COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF ADMINISTRATION AND FINANCE AND MCOFU, SUP-3462 AND SUP-3508 (7/29/93). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

28.	Relationship Between c. 150E and Other Statutes Not Enforced by Commission
52.331	rights of successor union under predecessor's contract
52.332	arbitration under expired contract
54.55	past practices
54.8	mandatory subjects
64.1	assistance to union
65.9	other interference with union
67.621	refusal to bargain based on change of union affiliation
67.8	unilateral change by employer
68.	Refusal to Participate in Arbitration
68.2	refusal to discuss grievances
82.12	other affirmative action
82.3	status quo ante
92.51	appeals to full commission

Commissioners participating:[1]

Maria C. Walsh, Chairperson
William J. Dalton, Commissioner

Appearances:

Rosemary Ford, Esq. Joseph M. Daly, Esq.	- Representing the Commonwealth of Massachusetts
Matthew E. Dwyer, Esq.	- Representing the Massachusetts Correction Officers Federated Union

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[1] Commissioner William G. Hayward, Jr. recused himself from any consideration of the instant case.

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DECISION ON APPEAL OF HEARING OFFICER'S DECISION

On April 1, 1991, Hearing Officer Robert B. McCormack, Esquire issued a hearing officer decision in which he ruled that the Commonwealth of Massachusetts had violated various aspects of the public employee collective bargaining law, Mass. Gen. L. c.150E (the Law).[2] Specifically, the hearing officer found that the Commonwealth had violated the Law by, inter alia, communicating with one labor organization concerning grievances filed on behalf of employees in Commonwealth bargaining unit 4 after the date when another labor organization, the Massachusetts Correction Officers Federated Union (MCOFU) was certified as the exclusive representative of bargaining unit 4, and refusing to participate in the arbitration of certain grievances.[3]

The Commonwealth filed a timely appeal from the above-referenced portions of the hearing officer's decision and order. We have reviewed the appealed portions of the hearing officer's decision and order and have decided to AFFIRM the hearing officer. We have reviewed the facts found by the hearing officer[4] and hereby affirm the facts material to this decision which are briefly summarized below.

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2 The hearing officer's decision is published at 17 MLC 1615.

3 The hearing officer also concluded that the Commonwealth had violated the Law by the following conduct: unilaterally changing release time practices by denying MCOFU representatives reasonable release time to investigate and process grievances, by denying MCOFU representatives paid release time to attend labor-management meetings, and by denying MCOFU permission to conduct meetings on state-owned premises; and failing to apply certain laws regulating leaves of absence to a representative of another labor organization. The Commonwealth has not appealed these aspects of the hearing officer's findings, conclusions, decision or order; and, therefore, we have not reviewed them.

4 Specific challenges by the Commonwealth to material factual findings of the hearing officer pursuant to the requirements of Commission Rule 13.15(5) are discussed below. The Commonwealth also articulated a general challenge to the "tone" of the

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DISCUSSION

The Association of Federal, State, County and Municipal Employees (AFSCME) represented the employees of state bargaining unit 4 from April 1976 until October 2, 1989, when MCOFU was certified as the exclusive collective bargaining representative of bargaining unit 4.

The most recent collective bargaining agreement was applicable by its own terms from April 1, 1986 through March 31, 1989 (herein referred to as the Agreement). The Agreement, signed by the Commonwealth and AFSCME, contained a duration clause that included the following language:

> Should a successor agreement not be executed March 31, 1989, this Agreement shall remain in full force and effect until a successor agreement is executed or an impasse in negotiations is reached.

Article 23A of the Agreement contained a multi-step Grievance Procedure culminating in final and binding arbitration. The Agreement defined a grievance as "any dispute concerning the application or interpretation of [the] agreement."[5]

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4 (continued)
hearing officer's findings, characterized by the Commonwealth as "defamatory," "liberally peppered with false accusations," and "an unwarranted hatchet job." We have reviewed the record before the hearing officer along with the hearing officer's findings and find neither support for the Commonwealth's characterizations nor error on the part of the hearing officer.

