In the Matter of COMMONWEALTH OF MASSACHUSETTS COMMISSIONER OF ADMINISTRATION AND FINANCE

and

MASSACHUSETTS NURSES ASSOCIATION

Case No. SUP-4050

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| *54.589* | *bargaining unit work* |
| *63.3* | *discrimination—hiring, layoffs, promotion* |
| *63.44* | *pursing Civil Service Appeal* |
| *67.13* | *economic justification* |
| *82.11* | *back pay* |
| *82.13* | *reinstatement* |
| *82.3* | *status quo ante* |
| *82.4* | *bargaining orders* |

*June 10, 1998*
*Claudia T. Centomini, Commissioner*[1]
*Helen A. Moreschi, Commissioner*

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| *John Marra, Esq.* | *Representing the Commonwealth* |
| *James F. Lamond, Esq.* | *Representing the Massachusetts Nurses Association* |

## DECISION[2]

### Statement of the Case

On March 17, 1994, the Massachusetts Nurses Association (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Commonwealth of Massachusetts (the Commonwealth) had violated Sections 10(a)(1), (3) and (5) of Massachusetts General Laws, Chapter 150E (the Law). The Commission investigated the charge and issued a Complaint of Prohibited Practice on August 19, 1994. The first count of the complaint alleged that the Commonwealth had violated Section 10(a)(3), and derivatively, Section 10(a)(1), of the Law by terminating twelve nurses in retaliation for filing an appeal with the Civil Service Commission. The second count of the complaint alleged that the Commonwealth had violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by transferring bargaining unit work previously performed by the terminated nurses to non-unit personnel.

Administrative Law Judge Robert McCormack (the ALJ) heard the case and issued his Recommended Findings of Fact and Recommended Conclusions of the Law (the findings) on July 30, 1996. Both parties filed objections to the ALJ's findings. On April 10, 1997, the Commission issued a letter to both parties inviting them to submit briefs addressing whether the nurses' actions in filing the appeal with the Civil Service Commission constituted concerted activity protected under Section 2 of the Law. Both parties filed briefs addressing this issue.

### Findings of Fact

The Commonwealth has raised objections to the ALJ's findings of fact. After reviewing the evidence, we adopt the ALJ's findings with certain modifications, as noted.

*Count I: Alleged Retaliation*

Seven nurses (the nurses) employed by the Department of Social Services (DSS) filed an appeal with the Civil Service Commission for an upgrade in their position to "Public Health Nursing Advisor II," pursuant to a provision in the parties' collective bargaining agreement. On September 29, 1992, the Civil Service Commission issued a written opinion, favoring the merits of the nurses' case, but denying them any relief for lack of jurisidiction. The nurses subsequently filed suit in superior court pursuant to Massachusetts General Laws Chapter 249, Section 4, to compel the Civil Service Commission to exercise jursidiction over the appeal. The superior court remanded the appeal to the Civil Service Commission and the Civil Service Commission voted to schedule the matter for further hearing on January 3, 1994. On January 3, 1994, the Civil Service Commission orally advised the parties that it would rule favorably on the nurses' appeal. A week or two later, Ann Looney-Cannole (Looney-Cannole), one of the nurses involved in the appeal, informed Suzanne Tobin (Tobin), who at the time supervised and coordinated the duties of the other nurses, that the nurses were expecting a favorable decision from the Civil Service Commission.

On January 13, 1994, Tobin ran into Personnel Director Steven Polley (Polley) in a smoking room at their workplace.[3] Tobin commented to Polley that the nurses had won at Civil Service. Polley reacted angrily and replied, "What? No way. No way will they get an upgrade! That will never happen!...We'll fire them! The department will never pay." Tobin inquired into the nurses' work, and Polley replied, "We'll lay them off and hire them back as consultants."[4]

Polley had been representing DSS at the civil service level for several years. Near the end of January 1994, when DSS had

1. Chairman Dumont has recused himself from this case.

2. Pursuant to 456 CMR 13.02(1), the Commission designated this case as one in which the Commission issues a decision in the first instance.

3. In his Recommended Findings of Fact, the ALJ mistakenly states that Looney-Cannole participated in a conversation with Polley in the smoking room. The Commonwealth and the Union both addressed this error in their post-hearing briefs. Upon review of the record, we conclude that it was actually Tobin who spoke with Polley in the smoking room on January 13, 1994.

4. In its challenge to the ALJ's findings of fact, the Commonwealth argues that the evidence does not support a finding that Polley made the statement the ALJ attributed to him. However, Tobin testified that she heard Polley make the statement that the ALJ attributed to him. The Commission's regulations state that the findings of fact made by a hearing officer will constitute the record on review unless one of the parties in its supplementary statement directs the Commission to specific evidence warranting either a contrary finding on a material issue or an additional material finding not made by the hearing officer. 456 CMR 13.15(5); *Greater New Bedford Infant Toddler Center* 13 MLC 1620, 1621 (1987); *Hadley School Committee*, 7 MLC 1632, 1634 (1980). Here, however, the Commonwealth fails to cite specific evidence that would warrant a contrary finding.

received the Civil Service Commission decision involving the nurses, Polley discussed implementing that decision with unspecified officials in DSS. They discussed whether to appeal the Civil Service Commission decision, but decided not to do so. Ted Boileau (Boileau), the assistant commissioner for human resources at DSS, directed Polley to compute the cost of upgrading the nurses, and to determine how it would have an impact on the budget.

The parties' collective bargaining agreement contained a provision giving individual unit members the right to appeal position classifications to the Personnel Administrator of the Civil Service Commission. Article 19, Section 3 of the agreement provided:

> Individual employees shall continue to have the same right to appeal the propriety of his/her position classification through the Personnel Administrator of the Civil Service Commission which the individual employees enjoyed on June 30, 1976, and such appeal may not be the subject of a Grievance or arbitration under Article 25 herein.

In July 1993, when DSS was preparing its spending plan for fiscal year 1994, it knew that it had a budget shortfall of approximately $415,000 in the social worker account which included the registered nurses. This amount was approximately equivalent to the salaries of thirteen nurses. Shortly thereafter, DSS filed a request for a supplemental budget appropriation to make up this deficiency. By December 1993, DSS knew that it would not receive additional monies from the Legislature.

On January 24, 1994, the Civil Service Commission issued a new decision accepting jurisdiction over the nurses' appeal and concluding that it should be granted. Accordingly, the Civil Service Commission ordered that the nurses be reallocated to the title of Public Health Nursing Advisor II. The economic impact of the Civil Service Commission decision on DSS was between $75,000 and $100,000. In February 1994, Ted Boileau (Boileau), Assistant Commissioner for Human Resources, and the Director of Labor Relations at DSS made the decision to lay off twelve bargaining unit nurses, including the seven nurses who were participants in the Civil Service Appeal.[5] The Commonwealth informed the nurses, by letter dated February 23, 1994 that, due to the status of the DSS budget, it could not continue to fund all currently-filled positions and that they would be laid off the next day.[6]

*Count II: Transfer of Bargaining Unit Work*

The nurses spent the bulk of their time advising DSS staff, vendors and foster parents on health issues relating to specific DSS cases or DSS policy and practice. Among their specific duties, they: 1) facilitated the completion of the "medical passport" for children in DSS care and custody to ensure consistency of medical care and to maintain a complete medical history; 2) coordinated referrals for the testing and placement of children who were at high risk for or were in fact infected with HIV to insure that appropriate decisions were made regarding these children; 3) consulted about the ongoing medical management of children who were at high risk for or already infected with HIV to promote appropriate medical treatment and "substitute care" treatment; 4) consulted with DSS social workers, DSS legal staff members, and related community personnel on general medical issues and case-specific problems; 5) participated on multi-disciplinary teams and task forces; and 6) trained DSS social workers and foster parents. They also collected data pertaining to AIDS, audited medical and dental compliance, and drafted publications for DSS.

