COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of TOWN OF CHELMSFORD and NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, LOCAL 20	Case No.: MUP-19-7227 MUP-19-7313 MUP-19-7361 Date Issued: September 6, 2022

Hearing Officer: Sara Skibski Hiller, Esq.

Appearances:

Brian Maser, Esq. - Representing the Town of Chelmsford

Gary Nolan, Esq. - Representing the New England Police Benevolent Association, Local 20

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Town of Chelmsford (Town) violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of Massachusetts General Law Chapter 150E (the Law) when Town Counsel engaged in several ex-parte communications with a Joint Labor Management Committee (JLMC or Committee) Member serving on a tripartite arbitration panel during the panel's deliberation period and drafted a dissenting opinion (dissent) on behalf of the Committee Member that was included in the Arbitration Award. The case also asks whether the Town violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of the Law by failing to bargain in good faith by misrepresenting the Arbitration Award and misleading Town Meeting

representatives when it scheduled a vote to fund the Arbitration Award for the same day the Award was issued, discussed only the dissent and failed to clarify that the Award contained a majority opinion, and when the Town's Finance Committee distributed copies of the Award's dissent and read it aloud. Further, this case asks whether the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by failing to provide the New England Police Benevolent Association, Local 20 (Union) with Board of Selectmen executive session meeting minutes that were relevant and reasonably necessary for the Union to execute its duties as collective bargaining representative, without first initiating a discussion with the Union to determine if there was an alternate way to provide the information that would protect the Town's confidentiality concerns.

For the reasons explained below, I find that the Town violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of the Law by engaging in ex-parte communications with the JLMC Committee Member, drafting a dissenting opinion which was incorporated into the Arbitration Award, and misleading the Finance Committee and Town Meeting when the Town submitted a request to fund the Arbitration Award without disclosing that the Award had been influenced by the Town's conduct. I do not find that the Town violated the Law by scheduling a vote to fund the Award on the day the Award was issued, or by failing to disclose or clarify the majority opinion of the Award, or through the actions and statements of the Finance Committee. In addition, for the reasons stated below, I also find that the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by failing to provide information to the Union.

STATEMENT OF THE CASE

On March 22, 2019, May 3, 2019, and May 30, 2019, the Union filed charges of prohibited practice with the Department of Labor Relations (DLR) alleging that the Town had engaged in prohibited practices within the meaning of Sections 10(a)(1), 10(a)(5) and 10(a)(6) of the Law. A DLR Investigator conducted in-person investigations into the charges on June 6, 2019 and June 16, 2019. On July 3, 2019, the Investigator issued a Consolidated Complaint of Prohibited Practice in case numbers MUP-19-7227 and MUP-19-7361 (Consolidated Complaint), and on September 23, 2019, issued a Complaint of Prohibited Practice in case number MUP-19-7313 (referred to collectively as "Complaints").

The Town filed its answers to the Complaints on July 13, 2019 and October 3, 2019. Subsequently, the DLR consolidated the cases for hearing. On February 27, 2020, I conducted a hearing in-person and on November 18, 2020, January 6, 2021, February 5, 2021, February 10, 2021, February 23, 2021, February 26, 2021 and March 10, 2021, I conducted a hearing by video conference.[1] During the hearing, the parties received a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On March 11, 2021, I ordered the Town to submit the records described in the Complaints for in-camera review, which the Town provided on March 16, 2021. On June 25, 2021, the parties filed post-hearing briefs. Based on my review of the record, I make the following findings of fact and render the following opinion.

[1] I conducted the remaining dates of hearing by video conference pursuant to Governor Baker's teleworking directive to executive branch employees.

STIPULATIONS OF FACT

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

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive bargaining representative for police sergeants employed by the Town.

4. On or about September 22, 2016, the Union submitted a Petition for Exercise of Jurisdiction to the JLMC in connection with its successor contract negotiations with the Town.

5. On or about December 1, 2016, the JLMC voted to exercise formal jurisdiction in the matter referenced in Stipulation #4.

6. In or about June 2018, the JLMC determined that there was an apparent exhaustion of the processes of collective bargaining and ordered the parties to tripartite arbitration. The tripartite arbitration panel included Alan Andrews (Andrews), a JLMC labor representative, Andrew Flanagan (Flanagan), a JLMC management representative, and Beth Ann Wolfson (Wolfson), a neutral arbitrator.

7. By email dated December 11, 2018, Town Counsel attached a draft of the Town's post-arbitration brief to Flanagan and requested feedback.

8. By email dated January 12, 2019, Flanagan forwarded the draft arbitration award to Town counsel, and stated, "Let's discuss."

9. By email dated January 14, 2019, Town Counsel responded to Flannagan's January 12 email stating, "You have got to be kidding me! I'm in meetings this morning, but will call this afternoon."

10. By email dated January 16, 2019, Town Counsel advised Flanagan of several concerns he had with Wolfson's draft award, including her proposed wage increases. Town Counsel also noted that, "we only addressed the cost valuation of the steps because she indicated to you early on that she was going to go with the original MOA and saw the steps as a fair exchange for the wage package."

11. By email dated January 22, 2019, Town Counsel thanked Flanagan for his "continued advocacy on behalf of the Town," and provided additional thoughts on a wage increase to include in the award.

12. By email dated January 30, 2019, Flanagan advised Town Counsel and the Chelmsford Town Manager (Town Manager) that he was going back and forth

with Wolfson and Andrews, and that he hoped to have a resolution the next day. He also advised them that he had maintained a position "that the total package has to be valued at or close to 7% if I'm going to sign the award."

13. By email dated January 31, 2019, Flanagan asked Town Counsel for the Town's interpretation of the value of the patrol officer's JLMC award.

14. By email dated February 1, 2019, Town Counsel replied to Flanagan's email referenced in Stipulation #13 and attached a copy of the patrol officer's JLMC Award.

15. Following receipt of Wolfson's final draft of the award, Flanagan spoke with Town Counsel to advise him of the terms of the award.

16. By email dated February 3, 2019, Town Counsel forwarded Flanagan a dissenting opinion based on Town Counsel's "understanding of the likely award."

17. By email dated February 4, 2019, Wolfson forwarded the final award to the parties, including Flanagan's dissent, which Town Counsel had written for Flanagan.

18. By email dated February 4, 2019, the Town Manager emailed the arbitration award and dissent to the Town's Finance Committee, stating "Under the provisions of Massachusetts General Laws, the Board of Selectmen and Town Manger are required to favorably present the decision to Town Meeting. However, you have no such constraint."

19. Although the Town typically provides the Finance Committee with at least seven days to consider a JLMC award, the Town scheduled the vote on the award at a Special Town Meeting that was held later on February 4, 2019.

20. During the Special Town Meeting, the Finance Committee distributed copies of the arbitration dissent to the Town Meeting representatives who would ultimately vote on the award, and read it aloud, but did not distribute or read aloud the majority portion of the award, or any part thereof.

21. Also during the Special Town Meeting, the Finance Committee explained to the Town Meeting representatives that it was unanimously rejecting the award based on the dissenting portion of the award.

22. The Town Manager neither clarified that the arbitration panel had, in fact, considered the dissent, in response to the Town Meeting representatives' statements, nor did he inform the Town Meeting representatives that the Town Counsel had drafted the dissent.

23. The Town Meeting representatives voted to not fund the JLMC award.

24. By letter dated February 15, 2019, the Union requested the following from the Town in accordance with the state public records law:

    1. All executive session meeting minutes dating back to December of 2015 that in any way relate to the collective bargaining between the Town and Chelmsford Superior Officers and any other bargaining unit/unions within the Town.

    2. Copies of all correspondences between the members of the Board of Selectmen amongst each other, between any member of the Board of Selectmen and the Town Manager, Assistant Town Manager, or any other Committee or Committee member of the Town that in any way discusses or is related to collective bargaining between the Town and the Chelmsford Superior Officers dating back to December of 2015, [t]the Memorandum of Agreement between the Town and the Chelmsford Superior Officers that was voted down by your board in 2016, as well as the recent JLMC arbitration award that was not approved at the Town Meeting on February 4, 2019, between the Town and the Chelmsford Police Superior Officers.

25. By letter dated February 28, 2019, the Town provided the requested information, with the exception of "some executive session minutes," stating that "minutes related to ongoing collective bargaining are exempt from disclosure."

26. By email dated March 25, 2019, the Union explained that some of the materials provided in response to its various public records requests "have raised concerns about the bargaining process that resulted in an MOA between the parties (2016), which MOA was not supported by the [Board of Selectmen]." The Union then requested, pursuant to the Law, "any executive session [Board of Selectmen] minutes…that were not produced because they have not yet been publicly released, or were not produced for any other reason."

27. In its email described in Stipulation #26, the Union also stated, "Should you have privacy concerns that need to be addressed, if the concerns are supported by DLR caselaw, the union will be happy to discuss a procedure to address those concerns so that the union may receive the relevant materials."

28. By letter dated April 12, 2019, the Town refused to provide the information requested by the Union, as described in Stipulation #26, stating in relevant part, "There is no protective measure, such as a confidentiality agreement, that would effectively balance the Town's legitimate interest in not disclosing its bargaining

strategy with the Union – even if the Union's request was otherwise within the bounds of information to which it is entitled."

ADDITIONAL FINDINGS OF FACT

The Town employs approximately seven Police Sergeants in its Police Department who are also members of the Union. The Town and Union are parties to a collective bargaining agreement effective July 1, 2013 to June 30, 2016 (collective bargaining agreement). In or around 2016, the Town and the Union began negotiating a successor collective bargaining agreement. On or about June 22, 2016, the parties executed a memorandum of agreement which incorporated wage increases through an amended step schedule (2016 MOA). Shortly thereafter, the Chelmsford Board of Selectmen (Board of Selectmen) voted not to approve the 2016 MOA and the parties continued bargaining.[2] Unable to reach an agreement by September of 2016, the Union submitted a petition to the JLMC to request that they exercise jurisdiction and assist the parties in resolving their dispute.

