COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND FINANCE AND MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS, SUP-2619, SUP-2638 (1/31/86).

54.67 step increases
67. Refusal to Bargain
67.3 furnishing information
67.42 reneging on prior agreements
91.13 mootness

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

Appearances:

Nathan S. Paven, Esq. - Representing Massachusetts Organization of State Engineers and Scientists

Joseph M. Daly, Esq. - Representing the Commonwealth of Massachusetts

DECISION

Statement of the Cases

On December 31, 1981 and February 19, 1982, Massachusetts Organization of State Engineers and Scientists (Union) filed charges with the Labor Relations Commission (Commission) alleging that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (Employer) violated various sections of G.L. c.150E (the Law). Following a preliminary investigation, the Commission issued two complaints of prohibited practice on April 1, 1982.

The Complaint in Case No. SUP-2619 alleged that the Employer violated Sections 10(a)(5) and (1) of the Law by refusing to supply the Union with budget information. In addition, the complaint alleged that the Employer violated Sections 10(a)(1) and (5) by adopting a bargaining position which was inconsistent with actions that the employer took away from the bargaining table.[1]

The Complaint in Case No. MUP-2638 alleged that the Employer violated Sections 10(a)(1) and (5) of the Law by engaging in regressive bargaining. In substance, it averred that after extended bargaining, which included mediation and fact-finding, the Employer offered a new package of proposals modeled after a collective bargaining agreement accepted by another union which represents professional employees in State Bargaining Unit 6. That package offer ignored items previously agreed-upon and introduced other subjects which had not been previously considered at the table.

[1]Specifically, the Employer has steadfastly declined to offer retroactive pay raises. Yet in calculating the extent of a reduction in force, the Employer took into account anticipated retroactive wages.

Pursuant to notice, the cases were consolidated and heard before Hearing Officer Robert B. McCormack on April 15 and 21, 1982. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary evidence was afforded all parties. Having examined the evidence of record, we find and rule as follows.

Findings of Fact[2]

In April 1980, the Union and the Employer commenced negotiations upon a collective bargaining agreement to succeed one which was due to expire June 30, 1980. At the outset, the parties agreed to certain procedural groundrules. In pertinent part, they agreed that until the entire contract had been agreed to, all individual items discussed at negotiations were "open." That is to say, either party was free to modify or subtract from proposals tentatively agreed to.[3]

The parties were unable to agree upon a new contract before the expiration of the old one, and negotiations extended into the summer of 1980. Bargaining then broke down, and in late August 1980 mediation was attempted at the Union's request.

On or about September 3, 1980, the Employer offered a three-year contract.[4] The Union declined any wage increase which was not retroactive to the expiration of the old agreement. Herein lies the principal point of contention between the parties. The Employer persistently maintained that the first raise become effective upon signing of the new agreement. The Union was equally adamant that it should be retroactive.

The parties engaged in "formal" and "informal" negotiations.[5] The Employer's formal economic offer remained as previously described. However, in October 1980 the parties talked of an informal proposal for a twenty-four percent (24%) wage increase

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[2]Since no party contests the jurisdiction of the Commissionk jurisdictional findings are unnecessary.

[3]This negotiating procedure was unlike other procedures, oft-times employed by the Commonwealth and others, wherein the parties initial or sign proposals as they are agreed upon.

[4]The terms of the proposed contract included the following wage increases:
A seven percent (7%) wage increase effective upon execution of the new collective bargaining agreement;
Four percent (4%) effective July 1, 1981;
Two percent (2%) effective January 1, 1982;
Four percent (4%) effective July 1, 1982; and
Four percent (4%) effective January 1, 1983.

[5]The apparent difference was that "formal" negotiations were conducted through the mediator. "Informal" negotiations were carried on privately in the mediator's absence.

and a contract ending June 30, 1983. An eighth step in the so-called "step system" would be added. The Employer's bargaining representative carried the informal proposal back to the Secretary of Administration and Finance, who rejected it in late October or November 1980.

