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CHIEF COUNSEL MEMORANDUM 2010-1

TO: Interested Parties

FROM: Erica F. Crystal, Chief Counsel 

SUBJ: Memorandum Concerning Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, 458 Mass. 155 (2010)

DATE: December 2, 2010

Since the Supreme Judicial Court issued the above-referenced decision, the Division has received numerous questions from both management and labor representatives, concerning the effect of the decision on the parties' bargaining obligations under M.G.L. c. 150E. Under the circumstances, the Division has determined that it is in the public interest to provide management and labor representatives with a clear and consistent summary of case law relevant to the most frequently asked questions.¹ Please be advised that this summary is intended to be informational only and under no circumstances should parties or their representatives construe this summary as legal advice or cite it in support of a legal argument. The Division Investigators, Hearing Officers and the Commonwealth Employment Relations Board (CERB) will make all determinations based on the facts and merit of each individual case. Further, the CERB

¹ Director Michael A. Byrnes (Director Byrnes) formally recused himself from the processing of MUP-06-4769, the related Boston Housing Authority case pending at the Division because of his prior employment with the National Conference of Firemen and Oilers, Local 3, SEIU.

will make the final determinations in each case subject to appeal.²

A. Is an employer permitted to make unilateral changes to mandatory subjects of bargaining once a contract expires?

No. It is well established that public employers are prohibited from making unilateral changes in established conditions of employment that affect mandatory subjects of bargaining both during the term of the collective bargaining agreement and after it expires. Town of Chatham, 28 MLC 56, 58 (2001) (citing Chatham I, 21 MLC 1526, 1529 (1995) and cases cited therein, including National Labor Relations Board v. Katz, 369 U.S. 736, 743 (1962)).

Established terms and conditions of employment in effect at the time the contract expires constitute the status quo. The status quo cannot be altered without satisfying the obligation to bargain in good faith. Town of Chatham, 28 MLC at 58 (Town violated the Law when it unilaterally ceased its practice of continuing to advance step and longevity increases during the hiatus after the expiration of the parties' collective bargaining agreement without first bargaining with the Union to resolution or impasse).

To identify the terms and conditions of employment that are in effect when the contract expires, the CERB looks both to the relevant provisions of the expired contract and the established practice between the parties. Id.

B. What happens if there a conflict between the expired contract language concerning a mandatory subject of bargaining and the practice that exists between the parties?

The CERB has not yet squarely reached this question, but it has noted in dicta that during the hiatus period between contracts, an employer's obligation is to continue the prevailing practices regarding wages, hours, and working conditions. The expired contract frequently will supply compelling evidence of what the prevailing practice is on a particular subject. Just as the expired contract may be silent on a particular issue, it is also possible for actual practices to differ from, or even conflict with, contractual provisions. Commonwealth of Massachusetts, 9 MLC 1355, 1359 (1982).

C. Do contractual waivers of bargaining rights survive the expiration of the collective bargaining agreement?

The CERB has not yet squarely reached this question, but it has noted in dicta that, "It is questionable that a contractual waiver of bargaining rights would survive the expiration of the contract." Commonwealth of Massachusetts, 9 MLC at 1361. The

² This memorandum addresses questions concerning M.G.L. c. 150E. Although organizationally within the Division, the Joint Labor Management Committee (JLMC) retains its unique structure and mission and "shall have oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters." Chapter 1078 of the Acts of 1973, As Amended.

National Labor Relations Board³ has held that a contractual waiver does not survive the expiration of the contract. See, e.g., Control Services, 303 NLRB 481, 484 (1991) (“a management rights clause is not, in itself, a term or condition of employment that outlives the contract that contains it, absent some evidence of the parties' intentions to the contrary. Thus, any waiver of a union's bargaining rights that is bottomed on a management rights clause normally is limited to the time the contract is in force.”).

D. Does an employer have to arbitrate grievances now that the contract has expired?

The question of whether an employer is obligated to arbitrate a grievance after the expiration of a contract is a fact specific issue that must be made on a case by case basis. This is because, though arbitration is a matter of contract, see, e.g., Town of Watertown v. Watertown Municipal Employees Ass'n, 63 Mass. App. Ct. 285, 289 (2005), an employer can be forced to arbitrate after a collective bargaining agreement expires, as long as the dispute submitted to arbitration arose under the agreement. Old Rochester Regional Teacher's Club v. Old Rochester Regional Sch. Dist. Comm., 398 Mass. 695, 699 (1986), (citing Nolde Bros. v. Local 358, Bakery & Confectionary Workers' Union, 430 U.S. 243, 249 (1977)) (the incident for which a teacher was disciplined was the origin of the grievance, not the teacher's subsequent dismissal). See also Commonwealth of Massachusetts, 8 MLC 2080, 2086 (1982) (CERB found that few rights could be said to have more clearly arisen under an agreement than the right to be properly classified and compensated during the life of that very agreement); Commonwealth of Massachusetts, 20 MLC 1087, 1094 (1993) (upon the expiration of the collective bargaining agreement, the employer has a continuing obligation to complete the grievance process for grievances that arose under the agreement, even when arbitration is not otherwise required).

In the private sector, the Supreme Court has opined that, “A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken under expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.” Litton Financial Printing Div., 501 U.S. 190, 205 (1991).

E. Is an employer required to honor dues checkoff after a collective bargaining agreement expires?

Yes. There is an obligation to continue the dues checkoff practice. In fact, in Massachusetts, an employee may select to have dues deducted and paid to the union without the necessity of having a collective bargaining agreement in effect. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority et al., (Woods Hole 1), 12 MLC 1531, 1553 n.18 (1986) (citing M.G.L. c. 180, Sections 17A, 17C, 17E and 17G).

³ The Division and the CERB frequently look to National Labor Board Relations decisions for guidance in construing similar statutory provisions. Salem Hospital, 1 MLC 1078, 1085 (1974).