CITY OF GARDNER AND GARDNER FIRE FIGHTERS, LOCAL 2215, IAFF, MUP-5471 (4/4/86). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

52.8 unlawful provisions
53.6 parity provisions
54.5111 layoff
67.64 refusal to sign contract
82.1 affirmative action
92.45 motions to reopen
92.492 motion to strike
92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner

Appearances:

Jonathan Hiatt, Esq. - Representing Local 2215, Gardner Fire Fighters

Edward Ryan, Esq. - Representing the City of Gardner

DECISION ON APPEAL
OF HEARING OFFICER'S DECISION

On June 20, 1984, Hearing Officers Robert B. McCormack and Sherrie R. Talmadge issued a decision in the above-referenced matter.[1] They concluded that the City of Gardner (City) was obligated to execute a clause contained in a successor collective bargaining agreement between the City and the Gardner Fire Fighters, Local 2215, IAFF (Union) which provided that layoffs would occur only after certain apparatus had been taken out of service. The hearing officers further held that the City was excused from executing or implementing another clause of the agreement which specified that reductions in Fire Department personnel were to be proportionate to personnel reductions in other specified City departments. The hearing officers concluded that the latter clause constituted an illegal parity provision.

Both the City and the Union filed timely notices of appeal pursuant to 402 CMR 13.13 and filed supplementary statements which have been carefully considered.[2] We affirm the hearing officers' decision for the reasons set forth below.

[1]The full text of the hearing officer's decision is found at 11 MLC 1014 (H.O. 1984).

[2]On July 13, 1984 the City filed its supplementary statement in this case. On August 1, 1984 the Union filed its supplementary statement. On August 14, 1984 the City filed a "Reply to the Union's supplementary statement" (Reply), in which it attempted to introduce into evidence various exhibits and affidavits which were not contained in the record before the hearing officer. The Union filed a motion to

(continued)

Facts[3]

We have reviewed the record below and adopt the hearing officers' findings of fact, except where noted.[4] We summarize the relevant facts as follows.

On August 17, 1983, the Employer and the Union agreed to the terms of a successor collective bargaining agreement for the period covering July 1, 1983 through June 30, 1985.

In November 1983, the Mayor of Gardner, Charles P. McKean, forwarded a copy of the proposed contract to City Solicitor Anthony E. Penski requesting a ruling on the legality of the last paragraph of Article XXIV, the Health and Safety Article. Article XXIV states, in pertinent part:

> Both parties also agree that, if unprecedented or extraordinary State or Federal action, which substantially effects in an adverse manner, the ability of the City to appropriate or raise in the tax levy, sufficient funds to maintain the present levels of manpower and services in the City: then and only then shall reductions in force and manning levels of the Gardner Fire Department be allowed and then and only according to the following procedure:
>
> (1) Presonnel shall be laid off only after any one of the above mentioned assigned pieces of appartus is taken out of service by a 2/3 vote of the City Council.
>
> (2) Such reductions in personnel will also be proportionate to reductions in personnel of the School, Public Works and Police departments of the City.[5]

---

2 (continued)
strike the City's Reply on the grounds that it contained factual allegations and documents which were not presented at the hearing and which the Union had no opportunity to rebut. The City filed a response to the Union motion, and argued its entitlement to present the new evidence.

The City, however, did not move to reopen the hearing to litigate the allegations contained in its Reply and has not shown good cause to reopen. Therefore, we grant the Union's motion to strike and disregard those allegations contained in the City's Reply which are not supported by evidence contained in the record below. In addition, we note that the subject matter of the City's allegations (i.e. detailing steps taken by the City to implement the cost items of the agreement) is irrelevant to the issues before us on appeal.

[3]Neither party disputes the Commission's jurisdiction to hear this matter.

[4]In its supplementary statement the Union asserted that the hearing officer failed to make certain material factual findings regarding the parties' bargaining history. Those facts are contained in footnote 5, below.

[5]Although the hearing officers did not include in their decision a reference
(continued)

On November 12, 1983, City Solicitor Penski responded to the Mayor's request and opined that both subparagraph (1) and subparagraph (2) of the Health and Safety Article XXIV were unlawful. Specifically, Penski felt that subparagraph (1) was an unlawful restriction on the City Council's budgetary powers.[6] In addition, Penski opined that subparagraph (2) was an unlawful parity clause.

