BOSTON SCHOOL COMMITTEE AND BOSTON PUBLIC SCHOOL BUILDING CUSTODIANS' ASSOCIATION, MUP-7210 (7/13/90). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

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Commissioner participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, commissioner

Appearances:

Marcia E. Adams, Esq. - Representing the Boston School Committee

Matthew E. Dwyer, Esq. - Representing the Boston Public School Building Custodians' Association

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

Hearing Officer John B. Cochran issued his decision in this case on June 5, 1989.[1] He found that the Boston School Committee had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. c.150E (the Law) when it transferred certain mailroom duties previously performed by elevator operators at School Committee headquarters to non-bargaining unit employees, without giving prior notice or opportunity to bargain to the representative of the elevator operators, Boston Public School Building Custodians' Association (the Association). Subsequent to the issuance of the hearing officer's decision, the School Committee filed a Motion for Reconsideration and Request for rehearing, asserting that its counsel had just discovered a relevant appendix to the parties' collective bargaining agreement, evidence of which arguably would establish the School Committee's right to modify the duties of elevator operators. The hearing officer denied the Motion and refused to reopen the hearing on the ground that in the exercise of due diligence the School Committee could reasonably have been expected to discover the existence of this contract language prior to the conclusion of the hearing in this case. He also noted that, even if proven, the School Committee's right to modify unit duties

[1] The full text of the hearing officer's decision appears at 16 MLC 1012.

would not necessarily obviate its obligation to bargain concerning a decision to transfer those duties out of the bargaining unit.[2]

The School Committee appealed the hearing officer's decision, but filed no supplementary statement pursuant to 456 CMR 13.13. Instead it chose to rely upon the assertions contained in its Motion for Reconsideration and Request for Rehearing. The Association has not appealed the hearing officer's decision.

After having considered the arguments of the parties and reviewed the record, we affirm the hearing officer's decision and order.

Findings of Fact

Since neither party has challenged the hearing officer's findings of fact, we adopt those findings for purposes of our review.[3] The relevant facts are summarized as follows.[4]

The Association is the exclusive representative for a bargaining unit comprised of senior custodians, junior custodians, janitresses and elevator operators. The Association and the School Committee are parties to a collective bargaining agreement covering this unit that is effective from September 1, 1986 to August 31, 1989. In the early 1970's, the School Committee moved its headquarters from 15 Beacon Street to the present location at 26 Court Street, Boston. Because the elevators at 26 Court Street are operated electronically, the two elevator operators who had operated the manual elevators at the former Beacon Street location were assigned to work in the mailroom at Court Street. The mailroom duties performed by the elevator operators included sorting and distributing incoming mail and packages throughout the eleven-floor headquarters building, stamping and weighing all outgoing postal mail, and sorting outgoing courier mail to be

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2 The hearing officer's ruling on the motion is reported at 16 MLC 1075.

3 When no party files a supplementary statement that identifies specific findings of fact which are claimed to be erroneous, the Commission may limit its review on appeal of hearing officer's decision to a review of the hearing officer's conclusions of law. Medford School Committee, 16 MLC 1549 (1990); Town of Dedham, 4 MLC 1720 (1977).

4 The hearing officer made additional findings of fact regarding a separate allegation of unlawful subcontracting of unit work belonging to another bargaining unit. We will not consider those facts because the hearing officer found no violation of the Law with respect to this allegation, and no party has appealed that portion of the hearing officer's decision.

delivered throughout the school system. The elevator operators performed these mailroom duties exclusively until the fall of 1988.

In October, 1988, one of the elevator operators died, leaving only one elevator operator working in the mailroom. The School Committee decided not to fill the vacant elevator operator position. Consequently, the School Committee's business manager, Leo Burke, who is not a member of the bargaining unit, began to assist in sorting the mail; and non-unit secretaries from the various departments located at Court Street began to pick up the mail for their departments directly at the mailroom. The remaining elevator operator, Seymour Cohen, continued to deliver packages throughout the headquarters building, but neither he nor any other employee in the custodians' bargaining unit delivered mail within the building after October, 1988. Since that time, Burke has assigned non-unit employees from the School Committee's Purchasing Department to fill in for Cohen when he is sick. The School Committee has not offered Cohen any overtime since October, 1988.

The negotiations for the most recent collective bargaining agreement between the School Committee and the custodians' bargaining unit were concluded in February 1988. During those negotiations the parties did not discuss transferring any of the mailroom work performed by the elevator operators to non-bargaining unit personnel. Association president Paul Wood first became aware that non-bargaining unit employees were doing mail sorting and delivery when he received a copy of a grievance filed by another union alleging that employees it represented were being required to perform custodial work in the mailroom at School Committee headquarters.

Opinion

The hearing officer concluded that in October, 1988, the School Committee transferred mailroom work performed by elevator operators represented by the Association to non-unit employees when the Business Manager, various secretaries and purchasing department personnel began to perform some elevator operator duties. He also found that the School Committee did not give the Association prior notice of, or an opportunity to bargain about this transfer of unit work. On appeal, the School Committee appears only to renew its post-hearing argument, made to and rejected by the hearing officer, that the record should be reopened in order to receive into evidence an appendix to the parties' collective bargaining agreement. Thus the School Committee's appeal seeks reversal of the hearing officer's ruling to not reopen the hearing to include the appendix.

In its motion requesting reopening of the record, the School Committee contended that it had only become aware of the proffered appendix after receipt of the hearing officer's decision. A party who seeks to reopen a hearing to submit newly discovered evidence must demonstrate that it was excusably ignorant of the existence of the evidence at the time of the hearing despite the exercise of due diligence. Boston City Hospital, 11 MLC 1065, 1075 (1984) (and cases cited therein).

The School Committee has not explained why the appendix could not have been discovered or produced until after the issuance of the adverse hearing officer decision. In fact, the Committee had requested and received additional time before the hearing closed to submit evidence of an alleged agreement between the parties concerning elevator operator duties, but failed to offer the evidence. See 16 MLC at 1076, n.1. In this case, we cannot conclude the School Committee has demonstrated that with the exercise of reasonable diligence it could not have discovered this evidence before the hearing concluded. An appendix to the currently applicable collective bargaining agreement clearly existed when the hearing was conducted, and should have been discovered with minimal exercise of due diligence by the School Committee in preparing and presenting its case before the Commission. Thus we see no reason to disturb the hearing officer's ruling that the School Committee's failure to have offered the appendix into evidence at the hearing does not justify reopening the record. To reopen the record under these circumstances would erode the finality of Commission proceedings and effectively discourage parties from securing and presenting all available relevant evidence at the hearing. Town of Wayland, 5 MLC 1738, 1740 (1979). Consequently, we affirm the hearing officer's denial of the School Committee's Motion for Reconsideration and Request for Rehearing.

Having affirmed the hearing officer's ruling on the motion to reopen the record, we also affirm the hearing officer's decision based upon the record evidence. The School Committee does not contend on appeal that the hearing officer erred as a matter of law in finding that I unlawfully transferred to non-unit employees bargaining unit work formerly performed by the elevator operators in the mailroom, and we perceive no error in his conclusion.

Accordingly, we find that the School Committee violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law when it transferred mailroom duties previously performed by unit employees to non-bargaining unit personnel, without affording the Association prior notice and an opportunity to bargain.

Order

Wherefore, based upon the foregoing,

IT IS HEREBY ORDERED, that the Boston School Committee shall:

1. Immediately cease and desist from:

   a. Unilaterally transferring work previously performed by employees in the custodians' unit represented by the Boston Public School Building Custodians' Association to non-bargaining unit personnel, including mailroom work at the School Committee's Court Street headquarters, without first giving notice to and an opportunity to bargain to resolution or impasse to the Boston Public School Building Custodians' Association.

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

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

a. Restore to the custodians' bargaining unit represented by the Boston Public School Building Custodians' Association all mailroom work formerly performed by the elevator operators at the School Committee's Court Street headquarters, including sorting, handling, and delivering incoming and outgoing postal and courier mail.

b. Upon request, bargain collectively with the Boston Public School Building Custodians' Association to resolution or impasse over the decision to transfer to non-bargaining unit personnel mailroom work at the School Committee's Court Street headquarters that had previously been performed by members of the custodians' bargaining unit.

c. Make whole any unit employee who suffered a loss of pay or benefits as a direct result of the School Committee's decision to transfer mailroom work at its Court Street headquarters to non-bargaining unit personnel, plus interest on any sums owing at the rate specified in Everett School Committee, 10 MLC 1609 (1984).

d. Immediately sign and post, and leave posted for a period of thirty (30) consecutive days, copies of the attached Notice to Employees in all conspicuous places where notices to employees are usually posted and where employees usually congregate.

e. Notify the Commission in writing within thirty (30) days of service of this Order of the steps taken to comply with it.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

Boston School Committee and Boston Public School Building Custodians' Association, 17 MLC 1118

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 Boston School Committee has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E by transferring mailroom work previously performed by elevator operators at the School Committee's Court Street headquarters to non-unit personnel, without first providing the Boston Public School Building Custodians' Association (Association), the exclusive bargaining representative of the elevator operators, with notice and an opportunity to bargain over that decision.

WE WILL NOT transfer bargaining unit work to non-bargaining unit personnel without first giving the Association prior notice and an opportunity to bargain to resolution or impasse about that decision.

WE WILL NOT refuse to bargain in good faith with the Association over the decision to transfer mailroom work previously performed by elevator operators at the School Committee's Court Street headquarters to non-unit personnel.

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

WE WILL restore to the Association's bargaining unit the mailroom work previously performed by elevator operators at the School Committee's Court Street headquarters that had been unlawfully transferred to non-unit personnel.

WE WILL make whole any unit employee who suffered a loss of pay or benefits as a direct result of the School Committee's decision to transfer mailroom work previously performed at its Court Street headquarters to non-unit personnel.

WE WILL, upon request bargain in good faith to resolution or impasse with the Association over the decision to transfer mailroom work previously performed by elevator operators at the School Committee's Court Street headquarters to personnel outside of the bargaining unit represented by the Association.

SUPERINTENDENT OF SCHOOLS