In the Matter of CITY OF MALDEN

and

MALDEN SCHOOL COMMITTEE

and

MALDEN EDUCATION ASSOCIATION/MTA/NEA

Case Nos. MUP-9312, MUP-9313

13.	*Municipal Employer*
21.	*The Act*
51.15	*bargaining on matters not in employer's control*
54.611	*health insurance*
67.5	*negotiability of items*
67.8	*unilateral change by employer*
82.12	*other affirmative action*
82.3	*status quo ante*
92.413	*motion for reconsideration/clarification*
92.51	*appeals to full commission*

February 20, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Jordan L. Shapiro, Esq.	*Representing the City of Malden*
John P. Reilly, Esq.	*Representing the Malden School Committee*
Ira Fader, Esq.	*Representing the Malden Education Association/MTA/NEA*

DECISION ON APPEAL OF ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

On November 15, 1994, Administrative Law Judge (ALJ) Diane Drapeau issued her decision in this case, finding: 1) that the City of Malden (the City) had violated Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law) by unilaterally changing the health insurance benefits of members of a bargaining unit represented by the Malden Education Association (the Association); and 2) that the City and the Malden School Committee (the School Committee) had violated Sections 10(a)(5) and (1) of the Law by repudiating the terms of a collective bargaining agreement between the Association and the School Committee.[1]

Both the City and the School Committee appealed the ALJ's decision and filed Supplementary Statements, to which the Association filed a response. For the foregoing reasons, we affirm the ALJ's decision as modified.

Statement of the Facts

None of the parties specifically challenge any of the ALJ's findings of fact. Accordingly, we adopt them in their entirety and summarize the relevant portions below.

Since the 1970's, the City has offered its employees, including school employees, certain health insurance benefits, including an indemnity plan, Blue Cross/Blue Shield Master Medical Plan (BC/BS), and several Health Maintenance Organization (HMO) plans, for which the City contributed 75% of the premium for BC/BS and 90% for the HMO plans. The School Committee and the Association were parties to a collective bargaining agreement covering the period September 1, 1991 through August 31, 1993.

1. The procedural history of this case is complex, but can be briefly summarized as follows:

On January 17, 1993, the Association filed charges alleging that the City and the School Committee: 1) unilaterally changed the health insurance benefits of members of the bargaining unit represented by the Association; and 2) repudiated the terms of a collective bargaining agreement between the Association and the School Committee. However, the parties apparently chose to proceed only with the charge against the School Committee. Following an investigation, on April 12, 1993 the Commission issued a Complaint of Prohibited Practice, alleging that the School Committee had repudiated the terms of a collective bargaining agreement between the Association and the School Committee, but deferred the matter to arbitration. Thereafter, the Association decided to pursue its charge against the City, and, on October 18, 1993, the Commission issued an Amended Complaint of Prohibited Practice, alleging that both the City and the School Committee had repudiated the terms of a collective bargaining agreement between the Association and the School Committee. The Commission dismissed those portions of the Association's charges alleging that the City and the School Committee unilaterally changed the health insurance benefits of members of the bargaining unit. On October 24, 1993, the City and the School Committee filed a Motion to Dismiss the charges and to defer the matter to an arbitrator's award that had been issued on July 6, 1993. On October 28, 1993, the Association requested that the Commission reconsider its dismissal of that portion of its charges alleging that the City and the School Committee unilaterally changed the health insurance benefits of members of the bargaining unit. The Association also filed a response to the Motion to Dismiss.

After considering the parties' positions, on December 23, 1993, the Commission issued a second Amended Complaint of Prohibited Practice and referred the motion to defer the matter to the arbitrator's award to the ALJ. On January 2, 1994, the ALJ denied that motion on the grounds that: 1) the arbitrator's award did not resolve the allegations in the Complaint against the City; and 2) the Commission's remedial authority was broader than the award issued by the arbitrator.

Prior to the hearing, the ALJ allowed a motion filed by the Association to clarify the Complaint to reflect that the Complaint alleged a change in the City's Health Maintenance Organization plans as well as its Blue Cross/Blue Shield plan. The ALJ also denied a Motion to Dismiss on the ground that the Commission lacked jurisdiction.

