Any differences between the regular part-time fire fighters/EMTs and the full-time fire fighters/EMTs are outweighed by the undisputed fact that all Town fire fighters perform similar functions under similar working conditions. Therefore, we find that the regular part-time fire fighters/EMTs share a sufficient community of interest with the full-time fire fighters/EMTs to warrant including them in the same bargaining unit. *See, Town of Sturbridge*, 18 MLC 1416, 1421 (1992); *Town of Swansea*, 4 MLC 1527, 1528 (1977).

CONCLUSION AND DIRECTION OF ELECTION

Based on the record and for the reasons stated above, we conclude that a question of representation has arisen concerning certain employees of the Town of Sturbridge and that the following constitutes an appropriate unit for collective bargaining within the meaning of Section 3 of the Law:

> All full-time and regular part-time fire fighters/EMTs below the rank of fire chief employed by the Town of Sturbridge, excluding the fire chief, and further excluding all managerial, confidential and casual employees, and all other employees of the Town of Sturbridge

IT IS HEREBY DIRECTED that an election by secret mail ballot shall be held for the purpose of determining whether a majority of the employees in the above-described bargaining unit desire to be represented by the Professional Fire Fighters of the Sturbridge Fire Department or by no employee organization.

The eligible voters shall include all those persons within the above-described unit whose names appear on the Town of Sturbridge's payroll for the payroll period ending on the Saturday immediately preceding the date of this decision, and who have not since quit or been discharged for cause. This list must be either electronic (e.g. Microsoft Access or Excel) or in the form of mailing labels. For the purposes of determining the eligibility of the regular, part-time fire fighters/EMTs to participate in this election, an employee's work history for the thirteen (13) weeks preceding the eligibility date, the Saturday immediately preceding the date of this decision shall be used. *See, Town of Millville*, 11 MLC at 1645 (1985) (Commission adopts the general rule that an employee's work history for the thirteen (13) weeks preceding the eligibility date offers the most helpful evidence of the quantity, regularity and currency of employment).

To ensure that all eligible voters shall have the opportunity to be informed of the issues and the statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that two (2) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the Town of Sturbridge with the Executive Secretary of the Commission, 399 Washington Street, 4th floor, Boston, MA 02108 not later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the list available to all parties to the election. Failure to submit the list in a timely manner may result in substantial prejudice to the rights of the employees and the parties; therefore, no extension of time for filing the list will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election, should proper and timely objections be filed.

SO ORDERED.

* * * * * *

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

and

AFSCME COUNCIL 93

Case Nos. SUP-3993, SUP-3972

82.3 status quo ante
82.4 bargaining orders
83. Compliance

February 27, 2003
Helen A. Moreschi, Chairwoman
Peter G. Torkildsen, Commissioner

Michelle A. Heffernan, Esq.	*Representing the Commonwealth of Massachusetts*
Angela Wessels, Esq.	*Representing the Newton Police Association*

SUPPLEMENTAL DECISION ON COMPLIANCE

STATEMENT OF CASE

SUP-3993

On July 23, 1993, AFSCME Council 93 (Union) filed the above-referenced charge alleging that the Commonwealth of Massachusetts (Commonwealth) had engaged in prohibited practices within the meaning of M.G.L. c. 150E (the Law) relating to the contracting out of work at the Department of Public Health (DPH). The Commission issued a complaint on January 21, 1994, alleging that the Commonwealth had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by repudiating certain provisions of the parties' collective bargaining agreement (Agreement), including Article 15 of the Agreement, requiring the Commonwealth to convene a "Special Labor Management Committee" to discuss contracting out of personnel services. The Commission issued a decision on March 13, 2000, concluding, among other things, that the Commonwealth had repudiated Article 15 of the Agreement and ordering it to "convene the Special Labor Management Committee pursuant to Section 2 of Article 15 of the [Agreement]." [1]

1. [See next page.]

SUP-3972

The Union filed this charge against the Commonwealth on May 27, 1993 alleging that the Commonwealth had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by repudiating certain provisions of the parties' collective bargaining agreement. The Commission issued a complaint on March 15, 1995, alleging that the Commonwealth had repudiated Article 15[2] of the parties' agreement in connection with its subcontracting work at the Department of Mental Retardation (DMR). On June 26, 1996, Administrative Law Judge (ALJ) Diane Drapeau issued a decision, finding that the Commonwealth had violated the Law as alleged in the complaint.[3] The Commonwealth filed a timely notice of appeal on July 2, 1996.

On March 13, 2000, the Commission issued a decision affirming the ALJ's decision, but modifying her reasoning, remedy and order. Specifically, the Commission eliminated the make-whole portion of the ALJ's order, reasoning that it would be speculative for it to conclude that convening the Special Labor Management Committee would have prevented the layoffs, thereby entitling bargaining unit members to backpay. The Commission's order, as modified, required the Commonwealth to "upon written request by the Union, convene the Special Labor Management Committee pursuant to section 2 of Article 15 of the parties' collective bargaining agreement."[4]

Compliance Proceedings

On May 15, 2002, the Union wrote to the Commission pursuant to 456 CMR 16.08 seeking compliance with both SUP-3993 and SUP-3972. The Union claimed that the Commonwealth had failed to, upon request, convene a meeting of the Special Labor Management Committee to address the contracting out of bargaining unit work at DMH and DMR in 1993. The Union also requested that the two cases be consolidated for compliance. [5]

The Commission held an informal compliance conference before Chief Counsel Marjorie F. Wittner on July 9, 2002. On August 6, 2002, both parties filed memoranda of law in support of their respective positions and on August 29 and 30, 2002, respectively, both AFCSME and the Commonwealth filed replies to each other's briefs.

Facts

Article 15 of the parties' collective bargaining agreement, effective by its terms from July 1, 1990 through June 30, 1993, states in pertinent part:

> Section 1: There shall be a Special Labor Management Committee to advise the Secretary of A&F on contracting out of personnel services...Said Committee shall develop and recommend to the Secretary of A&F procedures and criteria governing the purchase of contracted services by the Commonwealth where such services are of a type traditionally performed by bargaining unit employees.
>
> Section 2: In the event that the Principal of the Alliance who represent(s) the affected employees, desire(s) to discuss the purchase of services which are of the type currently being provided by employees within a department/agency covered by this Agreement, that Principal(s) shall request in writing a meeting of the Special Labor Management Committee established in Section 1. The Committee shall examine both the cost effectiveness of such contracts and their impact on the career development of Alliance members. In the event that the parties fail to reach an agreement in the Committee, the parties agree to submit the matter to an expedited fact-finding process.

In each of the decisions at issue here, the Commission's argument that the Commonwealth had repudiated Article 15 was based on its findings that the Commonwealth had refused to convene the Special Labor Management Committee on the numerous occasions it had been asked to do so by the Union. In each of those cases, the Commission expressly interpreted Section 2 of Article 15 to grant to the Union the right to make a written request to convene the Special Labor Management Committee when its principals wanted to discuss contracting out unit work. In both cases, the Union's request to convene the Special Committee were prompted by the Commonwealth's indicating that it intended to contract out DMR's and DPH's dietary and housekeeping services.

Also on March 13, 2000, the Commission issued *Commonwealth of Massachusetts*, SUP-3835 (2000)[6]. That case addressed allegations by the Union that the Commonwealth had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by failing to bargain with the Union concerning a decision, and the impacts of that decision, to subcontract housekeeping and dietary services at the Fernald State School. The Commission concluded that the Commonwealth had violated the Law when it contracted out dietary and housekeeping functions at Fernald without bargaining to resolution or impasse with the Union and that the Union did not waive its right to bargain about contracting out unit work by agreeing to the language in Article 15 of the parties' collective bargaining agreement.[7] Recognizing that a return to the *status quo ante* would not effectuate the purposes of the Law because the Commonwealth had employed outside contractors for several years, the Commission ordered the Commonwealth to: 1) cease and desist from contracting out bargaining unit work to non-unit employees without first bargaining to resolution or impasse with the Union; 2) refrain from renewing the outside contracts until after it has bargained with the Union to resolution or impasse over that decision

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1. The Commission's decision in that case is reported at 26 MLC 269 (2000).

2. Article 15 is identical in both charges.

3. The full text of the decision is reported at 23 MLC 21 (1996).

4. That decision is reported at 26 MLC165 (2000).

5. The Commonwealth did not oppose the Union's motion and the Commission granted that motion.

6. That case is reported at 26 MLC 161 (2000).

7. The Commonwealth appealed that decision, but indicated that it would withdraw that appeal if the Commission amended its order to reflect the interest rate that the Supreme Judicial Court ruled should be applied to monetary awards against the Commonwealth in *Secretary of Administration and Finance* v. *Labor Relations Commission*, 434 Mass. 340 (2001). The Commission issued an amended order that adjusted the interest rate on June 13, 2002 and accordingly, there is no pending appeal.

and its impacts; 3) upon request, bargain in good faith with the union to resolution or impasse over the decision to contract out bargaining unit work and 4) make whole any employee or employees who suffered economic losses as a direct result of the contracting out of dietary and housekeeping services at Fernald. The facts adduced during the compliance proceedings reflect that the Commonwealth and the Union have bargained over the Commonwealth's decision to contract out dietary and housekeeping services at Fernald in 1992, pursuant to the Commission's order.