An impasse was declared in November 1980, and factfinding commenced November 29, 1980 before Arbitrator Robert M. O'Brien. Factfinding continued for several months, and retroactivity of wage increases played a prominent role. On May 15, 1981, the Employer's economic offer was the same as before. Under it, the first pay increase would be effective upon signing the collective bargaining agreement, and the second increase on July 1, 1981. The Union questioned what would happen if agreement were reached after July 1, 1981. On or about June 4, 1981, the Employer responded with the following economic proposal:

> Effective on the first weekly payroll period after ratification by the Union 7%.
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> Effective July 1, 1981 4%.
>
> Effective January 1, 1982 2%.
>
> Effective July 1, 1982 4%.
>
> Effective January 1, 1983 4%.
>
> Should ratification as set forth above not occur in FY 81, the Commonwealth's wage offer is as follows:
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> Effective on the first payroll period after ratification by the Union, 7%.
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> Effective twelve months after ratification, 4%.
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> Effective eighteen months after ratification, 2%.
>
> Effective twenty-four months after ratification, 4%.
>
> Effective thirty months after ratification, 4%.

After extensive hearings, the factfinder took the case under advisement. The parties did not negotiate over wages pending his decision.

After submission of the aforesaid June 4, 1981 proposal, the Massachusetts General Court and the Governor expressed differences over the state budget. This attracted the attention of the media, and by early July the Union knew that layoffs of employees were probable due to a restrictive budget in Fiscal Year 1982. Later in June the President of the Union confirmed this with a personnel officer in the Department of Public Works.

On July 10, 1981, the Union met with the Commissioner of the Department of Public Works to discuss proposed layoffs. The Union requested budgetary data from the prior and the present fiscal years so as to determine whether the layoff calculations were correct. The Union also wanted the information so that it might propose alternative methods of economy.

Another meeting occurred later in July. The Union repeated its earlier requests, but the Employer insisted that the only purpose of the meeting was to discuss seniority problems resulting from the layoffs. Several other meetings concerning layoffs were held between July and November 1981. The aforementioned information was requested at each meeting, but was never provided.

Meanwhile, unbeknownst to the Union, the Executive Office of Administration and Finance issued a memorandum on July 24, 1981 to all agencies directing them to prepare spending plans to accurately predict budget costs as they related to the fiscal crisis. Each agency was to compute its projected payroll costs should all employees be retained. One computation was to be made when multiplying the number of employees times a collective bargaining factor which projected increases in wages. If, after so computing labor costs, the amount exceeded the agency's budget, it was to compute the number of layoffs needed to achieve compliance.

On or about August 4, 1981, the Department of Public Works complied with the memorandum. There were to be 532 layoffs, and 235 jobs would be lost through attrition. The projections of wage retroactivity were considered to be, for employees in this collective bargaining unit, $1,494,000 and $3,361,500 in fiscal years 1981 and 1982, respectively.

The Employer continued to ignore the Union's request for financial data, and on November 19, 1981 the Union requested Commissioner Tersigni to delay terminations, demotions and bumping until there might be further bargaining. That request was repeated on December 18, 1981. On December 23, the Commissioner replied that he had referred the request to the Office of Employee Relations. No response was ever made.

In this bargaining unit there have been 569 layoffs in fiscal year 1982, and 600 demotions due to the budget shortage predicated upon retroactive salary increases.

The factfinder's report issued January 25, 1983. It contained, inter alia, the following observation and recommendation:

> Issue No. 3 -- Retroactivity
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> Due to the protracted negotiations, and the protracted factfinding hearings which preceded this report, it would be patently unfair to suggest that the salary increases proposed herein should be prospective only. It would certainly be a gross injustice to recommend a salary increase effective upon ratification of the agreement by

> MOSES. This, of course, would result in no salary increase from July 1, 1980 until at least February 1, 1982. This result would be patently inequitable since the delay in reaching agreement must not rest entirely with MOSES. Accordingly, I recommend that the salary increases proposed herein (Issue No. 1) be fully retroactive for all present and former employees of the Commonwealth in Unit 9.
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> Recommendation: That the salary increases proposed herein be fully retroactive for all current and former employees in Unit 9.

The factfinder's report was accepted by the Union but rejected by the Employer.

The parties met again on Febraury 16, 1982. The Union requested the Employer to submit a total and complete package proposal that day. The Employer agreed that it would make every effort to do so.

The Employer spent the next three to four hours putting together the package proposal. In doing so, it drew items from various contracts which had been accepted by other unions representing state employees. Many of the provisions were markedly similar to the Unit 6 agreement with the National Association of Government Employees. Some matters which had been tentatively agreed upon previously were omitted.[6] The package proposal contained other items which had not been discussed in previous negotiations.

