
**CITY OF MALDEN AND LOCAL 902, MALDEN FIREFIGHTERS,
IAFF, MUP-7998 (2/23/94).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION.**

- 18. Employer
- 51.15 bargaining on matters not in employer's control
- 54.31 impact of management rights decision
- 54.613 pension and retirement
- 67.8 unilateral change by employer
- 82.3 status quo ante
- 92.51 appeals to full commission

Commissioners Participating:

William J. Dalton, Acting Chairman
William G. Hayward, Jr., Commissioner

Appearances:

- Jordan Shapiro, Esq. - Representing the City of Malden
- William J. Lafferty, Esq. - Representing Local 902, Malden Firefighters, IAFF

**DECISION ON APPEAL OF
HEARING OFFICER'S DECISIONS**

Statement of the Case

Local 902, Malden Firefighters, I.A.F.F. (IAFF) and Local 411, International Brotherhood of Police Officers (IBPO) filed the charges in this case alleging that the City of Malden (City) had violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) when the Malden Retirement Board (Retirement board) unilaterally discontinued the practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement in lieu of accrued unused vacation. On April 3, 1992, Hearing Officer Diane M. Drapeau issued her decision in this case, dismissing the Complaint of Prohibited Practice on the grounds that the City was not

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

responsible for the action of the Retirement Board.¹ IAFF filed a timely appeal of the decision and a supporting supplementary statement. For the reasons discussed below, we hereby find and rule as follows.

Facts

In lieu of an evidentiary hearing, the parties stipulated to the facts. There were no factual objections made on appeal and we adopt the following stipulations of the parties verbatim.

1. The City of Malden is a public employer within the meaning of Section 1 of the Law.
2. IAFF and IBPO are employee organizations within the meaning of Section 1 of the Law and are exclusive collective bargaining units for the respective bargaining units of firefighters and police superior officers.
3. Prior to June, 1990, employees of the City who applied to the Malden Retirement Board for superannuation retirement and were otherwise qualified were allowed to choose the effective date of their retirement and to be paid a lump sum payment in lieu of any accrued unused vacation at retirement.
4. In or about June, 1990, a police captain (Mastrangelo) applied for retirement to be effective June 15, 1990 and requested that he receive a payment at that time for any accrued unused vacation pay. Mastrangelo is otherwise qualified for a superannuation retirement.
5. On August 17, 1990, the Malden Retirement board voted to accept Mastrangelo's retirement application but set the effective retirement date as September 6, 1990, because they considered the lump sum he received from the City for unused accrued vacation as regular compensation.

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The full text of the hearing officer's decision is published at 18 MLC 1366.

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

6. At or about that time, for the first time, the IBPO became aware that on January 19, 1990, the Malden Retirement Board voted to change the prior existing practice in that it would treat unused vacation as regular compensation prior to setting the effective date of retirement.
7. The Malden Retirement Board took the action of January 19, 1990 as described above at Paragraph 6, without giving prior notice to the Mayor of the City of Malden, the IBPO or the IAFF.
8. The IBPO objected by letter of August 9, 1990 to the Retirement Board. In addition, on August 14, 1990, the IBPO on behalf of Mastrangelo requested an opinion from PERA² regarding their regulation (840 CRM 15.04(2)). PERA acknowledged the Union's letter on August 20, 1990.
9. On August 20, 1990, Mastrangelo filed an appeal of the Malden Retirement Board's action with the Contributory Retirement Appeals Board.
10. On February 27, 1991, PERA issued a ruling which stated that the actions taken by the Malden Retirement Board were in violation of the Law and regulations.
11. On March 25, 1991, the IBPO on behalf of Mastrangelo forwarded PERA's ruling to the Malden Retirement Board requesting a return to the status quo and an adjustment in Mastrangelo's retirement benefits.
12. The Malden Retirement Board did not respond to the IBPO's letter of March 25, 1991 and continues to maintain its treatment of accrued vacation pay upon retirement and continues to refuse to adjust Mastrangelo's retirement benefits.
13. In July 1990, the Malden Retirement Board notified the IAFF that applicants for superannuation retirement, including fire fighters, would no longer be allowed

²

Public Employee Retirement Administration

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

to receive a lump sum payment in lieu of accrued unused vacation at retirement, but would be paid for such vacation as regular compensation prior to retirement.