By memorandum of March 22, 1994, Farley informed all DSS staff that a new policy would be in place effective March 28, 1994 to address the medical care management and technical assistance functions that previously were handled by the nurses. The memorandum identified, *inter alia*, the procedure for DSS staff to obtain nursing support from three remaining nurses who would continue to be employed after the layoffs; it instructed that Tobin would be providing assistance in the coordination of medical services to children involved with Boston hospitals; it designated and identified by name six non-bargaining unit employees who would assist in accessing needed medical services and indicated that the duties of those individuals would include coordination of the AIDS board, gathering information on medically needy children, and establishing linkages with the Department of Public Health and the medical community. Finally, the memorandum informed the DSS staff that a training program was to be developed to address pertinent medical issues for staff and foster parents and that they would soon be getting an outline of medical resources and support services available through the Department of Public Health.

Following the layoffs, Tobin, who was not employed in a bargaining unit capacity following the nurses' layoff, continued to perform some of the duties she had performed while in her bargaining unit position, including some of the same duties performed by her DSS nursing staff peers. The DSS greatly expanded the scope of the assignments of the three nurses who remained employed after the layoffs. Patricia Peterson (Peterson) was assigned a territory that served the areas within the northeast, central, and west regions, stretching from Newburyport to the New York border. Edith Kelly was assigned to the area offices within the southeast and Boston regions and Florence Kelley covered the metro and Boston regions. Peterson previously covered three northeastern offices in the Beverly area. She was laid off with the

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5. The Commonwealth argues that the ALJ erred in finding that the Commonwealth made its decisions to lay off the Nurses following the successful disposition of the Civil Service Commission appeal. The Commonwealth references testimony of witnesses as evidence tending to rebut the ALJ's finding of facts. Specifically, it points to the testimony of deputy commissioner John Farley (Farley) and Boileu as demonstrating that the decision to lay off the Nurses was made prior to the Civil Service Commission determination. However, upon further review, the testimony cited by the Commonwealth does not warrant a finding contrary to that of the ALJ. The ALJ determined that the lay off decision was made in February 1994 after contrasting Farley's testimony with an affidavit he gave to Suffolk Superior Court on March 23, 1994 as well as Polley's testimony that he had a conversation with Boileau in January 1994 which indicated that a lay off decision was yet to be made. Although the evidence cited by the Commonwealth may lend some support to its contention, it did not convincingly establish that the Commonwealth made its decision prior to the Civil Service Commission determination. Generally, credibility findings by a hearing officer have been granted "substantial deference" by the Commission as well as the Massachusetts' courts. *United Water & Sewer Workers, Local 1* v. *Labor Relations Commission*, 28 Mass. App. Ct. 359, 360 (1990).

6. Testimony at the hearing established that the lay offs were actually effective as of April 1, 1994.

other nurses, but managed to bump into one of the federally funded positions. Now, her work area covers approximately half of the Commonwealth.

## Opinion

*Alleged Retaliation:*

The Commission applies a three-step analysis when reviewing an allegation of unlawful retaliation or discrimination. *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 565 (1981). First, the charging party must establish a prima facie case demonstrating that: 1) the employee was engaged in activity protected under Section 2 of the Law; 2) the employer was aware of this protected activity; 3) the employer took an adverse action against the employee; and 4) the adverse action was motivated by the employer's desire to discourage or penalize against the protected activity. If the charging party successfully establishes a prima facie case of discrimination, the employer may rebut it by stating a lawful reason for its decision and producing evidence that this reason actually motivated the adverse action. If the employer effectively rebuts the charging party's prima facie case, the analysis reaches its third step and a mixed motive analysis is applied to the facts. *Town of Clinton*, 12 MLC 1361, 1364 (1985); *Boston City Hospital*, 11 MLC 1065, 1071 (1984). A mixed motive analysis requires the Commission to assess the Commonwealth's purported reason for taking adverse action and, then determine if the Commonwealth would have laid off the nurses but for their concerted, protected activity. *Town of Stow*, 11 MLC 1312, 1319 (1984), *aff'd* 21 Mass. App. Ct. 935 (1985); *Trustees of Forbes Library* at 566.