Post-Decision Events

By letter dated February 20, 2002, Tony Caso, AFSCME Council Executive Director and Alliance Chairperson informed the Commonwealth in writing that the Alliance wished to convene the Special Labor Management Committee to discuss the "matter of the 1993 privatization of housekeeping and dietary services in the Department of Mental Retardation and the matter of the 1993 privatization of dietary services in the Department of Public Health."

According to the unrebutted affidavit of Howie Fain, the Union's Assistant Field Services Director, on March 15, 2002, John Jesensky, Director of OER, met with the Union pursuant to Article 15. However, when the Union broached the issue of the 1993 privatizations at issue here, the Commonwealth, in essence indicated that those matters were "done deals," the services were gone and now being provided by contractors and that there were no services currently being provided by unit members that the Commonwealth was going to subcontract. According to Fain, Mr. Jesensky also stated that the Commonwealth did not have any obligation to bargain over the DMR and DPH privatizations because the Commission's order did not include reinstatement or a return to the *status quo ante*. The parties did however discuss the potential privatization of the Soldiers Home at Holyoke (a situation wholly unrelated to the instant matters) pursuant to Article 15.

Opinion

The Commission has consistently recognized that remedies for violations of the Law should be fashioned to place charging parties in the position they would have been in but for the unfair labor practice. *Natick School Committee*, 11 MLC 1387, 1400 (1985). The Commission has broad discretion in fashioning a remedy calculated to effectuate the purposes of the Law and to vitiate the effects of the violation. *Boston Police Patrolmen's Association, Inc.* 8 MLC 1993, 2002 *citing Board of Regional Community Colleges* v. *Labor Relations Commission*, 377 Mass. 847 (1979). Moreover, the Commission attempts to fashion remedies that will prevent a respondent from benefiting from its unlawful practice. *Amesbury School Committee*, 13 MLC 1196, 1197.

There is no dispute that since the Commission issued the order in the cases at issue, the Commonwealth has refused, upon request, to convene the Special Labor Management Committee for the purpose of discussing the 1993 privatizations. The Commonwealth justifies that refusal to bargain by arguing, in essence, that because the Commission declined to award a make-whole remedy in the two cases, the Commission's order to cease and desist from refusing to implement Article 15 and to convene the Special Labor Management Committee was prospective only; the Commission could not have intended to restore the parties to the *status quo ante*. The Commonwealth also stresses how difficult it would be to restore the *status quo* because over nine years have passed since the Commonwealth privatized the housekeeping and dietary functions at DMR and DPH.

We do not find those arguments to be persuasive. The Commonwealth correctly notes that the traditional remedy in a repudiation case is an order that requires an employer to do three things: cease and desist from refusing to implement the agreement; make whole any employee who suffered an economic loss as a result of its unlawful action; and post a notice to employees. In SUP-3972 however, the Commission declined to award a make-whole because it would have been "speculative" for it to conclude that convening the Special Committee would have prevented any layoffs. 26 MLC at 169. The Commission nevertheless ordered the Commonwealth to convene, upon request, the Special Labor Management Committee, thereby remedying the very prohibited practice charge at issue, the Commonwealth's repudiation of Section 2, Article 15 of the Special Labor Management Committee. Thus, in declining to award any backpay, the Commission was not, as the Commonwealth argues, refusing to restore the *status quo ante*—it was simply refusing to order the make-whole aspect of a *status quo* remedy. Notably, in SUP-3835, the Commission also expressly declined to restore the full *status quo*, reasoning that because the Commonwealth had employed outside contractors for several years, a return to the *status quo* would not effectuate the purposes of the Law. 26 MLC at 164. The Commission nevertheless ordered the parties to bargain over the decision to contract out the positions at Fernald and the impacts of that decision and the Commonwealth has apparently complied with that order. Thus, the Commonwealth's arguments concerning the significance of the Commission's refusal to award a make-whole remedy in the instant matters are simply without merit.

