OWN OF HOPEDALE AND HOPEDALE PERMANENT FIRE FIGHTERS ASSOCIATION, LOCAL 2225, IAFF, UP-5564 (2/8/85). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

67. Refusal to Bargain
67.161 pending litigation
82.122 expenses; counsel fees
82.2 cease and desist orders
91.4 procedure and rules
92.36 failure to appear at hearing
92.51 appeals to full commission

ommissioners participating:

Gary D. Altman, Commissioner
Maria C. Walsh, Commissioner

ppearances:

Robert S. Phillips, Esq. - Representing the Town of Hopedale

Dennis R. Brown, Esq. - Representing the Hopedale Permanent Firefighters, Local 2225, IAFF

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

On August 22, 1984, Hearing Officer Timothy J. Buckalew issued his decision n the above-captioned matter.[1] He found that the Town of Hopedale (Town) had vio- ated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the .aw) by suspending negotiations with the Hopedale Permanent Fire Fighters Associa- ion, Local 2225, IAFF (Union) during the pendency of a civil action in the Worcester uperior Court and refusing to reinstate those negotiations until that litigation as completed. The hearing officer also denied the "Cross Complaint" of the Town[2] nd declined to consider factual allegations made by the Town in ex parte

[1]The full text of the hearing officer's decision is reported at 11 MLC 1130 H.O. 1984).

[2]The Town's Answer presented a "Cross Complaint" which alleged that the Union ad filed litigation, during negotiations, which was calculated to have a chilling ffect on those negotiations. Presumably, the Town wished the hearing officer to onsider this as a counterclaim, similar to those claims brought in civil actions nder MRCP Rule 13. The Commission will not entertain such cross claims. "The roper way for a respondent to allege a violation of c.150E is to file a charge of rohibited practice with the Commission and if the Commission finds there is probable ause to believe that the Law has been violated, the Commission will issue a com- laint in its own name." Town of Wilmington, 9 MLC 1694 at 1701, fn. 8 (1983).

ondence with the Commission.[3] Finally, the hearing officer declined to ttorneys' fees and costs to the Union in light of the Massachusetts Appeals determination that the Commission lacks the authority to do so. City of v. Labor Relations Commission, 15 Mass. App. Ct. 122, 125 (1983).

The Town filed a timely notice of appeal pursuant to 402 CMR 13.13(4) and nelty filed a supplementary statement contesting several of the hearing offi- onclusions of law. The Union did not file a supplementary statement. The supplementary statement does not dispute the facts as found by the hearing , so we adopt them pursuant to 402 CMR 13.13(7). Town of Dedham, 3 MLC 1332 We have reviewed the hearing officer's decision and the Town's supplemen- atement and we find no error in the hearing officer's legal conclusions. We re affirm his decision and order.

Findings of Fact

The Town and the Union were parties to a collective bargaining agreement, due re on or about June 30, 1984. For some time prior to March 19, 1984, they en engaged in collective bargaining over the terms of a successor agreement.

On March 19, 1984, the Union met with the Town for a previously scheduled ing session. At that session, a representative of the Town refused to bargain e Union because of the pendency of a civil suit filed by the Union and/or ividual members in Worcester Superior Court. The Selectmen subsequently o refuse to bargain as long as the suit was pending. The Union objected that n's action constituted a violation of the Law.

Opinion

The Town is obligated to bargain in good faith with the Union over "wages, standards of productivity and performance, and any other terms and conditions oyment." G.L. c.150E, Section 6. The hearing officer concluded that, by g to bargain until litigation between the parties was completed, the Town had to meet this obligation. In its supplementary statement, the Town objects to ring officer's conclusion and to the procedures followed by the hearing offi- laving reviewed the hearing officer's decision, we find the Town's objections ithout merit.

The Town contends that the hearing officer erred procedurally by not admitting ence or as argument, a letter from Town Counsel to the Commission dated

[3]The Town chose not to participate in the hearing and attempted instead to its case in writing to the Commission. The Town neglected to serve its ondence on the Union, in violation of our regulations. As discussed in the section of the decision, we affirm the hearing officer's refusal to consider loyer's ex parte submission.

ugust 7, 1984. The Town filed the letter after the close of the hearing. The own argues that the hearing officer applied the Rules of Evidence too strictly and hat, pursuant to Section 11 of the Law, the letter should have been admitted both s evidence and as argument.[4] The hearing officer ruled that the letter was inad- issible on the grounds that it had not been served on the Union pursuant to 402 MR 12.02.

We concur with the hearing officer's ruling that the August 7 letter is nadmissible. The Town failed to serve that letter on the Union in spite of our equirement that it do so. This requirement is designed to protect the rights of he parties to Commission proceedings to have fair and equal access to the Commis- ion. To permit the parties to ignore this rule would endanger the fairness of our rocess.