That package proposal was submitted to the Union shortly after 3:00 p.m. The Union took it and discussed it for about an hour. Thereafter, they informed the Employer that the proposal was unacceptable, and that they would henceforth only negotiate with a mediator. There was no other discussion that day concerning the package proposal. Three days later, the Union filed the charge which has brought this matter before us.

There have been other bargaining sessions since February 16, 1982, but they have been to no avail. After the litigation of this case, the Union and Employer reached agreement on a collective bargaining agreement. The agreement which covered the period from 1980-1983 provided for full retroactivity. In addition, the Union and Employer reached a successor collective bargaining agreement for the period of 1983-1986.

Opinion

Section 11 of the Law states that when the Commission determines in an unfair

[6]The Employer admitted that some items were omitted due to error, the rush in responding, and concern about contractual language. At the time of the hearing, they indicated that they would restore some of the omitted provisions.

labor practice hearing that "a prohibited practice has not been or is not being committed, it shall...issue a final order dismissing the complaint." (Emphasis added). In these consolidated cases before us, we consider whether portions of a complaint issued by the Commission have become moot when the conduct complained of has ceased and thus is "not being committed" for purposes of the Law.

Pertinent to this inquiry is a letter sent by the Commission on February 22, 1984 to both the Employer and the Union. In the letter, the Commission informed the parties that it had knowledge of the parties' successful completion of bargaining during the pendency of the Complaint. Because the completion of bargaining directly resolved the issues raised in the complaint, the Commission requested the parties to show cause why the Commission should not dismiss the case as moot; neither party responded to the Commission's show cause request. In considering the mootness of the claims before us, we focus on the defendant's voluntary cessation of its allegedly unlarful conduct in the context of the parties' private resolution of their dispute and apparent loss of interest in pursuing an administrative remedy.

Generally a case is not mott as long as there is a real and existing controversy, calling for a present adjudication involving present rights, for which specific relief is sought that may be granted. Nonetheless, the voluntary cessation of allegedly illegal conduct does not necessarily moot a controversy since, absent a judicial or administrative ruling, the defendant remains "free to return to its old ways." U.S. v. W.T. Grace, 345 U.S. 629, 632 (1953); City of Boston, 7 MLC 1707, 1708 (1980). Further, there is a public interest in determining the legality of challenged practices that have been subsequently settled. Id. Where a violation of law has occurred, the imposition of a continuing obligation on the defendant to conform its conduct to law is the best means of diminishing the likelihood that it will not reject its prohibited conduct. Galloway Board of Education v. Education Association, 100 LRRM 2250 (N.J. 1972).

In the context of a collective bargaining relationship, it is not uncommon for an employer and a union to successfully execute a bargaining agreement during the pendency of complaint alleging either a refusal to bargain or bad faith bargaining. The NLRB[7] has issued complaints and enforced its orders despite the parties' subsequent consummation of a contract, even where both parties agreed that no remedy is necessary. NLRB v. Hiney Printing Co., 116 LRRM 2404 (6th Cir. 1984); see also, Carpenters Local 1976 v. NLRB, 357 U.S. 93, 42 LRRM 2243 (1958); Massihon Publishing Co., 215 NLRB No. 74, 88 LRRM 1040 (1974). The Board has reasoned that,

[7]Because the NLRB has confronted this issue squarely, and because there is a substantial identity between the statutory scheme of the Commission's unfair labor practice jurisdiction and that of the NLRB under 29 USC Sections 158 and 160, we advert to the reasoning and wisdom of the cases arising under the federal statute for their persuasive value in guiding our decision here.

since the successful completion of bargaining provides "no assurance that the interests of the public, as distinguished from those of the charging party, will be sufficiently protected by what is essentially a private settlement agreement...," it would be improper for the Board to waive its jurisdiction and "thereby deprive the public of the right of enforcement and protection of future rights... ." Schnykill Metals Corp., 218 NLRB No. 49, 89 LRRM 1972 (1975). On the other hand, the Board has exercised its discretion to accept as "definitive" the results of the parties' recourse to the processes of negotiation rather than the compulsion, as well as trouble and expense, of an enforcement decres. NLRB v. Pool Mfg. Co., 339 U.S. 577, 580, 26 LRRM 2127 (1950); NLRB v. General Motors Corp., 179 F.2d 221, 25 LRRM 2281 (2d Cir. 1950). The Board has accorded dispositive effect to private settlements and dispensed with remedial orders where, in its discretion, it was satisfied that the agreement was consistent with the policies of the Labor Management Relations Act and fully cured the unfair labor practice and where the record of the controversy indicated a minimal likelihood for recurrence of the illegal conduct. See, Fetzer Broadcasting Co., 227 NLRB No. 185, 95 LRRM 1544 (1977); Retail Clarks Local 322, 226 NLRB No. 20, 94 LRRM 1012 (1976); Bankers Club, Inc., 218 NLRB No. 7, 89 LRRM 1812 (1975).

