TOWN OF IPSWICH AND LOCAL 1913, IPSWICH FIRE FIGHTERS, IAFF, MUP-5248 (2/7/85).

52.62 matters not covered
52.65 "meeting of the minds"
54.23 overtime
54.7 permissive subjects
67.15 union waiver of bargaining rights
67.42 reneging on prior agreement
67.64 refusal to sign contract
91.11 statute of limitations
91.51 scope of complaint

Commissioners participating:

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

Appearances:

Charles C. Dalton, Esq. - Representing Town of Ipswich

Neil Rossman, Esq. - Representing Local 1913, Ipswich Fire Fighters, International Association of Fire Fighters

DECISION

Statement of the Case

This case involves an allegation by Local 1913, Ipswich Fire Fighters, International Association of Fire Fighters (Association or Union) that the Town of Ipswich (Town) has refused to execute a "side letter" agreement containing previously negotiated terms governing the administration of overtime.

On May 26, 1983, the Association filed a charge with the Labor Relations Commission (Commission) alleging that the Town had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of General Laws, Chapter 150E (the Law). Following an investigation of the charge, the Commission issued a Complaint of Prohibited Practice on July 19, 1983, alleging that the Town had failed to execute a "side letter" agreement previously negotiated with the Union, in violation of Section 10(a)(5) and (1) of the Law.

Pursuant to notice, a formal hearing was held on October 4 and 17, 1983 before Diane M. Drapeau, a duly designated hearing officer of the Commission. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded to both parties. The Town filed a post-hearing brief on November 18, 1983.

On the basis of the record and for the reasons set forth below, we find that the Town violated Sections 10(a)(5) and (1) of the Law.[1]

1 Neither party disputes the Commission's jurisdiction over this matter.

Findings of Fact

To understand the present controversy, it is necessary to take administrative notice of and incorporate by reference the facts of an earlier case involving the same parties. Ipswich Firefighters, 9 MLC 1153 (H.O. 1982), aff'd 9 MLC 1335 (1982) (MUPL-2484). The earlier case arose while the parties were in the process of bargaining for a successor to their collective bargaining agreement (hereinafter "contract") due to expire on June 30, 1982. The issue in that case was whether the Association bargained in bad faith by refusing to execute a contract after having agreed to its terms. On July 16, 1982, the hearing officer in MUPL-2484 issued her decision and concluded that the Association had violated Sections 10(b)(2) and (1) of the Law by failing to execute a duly-negotiated contract. The hearing officer's decision was affirmed by the Commission on October 12, 1982. The case before us arises in the context of the parties' attempts to comply with the Commission decision and subsequent orders.

According to Robert Gambale, current president of the Association, upon receipt of the Commission's October 12, 1982 decision, he instructed the Association's attorney, Neil Rossman, to prepare a draft of the contract for signature. Apparently, the contract contained several typographical errors and some ambiguous language. Rossman prepared a draft of the contract and a typewritten copy of a document entitled "departmental regulation." The contract itself was an 18-page document and Rossman added the "departmental regulation" as page 19. The regulation reads as follows:

DEPARTMENTAL REGULATION

> With respect to the administration of overtime, it shall be a departmental policy that if there is a need to file [sic] a position on a shift (less than three privates only on duty), then an officer shall be called first; in the event an officer is not available, then a third private would be called and the senior on-duty private accepting the assignment would serve as the acting officer. In the event only three privates are on duty and the Chief or acting Chief is on duty and in Tour, then there shall be no one assigned as "acting officer."

The above language had been agreed to by the parties at a January 11, 1982 meeting. Town Manager George E. Howe, had written the text of the "departmental regulation" and had given it to William Maker, then union president. The language of the regulation was not disputed at the time the hearing officer issued her decision.

On November 4, 1982, Rossman and Charles Dalton, the Town's attorney, had a telephone conversation regarding the execution of the contract. Dalton agreed to send Rossman a copy of Howe's corrections to the first draft of the contract which Rossman drafted. On November 5, 1982, Dalton sent the corrected draft, along with a letter, to Rossman. In that letter, Dalton stated that he believed most of Howe's corrections concerned typographical errors. However, he stated that "some [corrections] may represent substantive disputes." Dalton further invited Rossman to

discuss with him, if necessary, "any aspects of the final draft which are not in accordance with the wishes of your clients, my client, and the decision of the Labor Relations Commission."

One of Howe's corrections concerned Rossman's draft of the "departmental regulation." Howe's notation stated, "Delete -- This is a departmental regulation and it was agreed at the table that it would be handled as such, but not included in the contract."

On November 9, 1982, Gambale and Rossman met to discuss Rossman's draft and Howe's corrected draft. On November 10, Dalton and Rossman met to finalize the contract. At this meeting, they agreed that the "departmental regulation" would not be reflected in the contract, but would instead take the form of a "side letter" agreement.

At a meeting with Dalton, Howe authorized Dalton to draft a "side letter" agreement consistent with the agreement that Howe and Maker had reached on January 11, 1982, regarding the "departmental regulation." Sometime between November 12 and 16, 1982, Dalton sent a "Memorandum of Agreement" to Rossman and Howe.

The "Memorandum of Agreement" was drafted on the Town Manager's letterhead and stated that the parties "hereby agree that in conjunction with and as an integral part of the Collective Bargaining Agreement...[to] abide by and be bound by the following departmental policy regarding overtime for the duration of said Collective Bargaining Agreement." The Memorandum then recited the exact wording of the "departmental regulation" that Rossman had added as page 19 of the contract.

On November 15, 1982, Rossman sent a letter to Dalton. The letter enclosed his "final" draft of the contract and a side letter. Rossman deleted page 19 from the contract and enclosed a side letter on the topic. Rossman requested that Dalton respond to it within a week.

Rossman's side letter was addressed to Dalton.[2] It stated that, in accordance with the parties' discussions and agreements, the "departmental regulation" language would be set forth in the "letter of agreement rather than in the contract document per se." In addition, Rossman stated, "It is agreed, however, that it shall have the full force and effect as if contained in the contract document...[and] shall be in force for the duration of the Collective Bargaining Agreement or until revised or modified by the parties through negotiations."

On December 20, 1982, Dalton, Howe, Gambale and Rossman met to finalize the contract. At some point prior to December 20, Howe had informed Dalton that Dalton's "Memorandum of Agreement" was unacceptable to Howe. On December 20, Howe informed

[2]Dalton did not receive a copy of Rossman's draft of the contract until the hearing in this case. He called Rossman's office after receiving the November 15 letter seeking a copy of the draft, but he never received one.

Rossman and Gambale for the first time of his opinion regarding the "Memorandum of Agreement" and offered, for their consideration, another version of the "side letter."[3]

Howe's "side letter" was entitled "Memorandum of Agreement." It recited the "departmental regulation" language. In addition, in pertinent part, it stated:

> Ipswich and the Fire Fighters hereby agree that the following provisions shall apply in the event that there are two men or less working on a shift and the Town decides to fill a shift with additional regular personnel. It is intended to describe the application of "Acting Officer" status. In no way shall it restrict the right of the Town to assign permanent intermittents.

The Association indicated its willingness to accept Dalton's version of the "Memorandum of Agreement" but rejected Howe's version, and thereupon refused to execute the contract as ordered by the Commission on October 12, 1982.

On December 6, 1982, the Town filed a Motion for Compliance and Sanctions before the Commission. Rossman responded by sending a letter to the Commission dated December 21, 1982. In his letter, Rossman stated that the parties had made numerous good faith attempts to finalize a contract in accordance with the Commission's October order but that the Town had taken action to prevent the execution of the contract. He stated that the Town's action occurred on December 20 when it "attempted to substitute a new side letter...which it presented at the conclusion of the December 20 meeting after the contract revisions had been agreed to in total." (Emphasis in original). Rossman stated that "the Union's position is that it is ready, willing and able to execute the contract document with the acting officer language included as part of the document itself or is willing to execute the contract document with [the language] as an integral part, but it is not willing to execute the contract document without the ['departmental regulation'] language within or without the contract itself" as set forth in the Town's substitute new side letter.

Sometime prior to January 14, 1983, Gambale became aware of the Fire Chief's intention to formally adopt the disputed department regulation and sent a letter of protest to Howe. In that letter, Gambale stated that the rules and regulations under which permanent uniformed firefighters and provisional fire fighters operate are contained within the contract and subject to collective bargaining. He further stated that the Association would not recognize, nor had it ever recognized, the Town's attempt to implement a separate set of rules and regulations.

On January 27, 1983, the Fire Chief posted a notice which he had signed. The notice was entitled "Legal Notice: Departmental Regulations for the Permanent Force." It contained, in substance, the terms of Howe's proposed "side letter."[4]

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[3]Rossman's draft was never discussed at this meeting.

[4]See page 1407.

On January 16, 1983, the Commission held a compliance conference on the Town's earlier Motion for Compliance and Sanctions based on the Association's failure to comply with the October 12, 1982 Commission order to execute the Town's proposed contract. The Commission issued a ruling on the Town's motion on February 14, 1983. The Commission ruled that the "side letter" and "departmental regulation" were outside the scope of its October 12, 1982 order.[5] The Commission, therefore, found no basis for the Union's refusal to comply with its order and granted the Town's Motion. The Commission further stated that the Union would be in compliance with the order if it executed the contract in question or the contract as mutually revised.

Because the Association continued to refuse to execute the contract, the Commission began enforcement action in the Appeals Court. A Single Justice found that in the absence of the parties' mutual agreement to a revised contract, the Commission's order of October 12, 1982 was final and ought to be enforced. The Single Justice ordered the Association to execute the contract and to post the Notice to Employees attached to the Commission's decision.

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4 (from page 1406)

The Regulations reads as follows:

"Regulation 83-1

1. Acting Officers

A. Purpose. The purpose of this section is to describe the application of "Acting Officer" status. In no way is it intended to, nor shall it operate to impose any minimum manning standards whatsoever, nor is it intended to nor shall it operate to restrict the right of the Town to assign permanent intermittents.

B. Designation of Acting Officer. In the event there are fewer men on duty on a shift than the Department, as a matter of Department policy, deems desirable and as a result the department chooses as a matter of policy to employ additional personnel on a shift, then,

(1) an officer shall be called first;
(2) in the event an officer is not available, then a private would be called and the senior on-duty private who accepts the assignment would serve as the acting officer.

In the event no officers are on duty but an acceptable complement of privates are on duty, as a matter of departmental policy and the Chief or acting Chief is on duty and in Town, [sic] then there shall be no one assigned as "Acting Officer."

[5]The wording and significance of the "side letter" were not the basis of the controversy before the hearing officer in MUPL-2484. In MUPL-2484, the dispute was over language changes regarding Civil Service. The issues litigated in MUPL-2484 arose from events which occurred long before the conduct which forms the basis of the instant case.

In compliance with the Court's order, the parties executed the contract in May 1983, but the Town refused to execute Dalton's "Memorandum of Agreement." As a result, the Association filed the instant charge with the Commission on May 26, 1983.

Opinion

The issue before us is whether the Town violated Sections 10(a)(5) and (1) of the Law when it failed to execute the "side letter" agreement.[6] Section 7(a) of the Law provides in pertinent part that that "Any collective bargaining agreement reached between the employer and the exclusive representative...shall be reduced to writing, [and] executed by the parties." (Emphasis supplied). The failure of a party to execute a contract embodying the terms of an agreement constitutes a refusal to bargain in violation of Sections 10(a)(5) and (1). City of Boston, 8 MLC 1113 (1981); Belmont School Committee, 4 MLC 1189 (H.O. 1977), aff'd 4 MLC 1707 (1978). The issue in this case is whether the failure to execute a "side letter," which is not part of the contract but is still a part of the total agreement between the parties, constitutes a refusal to bargain in violation of Sections 10(a)(5) and (1).

The Town offers several arguments in defense of its refusal to execute the side letter agreement. First, it contends that the Association is estopped from raising the issue of the side letter agreement at this time since it had the opportunity to litigate this issue and did so in the previous case between the same parties, Case MUPL-2484. Contrary to the Town's assertions, the side letter agreement was not previously considered by the Commission.

