
**ESSEX COUNTY AND TRUCK DRIVERS, CHAUFFEURS, & HELPERS
UNION, TEAMSTERS LOCAL 42, MUP-9370 (2/26/96).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION.**

51.1 employer
52.6 interpretation
54.53 grievance administration
67.161 pending litigation
68.21 refusal to implement grievance settlement
92.51 appeals to full commission

Commissioners Participating:

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

Appearances:

Gabriel O. Dumont, Esq. - Representing the Truck Drivers,
Chauffeurs, & Helpers Union,
Teamsters Local 42

James F. Murray, Esq. - Representing Essex County

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

The Truck Drivers, Chauffeurs, & Helpers Union, Teamsters Local 42 (the Union) filed a charge with the Labor Relations Commission (Commission) on March 2, 1993, alleging that Essex County (the County), through Sheriff John Reardon (the Sheriff), had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to implement certain settlement agreements that the Essex County Commissioners (the County Commissioners) and the Union had reached at Step 3 of the grievance procedure in the parties' collective bargaining agreement. Following an investigation, the Commission issued a Complaint of Prohibited Practice on June 3, 1993 and scheduled an expedited hearing for December 28, 1993. On December 28, 1993, the parties agreed to waive their right to a

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

hearing and to submit a stipulated evidentiary record. The Essex County Sheriff's Department and the Sheriff filed a brief on March 1, 1994, and the Union filed a brief on March 16, 1994.¹

On May 3, 1994, Susan L. Atwater, Esq., a duly designated hearing officer of the Commission, issued her decision, finding that the County violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by refusing to implement settlement agreements that the County Commissioners had reached with the Union at Step 3 of the grievance procedure concerning the promotions of Wayne Garrett (Garrett), Edward Smallwood (Smallwood), and Kevin O'Leary (O'Leary).² The Sheriff filed a timely notice of appeal and supplementary statement on May 13, 1994, and the Union filed its supplementary statement on May 23, 1994.

Upon our review of the hearing officer's decision and the statements of the parties on appeal, we affirm the hearing officer's decision as modified for the reasons set forth below.

Stipulated Findings of Fact

1. At all times material, Local 42 has represented a bargaining unit of employees at the Essex County Correctional Facilities located in Middleton and Lawrence, Massachusetts.
2. The Essex County Sheriff, Charles H. Reardon (Reardon) is an agent of the Essex County Sheriff's Department.
3. The grievance procedure contained in the collective bargaining agreement dated July 1, 1987 to June 30, 1987 provides in pertinent part as follows:

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On March 1, 1994, the Sheriff's Department and Sheriff Reardon also filed a Motion to Amend Stipulation Nos. 10 and 22. The Union did not object, and the record reflects those stipulations as amended.

2

The full text of the hearing officer's decision is reported at 20 MLC 1531 (1994).

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

STEP ONE- The Union Steward or representative, with or without the employee alleging the grievance, shall confer with the deputy Master within ten (10) calendar days of the Submission of the grievance unless both parties agree to an extension. The latter shall give his decision in writing within five (5) calendar days of such conference.

STEP TWO- If the grievance has not been settled, it shall be presented to the Sheriff within three (3) days after decision in STEP ONE. The Sheriff or his designee shall hold such hearing within five (5) calendar days. Failure by the Sheriff to hold such hearing within this period shall be construed as a decision favorable to the employee unless the Sheriff within such latter period advised the Union that for good cause set forth an additional period of ten (10) calendar days is needed, or the Union agrees to an extension of time. Within fifteen (15) calendar days thereafter, the decision of the Sheriff shall be forwarded in writing to the Union.

STEP THREE- If the grievance still remains unadjusted the Union may present the grievance in writing to the County Commissioners within ten (10) days from the date in which the response was due in STEP TWO, and the County Commissioners shall respond in writing within ten (10) days.

STEP FOUR- If the grievance is still unsettled, either party may, within ten (10) calendar days after the date the reply of the County Commissioners is due or extended, by written notice to the other, request arbitration by the Massachusetts Board of Conciliation and Arbitration.

