
COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF
ADMINISTRATION AND ALLIANCE, AFSCME-SEIU, AFL-CIO,
SUP- 3922 AND 3944 (2/2/96).

54.62 other fringe benefits
54.8 mandatory subjects
67.16 other defenses
67.5 negotiability of items
67.8 unilateral change by employer
82.3 status quo ante

Commissioners Participating:

William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Appearances:

Matthew D. Jones, Esq. - Representing the Alliance,
Wayne Soini, Esq. AFSCME-SEIU, AFL-CIO

Anna M. McKeon, Esq. - Representing the Commonwealth of
Massachusetts, Commissioner of
Administration

DECISION¹

Statement of the Case

On February 8, 1993, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, a member of the Alliance, AFSCME-SEIU, AFL-CIO (Union) filed a prohibited labor practice charge with the Labor Relations Commission (Commission), and on March 29, 1993, Service Employees International Union, Local 509,

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Pursuant to 456 CMR 13.02(1), the Commission redesignated this case as one in which the Commission issues a decision in the first instance. 456 CMR 13.02(2).

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AFL-CIO, a member of the Union, filed a prohibited labor practice charge with the Commission. Both of the Union's charges allege that the Commonwealth of Massachusetts, Commissioner of Administration (Commonwealth) had violated Sections 10(a)(1) and (5) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charges and, on September 9, 1993 and March 7, 1994 issued its own Complaints of Prohibited Practice, alleging that the Commonwealth failed to bargain in good faith by unilaterally implementing a catastrophic illness leave bank program without giving the Union prior notice or an opportunity to bargain, in violation of Sections 10(a)(1) and (5) of the Law.

On March 2, 1995, the Commonwealth and the Union filed a Statement of Agreed Facts with the Commission and, on December 1, 1995, the parties filed an Amendment to the Statement of Agreed Facts.² Briefs from both parties were received or post-marked on March 28, 1995.

FINDINGS OF FACT³

The Union is the exclusive collective bargaining representative for all employees in statewide bargaining Units 2, 8 and 10. By Executive Order No. 335, issued April 17, 1992, the Commonwealth established a catastrophic illness sick leave policy for the benefit of certain state employees. The Executive Order, in part, provided:

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The Statement of Agreed Facts contains the following prefatory language:

The parties hereby stipulate and agree to the following facts for the sole purpose of resolution of the complaint of Prohibited Practice in the above matters [SUP-3922, SUP-3944] by the Labor Relations Commission. The parties acknowledge that this statement, the charges, the Commission's Complaints and the Respondent's Answers shall constitute the entire record of this case and hereby waive their right to a hearing. The parties do not stipulate to the relevance of the facts contained herein, and reserve their rights to contest the relevance of specific facts.

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The Commission's jurisdiction is uncontested.

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Article I. Declaration of Policy

1.1 It shall be the policy of the Commonwealth to establish a catastrophic illness sick leave bank in the executive office of each secretariat for all persons employed in the Executive Branch, the cost of which shall not be borne by the taxpayers of the Commonwealth.

1.2 An employee may contribute any amount of their accrued personal or vacation time to the catastrophic illness sick leave bank for the use by any other qualifying employee within their secretariat.

1.3 The purpose of this policy is to enable public employees who are concerned about the plight of their fellow employees to make a contribution for the benefit of any other public employee who has taken ill and lacks sufficient sick time or insurance coverage.

Article II. IMPLEMENTATION OF THE POLICY

2.1 The Secretary of Administration and Finance in consultation with the Director of Personnel Administration shall develop uniform policies and guidelines for the operation of said catastrophic illness sick leave banks including criteria for eligibility, procedures for donating time accrued, as well as procedures for the distribution of the donated time to qualifying individuals.

On or about August 11, 1992, the Commonwealth, through the Secretary of the Executive Office for Administration and Finance, issued Administrative Bulletin 92-11 that addressed the implementation of a catastrophic illness leave bank for certain Commonwealth employees. Attached to the administrative bulletin were guidelines governing the establishment and implementation of catastrophic illness leave banks in each Commonwealth secretariat. The guidelines addressed employee eligibility and membership criteria, procedures for donating and withdrawing time, and audit and dissolution procedures. Subsequently, several Commonwealth agencies, including the Office for Children, the Department of Public Welfare, the Massachusetts Rehabilitation Commission, the Department of Mental Retardation, the Department of Mental Health, and the Department of Public Health established catastrophic illness leave banks in accordance with the procedures contained in the administrative bulletin. The Executive Order, Administrative Bulletin 92-11 and the establishment of catastrophic illness leave banks within certain Commonwealth agencies were done without prior notice to, or bargaining with, the Union.

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By letter dated September 3, 1992, then Deputy Director and General Counsel Joseph M. Daly of the Commonwealth's Office of Employee Relations informed the Union's Executive Director, Joseph Bonavita, that the Commonwealth was prepared to meet and bargain with the Union over the terms and conditions of the implementation of the catastrophic illness leave bank. On October 27, 1992, the Union and the Commonwealth met to negotiate about the implementation of the catastrophic illness leave bank. On or about October 28, 1992, Bonavita and the Union's Secretary/Treasurer Sandy Felder directed a joint letter to Daly that, in part, provided:

The Alliance is requesting that the Administration rescind any and all CILB recruiting bulletins until such time as the parties have had an opportunity to negotiate a mutually agreed upon Catastrophic Illness Sick Bank Agreement.

On or about January 8, 1993, the parties met again to negotiate about the implementation of a catastrophic illness sick leave bank. Further, on or about January 8, 1993, the Union demanded that the Commonwealth maintain the status quo during negotiations and that the Commonwealth rescind the implementation of any catastrophic illness leave bank established in accordance with the August 11, 1992 guidelines. The Commonwealth did not rescind the program. Rather, it remained in effect at least through February 1995.