The JLMC is an executive agency established under Section 4A of Chapter 589 of the Acts of 1987 (Section 4A) for the purpose of resolving collective bargaining disputes between municipalities and their police and fire unions. Under Section 4A, the Committee has "oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters" and the authority to "promulgate rules and regulations

[2] On May 11, 2020, the Union filed a separate charge of prohibited practice against the Town alleging that the Town violated Section 10(a)(5) and Section 7(b) of the Law when the Board of Selectmen rejected the 2016 MOA in August of 2016, which the DLR docketed as case number MUP-20-8000. On September 11, 2020, a DLR investigator issued a Complaint and the matter is currently under review by a different hearing officer.

necessary for the performance and enforcement of the responsibilities and powers" in the Act. St. 1987, c. 589, s. 4A (2)(a).

The JLMC is comprised of a chairman, vice chairman, and volunteers from public sector management organizations, police unions and fire unions, who are appointed by the Governor to serve a specified term and are known as "Committee Members." Depending on their affiliation and work experience, Committee Members are designated as "Management" or "Labor" Committee Members. The JLMC also appoints Alternate Committee Members to serve in the place of Appointed Committee Members and employs labor and management Staff Representatives / Mediators to assist in the administration of petitions filed with the JLMC. When the JLMC takes jurisdiction of a dispute, it appoints a Management Committee Member and a Labor Committee Member to the petition. Committee Members assist their respective parties by providing advice and perspective during a mediation process. If a dispute is not resolved in mediation and the JLMC votes to move the matter to tripartite arbitration, Committee Members also serve on the 3(a) Hearing panel to determine the issues for arbitration and on the arbitration panel alongside a neutral arbitrator.[3]

On or about December 1, 2016, the JLMC voted to exercise formal jurisdiction of the Union and Town's dispute and appointed Labor Committee Member Alan Andrews (Andrews) and Management Committee Member Andrew Flanagan (Flanagan) to the

[3] The JLMC adopted formal rules on July 2, 1979, as amended August 24, 2000 (JLMC Rules), and policies and procedures on July 14, 2016 (JLMC Policies). The JLMC's Rules and Policies do not address the conduct of Committee Members while serving on a tripartite arbitration panel.

petition.[4] After failing to resolve the dispute in mediation, the JLMC voted to send the dispute to tripartite arbitration. The parties mutually selected and the JLMC appointed Beth Ann Wolfson, Esq. (Wolfson) as the neutral arbitrator and chair of the tripartite panel to serve alongside Andrews and Flanagan (collectively referred to as "panel" or "arbitration panel.") [5]

Arbitration Proceeding

The panel conducted the arbitration proceeding on October 19, 2018. At the arbitration, Marc Terry, Esq. represented the Town (Town Counsel), [6] and Sean McArdle represented the Union (Union Representative). The panel heard opening statements, swore in witnesses, heard objections, and received evidence through witness testimony and documents. At the close of the proceeding, Wolfson informed the parties that they could submit post-hearing briefs by December 12, 2018. Immediately after the proceeding, Wolfson, Andrews and Flanagan met privately to discuss their opinions on the proceeding and anticipated award. Wolfson indicated she would write a draft award for the panel to review. Wolfson did not give Andrews or Flanagan any verbal or written instructions about confidentiality during the period after the arbitration proceeding until an

[4] Flanagan was appointed by the JLMC as an Alternate Management Committee Member in 2016. While serving on the JLMC, Flanagan was also the Town Manager of the City of Andover. Except for observing another Management Committee Member on one occasion, Flanagan did not receive any formal training regarding his service on the JLMC.

[5] On February 8, 2018, the JLMC issued Wolfson an appointment letter that explains the manner in which dates should be selected for the arbitration proceeding. The letter also clarifies "the arbitration panel may reserve the right to conduct an ex-parte hearing if it determines that one of the parties is acting in bad faith in not attending."

[6] At all relevant times, Town Counsel served as an agent of the Town.

award is issued (deliberation period).[7] Wolfson also did not tell Andrews or Flanagan that they were prohibited from speaking with the parties about the substantive issues of the case.[8]

Communications Between Town Counsel and Flanagan

On or about October 22, 2018, Town Counsel spoke on the phone with Flanagan about the arbitration proceeding and the panel's deliberations. Specifically, Flanagan shared with Town Counsel the wage package that Wolfson was leaning towards, which the Town then addressed in its post-hearing brief. On December 11, 2018, Town Counsel forwarded a draft of the Town's post-hearing brief to Town Manager Paul Cohen (Town Manager) and Flanagan, requesting feedback. The Union filed its post-hearing brief with the panel on December 10, 2018, and the Town filed its post-hearing brief on December 12, 2018.

[7] Wolfson testified that she expected the deliberations between panel members to be kept confidential, but she did not verbally inform the panel of her expectations.

[8] Flanagan testified that at this meeting that Wolfson suggested he and Andrews meet and talk to the parties to see if there was anything that could be included in an award that would make it acceptable to the parties. Flanagan further testified that he left the meeting with the understanding that nothing that was discussed between the panel was off-limits in terms of future communications with the parties. Conversely, Wolfson testified that she did not give Flanagan any instruction that he could speak with the parties to the case while the panel was in their deliberation period. Here, I credit Wolfson's testimony over Flanagan's recollection of the conversation. Although Wolfson served on the arbitration panel, no portion of the Complaints allege that she engaged in ex-parte communications or had knowledge of the alleged ex-parte communications between the Town and Flanagan. The issue at hand requires a close examination of Flanagan's conduct and his participation in the alleged ex-parte communications. Therefore, a finding that the Town violated the Law would also reflect on Flanagan's conduct as JLMC Committee Member. In this respect, I find Wolfson's testimony more persuasive.

On or about January 8, 2018, Wolfson sent Flanagan and Andrews an email marked "Confidential" with a draft arbitration award attached for their review and feedback (Draft Award). After receiving the Draft Award, Flanagan forwarded the email with the Draft Award attached to Town Counsel with the message, "Let's discuss." The Draft Award proposed issuing a three-year contract, with wage increases of 2% effective July 1, 2016, 2% effective July 1, 2017, 2% effective July 1, 2018, and 3% effective January 1, 2019. The Draft Award also included the Union's proposal to increase the physical fitness test stipend retroactively from $500 to $1,000 but did not include the Town's light duty proposal.[9]

On January 14, 2019, Town Counsel emailed Flanagan in reply stating, "You have got to be kidding me! I'm in meetings this morning but will call this afternoon." On January 16, 2019 at 1:39 p.m., Town Counsel emailed Flanagan with his thoughts on the Draft Award. Specifically, he wrote the following:

> "Andrew, I left you a couple of messages in response to your email below. Given we haven't been able to talk and the award is presumably going to be issued on Friday, I'd like to offer a couple of observations.
>
> 1. The Award incorrectly values the Firefighter's award. Specifically, the arbitrator states that the 1% increase in the EMT stipend is equal to three percent (1% per year). This is not the same as 3% base wage increase, which, as you know, is paid at 3% per year. In other words, the Fire award is worth 7% not 9%. If she is looking for an equivalency, let's get an award that adds an extra 1% to the base on day 1 and be done with it.

[9] The Town's Light Duty proposal is a proposal to add a new Article 30A to allow the Town to return bargaining unit members who are injured on duty under G.L. c. 41 s. 111F to work on light duty assignments.

The Draft Award also amends Article 35, Section 1, Procedure #10 of the collective bargaining agreement by adding the words "firearms training."

2. She argues that our external comparison data was not persuasive because we compared pay at year 5. As I specifically represented to her at the hearing, we did this because the other contracts embedded longevity pay into the base wage schedule. If she is going to take this route, she needs to at least consider the value of Chelmsford's longevity.

3. She fails to acknowledge that the patrol officers, as I believe was referenced in that award, were underpaid in the market based on the 37.5 v. 40 hour issue.

4. Not that the steps we sought were a great savings, but she is missing the point of the comment in our brief. We would prefer the pattern of 2/2/2 to the steps plus something more. If she is going to ignore the pattern, we should at least get the steps. (I'll add that we only addressed the cost valuation of the steps because she indicated to you early on that she was going to go with the original MOA and saw the steps as fair exchange for the wage package. I'm not trying to throw you under the bus. It is fair (I think), however, for you to share that with her so she has context for the position we articulated in the brief)

5. And, on top of the ridiculous base wage award, she is awarding them a $500 increase in the physical fitness stipend when the Union provided absolutely no support for the increase and not awarding the Town the Light Duty proposal when it was included in the other two awards. Doesn't the concept of a "pattern" work in both directions? If we got light duty as part of a package with those units, shouldn't we also get it here.

In short, the award is not only awful; it's poorly reasoned. It will only continue the ongoing pattern of every one of these units looking (and succeeding) in one-upping each other with no respect for the long-term impact on the Town's finances or for the goal of equity with other bargaining units.

Please call me on my cell phone at your earliest convenience." [10]

[10] Prior to the arbitration, the Town entered into successor collective bargaining agreements with two other public safety units. In the matter of the International Association of Firefighters, Local 1839 (Firefighter's Union), a tripartite arbitration panel comprised of neutral arbitrator Bonnie McSpiritt, Esq., Flanagan, and Labor Committee Member Matthew Reddy issued an award on March 26, 2018 (Firefighters' Award). The panel awarded the Firefighters Union wage increases of 2% on July 1, 2016, 2% on July 1, 2017, and 2% on July 1, 2018, as well as increasing the EMT stipend to 7% of a firefighter's top step annual base wage, retroactively effective to July 1, 2016. In the matter of the Fraternal Order of Police, Lodge 110 (Police Patrol Officers Union), a tripartite arbitration panel comprised of neutral arbitrator Ira B. Lobel, Esq., Flanagan, and Andrews, issued an award on September 8, 2018 (Police Patrol Officers' Award). The Police Patrol Officers Award increased the pay of bargaining unit members from 37.5 hours to 40 hours a week, without a change in actual working hours, awarded wage

At 3:26 p.m. on the same day, Town Counsel sent Flanagan the following additional email:

> "Andrew, another issue that arises with this award pertains to the police detail rate. Article 22 of the collective bargaining agreement provides that extra duty details are paid at a rate of time and one-half of the Sergeants hourly rate. This award increases the detail rate by 9% to $58.12/hour. The patrol officers would also receive this detail rate."