In the instant case, the two complaints allege three distinct prohibited practices: 1) the Commonwealth bargained in bad faith by declining to offer retroactive pay raises while, at the same time, basing a reduction in force on anticipated retroactive wages for bargaining unit members; 2) the Commonwealth engaged in regressive bargaining by offering a package of proposals substantially different from the proposals discussed in extended bargaining for the 1980-83 collective bargaining agreement, which included mediation and fact-finding; and 3) the Commonwealth unlawfully refused to provide the Union with requested information.

We first deal with the prohibited practices that deal with the Commonwealth's alleged bad faith bargaining. Significant events have intervened since the issuance of the complaints. Most importantly, the parties consummated a bargaining agreement that granted wage increases retroactive to the day after the expiration of the old contract. Thus, the Union's argument that the Commonwealth unlawfully maintained a bargaining posture inconsistent with its behavior away from the table has been erased by later bargaining developments. Moreover, the illegal regressive bargaining committed by the Commonwealth on February 16, 1982 has similarly been attenuated by the parties reaching agreement not only on the collective bargaining agreement in dispute in the instant case but by agreement on a successive agreement to the agreement that was in dispute.[8]

[8]The controlling case on the issue of mootness is City of Boston, 7 MLC 1707 (1980). In that case, the City of Boston, faced with a Complaint of Prohibited Practice alleging a refusal to bargain over the impact of a decision to eliminate three fire companies and 44 deputy fire chiefs' aides positions, made an offer to bargain after the issuance of the Commission's Complaint. On the date of hearing, the City moved to dismiss the case on the basis of mootness. We held that the case came "within a recognized exception to the mootness doctrine, namely, that a case is (continued)

These later developments do not mechanically moot the Commission's complaint since a complaint "does not become moot solely because changing circumstances indicate the need for it may be less than when made." C.B. Buick, Inc. v. NLRB, 87 LRRM 2878 (3d Cir. 1974), quoting NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 271, 2 LRRM 600 (1938); City of Boston, 7 MLC 1707 (1980). Nonetheless, the parties' successful resolution of the conflicts underlying the Commission's complaint leads us to question the efficacy of making a determination on the merits of the complaint at this time. The parties have achieved a status of stable and continuing labor relations that Chapter 150E is designed to promote and protect. Neither a dismissal on the merits nor a finding of a violation coupled with a remedy would better effectuate the policies of Chapter 150E. The parties have effectively cured the alleged unfair labor practices in a manner that both settles the private disputes underlying the complaint and, in our view, adequately protects the public rights embodied in the Law. No purpose is served in our adding the ingredient of administrative compulsion to remedy what has already been satisfactorily remedied.

Moreover, the silence of both parties in response to the Commission's show cause request on the question of mootness supports our conclusion that the Law's policies are better effectuated in this instance by accepting the parties' private settlement as dispositive of the issue. The 1980-1982 collective bargaining agreement which eluded the parties at the time of the complaint has since expired, and the parties have successfully negotiated a new three-year agreement. Obviously, an acrimonious bargaining environment gave way to an atmosphere of more productive and cooperative bargaining. Perhaps for this reason, neither party responded to the Commission's request briefs on an issue related to a past quarrel. Since the parties' resolution of that quarrel is consistent with the policies of the Law, we see no reason to further adjudicate the issue.

Because we accept as definitive the parties' successful recourse to the process of negotiation, we decline to rule whether the Commonwealth, by maintining an inconsistent bargaining posture during the 1982 negotiations, engaged in bad faith bargaining in violation of Sections 10(a)(5) and (1) of the Law. The question

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8 (continued)
not moot if there is a possibility that the challenged conduct will recur in substantially the same form, especially if the asserted violator contends he was properly engaged in the conduct." 7 MLC at 1709. We further stated that "the parties' continuing barganing relationship is relevant to the application of this exception to the mootness doctrine." 7 MLC at 1709.