The hearing in the previous case was held in May of 1982, and the hearing officer issued her decision in July of 1982. Case MUPL-2484 presented the issue of whether the Union was refusing to sign an agreed upon contract. The hearing officer found that an agreement had been reached by the parties and ordered the Union to execute the contract. The problem of the side letter arose after the hearing officer's decision and was not an issue in the previous case. Specifically, during their negotions, the parties bargained further over both matters that were to be included in the agreement and items that were not to be included in the body of the contract. Indeed, the departmental regulation in the instant case was treated in this fashion. There was no question that the parties agreed to the language of the departmental regulation as a part of their collective bargaining process in January of 1982. What was at issue at the time of the Commission compliance conference, however, was

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[6] G.L. c.150E, Section 10, in pertinent part, provides:

(a) It shall be a prohibited practice for a public employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this Chapter;

* * * * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six.

whether the departmental regulation should be executed as part and parcel of the parties' collective bargaining agreement or whether it was an outside agreement. The Commission, without deciding the extent or scope of the agreement, determined that it did not have to be included in the collective bargaining agreement. It was after the Commission compliance proceedings that the parties disagreed over the scope of the side agreement. It is the disagreement which is now in controversy. This is the first time the Commission has been asked to decide the extent to which the parties agreed to the regulation. Accordingly, the Union is not estopped because of the previous case from now contending that the side agreement should be executed.

The town also argues that the Association's charge was filed outside the six-month rule of limitations period in violation of Commission Rules and Regulations, 402 CMR 15.03. The dispute at issue in the instant case arose at the December 20, 1982 meeting. It was on that date that the Association first learned that the Town would not execute Dalton's version of the side letter agreement. Thus, when the Association filed its charge on May 26, 1983, it was within the six-month rule of limitations period.

The Town also argues that the Complaint and its evidentiary support are barred by the specific terms of the present contract between the parties. In compliance with the Court's order, the parties executed the contract in May of 1983. Article XX of the current contract provides as follows:

> The parties agree that all negotiable items have been discussed during the negotiations leading to this Agreement, and they, therefore, further agree that negotiations will not be reopened on any item, whether contained in this Agreement or not, during the life of this Agreement except as specifically contained in this Agreement.

The issue of what was discussed and included in and/or with the current contract is the subject of this decision. For the reasons discussed below, we find that the issues contained in Dalton's version of the side letter were discussed and agreed upon by the parties as part of their collective bargaining negotiations. Therefore, Article XX does not preclude negotiation of the side letter as part of the total agreement, although it is a document in addition to the contract.

Turning to the merits of the Association's charge, we reject the Town's assertion that the Association failed to prove by a preponderance of the evidence that there was a "meeting of the minds" regarding the issue of the administration of overtime. The record supports the conclusion that Howe and Maker had a "meeting of the minds" concerning the language contained in the "departmental regulations" as early as January 11, 1982. It was on that date that Howe gave Maker a handwritten copy of the agreed-upon language. Later in October or November 1982, Rossman submitted to Dalton the identical language as page 19 of his draft of the contract. In November 1982, Dalton and Rossman agreed not to include the "departmental regulation" language in the contract per se, but rather to have it take the form of a side letter.

In November 1982, Howe authorized Dalton to draft a letter consistent with the Agreement that Howe and Maker reached in January 1982, and to present the letter to the Union without Howe's further review.[7] Acting upon that authorization, Dalton drafted a Memorandum of Agreement which incorporated the January agreement and gave it to the Union at the same time that it was submitted to Howe. Howe did not notify either the Union or Dalton that Dalton's letter was unsatisfactory until after the Union had accepted the offer. Thus, when the Union accepted Dalton's Memorandum of Agreement, the parties reached an agreement that covered the side letter.

Dalton's draft stated that the "departmental regulation" would be "in conjunction with and as an integral part of" the Collective Bargaining Agreement." (Emphasis added). The Association accepted Dalton's version of the side letter agreement and was willing to execute it when the parties met on December 20, 1982. The Law recognizes that "a meeting of the minds can occur without anything having been reduced to writing or having been signed by either party." Turner Falls Fire District, 4 MLC 1658, 1661 (1977). Therefore, based on the totality of the circumstances, we find by a preponderance of the evidence that the parties reached a "meeting of the minds" on the content of the side letter concerning the administration of overtime. Further, the evidence reflects that the parties reached their agreement during the course of negotiations for a collective bargaining agreement. The Town's obligation to execute a written recitation of the terms of that agreement is not diminished because the terms are to be embodied in two separate documents, i.e., a contract and a side letter.

In December 1982, when Howe informed the Union that the Memorandum of Agreement prepared by Dalton was unacceptable, he was refusing to execute the parties' agreement. Further, on December 20, when Howe proposed his changes in the side letter, he was reneging on substantive terms previously agreed to with Maker in January of 1982, and not merely on the "form" of the agreement.