4. The grievance procedure contained in the successor collective bargaining agreement (the successor agreement) which expires June 30, 1993 provides in pertinent part as follows:

STEP ONE- The Union Steward or representative, with or without the employee alleging the grievance, shall confer with the employees immediate Deputy Superintendent and the Director of Personnel and Human Resources within ten (10) calendar days of the submission of the grievance unless both parties agree to an extension. The latter shall give his decision in writing within five (5) calendar days of such conference.

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

STEP TWO- If the grievance has not been settled, it shall be presented to the Sheriff within three (3) calendar days after the decision at the Step 1 level. The Sheriff or his designee shall hold such hearing within five (5) calendar days. Failure by the Sheriff or his (sic) designee to hold such hearing within this period shall be construed as a decision favorable to the employee unless the Sheriff within the latter period advises the Union that for good cause set forth an additional period of ten (10) calendar days is needed, or the Union agrees to an extension of time. With fifteen (15) calendar days thereafter, the decision of the Sheriff shall be forwarded in writing to the Union.

STEP THREE- If the grievance still remains unadjusted the Union may present the grievance in writing to the County Commissioners within ten (10) days from the date in which the response was due in Step 12, and the County Commissioners shall respond in writing within ten (10) days.

STEP FOUR- If the grievance is still unsettled, either party may, within ten (10) calendar days after the date the reply of the County Commissioners is due or extended, by written notice to the other, request arbitration by the Massachusetts Board of Conciliation and Arbitration.

5. On August 25, 1992, Wayne Garrett, while employed as a corrections officer with the Sheriff's Department, filed a failure to promote grievance with the Essex County Commissioners.
6. In August 26, 1992, Edward Smallwood, while employed as a corrections officer with the Sheriff's Department, filed a failure to promote grievance with the Essex County Commissioners.
7. On August 28, 1992, Kevin O'Leary, while employed as a corrections officer with the Sheriff's Department, filed two (2) failure to promote grievances with the Essex County Commissioners.
8. Between September, 18, 1992 and October 7, 1992, the Essex County Commissioners granted relief at the third step or Step Three of Wayne Garret's, Edward Smallwood's, and Kevin O'Leary's failure to promote grievances.

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

9. On October 7, 1992, the Essex County Commissioners notified the Sheriff's Department of its decision on the grievances filed by Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
10. At that time, the Sheriff's Department was notified of the Essex County Commissioners' decision concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary. It was the Sheriff's Department's Position that it had the right, pursuant to Article XXIX of the collective bargaining agreement referred to in paragraph 4, above, to proceed to the fourth step or Step Four Arbitration before the Massachusetts Board of Conciliation and Arbitration concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
11. Immediately following the Sheriff's Department's receipt of the Essex County Commissioners' decisions concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary, the Sheriff's Department retained Attorney Joseph Casey to institute Step Four arbitration before the Massachusetts Board of Conciliation and Arbitration concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
12. The Sheriff's Department was informed by its Attorney, Joseph Casey not to proceed to Step Four arbitration since an unrelated case involving another corrections officer Christopher Farnham was pending before the Massachusetts Board of Conciliation and Arbitration which would resolve whether the Sheriff's Department could proceed to Step Four arbitration concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
13. The Farnham case arose under the Collective Bargaining Agreement referred to in paragraph 3.
14. At issue in the Farnham case and before Arbitrator Robert Canavan of the Massachusetts Board of Conciliation and Arbitration was whether the Sheriff could process to arbitration a grievance resolved in favor of Local 42 by the County Commissioners at Step Three of the grievance procedure.