On January 17, 2019 at approximately 1:12 a.m., Flanagan forwarded Town Counsel an email containing a message that he intended to send to Wolfson requesting his thoughts. Flanagan's intended message to Wolfson was almost identical to Town Counsel's January 16, 2019, 1:39 p.m. email to Flanagan. On January 17, 2019, Flanagan sent the email to Wolfson and Andrews.

In response, Wolfson indicated that she would like to meet with Flanagan and Andrews. Flanagan shared this with Town Counsel via text message, who responded "Good, let me know how it goes." On January 22, 2019, Town Counsel followed up with Flanagan with a text message stating, "Any sense of when you are going to meet?" Flanagan responded, "I've talked to Dan M and Jodi R and made it clear I'll most likely will be voting against it." Town Counsel responded to Flanagan, "Let's hope she'll hear you out and change the award to something you can sign. That's our hope." Flanagan then replied, "Can you send me an email outline your best case. She's panicking she won't have my vote."

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increases of 0.5% on July 1, 2016, 0.5% on July 1, 2017, and 0.5% on July 1, 2018, and increased shift differential to $2.00. The Town Meeting voted to fund the Firefighters' Award and Police Patrol Officers' Award on April 30, 2018, and October 15, 2018 respectively.

On January 22, 2019 at 5:35 p.m., Town Counsel emailed Flanagan the following:

> "Andrew, Thanks for your continued advocacy on behalf of the Town. You have asked for a "best case" outcome. The Town understands that a 2/2/2 base wage package is consistent with the pattern of wage increases. As such, this would be an acceptable outcome. The Town also believes that it should be awarded the light duty proposal and firearms comp time provision (as in the initial draft award) as these are consistent with the other awards. That said, neither is of so substantial a value that they are worth a higher base wage increase. They should be awarded as part of the pattern. Also the Town does not believe the introduction of steps is worth enough to risk pursuing at this time. The arbitrator just seems to be overvaluing that item such that we are not going to get fair exchange for it so let's drop that from the discussion.
>
> Realistically, we know the arbitrator is not going to fully eliminate the additional 3% she included in the draft award. Given that, the Town would accept an additional 1% base wage increase. This would be consistent with the additional 1% that as added to the Fire Award in the form of the EMT stipend, which applied to all bargaining unit members. It is also defensible given that the comparability analysis Bonnie McSpiritt did in the Fire Award was between the patrol officers and firefighters. It was not between the Fire Captains and Sergeants. As such, we could later argue that the additional 1% allows the sergeants to keep pace with the fire captains. There is no basis for the $500 increase to the physical fitness stipend as the Union introduced no evidence supporting it. The Town would agree to the implementation of the bi-annual shift bidding.
>
> Please let me know if you have any questions."

On January 30, 2019, Flanagan emailed Town Counsel and the Town Manager, indicating that he was "going back and forth" with Wolfson and Andrews and that he had maintained the position that "the total package has to be valued at or close to 7% if I'm going to sign the award." The following day, the Town Manager emailed Flanagan stating, "Thank you for your ongoing efforts."[11]

[11] The Town Manager was generally aware that Town Counsel was engaging in communications with Flanagan throughout the deliberation period.

On January 31, 2019, Flanagan emailed Town Counsel to ask him to clarify the Town's interpretation of the value of the Police Patrol Officers' Award, because "[t]his is a game I'm playing with Alan and Sean."[12] On February 1, 2019, Town Counsel responded to Flanagan's email with the following: "No worries. We valued the patrol officers award at 5.63%. The analysis is at page 10 of our brief. I've attached a copy for your reference." Flanagan then forwarded the email with the attachment to Wolfson with the message "FYI" and Town Counsel's comments in the message below.

On February 1, 2019, Wolfson sent Flanagan and Andrews a second draft decision and award marked "Confidential." Wolfson told Flanagan that if he was going to dissent, she needed to know by that evening. Later that day, Town Counsel texted Flanagan to ask, "any update?" to which Flanagan responded, "She's proposing 2%, 2%, 2%, 1.5 Jan 1, 1.5 June 30th. I can't support it. She doesn't get the 1% EMT. She values it at 3 because it started in the first year." Town Counsel responded, "If that's how she sees it, can you get her to put an extra 1% on the first day of the contract? Basically make it a 3/2/2. That would be equivalent to her process of evaluation." Flanagan stated, "I'll give it a go." Subsequently, Flanagan emailed Wolfson stating, "This may be a little too late, but would you entertain a wage pattern that includes 3-2-2? That will increase the value of the agreement and I think it's closer to the other two awards. Thanks."

The following day, Town Counsel texted Flanagan and stated "another thought - could Hanson be brought in to help her understand fair valuation. If all fails, would you

[12] Flanagan is referring to Union Representative McArdle and Labor Committee Member Andrews.

consider writing (I can draft) a minority position calling out the incorrect valuation issue to give us some history / explanation to work from for the future."[13] Flanagan responded, "I think you should go ahead and draft my dissenting opinion. She and I are at a deadlock on this." Flanagan told Town Counsel that Wolfson took the fitness stipend out of the Draft Award but would not budge on the light duty. When Town Counsel asked, "Is she still on the 2/2/2/1.5/1.5?", Flanagan responded, "Yes." Shortly thereafter, Flanagan emailed Wolfson and Andrews and indicated, "I plan to dissent. I'll send the signature page along with my dissenting opinion."

On February 3, 2019, Town Counsel forwarded Flanagan an email stating, "Attached for your consideration is a draft dissenting opinion based on my understanding of the basis of the likely award. Please let me know if you want to talk."[14] The draft dissenting opinion stated the following:

> I cannot join in the Award because it is based on a fundamental error in valuation.
>
> During the Panel's extensive deliberations, the majority reasoned that it was appropriate to increase the base wages by a total 9% over the duration of the contract. The 2% base wage increases on July 1, 2017, 2018 and 2019, were entirely consistent with the Town's pattern of base wage increases. I support these increases.
>
> The majority, however, reasoned that it was also appropriate to award the bargaining unit of sergeants an additional 3% split as 1.5% base wage increases on January 1 and June 30, 2019, because the Panel in the recent Firefighters case awarded a 1% increase in the EMT stipend, retroactive to the first day of the contract. The majority found that the 1% EMT stipend increase (which applies to the entire bargaining unit) is equivalent to an additional 3% increase to the base wage because the 1% EMT stipend was paid for 3 years. The additional 3%

[13] In his text message, Town Counsel is referring to JLMC Chairman John Hanson.

[14] Before sending the draft dissenting opinion to Flanagan, Town Counsel also shared the document with the Town Manager for his review.

increases, the majority, reasoned will be implemented in the third year of the contract, giving them a lesser value. I cannot support these additional increases.

The following illustrates the flaw in the majority's valuation. A $100 increase on the first day of the contract costs an employer $100 every year thereafter. A $300 increase, regardless of when it is implemented, costs $300 per year every year thereafter, except in the first two years of the contract. So, while the cost may be the same over the limited duration of a 3-year contract, the value over time is not.

If the majority was truly seeking to issue an award comparable to the Firefighters award, it should have awarded the 2% per year base wage pattern increase with an additional 1% base wage increase in the first year of the agreement. Further, although the Patrol Officers Award did not follow the pattern, it explicitly stated that the intent was to approximate the value of the Firefighters Award. I, therefore, would have supported a 7% total award as it would have been equal in value to the Firefighters Award. (I also object to failure to award the Town its light duty proposal as its light duty proposal was awarded in both the Firefighters and Patrol Officers cases).

Ultimately, I cannot sign on to the Award of 9% base wage increase because it is based on a flawed valuation of the Firefighters Award and is not supported by the evidence. Moreover, the Award unfairly sets up the Town for ongoing battles with its fire and patrol officer unions which, undoubtedly, will seek to obtain the increases awarded here, arguing that the sergeants received a more generous award.

For these reasons, I decline to join in the Award.

Arbitration Award Issued

On February 4, 2019, Wolfson issued the Award by email to the Town and Union, with copy to the arbitration panel and JLMC Staff Representatives (Award or Arbitration Award). The Award granted a three-year contract, with increases of 2% effective July 1, 2016; 2% effective July 1, 2017; 2% effective July 1, 2018, 1.5% effective January 1, 2019 and 1.5% effective June 30, 2019.[15] The Award did not grant the Union's proposal to

[15] The Award also amends Article 35, Section 1, Procedure #10 of the Collective bargaining agreement by adding the words "firearms training."

increase the physical fitness stipend from $500 to $1,000 and did not award the Town's Light Duty proposal.[16] The Award was signed by Wolfson and Andrews, and by Flanagan with the word "Dissent" next to his name. The Award included an attachment titled "Andrew Flanagan" and "Dissenting Opinion," with the exact language provided by Town Counsel to Flanagan on February 3, 2019.

Town Meeting Vote to Fund the Award

Originally, the arbitration panel had indicated it would issue the Award to the Town and Union on or about January 18, 2019. To prepare for funding of the Award, on January 15, 2019, the Board of Selectmen issued a warrant for a Special Town Meeting to be held on February 4, 2019.[17] Article 3 of the warrant requested to transfer money from the general stabilization fund to finance the collective bargaining agreement between the Union and the Town. Anticipating he'd receive the Award in mid-January, the Town Manager intended to have the total cost calculated and prepared for the Finance Committee's January 24, 2019 meeting, so they could review the matter and make a recommendation to the Town Meeting on February 4, 2019.

[16] Although the Draft Award included the physical fitness stipend, the evidence does not demonstrate that Town Counsel's conduct caused the arbitration panel to remove the stipend from the final Award.

