In the Matter of COMMONWEALTH OF MASSACHUSETTS

and

MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS

Case No. SUP-3586

52.4	*extension and renewal*
54.691	*merit awards*
65.9	*other interference with union*
67.8	*unilateral change by employer*
82.12	*other affirmative action*
91.1	*dismissal*
92.51	*appeals to full commission*

January 30, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

John M. Marra, Esq.	*Representing the Commonwealth of Massachusetts*
James P. McDonagh, Esq.	*Representing the Massachusetts Organization of State Engineers and Scientists*

DECISION ON APPEAL OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Massachusetts Organization of State Engineers and Scientists (the Union) filed a charge on October 31, 1990, alleging that the Commonwealth of Massachusetts (the Commonwealth) violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law) by unilaterally eliminating an in-service recognition bonus. The Commission investigated the charge and issued a Complaint of Prohibited Practice on March 23, 1992. The Complaint alleged that the Commonwealth violated Sections 10(a)(5), and, derivatively, 10(a)(1), of the Law by unilaterally reducing its employees' wages. The Complaint dismissed the Union's charge alleging that the Commonwealth repudiated the duration clause and in-service bonus provision of the parties' collective bargaining agreement.

Administrative Law Judge Robert McCormack (the ALJ) heard the case on June 16, 1994 and both parties filed briefs. On August 23, 1994, the ALJ issued his decision and found that the Commonwealth violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by unilaterally reducing its employees' wages. The Commonwealth appealed the decision, and both parties filed supplementary statements.

Statement of Facts

Neither party has contested the ALJ's findings of fact. Therefore, we adopt the ALJ's findings of fact and summarize the relevant portions below.

The Union and the Commonwealth had entered into a collective bargaining agreement (the agreement) that was effective from July 1, 1986 to June 30, 1989. Article 12A of the agreement was entitled "In Service Recognition" and provided that a bonus would be paid for in-service recognition to those employees who had attained the maximum step in the range of the job group, and who had received a "meeting expectations" or better rating on their most recent performance evaluation. That article further provided that the in-service recognition payments would be paid once per year pursuant to Appendix B of the agreement. Appendix B(1) is entitled "In-Service Recognition Plan FY 1988" and described the amounts of the bonuses for fiscal year 1988. Appendix B(2) is entitled "In-Service Recognition Plan FY 1989" and described the bonuses for fiscal year 1989. The agreement also contained the following duration clause in Article 29:

> This agreement shall be for the three year period from July 1, 1986 to June 30, 1989 and the terms contained therein shall become effective on July 1, 1986 unless otherwise specified. Should a successor agreement not be executed by July 1, 1989, this agreement shall remain in full force and effect until a successor agreement is executed. At the written request of either party, negotiations for a subsequent agreement will be commenced on or after April 1, 1989.

During fiscal years 1988 and 1989, employees in bargaining unit 9 were awarded in-service recognition bonuses when they reached the top step in the salary schedule and their annual evaluations contained an "exceeded expectations" or "met expectations" evaluation. However, in late September 1990, the Union began receiving calls from employees who had not received their bonuses. In early October, the Commonwealth informed the Union that it would not pay the in-service recognition bonuses that year. According to James Loughman, a former Assistant Director at the Office of Employee Relations and the chief negotiator for the Commonwealth in its collective bargaining with the Union, Article 12A was intended by the parties to provide the in-service bonuses only for fiscal years 1988 and 1989. The Commonwealth did not provide the Union with notice or an opportunity to bargain prior to its decision to discontinue the bonus for fiscal year 1990. The Union filed a contractual grievance and a prohibited practice charge with the Commission.

Subsequently, the parties began bargaining for a successor collective bargaining agreement (the successor agreement) to cover the period from July 1, 1990 to June 30, 1993. The successor agreement, which was executed on January 2, 1991, provided the following:

> It is hereby agreed and understood that the collective bargaining agreement between the parties for the period July 1, 1986-June 30, 1989 shall continue in full force and effect, except as modified by the amendments herein. Such amendments shall become effective on the signing date of the agreement unless specified otherwise.

One of the amendments in the successor agreement deleted Article 12A, the bonus plan, in its entirety.

In addition, during the negotiations for the successor agreement, the parties entered into a supplemental agreement. The supplemental agreement provided that the Union would not pursue its grievance pertaining to the in-service recognition bonus to

arbitration. However, the supplemental agreement further provided that if another bargaining unit entered into an agreement with the Commonwealth that provided for an in-service bonus, or if another bargaining unit pursued the in-service bonus to arbitration such that the Commonwealth was required to pay the bonus, the Commonwealth would pay the bonus for fiscal year 1990 to the employees represented by the Union. This agreement was never signed by the Union, but the Union acknowledged its terms.

Opinion

An employer may not unilaterally change conditions of employment that affect mandatory subjects of bargaining without notifying the exclusive representative of its employees of the proposed changes and offering the representative an opportunity to bargain. This principle applies during the hiatus between the expiration of a contract and the effective date of a successor agreement. *See Commonwealth of Massachusetts*, 9 MLC 1355, 1358 (1982). The established terms and conditions of employment in effect at the time the contract expires constitute the *status quo*, which cannot be altered without satisfying the bargaining obligation. *Town of Chatham*, 21 MLC 1526, 1529 (1995). The *status quo* is composed of the terms and conditions of employment that prevail when the contract expires. To identify the terms and conditions of employment that were in effect when the contract expired, "the Commission must look both to the relevant provisions of the expired contract and the established practice between the parties." *Id.* at 1530 (citing *Commonwealth of Massachusetts*, 9 MLC at 1359).

However, expired contract rights "have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the *status quo* of the entire plant operation." *Id.* (citing *Commonwealth of Massachusetts*, 9 MLC at 1360, quoting *N.L.R.B.* v. *Frontier Homes*, 371 F.2d 974, 64 LRRM 2320 [1967]). Therefore, the right established by the contract must also have become an established practice between the parties. Without evidence that the contract right is an established practice, the Commission cannot find that the right articulated by the contract, alone, constitutes the *status quo*. *See id.* Accordingly, although the in-service bonus was contained in the agreement which was continued by the duration clause, the contract language alone is not sufficient to demonstrate that the in-service bonus had become part of the *status quo*. Therefore, we must determine whether the in-service bonus plan had become an established practice between the parties.

To determine whether a practice exists, the Commission analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. *Id.* at 1531 (citations omitted). The Commission has found a past practice to exist where the action has been repeated over a number of years. *See e.g. Ware School Committee*, 22 MLC 1507 (1996)(Twelve year history of giving preference to teachers over non-teachers when hiring constitutes a practice); *City of Boston*, 19 MLC 1613 (1993)(Nine year history of allowing union members to address new employees during their orientation period constitutes a practice). However, the Commission has found a past practice to exist despite a sporadic or infrequent action if "a consistent practice that applies to rare circumstances...is followed each time the circumstances precipitating the practice recur." *City of Boston*, 19 MLC 1487, 1491 (1994); *Town of Arlington*, 16 MLC 1350, 1351 (1989); *Town of Lee*, 11 MLC 1274, 1277 (1984).

On appeal, the Commonwealth argues that, because the appendices to the agreement provide the bonus amounts for fiscal years 1988 and 1989 only, this establishes that the in-service bonus was not to be paid beyond fiscal year 1989. The Commonwealth further argues that James Loughman testified that when the bonus was negotiated, the parties intended that the in-service bonus would expire after fiscal year 1989, regardless of whether a successor agreement had been executed. The Union argues on appeal that the Commonwealth's unilateral elimination of the bonus payments was tantamount to a repudiation of the parties' collective bargaining agreement because that agreement remained in force by virtue of the continuation clause. However, because the Union's charge alleging that the Commonwealth repudiated the agreement was explicitly dismissed in the complaint, that argument is not before us.

Although the evidence reveals that the in-service bonus was paid on a consistent basis over a two year period, that evidence is not sufficient for us to infer that the in-service bonus rises to the level of an established condition of employment that was a part of the *status quo* at the time the agreement expired. Rather, the fact that the appendices provided the bonus amounts only for fiscal years 1988 and 1989, in addition to the unrebutted testimony of James Loughman that, at the time the bonus was negotiated, the parties intended for the bonus to be paid only for fiscal years 1988 and 1989, is persuasive evidence that the in-service bonus was not an established condition of employment between the parties, and that the parties did not contemplate that it would be paid after 1989. Therefore, based on this evidence, we do not find that the in-service bonus was an established practice between the parties that had become part of the *status quo* at the time that the agreement expired. Accordingly, we conclude that the Commonwealth did not violate Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by discontinuing the payment of the in-service bonus.

Conclusion

For the foregoing reasons, we reverse the decision of the administrative law judge and find that the Commonwealth did not violate Section 10(a)(5), and, derivatively, 10(a)(1) of the Law by unilaterally reducing its employees' wages. Accordingly, the Complaint is dismissed.

SO ORDERED.

* * * * * *

In the Matter of QUINCY SCHOOL COMMITTEE

and

TEAMSTERS LOCAL UNION NO. 122

and

QUINCY PUBLIC SCHOOLS BUS DRIVERS ASSOCIATION

Case Nos. MCR-4468, MCR-4469

35.841	*bus drivers*
35.842	*bus monitors*
45.1	*contract bar*
93.3	*petition for certification*

February 4, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner

Stephen R. Domesick, Esq.	*Representing Teamsters Local Union No. 122*
Robert J. Waddick, Esq.	*Representing Quincy School Committee*
Ms. Susan Columbus	*Representing Quincy Public Schools Bus Drivers Association*

DECISION

Statement of the Case

Teamsters Local Union No. 122 (Teamsters) filed two representation petitions with the Labor Relations Commission (Commission). Case No.MCR-4468 seeks to represent a bargaining unit comprised of all full-time and regular part-time school bus drivers employed by the Quincy School Committee (Employer). The second, Case No. MCR-4469, seeks a bargaining unit of all full-time and regular part-time school bus monitors employed by the school committee. Although it filed two separate petitions, Teamsters desires to represent the bus drivers and bus monitors in a single bargaining unit.

The Quincy School Committee urges that the petition in Case No. MCR-4468 be dismissed because it was not filed during the open period in the existing collective bargaining agreement between the City of Quincy and the Quincy Public Schools Bus Drivers Association (QPSBDA) pursuant to Commission Rule 456 CMR 14.06(1). It further contends that the drivers and the monitors do not share a community of interest, and should be represented, if at all, in separate bargaining units.

Currently, QPSBDA represents the bus drivers, but not the bus attendants. This labor organization opposes the Teamster's petitions, and objects to having the monitors in their bargaining unit of drivers.

Administrative Law Judge Robert B. McCormack conducted a hearing on this matter, and issued his recommended findings of fact on September 9, 1996. His recommended findings were unchallenged. Briefs of the parties were carefully studied, and the following findings and opinion are warranted.

Findings of Fact

The Contract Bar Issue: Article XVI of the collective bargaining agreement between QPSBDA and the Employer is entitled "Duration", and reads as follows:

Terms of Agreement

> A. This agreement shall be effective from July 1, 1993 through June 30, 1996 and shall thereafter automatically renew itself for successive terms of two (2) years unless, by the first of September next preceding the expiration date of the contract term involved, either party shall have given the other written notice of its desire to modify or terminate this contract.
>
> B. If any notice under Section A is given, the parties shall meet thereafter with all reasonable promptness and in good faith endeavor to reach an agreement to matters mentioned in such notice.

Neither QPSBDA nor the Employer sought to modify or terminate their collective bargaining agreement pursuant to the above-cited provisions of its duration clause, and therefore it was extended by its terms to June 30, 1998. Both of the Teamster's petitions were filed on March 13, 1996. This was 109 days prior to the expiration of the original term of the existing collective bargaining agreement, and more than two years prior to the expiration of the agreement as extended. The QPCBDA and the Employer have not commenced re-negotiation of any successor bargaining agreement.

The Bargaining Unit(s) Issue: The Employer hires approximately thirty-eight (38) full-time and regular part-time bus drivers and approximately twenty-five (25) school bus monitors. There is a different wage structure for the drivers and the monitors. Drivers are paid $8.70 to $10.26 per hour, while the monitors are paid at a flat rate of $6.00 per bus trip. Drivers work from 38.5 to 42.5 hours per week, while monitors work 20 to 25 hours. The Employer considers drivers to be full-time employees, while monitors are considered part-timers. Drivers who work a 40 hour week enjoy 10 1/2 holidays if their longevity is sufficient, ten (10) days sick leave per year, longevity raises, and city assisted insurance benefits. Monitors are all paid at the $6.00 flat rate per trip, have five sick days, three snow days, and receive no insurance benefits. Drivers are required to possess a commercial driver's license, and receive twenty (20) hours of training in order to receive it. They must also pass a physical examination and drug and alcohol testing. They receive eight hours of paid time each year for driver licence renewal. Monitors do not participate in any of this. All drivers report for work at the Employer's garage on West Squantum Street where the twenty-two (22) busses and seven (7) vans for the handicapped are kept. They then pick up the bus monitors. The pupils range from pre-schoolers through high school seniors. Drivers are assigned bus routes on a schedule which rotates monthly. Monitors are usually assigned a route for the duration of the year, although some rotate their routes in accordance to their assigned bus driver.

Bus drivers are the only people driving the school busses, and they inspect their busses daily when they report to the garage. Monitors neither drive nor inspect. The Employer's witness described the

drivers as "the captain of the ship", who are in charge of their respective busses and who see to it that monitors do their jobs.

Monitors are hired to assure that peace and decorum prevail during bus trips, and to assist handicapped and very young students on and off the bus and when crossing streets. They usually ride at the back of the bus. Drivers do not ordinarily assist monitors in these tasks.

In various respects, the drivers and monitors do work as a team. Thus, a driver would assist a monitor in an emergency situation, or to help quell noise and disorder on the bus. The vehicles are equipped with telephones, and either might report trouble on the bus.

Both the bus drivers and the monitors report to Barbara Cahill, the Administrative Assistant of Transportation, and she is their immediate supervisor. She possesses the power to initiate disciplinary action, although the actual discipline would be recommended by the Coordinator of Personnel or the Assistant Superintendent.

Twelve to twenty years ago, approximately nine of the current bus drivers were bus monitors. Most of these were promoted to driver since 1985.

OPINION

Commission Rule 456 CMR 1406 (1) requires that representation petitions be filed either when there is no valid contract in existence covering the bargaining unit, or between 150 and 180 days before the expiration date of the contract. Here, the bus driver's petition (MCR-4468) was filed on March 13, 1996, which was 109 days prior to June 30, 1996 when the original term of the collective bargaining agreement expired, and more than two years prior to the expiration of the agreement as it was extended by its terms. Hence, Case No. MCR-4468 is time barred by the Employer's collective bargaining agreement with the Quincy Public Schools Bus Drivers Association. The contract bar doctrine has a well established purpose, which is to give meaning to the process through which parties enter into private agreements and to respect the integrity of agreements they enter. The contract bar doctrine helps ensure stability in the workplace by requiring parties to live by their agreements. The Employer is entitled to rely on the validity of the current agreement, and is entitled to presume that the members of the bus driver's association are represented by their regular bargaining representative. The contract bar doctrine should not be waived merely because members of the bargaining unit are dissatisfied with their representative. *City of Salem,* 1 MLC 1172, 1173 (1974). There is no evidence of defunctness or a schism. See, also, *Boston Water & Sewer Commission,* 5 MLC 1870 (H.O., 1979); *aff'd on other grounds,* 6 MLC 1601 (1979). No good cause has been shown for varying from this cardinal rule. For this reason, MCR-4468 is hereby dismissed.

DIRECTION OF ELECTION

We conclude that a question of representation has arisen concerning the school bus monitors of the Quincy School Committee. The following unit is appropriate for the purpose of collective bargaining:

> All full-time and regular part-time school bus monitors employed by the Quincy School Committee, excluding managerial and confidential employees, supervisory employees, and all others.

It is hereby determined that an election shall be held to determine whether a majority of employees in the above-described unit desire to be represented by Teamsters, Local 122 or by no employee organization.

The eligible voters shall include all those employees in the above-described unit whose names appear on the payroll of the employer on January 1, 1997 and who have not since quit or been discharged for cause.

To ensure that all eligible voters shall have the opportunity to be informed of the issues and their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses, which may be used to communicate with them.

Accordingly, it is hereby further directed that three (3) copies of an election eligibility list, containing the names and addresses for all eligible voters must be filed by the Quincy School Committee with the Executive Secretary of the Commission, 100 Cambridge Street, Room 1606, Boston, Massachusetts 02202 immediately on receipt of this decision.

The Executive Secretary shall make the list available to all parties to the election. Failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties; therefore no extension of time for the filing thereof shall be made except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should timely and proper objections be made. IT IS SO ORDERED.

* * * * * *