TOWN OF WAKEFIELD AND IBPO, MUP-5082 (6/14/83).

46.12 rival claims of representation
46.121 employer's duty of neutrality
52.35 bargaining in the face of rival union's petition
64.11 bargaining during pendency of rival petition
82.3 remedy -- status quo ante

Commissioners participating:

Paul T. Edgar, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Mario Simeola, Esq. - Town Counsel, representing Town of Wakefield

Robert Canavan, Esq. - Representing the International Brotherhood of Police Officers

DECISION

The issue in this case is whether the Town violated Sections 10(a)(2) and (1) of the Law by engaging in negotiations with the incumbent union, the Wakefield Police Officers Association (Association), after the Commission had determined that a challenging union, the International Brotherhood of Police Officers (IBPO), had raised a question of representation and the Commission had scheduled an election.

On November 8, 1982,[1] the IBPO filed a petition (MCR-3338, Town of Wakefield and IBPO) with the Labor Relations Commission (Commission) seeking to represent a unit of 33 police officers in the Town of Wakefield (Town). The Commission determined that the petition was supported by an adequate showing of interest, and the Commission proceeded with a preliminary investigation of the petition. On November 19, the incumbent Association moved to intervene in the proceedings. At an expedited hearing on December 1 before a Commission agent, the IBPO and the Association entered into a consent agreement for a direction of election. The Town received notice of the hearing but did not attend. On December 2, the hearing officer directed an election to be held on December 22 to determine if a majority of employees in the unit wished to be represented by the incumbent Association, the IBPO, or by no employee organization. The Town acknowledged the direction of election by forwarding a list of eligible voters to the Commission.

On December 20, the IBPO filed a charge with the Commission alleging that the Town had engaged in negotiations and had executed a collective bargaining agreement with the Association in violation of various provisions of Chapter 150E.[2]

[1] All dates refer to 1982 unless otherwise indicated.

[2] The IBPO did not file a charge against the Association.

On December 22, the Commission postponed the election pending resolution of the IBPO's charge.

Following an investigation of the charge of prohibited practice, the Commission issued a Complaint on January 6, 1982, alleging that the Town had interfered in the formation and existence of an employee organization in violation of Sections 10(a)(2) and (1) by negotiating and executing a successor collective bargaining agreement with the incumbent Association. On February 15, 1983, the Town filed its answer to the Complaint of Prohibited Practice admitting the factual averments of the complaint, but denying that the Employer and Association had reached an agreement for a new contract.

On February 22, 1983, a formal hearing was held before Timothy J. Buckalew, a duly designated hearing officer of the Commission. At the hearing, the parties were afforded a full opportunity to be heard and to examine and cross-examine witnesses. On March 21 and April 20, 1983, the Town and IBPO, respectively, filed post-hearing briefs which have been considered in reaching the following findings of fact and conclusions of law.

Based upon the facts and the application of the Midwest Piping doctrine adopted by the Commission in Commonwealth of Massachusetts and NAGE, 7 MLC 1228 (1980), we find that the Town interfered with the formation and existence of an employee organization in violation of Sections 10(a)(2) and (1) of the Law after a question of representation had been raised by the IBPO.

Findings of Fact

On June 30, the collective bargaining agreement between the Association and the Town expired. The Town and the Association then started bargaining for a successor contract. The Town and Association had not reached agreement by November 8, when the IBPO filed its petition accompanied by a sufficient showing of interest. 402 CMR 14.05. The Town received notice of the petition but did not appear at the Commission hearings, challenge the appropriateness of the sought-after unit, or otherwise contest the IBPO's petition.

After receiving the Commission's notice of the IBPO's petition and the scheduled election, the Town continued to engage in collective bargaining negotiations with the local Association. Specifically, on Decmeber 2, Jeffrey Fisher, Esq., the Association's labor counsel, indicated to Marc Pherson, president of the Association, that the Town had made a wage offer. Pherson asked Fisher to set up a meeting with the Town's negotiating committee. At a meeting on December 5, the Town was represented by Phillip Schneider, labor counsel to the Town, Mario Simeola, Town counsel, and William R. Connors, chief of police for the Town of Wakefield. Pherson, Fisher, and other members of the Association negotiating team attended on behalf of the incumbent. The Town advanced an across-the-board wage increase of 6% effective July 1, 1982 and 6% effective July 1, 1983. The Association made a proposal to allow the employees the right to request the opinion of an outside physician in cases arising under Section 111F of G.L. Chapter 41. The Association also proposed that the Town indemnify bargaining unit members for attorneys' fees incurred in civil suits arising out of members' employment. Association

president Pherson agreed to take the Town's wage offer to the Union membership for their consideration. On December 12, a general membership meeting was held. Pherson presented the Town's wage offer and discussed the course of contract negotiations on the other topics raised by the Association. Pherson explained specifically that the parties had not reached agreement on the details of the indemnification and injury leave provisions. He cautioned the membership that, in his opinion, there were still many unresolved problems in the negotiations and that the wage offer should not be considered in a vacuum. Additionally, he explained that, in his opinion, the Town had committed an unfair labor practice by engaging in negotiations during the pendency of the representation proceedings.

Despite Pherson's advice, the membership of the Association voted to accept the Town's wage offer. We find no basis in the record for the IBPO's allegation that the membership voted to accept the wage offer because it was a "sweet deal" or that the wage offer was contingent on voting out the IBPO.

At this same meeting, the question of the legal effect of the vote to accept the wage offer was raised by some of the membership. The opinion was expressed that, because the Association had negotiated the wage increase, it would be unfair to the Town to proceed with the ratification election since the result of that election might bind the IBPO to a contract with the Town. After further discussion, a majority voted not to "continue to have the vote of the IBPO." Shortly thereafter, the IBPO filed the instant charge. Pherson called IBPO representatives Marc D'Aguanno and Thomas J. Turco and told them about the ratification meeting. He advised the IBPO to withdraw from the election to avoid the "embarrassment" of an election which he was certain would be lost by the IBPO.

Opinion

In Commonwealth of Massachusetts, 7 MLC 1228 (1980), the Commission adopted the Midwest Piping doctrine[3] and held that, "An employer commits a per se violation of Sections 10(a)(1) and (2) of G.L. c.150E if it bargains with an incumbent once a question of representation has been raised by a rival union." The obligation of strict neutrality arises "as of the point the employer has notice that the Commission has made its initial determination that the rival union's petition and showing of interest are adequate to raise a question of representation." Commonwealth of Mass., supra at 1235. Applying these principles to the facts of this case, we find that the Town violated its duty of neutrality by bargaining with the Association with the knowledge that the IBPO had filed a petition supported by a showing of interest and that the Commission had directed an election.

The Town's defense is that the Commission should reverse its recent decision in Commonwealth of Mass. and modify the Midwest Piping doctrine in light of the recent decision of the National Labor Relations Board (Board) in RCA del Caribe, 263 NLRB 116, 110 LRRM 1369 (1982). See also, Dresser Industries, 264 NLRB 145, 111

[3] See, decision of the National Labor Relations Board in Midwest Piping & Supply Co., 63 NLRB 1060, 17 LRRM 40 (1945); Shea Chemical Corp., 121 NLRB 1027, 42 LRRM 1486 (1958).

LRRM 1436 (1982). In RCA del Caribe, an outside union filed a petition with the Board during the pendency of negotiations with the incumbent union. In view of the pendency of the petition, the employer refused to recognize or negotiate with the incumbent. The incumbent union submitted to the employer sheets signed by a majority of the bargaining unit employees which authorized the incumbent to continue to represent the employees as their exclusive representative. Upon the incumbent's request, the employer agreed to the resumption of negotiations and finally concluded a new collective bargaining agreement. The Board majority, Chairman Van deWater and Member Jenkins dissenting separately, found "that the mere filing of a representation petition by an outside challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with the incumbent union," and that "an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the bargaining table." 110 LRRM at 1371.

We decline to follow the Board's apparent retreat from the principles of strict employer neutrality established in Midwest Piping and its subsequent decisions. In Commonwealth of Massachusetts, supra at 1235-1239, we fully articulated our views on why the Midwest Piping doctrine effectuates the purposes of G.L. c.150E and best assures the employer's obligation of strict neutrality. We are not persuaded by the Town's argument, based upon the strength of the Board's decision in RCA del Caribe, that we should abandon or modify the Midwest Piping doctrine adopted by us only three years ago in Commonwealth of Massachusetts. We have considered the Board's opinion in light of our rationale in Commonwealth of Massachusetts, and we believe that our holding remains sound.

The Board's conclusion in RCA del Caribe, that "the mere filing" of a representation petition will not require an employer to withdraw from bargaining with an incumbent union, is not applicable to the facts in this case. Here, not only had the IBPO filed a petition, but we had made the initial determination that the rival union's petition and showing of interest were adequate to raise a question of representation and cause the scheduling of an election. Additionally, in our opinion, the rule of strict neutrality adopted in Commonwealth of Massachusetts is a better rule for several reasons. First, allowing an employer to bargain after a question of representation has arisen invariably leads to the appearance of employer interference and coercion, even if the employer merely desires to conclude an agreement to enable it to continue peaceful labor relations and not to actually aid the incumbent in its contest. Such contamination of the election process must be avoided where at all possible. Second, allowing an employer to continue bargaining with an incumbent in a situation such as that involved in this case amounts to de facto voluntary recognition of the incumbent and undermines the exclusive function of the Commission to settle controversies concerning the representation of employees by secret ballot or other means which guarantee employee free choice.

Remedy

Having found that the Town has engaged in prohibited practices within the meaning of Sections 10(a)(2) and (1) of the Law, we now turn to the question of remedy. When Midwest Piping violations occurred, the Board generally ordered the employer to cease recognizing the incumbent union until certification and to cease effectuating any contract terms agreed upon during the neutrality period. See e.g.,

Wyco Metal Products Co., 183 NLRB 901, 74 MLRR 1411 (1970); Vanella Buick-Opel, Inc., 194 NLRB 744, 79 LRRM 1090 (1971). We shall order generally that the Town cease and desist from recognizing or bargaining with either union pending the certification of the results of the representation election. The more difficult question is presented by the ratified results of wage negotiations between the incumbent Association and the Town.

While we have no evidence of a fully negotiated, ratified or executed collective bargaining agreement between the Town and the Association, the record discloses that the Town proposed, and the Association accepted and ratified, an across-the-board wage increase of 6% effective July 1, 1982 and 6% effective July 1, 1983. We need not speculate as to what additional contractual terms might have been incorporated into a final agreement between these parties. For purposes of our remedy, the coercive effect of the wage bargaining is aptly demonstrated by the fact that, following ratification of the Town's wage offer, the employees expressed their desire not to proceed with the election. Were we simply to nullify the results of the wage negotiations between the Association and the Town, we would risk the employees' perceiving that the IBPO's insistence upon its rights under the Law frustrated their ability to secure negotiated wage increases. Requiring the IBPO to proceed to election under such a handicap is not the type of status quo remedy which will effectuate the purposes of Chapter 150E. Accordingly, we will order that the Town's wage offer that was accepted and ratified by the Association shall become the status quo for the purpose of wage negotiations between the Town and the IBPO, should the IBPO win the election and become certified as the exclusive bargaining representative. In this way, we will neutralize, as much as possible, the coercive effects of the Town's illegal bargaining and allow the rival unions to proceed to the representation election with neither prejudice nor advantage from the previous wage negotiations.

Our remedial approach to this case requires a further step, however. The record does not disclose what efforts, if any, the Town has made to secure funding for the wage increases. Nothing in this decision should be read as an impediment to the Town's continued efforts to secure funding for those wage increases. In fact, we think it is incumbent upon the Town, to the extent that it has not already done so, to take the necessary steps to secure and/or preserve funding for the wage increases. To the extent that the wage increases have been paid to members of the bargaining unit, they shall continue to be paid as the status quo.

Finally, the representation election, postponed on December 22, 1982 pending resolution of the IBPO's charge, shall now be administratively scheduled and conducted in accordance with the Rules and Regulations of the Commission.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Town of Wakefield shall:

1. Cease and desist from:

   a. Recognizing the Wakefield Police Officers Association as the exclusive representative of any of its employees for purposes

of collective bargaining unless and until the Commission certifies the Association as such representative;

b. Otherwise giving support or assistance to the Wakefield Police Officers Association;

c. In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Law.

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

a. Withdraw and withhold all recognition of the Wakefield Police Officers Association as the exclusive representative of any of its employees for the purpose of collective bargaining unless and until the Commission certifies the Association as such representative;

b. Establish any agreement made between the Association and the Town (to include the wage increases to take effect on July 1, 1982 and July 1, 1983) as the status quo for collective bargaining between the IBPO and the Town should the IBPO win the representation election and be certified as the exclusive bargaining representative of the bargaining unit employees; provided, however, that the Town, to the extent that it has not already done so, take the necessary steps to secure and/or preserve funding for the wage increases;

c. Post immediately in conspicuous places where bargaining unit employees are likely to congregate and leave posted for not less than thirty (30) days, the attached Notice to Employees;

d. Provide a copy of this decision to each member of the bargaining unit;

e. Notify the Commission, in writing, within ten (10) days of the service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEATLH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

Town of Wakefield and IBPO, 10 MLC 1016

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

The Massachusetts Labor Relations Commission has determined following a hearing that the Town of Wakefield committed a prohibited practice in violation of Sections 10(a)(2) and (1) of Massachusetts General Laws, Chapter 150E (the public employee collective bargaining law) by continuing to negotiate with the Wakefield Police Officers Association (Association) after the Commission had directed an election between the Association and the International Brotherhood of Police Officers (IBPO). The Commission has determined that such bargaining interferes with, restrains, and coerces employees when making a choice between the competing unions.

Accordingly,

WE WILL cease and desist from bargaining with or otherwise recognizing the Association as the exclusive representative of any of our employees unless and until the Commission certifies the Association as such representative.

WE WILL establish any agreement made between the Association and the Town (to include the wage increases to take effect on July 1, 1982 and July 1, 1983) as the status quo for collective bargaining between the IBPO and the Town should the IBPO win the representation election and be certified as the exclusive bargaining representative of the bargaining unit employees; provided, however, that the Town shall, to the extent that it has not already done so, take the necessary steps to secure and/or preserve funding for the wage increases.

WE WILL NOT otherwise give the Association support or assistance.

WE WILL NOT in any other manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under the Law.

All our employees are free to become or remain or refrain from becoming or remaining members of any employee organization.

TOWN OF WAKEFIELD