.MOUTH SCHOOL COMMITTEE AND FALMOUTH TEACHERS ASSOCIATION, MUP-5640 (11/26/85).

54.41 ground rules
54.53 grievance administration
54.8 mandatory subjects
67.7 refusal to meet or delay in meetings
82. Remedial Orders

missioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner
Maria C. Walsh, Commissioner

pearances:

Brian A. Riley, Esq. - Representing the Falmouth Teachers Association, MTA

Alan S. Miller, Esq. - Representing the Falmouth School Committee

DECISION

Statement of the Case

This case involves a charge by the Falmouth Teachers Association (Association) it the Falmouth School Committee (Committee) violated Sections 10(a)(5) and (1) of sachusetts General Laws, Chapter 150E (the Law) by refusing to act on the merits a grievance unless the third step of a grievance meeting was held in open session.

The Association filed the instant charge with the Labor Relations Commission mmission) on June 19, 1984. The Commission investigated the Association's charge suant to Section 11 of the Law and on October 23, 1984 issued a Complaint of hibited Practice and Notice of Hearing alleging that the Committee violated Sec- n 10(a)(5) of the Law by refusing to participate in good faith in the parties' otiated grievance/arbitration procedure by insisting that a grievance hearing be ld in open session and by denying grievances on the ground that they were not sented in open session. The Complaint further alleged that the Committee's con- t derivatively violated Section 10(a)(1) of the Law. In its Answer, the Committee itted all of the factual allegations of the Complaint. The parties wavied an identiary hearing. The Association filed a brief and the Committee filed a post- aring statement of position.

On the basis of the evidence presented and for the reasons discussed below, establish a prospective rule of law. We find that a party commits a per se vio- tion of Sections 10(a)(5) and (1) of the Law by insisting that grievance hearings conducted in open sessions over the objection of the other party.

Facts

The Town of Falmouth is a public employer within the meaning of Section 1 of

v. The Committee is the representative of the Town for the purpose of bar-
g collectively with the employees of the Town's school department. The Asso-
ı is an employee organization within the meaning of Section 1 of the Law and
exclusive bargaining representative for certain employees of the Committee,
ng teachers.

The Association and the Committee are parties to a collective bargaining
ent currently in effect. That agreement contains a grievance procedure culmin-
n final and binding arbitration. Step three of the grievance procedure pro-
or a hearing before the Committee. Step three does not specify whether the
ıces will be heard in open or closed session. For several years, it has been
ıctice of the Committee to hear Step three grievances in open session.

On or about March 5 and 20, and April 3, 1984, Robert Heath (Heath), a
and member of the bargaining unit represented by the Association, filed
ıces alleging violations of the collective bargaining agreement. The Associa-
epresented and continues to represent Heath in connection with his grievances.
grievances were denied at the first two steps of the grievance procedure.
17, 1984, the Association made a written request to John Mello, chairman of
mittee, that the Committee hear Heath's grievances at step three in executive
closed) session. On or about May 22, 1984, the Committee denied the Associa-
request to hear Heath's grievances in closed session.

On July 24, 1984, the Committee met with the Association. At that meeting,
ociation again requested that Heath's grievances be heard at step three of
evance procedure in closed session. The Committed still refused to hear
grievances in closed session. Because the Committee refused to hear
grievances in closed session, the Association presented the grievances in
on July 24, 1984. The Committee denied Heath's grievances in part because
ociation refused to present them in open session.

OPINION

In the instant case, the Commission is faced with the issue of whether it will
per se violation of the Law where a public employer insists upon conducting
ıce hearings in open session over the objection of the employee organization.
reasons discussed below, we extend to grievance hearings the per se rule
have articulated in the context of collective bargaining negotiations.

Generally, ground rules for bargaining are said to be manditorily bargain-
ınd thus a party is permitted to insist to impasse upon its position. Hol-
ichool Committee, 5 MLC 1491, 1494 (1978). However, "neither party can be
ed to prevent the commencement of bargaining by insisting upon ground rules
ıre patently unreasonable or which in and of themselves prevent bargaining."
mphasis added).

The Commission, however, has repeatedly held that a public employer commits
e violation of the Law by insisting upon open collective bargaining sessions
ıe employee organization has objected to the presence of the public. City of

tleboro, 3 MLC 1408, 1410 (1977) and cases cited therein; Holbrook School Committee, MLC at 1494 (1978); Town of Marion, 2 MLC 1256 (1975), aff'd. sub nom., Board of lectmen of Marion v. Labor Relations Commission, 7 Mass. App. 360 (1979). The mmission stated that the Employer's insistence upon open sessions effectively pre-nted the commencement of bargaining and articulated a policy that "[t]he norm is osed sessions; parties will not be permitted to scuttle bargaining by insisting herwise." Holbrook School Committee, 5 MLC at 1495.[1]

The process of grievance adjustment is similar to the negotiation process. Ghiglione v. School Committee of Southbridge, 376 Mass. 70 (1978), the Supreme dicial Court addressed the issue of whether the provision of General Laws Chapter , Section 23B (Open Session Law), allowing parties to meet in executive session r collective bargaining sessions, was equally applicable to grievance hearings. e Court held that grievance hearings were exempt under the Open Session Law since c]ollective bargaining sessions encompass not only negotiations leading up to the reement, but also resolution of grievances pursuant to the collective bargaining reement." Id. at 73. In so finding, the Court relied on the following language the Supreme Court in United Steelworkers v. Warrior & Gulf Navigation Co., 363 S. 574, 581 (1960):

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement... The grievance procedure is, in other words, a part of the continuous collective bargaining process. (Emphasis added).

at the parties have agreed to resolve a dispute through their grievance procedure ould not obfuscate the fact that they are bargaining collectively. Holliston hool Committee, 5 MLC 1161, 1163 (H.O. 1978), aff'd., 5 MLC 1429 (1978).

The rationale behind our policy of applying a per se rule to negotiation ssions applies equally to the grievance hearing context. As the Commission noted:

> Seccessful negotiations are based on compromise. They require that each side be free to test out a variety of proposals on the other; withdrawing some, giving up others in order to gain a better advantage in a different area. The presence of third parties necessarily inhibits such compromises and reduces the flexibility management and unions must have to reach agreement. Positions taken in public tend to harden and battle lines are drawn in spite of the mutual desire of the parties to meet in an acceptable middle ground.

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[1] The Commission stated that the degree of insistence which must be shown to igger a violation may be less than that required in an ordinary case of "insistence impasse on a permissive subject of bargaining" as defined in NLRB v. Wooster v. of Borg-Warner Corp., 356 U.S. 342 (1958). The Commission stated, "[I]t would em that once a party has requested closed sessions the other party should comply mediately." Holbrook School Committee, 5 MLC at 1495, n.2.

f Marion, 2 MLC 1256, 1258 n.3 (1975), aff'd. sub nom., Board of Selectmen of v. Labor Relations Commission, 7 Mass. App. Ct. 360 (1979); Town of Norton, 1140, 1142 n.3 (1976).

Successful grievance adjustment, like successful contract negotiation, re- that the parties make compromises which are not possible when they are conduct- eir business on public display. The presence of third parties "distract[s] union and employer] officials from concentrating their efforts toward a solu- f the issues before them and dampen[s]their willingness to make compromises... ons from the audience...impair the orderly and intelligent analysis of the s' positions." Town of Norton, 3 MLC 1140, 1141-42 (1976).

The Commission previously held that the open or closed nature of a grievance g was a mandatory subject of bargaining. Ashland School Committee, 5 MLC 1151 . Our decision today alters that holding.

Ashland involved a unilateral change in which one party departed from the past ce by insisting on holding grievance hearings in open sessions. In Ashland, mmission ordered the employer to cease and desist from insisting that the nce hearing be held in open session. The Commission's decision yielded a grievance hearing, just as does our decision in the instant case. In fact, tcome of Ashland would not have been changed had we applied the per se rule lated today prohibiting either party from insisting to impasse on open griev- earings.