Moreover, the Union is correct that the Commission's remedial orders do not simply expound on general legal principles. The cases cited by the Commonwealth for the proposition that the Commission issues orders prospectively are distinguishable. In *City of Quincy*, 8 MLC 1217, 1220 (1981), the Commission issued no backpay or reinstatement award in a case where the Commission ordered the parties to bargain over the impact of a layoff decision. Consistent with the NLRB's practice, the Commission recognized that employees have no right to have their employment continue beyond the date of completion of bargaining over the impacts of a layoff. Nevertheless, the Commission ordered the parties to bargain prospectively and to pay the employees at their pre-layoff rate in order to "replicate as nearly as practicable the bargaining posture that would have existed but for the employer's unlawful refusal to bargain." *Id.* at 1220 (additional citations omitted). Clearly, that order cannot be read as requiring the parties to bargain over future disputes, but instead, directly addresses the prohibited practice at issue. The other cases cited by the Commonwealth, including *Town of Burlington*, 10 MLC 1387 (1984) and *Middlesex County Commissioners*, 9 MLC 1579 (1983), similarly do not speak to future speculative conduct, but are aimed at remedying the specific prohibited practice at issue.

The Commonwealth also argues that because the services that were privatized in 1993 are not of the type "currently" being provided by bargaining unit members as called for in Article 15, it no longer has any obligation to convene an Article 15 meeting to discuss those privatizations. However, in compliance proceedings, the Commission's inquiry is not whether the respondent has violated the Law anew, but whether the respondent has complied with the Commission's order. *See generally* 456 CMR 16.08. The Commission is therefore not required in this proceeding to interpret the Commonwealth's Article 15 obligations in light of circumstances that currently exist. To do so would allow the Commonwealth to benefit from its prohibited practices in direct contravention of the Commission's stated goals in fashioning remedies. *See Amesbury School Committee*, 13 MLC 1196, 1197 (1986), *quoting City of Everett*, 2 MLC 1471, 1477 (1976), *enf'd sub nom LRC* v. *City of Everett*, 7 Mass. App. Ct. 826 (1979).

Finally, although Commonwealth argues that the passage of time may make it more difficult for the Committee to discuss the cost effectiveness of the privatization contracts and their impact on the career development of bargaining unit members, that does not alter our conclusion that the Commonwealth, by refusing to discuss the 1993 privatizations pursuant to Section 2 of Article 15 of the parties' collective bargaining agreement, has not complied with the Commission's orders.

Conclusion

For the foregoing reasons, we conclude that by refusing to discuss the 1993 privatizations at issue here during the March 15, 2002 meeting of the Special Labor Management Committee, the Commonwealth has not fully complied with the Commission's orders.

Amended Order

WHEREFORE, based on the foregoing it is hereby ordered that the Commonwealth shall fully comply with the Commission's orders dated March 13, 2000 in the above-captioned cases by taking the following action:

1. Convene the Special Labor Management Committee pursuant to section of Article 15 of the parties' collective bargaining agreement to discuss the 1993 privatizations at issue in Case Nos. SUP-3993 and SUP-3972.

2. Notify the Commission within ten (10) days of the receipt of this Amended Order of the steps taken to comply with it.

SO ORDERED.

* * * * * *

In the Matter of CITY OF BOSTON

and

BOSTON POLICE SUPERIOR OFFICERS FEDERATION

Case No. MUP-2483

54.513 ***promotion***
67.14 ***management rights***
67.3 ***furnishing information***

March 6, 2003
Helen A. Moreschi, Chairwoman
Peter G.Torkildsen, Commissioner

William J. Murphy, Esq.	*Representing the City of Boston*
James F. Lamond, Esq.	*Representing the Boston Police Superior Officers Federation*

DECISION[1]

Statement of the Case

On September 9, 1999, the Boston Police Superior Officers Federation (the Federation) filed a charge with the Labor Relations Commission (the Commission) alleging that the City of Boston (the City) had violated Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on May 8, 2000 alleging that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the Federation with information that is relevant and reasonably necessary to its role as exclusive collective bargaining representative. The City filed an answer on April 15, 2000.

On October 20, 2000, the parties agreed to waive an evidentiary hearing before Hearing Officer Margaret M. Sullivan and agreed to file certain joint exhibits with the Commission. Both parties submitted post-hearing briefs on or about January 5, 2001. On May 31, 2002, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

Findings of Fact[2]

Police officers employed by the City in its police department, who are not managerial or confidential pursuant to Section 1 of the Law, are members of one of four bargaining units. The Boston Police Patrolmen's Association (the Association) is the exclusive collective bargaining representative for patrol officers; the Boston Police Superior Officers Federation (the Federation) is the exclusive collective bargaining representative for uniformed personnel who hold the rank of sergeant, lieutenant and captain; and the

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

2. The Commission's jurisdiction in this matter is uncontested.