[17] The Town maintains a form of government with a five-member elected Board of Selectmen as its executive authority and a 162-member elected Representative Town Meeting (Town Meeting) as its legislative authority. The Town also maintains a seven-member Finance Committee (Finance Committee), a group of individuals appointed by an elected Town Moderator, who review financial matters and make recommendations to the Town Meeting.

In or around mid-January, Wolfson requested an extension from the parties and indicated that the Award would be issued on February 4, 2019. Subsequently, on January 29, 2019, the Town Manager emailed Finance Committee Chairman James Clancy (Finance Chair) to inform him of the change and stated, "It makes sense for you to post a finance committee meeting for Monday night at the Senior Center prior to the 7:30 p.m. start for the special town meeting…"[18] On February 4, 2019 at 1:21 p.m., Town Counsel forwarded the Award to the Town Manager, who shortly thereafter sent the Award to the Finance Chair and Finance Committee. In his email, the Town Manager stated, "Under the provisions of Massachusetts General Laws, the Board of Selectmen and Town Manager are required to favorably present the decision to the Town Meeting. However, you have no such constraint…" The Town Manager also forwarded the Finance Committee calculations on the total cost necessary to fund the Award.

At 6:30 p.m. on February 4, 2019, the Board of Selectmen met to discuss the Award. The Town Manager explained the Award and reminded the Board of Selectmen that both he and the Board were required to present the Award favorably to the Town Meeting for funding. The Board of Selectmen voted to recommend approval of Article 3 of the warrant with a vote of 3-0, one member abstaining. At 6:40 p.m. on February 4, 2019, the Finance Committee met to discuss the Award. The Town Manager presented copies of the Award to the Finance Committee and explained the costs. The Finance Chair shared his concerns about the Award with the Finance Committee and indicated

[18] The Town presented evidence to show that when the Town Meeting voted to fund the Firefighters' Award in 2018, the Finance Committee met the same evening and just before the Town Meeting.

that he believed it was not fair or proper.[19] The Finance Chair also reiterated several points that were discussed in the Award's dissent. Other members of the Finance Committee expressed concern over the total cost of the Award and the retroactivity. The Town Manager did not inform the Finance Committee that Town Counsel had engaged in communications with Flanagan during the panel's deliberation period or that Town Counsel authored the dissent on Flanagan's behalf. The Finance Committee voted unanimously against recommending approval of Article 3 to the Town Meeting.

At 7:30 p.m., a Special Town Meeting was held to vote on the Articles in the Warrant issued January 15, 2019.[20] Approximately 125 Town Meeting representatives were present, including the Board of Selectmen and Finance Committee. The Town Moderator shared with the Town Meeting Representatives the recommendations of the Board of Selectmen and the Finance Committee. In his presentation, the Town Manager presented Article 3 to the Town Meeting Representatives through slides on a projector and explained the JLMC process as well as the content of the Award. At the beginning of the meeting, the Town also provided the Town Meeting Representatives with handouts of the slides which would be displayed in the Town Manager's presentation, but did not provide the representatives with a copy of the Arbitration Award. [21] In addition, the Town

[19] The Finance Chair did not indicate that he did not have sufficient time to read and consider the Arbitration Award.

[20] At the February 4, 2019 Special Town Meeting, Town Meeting discussed another unrelated warrant article at length prior to taking up the matter of Article 3.

[21] When the Town Meeting Representatives voted to fund the Firefighters' Award and Police Patrol Officers' Award, the Town Manager showed the Town Meeting Representatives similar slides and explained the specifics of the arbitration awards. The

Manager told the Town Meeting, "The final piece of this process is under the provisions of state law Chapter 150E s. 7(B), the Town Manager and the Board of Selectmen is the executive authority of the Town, we are mandated to present this Award to you favorably to the community in order to bargain in good faith." Assistant Town Manager Michael McCall further explained that if the Town Meeting Representatives did not approve funding for the Award, the Award would not bet binding on the Town and would be sent back to the parties for continued bargaining.

When asked to explain why the Finance Committee did not recommend approval of Article 3, the Finance Chair stated:

> "At a vote this evening before this … special town meeting the finance committee met. We were introduced to this arbitration award that came down this afternoon. It is a 24-page award with a dissent. It was not a unanimous decision by the arbitration board. It was a two to one vote and there was a dissent written in the dissenting opinion. It has to do with the award and the valuation of it, and the dissenting opinion believes that there's an error in the evaluation as it's been calculated, and we agree. Our concern with the calculation that has been made is that this is a nine percent award where the 1.5 and 1.5 are stacked at the end of the term creating an inequity between the other bargaining contracts and although this is a small bargaining unit, this will be addressed by further bargaining units going forward because now they are not in step with the other unions. They are actually ahead of the other unions in their bargaining position."

Following, the Finance Chair read the dissenting opinion aloud to Town Meeting Representatives. Copies of the dissenting opinion were also made available.[22] Several

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Town Meeting Representatives were not provided a copy of any portion of the Firefighters' Award or Police Patrol Officers' Award.

[22] Count II of the Consolidated Complaint alleges that the Finance Committee distributed copies of the dissent to the Town Meeting Representatives. However, the evidence indicates that the Finance Committee made copies available but did not distribute the document in the same manner in which other written materials had been distributed to Town Meeting Representatives.

Town Meeting Representatives spoke during the meeting. One Town Meeting Representative expressed concern with the Town "getting out of sync" with the different unions in the Town and requested that they send the matter back to the arbitration panel so that the panel could consider the arguments in the dissenting opinion. In response, another Town Meeting Representative, noting the dissenting opinion, asked the Finance Chair if the majority issued a majority opinion. He responded, "There's a 23 page opinion that was issued this afternoon." The Town Meeting Representative then asked, "so to the previous speaker's point, that argument has already taken place among the arbitrators?" to which the Finance Chair responded, "Effectively, it has…The arbitration decision that has been issued has been authorized by the majority…its authored by three individuals [who] had a discussion and came up with the conclusion however that they do not agree on the math. We have responsibilities as a legislative body to ensure that when we accept a decision that it does not irreparably affect the town when someone points out as an arbitrator has in this instance, there is a miscalculation in the award that has been given that will lead to a weakened bargaining position for the rest of the town unions. We have a responsibility to have that reevaluated and brought back to us, possibly as soon as Spring Town Meeting."

Another Town Meeting Representative asked if there was anyway the matter could be tabled to the April Town Meeting so that the Town Meeting Representatives could learn more. When told they could make a motion, the Representative declined to do so. One Town Meeting Representative indicated that she had received a full copy of the Award from the Finance Committee, including the 23 page majority opinion, and urged others to read it to understand why the decision was reached. In response to the

statements of the Town Meeting Representatives and Finance Chair, the Town Manager did not disclose that Town Counsel had engaged in communications with Flanagan during the panel's deliberation period or that Town Counsel authored the dissent on Flanagan's behalf.

Ultimately, the Town Meeting Representatives voted not to approve Article 3, with 89 opposing the Article, 26 in favor, and 5 abstaining. After the Town Meeting concluded, the Town Manager emailed Town Counsel and Flanagan, amongst other Town employees, to inform them that the Town Meeting had rejected the appropriation of $108,531 to fund the Award. On February 6, 2019, Flanagan texted Town Counsel indicating "Well that went well I suppose," to which Town Counsel responded, "I am not unhappy with the result. Apparently, there was significant discussion about your dissent."[23]

OPINION

Ex-Parte Communications

Count I of the Consolidated Complaint alleges that the Town violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of the Law by failing to bargain in good faith by engaging in ex-parte communications with Flanagan which interfered with the JLMC arbitration panel's confidential deliberative process. An employer violates Section 10(a)(5) of the Law if it refuses to bargain collectively in good faith with the exclusive representative as required in Section 6 of the Law. Section 6 of the Law requires a public employer and a union meet at reasonable times to negotiate in good faith over

[23] Regarding the allegations set forth in the Complaint issued in MUP-19-7313, I find no additional facts in addition to those listed in Stipulations No. 24 – 28.

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. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 562 - 563 (1983). The good faith requirement of Section 10(a)(5) further requires parties to enter negotiations with an open and fair 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)). To assess whether a public employer or a union has bargained in good faith pursuant to Section 10(a)(5) of the Law, the Commonwealth Employment Relations Board (CERB) examines the totality of the parties' conduct, including acts away from the bargaining table. Higher Education Coordinating Council, 25 MLC 69, SUP-4087 (September 17, 1998) (citing King Phillip Regional School Committee, 2 MLC 1393, MUP-2125 (February 18, 1976)).

Similarly, an employer violates Section 10(a)(6) of the Law if it refuses to participate in good faith in the mediation, fact-finding or the arbitration procedures set forth in Sections 8 and 9 of the Law. City of Boston, 41 MLC 119, 129, MUP-13-3371, MUP-14-3466, MUP-14-3504 (November 7, 2014). The CERB has held that an employer who refuses to participate in good faith in an arbitration invoked by the JLMC violates Section 10(a)(6) of the Law. City of Melrose, 28 MLC 53, MUP-1010 (June 29, 2001). Further, the good faith requirement of Section 10(a)(6) "specifically contemplates

compliance with the rules of the [DLR] and generally contemplates a reasonableness, integrity, honesty of purpose, and desire to seek a resolution of the impasse consistent with the respective rights of the parties." Framingham School Committee, 4 MLC 1809, MUP-2428 (February 27, 1978) (citing Majure Transportation Co. v. NLRB, 198 F. 2d 735, 739 (C.A.. 5, 1952); Local 1009 IAFF, 2 MLC 1238, 1245, MUPL-2018 (December 15, 1975)). Refusal to participate in arbitration in good faith has been broadly construed to include an employer's delay in responding to an information request regarding a matter that is pending interest arbitration at the JLMC, City of Boston, 41 MLC at 129, or where an employer fails to request an appropriation to fund a JLMC award. City of Melrose, 28 MLC at 55.

As a threshold issue, I first address the Town's argument that Town Counsel's communications do not constitute unlawful ex-parte communications because Flanagan was not a neutral member of the arbitration panel and neither the JLMC, nor the neutral arbitrator, prohibited such communications. The JLMC's statute, Section 4A, gives the JLMC exclusive oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters. St. 1987, c. 589, s. 4A (2)(a). This authority includes the ability to order parties to participate in tripartite arbitration, as in the present matter. Id. at s. 3(a). Further, the JLMC's Rules also give the Committee the authority to specify conditions controlling how that arbitration should be conducted, such as determining the issues to be heard by the panel, the number of days of hearing and whether the parties submit pre-hearing briefs.

The JLMC's Rules also indicate that the arbitrator or arbitration panel has a certain amount of discretion to handle procedural matters and other issues that arise during

arbitration, which are not addressed by the JLMC.[24] This is consistent with industry practice. It is widely accepted that an "arbitration proceeding is under the jurisdiction and control of the arbitrator, subject to the rules of procedure that may be jointly prescribed by the parties and that, in the arbitrator's estimation, allow for a full and fair hearing." Elkouri, Frank. How Arbitration Works / Elkouri & Elkouri. Washington D.C. Bureau of National Affairs, Pg. 7-3 (7th Ed. 2012), (citing, FMCS Regulations, 29 C.F.R. s. 1404.8, 1404.13. Section 1404.13 reads in part, "The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control"); Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, National Academy of Arbitrators, American Arbitration Association & Federal Mediation and Conciliation Service, Sec. 5(A)(1) & (1)(a) (2007) (Section 5(A)(1) states, "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."))

A full and fair hearing requires that the parties abstain from engaging in ex-parte communications with members of the arbitration panel unless so authorized.[25] It is widely

[24] Part III, Section 7 of the JLMC Rules states, "[a] JLMC panel at a 3(a) hearing is further authorized to recommend to the Committee procedures to expedite the arbitration or fact-finding process by specifying or not pre-hearing briefs and the date and the number of days of hearing. The question of post-hearing briefs is ordinarily to be left to the discretion of the arbitrator or arbitration panel. The arbitration award or fact-finding report is due in the JLMC office thirty days from the conclusion of the hearing or due date of the post-hearing briefs. The JLMC may specify these elements of the arbitration or fact-finding process in its order to the parties." Further, the JLMC policies contain a section regarding scheduling which states, "The Arbitration panel may reserve the right to conduct an ex-parte hearing if it determines that one of the parties is acting in bad faith in not attending."

[25] An ex-parte communication is commonly defined as "a communication pertaining to a proceeding that occurs without notice to or participation by all other parties or their

understood that "[a] lawyer shall not "communicate ex parte with [a judge] … during the proceeding unless authorized to do so by law or court order." S.J.C. Rule 3.5. Further, while not controlling here, the CERB has opined that the regulation prohibiting ex-parte communications in DLR proceedings is "designed to protect the rights of parties to the Commission proceedings to have fair and equal access to the Commission. To permit the parties to ignore this rule would endanger the fairness of our process." Town of Hopedale, 11 MLC 1413, 1415, MUP-5564 (February 8, 1985) (Ruling to exclude inadmissible evidence where not simultaneously served on other party).

Here, the parties do not dispute that it would be impermissible to communicate with Wolfson directly without including the arbitration panel and opposing counsel. However, the Town argues that the same communications with Flanagan are permissible because Flanagan served on the panel as an advocate. The JLMC appointed Flanagan to assist with the petition and to serve on the arbitration panel based on his general experience in municipal management. The Town did not choose Flanagan as its representative on the panel. Further, Flanagan was not an employee or representative of the Town and had no personal or financial interest in the matter. As a Committee Member, Flanagan is charged by Section 4A to "make everyone effort to encourage the parties to engage in good faith negotiations to reach settlement through negotiations or mediation…" St. 1987, c. 589, s. 4A (2)(d). For this reason, a Committee Member's role is not to advocate for a party's interest, but rather to advocate for the dispute resolution process. Accordingly and in order to advocate for the fair and equitable resolution of

representatives between a judge… and (i) a party or a party's lawyer…" S.J.C. Rule 3.09, Code of Judicial Conduct, Rule 2.9, fn. 1(A).

disputes, the expectation to abstain from ex-parte communication to allow for a full and fair hearing similarly applies. The JLMC and the neutral arbitrator's failure to explicitly inform the parties that ex-parte communications are prohibited does not render the conduct lawful.

This is not to say, however, that all communications between a party and a Committee Member on an arbitration panel during the deliberation period, without including the panel and opposing counsel, violate the Law. Presumably, there are instances in which communication between parties and Committee Members may be appropriate, such as communications authorized or at the request of the neutral arbitrator or JLMC, or communications necessary to effectuate settlement outside of the arbitration proceeding. In order to determine if an ex-parte communication violates Section 10(a)(5) and Section 10(a)(6) of the Law, it is necessary to review the totality of the conduct, including the timing of the communications, the recipients and substance of the communications, the intent of the parties in sending the communication, and the arbitration panel and participants' knowledge of the communication. See generally Higher Education Coordinating Council, 25 MLC at 69.

In reviewing the totality of the conduct, I find that the Town acted in bad faith when Town Counsel engaged in ex-parte communications with Flanagan with the intent to gain information about the arbitration panel's confidential deliberations and influence the Award. The record shows that on October 22, 2018, Town Counsel engaged in a phone conversation with Flanagan in which Flanagan told him about the content of the panel's deliberations after the arbitration proceeding on October 19, 2018. From this conversation, Town Counsel learned what financial package Wolfson was considering

adopting for the Award. During the panel's deliberation period, Town Counsel also texted Flanagan for an update on the status of the panel's deliberations on January 17, 2019, January 22, 2019, February 1, 2019, and February 2, 2019. Town Counsel sent these communications to obtain information about the arbitration panel's confidential deliberations. Neither Wolfson nor Andrews knew that Town Counsel had received information about the panel's confidential deliberations from Flanagan and the information was not similarly shared with the Union. Through these communications, the Town gained an unfair advantage by receiving information about the confidential deliberations of the arbitration panel before the Award was issued.

Furthermore, the Town acted in bad faith when Town Counsel engaged in ex-parte communications with Flanagan with the intent to influence the opinion of the panel and modify the Award. After Flanagan forwarded the Draft Award to Town Counsel during the deliberation period, Town Counsel emailed Flanagan on January 16, 2019 with specific objections, accusing Wolfson of "incorrectly valu[ing]" and "fail[ing] to acknowledge" comparable awards and proposing a resolution more favorable to the Town, namely "we would prefer the pattern of 2/2/2…" and "if we got light duty as part of a package with those units, shouldn't we also get it here." The Union, who was not provided a copy of the Draft Award, had no knowledge of the Town's ex-parte communication with Flanagan and was not offered the same opportunity to object to the Draft Award and propose changes. The evidence also shows that the Town knew that its objections and proposals would be forwarded to the panel because Flanagan informed Town Counsel that he intended to send an almost identical version of the email to Wolfson and Andrews. Wolfson and Andrews were not aware that the objections and proposals presented by Flanagan were

provided by the Town in an ex-parte communication. Through this communication, the Town engaged in unlawful ex-parte communications with Flanagan with the intent to influence the opinion of the panel and modify the Award.

In addition, on January 22, 2019, Town Counsel emailed Flanagan a "best case scenario" where he outlined a proposal to the panel, indicating that the Town would accept an additional 1% instead of the 3% indicated in the Draft Award. Also, during a text message exchange on February 1, 2019, Flanagan provided Town Counsel an update on Wolfson's position. Town Counsel responded with a proposal for Flanagan to communicate to Wolfson, "can you get her to put an extra 1% on the first day of the contract? Basically, make it a 3/2/2." Through these communications, Town Counsel sought to propose additional changes to the Arbitration Award. Wolfson and Andrews were not aware of the communications, and the Union was not provided the same opportunity to propose changes or to argue its position to the panel. Further, Town Counsel also sent Flanagan the valuation of the Police Patrol Officers' Award which Flanagan requested because of a "game" he was playing with Andrews and the Union Representative. Even though Wolfson was aware of this communication, the same was not shared with the Union Representative or Andrews and Town Counsel knew he was providing the information to Flanagan to influence the panel's decision. Again, through this conduct, the Town sought to influence and modify the arbitration panel's decision during the deliberation process.

Moreover, the Town acted in bad faith when Town Counsel drafted a dissenting opinion for Flanagan with the intent and understanding that it would be incorporated into the Award. On February 1, 2019, Town Counsel offered to draft a dissenting opinion for

Flanagan and forwarded it to Flanagan the following day. Both Town Counsel and Flanagan understood that Wolfson would incorporate his words verbatim into the Award. The substance of the dissenting opinion includes criticisms and observations of the majority Award as well as the Town's proposal for a wage increase that it would find acceptable. Wolfson and Andrews were not aware that Town Counsel had drafted the dissenting opinion on Flanagan's behalf. The Union was also not included on the communication and did not have the similar opportunity to attach its commentary to the Award. As a result of the Town's conduct, the Town's Finance Committee discussed the dissent and read it aloud before the Town Meeting, and both the Finance Committee and Town Meeting voted not to approve the request for appropriation to fund the Award.

For these reasons, the Town failed to bargain in good faith in violation of Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by engaging in ex-parte communications, unbeknownst to Wolfson or Andrews or to the Union, with the intent to gain information about the arbitration panel's confidential deliberations and influence the decision of the panel and modify the Award. Further, through Town Counsel's conduct, the Town failed to participate in good faith in the arbitration procedures of the JLMC in violation of Section 10(a)(6), and derivatively Section 10(a)(1), of the Law.

Misleading the Town Meeting

Count II of the Consolidated Complaint alleges that the Town violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of the Law when it failed to bargain in good faith by misrepresenting the Award and misleading Town Meeting Representatives prior to their vote on the Award. Making misrepresentations of material fact during negotiations which are known to be false is unlawful. Woods Hole, Martha's

Vineyard & Nantucket Steamship, 12 MLC 1531 (1986). Further, an employer fails to bargain in good faith in violation of Section 10(a)(5) of the Law when it fails to take all steps necessary to secure the funding of a JLMC arbitration award, including the failure to speak up and clearly convey renewed support in the face of opposition. City of Chelsea, 40 MLC 353, MUP-13-2683 (May 29, 2014). In addition to the Section 10(a)(5) duty to bargain in good faith, the CERB has established that an employer's bad faith conduct when requesting funding of a JLMC arbitration award can also violate Section 10(a)(6) of the Law. See City of Melrose, 28 MLC at 55.

