CITY OF BOSTON SCHOOL COMMITTEE AND BOSTON TEACHERS' UNION LOCAL 66, AFT, MUP-2084 (2/20/75).

(20 Jurisdiction of the Commission)
22. Arbitration - deferral to
(30 Bargaining Unit Determination)
34.91 accretion
(60 Prohibited Practices by Employer)
67. Refusal to bargain
67.61 bargaining with individuals
67.9 refusal to bargain with new employees
(90 Commission Practice and Procedure)
91.6 deferral to prior arbitration award
93.7 deferral to prior arbitration award

Commissioners participating: Alexander Macmillan, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

Steven C. Kahn, Esq. - Counsel for the Commission
Albert L. Goldman, Esq. - Counsel for the Charging Party
John J. McMahon, Esq. - Counsel for the Charging Party
John J. Murray - Representing the Boston School Committee

DECISION

Statement of the Case

On October 21, 1974 the Boston Teachers' Union, Local 66, American Federation of Teachers (hereafter, "the Union") filed with the Labor Relations Commission ("the Commission") a Complaint of Prohibited Practice, charging that the City of Boston School Committee ("the Employer") committed violations of Chapter 150E of the General Laws. After preliminary investigation, the Commission, on January 8, 1975, issued its Complaint of Prohibited Practice, alleging that the Employer, in violation of Chapter 150E, Section 10(a)(5) and (1), refused to bargain in good faith with the Union as the exclusive representative of "transitional" (formerly "security") aides, members of a unit represented by the Union for purposes of collective bargaining, No answer was filed by the Employer.[1] Thereafter, on January 23, 1975, a formal hearing was conducted before

[1]The Employer's failure to file an answer-or to establish "good cause" therefor-disregards Article III, Section 8 of the Commission's Rules and Regulations, which requires the filing of an answer and provides further that:

> "[a]ll allegations in the complaint to which no answer is filed...shall be deemed to be admitted to be true and shall be so found by the commission, unless good cause to the contrary is shown."

While the Commission views noncompliance with the requirements of Section 8 with a jaundiced eye and will hereafter take appropriate measures to assure compliance therewith, it declines in the instant case-particularly in view of the significance of the issues presented-to find against the Employer on the basis of its failure to file an answer.

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Steven C. Kahn, a duly designated Hearing Officer, at which all parties were afforded full opportunity to be heard, to introduce testimony and to present argument. Briefs filed by the Union on February 3, and the Employer on February 7, 1975 have been carefully considered. Accordingly, upon the entire record herein, the Commission finds:

Findings of Fact

1. The City of Boston and its School Committee is a "Public Employer" within the meaning of Chapter 150E, Section 1 of the Law.

2. Boston Teachers Union, Local 66 American Federation of Teachers is an "employee organization within the meaning of Chapter 150E, Section 1 of the Law.

On April 6, 1972 a consent election was conducted by the Commission in a unit of "all teacher aides employed by the School Committee of the City of Boston, excluding lunch hour monitors and all other employees."[2] Noninstructional aides performing security duties, including approximately 30 now employed as transitional aides, were included on the voter eligibility list and did, in fact, vote without challenge in the election, in which the Union prevailed. Accordingly, on April 13, 1972 the Union was certified as exclusive representative for purposes of collective bargaining of the employees in the above-described unit.

Subsequently, the parties negotiated a collective bargaining agreement, effective September 1, 1972 to August 31, 1973, which, pursuant to the terms of a Settlement Agreement executed June 4, 1974, was continued in full force and effect retroactively from September 1, 1973 to August 31, 1974 with modifications, including the following:

I. If a program is abolished and then reinstated, Aides who were forced to transfer by the abolishment of the program shall have the right to return to their former position in accordance with their seniority...

IV. Salary: Retroactive to September 1, 1973

Teacher Aides $3.52
Community Field Coordinator $5.88

Article I, Section A of the collective bargaining agreement, the Union Recognition clause, states:

> "The Committee recognizes the Union as the exclusive bargaining representative for all teacher aides employed by the Boston School Committee including clerical aides, teacher aides, library aides, bilingual aides, security aides, community liason aides, community field coordinators, and all other aides, but excluding lunch hour monitors."

[2]The Union petitioned for a unit of "all para professional aides (including without limitation academic aides, aides serving as coordinators, bilingual aides, clerical aides, community liason aides and teacher aides) excluding lunch room monitors."

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Article I, Section B states, in pertinent part, that:

> "[t]he jurisdiction of the Union shall include those individuals employed by the Committee who now or hereafter perform the duties of aides as described in Article III, Section A..."[3]

Aides performing security duties were first utilized in the Boston public schools in the 1971-1972 school year under the federally - funded Emergency Employment Act. The "EEA" aides monitored the corridors, supervised the fire alarm boxes, patrolled the building and grounds, and generally assisted the teachers. Upon the termination of federal aid, the City absorbed the cost of employing aides, who were then designated "security" aides but who performed the substantially identical duties of the former "EEA" aides. In 1973-1974 approximately 86 security aides were employed in the public school system. Union dues of security aides were deducted by the Employer in 1973-1974 pursuant to Article IX of the collective bargaining agreement. On June 21, 1974 Judge W. Arthur Garrity, Jr. issued his desegregation order in Tallulah Morgan et al v. John J. Kerrigan et al, 379 F.Supp. 410 (D.Ma., 1974). Thereafter, on June 27, at a meeting attended by representatives of the Union and the School Committee, William Harrison, Associate Superintendent of the Boston Public Schools, informed the Union of the School Committee's proposed employment of several hundred security aides, in view of the anticipated security risks created by implementation of Garrity's order. By September 1974 approximately 4-500 "security" aides were employed by the School Committee and classified "transitional" aides. While a few former security aides who had performed their duties satisfactorily were rehired as transitional aides, the Employer neither complied with the recall procedure set forth in the agreement[4] nor notified the Union of its hiring procedure for 1974-1975. On August 28, 1974 the parties executed a Memorandum of Agreement pursuant to which, inter alia, the salaries of "all teacher aides represented by the Union", commencing September 1, were increased 5½%. Also pursuant to the Memorandum of Agreement the parties submitted "all outstanding items...to prompt final and binding arbitration as to the terms of the successor collective bargaining agreements for...aides...."

Applicants for employment as transitional aides were required to execute an application form, which provided that the Employer could terminate their employment upon 24 hours notice. The Union was not consulted concerning use of the application form or its contents. In late August or early September the

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[3]Article III, Section A ("Working Conditions") defines aides as "non-certified individual[s] employed by the Boston School Committee" and describes their function as "assist[ing] teachers and other school personnel except that aides shall not perform the work of custodial or cafeteria workers." Compare Article I, Section C which defines an "aide" as a "person employed by the Committee in the bargaining unit as defined in Article I."

[4]Article IV of the parties' collective bargaining agreement provides that:

> "[a]ides on layoff status shall be recalled according to seniority to any aide vacancy in the city provided that the senior aide has satisfactorily performed or has the ability to perform any of the available work."

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Employer conducted an orientation session for transitional aides, at which their duties, and the legal rights of students, were explained. The duties of the transitional aides include supervision of fire alarm boxes, investigation of disturbances of the peace and, generally, "patrol[ling] the buildings and grounds of the school to maintain order..."

On January 11, 1975 Arbitrator Mark Santer, pursuant to the parties submission of August 28, 1974, issued an award which, inter alia, sustained the Union's position that "transitional" aides are included within the certified unit of teacher aides, and to which the Union, accordingly, urges the Commission to defer a request which we next consider.

Opinion

In Spielberg Manufacturing Company, 112 NLRB 1080 (1955) the NLRB ("the Board") established criteria under which it determines to recognize an arbitration award and decline to exercise its jurisdiction. Thus, while acknowledging that it is not bound as a matter of law by an arbitration award, the Board concluded that where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, it will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision is not clearly repugnant to the purposes and policies of the Act. (112 NLRB at 1082)[5] The position taken by the Board and adopted herein by the Commission recognizes that where the parties have established private machinery for the resolution of disputes arising under a collective bargaining agreement, or in the negotiation thereof, encouragement of arbitration, which federal labor policy and Chapter 150E mandate, is most fully accommodated by deferring to an award which satisfies the Spielberg criteria, supra.[6] Moreover, if access to the Commission's machinery for relitigation of the dispute is limited to cases involving procedural unfairness or awards clearly repugnant to the Law, the party against whom the award is directed will not be encouraged to ignore the award in the anticipation that a more favorable determination may be reached at subsequent Commission proceedings. Accordingly, forum shopping and multiple litigation are discouraged and the policy in favor of arbitration is thereby advanced. Finally, we submit that the considerations which warrant deferral to an arbitration award in a prohibited practice proceeding apply with equal force to a representation proceeding or, as in the instant case, to a nominally prohibited practice proceeding which raises essentially "representation" issues.