14. On July 31, 1990, the City Solicitor forwarded a memorandum to the Retirement Board indicating the filing of the Charge of Prohibited Practice. his opinion that the charge would be overturned by a court or Labor Relations Commission, and suggesting it seek advice of legal counsel.
15. On August 2, 1990, the City Solicitor forwarded a memorandum to the Retirement Board indicating that his opinion as to the effect of MGL Ch.41 §111F as to police and fire fighters and that their employment "terminates... by...retirement," according to the Statute.
16. The Malden Retirement Board informed the City Solicitor that it intends to take no action to change the vote of January 19, 1990 except as so ordered by the Contributory Retirement Appeals Board.
17. The IBPO and IAFF and the City have discussed the effect of the vote of the Retirement Board, and the City would agree, in principle, to restore the status quo ante the January 19, 1990 Retirement Board vote.
18. However, the City has informed the IBPO and IAFF that, in the opinion of the City, as a matter of law, it has no control, authority, or ability to change, alter or vary the vote of the Malden Retirement Board on this issue and that, despite its willingness to bargain, the City cannot compel the Retirement Board to change its records or its vote or otherwise restore the status quo ante; and further, that it cannot affect or impose any changes in any vote of the Malden Retirement Board, insofar as the Retirement Board may interpret the laws affecting the Retirement Board's relationship with public employees who apply to it for retirement benefits under Mass. G.L. Chapter 32.
19. Chapter 32 of the General Laws is the statutory scheme regulating public employee retirement systems. In approximately 1947, the City's voters accepted Chapter 32. The City Retirement System is managed by the Malden Retirement Board.

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

20. Pursuant to Chapter 32, section 20(4)(b), the Malden Retirement Board consists of three members, one of which is city controller (Domenic Fermano) who has full voting rights, second member (James Cummings) selected by current employees and retirees (serves a term determined by Mayor but limited by statute to 3 years) and third member (Westford Robbins) chosen by other two for three years (if not chosen within 30 days, then the Mayor with Council confirmation picks the third member) (as required by MGL Ch. 32(4)(b).
21. Cummings and Robbins are part-time, serve without compensation, and are paid out of retirement board expense fund for expenses or loss of salary (MGL Ch. 32 (20)(4)(d)).
22. The essential job of the Retirement Board is to administer the Malden contributory retirement system for city employees, Malden Housing Authority, and the Malden Redevelopment Authority and to process applications and compute benefits in accordance with MGL Ch. 32. It has power to "adopt by-laws and make rules and regulations consistent with law, which shall be subject to approval as provided for in subdivision (4) of section twenty-one" (MGL Ch. 32(20)(5)(b). It has power to take evidence, subpoena witnesses, and examine parties' books and records (MGL Ch. 32 (20)(5)(b).
23. Chapter 32 continues to mandate fiscal autonomy for the retirement system (MGL Ch. 32(20)(5)(f), according to MGL Ch. 32(22)(7).
24. The fourth paragraph (bottom of page 9 MLC 1074) of the City of Malden and Teamsters case (9 MLC 1073), beginning "Chapter 32 mandates fiscal autonomy for retirement systems" is incorporated herein by reference and remains correct.
25. No other Board in the City of Malden has the fiscal autonomy possessed by the Board and no other Board is controlled by the Commonwealth's Commission of Insurance (MGL Ch. 32(24)). No other Board or Department is subject to or responsible for implementing MGL Ch. 32.

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

Opinion

Chapter 150E obligates a public employer to provide its employees' bargaining representative with notice and an opportunity to bargain before changing any existing terms or conditions of employment. City of Holyoke, 13 MLC 1336, 1343 (1986) (and cases cited). It is not disputed here that the Retirement Board made changes affecting the vacation and retirement benefits of city employees. The hearing officer concluded, and we agree, that the Retirement Board is an independent entity separate from the City.³ Thus, the decisive issue is whether or not the employer incurred a bargaining obligation when the changes were implemented by an independent third party. Here, we disagree with the hearing officer and find that the City was obliged to bargain over the impacts of the Retirement Board's action.

Where a third party exercises its authority to change the terms and conditions of employment of public employees, the public employer may not be required to bargain over the decision to make the change. In circumstances such as these, where the employer has no ability to control the decision of the third party, we have not imposed a duty to bargain over the decision. Massachusetts Correction Officers Federated Union v. Labor Relations Commission, No. S-6402, slip op. at 3 (SJC, Feb. 7, 1994). See also, Board of Regents of Higher Education, 19 MLC 1249, 1265 (1992).

There is, however, a duty to bargain over the impacts of such a decision.⁴ Where a

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The facts in this case support a ruling that the Malden Retirement Board is an entity independent of its host municipality, consistent with the standard articulated in City of Brockton, 19 MLC 1139, 1142 et seq. (1992). As in Brockton, the Malden Retirement Board is organized pursuant to a state statute and is both fiscally and administratively autonomous from the City of Malden. The city stipulated that, in its opinion, it has no authority or control over the decision of the Retirement Board in this case. See, Stipulation 18, above.