The Town contends that the hearing officer erred when he relied upon Town of pswich, 4 MLC 1600 (1977), to find a violation of the Law. In Town of Ipswich he Commission observed that litigation cannot be used to delay the collective bar- aining process. Ipswich had filed suit to vacate an arbitrator's award and then nlawfully refused to bargain over a successor contract pending resolution of the itigation. The Town does not suggest that the hearing officer misinterpreted pswich; rather, it argues that Ipswich is inapplicable because the Town initiated he litigation, whereas in the instant case litigation was initiatied by the Union. he Town's argument is without merit. While we agree that there is a factual dis- inction between Ipswich and the present case, regarding who initiated the litigation e reject the Town's suggestion that this distinction justifies a different result. pswich does not turn on the fact that the employer was initiating litigation, but ather on the fact that it was using the litigation to delay bargaining. In this espect, the cases are identical.

The Town in this case conditioned bargaining upon its demand that the Union elinquish its right to pursue civil remedies at law. By so conditioning the con- inuation of negotiations the Town delayed collective bargaining by refusing to meet. t is the Town's unjustified refusal to meet with the Union which violates the Law.[5]

While denying that it has committed a prohibited practice, the Town defends ts conduct by noting that it suspended bargaining on the advice of counsel, and rguing that therefore it must have been acting in good faith. We disagree. The act that the Town acted on advice from its attorney does not relieve it of liability or its actions.

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[4]Section 11 of the Law states, in pertinent part, "In any hearing the commis- ion shall not be bound by the technical rules of evidence prevailing in the ourts."

[5]Whether delays pending resolution of disputes between the parties which are entral to the parties' bargaining concerns may ever be justified is a question not resented by this case. Cf. Watertown School Committee, 9 MLC 1468 (H.O. 1983). e therefore decline to address it.

The Town also seeks to exculpate itself by insisting that it has bargained e Union since March 19, 1984. The record does not support the Town's contend no motion was properly filed to reopen the record before us. Therefore, ot consider this averment by the Town. We note, however, that if the parties bargaining subsequent to the Town's March 19 suspension of negotiations, that uld not alter our conclusion. The violation in this case occurred when the spended negotiations. A subsequent resumption of negotiations would comport rt of the remedy which we order in this case, but would not vitiate the need ull remedial order. Nor would the existence of subsequent bargaining alter t of the earlier violation.[6]

Finally, the Town appeals the remedy ordered by the hearing officer. Speci- the Town objects to the order that it post a Notice to Employees and notify mission within ten (10) days of the steps taken to comply with the hearing 's decision. The Town argues that these aspects of the order are "Draconian" lculated to inflame and punish one side for a relatively ephemeral act." mission is charged with the statutory responsibility to protect employee to bargain collectively, inter alia. The Commission routinely orders that es be given notice that their statutory rights will not be violated. Such ng is appropriate here. The Town has violated the Law. The Town can remedy olation only by ceasing its refusal to negotiate, bargaining upon request, licly renouncing its unlawful conduct while assuring employees and their Union liance with the Law in the future. The notice ordered by the hearing officer to inform employees and their Union of three things: 1) that the Town recognat its conduct has been found to be unlawful; 2) that the Town will not in such conduct in the future; and 3) that the Labor Relations Commission force the Law. The Notice serves a critical remedial purpose and we will the order to post it.

Conclusion

We have reviewed the hearing officer's decision and the arguments raised by n. We conclude that the hearing officer correctly interpreted and applied to the facts in this case, and that his order is appropriate and effectuates poses of the Law. For the reasons discussed above, we hereby affirm the hearicer's decision and order in its entirety.

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[6]The Town also avers that its "good faith" compliance with the Law is demonby the fact that the Union filed for a determination that an impasse existed. ot know whether the Union filed for a determination that the parties were at because the record before us contains no evidence on this point. We note that filing for a determination of impasse does not demonstrate that the must have bargained in good faith. To the contrary, the refusal of one bargain in good faith can lead quickly to the existence of an impasse in ing.

own of Hopedale and Hopedale Permanent Fire Fighters Association, Local 2225, IAFF, 11 MLC 1413

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of opedale shall:

1. Cease and desist from:

   (a) Refusing or failing to bargain in good faith with the Union over all mandatory subjects of bargaining by refusing to meet while litigation concerning fire fighters' overtime, or any other similar civil litigation, is pending.

   (b) In any like or similar manner, interfering with, restraining, or coercing members of the Union in the exercise of their rights guaranteed under the Law.

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

   (a) Upon request, bargain in good faith with the Union with regard to all mandatory subjects of bargaining;

   (b) Immediately post the attached Notice to Employees in conspicuous locations, where notices to employees are usually posted, and leave the notice posted for a period of not less than thirty (30) days;

   (c) Notify the Commission within thirty (30) days of receipt of this Decision and Order, of the steps taken to comply herewith.

O ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

GARY D. ALTMAN, Commissioner
MARIA C. WALSH, Commissioner