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[5]Pursuant to the Spielberg doctrine, the Board has frequently deferred to outstanding arbitration awards "not at odds with the statute" (112 NLRB at 1082), even where the Board may not have reached the same result had it considered the merits of the case de novo. See, e.g., I. Oscherwitz & Sons, 130 NLRB 1078 (1961); Local 18, Operating Engineers, 145 NLRB 1492 (1964); Terminal Transport Co., Inc., 185 NLRB 672, 673 (1970).

[6]Consistent with the Commonwealth's policy of encouraging arbitration, the Commission, adopting the Board's Collyer doctrine (Collyer Insulated Wire, 192 NLRB 837 (1971)), concluded that it should defer to the parties' contractual grievance and arbitration machinery disputes which may constitute not only a prohibited practice but also a claimed violation of the parties' contract, where certain enumerated conditions precedent for deferral are satisfied. Cohasset School Committee, MUP-419 (6/19/73).

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In Raley's Supermarkets, 143 NLRB 256 (1963), upon which the Union relies in urging deferral, the Employer and incumbent union were parties to a collective bargaining agreement which covered a unit of "all nonsupervisory employees of the Employer, excluding meat department employees" (143 NLRB at 257). During the contract term the Employer hired on a full-time basis janitors and bottle sorters for whom a rival union then petitioned under Section 9(c) of the National Labor Relations Act. Subsequently, an arbitrator issued an award sustaining the position of the incumbent union that the disputed employees were covered by the existing contract. The Board, extending the Spielberg doctrine to representation proceedings, deferred to the award and, accordingly, dismissed the petition under its contract bar rules.[7] See also Insulation & Specialties, Inc., 144 NLRB 1540, 1543 (1963). Subsequently, in Hotel Employers Association of San Francisco, 159 NLRB 143, 147-149 (1966), the Board, limiting the scope of Raley's, concluded that the arbitrator's determination of the question of contract interpretation "did not dispose of the ultimate issue we must decide" (159 NLRB at 148) and that, accordingly, deferral to the award was not warranted. In declining to defer, the Board noted that the arbitrator did not consider evidence that might have supported the conclusion that, notwithstanding his contract interpretation, a question of representation was presented that could best be resolved through the Board's election machinery. Accord: Horn & Hardart Co., 173 NLRB 1077, 1079 (1968); Pulitzer Publishing Co., 203 NLRB No. 105, 83 LRRM 1177, 1179-1180 (1973). See also Westinghouse Electric Corp., 162 NLRB 768, 770-771 (1967) in which the Board, reaffirming Hotel Employers Association, declined to honor an arbitration award where the issued before the Board could be resolved only "by utilization of Board criteria for making unit determinations" and not merely by an interpretation of the contract "under which...[the arbitrator] was authorized to act..." (162 NLRB at 771). The Board suggested, however, that deferral might have been warranted had the arbitrator's award "clearly reflect[ed] the use of and...consonan[ce] with Board standards" (id). Compare Pullman Industries, Inc., 159 NLRB 580 (1966), decided six days later, in which the Board rejected an arbitration award because resolution of the issue presented required application of the Board's accretion doctrine and the record reflected only an arbitral determination that the parties' contract covered the disputed employees. Accord: Beacon Photo Service, 163 NLRB 706 (1967). While the principles of Raley's and Hotel Employers Association or Pullman Industries are not easily reconciled, the Commission concludes that the touchstone in "Spielberg" deferral cases is whether the issue resolved by the arbitrator is dispositive of the issue before the Commission. Accordingly, the Commission will defer-either in a representation or prohibited practice proceeding-to an arbitration award which otherwise satisfies the Spielberg requirements and which either disposes of the substantially identical issue presented to the Commission or which in resolving