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The Commission's complaint in this case alleged generally that the City violated the Law by its failure to bargain about the change effectuated by the Retirement Board. It does not make a distinction between the obligation to bargain about the Retirement Board's

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City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

decision is mandated by a third party or is within an employer's managerial discretion, the policies of G.L. c.150E require that the collective bargaining process be brought to bear upon the impact of that decision on the employees' terms and conditions of employment. City of Somerville, 19 MLC 1795, 1802 (1993), citing School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 563 (1987); Board of Regents of Higher Education, 19 MLC 1248, 1265 (1992); City of Springfield, 12 MLC 1021, 1025 (1985). Although the decision of the Retirement Board was beyond the control of the City, the impacts of that decision were well within its control. Collective bargaining concerning the impact of the lost vacation and retirement benefits could result in a solution that would have minimized the loss to employees and addressed related concerns of the employer. For example, the city might have agreed to implement a sick leave buy-back program at retirement, which would mitigate the economic loss caused by the Retirement Board's vote and also encourage conservation of sick leave benefits. The unions should have been given an opportunity to propose and discuss that kind of alternative with the City.

Accordingly, the City violated Sections 10(a)(5) and (1) of the Law when it failed to provide the unions with an opportunity to bargain over the impacts of the change effectuated by the Retirement Board.

Remedy

In cases like these, where the employer's bargaining obligation involves only the impact of a decision to alter a mandatory subject of bargaining, the appropriate remedy is a bargaining order restoring the economic equivalent of the status quo ante during impact bargaining. This remedy attempts to place the parties in the position they would have been in absent the employer's unlawful conduct. City of Quincy, 8 MLC 1217, 1220 (1981); Town of Burlington, 10 MLC 1387, 1389 (1984).

4 (continued)

decision and the obligation to bargain about the impact of the decision. There was no request for clarification by the parties. Because the general allegation concerning bargaining implicates both decision bargaining and impact bargaining, and the record permits full consideration of the dispute, we have addressed both kinds of bargaining obligations.

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

Here, the City's obligation began in August 1990, when the IBPO made its objection to the Retirement Board's action and both unions filed the charges that gave rise to this case. Upon notice of the change effectuated by the Retirement board, the city should have offered the unions an opportunity to bargain to impasse or resolution over the impacts of the change. At the time, the Retirement Board had already voted and implemented the change in benefits, and the City had no authority to restore the status quo ante in fact. During bargaining, the City would have been obligated to maintain the economic equivalent of the status quo ante, by compensating any retiring employees who were unable to receive their accrued vacation benefits as a lump sum payment. Therefore, the appropriate remedy here is to restore the parties to the status quo while the parties bargain about the impacts of the changes imposed by the Retirement Board.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the City of Malden shall:

- I. Cease and desist from:
 - A. Refusing to bargain in good faith with IAFF about the impact on terms and conditions of employment of the decision of the Retirement Board to discontinue the practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement in lieu of accrued unused vacation.
 - B. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Law.
- II. Take the following affirmative action which will effectuate the purposes of the Law:
 - A. Upon the request of IAFF, bargain in good faith to agreement or impasse about the impact on employees' wages, hours, and other terms and conditions of employment of the Retirement Board's vote of January 19, 1990.

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

- B. Restore the status quo ante by compensating bargaining unit members represented by IAFF who are unable to receive accrued vacation as a lump sum payment at retirement during the period beginning as of the date of receipt of this decision and continuing until the earliest of the following events:
1. The City and IAFF reach mutual agreement regarding the impact of the change in retirement and vacation benefits;
 2. The City and IAFF reach impasse after bargaining in good faith;
 3. The IAFF fails to commence negotiations within five (5) days of receipt of the City's notice of its willingness to bargain; or
 4. The IAFF subsequently fails to bargain in good faith.
- C. Post in all conspicuous places where employees in each bargaining unit usually congregate and where notices to employees are usually posted, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees; and take reasonable steps to ensure that these notices are not altered, defaced or covered by any other material.
- D. Notify the Commission in writing of the steps taken to comply with this decision within thirty (30) days after the date of its receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, ACTING CHAIRMAN

WILLIAM HAYWARD, JR.,
COMMISSIONER

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400

**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 determined that the City of Malden violated Sections 10(a)(5) and (1) of G.L. c.150E (the Public Employee Collective Bargaining Law) when it failed to bargain with Local 902, Malden Firefighters, I.A.F.F. (IAFF) over the impact of the Malden Retirement Board's decisions to discontinue the practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement in lieu of accrued unused vacation benefits.

WE WILL cease and desist from refusing to bargain in good faith with IAFF about the impact of the decision of the Malden Retirement Board.

WE WILL take the following affirmative action which will effectuate the policies of the law:

WE WILL bargain in good faith upon demand with IAFF about the impact of the Retirement Board's decision to discontinue the practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement in lieu of accrued unused vacation benefits.

WE WILL restore the status quo ante by compensating IAFF bargaining unit members who are unable to receive accrued vacation benefits as a lump sum at retirement until we have discharged our duty to bargain as detailed in the Commission's Order in case number MUP-7998.

CITY OF MALDEN

By:

MASSACHUSETTS LABOR CASES

CITE AS 20 MLC 1410

City of Malden and Local 902, Malden Firefighters, IAFF, 20 MLC 1400