5 The Commonwealth challenges a hearing officer finding that the Agreement contained final and binding arbitration for employees electing to avail themselves of arbitration in lieu of appealing to the Civil Service Commission. The Commonwealth acknowledges that the Agreement specified that only the union may bring a case to arbitration; but apparently argues that the hearing officer erred by failing to conclude that the union also was obliged to waive the right to proceed in any other forum. Since the
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As of October 2, 1989, there were approximately 140 unresolved grievances which had been filed by AFSCME pursuant to the Agreement while AFSCME was the bargaining representative. At least two of the pending grievances had been scheduled by AFSCME and the Commonwealth for arbitration hearings.

When MCOFU was certified on October 2, 989, it requested that AFSCME transmit to MCOFU all pending unresolved grievance case files for bargaining unit 4. AFSCME provided most of the files to MCOFU on October 28, 1989.

On October 10, 1989, representatives of MCOFU and the Commonwealth met to discuss the transition in bargaining agents from AFSCME to MCOFU. MCOFU's attorney, Matthew E. Dwyer, asked the Commonwealth to arbitrate pending grievances which had arisen under the Agreement. Commonwealth representative John McKeon, Director of the Commonwealth Office of Employee Relations (OER), replied that the arbitration process was a benefit that AFSCME enjoyed as a union and was not a term or condition of employment that the Commonwealth would be required to maintain during the pendency of negotiations for a successor agreement. The Commonwealth initially refused to discuss or arbitrate with MCOFU any of the grievances filed by AFSCME. During further discussions, however, the Commonwealth agreed to process certain grievances through the Agreement's pre-arbitration steps. The Commonwealth continued to refuse to process any of the grievances to arbitration.[6]

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5 (continued)
possibility of proceeding on the grievances in a non-arbitral forum is not at issue in this case, we find the alleged error of the hearing officer immaterial to the issues before us.

6 The Commonwealth concedes the accuracy of the hearing officer's factual finding that the Commonwealth refused to arbitrate grievances with MCOFU; but argues that these findings "obfuscate what actually occurred." The Commonwealth emphasizes that AFSCME did not "assign its rights to grievance/arbitration to MCOFU; and, for that reason, the Commonwealth did not accede to MCOFU's demands for arbitration. The Commonwealth argues that its conduct was guided by an earlier decision of the hearing officer (discussed below) and was not undertaken in bad faith. The Commonwealth's
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By letter of November 21, 1989, addressed to both Attorney Dwyer and to AFSCME's general counsel, Augustus J. Camelio, OER attorney Joseph M. Daly announced that the Commonwealth's "obligation to process these grievances runs only to AFSCME (and to the grievants as individuals through Step 3 only)..."[7] The Commonwealth agreed to arbitrate two grievances only if Attorney Dwyer participated as an "agent" of AFSCME rather than as a representative of MCOFU. Attorney Dwyer responded on November 29, 1989, that MCOFU took the position that the commonwealth was obliged "to arbitrate and/or process grievances" with MCOFU as the exclusive collective bargaining representative.

In a February 21, 1990, letter to an arbitrator canceling the arbitrator's appointment to hear a grievance the Commonwealth explained its position as follows:

> ... Attorney Dwyer does not represent [AFSCME], and as such has no authority to demand arbitration with the Commonwealth over issues arising prior to the decertification of AFSCME, absent proof of his acting as the authorized agent of AFSCME.

In a February 21, 1990, letter to Attorney Dwyer, Commonwealth Attorney Daly explained:

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6 (continued)
challenge is therefore directed more to the conclusions to he drawn from the concededly accurate factual findings of the hearing officer, rather than to the findings themselves. We discuss below the conclusions to be drawn from the evidence.

7 In its appeal the Commonwealth argues that the Commonwealth bargained for substantive rights, including "the right to have the union interested in the welfare of the employee and all other similarly situated employees and privy to the bargaining history and intent behind the language involved in the arbitration process and for the right of precedential effect for soundly reasoned interpretation awards not merely for a non judicial process of dispute resolution" (emphasis in original). Our review of the Agreement and the record in this case fails to disclose evidence that such rights were stated in the Agreement or were discussed when the Agreement was negotiated. Accordingly, we have treated this portion of the Commonwealth's contentions as legal argument, rather than as a challenge to facts found by the hearing officer.