In early December 1983, the City notified the Union that it was concerned about the legality of subparagraphs (1) and (2) of the Health and Safety Article. On December 20, 1983 the Union, through its attorney, sent a revised severability clause which specifically dealt with subparagraphs (1) and (2) of the Health and Safety Article.[7]

On December 27, 1983, counsel for the City sent a letter to the Union stating that the Mayor would only sign the agreement if subparagraphs (1) and (2) of the Health and Safety Article were deleted entirely from the agreement. The City explained that it took this position based upon the opinion of City Solicitor Penski that the two clauses were unlawful.

On Decmeger 29, 1983, the Union filed the instant charge against the City alleging that the City was refusing to execute the collective bargaining agreement it reached with the Union. During the investigation of the charge on February 1, 1984, the parties executed the following memorandum of agreement:

---

5 (continued)
to this matter, the record supports the following additional finding: both subparagraph (1) and subparagraph (2) of Article XXIV had been included in the predecessor collective bargaining agreement between the parties which was effective from January 1980 through June 30, 1982. At the outset of negotiations for the agreement at issue here, the City proposed deleting the above two clauses contained in the prior agreement. At a mediation session in October 1982, the City's attorney stated that the City was withdrawing its proposal to delete the two health and safety clauses because the Mayor was appreciative that the fire fighters were being patient and "not making noise" about working so long without a contract. The City did not make any further proposals regarding deletion of the two clauses until after the parties reached full agreement on the contract and it was reduced to writing.

[6] In this regard, Penski cited the case of Whalen v. City of Holyoke, 12 Mass. App. 446 (1982), in which the Appeals Court held that a mayor is not bound by an ordinance passed by the Board of Aldermen establishing a minimum manning level in the fire department because the Aldermen's ordinance impinged upon the mayor's "initial responsibility for limiting municipal expenditures." As will be discussed infra, Whalen has no bearing on the instant case.

[7] The revised severability provision read as follows:

"If any provision of this Contract, including the provisions of subparagraphs (1) and (2) of the fifth paragraph of Article XXIV of this Agreement, or any application of this Contract shall be found contrary to law by a Court of competent and final jurisdiction, such provision or application shall have effect only to the extent permitted by law, and all other provisions or applications of this contract

(continued)

MEMORANDUM OF AGREEMENT

Case No. MUP-5471
City of Gardner and Gardner Firegithters,
Local 2215

In consideration of the mutual promises of the City of Gardner (City) and the Gardner Firefighters, Local 2215 (the Union) as set forth below, the City and the Union agree:

1. That the City and the Union shall promptly execute the July 1, 1983 through June 30, 1985 collective bargaining agreement; provided that those portions of Article XXIV beginning with the words "Both parties also agree that, if unprecedented or extra-ordinary..." at the bottom of page 28 and continuing to the end of the Article shall be deemed unexecuted until if and when the Commission issues a final order requiring the City to execute the contract containing all or part of those provisions, in Case No. MUP-5471, and until the exhaustion of any appeals proceedings that either party may undertake with respect to such Commission order. Upon the conclusion of proceedings including the exhaustion of any appeals, in Case No. MUP-5471, those portions of the contract which the Commission has ordered executed, if any, shall be deemed executed.

2. Neither party waives or relinquishes any rights to maintain its charges or defenses in Case No. MUP-5471, but both parties contemplate that the issues in that case will remain for resolution by the Commission.

Opinion

The issue in this case is whether the City is excused from executing either of the provisions of subparagraphs (1) and (2) of Article XXIV, "Health and Safety," on the grounds of illegality. The Union asserts both that the City's failure to execute the collective bargaining agreement was in bad faith and that the City's belated assertions regarding the legality of the two caluses are pretextual.[8]

7 (continued)
shall continue in full force and effect. The execution of this Agreement shall not waive the provisions of the Article.

The invalidation of any such provision or application of any such Article by such Court shall be sufficient cause for the parties to meet and renegotiate such provision or application.

[8] In this regard, the Union points out that the same two clauses had been included in the prior collective bargaining agreement and the City did not raise the legality of the clauses until after negotiations for this agreement had been completed.

Accordingly, the Union maintains that the City should be ordered to execute the agreement without regard to the legality of the two clauses. Alternatively, the Union argues that both clauses are lawful provisions regarding the means of achieving a reduction in force. The City contends that both of the provisions at issue are unlawful, and it is therefore not obligated to execute either of the provisions.

Article XXIV, subparagraph (1) states:

> (1) Personnel shall be laid off only after any one of the above-mentioned assigned pieces of apparatus is taken out of service by 2/3 vote of the City Council.

The City contends that this provision illegally limits the City's authority to determine the level of services. The City also argues that the clause serves to shift the power of the executive from the Mayor to the City Council; and that the clause conflicts with the majority vote requirements of the City Charter. We disagree.

A City may voluntarily obligate itself to maintain a certain number of personnel. See Boston Teachers Union v. School Committee of Boston, 370 Mass. 455, 464, 470 (1976) (where School Committee agreed to maximum class size and teaching load it implicitly agreed to maintain a particular level of staffing). We also note that the Mayor can lawfully enter into an agreement concerning "the timing of layoffs and the number and identity of the employees affected [because such issues] are proper subjects of collective bargaining." See Boston Teachers Union, Local 66 v. Boston School Committee, 386 Mass. 197, 213 (1982); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 567 (1983). Moreover, an employer who has agreed not to lay off personnel may achieve desired reductions in force through other means such as early retirement, voluntary termination, transfers, reduction in hours, etc. Thus, a public employer's ability to determine workforce size is not necessarily destroyed by an agreement restricting the ability to lay off.

Neither does subparagraph (1) of Article XXIV shift the executive's authority to the legislative body. Unlike the Whalen case,[9] cited by the City, this case involves a provision in a collective bargaining agreement to which the Mayor voluntarily agreed. The Mayor has voluntarily restricted his own authority to lay off by agreeing to act only upon a particular contingency.[10] The fact that the contingency arises only after action by the City Council does not mean that the City Council exercises the Mayor's authority.

---

[9] Whalen v. City of Holyoke, supra.

[10] In this respect, the layoff contingency is not dissimilar to wage adjustment clauses commonly found in collective bargaining agreements which specify that wages will increase by some percentage determined by the rate of inflation (or some other factor outside of the employer's control).

Moreover, the reference in the clause to a two-thirds vote of the City Council is not an attempt to modify the City Charter. The City Council may still take pieces of apparatus out of service by a mere majority vote. Should it do so, the Mayor would have to devise a method of reducing the City's level of services other than through fire fighter layoffs. Thus, this provision does not restrict the City Council's powers; instead, it restricts the Mayor's right to lay off. The Mayor voluntarily entered into this agreement to restrict his own authority under the municipal finance act, and we find nothing illegal about this provision. Accordingly, we hold that subparagraph (1) of Article XXIV is a lawful provision concerning the means of achieving a reduction in force. See School Committee of Newton v. Labor Relations Commission, 388 Mass. at 563-64. Therefore, the City is obligated to execute this clause. Its failure to do so constitutes a refusal to bargain in good faith in violation of Section 10(a)(5) of the Law. Town of Ipswich, 11 MLC 1403 (1985), aff'd. ____ Mass. App. ____ (1985); Ipswich Firefighters, Local 1913, 9 MLC 1153 (H.O. 1982), aff'd. 9 MLC 1335 (1982); Springfield Housing Authority, 9 MLC 1068, 1071 (1982).

Article XXIV, subparagraph (2) states:

> (2) Such reductions in personnel will also be proportionate to reductions in personnel of the School, Public Works and Police departments of the City.

The hearing officers held that the above clause constituted an illegal "parity" agreement. We affirm. The Commission has repeatedly held that a provision in one union's contract which directly inhibits another union's ability to bargain with the employer unlawfully restrains the second union's ability to negotiate on behalf of the employees whom it represents. Medford School Committee, 3 MLC 1413 (1977); Worcester Police Officials Association, 4 MLC 1366, 1370-71 (1977). The clause at issue here ties layoffs in the fire department to layoffs in other referenced bargaining units. The City would be reluctant to grant concessions to the referenced groups by guaranteeing no reductions in personnel because to do so would preclude the City from reducing personnel in the fire department. Thus, like other unlawful parity provisions, this clause forces the police, teacher and public works unions to bargain in an expanded unit. If they seek a "no layoff" clause, they must convince the City to agree not only to "no layoffs" in their bargaining unit but also to no layoffs in the Fire Department. Such a clause increases the impact of every bargaining proposal each of these unions might advance to limit the reduction of personnel. Such a situation does not allow these three employee groups the unimpaired exercise of their right to bargain collectively over the means of achieving a reduction in force as contemplated under School Committee of Newton, supra. We therefore conclude that subparagraph (2) of Article XXIV is an illegal parity provision.

We agree with the haring officers' analysis that this provision is severable from the remainder of the collective bargaining agreement, given that the contract contains an effective severability clause.[11] Therefore, the Employer's bargaining

[11] The language of severability provision is contained at p. 1683, fn. 7, supra.

obligation included the duty to execute the agreement, excluding Article XXIV clause (2), the illegal parity clause.[12]

CONCLUSION

For the reasons set forth above, we conclude that subparagraph (1) of Article XXIV of the parties' collective bargaining agreement is a lawful provision regarding the means of achieving a reduction in force. The City's failure to execute that provision violated Sections 10(a)(5) and (1) of the Law.

We further conclude that subparagraph (2) is an illegal parity clause. Accordingly, the City was not obligated to execute that provision.

REMEDY

The City has violated the Law by its refusal to include subparagraph (1) of Article XXIV in its executed version of the parties' collective bargaining agreement. Our decision, however, issues after the stated expiration date of that collective bargaining agreement has been extended, or superceded, or whether the terms and conditions of employment established in the 1983-1985 agreement have been maintained. Therefore, we shall order the City to include subparagraph (1) of Article XXIV in its executed version of the parties' 1983-1985 collective bargaining agreement. The City must consider subparagraph (1) of Article XXIV of that agreement to have the same present force and effect as other provisions of that collective bargaining agreement.

ORDER

On the basis of the foregoing, IT IS HEREBY ORDERED that the City of Gardner shall:

1. Cease and desist from:

   a. Refusing to include subparagraph (1) of Article XXIV "Health and Safety" in its executed version of the 1983-1985 collective bargaining agreement reached with the Union;

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

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

---

[12] We note that the severability clause of the agreement contains a reopener provision obligating the City to meet and re-negotiate over any provision which is invalidated.

a. Include subparagraph (1) of Article XXIV "Health and Safety" in the executed version of the 1983-1985 collective bargaining agreement reached with the Union;

b. Post immediately in conspicuous places where employees usually congregate or where notices are usually posted, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.[13]

3. Notify the Commission in writing within thirty (30) days of service of this decision of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGER, CHAIRMAN
MARIA C. WALSH, COMMISSIONER

[13] In ordering a posting in this case, we modify the hearing officers' remedy. The hearing officers held that "[i]t would not effectuate the purposes of the Law to require the posting of notices or other sanctions." 11 MLC at 1020. We disagree. Given the totality of the bargaining history in this case, including the City's failure to raise the validity of the clauses until a full agreement was reached, we find that a posting is appropriate.

City of Gardner and Gardner Fire Fighters, Local 2215, IAFF, 12 MLC 1681

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 City of Gardner committed a prohibited practice, in violation of Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E, by refusing to execute a lawful provision concerning the means of achieving a reduction in force contained in the 1983-1985 collective bargaining agreement, which was duly negotiated with the Gardner Firefighters, Local 2215, International Association of Fire Fighters.

Section 6 of Chapter 150E requires that the City of Gardner negotiate in good faith with Gardner Firefighters, Local 2215 with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment.

WE WILL INCLUDE subparagraph (1) of Article XXIV "Health and Safety" in the executed version of the 1983-1985 collective bargaining agreement with the Gardner Firefighters, Local 2215.

WE WILL BARGAIN in good faith with the Gardner Firefighters, Local 2215.

_____
MAYOR, CITY OF GARDNER