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[7] The Town argues in its brief that there is no evidence that Rossman or Dalton had authority from their respective clients to present drafts binding on the Town or the Union to the opposing party. This is not supported by the record. Howe testified that Dalton acted as Howe's agent for the purpose of collective bargaining. If Howe intended to vest only limited authority in his negotiator, he was obligated to transmit that information to the Association. Spencer-East Brookfield Regional School Committee, 3 MLC 1400, 1403 (H.O. 1977). In the absence of such a restriction, an "individual in charge of a transaction has been held to have broad apparent authority." Costonis v. Medford Housing Authority, 343 Mass. 108, 115 (1961). Thus, Dalton was cloaked with apparent authority to present binding drafts to the Union. Moreover, Dalton had implied authority based upon Howe's directive that Dalton propose a side agreement to the Union. "Unless otherwise agreed, authority to conduct a transaction includes the authority to do acts which are incidental to it, usually accompany it, or are resonably necessary to accomplish it." Beit Bros., Inc. v. Irving Tanning Co., 315 Mass. 561, 566 (1944), quoted with approval in Costonis, supra.

The Town relies on Acushnet Permanent Firefighters Association, 7 MLC 1265 (H.O. 1980) in support of its position that there was no "meeting of the minds" regarding the "departmental regulation" language. The Town's reliance on Acushnet is misplaced. In Acushnet, the hearing officer found that there was no "meeting of the minds" where one party presented language that had previously been proposed by the other party but the parties could not agree on the meaning of the language. In the instant case, the parties both exchanged language and agreed on the meaning of that language.

G.L. c.150E does not require an employer to bargain over a non-mandatory subject. The side letter concerns both mandatory and non-mandatory subjects of bargaining. The non-mandatory subject concerns minimum manning per shift coverage. Town of Danvers, 3 MLC 1559, 1573 (1977); City of Newton, 4 MLC 1282 (1977). The provision dealing with the distribution of overtime, for example, is a mandatory subject of bargaining. City of Boston, 9 MLC 1429, 1434 (H.O. 1982), aff'd 10 MLC 1238 (1983).

Where, as in this case, the employer has bargained and reached an agreement incorporating both non-mandatory and mandatory subjects of bargaining, the public policy articulated in Section 7(a) of the Law obligates the employer to reduce to writing and to execute the entire agreement. See Sea Bay Manor Home, 253 NLRB 739, 106 LRRM 1010 (1980), enf'd sub nom National Labor Relations Board v. Sea Bay Manor Home, No. 81-4151 (2d Cir. Feb. 5, 1982), 111 LRRM 2608. The fact that the agreement contains both mandatory and non-mandatory subjects does not alter the Town's obligation to execute the agreement.

We order the Town to execute Dalton's Memorandum of Agreement in fulfillment of its obligations pursuant to G.L. c.150E, Sections 6 and 7(a).

ORDER

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

1. Cease and desist from:

   a. Refusing to bargain collectively in good faith with the Association by refusing to execute the "Memorandum of Agreement," drafted by Town Counsel Dalton, which embodies the parties' agrement;

   b. In like and similar manner, refuse to bargain collectively in good faith with the Association as the exclusive representative of certain employees of the Town;

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

   a. Execute the "Memorandum of Agreement" drafted by Town Counsel Dalton, which embodies the parties' agreement;

b. Post immediately in conspicuous places where employees congregate and maintain for a period of thirty (30) consecutive days, the attached Notice to Employees;

c. Notify the Commission in writing within thirty (30) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
GARY D. ALTMAN, Commissioner
MARIA C. WALSH, Commissioner

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

The Labor Relations Commission has ruled that the Town of Ipswich has committed a prohibited practice in violation of Sections 10(a)(5) and (1) of G.L. Chapter 150E. The ruling was based on the Town's failure to execute a "Memorandum of Agreement" previously agreed-upon with Local 1913, Ipswich Fire Fighters. General Laws, Chapter 150E requires that employers and unions bargain in good faith over wages, hours, standards of productivity and performance, and other terms and conditions of employment. The Labor Relations Commission has ordered us to post this Notice and to abide by what we say in it.

WE WILL NOT refuse to bargain in good faith by failing to execute the "Memorandum of Agreement" drafted by Town Counsel Dalton, which embodies the parties' agreement.

WE WILL execute the "Memorandum of Agreement" drafted by Town Counsel Dalton, which embodies the parties' agreement.

GEORGE E. HOWE
Town Manager