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> Since this case ... is a matter which was pending as of the date of certification of MCOFU, the Commonwealth's obligation to arbitrate this matter runs solely to the predecessor union. The case law in the Commonwealth is well settled on that point. Therefore, while we are ready and willing to fulfill that obligation with the prior bargaining agent, we feel it would be a violation of law for the Commonwealth to recognize MCOFU as the entity entitled to arbitrate this matter ... if this office receives written notice from the prior incumbent that it has delegated or assigned its right to arbitrate pre-certification matters to yourself (or anyone else) the Commonwealth would proceed to arbitration accordingly. Absent creation of such an agency, however, the Commonwealth cannot lawfully ignore the legal rights of the predecessor union without violating the law and incurring liability therefore.

The Commonwealth continued to deal with AFSCME concerning grievances pending at the arbitration step of the grievance procedure of the Agreement. On March 7, 1990, Attorney Augustus Camelio of AFSCME notified the Commonwealth by letter that OER Attorney Daly had sent arbitration notices concerning several grievances to AFSCME in error, "...AFSCME is not the certified bargaining representative and has transferred all pending cases to Attorney Matthew E. Dwyer." By letter of March 8, 1990, Daly asked AFSCME whether it was refusing to arbitrate the cases, or had assigned Attorney Dwyer to represent AFSCME. Attorney Camelio responded:

> I am in receipt of your letter of March 8, 1990 and have difficulty understanding its contents. As you know at the request of Attorney Matthew Dwyer, Representative for Massachusetts Correction Officers Federation Union and with the knowledge of the Office of Employee Relations, the General Counsel's office of Council 93 transmitted all pending matters involving Corrections to Attorney Dwyer. Until that request AFSCME Council 93, AFL-CIO was ready, willing and able to represent the cases to which you refer.

Approximately 120 other grievances were unanswered at Step III of the Agreement's grievance procedure as of the date of MCOFU's certification. Between October 2, 1989, and April 30, 1990, the Commonwealth continued to communicate with AFSCME concerning those grievances, providing Step III answers to AFSCME but not to MCOFU.

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The Commonwealth's refusal and/or failure to communicate directly with MCOFU took other forms as well. On December 26, 1989, Attorney Dwyer wrote to OER to inquire about the status of a grievance. OER never replied directly to Dwyer's inquiry; instead, the Commonwealth wrote to the employee, whose grievance originally had been filed when AFSCME was the certified bargaining agent, inviting him to schedule a Step III grievance conference. A copy of the OER letter to the employee was sent to Dwyer and marked "for informational purposes only." Similar letters were sent to other bargaining unit members.

Two days after MCOFU's certification AFSCME filed a Step III appeal in a grievance with OER. OER's Step III response, dated March 2, 1990, was sent to AFSCME, but not to MCOFU.[8]

OPINION

The Commonwealth argues that the hearing officer erred by imposing on the Commonwealth a duty to arbitrate with a new exclusive bargaining representative, not signatory to a collective bargaining agreement, grievances that arose under the agreement that were initiated by the predecessor union. The Commonwealth also argues that the hearing officer erred by concluding that the Commonwealth violated the Law by its continued communications with AFSCME concerning the grievances after the date of MCOFU's certification.[9]

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8 The employee, whose grievance was the subject of this communication, filed prohibited practice charges with the Commission against both AFSCME and MCOFU. Both charges were dismissed by the Commission in July 1990.

9 The commonwealth also objects to the hearing officer's extensive quotation of legal authority and reasoning from the brief filed by MCOFU in the case. The Commonwealth complains, understandably, that the hearing officer's extensive quotation from MCOFU's brief suggests that the hearing officer failed to exercise independent judgment in the case. While we appreciate the Commonwealth's concerns, we also note that the hearing officer addressed this issue at the outset of his opinion when he wrote, "I have adopted certain

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The precise situation in which the Commonwealth, AFSCME and MCOFU found themselves rarely arises; and it is understandable, given the fact that this is the first time that the Commission has had occasion to address the issue,[10] that the Commonwealth felt itself in a difficult position. Nonetheless, certain well-established principals of labor-management relations provide a clear guide to the resolution of this quandary.