In the instant case, however, the Commission on its own motion has directed the parties to show cause why the controversy is not moot and neither party has responded. The Union has not asserted any likelihood of recurrence, nor has the Commonwealth contended that it was properly engaged in its conduct. The exception to the mootness doctrine which City of Boston illustrates was designed so that courts need not play hide-and-seek with defendants who cease and resume their challenged conduct. See, NLRB v. Mexia Textiles Mills, 339 U.S. 563, 26 LRRM 2123, 2125 (1950). Because no such possibility exists here, the instant case does not fall within the exception.

is moot. Similarly, we dismiss as moot the question whether the Commonwealth engaged in regressive bargaining on February 16, 1982 when it submitted a package of proposals that was different from previous proposals discussed by the parties. Since the parties' private resolution is consistent with the purpose of the Law to safeguard public rights and promote stable labor relations, we accept as dispositive the results of the parties' recourse to the process of negotiation. The portions of the complaint which allege bad faith and regressive bargaining are hereby dismissed as moot.

The complaint in Case No. SUP-2619 further alleges that the Commonwealth violated Sections 10(a)(5) and (1) of the Law by failing and refusing to supply the Union with budget information. Unlike the refusal to bargain allegations dismissed above, the Commonwealth's failure to provide the requested information is not cured by the parties' successful completion of bargaining. There is no evidence that the Commonwealth subsequently supplied the information sought by the Union nor that the parties privately settled the question. The public interest in resolving the question whether the Commonwealth had an obligation to furnish information under the facts presented requires that we address the issue.

The Union repeatedly requested certain budget information that might have been provided with the spending plans for fiscal years 1981 and 1982 which were readily available. The Employer's only defense was that department budget information is a matter of public record. The fact that information is available from another source is not a sufficient defense to a request for information. See Boston School Committee, 10 MLC 1501 (1984). The law relative to withholding pertinent information from a union is well-settled, and the Employer here is no stranger to it. Commonwealth of Massachusetts, Department of Public Works, SUP-20 (1972); City of Boston, 1 MLC 1064 (1974); NLRB v. Acme Industrial Acme Co., 385 U.S. 432, 64 LRRM 2069 (1967); J.I. Case Co., 146 NLRB 1582, 56 LRRM 1108 (1964); NLRB v. Item Co., 35 LRRM 2709 (5th Cir. 1955); Commonwealth of Mass., 5 MLC 1053 (1978); University of Mass., 8 MLC 1148 (1981); Boston School Committee, 8 MLC 1380 (1981). If an employer objects to furnishing the requested information, it must voice its objection in a timely manner. Commonwealth of Mass., supra at 5 MLC 1058; Shell Oil Co. v. NLRB, 441 F.2d 880, 77 LRRM 2043 (9th Cir. 1971). It did not do so here.

Accordingly, we hold that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the requested information to the Union.

ORDER

WHEREFORE, pursuant to the authority vested in the Commission under Section 11 of the Law, IT IS HEREBY ORDERED that the Commonwealth of Massachusetts shall:

1. Cease failing to bargain collectively in good faith with the Massachusetts Organization of State Engineers and Scientists by refusing to provide the Union with information that is relevant and reasonably necessary to the Union for collective bargaining and contract administration;

2. Provide the Union with requested information that is relevant and reasonably necessary for collective bargaining and contract administration;

3. Post the enclosed Notice to Employees immediately and conspicuously in offices where State Bargaining Unit 9 employees report for work and maintain said Notice for a period of not less than thirty (30) days.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
GARY D. ALTMAN, 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 determined that the Commonwealth of Massachusetts has violated General Laws, Chapter 150E, Sections 10(a)(5) and (1) of the Public Employee Collective Bargaining Law (the Law) by refusing to provide the Union with information that is relevant and reasonably necessary to the Union for collective bargaining and contract administration.

WE WILL NOT refuse to provide the Association with information that is relevant and reasonably necessary to the Union for collective bargaining and contract administration.

WE WILL promptly provide the Association with requested information that is relevant and reasonably necessary for collective bargaining and contract administration.

OFFICE OF EMPLOYEE RELATIONS