[7]While recognizing the award, the Board nonetheless independently analyzed the merits, concluding that the arbitrator's decision was consistent with Board precedent.

a question of contract coverage, considers and applies criteria utilized by the Commission-and the Board-in deciding similar "accretion" issues.[8]

Applying the foregoing principles, the Commission concludes that deferral to the arbitration award is warranted herein with respect to the issue decided by the arbitrator-i.e., inclusion of the disputed employees in the contract unit. In so concluding, the Commission particularly notes that Arbitrator Santer, in finding that "transitional" aides are part of the certified unit, expressly relied not only upon provisions of the contract but also upon "overwhelming [evidence] that 'transitional aides' do the identical work which security aides have formerly performed." Moreover, the Employer does not claim, and the record does not disclose, that the arbitration proceeding was not fair or regular or that it suffered from any procedural defect which might vitiate the award. Additionally, the identical parties who are before the Commission presented to the arbitrator an identical issue. Goodyear Tire & Rubber Co. (Apple Grove Plant), 147 NLRB 1232, 1235 (1964). And the terms of the August 28, 1974 submission agreement, which empowered the arbitrator to decide "all outstanding items" as to the terms of a successor agreement, establish that the parties agreed to be bound by the arbitrator's award. Finally, the Commission notes that the record before it consists primarily of the transcript of testimony and the exhibits introduced at the abritration hearing-a circumstance militating in favor of deferral and against relitigation of an identical issue upon the basis of substantially identical evidence.

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[8] Of course, the Commission will, in accordance with Board policy, decline to defer to an award where the arbitrator failed to rule on the issue presented in the prohibited practice or representation proceeding. Monsanto Chemical Co., 130 NLRB 1097, 1099 (1961); Illinois Ruan Transport Corp., 165 NLRB 227, 232 (1967), enf'd 404 F.2d 274 (C.A. 8, 1968); Local Union No. 715, International Brotherhood of Electrical Workers, AFL-CIO [Malrite of Wisconsin] v. N.L.R.B., 494 F.2d 1136, 85 LRRM 2823, 2825 (C.A.D.C., 1974). Thus, as the Board explained in Monsanto Chemical Co, supra:

> "It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it."

Recently, in Electronic Reproduction Service Corp., 213 NLRB No. 110, 87 LRRM 1211 (1974) the Board, in "refining" its Speilberg doctrine, concluded that deferral to an arbitration award is warranted in discipline and discharge cases even where the record does not disclose whether the arbitration panel was presented with or considered the question of the employer's allegedly unlawful motivation in effecting the discharge or imposing the discipline. However, the Board, apparently reaffirming Monsanto Chemical Co., supra and Raytheon Co., 140 NLRB 883, 885 (1963), expressly acknowledged that "deferral may not be appropriate with respect to an issue not considered by the arbitration panel." (87 LRRM at 1216) (Emphasis added)

In any event, the record, which also includes the testimony of John Dougherty, President of the Union, and Luegenia Allen, a "transitional" aide, confirms the validity of the arbitrator's conclusion. Thus, the duties performed by the transitional aides and their conditions of employment, including hours, place of work and lines of supervisory authority, are substantially identical to those of security aides, except as to certain terms of employment established by the collective bargaining agreement which the Employer declined to extend to transitional aides. Moreover, noninstructional aides performing security duties-of whom approximately 30 are now employed as transitional aides-were included on the voter eligibility list and did, in fact, vote without challenge in the April 1972 election. The Union was then certified as exclusive bargaining representative in a unit of "all teacher aides" and negotiated a collective agreement which clearly recognized the Union's jurisdiction over all teacher aides "now or hereafter" employed by the City of Boston. Nor is it disputed that the contract was applied to security aides, whose union dues were deducted pursuant to Article IX. Accordingly, the parties clearly contemplated that teacher aides, by whatever name, and performing whatever function, were to be covered by the agreement. Finally, while the nearly two-fold expansion of the unit resulting from the employment of several hundred additional security aides is a circumstance militating against accretion,[9] it is outweighed here by the countervailing position accretion factors discussed above. Cf. The Great A & P Tea Co. (Family Savings Center), 140 NLRB 1011, 1021 (1963). In light of the foregoing, we submit that the "transitional" aides employed by the City constitute normal accretions to the existing unit of "all teacher aides" and that the Employer's refusal to bargain with respect to them on the ground that they are not part of the certified unit violated Chapter 150E Section 10(a)(5) and (1). Firestone Synthetic Fibers Company, 171 NLRB 1121, 1123 (1968); California Offset Printers, 181 NLRB 871, 872-873 (1970); Southwest Forest Industries, 179 NLRB 87, 88 (1969); Lapp Insulator Co., 150 NLRB 596, 597 (1964). Compare City of Somerville, CAS-2008 (1/7/75) ("...[A]s a general proposition, it may be stated that disputed employees are properly accreted into a unit...in accordance with either the presumed intent of the parties at the time of certification or recognition, or in accordance with their subsequent conduct, as reflected, typically, by the negotiation of successive collective bargaining agreements.") (at p.8)