While a collective bargaining agreement is in effect the employer and union who are signatory to the agreement must process grievances that arise under the agreement pursuant to the agreement's grievance procedure. See, e.g., Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers v. Lucus Flour Co., 369 U.S. 95, 49 LRRM 2717 (1962) (citing United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 46 LRRM 2416 (1960). Upon the expiration of the collective bargaining agreement the employer has a continuing obligation to complete the grievance process for grievances that arose under the agreement. Boston Lodge 264, Dist. 38, Intern. Ass'n of Machinists v. Mass. Bay Transport. Authority, 389 Mass. 819, 821 (1983); see also Nolde Bros., Inc. v. Bakery Workers, 420 U.S. 243, 251, 94 LRRM 2753 (1976) (citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964)). The arbitrator can apply the terms of the expired contract to resolve the grievances.[11]

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9 (continued)
language contained in the Union's brief, since I consider it both accurate and appropriately expressed." We find nothing in the hearing officer's quotation from the MCOFU brief that indicates that the hearing officer did not apply independent analysis to the facts of the case. Moreover, since our independent analysis of the case reaches the same conclusion as the hearing officer, we find no basis for reversing the hearing officer's conclusion.

10 The hearing officer acknowledged that he had previously considered a similar dilemma in a 1978 hearing officer decision involving the town of Chelmsford. That decision, however, was never considered by the Commission and therefore offered no binding precedent for any other parties or the hearing officer.

11 The Commonwealth contends on appeal that MCOFU would have "no obligation to preserve the integrity of [the] bargain [made by AFSCME and the Commonwealth]" and (continued)

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Had AFSCME continued to represent bargaining unit 4 after the expiration date of the collective bargaining agreement, the Commonwealth would have had a continuing duty to process the grievances through the procedure specified in the expired agreement. See Litton Financial Printing Div. v. NLRB, ____ U.S. ____, 111 S.Ct. 2215, 137 LRRM 2441 (1991). Indeed, the Commonwealth attempted to continue to process the grievances with AFSCME pursuant to the expired Agreement. Similarly, had AFSCME remained the exclusive collective bargaining representative of bargaining unit 4 after October 2, 1989, AFSCME would have had a continuing duty to fairly represent the grievants in the bargaining unit, including the duty to fairly process grievances that AFSCME had decided to pursue under the expired contract.

After October 2, 1989, however, AFSCME no longer represented the employees of bargaining unit 4.[12] Instead, MCOFU was the new exclusive collective bargaining

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11 (continued)
"... might not possess the knowledge that a claim is based on a faulty interpretation of contractual language given the bargaining history." Because a neutral arbitrator, selected by the Commonwealth and the exclusive collective bargaining representative, will interpret the contract, MCOFU's lack of familiarity with bargaining history may place it at a disadvantage, but is unlikely to interfere with the Commonwealth's right to a fair arbitral proceeding. The Commonwealth further complains that the arbitrations will "be precedential eunuchs" because the Commonwealth will be unable to rely upon them in the future. By this reasoning, all arbitrations with a union that later is decertified fit the Commonwealth's unflattering definition. As important as arbitration is to the creation of workplace precedent, it also plays a critical role in the resolution of specific disputes. the employees' right to be represented by their exclusive collective bargaining representative in the resolution of their workplace disputes is the focus of our decision in this case.

12 This case does not pose the question of whether a decertified union that has not been replaced by a new exclusive bargaining representative has any duty or right to continue to process grievances that arose under an expired contract. Nor need we consider whether an employer is obligated to complete a grievance arbitration process timely begun by a union that later is decertified in the absence of a new exclusive bargaining representative.
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representative of bargaining unit 4. Once MCOFU was certified by the Commission as the exclusive collective bargaining representative of bargaining unit 4, MCOFU, and only MCOFU had the right and duty to represent bargaining unit 4 employees in their dealings with the Commonwealth on subjects of collective bargaining. See generally, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 88 LRRM 2660 (1975); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 1 LRRM 703, 713 (1937); Modine Mfg. Co. v. Int'l Ass'n of Machinists, 216 F.2d 326, 329, 35 LRRM 2003 (6th Cir. 1954). Resolution of workplace disputes through the grievance arbitration procedure is part of the bargaining process in which an employer and a union agree on employee working conditions consistent with any applicable collective bargaining agreement. See generally United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960) quoted in Morceau v. Gould National Batteries, Inc., 344 Mass. 120, 126 (1962); Ayer School Committee, 4 MLC 1478, 1483 (1977). MCOFU had the right to evaluate the merits of grievances filed by another union before deciding whether the grievances warranted further processing (and the concomitant right to decline to proceed with a nonmeritorious grievance despite the fact that it had been filed by another union). Once MCOFU was certified, however, the Commonwealth had an obligation to deal only with MCOFU[13] concerning the previously filed grievances.[14]

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12 (continued)
See generally, UAW v. Telex Computer Products, 816 F.2d 519, 125 LRRM 2163, 2165 (10th Cir. 1987); United States Gypsum Co. v. United Steelworkers, 384 F.2d 38, 66 LRRM 2232 (5th Cir. 1967), cert. denied, 389 U.S. 1042 (1968); but cf. Retail Clerks v. Montgomery Ward & Co., 316 F.2d 754, 53 LRRM 2069 (7th Cir. 1963).

13 The Commonwealth suggests on appeal that it is entitled to require that AFSCME "screen" cases and control MCOFU's representation of employees in the grievance process. This suggestion would eviscerate MCOFU's status as the certified exclusive bargaining representative, and we decline to adopt it.

14 As the hearing officer correctly noted, the Agreement's broad definition of a grievance as "any dispute concerning the application or interpretation of the terms of [the (continued)

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By ignoring MCOFU after the date of MCOFU's certification and dealing instead with AFSCME concerning grievances, the Commonwealth failed and refused to recognize MCOFU's status as the exclusive bargaining representative and violated the duty imposed by G.L. c.150E to bargain only with the exclusive bargaining representative.[15]

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14 (continued)
Agreement]" did not limit the grievance arbitration procedure only to disputes that arose between AFSCME and the Commonwealth, but instead encompassed any dispute concerning the Agreement.

15 Although not raised by the parties we note that Mass. Gen. L. c.150C has been construed to grant standing to seek review of an arbitration award only to "parties to the collective bargaining agreement." Miller v. Board of Regents of Higher Education, 405 Mass. 475 (1989) (individual employee grievant was not a "party" to the agreement within meaning of c.150C and therefore lacked standing to seek review of arbitration award). Mass. Gen. L. c.150C does not precisely define the term "party." Whether MCOFU, as the exclusive collective bargaining representative, would have standing as a successor in interest party to the agreement to seek review under c.150C of any arbitration award rendered as a result of our decision is beyond our jurisdiction to determine. We note, however, that c.150C has been interpreted to include certain successors in interest within the meaning of the term "party," see Pine Mfg. Co., Inc. v. Int'l. Ladies Garment Workers Union, Local 718, 6 Mass. App. 957 (1978) (rescript) (successor employer was a "party" to the collective bargaining agreement negotiated by predecessor employer and union). Moreover, AFSCME was a "party" to the Agreement with the Commonwealth only because of its status as the exclusive collective bargaining representative of bargaining unit 4. When MCOFU succeeded to the role of exclusive collective bargaining representative the identities of the labor organizations changed, but the fact that the bargaining unit was collectively represented in its dealings with the Commonwealth remained the same. Rights and responsibilities contained in the expired Agreement which are enforceable only by the exclusive collective bargaining representative must be enforced by the labor organization certified to perform that role at the time that actions for enforcement become ripe. See generally Modine Mfg. Co. v. Int'l. Ass'n. of Machinists, 216 F.2d 326, 35 LRRM 2003 (6th Cir. 1954).

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ORDER

On the basis of the foregoing, it is hereby ordered that the Commonwealth of Massachusetts, Department of Corrections shall:

1. Cease and desist from communicating with or otherwise dealing with AFSCME in regard to grievances.

2. Upon demand by Massachusetts Correction Officers Federated Union, arbitrate any grievance with that union that was pending on the date of its certification or which is based on events occurring prior thereto.

3. Post in conspicuous places in each penal institution and other places in which bargaining unit 4 employees work, where notices to employees are usually posted, the attached Notice to Employees.[16] Said notice shall remain posted for not less then 30 consecutive days.

4. Notify the commission within thirty (30) days of receipt of this decision and order of the steps taken to comply therewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON
WILLIAM J. DALTON, COMMISSIONER

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16 The attached Notice to Employees is a modified version of the Notice to Employees ordered by the hearing officer. The record before the Commission does not reveal that the Commonwealth posted the Notice in compliance with those portions of the hearing officer's order which were unappealed. As a result the Commission hereby directs the attached, modified Notice to be posted. The rest of the hearing officer's remedial order has not been repeated here because it concerned unappealed portions of the hearing officer's order, with which the Commonwealth was obliged to comply within ten days of the date of receipt of the hearing officer's decision.

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

The Massachusetts Labor Relations Commission has held that the Commonwealth of Massachusetts, Department of Corrections, has violated Mass. Gen. L. c.150E by failing and/or refusing to bargain collectively with the Massachusetts Correction Officers Federated Union (MCOFU) when the Commonwealth refused and/or failed to proceed to arbitrate certain grievances that had been filed prior to MCOFU's certification as the exclusive collective bargaining representative of employees in bargaining unit 4. The Commission has concluded that MCOFU had a right to proceed to arbitrate grievances filed before the date of MCOFU's certification, and that the Commonwealth had an obligation to deal exclusively with MCOFU concerning those grievances.

In addition, a hearing officer of the Labor Relations Commission previously held that the Commonwealth of Massachusetts, Department of Corrections, violated the Law by refusing to provide MCOFU officers and stewards paid release time to investigate and process grievances, and to attend Union meetings and various meetings with management; and refusing to allow MCOFU use of state property to hold union meetings. As a result, the Commonwealth has been ordered to post this Notice in conspicuous places where employees work and to abide by what it says.

WE SHALL:

1. Cease and desist from communicating with or otherwise dealing with AFSCME or any other Union other than MCOFU in regard to grievances.

2. Upon demand by the Massachusetts Correction Officers Federated Union, arbitrate any grievance with that union that was pending on the date of its certification, or which is based on events occurring prior thereto.

3. Permit MCOFU officers and stewards reasonable release time both to investigate and process grievances.

4. Re-institute paid release time for MCOFU officers, stewards and designated representatives to enable them to attend labor-management meetings both at the institutions and with the Commissioner, Communicable Disease meetings, Career Ladder/Training meetings, and Penal Committee meetings. Said meetings shall be reconvened with the same frequency and with the same duration as prior to October 2, 1989. Reasonable travel time for attendance at these meetings at the Union's office at Boston shall be permitted to the same extent as was previously permitted prior to October 2, 1989.

5. Promptly apply the provisions of M.G.L. chapter 31, sections 38 and 68 to Andrew Rourke.

6. Re-institute the practice of permitting Union meetings to be held upon state property, to the same extent as was permitted prior to October 2, 1989. At least one union steward shall be permitted release time to attend such meetings.

7. Reimburse MCOFU for all demonstrable expenses incurred in having to hold its meetings off state-owned premises. Interest on any sums owed shall be paid at the rate specified in M.G.L. chapter 231, section 6B, compounded quarterly.

8. Reimburse MCOFU and its officers, stewards and designated representatives for loss of pay, if any, as a result of the Commonwealth's failure to grant paid release time for various activities which it previously permitted on a compensated basis. Interest on any sums owed hereunder shall be paid at the rate specified in M.G.L. chapter 231, section 6B, compounded quarterly.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTIONS