This includes the right to lay off individuals to achieve a desired number of employees.

Prior to the enactment of collective bargaining laws, management had the right to do almost anything it deemed appropriate to carry on its business. When municipal employees started to bargain collectively, the contracts which resulted contained items which improved wages, hours and working conditions. There appeared to be little need to insert a “management rights” clause in the early collective bargaining agreements. Essentially management retained all rights which it did not explicitly bargain away. Those contracts which did embody management rights clauses said little more than that.

Over the years public employee unions grew stronger, even as those in the private sector continued to lose members and public sympathy. As wages and hours grew closer to those in the private sector, unions started to press for other benefits, most notably seniority. This hallmark of the union movement worked its way into public sector contracts as well. Bargaining proposals that tied seniority to vacations and step increases came easily. When public sector unions started asking to have promotions, for example, be based solely on seniority, municipal officials and managers balked.

This increased emphasis on benefits tied more to seniority than performance or qualifications prompted an increasing number of municipal employers to negotiate management rights articles into their collective bargaining agreements. Although more detailed than their one-paragraph predecessors, these expanded articles were rapidly agreed to by the unions since they were not so expansive as to take away virtually any benefits the unions had won in prior contracts. They spoke in generalities of the kinds of things that management could do in conducting the public enterprise. Rarely were they the subject of controversy rising to the level of an appellate court decision, for example. The few that did found the courts continuing the tradition of either “favoring management” or “maintaining the long-standing public policy” of recognizing certain matters as inherent management rights, depending on one’s point of view.

The Department of Labor Relations (DLR) has been reluctant to enforce those vaguely worded traditional management rights clauses. The Commission finds them too general in nature. In order for an employer to argue that the union waived certain rights, the Commission requires a clear showing that there was an awareness of the right, some opportunity if not actual discussion, and a “meeting of the minds”. The LRC insists that for management rights clauses to be enforceable, they must be far more detailed -- preferably containing examples -- than their predecessors.
It is important to recognize the possible sources of management rights. Some are contained in statutes while others are “inherent” in the nature of public administration. Where neither is the case, a municipal employer is still free to negotiate for certain rights, just as are the unions when seeking benefits. The challenge is to recognize when something is an inherent managerial prerogative. In that case, numerous consequences follow. For example, certain items need not be discussed even if the union proposes them at the bargaining table. Moreover, even when they are discussed, management may be free to refuse to include them in any resulting contract. Lastly, in certain circumstances, they may not be enforceable even when they are included in a collective bargaining agreement.

In a 2002 Supreme Judicial Court decision involving the Worcester Police Department, the court upheld the Labor Relations Commission’s ruling that the decision to engage police officers in enforcing laws pertaining to school attendance implicated the city's ability to set its law enforcement priorities, and thus was not subject to bargaining. The city was not required to explain its decision, so long as it was a matter of policy. Since the city failed (neglected?) to raise an argument on appeal to the SJC concerning the Commission's order requiring bargaining over the impact of the city's policy decision, the court treated that as a waiver and (reluctantly?) upheld that part of the LRC's decision.

The Court's decision in the City of Worcester case contains an extensive discussion of management rights. It points out, for example, that setting the priorities for the deployment of law enforcement resources is purely a matter of policy and not a proper subject for collective bargaining as is the decision to reduce staff.

The 2003 City of Cambridge case found that the management rights clause authorized the police chief to change the criteria for overtime and to implement a new form of discipline without providing the union prior notice and an opportunity to bargain to resolution or impasse.

In its 1977 decision in the leading case of Town of Danvers and Local 2038, IAFF, the Labor Relations Commission set the tone for municipal collective bargaining in Massachusetts on the issue of mandatory subjects of bargaining. The following excerpt is informative:

The public employer, like the private employer, must have the flexibility to manage its enterprise. Efficiency of governmental operations cannot be sacrificed by compelling the public employer to submit to the negotiating process those core governmental decisions which have only a marginal impact on employees' terms and conditions of employment.

The public employer has a greater responsibility to all citizens of the community than its counterpart in the private sector. The government, as employer, must be responsible not merely to narrow corporate interests but to the overall public interest.
When management in the public sector gives up some of its "prerogatives" . . . it foregoes the right to make decisions in the name of all the people. When management in the private sector loses its unilateral power to act, however, the public loses little or nothing because the decision-making process is merely transferred from one private group to another, rather than from public to private. The loss of the power to manage unilaterally in the public service is, therefore, more serious than the same phenomenon in the private sector. Kilber, Appropriate Subjects for Bargaining in Local Government Labor Relations, 30 Md. L. Rev. 179, 193 (1970).

Therefore, those management decisions which do not have direct impact on terms and conditions of employment must not be compelled to be shared with the representatives of employees through the collective bargaining process. Those decisions must remain within the prerogative of the public employer. To compel the sharing of core governmental decisions grants to certain citizens (i.e., organized public employees) an unfair advantage in their attempt to influence public policy.

In the public sector employees already have, as citizens, a voice in decision making through customary political channels. The purpose of collective bargaining is to give them, as employees, a larger voice than the ordinary citizen. Therefore, the duty to bargain should extend only to those decisions where the larger voice is appropriate. Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1193 (1970).

This special access to governmental decisions is appropriate only when those decisions directly affect terms and conditions of employment.

*Public policy limits a municipality's ability to bargain away management rights. Even if language is included in a collective bargaining agreement, a court will refuse to enforce it if it somehow surrenders a management right.*

The Supreme Judicial Court's 1979 decision involving the Boston School Committee echoed the LRC's analysis. The court quoted from Clark, *The Scope of the Duty to Bargain in Public Employment* in Labor Relations Law in the Public Sector at 82-83 (A. Knapp, Ed. 1977) as follows:

"Public policy" . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it.
The court went on to explain its rationale:

Underlying this development is the belief that unless the bargaining relationship is carefully regulated, giving public employees a collective power to negotiate labor contracts poses the substantial danger of distorting the normal political process for patrolling public policy." Citing Welling & Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107 (1969).

Be careful not to include language in a collective bargaining agreement that conflicts with a municipal employer’s management rights. This could result in expensive and unnecessary litigation or arbitration.

While it has not been asked to do so, probably because no union has made a claim alleging a municipality waived its right to lay off workers, it is most unlikely that the DLR would find any such waiver lawful or binding. And, certainly, a court would not do so.

In a decision in which the SJC ruled that the abolition of the position of supervisor of music was committed to the exclusive, nondelegable decision of the school committee and thus the issue of the propriety of abolition should not have been submitted to the arbitrator, the court quoted with approval the following from a New York school district case:

Public policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may . . . restrict the freedom to arbitrate. Susquehanna Valley Cent. School District at Conklin v. Susquehanna Valley Teachers Ass’n, 37 N.Y.2d 616-617, 376 N.Y.S.2d 427, 429, 339 N.E.2d 132, 133 (1975).57

The Massachusetts courts have made it clear that -- even if agreement is reached and a provision is included in a contract -- there are certain matters of inherent managerial prerogative which cannot be bargained away. Therefore, a municipal employer is not bound by such provisions, even if they are inserted by agreement in a collective bargaining agreement. For example, in a case involving the Ayer Police Department, the appeals Court found that the decision to appoint police officers was a non-delegable managerial prerogative.58

There the contract required that the Selectmen reappoint police officers unless there was just cause found for not doing so. The court overturned the arbitration decision and stated:

We need not decide whether the parties agreed to submit the question of [the police officer's reappointment] to arbitration . . . because, even if they did so agree, [the Board] would not be bound by an agreement to arbitrate its [reappointment] decision.
Arguing that the Appeals Court holding in Ayer should be limited to departments organized under G.L. c. 41, § 96, a challenge was made concerning the actions of the Northborough Board of Selectmen (where G.L. c. 41, § 97A -- the “strong chief law” -- applied) to the Supreme Judicial Court. There the Board voted not to reappoint an officer (union president) at the expiration of his term of appointment. The court found no logic for any distinction focusing on the statutory basis under which a department is organized. It reiterated the reasoning of the Ayer decision and stated:

A town may not by agreement abandon a nondelegable right of management. *Billerica v. International Ass'n of Firefighters, Local 1495*, 415 Mass. 692, 694 (1993). Therefore, even if the arbitration clause in the present case could be interpreted to grant an arbitrator the right to decide whether a police officer is entitled to reappointment, such an agreement would be unlawful and unenforceable. “[A]n agreement to arbitrate a dispute which lawfully cannot be the subject of arbitration [is] equivalent to the absence of a controversy covered by the provision for arbitration.” *Dennis-Yarmouth Regional Sch. Comm. v. Dennis Teachers Ass'n*, 372 Mass. 116, 119 (1977).

**Municipal managers may be faced in police and fire cases with the prospect of arbitration in two contexts. The first is at the end of regular collective bargaining contract negotiations (called “interest arbitration”). The second is often the last step in a contractual grievance procedure (a.k.a. “grievance arbitration”). Municipal employers should not submit proposals concerning the decision to utilize them or the impact of layoffs during regular contract negotiations. Doing so would likely result in lengthy delays of months if not a year or more, while impasse resolution procedures at the DLR are followed.**

In Massachusetts, the Collective Bargaining Law (MGL c. 150E) only mandates interest arbitration for contractual disputes involving either police officers or firefighters. Other bargaining groups may include interest arbitration in their collective bargaining contract by voluntary agreement with the municipal employer, but as a practical matter this is rarely done. By and large, mediation and occasionally fact-finding are the last formal steps in the impasse resolution process for such other bargaining groups. The latter are carried out under the auspices of the Massachusetts Department of Labor Relations through its Conciliation and Arbitration service.

In police and fire negotiations, the DLR’s Joint Labor-Management Committee essentially supervises the process once it takes jurisdiction following a petition by one or both parties. After mediation efforts have failed, the JLMC will usually order the parties to binding arbitration. (Note: virtually all true arbitration is binding. If it were simply a recommendation, it would be fact-finding, or in some cases even mediation – where a mediator makes a recommendation and asks the parties to submit it to their respective constituencies.)
The statute which established the Joint-Labor Management Committee (JLMC) includes a provision specifying what matters may not be the subject of arbitration following the breakdown of contract negotiations. The relevant section states:

. . . ; provided, however, that the scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees; and provided, further, that the scope of arbitration in firefighter matters shall not include the right to appoint and promote employees. Assignments shall not be within the scope of arbitration; provided, however that the subject matters of initial station assignment upon appointment or promotion shall be within the scope of arbitration. The subject matter of transfer shall not be within the scope of arbitration, provided however, that the subject matters of relationship of seniority to transfers and disciplinary and punitive transfers shall be within the scope of arbitration. Notwithstanding any other provisions of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum staffing of shift coverage, with an employee organization representing municipal police officers and firefighters. Nothing in this section shall be construed to include within the scope of arbitration any matters not otherwise subject to collective bargaining under the provisions of chapter one hundred and fifty E of the General Laws.

Going forward, negotiators should refuse to bargain over the right to decide to lay off workers. A municipality is free to discuss certain matters during negotiations without waiving its right to refuse to allow an arbitrator to rule on them. This does not imply that topics impinging on inherent managerial prerogatives are therefore permissive subjects of bargaining. If this were the case, management would be bound, at least for the term of the contract, by an agreement reached on such matters. Moreover, at any point in the negotiations, a municipal employer is free to remove a matter of inherent managerial prerogative from discussions.

The Massachusetts courts have recognized consistently that there are a number of inherent managerial prerogatives which a municipal employer cannot relinquish even by agreement with a union and which an arbitrator may not include in an award. In the 1993 case of Town of Billerica v. International Association of Firefighters, Local 1495, the Supreme Judicial Court made this clear by saying:

There are certain non-delegable rights of management, matters that are not mandatory subjects of collective bargaining (G.L. c. 150E, § 6 [1990 ed]), that a municipality and its agents may not abandon by agreement, and that an arbitrator may not contravene.
The determination that a topic involves an inherent managerial prerogative is significant in several ways. It presumably means that the matter is not a mandatory subject of bargaining. If so, management need not discuss the proposal at negotiations. In fact, the union commits a prohibited (unfair labor) practice if it insists, at least to the point of impasse, on bargaining over a non-mandatory subject of bargaining. In other situations, even if the matter is a mandatory subject of bargaining, it still may not be a proper subject for arbitration. For example, standards of productivity and performance are included in G.L. c. 150E, § 6 as a mandatory subject of bargaining. However, the JLMC statute omits this topic from the scope of arbitration. Lastly, even where a contract already contains a provision purporting to restrict a chief’s managerial prerogative, e.g., power of assignment, a municipal employer may be able to disregard the impermissible restriction and, in any event, can insist that it not be included in a successor agreement.

*It is necessary to insist that the JLMC exclude certain “non-arbitral” topics from any referral to arbitration. Unless this is done, virtually any dispute is likely to be included in an arbitration award. While it is possible to object later, this will result in unnecessary delay, costs and animosity.*

*A strongly worded Management Rights article can constitute a waiver of the union’s right to demand decisional or, in rare cases, impact bargaining. The same will not apply to traditional vague Management Rights articles.*

A waiver cannot be found on the basis of a broad, but general, management rights clause. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 569; *Massachusetts Port Authority*, 36 MLC 5 (2009); *City of Boston*, 3 MLC 1450 (1977). Specific language in a management rights clause that relates to a disputed issue is sufficient to constitute a waiver. *City of Newton*, 35 MLC 142 (2008). Where contract language contained in a management rights clause is not ambiguous, it is necessary only to examine the specificity of the clause and to determine whether the disputed action is within its scope. *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), see *Ador Corp.*, 150 NLRB 1658, 58 LRRM 1280 (1965). The 2003 *City of Cambridge* case found that the management rights clause authorized the police chief to change the criteria for overtime and to implement a new form of discipline without providing the union prior notice and an opportunity to bargain to resolution or impasse. *City of Cambridge*, 29 MLC 134 (2003). Along the same lines, while a "zipper clause" (a provision making the contract the exclusive statement of the parties' rights) may support a finding of a waiver, a broadly formed clause is too vague to infer a clear and unmistakable waiver. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).

The following is the Management Rights article that I typically propose when entering regular contract negotiations. It contains a provision that management may take whatever action is required in an emergency as well as language authorizing layoffs “for lack of funds or other legitimate reason... or where funds are or will be depleted in the budget” While the latter exempts the employer from decisional bargaining, it must still engage in impact bargaining if a timely demand is made by the union to do so.
MANAGEMENT RIGHTS

Nothing in this agreement shall limit the Town in the exercise of its function of management and in the direction and supervision of the Town's business, except where such rights are specifically modified or abridged by the terms of this agreement. This includes, but is not limited to the right to: add or eliminate departments; require and assign overtime; increase or decrease the number of jobs; change process; assign work and work to be performed; schedule shifts and hours to work and lunch or break periods; hire; suspend; demote; discipline, or discharge; transfer or promote; layoff because of lack of work or other legitimate reasons; establish rules, regulations, job descriptions, policies and procedures; conduct orderly operations; establish new jobs; abolish and change existing jobs; determine where, when, how and by whom work will be done; except where any such rights are specifically modified or abridged by terms of this agreement.

Unless an express, specific provision of this Agreement clearly provides otherwise, the Town, acting through its Board of Selectmen, Fire Chief or other appropriate officials as may be authorized to act on their behalf, retains all the rights and prerogatives it had prior to the signing of this Agreement either by law, custom, practice, usage or precedent to manage and control the ____ Department and its Employees.

By way of example but not limitation, management retains the following rights:

- to determine the mission, budget and policy of the Department;
- to determine the organization of the Department, the number of employees, the work functions, and the technology of performing them;
- to determine the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or to any location, task, vehicle, building, station or facility;
- to fill temporary vacancies, and to assign shifts and work hours as the Town deems necessary;
- to determine the methods, means and personnel by which the Department's operations are to be carried out;
- to manage and direct employees of the Department;
- to maintain and improve orderly procedures and the efficiency of operations;
- to hire, promote and assign employees;
- to transfer, temporarily reassign, or detail employees to other shifts or other duties;
- to determine the equipment to be used and the uniforms to be worn in the performance of duty;
- to determine the policies affecting the hiring, promotion, performance reviews and retention of employees;
- to establish qualifications for ability to perform work in classes and/or ratings, including physical, intellectual, and mental health qualifications;
- to lay off employees in the event of lack of work or funds or under conditions where management believes that continuation of such work would be less efficient, less productive, or less economical;
- to establish or modify work schedules and shift schedules and the number and selection of employees to be assigned;
- to take whatever actions may be necessary to carry out its responsibilities in situations of emergency or where funds are or will be depleted in the budget;
- to enforce existing rules and regulations for the governance of the Department, if any, and to add to or modify such regulations as it deems appropriate subject to fulfilling its bargaining obligations;
- to suspend, demote, discharge, or take other disciplinary action against employees, to require the cooperation of all employees in the performance of this function, and to determine its internal security practices.

Management also reserves the right to decide whether, when, and how to exercise its prerogatives, whether or not enumerated in this Agreement. Accordingly, the failure to exercise any right shall not be deemed a waiver.

The parties agree that each side had a full opportunity during the course of negotiations to bargain over any and all mandatory bargaining subjects, whether or not included in this Agreement. Accordingly, as to any such matter over which the contract is silent, the Town retains the right to make changes but only after providing the Union notice and opportunity to bargain, if the Union so requests, to the point of agreement or impasse.

It is understood and agreed by the parties hereto that the Town does not have to rely on any collective bargaining contract with its employees as the source of its rights and management prerogatives. This contract does not purport to spell out the job responsibilities and obligations of the employees covered by this contract. Job descriptions are not meant to be all-inclusive. Management reserves the right to assign duties consistent with an employee’s training and ability, regardless of whether the exact duty is listed in a written job description.

Nothing in this Article will prevent the Union from filing a grievance concerning a violation of a specific provision of this agreement. However, where no specific provision of the agreement limits its ability to act, Management may exercise its rights under this article without having such actions being subject to the grievance procedure.

Notwithstanding the foregoing, all conflicts between the provisions of this article and the specific provisions of other articles in the agreement will be resolved in the favor of such other articles.
A common union tactic when facing layoffs (or almost any type of mid-term proposal) is to submit a lengthy set of requests for information. One goal seems to be to delay as long as possible any layoffs.

If a public employer possesses information that is relevant and reasonably necessary to an employee organization in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the employee organization's request. Higher Educ. Coordinating Council, 19 MLC 1035 (1992); Commonwealth of Mass. 11 MLC 1440 (1985); Boston Sch. Comm., 10 MLC 1501 (1984); Bd. of Trs., Univ. of Mass., 8 MLC 1139 (1981); Board of Higher Education, 26 MLC 91 (2000); City of Boston, 32 MLC 1 (2005), MUP-1687 (June 23, 2005) (citing Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997)). The employee organization's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. Boston School Committee, 10 MLC 1501, 1513, MUP-4468 (April 17, 1984).

This obligation arises both in the context of negotiations and contract administration. Boston School Committee, 10 MLC 1501, 1513, MUP-4468 (April 17, 1984). The union’s right to information includes information that will assist it in determining whether a grievance should be filed. Commonwealth of Mass., 21 MLC 1499 (1994); City of Boston, 29 MLC 165, 167, MUP-2483 (March 6, 2003).

A public employer has an obligation to provide only information that is within its possession or control.

If an employer does not possess information requested by a union, then the employer cannot be found to violate the Law by failing to provide the requested information. Boston School Committee, 43 MLC 36 (2016) See Higher Education Coordinating Council, 22 MLC 1662, 1673, SUP-4078 (April 11, 1996) (citing, Board of Regents of Higher Education, 19 MLC 1248, 1271, SUP-3267, 3268, 3269, 3270, 3271, 3272 (August 24, 1992)). Information about terms and conditions of employment of bargaining unit members is presumptively relevant and necessary to an employee organization to perform its statutory duties. City of Lynn, 27 MLC 60, 61, MUP-2236, 2237 (December 1, 2000). The relevance of the requested information must be determined by the circumstances that existed at the time when the exclusive bargaining representative made the request. Id.

A public employer has an obligation to provide only information that is within its possession or control, and it may not unreasonably delay in providing the union with such information. Mass. State Lottery Comm’n, 22 MLC 1468 (1996); Higher Educ. Coordinating Council, 19 MLC 1035, 1036 (1994) (holding that delay of two years was unreasonable); Woods Hole, Martha’s Vineyard, and Nantucket Steamship Auth., 12 MLC 1531 (1986); City of Boston, 8 MLC 1419 (1981); Boston
Public School Committee, 24 MLC 8 (1997). Additionally, the fact that the information being sought by the union is a “public record” (see G.L. c. 66, § 10, and its definitional counterpart, G.L. c. 4, § 7(26)), or is available from some other source is no defense to a public employer’s refusal to provide relevant and necessary information in its possession or control. Bd. of Regents, 19 MLC 1248 (1992); Commonwealth of Massachusetts, 12 MLC 1590 (1986). An employer may justify its refusal to provide information by demonstrating that it has legitimate and substantial concerns about disclosure of the information and that it has made reasonable efforts to provide as much of the information as possible. Commonwealth of Mass., 11 MLC 1440 (1985).

Information on budget resources must be supplied if a timely request is made. Town of Plymouth, 2015 MLRC Lexis 7 (2015).

**Supplying information about layoffs is required. However, a union may not refuse to participate in mid-term negotiations until it receives all its requested information.**

The refusal to provide information on a permissive subject of bargaining was a violation where it was relevant and reasonably necessary to the Union’s duties as the exclusive collective bargaining representative. City of Marlborough, 34 MLC 72 (2008). There the Union requested the information to inform its proposals and the negotiations over employee layoffs. The Commission observed that, as in *Boston School Committee* and *Commonwealth of Massachusetts*, the Union faced a loss of bargaining unit positions and had an interest in monitoring the retention of bargaining unit positions and work. Moreover, the Marlborough Police Chief’s letter indicated that the City’s minimum staffing levels would affect the City’s reassignment decisions, an issue that the parties were addressing in the negotiations. Although the City had no obligation to bargain over decisions to set minimum staffing levels and to determine the services that it intended to provide to the community, see, *Town of Dennis*, 12 MLC 1027 (1985), *Town of Danvers*, 3 MLC 1559, 1573 (1977), the information that the Union requested regarding these subjects was relevant and reasonably necessary to the Union’s ability to understand and negotiate the impacts of the City’s decision to reduce its workforce. See, *City of Boston*, 29 MLC 165, 167 (2003) (employer required to provide information regarding temporary appointments under Civil Service Law due, in part, to its impact bargaining obligation).

In Massachusetts, the DLR has never held that an employer’s duty to provide information is limited to mandatory subjects of bargaining. See, Higher Education Coordinating Council, 22 MLC 1662, 1672 bn.9 (Board declines to determine whether the employer was obligated to supply information regarding an optional retirement plan in the absence of a bargaining obligation. See, *Boston School Committee*, 13 MLC 1290, 1295 (1986) (Board rejects NLRB’s *per se* rule regarding providing witness statements). However, the Board has addressed an employer’s obligation to provide requested information regarding staffing levels and staffing agreements. In *Boston School Committee*, 22 MLC 1365 (1996), the union asked the school committee to provide information concerning the effect of a hiring freeze on negotiated staffing levels. Although the Board found that the school committee had not violated the Law because it did not possess the requested information, the Board noted that the information was relevant and reasonably necessary to the union’s duty as the exclusive bargaining representative. *Boston School Committee*
Committee, 22 MLC at 1379. Similarly, the Board required an employer to provide information concerning non-unit employee service contracts in Commonwealth of Massachusetts, 18 MLC 1220, 1228 (1991), reasoning that a union facing a proposed reduction in bargaining unit staffing levels had a legitimate and continuing interest in monitoring the retention of bargaining unit work.

In circumstances where the City repeatedly informed the Union that it would be implementing its decision to eliminate the SSI supervisor/overtime position by a date certain and gave the Union multiple opportunities to bargain prior to that date, the Union cannot defend its failure to make any impact bargaining proposals on the City's failure to provide old or new information that it inexplicably failed to discuss or request months earlier. City of Boston, 44 MLC 56 (2017).

The standard in determining whether the information requested by an employee organization is relevant is a liberal one.

The DLR applies a liberal standard for determining “relevancy.” City of Boston, 19 MLC 1327 (1992). The standard in determining whether the information requested by an employee organization is relevant is a liberal one, similar to the standard for determining relevancy in civil litigation proceedings. Board of Higher Education, 26 MLC 91, 92, SUP-4509 (January 11, 2000); Board of Trustees, University of Massachusetts (Amherst), 8 MLC 1139, 1141, SUP-2306 (June 24, 1981). Information about terms and conditions of employment of bargaining unit members is presumptively relevant and necessary to an employee organization to perform its statutory duties. City of Lynn, 27 MLC 60, 61, MUP-2236, 2237 (December 1, 2000). The relevance of the requested information must be determined by the circumstances that existed at the time when the exclusive bargaining representative made the request. Id. The employer must establish that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with the employer’s expressed concerns. Boston School Committee, 37 MLC 140 (2011).

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the exclusive representative, an employer may justify its refusal to provide information by demonstrating that it has legitimate and substantial concerns about disclosure of the information and that it has made reasonable efforts to provide as much information as possible, consistent with its expressed concerns. Boston School Committee, 13 MLC 1290, 1294, MUP-2905 (November 2, 1986); Adrian Advertising, 13 MLC 1233 (1986), aff’d sub nom. Despres v. Labor Relations Commission, 25 Mass. App. Ct. 430 (1988) or that it has already made a reasonable effort to provide the union with as much of the requested information as possible. If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the CERB will examine the facts contained in the record. Boston School Committee, 13 MLC at 1295. The employer’s concerns are then balanced against an employee organization’s need for the information. Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court, 11 MLC 1440, 1443-1444, SUP-2746 (February 21, 1985) (adopting the balancing test approach used by the United States Supreme Court in Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979). Absent a showing of great likelihood of harm flowing from
disclosure, however, the requirement that a bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality. Greater Lawrence Sanitary District, 28 MLC 317, 318-319, MUP-2581 (April 19, 2002). The employer must discuss (but the union is not required to negotiate) alternative methods of providing the union access to the information. Boston Public Health Commission, 38 MLC 6 (2011). The employer’s concerns are then balanced against those of the union and the employer’s refusal will be excused where its concerns outweigh those of the union. Commonwealth of Massachusetts, 11 MLC 1440, 1443, SUP-2746 (February 21, 1985).

Note: An employee organization is required to furnish information that the employer requests that is reasonably related to the bargaining process or to administering the contract. Mass. Nurses Ass’n, 16 MLC 1285 (1989); Woods Hole, Martha’s Vineyard, and Nantucket Steamship Auth., 12 MLC 1531 (1986). This duty parallels the employer’s duty to provide relevant information, and the standard for relevancy is the same liberal one as for employers. Usually unions are charged with bad faith bargaining in regard to furnishing information only when they provide false or misleading information. Often, when a failure to provide relevant information arises with respect to unions, the information at issue involves agency service fees.

Merely alleging that the information sought is redundant is insufficient to conclude that the information is not relevant and reasonably necessary to the union in fulfilling its duties as bargaining agent. The union in a Boston Police Department case needed to have access to the sexual harassment complaint in order to reach its own conclusions, including determining whether the complaint contained any potential exculpatory evidence. City of Boston, 2015 MLRC Lexis 33 (2015), citing City of Boston, 22 MLC 1698, 1707, MUP-9605 (April 26, 1996).

An employer’s obligation to disclose information does not turn on whether the information will help a union to win its case.

It is enough that the information would enable the Union to assess its rights and options along the way by reviewing the terms of contractual work assignments to non-bargaining members; see City of Boston, 25 MLC 181, 186 MUP-9794 (May 20, 1999); monitoring compliance with the contract; Worcester School Committee, 14 MLC 1682, 1685, MUP-6169 (April 20, 1988); and deciding whether to file and pursue a grievance, City of Boston, 28 MLC 374, 376, MUP-2448 (June 13, 2002). A union is also entitled to information that "sheds light" on the merits of the grievance. City of Boston v. Labor Relations Commission, 61 Mass. App. Ct. at 402.

Public records standards do not control.

Even assuming that a union's requested information falls within the investigatory materials exemption, the designation of the information as not a public record does not determine the Federation's right to access that information. See Sheriff of Bristol County v. Labor Relations Commission, 62 Mass. App. Ct. 665, 670 (2004) (determining whether materials are public
records or not does not resolve the question of union's right of access). Although materials may be exempt from disclosure under the Public Records Law, the CERB has held that an employer's obligation under Chapter 150E can be fulfilled in a manner consistent with the purposes of the Public Records Law. Commonwealth of Massachusetts, 21 MLC 1499, 1505-1506, SUP-3459 (December 14, 1994). Absent other legitimate and substantial concerns about disclosure, an employer's release of the information subject to certain safeguards concerning dissemination would harmonize all applicable statutory schemes by enforcing the employer's obligation to bargain in good faith but protecting the public interest in effective law enforcement under the investigatory materials exemption. City of Boston, 2015 MLRC Lexis 33 (2015), citing Bristol County Sheriff's Office, 28 MLC 11, 122, MUP-1820 (October 10, 2001), aff'd sub nom. Sheriff of Bristol County v. Labor Relations Commission, 62 Mass. App. Ct. at 665 (harmonizing Chapter 150E with the investigatory materials exemption by providing requested information to the union with safeguards).

A union can contractually waive all or part of its right to information. Bd. of Regents of Higher Educ. (N. Adams State Coll.), 9 MLC 1799, 1807 (1983). The DLR, however, will not find a waiver unless the employer establishes that the union and the employer agreed specifically to limit the union’s statutory right to certain information. Bd. of Regents of Higher Educ. (N. Adams State Coll.), 9 MLC 1799, 1807, (1983); see also Communication Workers, Local 1051 v NLRB, 644 F.2d 923, 928 (1st Cir. 1981); Commonwealth of Mass., Chief Admin. Justice of the Trial Court, 11 MLC 1440 (1985). The mere inference of a waiver, no matter how strong, will not justify the denial of the union’s statutory right. Communication Workers, Local 1051 v NLRB, 644 F.2d at 928. Rather, the evidence must demonstrate that the union clearly and unmistakably waived its right to receive information.

**Delay in Furnishing Information is a Violation.**

An employer may not unreasonably delay furnishing requested information that is relevant and reasonably necessary. Boston School Committee, 24 MLC 8, 11, MUP-1410, 1412 (August 26, 1997). In determining whether a delay in the production of information is unreasonable, the CERB considers a variety of factors including: 1) whether the delay diminishes the employee organization's ability to fulfill its role as the exclusive representative, Id.; 2) the extensive nature of the request, UMass Medical Center, 26 MLC 149, 158, SUP-4392, 4400 (March 10, 2000); 3) the difficulty of gathering the information, Id.; 4) the period of time between the request and the receipt of the information, Higher Education Coordinating Council, 23 MLC at 269; and 5) whether the employee organization was forced to file a prohibited practice charge to retrieve the information. Board of Higher Education, 26 MLC 91, 93, SUP-4509 (January 11, 2000). See also City of Malden, 2015 MLRC Lexis 1 (2015) and Newton School Committee, 44 MLC 178 (2018).

A Hearing Officer found the School Committee violated Section 10(a)(5) of the Law by failing to timely provide the Union with information about the revenue that the School Committee received from the use of school facilities by outside groups for approximately three months. Newton School Committee, 344 MLC 178 (2018). (The union was forced to file a charge before the City provided the requested information.)
The DLR may impose a variety of remedies.

When an employer violates the Law, the DLR typically orders the employer to cease and desist from in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights, guaranteed under the Law as well as to take certain affirmative action. The affirmative action in a request for information case would typically include providing the relevant and reasonably necessary requested information, producing relevant and reasonably necessary requested information in a timely manner, and adhering to the pertinent provisions of the parties' collective bargaining agreement.

However, where a party has demonstrated a flagrant disregard of its duties under the Law, it is possible that the DLR may be asked to consider extraordinary remedies. This was the case in Boston School Committee, 43 MLC 36 (2016). First, rather than the imposition of a cease and desist order containing the above-referenced language, the Union sought a so-called "broad" cease and desist order enjoining the employer from "in any other manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law." The Union also requested that the DLR institute judicial contempt proceedings to enforce that order, if needed. Second, the Union also requested the extraordinary remedy that the Superintendent or the President of the School Committee be required to read aloud the contents of the notice to employees at the next School Committee meeting. Although the Hearing Officer declined the requests, the reasoning given is indicative of what might be used in an appropriate case.
CHAPTER 7 - WAIVER OF THE RIGHT TO BARGAIN BY INACTION

*If after receiving adequate notice the union waits too long to demand bargaining, it may not be able to complain about layoffs. The DLR has long recognized affirmative defenses to the Section 6 obligation to bargain, which includes waiver by inaction.*

*A municipal employer should emphasize the need for prompt responses from the union and management’s willingness to schedule multiple meetings in advance of any proposed layoff date.*

In many ways, so-called “waiver by inaction” in the labor relations context resembles the doctrine of laches in civil litigation. Where a public employer raises the affirmative defense of waiver by inaction, it bears the burden of proving by preponderance of the evidence that the union had: (1) actual knowledge or notice of the proposed change; (2) a reasonable opportunity to negotiate prior to the employer's implementation of the change; and (3) unreasonably or inexplicably failed to bargain or to request bargaining. Town of Watertown, 32 MLC at 56-57 (citing Town of Hudson, 25 MLC at 148; Town of Milford, 15 MLC 1247, 1252-54 (1988), Scituate School Committee, 9 MLC 1010, 1012-13 (1982)). *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 570, 447 N.E.2d 1201 (1983). Holliston School Committee, 23 MLC 211, MUP-1300, (March 27, 1997); Ashburnham-Westminster Regional School District, 29 MLC 191, 194, MUP-01-3144 (April 9, 2003); Commonwealth of Massachusetts, 28 MLC 239 (2002).

*The DLR is reluctant to find that a union waived its rights by inaction.*

The agency seems to apply this same high standard to cases claiming a waiver by inaction or waiver by contract. As discussed earlier a contractual waiver will not be lightly inferred, City of New Bedford, 38 MLC 239, 248, MUP-09-5581, MUP-09-5599 (April 3, 2012), and there must be a clear and unmistakable showing that a waiver occurred through the bargaining process or the specific language of the agreement. In fact, it does not infer a union's waiver of its statutory right to bargain without a "clear and unmistakable" showing that a waiver occurred. Commonwealth of Massachusetts, 28 MLC at 40 (citing Holyoke School Committee, 12 MLC 1443, 1452 (1985); City of Everett, 2 MLC 1471, 1476 (1976), aff'd Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979).

*Providing too little notice before a scheduled layoff violates an employer’s duty of good faith. The DLR will not apply the doctrine of waiver by inaction where the union is presented with a fait accompli. The union is not required in such cases to demand bargaining in order to file a charge at the DLR.*

Where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless," the doctrine of waiver will
not apply. Town of Hudson, 25 MLC 143, 148, MUP-1714 (April 1, 1999); Holliston School Committee, 23 MLC 211, 212-213, MUP-1300 (March 27, 1997) (citing Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May 27, 1982)); Massachusetts Port Authority, 36 MLC 5, 13 (2009) (citing Town of Hudson, 25 MLC at 148); Ashburnham-Westminster Regional School District, 29 MLC 191, 194 (2003). Town of Douglas, 2015 MLRC Lexis 11 (2015) (a demand to bargain would have been futile at this point because the Employers had already implemented the Opt-Out program.) In such cases, the union is not required to make a demand to bargain in order to preserve its rights. Ashburnham-Westminster Regional School District, 29 MLC 191 (2003); Town of Hudson, 25 MLC 143 (1999). Nor will it apply the waiver by inaction doctrine in cases where a union refuses to bargain about a mandatory subject of bargaining apart from impending or ongoing successor negotiations. City of Boston, 31 MLC 25 (2004). A waiver by inaction may be found where an employee organization did not take sufficient action after notice of a proposed change to terms and conditions of employment affecting mandatory subjects of bargaining. Revere School Committee, 3 MLC 1537, 1540, MUP-2444 (March 18, 1977) (waiver found where union failed to request bargaining despite a seven-month notice of change).

The filing of a charge, after protesting a unilateral change, does not constitute a waiver even though there has been no formal request to bargain. City of Everett, 2 MLC 1471 (1976).

The HO found that the Association did not waive by inaction its right to bargain over the Town’s decision to implement that program on July 1, 2013, because the Town unlawfully presented the program as a fait accompli. See, Plymouth School Committee, 42 MLC 124 (2015) (The Employer claimed that the union waived by inaction its right to seek bargaining because it did not request to bargain after the Principal ordered the night custodian to empty the recycling totes. However, it was presented with a fait accompli. The Principal testified that he had made the decision to require the night custodians to empty the recycling bins after speaking with the Assistant Superintendent for Human Resources and before he even sent his April 4, 2014 email. The Principal’s April 4, 2014 email merely announced his decision rendering a demand to bargain as futile. See Ashburnham-Westminster School District, 29 MLC at 194 (finding that a demand to bargain was futile where a letter to employees only announced a previously-made decision to change prescription drug benefits).

**Actual notice or knowledge is required. Written notice to the union is preferred.**

To satisfy the burden of proof for a waiver by inaction defense, an employer must show that it notified the union of a proposed change or that the union had actual knowledge of the change. Town of Milford, 15 MLC 1247, 1252, MUP-6670 (November 9, 1988). The information that the employer conveys to the union must be sufficiently clear for the union to respond appropriately and must be received far enough in advance to allow effective bargaining to occur. Town of Hudson, 25 MLC at 148; Boston School Committee, 4 MLC at 1915.

While written notice to a union official is recommended, notice of a proposed employer action will be imputed to a union when a union officer with authority to bargain is first made aware of
WAIVER OF THE RIGHT TO BARGAIN BY INACTION

the employer’s proposed plan. City of Holyoke, 13 MLC 1336, 1343 (1986), citing Boston School Committee, 4 MLC 1912, 191, 415 (1978). Notice found to be sufficient to evoke a union response in several cases in which the employer stated it was considering certain actions, without specifying a date or deadline. Id., citing Scituate School Committee, 9 MLC 1010, 1012 (1982).

A union is not required to demand bargaining when the only available information consists of rumors or speculation. City of Gardner, 10 MLC 1218, 1222, MUP-4917 (September 14, 1983). Stoughton School Committee, 42 MLC 243 (2016) (conversations with union members that were not on the bargaining team were not sufficient without clear proof that the union knew of the proposed change.) The City of Boston violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith when it required unit members to purchase replacement vests without first giving the Association prior notice and an opportunity to bargain to resolution or impasse over the decision and the impact of that decision on employees' terms and conditions of employment. City of Boston, 40 MLC 301 (2014). The “notice” was allegedly contained in a new rule that the Union leadership failed to read. The Hearing Officer found, however, that the Association had neither actual notice nor constructive notice of the change.

If it is the employer that delays the negotiations, no waiver on the part of the union will be found. For example, Town of Plymouth, 40 MLC 209 (2014) (no waiver by inaction where delay resulted when town failed to contact union to schedule negotiations after promising to do so.) Along the same lines, although the City of Springfield suggested that the Union had an ample opportunity to discover the new 18.5 hour positions from the Library practice of announcing new hires by email, providing the Union with an employee list, and posting new positions on the internet, its argument that the Union should have pieced the puzzle together and demanded bargaining did not satisfy its burden. City of Springfield, 41 MLC 9 (2014).

There is no statutory or agency rule about how long a wait in demanding bargaining will result in a waiver.

The DLR looks at not only the length of time but also the circumstances surrounding why the union didn’t act sooner. A waiver by inaction may be found where an employee organization did not take sufficient action after notice of a proposed change to terms and conditions of employment affecting mandatory subjects of bargaining. Revere School Committee, 3 MLC 1537, 1540, MUP-2444 (March 18, 1977) (waiver found where union failed to request bargaining despite seven months’ notice of change).

A union runs the risk that by waiting too long to demand bargaining its complaint will be dismissed. Spencer-East Brookfield Regional School District, 43 MLC 197 (2017). Although the School District provided notice of the additional duties in August 2015, the affected employee was not compelled to perform them until February or March of 2016. The union waived its right to bargain by inaction since it never requested to bargain over the duties at any time between August 2015 and the date that Donohue began performing the additional duties.
Following notice, the burden shifts to union justifying delay in demanding bargaining.

Where the employer has presented evidence satisfying its burden, a finding that a union has failed to present evidence rebutting that case, does not improperly shift the burden of proving compliance to the union but, rather, results in a conclusion that the employer has proven its affirmative defense by a preponderance of the evidence. Id. at 213. Once the employer gives notice and provides the union the opportunity to demand bargaining, the burden shifts to the union to come forward in a timely manner and demand bargaining, or at least voice an objection to the change. If an opportunity to bargain is presented but no request is made, the union by its inaction may waive its right to bargain. Town of North Andover, 1 MLC 1103, 1107, MUP-529 (September 3, 1974). Such a waiver will not be lightly inferred. Town of Natick, 2 MLC 1086 (August 26, 1975).

There is no shifting of the burden of proving compliance to the Union, but where, for example, the Union failed to offer any reasons for not reviewing the information the City provided in preparation for a long-delayed bargaining session and failed to explain why it could not have offered a proposal in the intervening months, a waiver was found. Just as employers are free to raise defenses to allegations as to which the union bears the burden of proof, e.g., claims arising under Section 10(a)(5) of the Law, a union has the right to defend itself against waiver by inaction claims by presenting evidence that rebuts the evidence that the employer presented in support of its claim. See, e.g., Holliston School Committee, 23 MLC at 213 (finding that union waived its right to bargain by inaction by failing to provide sufficient evidence showing that it made a timely demand to bargain).
CHAPTER 8 - IMPASSE

Absent agreement, an employer must bargain to Impasse before implementing. And if the union does not negotiate in good faith, the employer may implement its pre-impasse position.

The concept of “impasse” is a word of art in the labor relations area. While a precise definition is not easy, essentially it means that even if there have been good faith efforts to do so, the parties have reached a point where additional efforts at reaching agreement are virtually pointless. A union's obligation to bargain in good faith mirrors that of an employer's obligation to bargain in good faith and is not satisfied by mere surface bargaining. Town of Saugus, 2 MLC 1480, 1484, MUP-591 (May 5, 1976). If the union engages in bad faith bargaining, or refuses to bargain at all, the employer may declare an impasse. After good faith negotiations have exhausted the prospects of concluding an agreement, an employer may implement changes in terms and conditions of employment that are reasonably comprehended within its pre-impasse proposals. City of Leominster, 23 MLC 62 (1996); Hanson School Committee, 5 MLC 1671, MUP-2196 (February 27, 1979). To fulfill its responsibility to bargain in good faith, an employer is obligated to make itself available at reasonable times and places to negotiate, to negotiate in good faith, and to refrain from unilateral action until impasse is reached. Taunton School Committee, 28 MLC 378, 390, MUP-1632 (June 13, 2002).

Although the good faith obligation does not compel parties to agree to a proposal or make a concession, it requires parties to have discussions with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences.

It is typically the employer that declares impasse and proceeds to implement its pre-impasse position or to cease participating in negotiations. Whether or not parties have achieved an impasse in their negotiations is a question of fact.

Impasse is not established simply because one party believes it is so or has stated such belief to the other party. Board of Higher Education, 30 MLC 141, 145, SUP-4650 (May 15, 2004). Although the Board considers a party's unilateral expression of desire to continue bargaining as evidence that the parties may not have bargained to impasse, the ultimate test is whether there is a "likelihood of further movement by either side" and whether the parties have "exhausted all possibility of compromise." Commonwealth of Massachusetts, 25 MLC at 205; City of Boston, 29 MLC 6, 9, MUP-2413 (June 27, 2002). Rather, the existence of impasse is a question of fact involving consideration of the totality of the circumstances. School Committee of Newton, 388 Mass. at 574.

If the union contends that impasse has not been reached, it may file a complaint at the DLR. That agency will determine that the parties have reached impasse in negotiations only where both parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked. Commonwealth of Massachusetts, 8 MLC 1499, 1513, SUP-2508 (November 10, 1981) (citing Taft Broadcasting Co.,
The factors that the DLR weighs to determine whether an impasse exists include:

- Bargaining history.
- The good faith of the parties in negotiations.
- The length of the negotiations.
- The importance of the issue or issues as to which there is disagreement.

Whether or not parties have achieved an impasse in their negotiations is a question of fact requiring a consideration of the totality of the circumstances as to whether, despite their good faith, further bargaining over bargainable issues would be fruitless because the parties are deadlocked. *City of Worcester*, 39 MLC 272, 272, MUP-11-6289 (March 29, 2013) (citing *City of Boston*, 29 MLC 6, 9, MUP-2413 (June 27, 2002) (further citing *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 575, 447 N.E.2d 1201 (1983). This involves examining the parties' bargaining history, the good faith of the parties, the length of negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties regarding the state of negotiations. *Ashburnham-Westminster Regional School District*, 29 MLC 191, 195, MUP-01-3144 (April 9, 2003). The ultimate test of whether parties have reached impasse is whether there is a "likelihood of further movement by either side" and whether the parties have "exhausted all possibility of compromise." *City of Boston*, 28 MLC 175, 184-185 MUP-1087 (November 21, 2001) (quoting *Commonwealth of Massachusetts*, 25 MLC 201, 205, SUP-2075 (June 4, 1999)).

The DLR recognizes that collective bargaining is a dynamic process that is influenced by many factors, such as changing circumstances which could affect the parties' relative positions on any outstanding issues, and which could improve the likelihood of further compromise (especially where a union expresses a desire to continue bargaining). See Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1528-30, UP-2496 (Feb. 3, 1988) (no impasse where hiatus in bargaining and major change in employer's bargaining proposal significantly altered the framework for the negotiations); see also *Town of Arlington*, 15 MLC 1452, 1464, MUP-6187 (Feb. 3, 1989) (no impasse because union membership's rejection of town's offer changed the dynamics of bargaining and created a need for both sides to bargain further); *Lawrence School Committee*, 3 MLC 1304, 1308-09, MUP-2287 and MUP-2329 (Dec. 7, 1976) (no impasse where passage of time created possibility that parties could retreat from earlier
positions, allowing for eventual settlement). Commonwealth of Massachusetts, 20 MLC 1298, 1302-03, SUP-3843 (Dec. 3, 1993) (no impasse where parties only met twice and employer failed to respond to union's information request).

The DLR assesses the likelihood of further movement by either side and whether they have exhausted all possibility of compromise. One session alone will not suffice.

An analysis of whether the parties are at impasse requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise. Commonwealth of Massachusetts, 25 MLC at 205; Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529-1530 (1988); City of Worcester, 39 MLC 271 (2012). If one party to the negotiations indicates a desire to continue bargaining, it often demonstrates that the parties have not exhausted all possibilities of compromise and precludes a finding of impasse. Commonwealth of Massachusetts, 25 MLC at 205, citing City of Boston, 21 MLC 1350 (1994). However, where the bargaining history shows that additional meetings would be pointless, the LRC will not require them even where one party desires to keep meeting. City of Boston, 29 MLC 6 (2002); Commonwealth of Massachusetts, 29 MLC 1 (2002).

There is no fixed number of sessions required before declaring impasse. In some cases, it may become clear after one or two sessions that there is no point in continuing to meet. The CERB has become more willing in recent years to recognize that the parties may be able to quickly perceive that they are at “loggerheads” and that further negotiations are pointless; however, declaring impasse after only one session has not withheld that agency’s scrutiny to date. In a 2002 case involving computerization at various correctional facilities, the Commission ruled that the Department of Correction did not violate the Law since it met with the union on numerous occasions over a number of years in on-going labor/management meetings aimed at addressing concerns and facilitating the transition to computerization. Commonwealth of Massachusetts, Commissioner of Administration, 29 MLC 1 (2002). In City of Boston, 28 MLC at 185 the Board found impasse after parties met at least nine times without resolution, employer declared parties had reached an "end point" and discontinued the negotiations.

In non-police or firefighter cases, if regular negotiations are under way and the employer’s proposal for layoffs is on the table, Section 9 may prohibit implementation after mediation petition is filed.

In cases not involving police officers or firefighters (see Town of Stoughton, 19 MLC 1149 (1992)), Section 9 of Chapter 150E prohibits public employers from implementing unilateral changes during successor negotiations after a Section 9 petition for mediation has been filed with the DLR until those procedures have been completed. Cambridge Public Health Commission d/b/a Cambridge Health Alliance, 37 MLC 39 (2010) (Ruling on Motion for Summary Decision leaves open question of whether or not Section 9 bans unilateral action in the context of successor negotiations absent a petition). In such cases, the CERB will evaluate whether the parties were at impasse at the time of the unilateral change. However, participation in Section 9 proceedings may not preclude an employer from making unilateral changes before completing the collective
bargaining process if the employer is able to demonstrate that externally imposed circumstances required unilateral action by a date certain. *Cambridge Health Alliance*, 37 MLC 39 (2010).

*The DLR will not usually find that impasse exists if the employer has not produced documents requested by the union that are needed to fulfill the union’s duty.*

Where the Union has an outstanding information request, a Hearing Officer found that that the parties had not reached impasse and that the Town unlawfully implemented the Narcan policy. *Town of Natick*, 43 MLC 178 (2017). In contrast to the facts of that case, the HO noted that the Board finds impasse in situations where there are no outstanding proposals or information requests. *City of Boston*, 28 MLC 175, 185, MUP-1087 (November 21, 2001). Second, the HO did not find that the Town otherwise bargained in good faith. "Good faith implies an open and fair mind as well as a sincere effort to reach common ground." *Taunton School Committee*, 28 MLC 378, 391, MUP-1632 (June 13, 2002). The policy changed, training was scheduled prematurely and the revised Narcan policy went beyond what the Town proposed, and what the parties bargained. The HO pointed out that, "There can be no impasse justifying unilateral action if the cause of the deadlock is the failure of one of the parties to bargain in good faith." *School Committee of Newton*, 388 Mass. at 572. Third, the Town's own bargaining team was not on the same page regarding the status of negotiation and presented conflicting perspectives to the Union's negotiating team. This disparity shows that even the Town's own negotiating team lacked a coherent and uniform understanding of the status of negotiations, which precludes a finding of impasse.

The CERB upheld a HO’s finding of impasse based on the union’s actions before it filed an information request. *City of Boston*, 44 MLC 56 (2017).

These recent cases indicate how the Board handles impasse determinations:

- *City of Boston*, 2018 MLRC LEXIS 25 (2018) the CERB upheld the HO finding that the City did not reach impasse with the BPPA when it implemented the Mediation Program without rescheduling the meeting between Harvard and the BPPA after a scheduling miscommunication. Thus, the BPPA never had any opportunity to discuss its concerns with the Harvard mediators, as promised by the City. Further, the City did not include language in the policy specifying that mediation would be considered an officer's tour of duty as it agreed to do. It also did not advise the BPPA that it would not make these changes and give them the opportunity to respond or discuss the issues further. Agreeing to the BPPA's requests, and then implementing the Mediation Program without complying with its agreement, cannot be considered bargaining to impasse. In addition, the City did not change the confidentiality language as requested by the BPPA or provide the BPPA an opportunity to discuss it further or explore options to alleviate its concerns about the confidentiality of mediation. Lastly, the City never indicated that it considered that the parties were at impasse or expressed its belief that they were deadlocked on any issue.
Even though only three bargaining sessions were held, the union’s failure to propose a single alternative solution regarding the impacts of the Town’s proposal to go to a one-shift operation led the HO to conclude that impasse had been reached. 43 MLC 195 (2017)

**The Law does not require parties to make concessions during bargaining or to compromise strongly felt positions.**

Where a party is determined to maintain a set position, such as the case is here, it must approach the subject with an open mind by allowing the other side to explain the reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. *City of Marlborough*, 34 MLC at 77. In this case, the Town offered its first response to the Association’s twenty-four hour shift proposal during the seventh negotiation session, which took place on September 15, 2016. The Association offered a counterproposal on that same date, the proposed terms of which included maintaining its own twenty-four hour shift proposal.

**DLR has broad authority to fashion a remedy.**

Section 11 of the Law grants the Board broad authority to fashion appropriate orders to remedy a public employer’s unlawful conduct. *Labor Relations Commission v. Everett*, 7 Mass. App. Ct. 826 (1979). Section 11 broadly commits the design of appropriate remedies to the CERB’s "discretion and expertise". *Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315, 326 (2005). When an employer refuses to bargain, the usual remedy includes an order to bargain, and to return the parties to the positions they would have been in if the violation had not occurred. *Town of Dennis*, 12 MLC 1027, 1033, MUP-5247 (June 21, 1985). However, if 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. *Town of Burlington*, 10 MLC 1387, 1388-89, MUP-3519 (February 1, 1984). The usual remedy for a failure to bargain over the impacts of a decision involving a managerial prerogative is a prospective order to bargain to resolution or impasse over the impacts of the decision on mandatory subjects of bargaining. *Id.* In cases where an employer’s refusal to negotiate is limited to the impact of a managerial decision, the Board traditionally orders restoration of the status quo ante applicable to those affected mandatory subjects rather than to the decision itself. *Commonwealth of Massachusetts*, 26 MLC 116, 121-22, SUP-4158 (February 15, 2000). In this respect, the Board seeks to restore the parties to their bargaining and economic positions that existed prior to the unlawful conduct. *City of Malden*, 20 MLC 1400, 1406-07, MUP-7998 (February 23, 1994).

In cases involving impact bargaining, although the DLR will traditionally order restoration of the status quo ante applicable only to those affected mandatory subjects, rather than to the decision itself, *see, e.g.*, *Commonwealth of Massachusetts*, 26 MLC at 121-122, the agency does not apply this principle rigidly. Rather, it considers other factors, including whether the impacts over which the union sought to bargain were an inevitable consequence of the managerial decision, *i.e.*,
whether bargaining could only have ameliorated, but not changed, the impacts of the managerial decision, see, e.g., City of Somerville, 42 MLC 170, 172, MUP-13-2977 (December 30, 2015), and whether it is possible to separate the impact issues from the decision issues, see, e.g., Commonwealth of Massachusetts, 26 MLC at 121-122.

Where an employee refuses to perform certain new duties following the layoff of other bargaining unit members, the fact that bargaining had not reached impasse and the employer violated the Law by imposing new duties on the employee will not insulate such worker from discipline. Where an employee’s refusal to perform the additional or new duties was protected activity, the DLR will not overturn the discipline. See Commonwealth of Massachusetts, 29 MLC 132 (2003) (refusal of Correction Officer to perform passbook audits); and Commonwealth of Massachusetts, 9 MLC 1337, 1341 (1982)(ruling that an individual who had resigned after the Commonwealth had unilaterally and unlawfully ordered him to give up his outside law practice was ineligible for backpay, because there was no evidence that individual was coerced into resigning). The Commission has previously opined that failure to obey a command may be grounds for discipline even if the order was improper. Town of West Springfield, 8 MLC 1041, 1047 (1981).
CHAPTER 9 - SURFACE BARGAINING

A party must take bargaining seriously, not just go through the motions. While management may stick to its sincerely made proposals, it must keep an open mind and make a good faith effort at reaching agreement.

Surface bargaining occurs when a party makes a pretense of bargaining but is merely going through the motions of negotiations without a substantive intent to reach an agreement. Similarly, a party may be guilty of surface bargaining if it rejects the other side’s proposals while tendering its own without making any attempt to reconcile the two positions. Town of Saugus, 2 MLC 1480 (1976). A party is surface bargaining if it merely attends a prescribed number of meetings without engaging in meaningful discussions. S. Worcester County, Reg’l Vocational Sch. Dist., 2 MLC 1488 (1976). When a public employer, for example, rejects a union's proposal, tenders its own, and does not attempt to reconcile the differences, it is engaged in surface bargaining. Id. Also, a failure to make any counterproposals may be indicative of surface bargaining. Id. A categorical rejection of a union's proposal with little discussion or comment does not comport with the good faith requirement. Revere School Committee, 10 MLC 1245, 1249, MUP-5008 (September 29, 1983). Also, a failure to make any counterproposals may be indicative of surface bargaining. Local 466, Utility Workers of America, AFL-CIO, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981).

A party engages in surface bargaining when an examination of the course of bargaining reveals various elements of bad faith bargaining that, together, tend to show that the dilatory party did not seriously try to reach a mutually satisfactory basis for agreement, but intended merely to "shadow box to an impasse." City of Marlborough, 34 MLC 72, 77, MUP-03-3963 (January 9, 2008). "Good faith implies an open and fair mind, as well as a sincere effort to reach a common ground." Id. at 572. Thus, the duty to bargain in good faith requires the parties to enter into negotiations with an open mind and a sincere desire to reach an agreement, and to make reasonable efforts to compromise their differences. Boston School Committee, 25 MLC 181, 187, MUP-9794 (May 20, 1999); Town of Hudson, 25 MLC 143, 147, MUP-1714 (April 1, 1999) (citing Commonwealth of Massachusetts, 8 MLC 1499, SUP-2508 (November 10, 1981)).

When examining acts alleged to violate the statutory obligation to bargain in good faith, the DLR looks to the totality of a respondent's conduct, and not merely to isolated deeds. Harwich School Committee, 10 MLC 1364, 1367, MUP-5216 (January 25, 1984). Therefore, based on the totality of the Association's conduct, including its concessions to a number of the Town's other proposals apart from the twenty-four hour shift in a fifty-six hour work week, the HO did not find that the Association engaged in surface bargaining about the twenty-four hour shift issue. Seekonk Firefighters Association, 45 MLC 51 (2018).

A party engages in surface bargaining "if, upon examination of the entire course of bargaining, various elements of bad faith bargaining are found, which considered together, tend to show that the dilatory party did not seriously try to reach a mutually satisfactory basis for agreement,
but intended to merely shadow box to an impasse." Everett School Committee, 43 MLC 55, MUP-09-5665 (August 31, 2016) (quoting Bristol County Sheriff's Department, 32 MLC 159, 160-161, MUP-19-2971 (March 13, 2003) (citing Newton School Committee , 4 MLC 1334, MUP-2501 (H.O.) (October 4, 1977), aff'd, 5 MLC 1016 (June 2, 1978), aff'd sub nom. School Committee of Newton v. Labor Relations Commission), 388 Mass. 557 (1983) (internal citations omitted). While most cases involve claims against the employer, a union's obligation to bargain in good faith mirrors that of an employer's obligation to bargain in good faith and is not satisfied by mere surface bargaining. Town of Saugus, 2 MLC 1480, 1484, MUP-591 (May 5, 1976).

In surface bargaining cases, the issue is whether a party's approach to bargaining demonstrated an unyielding rigidity during negotiations that rendered collective bargaining a futility. Prentice-hall, Inc., 306 NLRB 31, 39 (1992). See also Town of Braintree, 8 MLC 1193, 1197, MUPL-2363 (July 1, 1981) (finding a lack of willingness to fully discuss proposals). "Collective bargaining is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of take it or leave it; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." NLRB v. Ins. Agents’ Int'l Union, AFL-CIO, 361 U.S. 477, 485 (1960). NLRB v. Ins. Agents’ Int'l Union, AFL-CIO, 361 U.S. 477, 485 (1960) See, also, Newton School Committee, 44 MLC 178 (2018). (The School Committee engaged in bad faith bargaining and surface bargaining when it rejected the Union's proposals without making any counterproposals, refused to withdraw any proposals from its initial bargaining agenda, and refused to discuss economic proposals until the outsourcing proposal was resolved in violation of Section 10(a)(5) of the Law.)

Even where one side makes a proposal on a mandatory subject of bargaining, it is possible that this may have been done in bad faith, so the DLR will take a look at all the surrounding circumstances. Newton School Committee, 2017 MLRC Lexis 22 (2017) MUP-16-5186

A determination that the union engaged in surface bargaining does not rest on any single element, but upon an evaluation of the entire course of the Association's bargaining conduct. See City of Marlborough, 34 MLC 72, 77, MUP-03-3963 (January 9, 2008). In analyzing the totality of conduct, proposals are considered "not to determine their intrinsic worth but instead to determine whether in combination and in the manner proposed they evidence an intent not to reach agreement." Coastal Electric Cooperative, 311 NLRB 1126, 1127 (1993). See also King Philip Regional School Committee, 2 MLC at 1397 (finding that the relevant inquiry for the CERB is an examination of conduct exhibited at the bargaining table and the nature of the bargaining rather than the terms or merits of the parties' proposals.) Whether or not an employer has bargained in good faith is a fact-intensive inquiry that must be decided on a case by case basis based on the totality of the circumstances. Harwich School Committee, 10 MLC 1364, 1367-68, MUP-5216 (January 25, 1984) (citing City of Springfield, 7 MLC 1832, 1834, MUP-3720 (February 6, 1981)).

Except where the conduct in question is, on its face, a _de facto_ refusal to bargain, as noted above, the test of a party's good faith in negotiations involves an examination of the totality of conduct. King Philip Regional School Committee, 2 MLC 1393, 1397, MUP-2125 (February 18, 1976). In examining the totality of the parties' conduct, the CERB also considers acts away from the
bargaining table. Higher Education Coordinating Council, 25 MLC 69, 71, SUP-4087 (September 17, 1998) (citing King Phillip Regional School Committee, 2 MLC at 1393). Acts away from the bargaining table that suggest bad faith bargaining include unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, delaying tactics and arbitrary scheduling of meetings. Regency Serv. Carts, Inc., 345 NLRB 671 (2005).

In Bristol County Sheriff’s Department, 33 MLC 159 (2003) the HO found that the Employer engaged in surface bargaining from May 16, 2000 through January 11, 2001 by making no effort to reach an agreement with the Union on the issue of the proposed vision and dental plan. See, Newton School Committee, 4 MLC at 1343 n.4, citing Wheeling Pacific Company, 151 NLRB 1192 (1965) ("belated bargaining which finally occurs after an extended period of refusal to bargain in good faith may be held to be only 'surface bargaining' rather than good faith bargaining").

**Hard bargaining is allowed.**

Section 6 of the Law requires a public employer and a union to meet at reasonable times to negotiate in good faith over wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but does not compel either party to agree to a proposal or to make a concession. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 562-563, 447 N.E.2d 1201 (1983). The Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. City of Marlborough, 34 MLC at 77. Where a party is determined to maintain a set position, it must approach the subject with an open mind by allowing the other side to explain the reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. Id. Section 6 of the Law does not compel either the union or the employer to agree to a proposal or make a concession. Seekonk Firefighters Association, Local 129312, IAFF, 45 MLC 51 (2018) (There was no violation since the union never refused to meet, and never characterized its counter offer as “final.”)

A party’s willingness to make concessions, though failing to yield on a major issue while making other concessions is not evidence of surface bargaining; while G.L. c. 150E, § 6 does not compel either party “to agree to a proposal or make a concession,” a party’s complete inflexibility to compromise is evidence of bad faith; see Towne Taxi, 4 MLC 1509 (1977) (refusing to make any attempt to compromise is unlawful); Newton Sch. Comm., 4 MLC 1334 (1977), aff’d, 5 MLC 1016 (1978) (affirming hearing officer’s decision that school committee’s failure to make a concession it was authorized to make as part of bargaining over layoffs was bad faith bargaining); but cf. Taunton Mun. Lighting Plant, 5 MLC 1515 (1978) (finding that mere refusal to offer wage increase due to economic constraints was not bad faith bargaining in the absence of other bad faith tactics); see also NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134–35 (1st Cir. 1953) (“While the [National Labor Relations] Board cannot force an employer to make a ‘concession’ on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable efforts in some direction to compose his/her differences with the union. . . .”).
Where a union engages in surface bargaining, an employer may declare impasse and implement its pre-impasse position. But caution should be exercised so as not to confuse hard bargaining with surface bargaining by the union.

The DLR rejected the employer’s complaint and concluded that the Association engaged in good faith, hard bargaining rather than surface bargaining. Seekonk Firefighters Association, 45 MLC 51 (2018). The Association's position regarding the twenty-four hour shift proposal was not so patently unreasonable as to frustrate agreement, nor did it, or the JLMC petition, constitute an effort to stall negotiations. Cf. Framingham School Committee, 4 MLC 1809, MUP-2428 (February 27, 1978) (finding that the employer engaged in delay tactics, and that the employer's proposal based on a long-abandoned position was predictably unacceptable). Further, the Association did not refuse to meet indefinitely, fail to bring a decision maker, refuse to discuss certain proposals, fail to respond to any Town proposals, or condition further negotiations or an agreement upon acceptance of certain proposals as presented. It is undisputed that the Association remained steadfast in its belief that the twenty-four hour shift within a forty-two hour work week proposal represented the most beneficial work schedule for its membership. However, the Town did not show that the Association refused to discuss or listen to the Town's proposal for a twenty-four hour shift within a fifty-six hour work week.

Although the Association rejected the Town's proposal on the fifty-six hour work week almost immediately and in the same bargaining session in which it was proposed, the record shows that negotiations did not immediately cease upon the Association's rejection of that proposal. Even though the Association's official bargaining representative stated that there was "no condition on the planet" that would persuade it to agree to a fifty-six hour work week, the fact that the Association verbally indicated to the Town that it intended to make a counteroffer, and proceeded to make that counteroffer during the same bargaining session, suggests that the Association considered the proposal, but sought to continue discussions on the twenty-four hour shift issue to achieve what it perceived to be a better result for its members. While the Town may have been disappointed by the Association's unwavering stance on the matter of twenty-four hour shifts, the Law does not require parties to make concessions during bargaining or to compromise strongly felt positions. See Town of Braintree, 8 MLC at 1197.

A Hearing officer found that the Seekonk Firefighters Association, Local 1931, IAFF (Association) did not violate Section 10 (b) (2), and, derivatively, Section 10(b)(1) of the Law, by engaging in surface bargaining during successor contract negotiations with the Town. Seekonk Firefighters Association, Local 1931, IAFF, 45 MLC 51 (2018). Specifically, the Town alleged that, under the totality of the circumstances, the Association failed to bargain in good faith during successor contract negotiations by engaging in surface bargaining with respect to the issue of twenty-four hour shifts. The Complaint alleged that the Association engaged in surface bargaining by its conduct in response to the Town’s proposal for twenty-four hour shifts within a fifty-six hour work week, which included the filing of a JLMC petition two days before the Town's bargaining representatives were scheduled to speak with the Board about whether it was willing to reconsider the Association's proposals, in violation of Section 10(b)(1). Based on the totality of the Association's conduct, including its concessions to a number of the Town's other proposals.
apart from the twenty-four hour shift in a fifty-six hour work week, the HO did not find that the Association engaged in surface bargaining about the twenty-four hour shift issue.
CHAPTER 10 - UNION OBLIGATION TO BARGAIN IN GOOD FAITH

If the union does not bargain in good faith, management may implement its latest proposal.

Public employee unions have a reciprocal obligation to bargain in good faith. General Laws c. 150E, § 10(b)(2) prohibits the employees’ exclusive bargaining representative (union) from refusing to bargain in good faith with the employer. Mass. State Lottery Comm’n, 22 MLC 1519 (1996). This issue generally arises during contract negotiations. An employer usually will file a refusal to bargain charge against a union only if the union refuses to discuss one of its proposals at the bargaining table. A slightly different situation arises during the term of the collective bargaining agreement, as will be discussed later. A union’s obligation to bargain in good faith is substantially identical to the employer’s bargaining obligation under Section 10(a)(5). A union may also be found to have refused to bargain in good faith should it interfere with the employer’s administration of the collective bargaining agreement. See Mass. State Lottery Comm’n, 22 MLC 1519 (1996). There is no obligation, however, to bargain over a permissive subject of bargaining. IAFF, Local 1820, 12 MLC 1398 (1985) (dismissing refusal to bargain charge against union because the union was not required to bargain over minimum manning, a permissive subject of bargaining). When a union fails to bargain over a midterm change not governed by contract, management may implement its midterm proposal.

A union's bad faith bargaining can effectively obliterate the existence of a situation in which the employer's good faith can be tested. Cont'l Nut Co., 195 NLRB 841, 845 (1972). If good faith "cannot be tested, its absence can hardly be found." Times Publ’g Co., 72 NLRB 676, 673 (1947). For instance, in NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997), the court concluded that the union's refusal to discuss the employer's no-tobacco policy proposal obviated any bad faith violation arising from the employer's conduct. See also Commonwealth of Massachusetts, 8 MLC at 1511 (declining to find regressive bargaining after considering the union's refusal to respond to negotiation requests, insistence on negotiating with a particular individual, and reluctance to participate in fact-finding, in juxtaposition to the employer's attempts to set up meeting dates, willingness to continue negotiating, wish to get the union back to the table, and cooperation with the mediator's request for a total contract proposal).

Good faith bargaining requires keeping an open mind, responding to inquiries and suggestions and trying to reach agreement; however, it does not require making a concession or counter-offer. For example, an employer fails to bargain in good faith if it refuses to negotiate over the impact of a reduction in work hours. R.E.A.D.S. Collaborative, 21 MLC 1251 (1994). Similarly, the union must negotiate in good faith. Should bad faith bargaining on the union’s part take place, the employer is free to implement the decision without being required to discuss the matter any further.

A union violates its good faith requirement by refusing to consider the employer’s proposals. Further, the commission held that the union could not refuse to discuss the proposals merely
because they were “take away” items. Town of Braintree, 8 MLC 1193 (1981). Similarly, in one case the commission found that the union failed to bargain in good faith because its representatives insisted on discussing only noneconomic items. Town of Braintree, 8 MLC 1193 (1981).

Another way that a union can violate its duty to bargain in good faith would be to circumvent the employer’s selected representative. Commonwealth of Mass., Comm’r of Admin., 8 MLC 1484 (1981). For example, when an American Federation of State, County and Municipal Employees (AFSCME) union lobbied for an increase in health insurance premium benefits at a town meeting, the committee found that the union violated its good faith duty by failing to bargain with the employer’s legal representatives. Comm’r of Admin., 8 MLC 1484 (1981).

Generally, the CERB does not interfere with union rules or actions that are within the legitimate domain of internal union affairs. Switzer v. Labor Relations Commission, 36 Mass. App. Ct. 565 (1994) (the question of whether the union violated its constitution and by-laws is a matter for the courts, not the CERB); National Association of Government Employees, 13 MLC 1525 (1987). However, a union’s freedom to regulate its internal affairs must give way to certain overriding interests implicit in the Law. Id. The CERB has found overriding interests outweighing a union’s freedom to act in the following situations:

- Testimony on behalf of an employer at a CERB proceeding; Brockton Education Association, 12 MLC 1497 (1986) (union violated Law by moving to censure members who voluntarily testified on behalf of employer).
- Prohibiting strikes. Luther E. Allen, Jr., 8 MLC 1518 (1981).

The collective bargaining agreement in Spencer-East Brookfield Regional School District, 43 MLC 197 (2017) did not contain explicit language requiring the union to encourage or not discourage bargaining unit members from applying for the stipend positions, or requiring the union to fill the stipend positions, but merely contained a list of compensation for stipend positions. Standing alone, the list established nothing more than pay rates. Even assuming that the list of compensation rates for stipend positions could be construed as ambiguous, the record was devoid of evidence of the parties' bargaining history with respect to these positions. Therefore, the Hearing Officer dismissed the Employer’s allegation that the union repudiated the agreement in violation of Section 10 (b) (2) and, derivatively, Section 10(b)(1) of the Law.

The CERB affirmed the dismissal of the charge that the City filed against the Union that alleged that the Union violated Section 10 (b) (2) of the Law by repudiating the parties' grievance procedure when it met with the City’s Director of Personnel and Budget who serves as the Mayor’s designate at Step 2 of the grievance procedure before meeting with the Fire Chief at Step 1. The grievance procedure affords the Union discretion as to whether or not to file a grievance and does not mandate or prohibit any process, including attempts to resolve a dispute
prior to filing a formal grievance. The evidence did not show that the plain and unambiguous language of the grievance procedure prevented the Union from having this meeting. City of Medford, 2015 MLRC LEXIS 44 (2015).
CHAPTER 11 - LAYOFFS UNDER EXPIRED CONTRACTS

Municipal officials should carefully review all collective bargaining agreements, including those that appear to have expired. In some cases, the language of an expired contract concerning layoffs will not apply, but consultation with labor counsel is strongly recommended before deciding to ignore any such wording.

Especially in public safety departments, municipal employers should never agree to include a so-called “evergreen clause” extending the contract beyond 3 years until a successor agreement is reached.

For years, most public safety and municipal administrators in this state lived with the belief that police and fire collective bargaining agreements virtually never expired, often even in the absence of so-called “evergreen” clauses. In fact, many contracts essentially had some form of evergreen clause, primarily based on such mistaken belief. The October 22, 2010 decision of the Massachusetts Supreme Judicial Court voiding all contract provisions that purported to extend the life of a public safety contract beyond three years caught many administrators, and even some labor attorneys, by surprise. Some municipal managers are still playing “catch up” when it comes to learning what impact this SJC ruling would have on public safety labor negotiations. The prompt action in the Fall of 2011 by the Massachusetts Legislature to amend Section 7 of Chapter, allowing evergreen clauses, has complicated the situation.

In light of the devastating loss of revenue resulting for the Covid-19 epidemic, some municipal officials are looking into whether an expired collective bargaining agreement may be a potential source of some relief that may allow communities to maintain a greater level of services than some had come to believe was possible.

As with so many areas of labor law, this is not one that is easily understood or even explained in “plain English” in just a few words. While the expiration of a contract in most areas of the law means the absence of any more obligations under it, this is far from the case in the labor relations arena. The danger is that well-meaning municipal officials may act prematurely in an attempt to seize on what they perceive as an “opportunity” to regain some of the concessions they or their predecessors have bargained away over the years. Mistakes in this area can be very costly in terms of both employee morale and productivity. Moreover, if an employer’s actions result in financial losses to employees, an order to “make whole” such workers (or in some cases even unions) for improperly instituted actions may be very costly.

There is no statutory requirement that the terms of a police or fire collective bargaining agreement "survive" its expiration. This is not the case, however, for contracts with other municipal bargaining units. Under the provisions of M.G.L. c.150E, § 9, (which does not apply to police or fire negotiations), upon the filing of a petition with the Massachusetts Department of Labor Relations (formerly the Board of Conciliation and Arbitration) for a determination of impasse following negotiations for a successor agreement, “an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding and arbitration, if applicable, shall have been completed.” Certainly, if the legislature intended police and fire cases to be
included, it would have so stated here or under the Joint Labor-Management Committee (JLMC) sections of the law.

Generally, when a collective bargaining agreement expires, the employer must continue paying the same wages and benefits—and continue most other terms and conditions of employment—until the parties reach either a new agreement or an impasse in negotiations. In short, the contract may have expired, but the obligation does not. This rule is an outgrowth of the rule that an employer's unilateral change in a term or condition of employment violates the statutory obligation to bargain in good faith.\textsuperscript{62} In fact, there can be no impasse justifying unilateral action if the cause of the deadlock is the failure of one of the parties to bargain in good faith.\textsuperscript{63}

If the employer wishes for a contractual obligation to cease with the contract, the contract must contain language that "clearly and unmistakably" waives the union's right to bargain about the matter upon expiration of the contract. In \textit{Local Joint Executive Board of Las Vegas v. NLRB}, No. 07-73979, Aug. 27, 2008, the Ninth Circuit clarified the contractual language necessary for such a "clear and unmistakable" waiver.

