

10(a)(1) of the Law. However, we dismiss those portions of the complaint alleging that the Employer changed the practice by: (1) allowing employees to take compensatory time only with the approval of their immediate supervisor and the Superintendent; and (2) requiring employees to report the accumulation of their compensatory time to the main office.

ORDER

Wherefore, based on the foregoing, WE HEREBY ORDER that Bristol County Agricultural High School shall:

- 1. Cease and desist from:
 - a. Restricting employees from using their compensatory time to not less than four hour time blocks without first giving notice and an opportunity to bargain to the Segreganset Teachers 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 actions which will effectuate the policies of the Law:
 - a. Upon request, bargain collectively in good faith with the Union to resolution or impasse restrictions on the use of compensatory time in less than four hour blocks.
 - b. Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
 - c. Notify the Commission in writing within ten days of receipt of this Decision and Order of the steps taken in compliance therewith.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has ruled that Bristol County has committed a prohibited practice in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Massachusetts General Laws, Chapter 150E, the Public Employers Collective Bargaining Law, by prohibiting employees from using their compensatory time in less than four hour time blocks without first bargaining with the Segreganset Teachers Association (Union) to resolution or impasse.

WE WILL NOT restrict employees from using their compensatory time in less than four hour blocks without first bargaining with the Union to resolution or impasse.

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, upon request by the Union, bargain to resolution or impasse restrictions on the use of compensatory time in less than four hour blocks.

* * * * *

In the Matter of COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO

Case Nos. SCR-2217, SCR-2223

- 17.5 public employee
- 18.2 public employer
- 21. The Act
- 35.8 uniformed services - general
- 46. Petition For An Election
- 91.1 dismissal

November 20, 1996

Robert C. Dumont, Chairman

William J. Dalton, Commissioner

Claudia T. Centomini, Commissioner

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

William J. Murphy, Esq. Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO

DECISION¹

Statement of the Case

On June 22, 1994 and September 29, 1995, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) filed petitions with the Labor Relations Commission (Commission) pursuant to Section 4 of M.G.L. c. 150E (the Law) seeking to represent security and law enforcement personnel located at the Otis Air National Guard facility, Camp Edwards, Barnes Municipal Airport, Camp Curtis Guild, and the Natick, MA National Guard facility.

The Commission scheduled a hearing for February 12, 1996 before Administrative Law Judge Ann T. Moriarty. Prior to the hearing, the Union and the Commonwealth of Massachusetts, acting through the commissioner of administration (the Commonwealth), agreed to the facts and waived their right to a hearing.² The Union and the Commonwealth filed briefs with the Commission on May 3, 1996.

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. Counsel for both parties signed the stipulation of facts. Mark P. Murray, counsel for the Adjutant General's Office of the military division of the Commonwealth of Massachusetts also signed the stipulation.

Findings of Fact

1. The Commonwealth, acting through the Commissioner of Administration and Finance, is a public employer within the meaning of Section 1 of G.L. c. 150E (the Law).

2. American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (AFSCME or Union) is an employee organization within the meaning of Section 1 of the Law.

3. On June 22, 1994, the Union filed a petition with the Labor Relations Commission (Commission) under G.L. c. 150E, s. 4, seeking certification as the collective bargaining representative for approximately ten civilians employed at the Otis Air National Guard Base. The case was docketed and assigned Case No. SCR-2217.

4. The proposed bargaining unit in the petition referred to in paragraph 3, above, includes employees in the positions of Security Officer, Security Programs Manager and Information Management Specialist.

5. On September 29, 1995, the Union filed a petition with the Commission under G.L. c. 150E, s. 4, seeking certification as the collective bargaining representative for approximately 17 civilians employed at the Otis Air National Guard Base, Camp Edward Air Reserve National Guard and related areas. The case was docketed and assigned Case No. SCR-2223.

6a. On October 31, 1995, the Union amended the petition referred to in paragraph 5, above. The amended petition modified the proposed bargaining unit description to read:

Included: Security and Law Enforcement Personnel on the Massachusetts Military Reservation to include Otis Air National Guard base, Camp Edwards Air Reserve National Guard and related areas.

Excluded: All others.

