

Any Bargaining Obligations with Unions Over New D.E.S.E. Retell/Certification Requirements?

By Joseph T. Bartulis, Jr., Esq.

By memo dated December 7, 2012, the Commissioner of the Massachusetts Department of Elementary and Secondary Education (DESE), Mitchell D. Chester, Ed.D., detailed the new and somewhat extensive RETELL (Rethinking Equity and Teaching for English Language Learners) - Sheltered English Immersion endorsement and the related professional development requirements. The new endorsement and PDP requirements directly impact affected teachers license criteria, and license renewal standards, among other things.

Accordingly, given the impact these new provisions will have on new and incumbent teachers alike, many questions have recently been posed by school district administrators across the Commonwealth regarding whether school districts have bargaining obligations with their teachers, be they decisional/main-table contract negotiations, impact bargaining obligations, or neither regarding these new changes?

Without getting into the minutia of the RETELL provisions or any of the precise requirements related thereto, there is little doubt that the RETELL provisions do impact wages, hours and terms and conditions of employment (the mandatory subjects of bargaining) of teachers. That fact, absent more, would generally be understood to require bargaining with the union if an employer-school district unilaterally decided to impose these requirements on its own.

That said, reviewing MGL c.150E (often referred to as the Massachusetts Labor-Management Relations Act) and the decisions decided thereunder the Law is quite clear that employers in the instant matter do not have an obligation to decisional bargain with the union over changes which are mandated by the DESE. This is because decisional bargaining, by implication, presupposes that the change being requested is being sought by the employer and is not being imposed by the Commonwealth. Since that is not the case here there is no decisional bargaining obligation.

Next, the question becomes whether there is an obligation for Massachusetts school districts to impact bargain with their teachers unions regarding the RETELL changes? That decision turns largely on the nature of the change being imposed and whether the impact bargaining obligations, if any, occur under the above-referred statute or under the collective bargaining agreement. As you will recall, the difference between impact bargaining and decisional bargaining is that unlike decisional bargaining -- where the unions

agreement is required as a prerequisite for a change to occur -- impact bargaining only obligates the employer to provide the union notice and an opportunity to bargain over the impacts that the decision (which is not open for discussion) will have on the union's members. Because the decision itself is not open for debate, impact bargaining often focuses on the procedures that will be in place to get from where a district is now to where it will be when the changes are implemented. Whenever there is an impact bargaining obligation, the Law requires that the union receive advance notice of the change before it takes place and an opportunity to impact bargain before the change occurs.

Looking first at whether there is an impact bargaining obligation under MGL c.150E, an argument can be made that there is no bargaining obligation at all since the change does not impact the teachers working conditions per se but rather constitutes a precondition to working at all -- since it relates to one's license to be employable as a teacher. Stated another way, a school district could argue that their obligation to bargain only extends to those things over which it actually has any control. Here, the districts have no control over either the decision to change the state's licensure requirements or how they are implemented; hence, they are not obligated to bargain. While it is probable that there is no bargaining obligation whatsoever, districts that want to completely immunize themselves from any potential unfair labor practice charge regarding an alleged impact bargaining obligation may nonetheless wish to give the union notice of the RETELL "change" (which the union likely already knows about anyway) and offer to meet with them to discuss the impacts of that "change." Having met with the union and having allowed them to convey any concerns they have may go a long way to engendering good labor relations and will better insulate the district from an avoidable unfair labor practice charge.

Finally, regarding whether school districts are obligated to bargain over these changes pursuant to a provision in the collective bargaining agreement, that question cannot be answered herein. While I presume that most collective bargaining agreements will not contain language which creates additional bargaining obligations, districts will want to thoroughly review their collective bargaining agreement to be certain. Whether there are any bargaining obligations under the statute or collective bargaining agreement in a particular district should be determined by conversation with your district's legal counsel.

As always, clients are welcome to contact me with any questions.

Joseph T. Bartulis, Jr. Esq. is a partner at Fletcher Tilton PC. He advises school district employers on all aspects of the employer-employee relationship and Massachusetts education law.

Fletcher Tilton PC is 45+ attorney firm with offices in Worcester, Framingham and Hyannis, Massachusetts. Mr. Bartulis can be reached at jbartulis@fletchertilton.com or 508-459-8214.

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www.fletchertilton.com



Joseph T. Bartulis, Jr.

P: 508.459.8214

F: 508.459.8414

E: jbartulis@fletchertilton.com

Fletcher Tilton PC
Attorneys at law

THE GUARANTY BUILDING

370 Main Street, 12th Floor
Worcester, MA 01608

TEL 508.459.8000 FAX 508.459.8300

THE MEADOWS

161 Worcester Road, Suite 501
Framingham, MA 01701

TEL 508.532.3500 FAX 508.532.3100

CAPE COD

1579 Falmouth Road, Suite 3
Centerville, MA 02632

TEL 508.815.2500 FAX 508.459.8300

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