In the \textit{Las Vegas} case, the union contract specified that all contract interpretation disputes were to be resolved through arbitration. It also stated that layoffs would be determined on the basis of seniority "if other things such as aptitude and ability are equal." When the contract expired, the company and union made no effort to negotiate a successor contract. Some months later, the company decided to partially close down operations and laid off employees without regard to seniority and without first notifying the union. The union filed grievances on behalf of the laid-off employees, but the company refused to submit the dispute to the grievance procedure and arbitration. The union protested that the layoffs violated the expired contract's seniority provisions and, therefore, were arbitrable. The dispute eventually reached the U.S. Supreme Court.

The Supreme Court, in a 5-to-4 decision in the leading case of \textit{Litton Financial Printing Div. vs. NLRB}, 137 LRRM 2441, determined that, while the arbitration provision survived the expiration of the contract, the dispute was not one arising under the terms of the contract. The court outlined the circumstances under which a dispute is one arising under the contract:

\begin{enumerate}
  \item when it involves facts and occurrences that arose before contract expiration or
  \item where an action taken after expiration infringes a right that accrued or vested under the contract.
\end{enumerate}

In the case, the union contract provided that seniority would be a determining factor so long as such other factors as aptitude and ability were equal. These factors were the primary considerations of who was selected for layoff. If the dispute went to arbitration, the court explained, the inquiry would focus on whether aptitude, ability and any other factors were equal on the date of the decision to lay off, which was long after the contract had expired. These are factors which change over time. They cannot be said to accrue or vest or be understood as a form of deferred compensation, the court reasoned. Refusing to apply "a presumption of arbitrability,"
the court said that "to do so would make limitless the contractual obligation to arbitrate." It added that because "arbitration is a matter of consent" under federal labor law, "it will not be imposed upon parties beyond the scope of their agreement."

In reaching its decision in the Litton case, the Supreme Court’s five-member majority gave a narrow reading of a 1977 Supreme Court decision (Nolde Brothers Inc. vs. Bakery Workers) that established, in somewhat vague terms, a presumption in favor of continuing recourse to arbitration even after union contracts expire. One of the dissenting opinions in the Litton case said that the majority opinion "turns Nolde on its head." It said that the majority opinion was "not only unfaithful to precedent but also it is inconsistent with sound labor law policy."

Especially on non-police or fire cases, if a municipal employer would like a contractual obligation to cease with the expiration of the contract, the CBA must contain language that "clearly and unmistakably" waives the union's right to bargain about the matter upon expiration of the contract. The law prohibits unilateral discontinuation of a term or condition of employment merely because a contract has expired. Instead, the contract must contain language clearly stating that the particular employer obligation "terminates" when the contract ends. An employer should not rely on general "duration" or "term" language, even if the language is contained in the very article that creates the obligation that the employer wishes to terminate. Nor should the employer rely on language in the general "Duration" or "Term" Article that states that all obligations under this contract "terminate" upon expiration. Rather, if the employer wishes a particular obligation to cease when the contract expires, the particular article that creates that obligation must clearly state that the obligation terminates when the contract expires. Moreover, bargaining history should not cause any ambiguity.

The Labor Relations Commission (LRC) was confronted in 1982 with a non-public safety case that presented the following central question: where a provision in an expired contract arguably allowed the employer to set and change work schedules, but where the record reveals only that the "summer hours" option available at two work sites had remained unchanged for at least four years, does the status quo which the employer may not change unilaterally consist of the employer's authority as arguably set forth in the expired contract language, or the actual hours which have prevailed for four years? The latter were found to be the actual existing conditions of employment. Therefore, the LRC ruled that the employer's action in discontinuing the "summer hours" option without bargaining was a unilateral change in conditions of employment in violation of Sections 10(a)(5) and (1) of the Law.

According to the duration clause in that agreement, the agreement was to expire when "an impasse in negotiations is reached." The parties did not dispute that the availability of a dual schedule, including the option of working "summer hours," is a mandatory subject of bargaining. The LRC noted that this directly affects employees' hours of work. Thus, the employer in this case had a duty to bargain concerning the subject of work schedules.

In a case much like this, which arose under the National Labor Relations Act, 29 U.S.C. §§151 et. seq., both the National Labor Relations Board (NLRB) and the U.S. Court of Appeals for the Eight Circuit held that an employer violated its duty to bargain during a hiatus period (following a contract’s expiration) when it laid off employees by utilizing a merit selection procedure,
authorized by the expired contract, rather than continue the practice of lay-offs by strict seniority followed by the parties. The Court of Appeals stated the following principle for determining the operative working conditions which must be maintained during the hiatus between contracts:

"An expired contract in the Labor-Management field must be viewed in light of its effect upon the past operation of the plant and the entire industrial pattern which has been established, in part, by it, together with the customs, practices, and traditions of the industry and the Company. Expired contract rights affecting mandatory bargaining issues, therefore, have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the status quo of the entire plant operation."

The decision of the NLRB in Shell Oil Co., 149 NLRB 283, 57 LRRM 1271 (1964), cited by the hearing officer in support of his decision, is consistent with the principles the Appeals Court applied in this case. In Shell Oil, actual practice (frequent sub-contracting over a 10-year period) coincided with contract language (establishing contractual wage standards for subcontracted work). In that case, the Board expressly relied upon the fact that the subcontracting had become "an established employment practice" rather than simply a contractual provision:

"We are persuaded and find that Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of Article XIV, had also become an established employment practice, and as such, a term and condition of employment." 149 NLRB at 287 (emphasis added).

Many cases on the issue of implementing changes after a contract's expiration have been decided under the National Labor Relations Act (NLRA). While the Massachusetts DLR generally follows NLRA precedents, it is not required to do so. However, the DLR has repeatedly cited NLRB decisions when faced with an issue involving implementation following the expiration of a collective bargaining agreement.

The following is a list of circumstances which, based on NLRB or federal court decisions, would appear to authorize a municipal employer to abandon a contract provision after expiration:

- the changes were made at a time when the union no longer represented a majority of the unit employees, or the employer had a good-faith doubt based on objective considerations, of the union's continued majority status;

- agreement is reached with the union on those terms and conditions to be changed;

- the union has waived its right to bargain on the issue;

- an impasse has been reached in bargaining, and the unilateral change is encompassed by the employer's pre-impasse proposals; or

- the union has failed to bargain in good faith.
1) **Successor Union**

Once a new union is certified the decertified union loses all rights to represent the employees in the unit and retains no rights under the collective bargaining agreement. Accordingly, the enforcement of contract violations predating the change in union representation is left to the new union, which steps into the shoes of its predecessor. Otherwise, there would be no way to enforce the contract rights without prejudicing the employee's right to select new representation. The fact that the new union is not a signatory to the contract is not dispositive.

*Where a city or town has a legitimate need to reduce employee benefits, it may be necessary to terminate the existing contract in order to do so. Where the benefit involves a mandatory subject of bargaining (which includes layoffs), it will be necessary to provide the union with notice and opportunity to bargain before implementing the proposed change.*

Where bargaining is requested, both parties must engage in good faith negotiations to the point of agreement or impasse. If the union fails to make a timely request, or fails to bargain in good faith, the employer is free to implement its pre-impasse position.

The Joint Labor Management Committee (JLMC) is not likely to look kindly on a municipal employer that implements changes following the expiration of a contract if that agency is engaged in trying to settle the dispute. In the absence of decided DLR or court cases on the subject, any advice here is speculative. However, since the Massachusetts courts have allowed implementation in other cases where mediation and fact-finding were involved, it would appear that the same principles apply regardless of whether the JLMC is involved.

Certainly, while active mediation is in progress, an employer would be hard-pressed to declare impasse unilaterally. It is unlikely that the DLR would find that impasse existed when the parties were still meeting with a JLMC mediator, especially if some progress was being made. However, should the mediator "throw up his/her hands" and refer the matter to the Committee for a "3a" hearing, an employer would have good grounds to contend that the parties were at impasse. While the statute does not use the word "impasse," an essential component of the "3a" process is a determination by the JLMC of the "apparent exhaustion of the collective bargaining process."

In light of the SJC's decision voiding so-called “evergreen” clauses that extend collective bargaining agreements (CBA) beyond the three-year limit contained in chapter 150E, and the subsequent legislation authorizing but not requiring such evergreen clauses, employers and unions will be faced with situations they have rarely experienced over the years in this state, viz., how to handle grievances following the expiration of a CBA. Unless a contract specifically provides otherwise, which is not likely to be the case, those grievances that were properly filed during the life of a contract should proceed under the applicable grievance procedure to arbitration. The confusion will focus on grievances filed after the contract has expired. In some cases, such grievances will be arbitrable, in other cases, grievances concerning events that took place after a contract expired may not need to be arbitrated, especially where the rights allegedly
violated had not become vested while the contract was in effect. However, the analysis is not as simple as looking at the timing of the events giving rise to the dispute. It is possible that a dispute may be grievable even though the complained of event actually took place after a contract expired especially where it relates to events that took place during the life of the agreement.

In 1977, the US Supreme Court, in the case of *Nolde Bros. v. Bakery & Confectionary Workers Local 358*, 97 S. Ct. 1067, 94 LRRM 2753 (1977), ruled that grievances that arise during the life of a collective bargaining agreement and are arbitrable under that agreement do not become non-arbitrable simply because the contract terminated before arbitration was requested or commenced. In addition, the Court held that a grievance will be arbitrable even though it arose after the termination of the collective bargaining agreement so long as the grievance was based on a right that arguably had accrued or become vested under the agreement prior to its termination.

The CBA in *Nolde* had a clause that required the payment of severance pay to all employees with three or more years of service. Negotiations for a new contract continued beyond the expiration date and the union gave notice of its intention to cancel the contract, presumably so they could strike. Negotiations continued for several days after the termination became effective. Finally, however, when faced with the threat of a strike, the employer decided to permanently close the plant effective immediately. After paying accrued wages and vacation pay, the employer refused to either pay or arbitrate the union’s claim for severance pay. The employer explained that its obligation to arbitrate such dispute ended when the contract was terminated.

In *Nolde*, there was general agreement that the severance-pay grievance would have been arbitrable under the broad “all grievances” clause if it had arisen during the life of the CBA. However, since the union filed the grievance after it terminated the contract, there was a dispute over the arbitrability of such grievance. The union argued that the severance benefits had accrued or become vested during the term of the agreement, even though they were payable only when employment terminates. The Court held that the grievance was arbitrable even though it arose from an event, in this case a plant closure, that occurred after the union terminated the agreement. The Court pointed out that the underlying dispute, “although arising after the expiration of the collective-bargaining contract, clearly arises under that contract.”

The Supreme Court’s decision covered only the issue of arbitrability of the dispute. The Court noted strong policy reasons for holding the dispute arbitrable. It also explained that “where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.”

In this case the parties each raised arguments concerning differing interpretations of a certain contract clause. “The dispute, therefore, although arising after the expiration of the collective-bargaining contract clearly arises under that contract.” Obviously, if the dispute over the clause had arisen when the contract was in effect, there would be no doubt of its arbitrability. The Court rejected the employer’s argument that the duty to arbitrate is automatically extinguished upon a contract’s termination. Pushed to its natural conclusion, this proposition might mean that even
grievances started when a contract was in effect would be stopped upon expiration, and that was clearly against the strong public policy that favors arbitration for the settlement of labor disputes. For many years following Nolde, lower courts and even the NLRB adopted varying interpretations of the Supreme Court’s ruling. In 1991, the Supreme Court issued its decision in the case of Litton Financial Printing Div. v. NLRB, 111 S. Ct. 2215, 137 LRRM 2441 (1991) in an effort to resolve some of these issues. Agreeing with the Board’s narrow interpretation of Nolde, the Court held that post-expiration arbitration is strictly limited to “disputes arising under the contract.” As the Court explained, where the dispute involves events that occurred before expiration, or where post-expiration conduct “infringes a right that accrues or vested under the agreement,” or where the right survives the contract’s expiration, the matter will be arbitrable as “arising under the contract.”

Municipal managers in police or fire cases may be faced with the prospect of arbitration in two contexts. The first is at the end of regular collective bargaining contract negotiations. The second is often the last step in a contractual grievance procedure.

When arbitration is involved in an effort to settle an impasse during regular collective bargaining negotiations, it is referred to as “interest arbitration.” In Massachusetts, the Collective Bargaining Law (MGL c. 150E) only mandates interest arbitration for contractual disputes involving either police officers or firefighters. Other bargaining groups may include interest arbitration in their collective bargaining contract by voluntary agreement with the municipal employer, but as a practical matter this is rarely done. By and large, mediation and occasionally fact-finding are the last formal steps in the impasse resolution process for such other bargaining groups. The latter are carried out under the auspices of the Massachusetts Board of Conciliation and Arbitration.

In police and fire negotiations, the Joint Labor-Management Committee essentially supervises the process once it takes jurisdiction following a petition by one or both parties. After mediation efforts have failed, the JLMC will usually order the parties to binding arbitration. (Note: virtually all true arbitration is binding. If it were simply a recommendation, it would be fact-finding, or in some cases even mediation – where a mediator makes a recommendation and asks the parties to submit it to their respective constituencies.)

If mediation efforts are not successful, the JLMC often refers outstanding issues to arbitration. The form of arbitration may vary. Occasionally there will be a three-person panel, with one (serving as the chair) and one representative of management and one of union. Often these persons come from the committee’s membership, with the chair or vice-chair serving as the arbitration panel’s chair. Alternatively, a single arbitrator is sometimes asked to handle the case. Often a list of private arbitrators is provided to each side, with the parties’ ranking determining who the arbitrator will be. In both instances, the result is the same. The municipality is required to submit the arbitration award to its legislative body (Town Meeting, City Council, etc.) for funding. The Board of Selectmen or the Mayor is required, in fact, to support the funding of the award.
The statute which established the Joint-Labor Management Committee (JLMC) includes a provision specifying what matters may not be the subject of arbitration following the breakdown of contract negotiations. The relevant section states:

. . . ; provided, however, that the scope of arbitration in police matters shall be limited to wages, hours and conditions of employment and shall not include the following matters of inherent managerial policy: the right to appoint, promote, assign, and transfer employees; and provided, further, that the scope of arbitration in firefighter matters shall not include the right to appoint and promote employees. Assignments shall not be within the scope of arbitration; provided, however that the subject matters of initial station assignment upon appointment or promotion shall be within the scope of arbitration. The subject matter of transfer shall not be within the scope of arbitration, provided however, that the subject matters of relationship of seniority to transfers and disciplinary and punitive transfers shall be within the scope of arbitration. Notwithstanding any other provisions of this act to the contrary, no municipal employer shall be required to negotiate over subjects of minimum staffing of shift coverage, with an employee organization representing municipal police officers and firefighters. Nothing in this section shall be construed to include within the scope of arbitration any matters not otherwise subject to collective bargaining under the provisions of chapter one hundred and fifty E of the General Laws.

The Massachusetts courts have recognized consistently that there are a number of inherent managerial prerogatives which a municipal employer cannot relinquish even by agreement with a union and which an arbitrator may not include in an award. In the 1993 case of *Town of Billerica v. International Association of Firefighters, Local 1495*, the Supreme Judicial Court made this clear by saying:

There are certain non-delegable rights of management, matters that are not mandatory subjects of collective bargaining (G.L. c. 150E, § 6 [1990 ed]), that a municipality and its agents may not abandon by agreement, and that an arbitrator may not contravene.

The determination that a topic involves an inherent managerial prerogative is significant in several ways. It presumably means that the matter is not a mandatory subject of bargaining. If so, management need not discuss the proposal at negotiations. In fact, the union commits a prohibited (unfair labor) practice if it insists, at least to the point of impasse, on bargaining over a non-mandatory subject of bargaining. In other situations, even if the matter is a mandatory subject of bargaining, it still may not be a proper subject for arbitration. For example, standards of productivity and performance are included in G.L. c. 150E, § 6 as a mandatory subject of bargaining.
However, the JLMC statute omits this topic from the scope of arbitration. Lastly, even where a contract already contains a provision purporting to restrict a chief's managerial prerogative, e.g., power of assignment, a municipal employer may be able to disregard the impermissible restriction and, in any event, can insist that it not be included in a successor agreement.

_A municipality is free to discuss certain matters during negotiations without waiving its right to refuse to allow an arbitrator to rule on them. This does not imply that topics impinging on inherent managerial prerogatives are therefore permissive subjects of bargaining. If this were the case, management would be bound, at least for the term of the contract, by an agreement reached on such matters. Moreover, at any point in the negotiations, a municipal employer is free to remove a matter of inherent managerial prerogative from discussions._

_It is necessary to insist that the JLMC exclude certain “non-arbitral” topics from any referral to arbitration. Unless this is done, virtually any dispute is likely to be included in an arbitration award. While it is possible to object later, this will result in unnecessary delay, costs and animosity._
CHAPTER 12 - CIVIL SERVICE LAYOFF PROCEDURES

Where employees that were appointed under the state’s Civil Service law (MGL c. 31) are to be laid off, they must be afforded notice and a hearing pursuant to Section 41 of that law. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority.

When a layoff is contemplated, the appointing authority shall provide such employee a written notice of the time and place of such hearing at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty.

If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.

Any hearing pursuant to this section shall be public if either party to the hearing files a written request that it be public. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

If it is the decision of the appointing authority, after hearing, that there was just cause to lay off such person, such person may appeal to the commission as provided in section forty-three.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

Notice of any action taken under this section shall be forwarded forthwith by the appointing authority to the personnel administrator.

When municipality makes good faith, nonarbitrary determination that its revenues will be less than was anticipated when tax rate was set, thereby jeopardizing ability to meet appropriation, there is lack of money within meaning of section 41. Debnam v. Belmont, 388 Mass. 632, 447 N.E.2d 1237 (1983). In the Debnam case, the town had just cause for layoff of 5 firefighters after enactment of Proposition 2½ (St. 1980, ch. 580) for lack of money, even though town had $500,000 in reserve fund.

The SJC overturned the decision of the Civil Service Commission (which was upheld by the trial court) and concluded that the lack of money caused by budgetary constraints, even though there might have been other funds available in a reserve fund, is just cause to eliminate a position and
lay off a municipal employee. *Gloucester v. Civil Service Com.,* 408 Mass 292, 557 N.E.2d 1141 (1990). There, the SJC noted that when a municipality made a good faith nonarbitrary determination that its revenues would be less than anticipated when the tax rate was set, thereby jeopardizing its ability to meet its total appropriation, there was a lack of money within the meaning of section 41.

SAMPLE NOTICE TO PROVISIONAL CIVIL SERVICE EMPLOYEE RE: LAYOFF HEARING

Date

HAND DELIVERED AND REGULAR MAIL

Name
Address

Dear:

You are hereby notified that the City of ANYCITY contemplates that you will be laid off from your Provisional position of _____________ on Monday, June 30, 2020 at 11:59 P.M.

The reasons for the contemplated layoff are due to FY09 budgetary constraints and lack of funds for your position in the FY21 (name of department) budget.

You presently hold your position in a provisional civil service status. Accordingly, you are not entitled to the usual Civil Service hearing procedures requested for those who have permanent civil service status. Nevertheless, in deference to your years of service with the City, you will be granted an opportunity to be heard, under procedures contained in G.L. c. 31, §41. I am enclosing a copy of §§39-45 of that statute.

The hearing will take place in the LOCATION at City/Town Hall on Wednesday, ___________, 2020 at 12:00 p.m. before me as the Appointing Authority or a Hearing Officer designated by me.

Very truly yours,

Appointing Authority

Enc.
CC: Union Representative
Employee File
SAMPLE NOTICE TO PERMANENT CIVIL SERVICE EMPLOYEE RE: LAYOFF HEARING

Date

HAND DELIVERED AND
REGULAR MAIL

Name
Address

Dear:

You are hereby notified that the City of ANYCITY contemplates that you will be laid off from your position of Permanent (title), on Monday, June 30, 2020 at 4:00 P.M.

The reasons for the contemplated layoff are due to FY21 budgetary constraints and lack of appropriation of funds for your position in the FY09 (department name) budget.

Enclosed are copies of Massachusetts General Laws Chapter 31, Sections 39 through 45, which outline your Civil Service Rights.

In accordance with Section 41, a hearing will take place in the LOCATION at City/Town Hall on Wednesday, __________, 2020 at 10:00 A.M. before me as the Appointing Authority or a Hearing Officer designated by me as the Appointing Authority,

Very truly yours,

Appointing Authority

Enc.
XC: Union Representative
   Employee File

THANKS TO ATTY. KATE FEODOROFF FOR SHARING THESE SAMPLES
1 City of Boston School Committee, 4 MLC 1912 (1972).
2 Id.
3 Newton School Committee, 5 MLC 1016 (1978).
5 Commonwealth of Massachusetts, 25 MLC 201, 205 (1999); Town of Brookline, 20 MLC 1570, 1594 (1994).
6 Commonwealth of Massachusetts, 25 MLC at 205; Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529-1530 (1988).
7 Commonwealth of Massachusetts, 25 MLC at 205; Commonwealth of Massachusetts, 25 MLC 201, 205 (1999); Town of Brookline, 20 MLC 1570, 1594 (1994).
9 See City of Worcester, 4 MLC 1378 (1977), where union was found to have violated c. 150E by submitting a non-mandatory subject of bargaining to a factfinder.
10 City of Malden, 20 MLC 1400 (1994).
11 City of Everett, 22 MLC 1275 (1995).
13 Weymouth Housing Authority, 14 MLC 1098 (1987) (collective bargaining agreement containing provision allowing employer to lay off employees for lack of work or funds constituted a waiver of right to bargain over alternatives to layoffs, but not waiver of right to bargain over impact.)
14 City of Fall River, 19 MLC 1114 (1992).
15 The term fait accompli is a word of art in collective bargaining. The literal meaning of the term is “accomplished deed”; in the context of bargaining it means that management has already made the decision to make a change in or affecting a mandatory subject of bargaining, and/or has already implemented the new policy.
16 G.L. c. 150E, § 10(a)(1) and 10(a)(5); Ware School Committee, 19 MLC 1107 (1992).
18 Town of Dennis, 12 MLC 1027 (1985), but c.f., North Adams, 21 MLC 1646 (1995) (holding that change in detectives’ schedules did not involve a managerial right because there was no evidence that the change affected the level or quality of services provided).
19 Town of Halifax, 20 MLC 1320 (1993) (holding that reduction in work shift coverage was a permissive subject of bargaining); Town of Danvers, 3 MLC 1559 (1977).
20 Cambridge School Committee, 7 MLC 1026 (1980).
21 Commonwealth of Massachusetts, 27 MLC 70 (2000).
23 Town of Danvers, 3 MLC 1559 (1977).
25 Town of Plymouth, 26 MLC 222, 223 (2000); Commonwealth of Massachusetts, 25 MLC 201, 205 (1999); see also School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 574 (1983) (impasse is a question of fact requiring a consideration of the totality of circumstances to decide whether, despite their good faith, the parties are simply deadlocked).
27 City of Boston, 29 MLC 6 (2002).
29 Commonwealth of Massachusetts, 29 MLC 1 (2002).
30 City of Boston, 29 MLC 6 (2002).
32 Commonwealth of Massachusetts, 20 MLC 1545 (1994)(holding that when union issued an ultimatum, the parties had reached impasse and the employer was free to implement the new policy).
33 Town of Bellingham, 21 MLC 1441 (1994); Suffolk County House of Correction, 22 MLC 1001 (1995).
37 City of Newton, 16 MLC 1036, 1044 (1989); Newton School Committee, 5 MLC 1016, 1027 (1982); enf’d sub nom., School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); City of Gardner, 10 MLC 1218, 1223 (1983); Commonwealth of Massachusetts, 27 MLC 1,5 (2000).


40 City of Quincy, 8 MLC 1217 (1981).

41 City of Gardner, 10 MLC 1218 (1983); Commonwealth of Massachusetts, 27 MLC 1 (2000).

42 Bedford School Committee, 8 MLC 1472 (1981).

43 New Bedford School Committee, 8 MLC 1472 (1981); Boston School Committee, 4 MLC 1912 (1978).


45 Town of Arlington, 21 MLC 1125 (1994).


48 City of Boston, 28 MLC 276 (2002).

49 City of Haverhill, 11 MLC 1289 (1984); City of Taunton, 11 MLC 1334 (1985); City of Boston, 3 MLC 1421, 1425 (1977); City of Chicopee, 2 MLC 1071, 1075 (1975).

50 Town of South Hadley, 8 MLC 1609, 1611 (1981).


53 Id.

54 Id.


57 School Committee of Hanover v. Curry, 343 N.E.2d 144 (1976).


60 Chapter 730 of the Acts of 1977, as amended.


64 Commonwealth of Massachusetts, 9 MLC 1355 (1982).

65 See Medford School Committee, 1 MLC 1250 (1975); City of Everett, 2 MLC 1471 (1976); Town of Dracut, 8 MLC 1016, 1020 (H.O. 1981); Scituate School Committee, 8 MLC 1726 (H.O. 1982).

66 N.L.R.B. v. Frontier Homes Corp., 371 F.2d 974, 64 LRRM 2320 (8th Cir. 1967), enf’d in relevant part, 153 NLRB 1070, 50 LRRM 1449 (1965).

67 N.L.R.B. v. Frontier Homes Corp., 371 F.2d 974, 64 LRRM 2320 (8th Cir. 1967), enf’d in relevant part, 153 NLRB 1070, 50 LRRM 1449 (1965).


70 See id.


73 Ibid. Compare John Wiley & Sons v. Livingston, 376 U.S. at 550, 84 S.Ct. 909 (union can arbitrate grievance against successor employer that did not sign the agreement).