6b. On January 19, 1996, the Union filed with the Commission the following final definition of its proposed bargaining unit:

All full-time and regular part-time Security and Law Enforcement Personnel located at the Otis Air National Guard Facility, Barnes Municipal Airport, Camp Curtis Guild, Camp Edwards, and the National Guard Facility located at 143 Speen Street, Natick, MA, and paid under a Security Cooperative Funding agreement.

7. The United States government funds the operation and maintenance, including security, of the Otis Air National Guard facility, Camp Edwards, Barnes Municipal Airport, Camp Curtis Guild, Reading, MA and the National Guard facility located at 143 Speen Street, Natick, MA. There is a funding agreement, known as a Security Cooperative Funding Agreement (Cooperative Agreement), between the United States, represented by the United States Property and Fiscal Officer and the State of Massachusetts represented by the Adjutant General, that governs the use and distribution of the federal funds. A copy of the Cooperative Agreement in effect from October 1, 1994 and continuing in effect as of February 12, 1996 is attached as Joint Exhibit 1. A copy of the funding documents for the federal fiscal years starting October 1, 1994 and October 1, 1995 are also attached as Joint Exhibit 2.

8. In accordance with the Cooperative Agreements described in paragraph 7 above, the federal funds for the care and control of the facilities identified in paragraph 7, above, are administered by the State Quartermaster. The State Quartermaster is a state employee position established under M.G.L. c. 33, s.15 (d).

9. The State Quartermaster appoints the Cooperative Agreement Administrator (Administrator). The Administrator's position is funded through the Cooperative Agreement. The Administrator is not eligible for state employee benefit programs, does not participate in the state retirement system, does not participate in the health care benefit program for state employees administered by the Group Insurance Commission, and does not participate in the state employee's deferred compensation program. Further, the Administrator is not considered to be a "public employee" as that term is defined in M.G.L. c. 258, and does not participate in the PERA administered worker's compensation program. For purposes of worker's compensation, benefits are paid by a private insurance carrier. The Administrator contributes to Social Security under the F.I.C.A. system. There are no other payroll deductions for any other retirement plan or system.

10. Certain custodians employed at facilities identified in paragraph 7, above, are not paid in accordance with the Cooperative Agreement, but are paid directly by the Commonwealth of Massachusetts. These custodians are represented for collective bargaining purposes in a state bargaining unit.

11. The Commissioner of Administration and Finance for the Commonwealth of Massachusetts does not administer the federal funds received in accordance with the Cooperative Agreement.

12. The "Supervisor's Guide for Policies and Procedures," written, issued and implemented by the Cooperative Agreement Administrator, provides for certain required terms and conditions of employment for the employees in the proposed bargaining unit described in paragraph 6b, above, including, *inter alia*, hiring procedures, hours of work, overtime, holidays, leave benefits and grounds for discipline. A copy of the applicable "Supervisor's Guide for Policies and Procedures" is attached as Joint Exhibit 3.

13. The employees in the proposed bargaining unit described in paragraph 6b, above, are not eligible for state employee benefit programs, do not participate in the state retirement system, do not participate in the health care benefit program for state employees administered by the Group Insurance Commission, and do not participate in the state employee's deferred compensation program.

14. The employees in the proposed bargaining unit described in paragraph 6b, above, are not considered to be "public employees" as that term is defined in M.G.L. c. 258.

15. The employees in the proposed bargaining unit described in paragraph 6b, above, do not participate in the PERA administered worker's compensation program. For purposes of worker's compensation, benefits are paid by a private insurance carrier.

16. The employees in the proposed bargaining unit described in paragraph 6b, above, contribute to Social Security under the F.I.C.A. system. There are no other payroll deductions for any other retirement plan or system.

17. The Cooperative Agreement Administrator and employees in the proposed bargaining unit described in paragraph 6b, above, receive paychecks through the State Quartermaster's Office in the following manner. The State Quartermaster maintains a separate account for the federal funds it receives in accordance with the Cooperative Agreement described in paragraph 6b, above. The office of the State Quartermaster submits bi-weekly time and attendance records to Accounting Corporation of America (ACA), 1505 Commonwealth Avenue, Boston, MA, and transfers sufficient funds from its federal funds account. ACA then issues checks to the employees in the proposed bargaining unit signed by the owner of ACA.

18. Employees of the Commonwealth, other than the employees that are the subject of this dispute, receive paychecks from the State Treasurer's Office, signed by the State Treasurer.

19. The word "employee" is used throughout these stipulations to describe the persons presently performing the job functions of the positions in the proposed bargaining unit described in paragraph 6b, above. The use of the word "employee" is not intended to constitute an agreed-upon determination that these persons are employees rather than independent contractors.

20. Within the Commonwealth of Massachusetts, there are two (2) Air National Guard Bases, the Otis Air National Guard base, located in Cape Cod and the Barnes Municipal Airport, located in Westfield, MA. Approximately thirteen (13) full-time security personnel are employed at the Otis Air National Guard Base. Approximately twelve (12) full-time security personnel, including five (5) supervisors, and two (2) part-time security personnel are employed at Camp Edwards. Approximately twelve (12) full-time security personnel are employed at the Barnes Municipal Airport. Approximately one (1) full time supervisor and two (2) part-time security personnel are employed at Camp Curtis Guild, Reading, MA. Further, approximately two (2) part-time security personnel are assigned on an as needed basis to the facility located at Camp Curtis Guild, Reading, MA.; and, approximately two (2) part-time security personnel are assigned on an as needed basis to the National Guard Facility located at 143 Speen Street, Natick, MA. By this

petition, the Union does not seek to represent the supervisory security personnel identified in this paragraph.

21. All thirty-two (32) full-time, non-supervisory, security personnel and six (6) part-time, non-supervisory, security personnel employed at the facilities identified in paragraph 20, above, perform similar job duties and responsibilities in a similar work environment. Economic and non-economic benefits for all full-time and part-time security personnel are governed by the Supervisor's Guide described in paragraph 12, above.

Discussion

The threshold issue presented in this case is whether the security and law enforcement personnel the Union seeks to represent are "public employees" of a "public employer" within the meaning of Section 1 of the Law.³ See, *Massachusetts Probation Ass'n v. Commissioner of Administration*, 370 Mass. 651, 658 (1976); *Committee for Public Counsel Services*, 20 MLC 1201, 1204-1205 (1993). The Union contends that the evidence demonstrates that the Commonwealth's military division exercises substantial control over the petitioned-for personnel, and, therefore, the Commonwealth of Massachusetts, through the military division of the executive branch, is a public employer within the meaning of Section 1 of the Law, and the security personnel are public employees. The Commonwealth contends that, absent any indicia of an employer-employee relationship between these security personnel and the commissioner of administration, the statutory employer, we must dismiss this petition.

In *Massachusetts Probation Ass'n v. Commissioner of Administration*, 370 Mass. 651 (1976), the Supreme Judicial Court compared M.G.L. c. 149, Section 178F(1)⁴ with Section 1 of the Law, and determined that the commonwealth acting through the commissioner of administration⁵ was the single public employer for state employees in the executive branch of government. *Massachusetts Probation Ass'n v. Commissioner of Administration*, 370 Mass. at 662. Further, citing the expanded scope of bargaining for state employees provided for in Section 6 of the Law, including the right to bargain over wages, hours and standards of productivity and performance, the court reasoned that

3. Section 1 of the Law defines "employee" or "public employee" as "any person in the executive or judicial branch of a government unit employed by a public employer..." and defines "employer" or "public 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, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees..."

4. M.G.L. c. 149, Section 178F, the prior statute covering state employee bargaining defined "employer" as "the commonwealth, acting through a department or agency head as agent..." and defined "employee" as "any employee of the commonwealth assigned to work in any department, board, commission or other agency thereof..."

5. M.G.L. c. 7, section 4 provides, in part, that the commissioner of administration "acts as the executive officer of the Governor in all matters pertaining to the financial, administrative, planning and policy coordinating functions and affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth." The commissioner of administration also serves as the secretary of administration and is "responsible for the exercise of all powers and the

performance of all duties assigned by law to the executive office for administration and finance or to any division, bureau or other administrative unit or agency under said office." M.G.L. c. 7, section 4.

M.G.L. c. 7, section 3 provides:

The executive office for administration and finance shall serve as the principal agency of the executive department of the government of the commonwealth for the following purposes:

- (1) Developing, co-ordinating, administering and controlling the financial policies and programs of the commonwealth;
- (2) Supervising the organization and conduct of the business affairs of the departments, commissions, offices, boards, divisions, institutions and other agencies within the executive department of the government of the commonwealth;
- (3) Developing new policies and programs which will improve the organization, structure, functions, economy, efficiency, procedures, services and administrative practices of all such departments, commissions, offices, boards, divisions, institutions and other agencies.

the legislature changed the definition of “public employer” for state employees to provide centralized leadership and direction for collective bargaining. *Massachusetts Probation Ass’n v. Commissioner of Administration*, 370 Mass. at 662. Therefore, to establish that the petitioned-for security personnel are “public employees” of a “public employer,” the evidence must demonstrate that the Commonwealth, acting through the commissioner of administration: 1) hires, unilaterally disciplines, transfers and discharges the employees; 2) establishes wage rates, determines job assignments, and pays the employees; and, 3) is liable for reporting and remitting deductions for social security, unemployment taxes, federal and state taxes. See, *Worcester School Committee*, 13 MLC 1471, 1482 (1987). The source of funding for employees’ salaries is not, standing alone, determinative of whether the petitioned-for personnel are Commonwealth employees. See, *Worcester School Committee*, 13 MLC at 1483.

In *Massachusetts Army National Guard*, 8 MLC 1766 (1982), the Commission determined that skilled maintenance civilians working at the Camp Edwards installation were not employees of the Commonwealth and, therefore, were not entitled to collective bargaining rights under the Law. *Massachusetts Army National Guard*, 8 MLC at 1768. The factors considered by the Commission in reaching this decision included evidence that the petitioned-for individuals: 1) were hired and compensated under a funding agreement, administered by the state quartermaster, between the Massachusetts Army National Guard and the National Guard Bureau of the Department of Defense; 2) were not civil service employees; 3) did not contribute to the state retirement system; and, 4) unlike state employees, paid social security under the FICA system. *Massachusetts Army National Guard*, 8 MLC at 1767.

Here, the facts are similar. The salaries of the petitioned-for security personnel are funded by a cooperative funding agreement administered by the state quartermaster,⁶ between the United States, represented by the U.S. Property and Fiscal Officer and the State of Massachusetts, represented by the adjutant general.⁷ The petitioned-for employees are not eligible for state employee benefit programs, do not participate in the state retirement system, the health care benefit program for state employees administered by the Group Insurance Commission, and the PERA administered worker’s compensation program. Rather, these employees contribute to social security under the FICA system, and benefits are paid by a private insurance carrier for worker’s compensation.

Although, unlike *Massachusetts Army National Guard*, 8 MLC 1766 (1982), this record contains evidence that may arguably support a finding that the Commonwealth, acting through the military division, exercises substantial control over the terms and conditions of employment of the security personnel at issue here, the evidence is insufficient to satisfy all three prongs of the Commission’s substantial control test when applied to the Commonwealth. Moreover, the record contains no evidence that

the commissioner of administration possesses or exercises any control or authority over the state quartermaster, who, when acting on behalf of the adjutant general, enters into and administers cooperative security agreements with the federal government to secure and protect federal military property. Therefore, absent evidence that the commissioner of administration controls the working conditions of the petitioned-for security personnel and could bargain effectively with an exclusive representative, the petition must be dismissed. *Committee for Public Counsel Services*, 20 MLC 1201, 1206 (1993).

Because we have determined that the security and law enforcement personnel the Union seeks to represent are not entitled to collective bargaining rights under the Law, we need not address the issue of what constitutes an appropriate bargaining unit under the Law and the Commission’s rules. 456 CMR 12.07, *Employees of the Commonwealth*.

Conclusion

The evidence is insufficient to warrant a determination that the Commonwealth possesses substantial control over the wages, hours and other terms and conditions of employment of the security and law enforcement personnel the Union seeks to represent. Therefore, we conclude that the petitioned-for security and law enforcement personnel are not public employees of a public employer within the meaning of Section 1 of the Law, and the petition is dismissed.

SO ORDERED.

* * * * *

6. Pursuant to M.G.L. c. 33, section 15(d), the state quartermaster is responsible for “the care and control of all land and buildings held for military purposes.”

7. Under M.G.L. c. 33, section 15(b), the adjutant general, appointed by, and under the control of the governor, in his capacity as commander-in-chief, is “the executive and administrative head of the military division of the executive branch of the government of the commonwealth.”