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

15. The hearing in the Farnham case before Arbitrator Canavan occurred on June 1, 1992. On November 17, 1992, Arbitrator Canavan found in the Farnham case that the Sheriff could not proceed to Step Four arbitration.
16. After the Sheriff's receipt of Arbitrator Canavan's decision in the Farnham case, the Sheriff instituted a Declaratory Judgment action in the Essex Superior Court, C.A. No. 92-3401 concerning the Farnham matter.
17. In the Declaratory Judgment action referenced in paragraph 16 above, the Sheriff requested that the Court vacate the arbitrator's decision pursuant to G.L.c. 150C, s.11.
18. In the Declaratory Judgment action concerning the Farnham matter, the Essex Superior Court pursuant to a decision dated July 2, 1993 denied the Sheriff's request to vacate the award of Arbitrator Canavan.
19. It was the Sheriff Department's former understanding that the Essex Superior Court's ruling in the Declaratory Judgment action in the Farnham case would resolve whether it could proceed to Step Four arbitration before Massachusetts Board of Conciliation and Arbitration concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
20. On June 3, 1993, the Labor Relations Commission issued a Complaint of Prohibited Practice. According to the Complaint, the Sheriff's Department allegedly refused to bargain in good faith and allegedly interfered, restrained and coerced its employees in violation of G.L.c. 150E, §§ 10(a)(1) and 10(a)(5) by not implementing the promotions of Wayne Garrett, Edward Smallwood, and Kevin O'Leary.
21. On June 9, 1993, the Sheriff's Department filed an Answer to the Complaint of Prohibited Practice. In the Answer, the Sheriff's Department denied the unfair labor claims set forth in the paragraph immediately above and stated, among other things, that it was the Sheriff's position that he had the right to proceed to Step Four Arbitration pursuant to the Collective Bargaining Agreement concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary and that the matter was the subject of pending litigation in the Essex Superior Court.

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

22. At the time the Sheriff's Department received the Essex Superior Court's decision in the Farnham case it could not initiate Step Four arbitration concerning the grievances of Wayne Garrett, Edward Smallwood, and Kevin O'Leary since the time to initiate such action had expired under the applicable Collective Bargaining Agreement referenced in paragraph 4.
23. After its receipt of the Essex Superior Court's decision in the Farnham case on approximately July 6, 1993, which was one Month after the Labor Relations Commission's issuance of the complaint, and until approximately August 8, 1993, the Sheriff's Department investigated and contemplated appealing the Essex Superior Court's decision in the Farnham case.
24. On August 9, 1993 and immediately after it decided that it would not appeal the Essex County Superior Court's Decision in the Farnham case, the Sheriff's Department sent its Notice of Intent to implement the promotions of Wayne Garrett, Edward Smallwood, and Kevin O'Leary to the Essex County Commissioners. Shortly, thereafter, the Essex County Commissioners approved such notices.
25. On August 13, 1993, Certificates of Employment concerning the promotions of Wayne Garrett, Edward Smallwood, and Kevin O'Leary were prepared and signed by the Sheriff and forwarded to the Essex County Commissioners with an effective date of September 1, 1993.
26. The Sheriff's Department's payroll must be submitted to the Treasurer by the tenth of each month so that checks can be issued to the Sheriff's Department's employees at the end of each month.
27. From August 13, 1993 until approximately September 15, 1993, documentation was obtained and reviewed and calculations were performed by the Sheriff's Department and it was determined that Wayne Garrett, Edward Smallwood, and Kevin O'Leary were to be paid back wages representing monies they would have received had their promotions to Sergeant been implemented on October 1, 1992.

MASSACHUSETTS LABOR CASES

CITE AS 22 MLC 1563

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

28. By the time the investigation and calculations referred to immediately above were completed by the Sheriff's Department the payroll deadline for September, 1993 had already passed.
29. On September 1, 1993, Wayne Garrett's promotion to permanent full-time Sergeant was implemented by the Sheriff's Department, retroactive to October 1, 1992.
30. Wayne Garrett's yearly salary as a Sergeant is \$27,393.60 or \$2,282.80 per month.
31. Wayne Garrett's yearly salary as a correction's officer as of October 7, 1992 was \$26,582.40 or \$2,215.290 per month.
32. On approximately October 1, 1993, Wayne Garrett was paid by the Sheriff's Department back wages of \$585.49 representing monies he would have received from October 1, 1992 through October 1, 1993 as Sergeant.
33. On September 1, 1993, Edward Smallwood's promotion to permanent full-time Sergeant was implemented by the Sheriff's Department, retroactive to October 1, 1992.
34. Edward Smallwood's yearly salary as a Sergeant is \$27,393.16 or \$2,282.80 per month.
35. Edward Smallwood's yearly salary as a correction's officer as of October 7, 1992 was \$26,582.40 or \$2,215.20 per month.
36. On approximately October 1, 1993, Edward Smallwood was paid by the Sheriff's Department back wages of \$585.98 representing monies he would have received for October 1, 1992 through October 1, 1993 as Sergeant.
37. On September 1, 1993, Kevin O'Leary's promotion to permanent full-time Sergeant was implemented by the Sheriff's Department, retroactive to October 1, 1992.
38. Kevin O'Leary's yearly salary as a Sergeant is \$26,478.36 or \$2,206.53 per month.
39. Kevin O'Leary's yearly salary as a correction's officer as of October 7, 1992 was \$25,708.80 or \$2,142.40 per month.

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

40. On approximately October 1, 1993, Kevin O'Leary was paid by the Sheriff's Department back wages of \$692.03 representing monies he would have received from October 1, 1992 through October 1, 1993 as Sergeant.
41. It is the position of Local 42 that Garrett, Smallwood, and O'Leary were not placed on the appropriate step upon the effective date of their promotions nor were they paid the overtime differential. It is the Sheriff's position that the promotions were not implemented until September 1, 1993 for a number of valid reasons. It is also the Sheriff's position that all back wages, including overtime differential, have been paid to Garrett, Smallwood, and O'Leary.
42. The Sheriff continues to maintain that he has the right to appeal a Step Three decision that is favorable to Local 42 to arbitration pursuant to the current Collective Bargaining Agreement which is referenced in paragraph 4. It is the position of Local 42 that the Sheriff refused to implement the Step Three decision for that reason. It is the position of Local 42 that the Sheriff's request for arbitration in another unrelated case involving Roy Mills has some application to the facts of this case. The Sheriff's position is that the Roy Mills matter illustrates a situation where the Sheriff is merely exercising a valid contractual right to proceed to Step Four arbitration under the current Collective Bargaining Agreement.

Opinion

On appeal, the Sheriff argues that the hearing officer improperly interpreted the parties' agreement, and insists that the language of the grievance procedure gives the Sheriff the right to process a grievance to arbitration, even if the County Commissioners settle the grievance at Step 3 of the grievance procedure. The Sheriff also argues that his failure to implement the settlement agreements was excused by his interest in learning the outcome of an unrelated, but analogous, case that was pending before the Board of Conciliation and Arbitration (the Farnham case).

First, contrary to the Sheriff's argument, the hearing officer did not find that "the Sheriff could not request arbitration after an adverse County Commissioners' finding at Step 3," but rather the hearing officer found only that the County, through the Sheriff, had violated

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

the Law by failing to immediately implement the settlement agreements that the County Commissioners had reached with the Union. Therefore, the narrow issue before us is whether the hearing officer erred in finding that, by failing to implement the settlement agreements, the County violated the Law.³ The duty to bargain in good faith includes the duty to comply with collectively bargained agreements and to implement settlement agreements reached during the process of resolving grievances. City of Quincy, 17 MLC 1603 (1991); Massachusetts Board of Regents of Higher Education, 10 MLC 1196 (1983). Here, the parties stipulated that, although the County Commissioners had reached settlement agreements with the Union at Step 3 of the grievance procedure, the Sheriff failed to implement the agreements. Although the Sheriff argues that its obligation to implement the settlement agreements was suspended by the Farnham case that was pending before the Board of Conciliation and Arbitration, pending litigation is not a defense to a delay in fulfilling a bargaining obligation. Town of Ipswich, 4 MLC 1600 (1977). Moreover, even if, as the Sheriff argues, he had the right to request arbitration under Step 4 of the grievance procedure, he did not request arbitration, but rather opted to wait for the decision in the Farnham case.⁴

3

Section 1 of the Law defines "Employer" as:

the Commonwealth acting through the commissioner of administration, or any county, city, town, district or other political subdivision acting through its chief executive officer ...