The Town first argues that under Commissioner of Administration & Finance v. Commonwealth Employment Relations Board, the Town had no duty to bargain in good faith when it requested the Town Meeting fund the Award. 477 Mass. 92, 100 (2017). In this case, the Supreme Judicial Court determined that the Commonwealth did not fail to bargain in good faith by failing to support a collective bargaining agreement when it submitted a request for funding to the legislature along with a letter indicating its fiscal and policy concerns. Id. at 98. The Town argues that in reaching its decision, the SJC opined that the duty to bargain in good faith only applies "during the negotiations, up until the negotiations are concluded" and thus in the present matter, the Town cannot be found to have violated Section 10(a)(5) of the Law. Id. at 100.

I disagree with the Town's argument for several reasons. First, in Comm'r of Admin. & Finance, the SJC reviewed the duty to bargain in good faith as it pertains to the duty to support an agreement under M.G.L. c. 150E, Section 7(b). However, unlike Section 7(b) of the Law, Section 4A requires an employer submit to the appropriate legislative body a request for appropriation to fund a decision or determination "with his

recommendation for approval of said request." St. 1987, c. 589, s. 4A (3(a). This indicates the duty to bargain in good faith extends to the process of funding a JLMC arbitration award. Second, in Comm'r of Admin. & Finance, the SJC opined that the focus of Section 10(a)(5) is the "state of mind of the employer during the negotiations, up until the negotiations are concluded," when the parties have reached a collective bargaining agreement. 477 Mass. at 100. By contrast, here, the Town and the Union's collective bargaining negotiations concluded with an arbitration award, and not by voluntary mutual agreement. Because an arbitration award is ordered upon the parties and is not entered into voluntarily, it is necessary that the parties be bound by a duty to bargain in good faith through the funding of the award. To find otherwise would allow either party to whom the award is not favorable an opportunity to oppose the finality of the Award, and consequently undermine the JLMC's dispute resolution process. Furthermore, the JLMC encourages settlement by the parties at all stages of the process, arguably to avoid the imposition of an involuntary arbitration award. St. 1987, c. 589, s. 4A (2)(d). Clearly, the parties would be bound by a duty to bargain in good faith throughout those settlement discussions, even if they occur post-award. And third, the SJC in Comm'r of Admin. & Finance notes that under certain circumstances, a Section 7(b) request may indicate that the employer failed to engage in good faith negotiations. 477 Mass. at 100-101 ("it cannot be said that a violation of 7(b), in and of itself, constitutes a failure to negotiate in good faith under 10(a)(5). That is not to say, however, that the form, contents, or legality of a 7(b) request may not be probative of whether the employer negotiated in good faith.") Therefore, the Town's conduct after the Award was issued can be probative of whether the Town failed to bargain in good faith during the JLMC process.

Here, the Finance Committee's conduct shows that it was heavily influenced by the dissenting opinion, which is indicative of the Town's bad faith during the arbitration panel's deliberation period. In this respect, the Town misled the Finance Committee and the Town Meeting by leading them to believe that the Award was independently reached by the panel of arbitrators. Good faith implies honesty, integrity and an open and fair mind. School Committee of Newton, 388 Mass. at 562-563. The Town Manager was aware that Town Counsel had communicated with Flanagan in an attempt to influence the Award throughout the deliberation period and knew that Town Counsel had drafted the dissenting opinion which was incorporated into the Award.[26] By presenting the Award to the Town Meeting and Finance Committee and not disclosing to either that Town Counsel had drafted the opinion, the Town misled the Town Meeting and Finance Committee into believing that the Award was reached by an independent arbitration panel after a full and fair hearing and an unadulterated deliberation process. For these reasons, the Town failed to bargain in good faith by misleading the Town Meeting and Finance Committee

[26] In their post-hearing briefs, the Town and the Union dispute the extent to which the Town Manager participated in the unlawful conduct or had knowledge of Town Counsel's conduct. The CERB has long held that a public employer is responsible for the unlawful actions of its supervisory employees and agents who act within the scope of their apparent authority, whether or not those acts were specifically authorized. Commonwealth of Massachusetts, 38 MLC 324, 325, SUP-07-5341 (April 12, 2013) (citing Higher Education Coordinating Council, 25 MLC 69, 71, SUP-4087 (September 17, 1998)). Here, the record also shows that the Town Manager knew that Town Counsel was communicating with Flanagan, was informed of the contents of those communications, and reviewed the dissent and understood it would be incorporated into the Award. In this regard, the Town, through its Board of Selectmen, authorized the Town Manager and Town Counsel as representatives for the purposes of collective bargaining and is responsible for the Town Manager's conduct as employee and supervisor and Town Counsel's conduct as agent for the employer.

in violation of Section 10(a)(5), and derivatively Section 10(a)(1), of the Law. Further, through this conduct, the Town failed to bargain in good faith by failing to participate in the JLMC arbitration process in violation of Section 10(a)(6), and derivatively Section 10(a)(1), of the Law.

Conversely, I do not find that the Town acted in bad faith when it scheduled a vote on the Award to take place on the evening of February 4, 2019, just hours after the Award was issued. The warrant for the Special Town Meeting, which included Article 3 requesting funding of the anticipated Award, was issued on January 15, 2019. At that point in time, the Town anticipated the Award would be released on or before January 24, 2019. The panel requested an extension, pushing back the release date to February 4, 2019.

Section 4A requires "[t]he employer shall submit to the appropriate legislative body within thirty days after the date on which the decision or determination is issued a request for the appropriation necessary to fund such decision or determination, with his recommendation for approval of said request. Notwithstanding the foregoing, where the legislative body is a town meeting, such request shall be made to the earlier of (i) the next occurring annual town meeting; or (ii) the next occurring special town meeting. St. 1987, c. 589, s. 4A (3(a). The Union argues that by submitting the request to the Town Meeting that evening, the Town did not give the Finance Committee or the Town Meeting sufficient time to review the arbitration decision. However, the plain language of Section 4A does not require an employer wait a certain amount of time before submitting the appropriation request to the Town Meeting. Arguably, if the Town had not submitted the request for appropriation to the Special Town Meeting on February 4, 2019, the Town would not be

in compliance with Section 4A. Id. at s. (3(a) ("such request shall be made to the earlier of…(ii) the next occurring Special Town Meeting.")[27] The Union offered no evidence that members of the Finance Committee felt that they did not have sufficient time to review the Award. In addition, during the Town Meeting, at least one representative discussed the option of tabling the vote until a point in time when they would be able to learn more and review the entirety of the Award. The representative declined to make a motion to table. Based on the totality of the circumstances regarding the scheduling of the vote, I do not find that the Town acted in bad faith by bringing the matter before the Town Meeting on February 4, 2019.

Further, I do not find that the Finance Committee acted in bad faith by misrepresenting the Award or misleading the Town Meeting. In the Town of Chelmsford, the Board of Selectmen is the executive authority of the Town, while the Finance Committee serves as an advisory board to the Town Meeting. In Town of Rockland, the CERB found that while the Board of Selectmen as the executive branch of Town government had an affirmative duty to support the appropriation, "the Rockland Finance Committee is part of the legislative body…the Finance Committee had no duty to support the request for funding the collective bargaining agreement either by transferring sufficient funds from the reserve account or by taking any other appropriate action." Town of Rockland, 12 MLC 1740, 1744, MUP-5603 (April 24, 1986) (citing Town of Webster, 4 MLC 1543, 1545, MUP-2498 (December 5, 1977)). "Town finance committees are not

[27] Even if the Town had decided to postpone the vote to a later date, the Special Town Meeting on February 4, 2019 would have taken place as scheduled because of additional matters on the warrant.

necessarily designated representatives of the public employer and, accordingly, may not have any affirmative obligation to support the funding of cost items of an executed collective bargaining agreement." Id. at 1744. Similarly here, because the Finance Committee is not the designative representative of the Town, it did not violate the Law by misrepresenting the Award or misleading the Town Meeting when it shared the dissent.[28] There is also no evidence in the record to indicate that the Finance Chair, as the primary spokesperson for the Finance Committee, knew that the Town had unlawfully communicated with the arbitration panel or drafted the dissenting opinion for Flanagan.[29]

[28] I decline to find, as the Union suggests, that the Town, through the Finance Committee, disseminated knowingly false information to the Town Meeting in the dissenting opinion. Specifically, the Union argues that the valuation of the Firefighters Union Award and the Police Patrol Officers Award was similar to the Award issued in the present matter and thus the statement in the dissenting opinion that there was an error in valuation is false. However, the totality of the evidence indicates that at the time the Award was issued, there was no clear agreement between the parties on the valuation of the three arbitration awards. It is also undisputed that the Police Patrol Officers Award was particularly difficult to calculate based on the changes to work hours incorporated therein. Further, the statements in the dissent were clearly opinion. After hearing the dissent, Town Meeting Representatives' primary concerns were not the comparisons of the Award to the awards of the Firefighters Union and the Police Patrol Officers Union, but rather the total cost of the Award, and the fact that the Award granted 1.5% and 1.5% wage increases in the final year that could set a precedent with other bargaining units who had not resolved their contracts. Furthermore, I defer to the decision of the arbitration panel. After having received and presumably read the dissenting opinion, the panel incorporated it into the Award and offered no commentary by the majority in rebuttal.

[29] Count II of the Consolidated Complaint describes that the Town Manager informed the Finance Committee that while the Board of Selectmen and Town Manager are required to present the Award favorably, the Finance Committee has no such constraint. The Complaints do not allege that the Town failed to support the Arbitration Award when they presented it to the Finance Committee and Town Meeting. Nevertheless, the Town Manager's recitation of the legal obligations of Town and Finance Committee are not indicative of bad faith.