On January 28, 1994, the ALJ conducted a hearing, after which all the parties filed post-hearing briefs. After the ALJ issued her original decision on August 3, 1994, the Association filed a Motion to Clarify the Remedy. On August 18, 1994, the ALJ allowed the Association's Motion and clarified the remedy. Thereafter, the City filed a Motion to Vacate the Clarified Remedy, which the Commission allowed. Finally, after vacating her clarified remedy and allowing the City to file a response to the Association's Motion to Clarify the Remedy, on November 15, 1994, the ALJ issued her decision from which this appeal has been taken. The full text of the ALJ's Amended Decision and Order is reported at 21 MLC 1419.

Article XXV of that agreement, entitled "Insurance and/or Annuity Plan," provided, in part:

> 25.01 Teachers will be covered for the duration of the Agreement for insurance coverage in compliance with Chapter 32B. The current Malden unit coverage is as follows:
>
> * * *
>
> 25.01.02 The medical coverage is Blue Cross/Blue Shield Master Medical with the City of Malden paying 75 percent of the premium.

The agreement made no reference to HMO plans, and the parties had never bargained over HMO options.

In early 1991, the City's Insurance Advisory Committee (IAC) met to discuss a notification from Blue Cross/Blue Shield that it had planned to withdraw its coverage from the City unless 20% of the City's employees enrolled in its plan. In a letter to the City dated June 5, 1991, Association President Gerard Ruane (Ruane) demanded to bargain over health insurance plan options. Ruane also sent a copy of his letter to the School Committee. On June 10, 1991, City Personnel Director Thomas Reilly (Reilly) informed the Association that Blue Cross/Blue Shield was not withdrawing its coverage from the City and that the Association should direct its demand to bargain to the School Committee, not to the City. The School Committee did not respond to the Association's June 5, 1991 letter.

During the Spring of 1992, the IAC met several times to discuss the possibility of Blue Cross/Blue Shield withdrawing its coverage from the City. In a meeting on May 18, 1992, representatives from the Association, the City, and the School Committee compared the benefits of BC/BS with Pilgrim Health Plan. The Association asked several questions about the plans and understood that the City would get back to it with certain information about the health plans.

In a letter dated May 28, 1992, the School Committee notified the Association that the City was considering changing health insurance carriers and that the School Committee was prepared to bargain about the impacts of any change. In a letter to School Committee Chairman William J. Mini (Mini) dated May 29, 1992, Ruane demanded to bargain over health insurance benefits.

In the meantime, the IAC continued to discuss the possibility of changing the City's health insurance plans. The City indicated that it preferred Pilgrim's preferred provider plan (Pilgrim PPO) and Pilgrim's HMO Plan (Pilgrim HMO) to replace all of the existing health insurance plans, except for Harvard HMO. The Association expressed its opposition to both Pilgrim plans.

At an IAC meeting on September 30, 1992, Reilly requested that the IAC participants vote to recommend to the City's Mayor that the Pilgrim plans and the Harvard HMO be adopted as the City's health insurance plans. Except for the Association, all other participants voted in favor of those plans.[2] On October 1, 1992, Reilly notified Mayor Edwin C. Lucey that the IAC had recommended the Pilgrim Plans and Harvard HMO with "no negative votes."

In a letter to Mini dated October 2, 1992, Ruane informed the School Committee of the IAC's vote and demanded to bargain over the health insurance benefits prior to the City's proposed change in benefits. Ruane also reminded the School Committee of its contractual obligations concerning BC/BS. Ruane sent copies of the letter to Reilly and Mayor Lucey.

The School Committee and the Association scheduled its first bargaining session for October 9, 1992, but it was subsequently rescheduled for October 16, 1992 because Reilly was not able to attend the October 9 meeting. In confirming the new date by letter, Association Bargaining Chair Davin reiterated the Association's position that the subject of health insurance benefits was a mandatory subject of bargaining, and that the Association's collective bargaining agreement provided for BC/BS for bargaining unit members.

On October 16, 1992, Ruane wrote to Reilly reminding him that the Association had voted against the Pilgrim plans at the IAC meeting on September 30, 1992. On that same date, Association representatives, School Committee attorney Richard Murphy, Superintendent Holland, and Reilly attended a meeting. Through Massachusetts Teachers Association (MTA) representative Joseph Murphy, the Association expressed its preference for BC/BS and its opposition to the Pilgrim plans. In addition, Joseph Murphy emphasized that the Association had the right to bargain over the choice of plans, not just the impact of the decision to change insurance carriers, and that there was a contractual obligation to continue providing BC/BS. The Association requested that Reilly provide Blue Cross/Blue Shield an opportunity to present its plans.[3] Subsequently, a Blue Cross/Blue Shield representative attended the November 2, 1992 IAC meeting and offered a presentation of Blue Cross/Blue Shield benefits, including Bay State HMO.

On November 12, 1992, Reilly notified all City employees that union negotiations were continuing over the possible change in health insurance coverage. He also mentioned that Blue Cross/Blue Shield had presented an alternative plan, and that the City was evaluating that plan and continuing to negotiate with the insurance companies, and that the City had decided to postpone the effective date of any health insurance change beyond December 1, 1992.

On November 17, 1992, Blue Cross/Blue Shield representatives attended a meeting with Association representatives, School Committee representatives, and Reilly and presented the identical information it had presented at the November 2, 1992 IAC meeting. At that meeting, Blue Cross/Blue Shield distributed materials comparing its plans with the Pilgrim plans.

On November 23, 1992, a similar meeting was held with Pilgrim representatives. At that meeting, MTA Representative Joseph

---

2. There were two abstentions, the police patrolmen's representative and the retired employees' representative.

3. At some date prior to this meeting, BC/BS merged with Bay State HMO, and Leahy HMO was acquired by BC/BS and became HMO Blue. As a result of those mergers and acquisitions, BC/BS represented approximately 70% of the City's employees.

Murphy repeated the Association's position that health insurance plans were a mandatory subject of bargaining, and that the Association had a collective bargaining agreement providing for BC/BS. Reilly responded that he was investigating the issue, but that it was the Mayor's position that the City did not have to honor any contract with the Association because the Mayor was not a signatory to the contract.

Another IAC meeting was held in late November or early December 1992. Although no recommendations were made at that meeting, Ruane reiterated the Association's position concerning BC/BS. On December 2, 1992, Blue Cross/Blue Shield notified Reilly that "Regarding carving out the teachers union, this segment alone would not meet the minimum 70% participation level that we require."[4]

On January 12, 1993, Ruane sent a letter to Reilly stating that he had not received notification of any bargaining sessions on the health insurance issue. He assumed that, because he had heard nothing from the City or the School Committee, the City had renewed its contract with Blue Cross/Blue Shield. On that same date, Mayor Lucey notified the School Committee that, effective March 1, 1993, Pilgrim PPO and Pilgrim HMO would replace BC/BS and Bay State HMO. He indicated that the City would continue to offer Harvard HMO. He also noted: I understand that this change will involve some labor relations issues. I will continue to cooperate with you and your administration by providing assistance and information. Mayor Lucey also communicated with Superintendent Holland about the change in insurance plans. The Mayor informed Superintendent Holland that "The School Committee must immediately offer impact bargaining to all unions regarding the change in health insurance."

On January 19, 1993, Superintendent Holland notified Ruane that Mayor Lucey had informed the School Committee that Pilgrim PPO and Pilgrim HMO would replace BC/BS and Bay State HMO effective March 1, 1993 and that the City would continue to offer Harvard HMO. In addition, Superintendent Holland offered to "...impact bargain the affect of this change in health care." Subsequently, the City notified all employees of the change in health insurance plans and the new premium rates.

On January 26, 1993, the Association filed a grievance concerning the change in health insurance plans and, on July 6, 1993, an arbitrator found that the School Committee violated Article 25 of the collective bargaining agreement when it discontinued offering BC/BS in March 1993.