The Employer, relying upon the 24 hour notice provision in the employment application forms (supra, p.6), contends that the disputed employees may not be accreted because they are "temporary." Alternatively, the Employer apparently contends that the nearly two-fold expansion of the certified unit justifies a withdrawal of recognition from the Union as exclusive representative thereof. With respect to the former contention-and without considering the question of the propriety of the Employer's reliance upon a document which is the product of its own unlawful conduct (infra, p.18)-the record establishes that the 1972-1973 security aides were also clearly informed that their assignment was "temporary" and that their employment was terminable upon two weeks' notice-circumstances which effectively undermine the Employer's claim that the disputed employees are not accretable because they are "temporary." Moreover, the Commission notes that, so far as the record discloses, none of the transitional

[9] Panda Terminals, Inc., 161 NLRB 1215, 1223 (1966); Spartans Industries, Inc. v. N.L.R.B., 406 F.2d 1002, 70 LRRM 2475, 2477 (C.A. 5, 1969)

aides has, in fact, yet been terminated or notified that termination is imminent. In any event, the allegedly "temporary" employment status of the transitional aides does not derogate from the conclusion that their substantial identity of employment conditions, as discussed above, warrants their accretion into the existing unit. The Employer's further, related contention that the job duties of the transitional aides differ "substantially" from those of the security aides is simply contradicted by the record.

The Commission also rejects the Employer's alternative contention that the expansion of the unit warranted a withdrawal of recognition. As a threshhold matter, the Commission points out that the Employer's continuing recognition, of, and negotiation with, the Union as exclusive representative of "nontransitional" teacher aides reflects only a position that the transitional aides are not part of the certified unit and is not consistent with the claim interposed herein of a good faith doubt of the Union's continuing majority status in the unit, as expanded. In any event, preservation of the stability of established bargaining relations dictates that the circumstances under which an employer may lawfully withdraw recognition from an incumbent bargaining agent be strictly limited. Thus, it is settled that a union's majority status is irrebuttably presumed to continue for a one-year period following its certification by the Commission. City of Gardner, MCR-1370, 1395 (9/10/74) (at p.5); Ray Brooks v. N.L.R.B., 348 U.S. 96, 101-103 (1954); Mar-Jac Poultry Co., 136 NLRB 785, 786 (1962). After this initial period has ended, the presumption of representative status continues, but becomes rebuttable by the employer upon a showing of demonstrable objective considerations underlying a purported good faith doubt of the incumbent union's continuing majority status; in short, there must be a "rational basis in fact" for the withdrawal of recognition. N.L.R.B. v. Rish Equipment Co., 407 F.2d 1098, 1101 (C.A. 4, 1969); Brooks v. N.L.R.B., supra; N.L.R.B. v. Frick Co., 423 F.2d 1327, 1330-1331 (C.A. 3, 1970). In the instant case, the only "fact" which the Employer relies upon to support its good faith doubt is the expansion of the unit which, absent independent evidence that the new employees did not support the Union, does not provide a reasonable basis for a withdrawal of recognition. See, for example, N.L.R.B. v. Little Rock Downtowner, Inc., 414 F.2d 1084, 72 LRRM 2044, 2049 (C.A. 8, 1969); N.L.R.B. v. Small Tube Products, Inc., 319 F.2d 561, 563 (C.A. 3, 1963). Indeed, the record discloses that several of the new employees were former "security" aides who were represented by the Union and who authorized the Employer to deduct union dues from their pay. Conversely, the record does not disclose that any employee "ever advised...[the Employer] that he was not going to join the [u]nion..." N.L.R.B. v. Little Rock Downtowner, Inc., supra. Accordingly, the Commission concludes that the Employer has not established the requisite good faith doubt of the Union's representative status sufficient to warrant withdrawal of recognition.