Where two independently elected officials (or boards) exercise control over the terms and conditions of employment of employees of a political subdivision of the Commonwealth, we have held that the independently elected officials (or boards) are "joint chief executive officers." See Essex Agricultural and Technical Institute, 4 MLC 1755 (1978). Here, the parties' stipulations reveal that both the County Commissioners and the Sheriff have, at the very least, a role in the adjustment of grievances. Therefore, we find that the County Commissioners and the Sheriff are joint chief executive officers, and therefore, may act on behalf of the County in dealing with collective bargaining matters.

4

Because the record reflects that the Sheriff neither complied with the agreements, nor challenged them in accordance with Step 4 of the grievance procedure, we need not decide

(continued)

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

Finally, the Sheriff argues that this issue is moot because, although it had initially failed to implement the settlement agreements, the employees have since been promoted in accordance with the agreements and have received full back-pay.

The Commission has recognized an exception to the mootness doctrine if there is a possibility that the challenged conduct will recur in substantially the same form, especially if the violator contends it was properly engaged in the conduct. See e.g. City of Boston, 7 MLC 1707 (1980). Here, although the Sheriff eventually complied with the settlement agreements, he continues to maintain that he has the right to lawfully delay implementing settlement agreements even after the County Commissioners settle the grievance at Step 3.

Therefore, because there is a likelihood that the challenged conduct will recur in substantially the same form, we find that the issue is not moot and affirm the hearing officers finding that the County violated Sections 10(a)(5) and, derivatively, 10(a)(1).

Conclusion

For the foregoing reasons, we affirm the decision of the hearing officer that the County violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by refusing to implement the grievance settlement agreements that the County Commissioners and the Union reached at Step 3 of the grievance procedure concerning the promotions of Garrett, Smallwood, and O'Leary.

Order

On the basis of the foregoing, the Commission orders that the County shall:

1. Cease and desist from:
 - a. Failing to implement grievance settlement agreements reached between itself and the Union;

4 (continued)

whether requesting arbitration would suspend the Sheriff's obligation to implement the agreements. We note, however, that the issue appears to have been decided in the Farnham case.

MASSACHUSETTS LABOR CASES

CITE AS 22 MLC 1567

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

- b. In any like manner, interfere with, coerce, or restrain its employees in the exercise of their protected rights under the Law.
2. Take the following affirmative action which will effectuate the purposes of the Law:
 - a. Make whole grievants Garrett, Smallwood, and O'Leary for any remaining wages and/or benefits due them pursuant to the agreement reached between the County Commissioners and the Union between September 18 and October 7, 1992, plus interest on all sums due calculated in the manner specified in Everett School Committee, 10 MLC 1609 (1984).
 - b. Post the enclosed Notice to Employees immediately and conspicuously in locations where Union members work and maintain said Notice for a period of not less than thirty (30) days.
 - c. Notify the Commission within (10) days of receipt of this decision and order, of the steps taken to comply herewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER

**Essex County and Truck Drivers, Chauffeurs, & Helpers Union,
Teamsters Local 42, 22 MLC 1556**

**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 Essex County, acting through the Essex County Sheriff's Department, has violated Sections 10(a)(5) and (1) of Massachusetts General Laws Chapter 150E by refusing to implement the grievance settlement agreements reached by the County Commissioners and the Union.

We Will Not fail to implement grievance settlement agreements reached by the County Commissioners and the Union.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Law.

We Will make the grievants, Garrett, Smallwood, and O'Leary whole for any remaining wages and/or benefits due them pursuant to the agreement reached between the County Commissioners and the Union.

For The Essex County Sheriff's Department