Although the Complaints allege that the Finance Committee and Town Manager only disclosed the dissenting opinion to Town Meeting Representatives, this is not supported by the evidence. Finance Committee members were provided a full copy of the Award, and Town Meeting Representatives were provided print outs of the slide show presentation, which summarized the costs and major points of the majority opinion of the Arbitration Award. In his initial presentation, the Town Manager discussed the majority opinion of the Award. Further, when asked to elaborate on the Finance Committee's recommendation not to approve Article 3, the Finance Chair told Town Meeting Representatives that it was a 24-page Award, including a dissent. At one point during the meeting, a Town Meeting Representative suggested that the Award be returned to the panel so they could consider the dissent. This statement was quickly corrected by another Town Meeting Representative and the Finance Chair who clarified that the 23-page majority of the Award demonstrated the panel considered the arguments. In addition, at least one Town Meeting Representative had a copy of the full opinion, which she had requested and received from the Finance Committee, and encouraged other representatives to read a copy themselves. Further, the Town has substantiated that as a matter of practice, it does not distribute the entire arbitration award to all Town Meeting Representatives prior to a vote. On this basis, the Town Meeting Representatives were clearly aware that there was a lengthy majority opinion and understood the Award associated therewith.

Failure to Provide Information

The Complaints further allege that that the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by failing to bargain in good faith when it refused

to provide the Union with information that is relevant and reasonably necessary for the Union to execute its duties as collective bargaining representative, without first initiating a discussion with the Union to determine if there was an alternate way to provide the information that would protect the Town's confidentiality concerns. At issue are records requested by the Union on February 15, 2019, described as Board of Selectmen executive session meeting minutes from December 2015 to February of 2019 that relate to collective bargaining between the Town and Union and any other bargaining units within the Town (meeting minutes).[30]

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. City of Boston, 35 MLC 95, 100, MUP-04-4050 (Dec. 10, 2008) (citing Board or Higher Education, 29 MLC 169, 170, SUP-4612 (March 6, 2003); Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997)). An employee organization's right to receive relevant and reasonably necessary information is derived from the statutory obligation of parties to engage in good faith collective bargaining. City of Boston, 35 MLC at 100 (citing Sheriff's Office of Middlesex County, 30 MLC 91, 96, MUP-2754 (December 31, 2003); Boston School Committee, 24 MLC 8, 11, MUP-1410, MUP-1412 (Aug. 26, 1997)).

[30] The Union also requested correspondence between and amongst members of the Board of Selectmen, the Town Manager, Assistant Town Manager, and any other Town Committee regarding collective bargaining with the Union and the 2016 MOA. The Union does not argue that the Town failed to provide these records.

The standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. Board of Higher Education, 26 MLC 91, 92, SUP-4509 (January 11, 2000). It is well established that records with information that may form the basis of a grievance or could enable a union to determine the merits of a grievance is relevant and reasonably necessary for a union to perform is representational responsibilities. City of Boston v. Labor Relations Commission, 61 Mass. App. Ct. 397, (June 28, 2004); See also, Commonwealth of Massachusetts, 21 MLC 1499, 1504, SUP-3459 (December 14, 1994) (citing Worcester School Committee, 14 MLC 1682, 1684-1685, MUP-6169 (April 20, 1988); Boston School Committee, 8 MLC 1380, 1382, MUP-3909 (October 20, 1981)). Here, the Union requested the meeting minutes because they believed the documents contained information pertaining to potential misconduct by the Board of Selectmen and the Town in voting on the 2016 MOA. On this basis, the meeting minutes requested by the Union are relevant and reasonably necessary for the Union to execute its duties as collective bargaining agent.[31]

[31] In its request, the Union also seeks meeting minutes that relate to collective bargaining between the Town and any other bargaining units within the Town. The Union provided no reasoning to the Town, no evidence at hearing, and no argument in its post-hearing brief as to why this information was relevant and reasonably necessary to the execution of its duties as an exclusive bargaining representative in February of 2019. The CERB has held that where employees outside of the bargaining unit are involved, the union may be entitled to the requested information. However, the standard for the union's initial showing of relevance is slightly higher. Suffolk County Sheriff's Department, 29 MLC 63, MUP-01-2979 (October 9, 2002) (citing Commonwealth of Massachusetts, 21 MLC at 1503). Without any initial showing of why the minutes pertaining to other bargaining units are necessary, I do not find that the Town had a duty to produce the information.

Once a union has shown that requested information is relevant and reasonably necessary to its duties as the employees' exclusive representative, the burden shifts to the employer to establish that its concerns about disclosure of the information are legitimate and substantial. Suffolk County Sheriff's Department, 29 MLC 63, 68, MUP-01-2979 (October 9, 2002) (citing Board of Trustees, University of Massachusetts (Amherst), 8 MLC 1139, 1144, SUP-2306 (1981)). To determine whether the information should be disclosed to the union, the CERB weighs a union's need for the information against an employer's legitimate and substantial interests in non-disclosure. Suffolk County Sheriff's Department, 29 MLC at 68 (citing City of Boston, 25 MLC 55, 57, MUP-1377 (August 31, 1998); City of Boston, 22 MLC 1698, 1706, MUP-9605 (April 26, 1996)). Refusing to provide information will be excused if the employer's concerns are found to outweigh the needs of the union. Suffolk County Sheriff's Department, 29 MLC at 68 (citing Commonwealth of Massachusetts, 21 MLC 1499, 1503, SUP-3459 (December 14, 1994)).

In response to the order for an in-camera review, the Town provided nine documents that represent meeting minutes from executive sessions of the Board of Selectmen for the period of December 7, 2015 to October 1, 2018 which the Town withheld from disclosure at the time of the Union's request for information on February 15, 2019.[32] Having reviewed the records at issue, I find that the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law.

[32] The Town provided a total of 13 documents but indicated that four had been released before or shortly after in response to the Union's request for information. For the purposes of reviewing whether the Town violated the Law, I am only considering records that were withheld from disclosure at the time of the Union's request and were not provided to the

The Town first argues that the records are not subject to disclosure because the meeting minutes had not been released as public records under the Open Meeting Law of M.G.L. c. 30A (Open Meeting Law). Under the Open Meeting Law, "[t]he minutes of any executive session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, may be withheld from disclosure to the public in their entirety under subclause (a) of clause Twenty-sixth of section 7 of chapter 4, as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21." M.G.L. c. 30A s. 22(f). The CERB has previously held that the designation of the information as not a public record does not determine a union's right to access that information. See Sheriff of Bristol County v. Labor Relations Commission, 62 Mass. App. Ct. 665, 670 (2004). Further, although materials may be exempt from disclosure under the Public Records Law, 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). On this basis, it would be unlawful for an employer to withhold executive session meeting minutes from disclosure to the Union solely on the basis that such documents have not yet been publicly released.

However, the Town also argues that the Union's request sought meeting minutes from when the Board of Selectmen discussed the status of contract negotiations, and the

Union promptly in response to the request. Further, in its submission for in-camera review, the Town also indicated eight of the nine meeting minutes at issue were released to the Union on September 28, 2020, October 5, 2020, and November 2, 2020, and at the time of hearing, the Town continued to withhold only one document from disclosure.

minutes contained confidential communications between the Town Manager and the Board about negotiation strategy and subsequent measures after the February 4, 2019 Special Town Meeting. The Town further argues that if the Union were able to review the meeting minutes in February of 2019, they would have an unfair advantage in negotiations. The Board of Selectmen is the Town's executive authority for the purposes of collective bargaining. However, as a public body under the Open Meeting Law, the Board is required to meet in open or executive session and to keep minutes of its meetings. M.G.L. c. 30A s. 22. In order to bargain in good faith, the Town's collective bargaining representatives need to have discussions with the Board of Selectmen about negotiation strategy and proposals. Depending on the content of those discussions, a town's legitimate concerns of confidentiality may be substantial enough to outweigh the union's need for the information. Suffolk County Sheriff's Department, 29 MLC at 68 (citing Commonwealth of Massachusetts, 21 MLC at 1503).

However, absent a showing of great likelihood of harm flowing from disclosure, the requirement that a union be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality. Suffolk County Sheriff's Department, 29 MLC at 68 (citing Greater Lawrence Sanitary District, 28 MLC 317, 318-319, MUP-2581 (April 19, 2002)). Having reviewed the records in-camera, I find that the Town has failed to substantiate a likelihood of harm that would result from the disclosure of the records to the Union. Five of the documents at issue describe discussions between the Board of Selectmen and Town Manager about the status of negotiations with the Union in 2016 at or around the time they were considering the 2016 MOA. Much of the information shared between the Town Manager and Board of Selectmen represents factual information about

the status of negotiations that was arguably known by the Union, and not discussion about positions, responses or prospective proposals or counterproposals. Furthermore, the Union requested the information in February of 2019, nearly two and a half years after the meetings took place. Although at the time of the request, the parties had returned to the bargaining table after rejection of the 2016 MOA and the Town Meeting's failure to fund the Arbitration Award, there is no indication that disclosure of the Board of Selectmen's discussions from two and a half years ago would impair the Town's present position in collective bargaining.

Further, the Union's interest in obtaining the meeting minutes to investigate a potential grievance or unfair labor practice outweighs the Town's interest in keeping the records of the Board's discussions confidential. The discussions about negotiation strategy described in these documents directly relates to the Board of Selectmen's review and rejection of the 2016 MOA. This information is directly relevant and necessary for the Union to assess whether the Town violated its duty to support the 2016 MOA when presented to the Board in June of 2016, a meeting that was closed to the public and to the Union. For these reasons, I find that the Town violated the Law by failing to provide the Union with the meeting minutes from April 11, 2016, June 27, 2016, August 1, 2016, August 22, 2016 and September 12, 2016.