The Commission has adopted the National Labor Relations Board's approach for determining whether an employee is engaged in concerted activity. This approach recognizes concerted activity where an employee is engaged in activity, with, or on the authority of other employees, rather than on behalf of the employee alone. *Town of Southborough*, 21 MLC 1242 (1994); *Meyers Industries*, 268 NLRB 73 (1984). More specific to this case, the Commission has adopted the *Interboro* doctrine, which provides that an employee pursuing an individual grievance pursuant to a collective bargaining agreement is engaging in concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enforced* 399 F.2d 495, (2nd Cir. 1967); *Town of Southborough*, 21 MLC 1242, 1248 (1994). The United States Supreme Court has also held that activity was concerted where the employees were invoking a right grounded in the collective bargaining agreement. *NLRB* v. *City Disposal*, 465 U.S. 822 (1984).

Here, the collective bargaining agreement between the Commonwealth and the Union guarantees the nurses the right to appeal their classifications through the Civil Service Commission. This exercise of contract-based redress may be analogized to an employees' use of a grievance procedure provided for in the collective bargaining agreement. Here, the nurses were appealing their classifications through the method provided for by the collective bargaining agreement. Therefore, we find that the nurses' appeal to the Civil Service Commission constituted concerted, protected activity.

In their arguments to the Commission, both parties addressed the issue of whether the nurses' sought their appeals as individuals or as a class. However, we need not reach this issue here, because the collective bargaining agreement conveys a concerted status to the nurses' actions, even if they had been acting as individuals. *Town of Southborough* at 1248.

After finding that the nurses were engaged in concerted activity, the next two factors of the prima facie case are easily met. It is undisputed that the Commonwealth was aware of the nurses' Civil Service Commission appeal and their subsequent layoff could be perceived as punitive. *Town of Holbrook*, 15 MLC 1221 (1988). The remaining element of the prima facie case, employer motivation, requires a more in-depth analysis.

Absent direct evidence of employer motivation, the Commission has held that improper motivation may be established through circumstantial evidence and reasonable inferences to be drawn from that evidence. *Commonwealth of Massachusetts*, 6 MLC 2041, 2045 (1980). There are several factors that may suggest improper employer motive including: timing, *Town of Somerset*, 15 MLC 1523, 1529 (1989); triviality of reasons given by employer, *Commonwealth of Massachusetts*, 14 MLC 1743, 1749 (1988); an employer's deviation from past practices, *Everett Housing Authority*, 13 MLC 1001, 1006 (1986); or expressions of animus or hostility towards a union or the protected activity, *Town of Andover*, 17 MLC 1475 (1991).

Among the circumstantial evidence most relevant to this case is the timing between an employee's exercise of concerted, protected activity and the employer's adverse action. *Commonwealth of Massachusetts*, at 1743. Here, the record reflects that the Commonwealth made its decision to lay off the nurses after the Civil Service Commission issued its decision to allow the nurses' appeal.

An employer's expression of hostility or animus against a Union or protected activity is also strong evidence of improper motive. *Town of Andover*, at 1483. Here, Polley's statement to Tobin that they would lay off the nurses illustrates hostility towards the nurses' protected activity. The hostility is evident because his comment was prompted by Tobin informing him of the nurses' prospective success in their appeal.

The Commonwealth further argues that, even if the Commission construes Polley's statements as an expression of animus against the nurses' protected activity, he did not have the authority to lay off employees and was not speaking on behalf of the Commonwealth. Although, Polley may not have possessed the direct authority to lay off the nurses, he was in a position to influence the Commonwealth's decision. Polley held the position of Personnel Director. His duties included personnel payroll, personnel classification, and processing performance evaluation data. Polley was an agent of the Commonwealth and the record demonstrates that Polley participated in the Commonwealth's layoff process by preparing a cost analysis and a seniority list for the layoff. Therefore, his expression of hostility towards the nurses' Civil Service Commission appeal can be attributed to the

Commonwealth. *Trustee of Forbes Library* 384 Mass. 559, 569 (1981).

The combination of suspicious timing and expressed employer hostility, establishes that the Commonwealth was motivated by a desire to discourage or penalize the nurses' protected activity. Thus, the Union has met the burden of establishing a prima facie case of discrimination. *Town of Clinton*, at 1364.