We have concluded that the purposes of G.L. c.150E will best be advanced by ing that grievance hearings should be held in "closed" session unless both the er and the union agree to conduct the hearing in an "open" session. Because we stablished the norm by which grievance hearings will be conducted, absent agreement, the issue of whether grievance hearings are to be held in "open" osed" session is no longer a mandatory subject of bargaining.[2] See Town of

[2]Prior to 1978, the National Labor Relations Board (NLRB) treated the presence ourt reporter or a recording device at a negotiation session as a mandatory t of bargaining upon which either party could lawfully insist to impasse, un- he impasse was done in bad faith. See, Reed & Prince Manufacturing Company, B 850, 28 LRRM 1608 (1951), enf'd. on other grounds, NLRB v. Reed & Prince cturing Company, 205 F.2d 131, 32 LRRM 2225 (1st Cir. 1953), cert. denied, S. 887, 33 LRRM 2133 (1953). However, in 1978, the NLRB instituted a new policy ating the recording of negotiations as a permissive subject of bargaining. tt-Collins Co., 237 NLRB 770, 99 LRRM 1034 (1978), enf'd., NLRB v. Bartlett- s Co., 639 F.2d 652, 100 LRRM 2272 (10th Cir. 1981); Latrobe Steel Co., 244 28, 102 LRRM 1175 (1979), enf'd., NLRB v. Latrobe Steel Co., 630 F.2d. 171, RM 2393 (3d Cir. 1980); Bakery Workers, 272 NLRB No. 210, 118 LRRM 1007 (1984). nerally, Stark; Preliminary Issues as Permissive Subjects of Bargaining: The ations of NLRB v. Bartlett-Collins Co., 16 Tulsa Law Journal 691 (1981).
In deciding that the issue of a court reporter was a permissive subject, the tated:

(continued)

ion, 2 MLC 1256 (1975), aff'd. sub. nom., Board of Selectmen of Marion v. Labor ations Commission, 7 Mass. App. Ct. 360 (1979). The parties can mutually agree hold grievances in open session.[3] However, neither party can unilaterally in- t that the grievance be heard in open session.

Administrative agencies often use their discretion to determine whether roactive application of a changed rule of law or procedure is appropriate. See, ., Blackman-Uhler Chemical Division-Snalloy Corporation, 239 NLRB 637 (1978) ere the National Labor Relations Board announced its policy of retroactively lying new rules of law). Whether a change in policy should be applied retro- ively or prospectively is a question to be determined on the facts of each case. must balance our interest in prompt application of the new policy against prin- les of fairness to the respondent who relied in good faith upon prior precedent. the instant case, the Employer relied upon the reasoning in Ashland while engag- in a course of conduct that produced results contrary to those in Ashland. We e concluded that neither party to a grievance procedure may refuse to conduct a evance hearing in closed session. Since the Employer in the instant case re- ed, we conclude that the Employer violated the Law and we shall order the Employer cease and desist from engaging in such conduct in the future. We also conclude, ever, that in view of the Employer's reliance upon the reasoning in Ashland, no ther remedy is required in this case.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Falmouth ool Committee shall:

1. Cease and desist from refusing to bargain in good faith with the Falmouth Teachers Association by refusing to conduct grievance hearings in "closed" meeting session;

2. Take the following affirmative action that will effectuate the purpose of the Law:

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2 (continued)

The question of whether a court reporter should be presented during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutoty responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue. (footnote omitted) (Emphasis added). Bartlett-Collins Co., 237 NLRB at 773, 99 LRRM at 1036.

[3]Based on the record, the Commission cannot determine if the parties reached agreement to hold their grievance hearings in open session.

a. Upon request by the Falmouth Teachers Association conduct grievance hearings in "closed" rather than "open" meeting session; and

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER
MARIA C. WALSH, COMMISSIONER