Referral to the arbitration award does not, however, dispose of subsidiary issues-alleged individual negotiation and nonimplementation of terms of the collective bargaining agreement-which the arbitrator did not consider and which we therefore shall resolve (supra, p.11, n.8). Thus, it is undisputed that applicants for employment as "transitional" aides were required to execute an application form, described supra, p.6, which was neither discussed with, nor shown to, the Union. Moreover, it is also undisputed that the Employer established a wage rate of $3.49 an hour for transitional aides-in conflict with the June 4, 1974 Settlement Agreement providing a rate of $3.52 for "teacher aides"-without consultation or negotiation with the Union. It is well established that the duty to bargain collectively, imposed by Chapter 150E Section 10(a)(5), "exacts the

negative duty to treat with no other" (Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 683 (1944)) and that, accordingly, an employer may not deal directly with employees regarding matters that are properly the subject of negotiation with their collective bargaining representative. Compare J.I. Case v. N.L.R.B., 321 U.S. 332, 14 LRRM 501, 504 (1944) ("Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement"). It follows that the Employer's individual negotiation with transitional aides, members of the certified unit, clearly violated Chapter 150E Section 10(a)(5) and (1). Wings & Wheels, Inc., 139 NLRB 578, 582 (1962); ABC Food Service, 176 NLRB 426, 432 (1969).

Finally, the Union claims, and the record so establishes, that the Employer declined to implement several provisions of its collective bargaining agreement with respect to transitional aides. Thus, as stated above, the $3.52 wage rate negotiated by the Union for "teacher aides" was not paid to the transitional aides, who also did not receive the 5½% salary increase which the Employer granted "all teacher aides" on August 28, 1974. Moreover, as Dougherty testified without contradiction, the Employer has not-again with respect to transitional aides-complied with Article IXG of the agreement, which provides for agency service fee deductions. Finally, the Employer, in disregard of Article IV and of the terms of the June 4, 1974 Settlement Agreement (supra, p.4), has not recalled, in accordance with seniority, security aides "on layoff status" who had performed their duties satisfactorily. D.H. Farms Co., 197 NLRB 267, 268 (1972); Hamilton Electronics Co., 203 NLRB No. 40, 83 LRRM 1097 (1973).[10] The Employer's nonimplementation of terms of a collective agreement to which it was party constitutes a per se violation of its duty to bargain. Chapter 150E Section 10(a)(5) and (1); County of Worcester and the County Personnel Board, MUP-649 (10/3/74) (at p.5); Town of South Hadley, MUP-230 (3/22/72); Mendes et al. v. Tauton et al., ___Mass.___, 315 N.E. 2d 865, 872-873 (1974).[11]

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[10]While Harrison testified that because of the "great need" to hire security aides after June 1974, seniority was "never a problem" and that, accordingly, all security aides who applied for the position of transitional aide were hired, the record does not disclose that the Employer has recalled the former security aides by seniority, as required by its agreement.

[11]By refusing to recognize the Union as exclusive representative of the transitional aides, the Employer, of course, assumed the risk that in a subsequent prohibited practice proceeding, the Commission would find that the transitional aides were properly accreted to the existing unit and that the Employer's conduct breached its duty to bargain, thereby requiring issuance of an affirmative remedial order-a risk the Employer could have avoided by filing a clarification petition to determine the scope of its bargaining duty. The Employer has apparently abandoned a contention advanced at the hearing that it was incumbent upon the Union to file a CAS petition rather than a complaint of prohibited practice. In any event, the contention is frivolous since an employee organization may elect, in its discretion, to present the issue raised herein either by CAS petition or by complaint of refusal to bargain.

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ORDER

Wherefore, on the basis of the foregoing, IT IS HEREBY ORDERED, pursuant to Chapter 150E Section 11 of the General Laws, that the City of Boston School Committee shall:

1. Cease and desist from:

   (a) Failing or refusing to recognize and bargain collectively in good faith with Boston Teachers' Union, Local 66, American Federation of Teachers as the exclusive representative of "all teacher aides", including transitional aides.