The Commonwealth argues that financial constraints were the legitimate legal reason for the nurses' layoff. Specifically, the Commonwealth produced Boileau's testimony that there was a budgetary shortfall in the social worker/nurses account of $415,000 and the Massachusetts legislature failed to approve a supplemental appropriation in December, 1993. He further testified that DSS management considered the role of the nurses' within DSS more expendable than social workers. Economic justification is among the lawful reasons that an employer may advance when making adverse personnel changes. *Town of Plainville*, 21 MLC 1001 (H.O. 1994); *aff'd*, 22 MLC 1690 (1996). As a result, the Commonwealth has met its burden of production.

Because the Commonwealth satisfied its burden to produce evidence of a lawful reason for the layoff, the case becomes one of "mixed motives" and the Commission will apply the last level of analysis and determine if the Commonwealth would have laid off the nurses but for their concerted, protected activity. *Trustees of Forbes Library* at 566. Even after considering the Commonwealth's possible financial motive, we find the nurses' concerted activity to be the proximate cause of the layoff. The balance of the evidence reflects that the Commonwealth would not have come to the decision to layoff the nurses but for their appeal to the Civil Service Commission. First, the Commonwealth did not give any evidence of seriously considering alternative, less drastic, ways to fit within budget restraints. Additionally, the evidence advanced by the Commonwealth of its fiscal concerns does not outweigh the evidence demonstrating that the Commonwealth harbored hostility towards the nurses' pursuit of position reclassification through the Civil Service Commission. Finally, the validity of the Commonwealth's proffered reason for the lay off is subject to question. The actual savings for DSS represented by the nurses' salary during that three-month period is negligible when contrasted with the actual amount of the budget shortfall. The layoff occurred in April 1994 with approximately three months left in the fiscal year. DSS had a budgetary shortfall of approximately $415,000 in an account that included the bargaining unit nurses. Unless the nurses were being compensated at an average rate of at least $11,500 per month, three months of the nurses' salaries would not remedy the budgetary shortfall. The Commonwealth's purported reason for the layoffs does not stand up to scrutiny and does not outweigh the balance of the evidence demonstrating the Commonwealth's unlawful motive. Therefore, we find that the Commonwealth unlawfully retaliated against the nurses for exercising rights that are protected by Section 2 of the Law.

*Alleged Transfer of Bargaining Unit Work:*

Section 10(a)(5) of the Law requires an employer to give the exclusive bargaining representative notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel. *City of Quincy*, 15 MLC 1239 (1988); *City of Haverhill*, 11 MLC 1289 (1984). To prove that the Commonwealth has failed to fulfill its bargaining obligation before transferring bargaining unit work, the Union must demonstrate the following elements: (1) the employer transferred bargaining unit work to non-unit personnel; (2) the transfer of work had an adverse impact on individual employees or the bargaining unit; and (3) the employer did not provide the exclusive bargaining representative with notice and an opportunity to bargain prior to making the decision. *Board of Regents of Higher Education*, 19 MLC 1485, 1488 (1992).

The Commonwealth argues that none of the job duties that were exclusive to the Public Health Nursing Advisor I and II positions were transferred to non-unit personnel and points to the testimony of unit member Peterson. When asked if she had knowledge of anyone, beside herself, performing former bargaining unit work in central Massachusetts, Peterson responded, "Not to my knowledge. I think a lot of things just aren't getting done."[7]

We find this statement to be ambiguous. Thus, despite this ambiguous statement, there is enough record evidence to support the Union's allegation that some of the reassigned work was exclusive bargaining unit work to satisfy the first element of an unlawful transfer of bargaining unit work analysis. *Id.* That evidence includes testimony that Suzanne Tobin continued her prior bargaining unit duties although she was no longer in the bargaining unit and a March 22, 1994 memorandum where Farley identifies six non-bargaining unit individuals as responsible for duties previously done by the nurses. Therefore, a preponderance of the evidence reflects that non-unit employees were performing the work previously done by the laid off nurses.

Next, we consider whether the transfer of the nurses' duties had an adverse effect on members of the bargaining unit. The Commission has held that a transfer of bargaining unit work, accompanied by no apparent reduction in bargaining unit positions, constitutes a detriment on the bargaining unit because it could result in an eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties. *City of Gardner*, 10 MLC 1218,1221 (1983). Here, as in *City of Gardner*, unit work was lost to non-unit employees and, thus, triggered an obligation to bargain over the transfer of bargaining unit work.

Finally, there is no evidence that the employer gave the Union notice and opportunity to bargain over the re-assignment of bargaining unit work. Therefore, the requisite elements of a Section 10(a)(5) violation are met, and we find that the Commonwealth's action was unlawful.

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7. Although the Commonwealth relies on Peterson's statement in its argument, the Commonwealth did not argue it should be included in the Commission's findings when the Commonwealth filed its challenges to the Recommended Findings of Fact. Thus, the findings of fact were not altered to include this statement. However, even if we were to include Peterson's statement in the findings, the statement would not have an effect on our final decision for the reasons cited above.

Conclusion

Accordingly, we conclude that the Commonwealth violated Section 10(a)(3) and (1) by laying off the nurses in retaliation for their participation in concerted, protected activity. In addition, we find that the Commonwealth violated Section 10(a)(5) and (1) of the Law by transferring bargaining unit work to non-bargaining unit personnel without first giving the Union notice and opportunity to bargain.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

a. Interfering with, restraining, and coercing employees in the exercise of their rights under the Law;

b. Discriminating against the nurses based upon their participation in an appeal of classifications to the Department of Personnel Administration (DPA) and the Civil Service Commission (Civil Service Commission);

c. Transferring bargaining unit work to non-bargaining unit personnel without first giving the Union notice and an opportunity to bargain.

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

a. Immediately offer to reinstate the nurses who were laid off on April 1, 1994, at the positions that they held prior to their layoffs;

b. Restore the duties of the registered nurses that formerly had been performed by members of the bargaining unit to the bargaining unit represented by the Massachusetts Nurses Association;

c. Upon request, bargain with the Massachusetts Nurses Association over the decision to transfer registered nurse duties formerly performed by members of the bargaining unit to personnel outside of the bargaining unit represented by the Massachusetts Nurses Association;

d. Make whole the nurses who were laid off on April 1, 1994, for any losses that they have suffered as a result of the Commonwealth's unlawful actions, plus all interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984);

e. Post in conspicuous places where employees usually congregate, and leave posted for not less than thirty (30) days, the attached Notice to Employees;

f. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED

**NOTICE TO EMPLOYEES**

The Massachusetts Labor Relations Commission (Commission) has ruled that the Commonwealth of Massachusetts (the Commonwealth) has committed prohibited practices in violation of Sections 10(a)(3), (5) and (1) of the Massachusetts General Laws, Chapter 150E, the Public Employee Collective Bargaining Law. The Commission determined that the Commonwealth unlawfully laid off twelve registered nurses in retaliation for their participation in activities protected by Section 2 of Chapter 150E. In addition, the Commission determined that the Commonwealth unlawfully transferred bargaining unit work to non-bargaining unit employees.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL NOT discriminate against employees in regard to hiring or any term or condition of employment in retaliation for their concerted, protected activity.

WE WILL NOT transfer bargaining unit work to non-bargaining unit personnel without first providing the employees' exclusive bargaining representative with notice and opportunity to bargain.

WE WILL immediately restore the affected nurses to the positions that they held prior to the April 1, 1994 layoff.

WE WILL make the nurses at issue whole, with interest, for any loss of wages or other benefits which they have suffered as a result of the Commonwealth's unlawful actions.

[signed]
Commissioner
DEPT. OF SOCIAL SERVICES

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In the Matter of TOWN OF EAST LONGMEADOW

and

LONGMEADOW NON-UNION EMPLOYEES ASSOCIATION

Case No. RBA-142

*94. Arbitration Under Chapter 150E, sec. 8*

*June 10, 1998*
*Robert C. Dumont, Chairman*
*Helen A. Moreschi, Commissioner*

| | |
|---|---|
| *Richard Hayes, Esq.* | *Representing the Town of East Longmeadow* |
| *Marshall Moriarty, Esq.* | *Representing the Longmeadow Non-Union Employee's Association* |

**RULING ON REQUEST FOR BINDING ARBITRATION**

Statement of the Case

On November 13, 1997 the East Longmeadow Non-Union Employees' Association (the Union) filed the above-referenced request for binding arbitration pursuant to Section 8 of Chapter 150E of Massachusetts General Laws (the Law). On January 16, 1998, the Town of East Longmeadow (the

Town) filed an opposition to the Union's request. On January 23, 1998, the Union filed a motion to strike the Town's opposition to the Union's request. On March 12, 1998, the Commission decided to deny the Union's motion.