The Town provided four additional documents for in-camera review which were responsive to the Union's request. Upon review, I find that the executive session meeting minutes from September 26, 2016, October 3, 2016, October 20, 2016 and October 1, 2018 contain responsive information that describe an exchange of factual information between the Board of Selectmen and Town Manager that was otherwise available to the

Union. The documents do not contain discussion about negotiation strategy, responses, proposals or counterproposals between the Town and Union. The Town has no legitimate reason for withholding these documents from disclosure. By not disclosing these documents, the Town additionally violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law.

Even if the Town could establish that its confidentiality concerns are legitimate and substantial, an employer must also 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. Suffolk County Sherriff's Department, 29 MLC at 69 (citing Commonwealth of Massachusetts, 21 MLC at 1506.) Although the Union indicated to the Town that it would be willing to discuss a procedure to address the Town's privacy concerns, the Town responded that there was no adequate protective measure. Here, the Town has failed to demonstrate that it made reasonable efforts to work with the Union to provide the Union with as much of the requested information as possible. Since February of 2019, the Town released all but one of the responsive documents to the Union in September, October and November of 2020. An employer may not unreasonably delay furnishing information that is relevant and reasonably necessary to the Union's function as the exclusive bargaining representative. Boston Public School Committee, 24 MLC 9, 11, MUP-1410, 1412 (August 26, 1997). Further, providing the requested information after the charge of prohibited practice was filed but before hearing on the matter does not render the allegations moot. Compare Bristol County Sheriff's Department, 30 MLC 47, 51-52, MUP-02-3345 (September 19, 2003) (compelling a union to file charges to obtain information to which it is legally entitled does not effectuate the purposes of the Law).

For these reasons, the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by failing to provide the Union with information upon request that is relevant and reasonably necessary to the Union in the performance of its duties as the exclusive collective bargaining representative, described as the April 11, 2016, June 27, 2016, August 1, 2016, August 22, 2016, September 12, 2016, September 26, 2016, October 3, 2016, October 20, 2016 and October 1, 2018 meeting minutes.

CONCLUSION

Based on the record and for the reasons explained above, I find that the Town failed to bargain in good faith in violation of Section 10(a)(5), and derivatively Section 10(a)(1), of the Law when the Town, through Town Counsel, engaged in ex-parte communications with Flanagan with the intent to gain information about the arbitration panel's confidential deliberations, influence the opinion of the panel and modify the Award, and by drafting a dissenting opinion for Flanagan with the intent and understanding that it would be incorporated into the Award. Through this conduct, I find that the Town also violated Section 10(a)(6), and derivatively Section 10(a)(1), of the Law by failing participate in the JLMC arbitration process in good faith. I further find that the Town violated Section 10(a)(5) and Section 10(a)(6), and derivatively Section 10(a)(1), of the Law when it misled the Town Meeting and Finance Committee into believing that the Award was issued by an independent arbitration panel after a full and fair hearing and an unadulterated deliberation process. I do not find, however, that the Town violated the Law by scheduling a vote to fund the Award on February 4, 2019 or failing to disclose the majority opinion of the Award as alleged or through the actions and statements of the

Finance Committee. Furthermore, I find that the Town violated Section 10(a)(5), and derivatively Section 10(a)(1), of the Law by failing to provide the Union with Board of Selectmen executive session meeting minutes upon request that were relevant and reasonably necessary for the Union to perform its duties as collective bargaining agent.

REMEDY

Section 11 of the Law grants the CERB broad authority and discretion to fashion appropriate orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979). Remedies should be fashioned to place charging parties in the position they would have been in but for the unfair labor practice. Commonwealth of Massachusetts, 29 MLC 132, 133, SUP-4488 (January 2, 2003). Here, the Town's conduct substantially impaired the collective bargaining and JLMC arbitration process. In addition, as an unfortunate consequence of the Town's conduct, the arbitration panel issued an Award, portions of which were heavily influenced by the Town's ex-parte communications with the panel. However, the majority opinion of the Award is favorable to the Union. For that reason, I decline to vacate the Award, as such would be contrary to the spirit and purpose of Section 11 of the Law. Further, I decline to modify the substance of the Award by removing portions of the Award which may have been influenced by the Town's conduct. The appropriate method to seek judicial review of the substance of a JLMC interest arbitration award is through an action in the nature of certiorari pursuant to M.G.L. c. 249 s. 4. Town of Bellingham v. Local 2071, International Association of Firefighters, 64 Mass. App. Ct. 446 (2005); vacated, 67 Mass.

App. Ct. 502 (2006); review granted, 447 Mass. 1113 (2006); affirmed, 450 Mass. 1011 (2007). [33]

As a result of the Town's conduct, the Finance Committee voted not to recommend, and the Town Meeting voted not to fund, the Award. Because of the funding contingency in Section 4A, a remedy requiring the Town pay the economic terms of the Arbitration Award is inappropriate. See City of Melrose, 28 MLC at 55 (citing County of Suffolk v. Labor Relations Commission, 15 Mass. App. Ct. 127, 132 (1983) (the funding contingency of Section 4A mirrors the funding contingency in Section 7(b) of M.G.L. c. 150E, in that a cost item in a collective bargaining agreement between a public employer and an employee organization cannot assume any monetary significance until there is a legislatively established appropriation from which the item can be paid). However, where an employer fails to support a JLMC award before the legislative body, the CERB has ordered the employer re-submit the Award in good faith for funding by the legislative body. City of Melrose, 28 MLC at 55 (citing City of Lawrence, 16 MLC 1760, 1764, MUP-7539 (May 4, 1990); City of Medford, 9 MLC 1792, MUP-4905 (April 11, 1983)).

To make the Union whole, I find that the appropriate remedy is to require the Town re-submit a request to fund the Arbitration Award to the Finance Committee and to the Town Meeting. As it is essential that Finance Committee Members and Town Meeting Representatives be informed of the Town's conduct, a copy of this decision, order and

[33] Notwithstanding the fact that the dissenting opinion was a product of the Town's unlawful conduct, rather than altering the substance of the Award by removing the dissent, I am allowing the Finance Committee and the Town Meeting the opportunity to review the Award in conjunction with this decision.

notice must be distributed to all Finance Committee members and Town Meeting Representatives prior to the vote. See Framingham School Committee, 4 MLC at 1815 (CERB ordered that the School Committee to mail copies of its decision to all members of the Framingham Town Meeting). Should the Town Meeting fail to approve funding for the Arbitration Award, this matter shall be returned to the jurisdiction of the Joint Labor Management Committee, so that they may take any and all appropriate steps to assist the parties in the resolution of their collective bargaining dispute.

ORDER

WHEREFORE, based upon the foregoing, it is hereby ordered that the Town shall:

1. Cease and desist from:

   a) Failing and refusing to bargain in good faith or participate in arbitration in good faith by engaging in unlawful ex-parte communications with the intent to gain an unfair advantage or influence or modify an arbitration award, or authoring portions of an arbitration award, or otherwise interfering with the JLMC's arbitration panel's confidential deliberative process;

   b) Failing and refusing to bargain or participate in arbitration in good faith by misleading the Finance Committee and Town Meeting when considering a request to fund an arbitration award;

   c) Failing and refusing to provide information to the Union that is relevant and reasonably necessary for it to perform its duties as collective bargaining representative;

   d) In any similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Law:

   a) Resubmit a request to fund the Arbitration Award issued on February 4, 2019 to the Town Finance Committee at a regular or special meeting and to Town Meeting Representatives at a regular or special Town Meeting held within thirty (30) days of receipt of this decision;

b) No less than fourteen (14) days prior to the meetings referred to above, mail to each current representative of the Town Finance Committee and Town Meeting a complete copy of this decision, order and notice. Said mailing shall be by first class mail, postage prepaid by the Town. Evidence of mailing shall be submitted by affidavit or sworn statement including the name, address and date of mailing.

c) Immediately provide to the Union all Board of Selectmen executive session meeting minutes responsive to the Union's request for information dated February 15, 2019, consistent with this decision;

d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Town customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;

e) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

SARA SKIBSKI HILLER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held in Case No. MUP-19-7227, MUP-19-7313 and MUP-19-7361 that the Town of Chelmsford (Town) violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1), of Massachusetts General Laws Chapter 150E (the Law) by failing to bargain in good faith and failing to participate in the JLMC arbitration process in good faith when it engaged in unlawful ex-parte communications with a Committee Member on a JLMC arbitration panel, drafted a dissenting opinion on the Committee Member's behalf that was incorporated into the Arbitration Award, misled the Town Finance Committee and Town Meeting by submitting a request to fund the Arbitration Award without disclosing the Award had been influenced by the Town's conduct, and failed to provide the Union with information that is relevant and reasonably necessary for the Union to perform its duties as collective bargaining agent.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights: "to engage in self-organization to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above." Based on these rights, the Town assures its employees that:

WE WILL NOT fail and refuse to bargain in good faith or participate in arbitration in good faith by engaging in unlawful ex-parte communications with the intent to gain an unfair advantage or influence or modify an arbitration award, or authoring portions of an arbitration award, or otherwise interfering with the JLMC's arbitration panel's confidential deliberative process;

WE WILL NOT fail and refuse to bargain in good faith or participate in arbitration in good faith by misleading the Finance Committee and Town Meeting when considering a request to fund an arbitration award;

WE WILL NOT fail and refuse to provide information to the Union that is relevant and reasonably necessary for it to perform its duties as collective bargaining representative;

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action that will effectuate the purpose of the Law:

- Resubmit to the Town Finance Committee and Town Meeting a request to fund the Arbitration Award issued in the matter of *Town of Chelmsford and New England Police Benevolent Association, Local 20* on February 4, 2019 at meetings to be held within thirty (30) days of receipt of the decision issued in the DLR cases referenced above;

- Mail to each current member of the Town Finance Committee and each current Town Meeting Representative a complete copy of the decision, order and notice issued in the cases, no less than fourteen (14) days prior to the meetings described above;

- Immediately provide to the Union all Board of Selectmen executive session meeting minutes responsive to the Union's request for information dated February 15, 2019, consistent with the decision issued in the cases.

_____ _____

Town of Chelmsford Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111 (Telephone: (617) 626-7132).