   (b) Engaging in unlawful individual bargaining with its employees within an exclusive bargaining unit.

   (c) Failing or refusing to implement certain provisions of its collective agreements with respect to employees within an exclusive bargaining unit.

   (d) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Law.

2. Take the following affirmative action which it is found will effectuate the policies of the Law:

   (a) Implement fully with respect to "transitional" aides the terms of the June 4, 1974 Settlement Agreement, the August 28, 1974 Memorandum of Agreement, and Articles IV, IX (B), (G) and other provisions of its collective bargaining agreement that have not heretofore been applied to transitional aides.

   (b) Make whole the transitional aides for any loss of earnings they may have suffered as a result of the unlawful refusal to bargain by payment to them of a sum, including interest at the rate of 6% interest per annum, equal to that which they would normally have earned, absent the unlawful conduct, retroactively from September 1, 1974.

   (c) Transmit to the Union, pursuant to Articles IX (B) and (G) of the collective agreement, the dues or agency service fees which would normally have accrued to the Union absent the unlawful conduct.

   (d) Discontinue unilateral use of the transitional aides' employment application.

   (e) Preserve and, upon request, make available to the Commission or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post in conspicuous places at schools where any transitional aide is employed, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.

(g) Notify the Commission in writing within ten (10) days of the service of this Decision and Order of the steps taken to comply therewith.

SEPARATE CONCURRING STATEMENT OF
CHAIRMAN ALEXANDER MACMILLAN

I agree entirely with the result reached here, and with the rationale of the majority decision. Nevertheless, in light of my concurrence in Cohasset School Committee, MUP-419, 6/19/73, I must separately emphasize the distinction between a Spielberg deferral and a Collyer or Cohasset deferral.

Here we are confronted, as was the N.L.R.B. in Spielberg, with a case in which the issue presented has already been decided in an arbitration proceeding. Given suitable criteria for deferral, (see pages 8-12 of this decision) no interest would be served by relitigation of such an issue before the Labor Relations Commission. Mechanical application of a pre-arbitration deferral policy, a potential danger in the wake of Collyer and Cohasset, is another matter entirely. In this regard I do not recede from the views expressed in my Cohasset concurring opinion.

See opinion of the dissenters in Collyer; PYE, "Collyer's Effect In The Individual Charging Party", 25 Labor Law Journal 561, (September, 1974); GRADY, "The Interface of Arbitration And The Law", 18 Boston Bar Journal 29, (June, 1974.)

In any event, the employer in the matter sub judice can hardly quarrel with the rationale of the majority decision, since it has argued as recently as February 19, 1975, (on appeal before Prince, J. in School Committee of Boston v. Labor Relations Commission, Suffolk, ss. C.A. No. 717), that the Commission must, by law, defer in a Cohasset situation. It would, to say the least, be somewhat anomalous for the same employer subsequently to oppose adoption of Spielberg.

We must assume that a discretionary deferral policy is acceptable to the highest courts of state and nation, but that a mandatory deferral policy, or an agency-imposed election of remedy doctrine, would not be. See Associated Press v. NLRB, 492 F.2d 662, (DC D. of C., 1974); and compare Alexander v. Gardner-Denver Co. _____U.S._____, 7 FEP 81 (1974), and Town of Dedham v. Labor Relations Commission, _____Mass._____, 312 N.E. 2d 548, (1974.)

NOTICE OF EMPLOYEES
POSTED BY ORDER OF THE
LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

WE WILL NOT refuse to recognize or bargain collectively in good faith with the Union as the exclusive representative of "all teacher aides", including transitional aides.

City of Boston School Committee, MUP-2084

WE WILL NOT engage in unlawful individual bargaining with our transitional aides.

WE WILL implement and apply the terms of our collective agreements to the transitional aides and WILL make them whole with interest for any loss of pay they suffered as a result of our unlawful conduct.

CITY OF BOSTON SCHOOL COMMITTEE

By_____
CHAIRMAN JOHN McDONOUGH

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Commission's Office, 100 Cambridge Street, Room 1604, Boston, Massachusetts, Telephone 727-3505.