OPINION

The issue presented in this case is whether the Commonwealth failed to bargain in good faith by unilaterally implementing a catastrophic illness leave bank program without giving the Union prior notice and an opportunity to bargain to resolution or impasse, in violation of Sections 10(a)(5) and (1) of the Law. For the reasons explained below, we find that the Commonwealth's catastrophic illness leave bank program, that details employee eligibility and membership criteria, procedures for donating and withdrawing leave, and audit and dissolution procedures, constitutes a mandatory subject of bargaining. Further, we find that the Commonwealth unilaterally implemented the program, that altered employees' terms and conditions of employment, without giving the Union prior notice and an opportunity to bargain to resolution or impasse. Therefore, we conclude that the Commonwealth's conduct violated Section 10(a)(5) and derivatively Section 10(a)(1) of the Law.

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A public employer violates Section 10(a)(5) and derivatively Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording its employees' exclusive collective bargaining representative prior notice and an opportunity to bargain to resolution or lawful impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983); City of Fall River, 20 MLC 1352, 1357 (1994); City of Boston, 16 MLC 1429, 1434 (1989). The Commission has determined that sick leave criterion constitutes a mandatory subject of bargaining. City of Holyoke, 13 MLC 1336, 1343 (1986).

Here, in or about August 1992, the Commonwealth established and implemented a catastrophic illness leave bank program that addressed employee eligibility and membership criteria, procedures for donating and withdrawing leave, and audit and dissolution procedures.

Because this program constitutes an economic benefit and a term or condition of employment, the Commonwealth was obligated to provide the Union with prior notice and an opportunity to bargain to agreement or impasse, prior to implementing the program. However, the Commonwealth implemented the program in certain agencies without first satisfying its statutory bargaining obligation.

The Commonwealth defends its conduct by arguing that the implementation of a voluntary catastrophic illness leave bank program does not constitute a change in employees' conditions of employment. We disagree. Although the terms of the program do not compel or mandate individual employee participation, the program offers employees an economic benefit similar to other employer provided voluntary benefit plans, like health care insurance that the Commission has determined constitutes a mandatory subject of bargaining. See, Town of Ludlow, 17 MLC 1191 (1990). The voluntary nature of the program, by itself, does not relieve the Commonwealth of its statutory obligation to bargain with the Union.

CONCLUSION

For the reasons explained above, we conclude that the Commonwealth violated Section 10(a)(5) and derivatively Section 10(a)(1) of the Law by unilaterally implementing the August 1992 catastrophic illness leave program without giving the Union prior notice and an opportunity to bargain to resolution or impasse about the program.

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REMEDY

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct. Labor Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979). To remedy a unilateral change, the Commission usually orders the restoration of the status quo ante until the public employer has fulfilled its bargaining obligation and directs the public employer to make whole the affected employees for any economic losses they may have suffered as a result of the unlawful conduct. Newton School Committee, 5 MLC 1016 (1978), 8 MLC 1544 (1981), affd sub nom. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). Generally, in cases involving a public employer's grant of an economic benefit to its employees, the Commission declines to order individual employees to return the benefit, but rather gives prospective effect to an order rescinding the economic benefit. Natick School Committee, 11 MLC 1387, 1400 (1985); Commonwealth of Massachusetts, 14 MLC 1322, 1327 (1987), affd sub nom. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989). The Commission's rationale for the prospective rescission of economic benefits is to avoid penalizing employees for the employer's illegal action, and to avoid alienating employees from the unions that represent them. Natick School Committee, 11 MLC at 1400. Further, reasoning that a prospective rescission of an economic benefit may alienate employees from their bargaining representative, the Commission has provided unions with an opportunity to elect not to seek an immediate rescission of an economic benefit. Commonwealth of Massachusetts, 14 MLC at 1328.

Consistent with precedent, the Commonwealth is ordered to rescind, to the extent applicable to employees represented by the Union, all catastrophic illness leave banks established pursuant to Executive Order 355 and Administrative Bulletin 92-11, and to return to each employee who participated in the program, but did not withdraw any leave, the amount of leave he or she donated. Further, no employee is required to return any leave withdrawn from the bank. If the Union does not desire an immediate rescission of the implemented catastrophic illness leave banks and the return of the donated time to each individual employee, it should so notify the Commonwealth and the Commission within ten (10) days of the date of service of this decision. Finally, regardless of the Union's election, the parties are free to discuss and reach agreement on an alternative(s) to the remedy ordered by the Commission.

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ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Commonwealth shall:

1. Cease and desist from:
 - a) Unilaterally implementing a catastrophic illness leave bank program, as authorized by Executive Order 355 and Administrative Bulletin 92-11, that is applicable to employees represented by the Union, without first giving the Union prior notice and an opportunity to bargain in good faith to resolution or impasse about the program;
 - b) Failing and refusing to bargain in good faith with the Union about a catastrophic illness leave bank program;
 - c) In any like or related 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 purposes of the Law:
 - a) To the extent applicable to employees represented by the Union, rescind the catastrophic illness leave bank program established and implemented pursuant to Executive Order 355 and Administrative Bulletin 92-11;
 - b) Restore to all employees who are represented by the Union and who did not withdraw leave under the catastrophic illness leave bank program, any and all leave contributed to the program established pursuant to Executive Order 355 and Administrative Bulletin 92-11.
 - c) Upon request by the Union, bargain in good faith to resolution or impasse over a catastrophic illness leave bank program authorized by Executive Order 355.

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- d) Post immediately in all conspicuous places where members of the Union's bargaining units usually congregate and where notices are usually posted in the Commonwealth's departments and agencies where the catastrophic illness leave banks were implemented, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,
- e) Notify the Commission in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER