WHITTIER REGIONAL SCHOOL COMMITTEE AND WHITTIER REGIONAL TEACHERS ASSOCIATION, MUP-5150 (12/11/86).

22.2	pre-award deferral
27.1	prohibited practice
28.	Relationship Between c.150E and Other Statutes Not Enforced by Commission
54.5711	agency service fee
65.93	refusal to enforce agency service fee
65.94	employer's unilateral determination of amount of agency service fee
82.1	affirmative action

Commissioners participating:

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

Appearances:

Robert P. Rudolph, Esq.	- Representing the Whittier Regional School Committee
Brian A. Riley, Esq.	- Representing the Whittier Regional Teachers Association

DECISION

Statement of the Case

At issue in this case is whether the Whittier Regional School Committee (School Committee) violated Sections 10(a)(1), (2), and (5) of Massachusetts General Laws, Chapter 150E (the Law) by failing to take action against a teacher[1] who failed to pay an agency service fee required as a condition of employment in a collective bargaining agreement between the School Committee and the Whittier Regional Teachers Association (Association).

On March 7, 1983, the Association filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the School Committee had violated Sections 10(a)(1), (2), (3), and (5) of the Law by refusing to discharge two teachers who failed to pay an agency service fee required as a condition of their employment. Pursuant to its authority under Section 11 of the Law, the Commission

[1] The charge alleged School Committee conduct toward two teachers, one of whom is Joseph Lyons. On November 3, 1986 the Whittier Regional Teachers Association requested permission to withdraw that portion of the charge that relates to Lyons. The request is hereby allowed and therefore the School Committee's conduct with respect to Lyons is not the subject of this charge.

investigated the Association's charge and on April 26, 1983 issued its own Complaint and Notice of Hearing alleging that the School Committee had violated Sections 10(a)(1), (2), and (5) of the Law.

On May 24, 1983 and March 13, 1984, a Formal Hearing was held before Hearing Officer Sarah Kerr Garraty. The parties subsequently submitted briefs, which have been considered along with the evidence in the case.[2] As discussed below, we find that the School Committee has violated Sections 10(a)(5) and (1) of the Law by repudiating a provision of its collective bargaining agreement with the Association which required employees to pay either Association dues or an agency service fee as a condition of employment. In addition, we find that the School Committee has interfered with the administration of the Association in violation of Section 10(a)(2) of the Law, by attempting unilaterally to determine the amount of the Association's agency service fee.

Jurisdictional Findings

1. The School Committee is a public employer within the meaning of Section 1 of the Law.

2. The Association is an employee organization within the meaning of Section 1 of the Law.

3. The Association is the exclusive bargaining representative of certain employees of the School Committee, including teachers.

Findings of Fact

The School Committee and the Association were parties to a collective bargaining agreement in effect from September 1, 1982 through August 31, 1983. This agreement contained an agency service fee provision which read as follows:

> 3-04 As a condition of his continued employment, every teacher, if and when not a member in good standing of the Association, shall pay or, by payroll deduction, have paid to the Association an agency fee of an amount to be determined by the Association, but in no event in excess of its dues, provided however, that in no case shall such

[2] At the hearing on May 24, 1983, Joseph Lyons, one of the teachers who had allegedly refused to pay the agency service fee, moved to intervene in the proceedings before the Commission. On February 14, 1984, the Commission denied Lyons' Motion to Intervene. On May 2, 1984, Lyons moved for permission to permit the filing of a brief amicus curiae. The Commission hereby grants permission to Lyons to file a brief amicus curiae.

> conditions arise before the thirtieth day next following the date of the teacher's employment or the effective date of this Agreement, whichever date shall be the later.

Both Carl O'Brien and Joseph Lyons were employed as teachers by the School Committee during the 1982-83 school year. During the 1982-83 school year, Association dues and the agency service fee were each set at $217 per year. This constituted $17 for the local Association, $145 for the MTA, and $55 for the NEA. Pursuant to Articles 3(2) and 6(1) of the Association's Bylaws, membership in the MTA and the NEA was a precondition to membership in the local Association.

In August 1982, the Association mailed a notice to all bargaining unit members notifying them that a meeting would be held on September 7, 1982 to ratify a new collective bargaining agreement containing an agency service fee provision. On October 22, 1982, Association Treasurer Paul Charron sent a letter to members who did not have their dues automatically deducted and to agency service payers, reminding them that the dues or fees were payable by December 1, 1982. A second reminder of the due date of dues or agency fees was posted by Charron on November 23, 1982. O'Brien did not pay the fee by December 1.

On February 2, 1983, Association President Joanne Crawley sent a registered letter to O'Brien demanding payment of the 1982-83 agency service fee and warning him that failure to pay the fee would result in the Association formally requesting the School Committee to terminate his employment. Enclosed with the letter were the Commission's Rules and regulations regarding agency service fees, 402 CMR 17.00.

At some point prior to April 16, 1983, O'Brien attempted to tender $167 to the Association in lieu of the full amount demanded. On March 3, 1983, the check was returned by the Association on the ground that the agency service fee was $217. Lyons did not tender the full amount of dues demanded either.

On February 17, 1983, Joanne Crawley wrote the following letter to Superintendent of Schools Richard Kay:

> Dear Mr. Kay:
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> This letter is to inform you that Mr. Carl O'Brien and Mr. Joseph Lyons are not members in good standing in the Whittier Regional Teachers Association and have not paid the agency fee as required by Article 3 of the Agreement and Labor Relations Commission Regulations, 402 CMR 1700 effective December 9, 1982.
>
> Mr. Carl O'Brien, Miss Marian Hannenian and Mr. Joseph Lyons were informed by registered mail of this ruling with a copy enclosed on February 2, 1983. To date only Miss Hannenian has responded.
>
> Pursuant (sic) to your obligations as Superintendent Director, the Whittier Regional Teachers Association hereby requests that you

> immediately begin dismissal proceedings against Mr. O'Brien and Mr. Lyons.
>
> Your prompt response and attention to this matter is appreciated.

Kay responded on February 22, 1983, and attached a May 1982 letter from School Committee attorney Robert P. Rudolph. The letter, which had been written to Association grievance chair Alfred Poirier regarding Lyons' failure to pay the fee during the previous (1981-1982) school year, read as follows:

> Dear Mr. Poirier:
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> In response to your letter regarding Joseph Lyons, this will advise you that the Whittier School Committee is not in a position to take any action in regard to his employment until such time as the factual and legal issues regarding the Associations [sic] refusal to accept the payment of the service fee and the determination of the amount of the service fee have been resolved by either the American Arbitration Association, Essex County Superior Court or Labor Relations Commission.
>
> Thank you for your courtesy.[3]

On March 3, 1983, Association Grievance Chairman Leland Brennan wrote another letter to Superintendent Kay outlining the Association's compliance with the contract and the Commission's Rules and Regulations regarding demand for payment of agency service fees. Brennan noted that neither Lyons nor O'Brien had complied with the contractual requirements for payment of the fee, and concluded: "[s]ince the Association has fulfilled its obligations under the contract and the Labor Relations Commission ruling, the question now remains under what conditions and at what time can we expect you to do likewise?" Kay responded that he would not comment further, since this case by then was pending before the Commission.

On April 15, 1983, Brennan wrote a second letter to Kay demanding that Lyons and O'Brien be discharged for failure to pay the agency service fee. He noted that neither had filed a timely charge challenging the amount of the fee. O'Brien never filed an unfair labor practice charge protesting the amount of the fee.[4] The School Committee has continued to refuse to take any adverse action against O'Brien for his failure to pay the agency service fee.

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[3] In 1982, there was pending an arbitration case regarding the interpretation of Article 3-04 (the agency service fee provision). Sometime thereafter, the parties mutually agreed to withdraw this case and settle their dispute through the Commission's procedures instead.

[4] Pursuant to 402 CMR Section 17.00 et. seq. employees may challenge the agency service fee demanded of them by filing an unfair labor practice charge with the Commission.

Whittier Regional School Committee and Whittier Regional Teachers Association, 13 MLC 1325

Opinion

The agency service fee provision in effect between the Association and the School Committee during the 1982-1983 school year required bargaining unit members who did not join the Association to pay an agency service fee "[a]s a condition of continued employment." The Association argues that this language clearly demonstrated the parties' intent that the School Committee would discharge employees who refused to pay the agency service fee. Although neither party offered any evidence of the bargaining history of this clause, the Association argued that Section 12 of the Law mandates termination for any employee who fails to pay an agency service fee.

Section 12 of the Law provides that

> [t]he commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment...of a service fee to the employee organization which is in accordance with the provisions of this chapter....

The Commission has previously held, however, that the language of Section 12 to which the Association refers does not require the discharge of an employee. Massachusetts Board of Regents of Higher Education, 10 MLC 1048 (1983). Rather, Section 12 merely sanctions discharge as a consequence of an employee's failure to pay an agency service fee. Id. at 1050-51, and cases cited therein.

The parties to the collective bargaining agreement are free to negotiate the form of sanctions to be applied to an employee who fails or refuses to pay the agency service fee and to assign any meaning to the language used in their contract. It is apparent that the parties intended some meaning to the requirement that employees pay an agency service fee "as a condition of continued employment." In this case, the Association argues that the parties intended that the Employer would discharge employees who did not pay their agency service fee and the Employer does not dispute this contention. The meaning urged by the Association, and not contested by the Employer, seems to us a reasonable interpretation of the parties' contract. While contract interpretation is not the regular business of the Commission, collective bargaining agreements will be analyzed when necessary to resolve prohibited practice charges. Lawrence School Committee, 4 MLC 1837, 1839 (1978). Accordingly, we conclude that the collective bargaining agreement required the Employer to terminate employees who had not paid agency service fees.

The School Committee argues, however, that the Law and the Commission's Regulations establish certain pre-conditions to termination for non-payment of the fee. Specifically, the School Committee asserts that the following factors caused the School Committee to conclude that O'Brien had not failed to pay the necessary fee and should mitigate against a finding that the School Committee has failed to comply with the contract: 1) the Association's demand for termination was premature since, at the time of the demand, O'Brien had not exhausted his right to challenge the service fee by filing a charge with the Commission' and 2) O'Brien had not refused to pay the contractually required service fee since he had tendered $17 to the Association. We address these arguments below.

It is undisputed that the Association initially demanded that the School Committee discharge O'Brien for failure to pay his service fees only fifteen days after it had demanded payment of the fee. At that time, pursuant to the Commission's regulations, 402 CMR 17.06(1) and (2),[5] O'Brien still had approximately thirty additional days in which to file a charge with the Commission challenging the validity or amount of the fee. Thus, the School Committee was under no obligation to take any action against O'Brien on Feburary 17, 1983, when the Association first requested that it do so. The Association made subsequent demands for termination on March 3 and April 15, 1983. Employee O'Brien never filed a charge with the Commission. Therefore, we cannot find that the School Committee's failure to terminate O'Brien was due to the pendency of a charge with the Commission.[6]

The School Committee's second defense is similarly defective. In essence, by maintaining that the employees by their offer of $17 had already tendered their fee in accordance with the agreement, the School Committee asserts that the collective bargaining agreement permits the School Committee to unilaterally determine whether an employee has "paid to the Association an agency fee of an amount to be determined by the Association." The plain language of the contract belies the School Committee's contention that it, not the Association, can determine that the $17 tendered by O'Brien constituted payment of the required agency fee. By the language of the contract, the School Committee agreed to require employees, as a condition of "continued employment," to pay the Association "an agency fee of an amount to be determined by the Association but in no event in excess of its dues.[7] The Association determined that the amount of the fee for 1982-83 was $217. The School Committee was aware that O'Brien had not paid the full amount and that the Association was not accepting the $17 offer as payment of the fee.[8] Pursuant to the School Committee's collective bargaining obligations, the School Committee was obligated to accede to the Association's request for termination.

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[5]The Commission's Regulation, 402 CMR 17.06(2), has since been amended to expand the time limit for filing agency fee charges from forty-five (45) days to six months after the union's demand for payment of the fee. The amendment was required to comport with the decision of the Supreme Judicial Court in Lyons v. Labor Relations Commission, 397 Mass. 498 (1986).

[6]Commission Regulation 17.16 states, inter alia, "[n]o employee who has filed a charge with the Commission and established an escrow account, if required...shall be terminated for failure to pay the service fee during the pendency of the charge before the Commission." (emphasis added).

[7]The School Committee argues that the reference in the contract to "its dues" means the dues of the Association only, not including its affiliates, the MTA and the NEA. Not only do we find no support in the language of the contract for this restrictive interpretation, but we also note that an employee could not maintain membership in the Association without also maintaining membership in and paying dues to the MTA and the NEA. Moreover, we note that the practice of the Association since 1980 had been to demand the full amount of Association dues, including dues for affiliates, and to reject offers to pay less than the full amount.

(8, see page 1331)

In its brief, the School Committee infers that it would have violated the statutory or Constitutional rights of the employee had it terminated O'Brien before the Commission made a determination of the permissible amount of his agency service fees. We disagree. The Commission's Regulations specify that employees shall be protected from termination during the pendency of their agency service fee charges at the Commission. If an employee fails to avail her or himself of the Commission's procedures and no charge is pending when the employer is required to comply with its contractual obligations, the employer may not assert theoretical employee rights in defense of its refusal to abide by its contract.[9] In the future the School Committee may protect itself from these concerns by proposing the inclusion of contractual language which would anticipate these issues.[10] For the present, the School Committee must honor its contractual commitment.

The School Committee also argues that even if it did violate its collective bargaining agreement with the Association, the breach should be remedied through the grievance arbitration process rather than through an unfair labor practice proceeding.[11] We disagree. As is apparent from our discussion so far, the School Committee's contractual commitment in this case is closely intertwined with statutory and regulatory concerns affecting agency fee payers. Deferral to the arbitration

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8 (from page 1330)
The Commission's Regulations support the Association's claim that the employee had not paid the fee merely by offering to pay $17. 402 CMR 17.16(1) specifies that "no employee shall be terminated who has tendered the required agency service fee prior to the decision to terminate...." 402 CMR 17.16(1). But "tender" is defined in 402 CMR 17.02 as the "actual production and unconditional offer to a representative of the bargaining agent of an amount of no less than the amount demanded as a service fee." See Leominster Education Association, 9 MLC 1114, 1133 (1982).

[9]Only the employee has the right to challenge the fee demanded of her or him. The employer has a duty to bargain in good faith. The distinction between the employee's right and the employer's duty is graphically illustrated in this case. While we sympathize with the employer's concern for an employee's statutory rights, the employer may not breach its bargaining duty in order to assert the employee's rights. If the time for filing a challenge to the fee has passed, the employer must comply with its contractual commitment.

[10]Some collective bargaining agreements specify that the union may not demand the employee's termination within a certain time period (e.g., the time for filing a charge with the Commission) from the date that the Union demands payment. Some collective bargaining agreements contain indemnification clauses in which the union agrees to indemnify the employer for liability incurred as a result of the employer's compliance with the union's request for termination.

[11]To the extent that the School Committee is contesting the Commission's jurisdiction to consider the allegations of a breach of contract we must also reject that argument. As the United States Supreme Court has noted when considering a similar challenge to the jurisdiction of our federal counterpart, the National Labor

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procedure is a matter of the Commission's discretion. Generally, the Commission defers when the issue posed by the unfair labor practice case is essentially a question of contract interpretation, the statutory issues raised by the case are well established, and the resources of the Commission and the parties can be conserved through deferral.[12] In this case, we perceive no advantage to bifurcation of the proceedings to refer to an arbitrator the question of an appropriate remedy. The parties have already litigated the case before the Commission, and we find no reason not to rule on the issues.[13]

We turn now to the central issue in this case: whether an employer violates M.G.L. c.150E by failing to comply with a contractual obligation to take action against a delinquent agency service fee payer. The Commission has previously stated that the penalty for non-payment of an agency fee, like other aspects of the fee, is a mandatory subject of bargaining. Massachusetts Board of Regents of Higher Education, supra at 1050. The parties were free to bargain an agency fee provision in their collective bargaining agreement that provides for termination as the penalty for non-payment of the agency fee. By refusing to adhere to the provisions of the agency fee clause contained in that agreement, the School Committee has abrogated that provision and in effect has partially repudiated its collective bargaining relationship. That conduct constitutes a violation of Sections 10(a)(5) and (1) of the Law. County of Suffolk, 8 MLC 1573, 1578 (1981), aff'd. in pertinent part 15 Mass. App. Ct. 127 (1983). See NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) (interpreting National Labor Relations Act); Morelli Construction Company, 240 NLRB 1190 (1979); Oak Cliff-Golman Baking Company, 207 NLRB 1063 (1973), aff'd. 90 LRRM 2615 (1974).

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11 (continued)
Relations Board: "the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, has not exceeded the jurisdiction laid out for it by Congress." NLRB v. C & C Plywood Corp., 385 U.S. 421, ____, 64 LRRM 2065, 2068 (1967). "...[T]he Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." NLRB v. Strong Roofing and Insulation Co., 393 U.S., 357, 360-61, 70 LRRM 2100, 2101 (1969) (and cases cited therein).

[12] After an arbitration award has been issued, the Commission will defer to an award that meets certain procedural and substantive standards. e.g., City of Boston, 11 MLC 1339 (1985).

[13] The School Committee also argues that the Commission lacks the statutory jurisdiction to order it to discharge a tenured teacher, since M.G.L. c.71 confers that authority solely upon the School Committee. In other contexts the Massachusetts Supreme Judicial Court has held that M.G.L. c.71 does not preclude the Commission from remedying violations of M.G.L. c.150E, Section 10. Southern Worcester County Regional Vocational School District, 386 Mass. 414, 421-424, (1982); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 566 (1983).

In the private sector, the National Labor Relations Board and the Federal Courts have held that an employer's failure to abide by a contractual union-security provision constitutes bad faith bargaining within the meaning of Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended. See, e.g., California Blowpipe and Steel Co., Inc., 218 NLRB 736 (1975), enf'd. 93 LRRM 2842 (D.C. Cir. 1976); Albert Van Luit & Co., 234 NLRB 1087 (1978), enf'd. 597 F.2d 681, 101 LRRM 2734 (1978) (unilateral repudiation of a check-off provision); King Electric Manufacturers, 229 NLRB 615, 96 LRRM 1370 (1977). This conclusion has been based largely upon the belief that abrogation of a union security provision:

> ...is the type of conduct which by its very nature is designed to interfere with the union's statutory duty to represent all unit employees and also has a tendency to undermine the union. As a practical matter the Respondent's repudiation of the union-security agreement constitutes a deathblow to the union in its role of bargaining representative by allowing employees a 'free ride' and, as such, comes close to repudiation of the collective bargaining relationship between the Respondent and the union.

California Blowpipe, 218 NLRB at 748.

We are similarly persuaded that by failing to enforce a contractual agency service fee provision, an employer seriously undermines the position of the union as exclusive bargaining representative. A union incurs costs in both negotiating and administering a collective bargaining agreement. These costs benefit union members and non-members alike. The function of an agency service fee provision is to ensure that those who elect not to join a union nevertheless pay their share of the union's collective bargaining and contract administrative expenses. Were the Commission to sanction an employer's refusal to enforce such a provision, this would both undermine the financial status of the union and encourage employees to shirk their responsibility to pay their proportional share of the union's legitimate costs. Thus, we conclude that, by abrogating an agency service fee provision, a public employer violates Sections 10(a)(5) and (1) of the Law.

The Association argues that an employer's refusal to enforce an agency service fee provision interferes with the existence and administration of a union by depriving it of economic benefit, in violation of Section 10(a)(2) of the Law. Although an employer's refusal to enforce an agency service fee requirement is not a per se violation of Section 10(a)(2) of the Law, in this case we find that the School Committee went further. The School Committee assumed to itself the right to determine the amount of the required service fee when it took the position that O'Brien had paid the fee by his tender of $17. In effect, the School Committee attempted unilaterally to set the amount of the agency service fee which could be charged by the Association. We conclude that the School Committee's attempted unilateral determination of the amount of a service fee which the Association may charge, coupled with the refusal to fulfill the terms of the collective bargaining agreement, demonstrates interference with the administration of the Association. Cf. Commonwealth of Massachusetts, Commissioner of Administration, 6 MLC 1054 (1979)

(Commission declined to find Section 10(a)(2) violation in absence of evidence of impact of employer's action on union).

CONCLUSION

Accordingly, we conclude that the School Committee failed or refused to bargain in good faith, in violation of Sections 10(a)(5) and (1) of the Law by repudiating terms of its collective bargaining agreement with the Association. The School Committee also has interfered with the administration of the Association, in violation of Section 10(a)(2) of the Law by attempting unilaterally to establish the amount of the Association's agency service fee.

ORDER

WHEREFORE, on the basis of the foregoing, IT IS HEREBY ORDERED that the Whittier Regional School Committee shall:

1. Cease and desist from:

   a. Abrogating its contractual duty to enforce the agency service fee provision of its collective bargaining agreement with the Whittier Regional Teachers Association;

   b. Interfering with the existence and administration of the Whittier Regional Teachers Association by refusing to enforce the agency service fee provision of its collective bargaining agreement;

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

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

   a. Adhere to the provisions of the agency service fee clause contained in its collective bargaining agreement with the Whittier Regional Teachers Association;

   b. Comply with the Association's request made pursuant to the agency fee provisions of the collective bargaining agreement with the Association to terminate Carl O'Brien for failure to pay the agency service fee demanded by the Association for the 1982-1983 school year;

   c. Post in conspicuous places where teachers 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;

d. 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. EDGAR, Chairman
MARIA C. WALSH, Commissioner

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

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has issued a decision finding that the Whittier Regional School Committee has violated Sections 10(a)(1), (2) and (5) of Massachusetts General Laws, Chapter 150E by abrogating its contractual obligation to enforce the agency service fee provision of its collective bargaining agreement with the Whittier Regional Teachers Association and by interfering with the administration of the Association. The Commission concluded that we had failed to take action against a teacher who failed or refused to pay the agency service fee demanded of him. In compliance with the Commission's order,

WE WILL NOT abrogate our contractual duty to enforce the agency service fee provision of our collective bargaining agreement with the Whittier Regional Reachers Association; in any like way interfere with, restrain, or coerce employees in the exercise of their rights under G.L. c.150E; or interfere with the existence and administration of the Whittier Regional Teachers Association by refusing to enforce the agency service fee provision in our collective bargaining agreement with the Association.

WE WILL adhere to the provisions of the agency service fee provision contained in our collective bargaining agreement with the Whittier Regional Teachers Association.

WE WILL comply with the Association's demand made pursuant to the provisions of our 1982-1983 collective bargaining agreement with the Whittier Regional Teachers Association that we terminate a teacher who failed to pay his agency service fees for the 1982-1983 school year.

For the Whittier Regional School Committee