On September 13, 1993, Locals 1579 and 1303-32, Council 4, AFSCME, AFL-CIO (the Union) filed a complaint with the Connecticut State Board of Labor Relations (the Labor Board) alleging that the City of Torrington (the City) had committed a prohibited practice in violation of § 7-470(a)(4) of the Municipal Employee Relations Act (the Act or MERA). Sometime prior to the hearing in this matter, Local 1303-32 and Local 1579 merged. Throughout this decision, the merged locals will be referred to as the Union.

Specifically, the Union alleged that “since on or about March 1, 1993, the City has refused to bargain on a Drug Program and has subsequently unilaterally implemented such Program”.

After the requisite preliminary administrative steps had been taken, the matter came before the Labor Board for a hearing on August 31, 1994. Both parties appeared, were represented and were allowed to present evidence, examine and cross-examine witnesses and make argument. Both parties filed post-hearing briefs, the last of which was received by the Labor Board on October 25, 1994. Based on the whole record before us, we make the following findings of fact, conclusions of law and we dismiss the complaint.

Sometime prior to the hearing in this matter, Local 1303-32 and Local 1579 merged. Throughout this decision, the merged locals will be referred to as the Union.
FINDINGS OF FACT

1. The City is a municipal employer pursuant to the Act.

2. The Union is an employee organization pursuant to the Act and at all times material hereto has represented a bargaining unit consisting of public works employees in the City.

3. The Union and the City were parties to a collective bargaining agreement with effective dates of July 1, 1988 through June 30, 1993. The collective bargaining agreement does not contain any provision concerning a drug policy or drug testing.

4. On September 1, 1992, the City posted and distributed a “policy on drug abuse” based, at least in part, on the Federal Drug-Free Workplace Act, 41 U.S.C. 702; P.L. 100-690. The policy provided in relevant part:

   I. The unlawful use, sale, manufacture, purchase, transfer, distribution or possession of illegal drugs on any City of Torrington property is prohibited. The presence in any detectable amount of any illegal drug on any employee while performing City business or while in a City facility is prohibited.

   II. Alcohol, though not an illegal drug, may not be brought or consumed on or in any property of the City including vehicles.

   III. It is the City’s intention to be supportive and empathetic to city employees with a substance abuse problem while still ensuring the safety and security of our fellow employees. In keeping with our commitment to rehabilitation, the City of Torrington will offer assistance to any employee for the treatment of drug abuse through referrals to rehabilitation programs, as provided for in the benefit package. We encourage employees with a substance abuse problem to seek help before disciplinary action is taken for job performance problems or other policy violations.

   IV. The possession, use or being under the influence of alcohol or illegal drugs will result in disciplinary action up to and including termination.

   V. As a condition of the Act, city employees must notify their employer in writing of any criminal drug statute conviction for a violation occurring in the workplace no later than five calendar days after such conviction. The City, in turn, must notify the federal agency providing the grant, in writing, within ten calendar days of receiving notice from the employee. Sanctions for such a conviction may include the satisfactory completion of a drug assistance or rehabilitation program and/or disciplinary action up to and including termination.
VI. Testing for the presence of illegal drugs may be necessary in situations which may include testing for reasonable suspicion of a violation of this policy.

5. The above policy was distributed on September 1, 1992 to, among others, Joe Hill, then President of Local 1303-32 and Joe Richardson, then President of Local 1579.

6. Between September 1, 1992 and March 1, 1993, the Union did not contact the City in any manner concerning the drug policy.

7. In or about January 1993, the parties began negotiating a successor collective bargaining agreement.

8. By letter dated March 1, 1993, Union representative Nicholas D’Andrea wrote to Personnel Director Tom Gritt concerning the drug policy, stating in relevant part:

   ***
   It has come to my attention that the City has posted a statement in the above matter. Please contact me to set up mutually convenient times to negotiate impact matters on this policy.
   ***
   (Ex. 3)

9. After March 1, 1993, the parties continued to negotiate a collective bargaining agreement. The negotiations did not include specific proposals concerning a drug policy.

10. At no time prior to or during contract negotiations did the Union identify the alleged impacts of the policy that it wished to negotiate.

11. The City represented at the hearing its willingness to negotiate the “drug testing” portion of the policy.

CONCLUSIONS OF LAW

1. The Union waived any right to bargain regarding the employer’s decision to implement the drug policy by failing to contact the City about the policy until March 1, 1993 and, thereafter, by failing to pursue the subject in negotiations for a successor agreement.

2. The Union has failed to meet its burden of proving substantial impacts of the drug policy on the bargaining unit.
DISCUSSION

In this case, the Union alleged that the City failed to bargain in good faith by refusing to negotiate concerning both the decision to implement a drug policy and the impacts of the drug policy.

The City defends on several grounds. First, it claims that it is not required to bargain regarding its decision to implement the policy (except for Section VI concerning drug testing) because the policy is required by Federal law pursuant to the Drug-Free Workplace Act. As such, the City claims that the policy is not a mandatory subject of bargaining.

The City also claims that due to the important public policy contained in the drug policy, any impacts of the policy constitute illegal or permissive subjects of bargaining. Further, the City argues that to the extent it had an obligation to bargain regarding any secondary impacts of the policy, the burden is on the Union to identify and prove the existence of such impacts. The City argues that the Union neither identified nor proved the existence of such impacts either prior to or during the hearing in this matter.

We first note that the City has admitted that drug testing is a mandatory subject of bargaining and has indicated its continuing willingness to bargain about that particular topic. Because there is no record evidence that drug testing has been implemented, there exists no issue before us with regard to drug testing.

Concerning the City’s decision to implement the remainder of the policy, we find that the Union waived any right it may have had to bargain concerning the decision. In this regard, the policy was posted on September 1, 1992 and the Union was specifically notified of its existence on the same date. Six months later, the Union first sent a letter to the City concerning the policy. In that letter, the Union demanded bargaining only about the impacts of the policy. Additionally, the parties were in contract negotiations from approximately January, 1993. During these negotiations, there is no evidence that the Union submitted any proposals concerning the policy, nor were there any substantive discussions concerning the policy.

Under these circumstances, we find that the Union waived any right it had to bargain about the decision to implement the policy. In City of New Haven, Decision No. 1558 (1977) we set forth the analysis to be used in a case such as this one. Applying the reasoning of the Court in City of Norwich v. Norwich Fire Fighters, 173 Conn. 210 (1977), we stated:

Norwich did of course deal with a unilateral change and the decision clearly does put some obligation on a union to participate in seeking negotiations in such a context. We interpret the decision this way: although an employer has an initial duty to propose bargaining about a change he wishes to make (concerning a mandatory subject of bargaining) his conduct is to be judged in its entirety and in context as of
the time a complaint is filed. If the employer announces the change without proposing it for negotiation at the onset, this does not free the union of a duty on its part to propose bargaining where there is full notice and a reasonable opportunity to do so. If thereafter the change is implemented without bargaining neither party can fault the other for the lack of negotiations. City of New Haven, supra.

In New Haven we dismissed the Union’s complaint because we found that the Union had failed to avail itself of a reasonable opportunity to bargain over a change of which it had clear notice. Likewise, in State of Connecticut, Decision No. 2859 (1990), we dismissed a portion of the Union’s complaint because certain work rules at issue were promulgated fourteen months before the Union filed its complaint with this Board and the Union failed to avail itself of the opportunity to bargain about the alleged changes of which it had clear notice.

Here the Union was notified of the City’s policy in September, 1992, yet the Union made no attempt to negotiate any aspect of the policy for six months. Even during January and February, 1993, while the parties were in regular contract negotiations, the record contains no indication that the Union sought to raise this subject. Thereafter, on March 1, 1993, the Union sent a letter demanding impact bargaining. However, there is no record evidence to establish that the matter was pursued in contract negotiations or otherwise until the filing of the instant complaint in September, 1993. Under these circumstances, we find that the Union waived any rights it may have had to negotiate the employer’s decision to implement this policy.

With regard to the impacts of the policy, the law is clear that we will not “assume impacts” to exist. The burden is on the Union to produce evidence that there exists substantial impacts on terms and conditions of employment. Town of Hamden, Decision No. 2145 (1982); Torrington Board of Education, Decision No. 2827 (1990). Here, the Union representative merely testified that he had “questions” concerning the policy, but did not introduce any evidence concerning impact upon the bargaining unit as a result of the City’s decision. In Torrington Board of Education, supm, a case involving similar facts and the same union representative, we said:

At the hearing Mr. D’Andrea testified that he had a number of “questions” about the portable classroom installation, but those “questions” were never converted into proof of impact. We have previously stated that we cannot assume impact. There must be evidence of such impact or probable impact. Town of Hamden, Decision No. 2145

Due to our finding of waiver we need not reach the City’s argument that the policy was required by Federal law and, as such, was not a mandatory subject of bargaining. It should also be noted that, had the Union availed itself of the opportunity to bargain and had we found the policy a mandatory subject of bargaining, the Union could have demanded a return to the status quo ante while bargaining took place.

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(1982). Clearly the Union failed to establish this threshold requirement. Torrington Board of Education, supra, at p. 4.

Here, there is no clear indication on the face of the policy that it would result in substantial impacts on the terms and conditions of employment of the bargaining unit. Because the Union has failed to prove the existence of alleged impacts, the complaint must be dismissed.

One final note is necessary. In its brief, the Union claims that the City, at the least, had an obligation to sit down with the Union and explain and answer questions concerning the drug policy. This argument sounds like the Union is claiming that the City failed to provide information to the Union. We agree with the City that this argument does not address the “impacts” of the policy. If the Union required information, it had a right to make an appropriate information request. Not having done so, it cannot claim that the City failed to provide relevant information.

ORDER

Pursuant to the powers vested in the Connecticut State Board of Labor Relations by the Municipal Employee Relations Act, it is hereby ORDERED that the complaint filed herein be, and the same hereby is DISMISSED.

CONNECTICUT STATE BOARD OF LABOR RELATIONS*

_s/Anthony Sbona
Anthony Sbona,
Board Member

_s/Antonia C. Moran
Antonia C. Moran,
Board Member

* Chairman Margaret A. Iareau resigned prior to a final determination in this matter.
CERTIFICATION

I hereby certify that a copy of the foregoing was mailed postage prepaid this 7th day of November, 1995 to the following:

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