### Findings of Fact

The Union and the Town are parties to a collective bargaining agreement that is in effect from July 1, 1996 through July 1, 1999. The parties' collective bargaining agreement contains a provision entitled "Grievance Procedure." The final (third) level of the grievance procedure reads as follows:

> Level Three: Upon receipt of the Board of Selectmen's decision, if the aggrieved employee and/or the Association are not satisfied, the grievance may be presented to the Personnel Policy Committee or advisory committee. Any decision rendered by the Personnel Policy committee or advisory committee agreed upon by the Committee shall be binding on the Town but not binding on the Association.

On June 3, 1997, bargaining unit member Leona L. Lessard (Lessard) submitted a request to have her position regraded pursuant to the regrading provision of the parties' collective bargaining agreement. The Union requested a level II grievance hearing on or about June 6, 1997. A level II meeting was held on August 12, 1997. On August 25, 1997, the Town's board of selectmen voted to deny Lessard's grievance.

Stephen Manning (Manning) is chair of the board of selectmen as well as the chair of the personnel policy committee. On September 2, 1997, Lessard sent Manning a letter requesting that the Respondent provide the reason for denying her upgrade. The letter contained the following caption: "RE: REGRADE OF POSITION GRIEVANCE LEVEL III." On September 19, 1997, the Respondent replied that Lessard's upgrade was denied because it determined that she had not assumed the major duties of a higher grade.

On October 24, 1997, the Union requested that Lessard's regrading grievance be advanced to arbitration. On November 12, 1997, the Respondent denied the Union's request, stating that the board of selectmen is the final arbiter of issues like regrading.

### Opinion

Section 8 of the Law authorizes the Commission to order final and binding arbitration where: (1) there is a written collective bargaining agreement in effect at the time of the alleged event; (2) there is a dispute over the interpretation or application of the written agreement; and (3) the agreement does not provide for final and binding arbitration. *Town of Sharon*, 22 MLC 1695 (1996); *Sturbridge School Committee*, 21 MLC 1233 (1994).

The Union argues that all of the above prerequisites are met here. The Town argues that binding arbitration is not proper because the Union failed to appeal to the personnel policy committee as provided for in the parties' collective bargaining agreement and that appeal would be binding on the Town. However, the Union's request represented that the Union did appeal to the personnel committee via a written request to Manning and that request was denied. When the Town subsequently denied the Union's request for arbitration of Lessard's regrading, it stated that the board of selectmen was the final arbiter of regrading issues.

When considering requests for binding arbitration, the Commission has held that matters of procedural and substantive arbitrability are proper for an arbitrator to determine. *Town of Grafton*, 16 MLC 1090 (1989); *North Shore Regional Vocational School Dist.*, 12 MLC 1347 (1985). Here, the facts of the case and the language of the parties' collective bargaining agreement combine to produce a genuine question of arbitrability regarding the issue of Lessard's regrading.

### Conclusion

Accordingly, we conclude that a dispute over the interpretation or application of a written collective bargaining agreement exists between the Union and the Town, and that the agreement does not provide for final and binding arbitration.

WHEREFORE, the Commission, by virtue of the power vested in it by Section 8 of the Law, HEREBY ORDERS:

1. That the dispute raised by the Union's request for binding arbitration be promptly submitted to binding arbitration; and

2. That within thirty (30) days of the date of service of this decision, the parties shall inform the Commission of arbitrator selected If the parties do not agree on an arbitrator, they shall submit the dispute for arbitration before the Board of Conciliation and Arbitration.

SO ORDERED

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