Opinion

A. The Parties' Obligation to Bargain in Good Faith

In its Supplementary Statement, the City argues that, because Section 1 of the Law mandates that the School Committee not the Mayor bargain with school employees, the ALJ erred in finding that the City was obligated to bargain with the Association over changes in health insurance benefits. On the other hand, the Association argues that neither the Mayor nor the School Committee is the public employer, but rather the City is the public employer and, therefore, the City is required to honor the contractual commitments of its statutory representative (the School Committee) and refrain from taking steps that are inconsistent with its statutory representative's bargaining obligations.

Section 1 of the Law defines "employer" as:

> ... 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.... In the case of school employees, the municipal employer shall be represented by the school committee or its designated representative or representatives.

Section 6 of the Law states, in part:

> The employer and the exclusive representative shall ... negotiate in good faith..

Unlike a regional school district, a municipal school committee is not a separate legal entity, but rather the agent of the municipality for the purpose of dealing with school employees. *Compare*, *Old Colony Regional Vocational Technical High School District* v. *New England Contractors, Inc.*, 443 F.Supp. 822 (D.C. Mass. 1978), *aff'd* 588 F.2d 817 (1st Cir 1978), and *Anderson* v. *Board of Selectmen of Wrentham*, 406 Mass. 508, 512, n.7 (1990). In *Medford School Committee*, 4 MLC 1450 (1977), *aff'd sub nom. School Committee of Medford* v. *Labor Relations Commission*, 380 Mass. 932 (1980), we first addressed the relative obligations of a municipal employer and school committee when dealing with school employees about health insurance purchases under M.G.L. c.32B. In that case, we rejected a school committee's argument that, because M.G.L. c.32B, §3 provides that the governmental unit shall "negotiate and purchase" health insurance coverage for its employees, the municipal employer and not the school committee is obligated to bargain over health insurance with unions who represent school employees.[5]

When dealing with school employees, a municipality and a school committee are a single entity and share the responsibility for making and fulfilling contractual commitments. *Lawrence School Committee*, 19 MLC 1167, 1170, n.4 (1992); *Town of Brookline*, 20 MLC 1570, 1598, n.22 (1994). Therefore, when a municipality

4. We note that this statement appears to conflict with the ALJ's earlier finding concerning Blue Cross/Blue Shield's required participation level. However, the ALJ's findings are supported by the record and resolution of the apparent conflict is not necessary to our consideration of the issues before us.

5. The City argues that the ALJ's finding that the City has an obligation to bargain with unions who represent school employees over changes in health insurance benefits is contrary to the principles set forth in *Medford School Committee*. However, despite the City's broad reading, we found only that M.G.L. c. 32B does not relieve a school committee of its obligation to bargain over changes in health insurance. Therefore, we do not find *Medford School Committee* to be dispositive of the issues presented in this case.

proposes changes that affect the terms and conditions of employment of its school employees, it has an obligation to allow its representative (the school committee) to meet *its* obligation before the municipality implements its proposed change. Accordingly, when contemplating health insurance purchases under M.G.L. c.32B, a municipality has an obligation to refrain from implementing any changes in health insurance benefits until the school committee provides the exclusive representative of those employees with notice and any opportunity to bargain to resolution or impasse.[6] Further, the school committee's obligation, as the representative of the municipality, is to bargain over the municipality's decision to change health insurance benefits and not merely the impact of the municipality's decision. *See*, *Town of Ludlow*, 17 MLC 1191 (1990).

The City further argues that the relationship between the School Committee and the City is analogous to that of the Commonwealth of Massachusetts (Commonwealth) and the Group Insurance Commission (GIC), and, therefore, we should apply our holding in *Board of Regents of Higher Education*, 19 MLC 1248 (1992), and the Supreme Judicial Court's (SJC) holding in *Massachusetts Correction Officers Federated Union* v. *Labor Relations Commission*, 417 Mass. 7 (1994), to the present case. In *Massachusetts Correction Officers Federated Union*, the SJC found that because the GIC is not under the jurisdiction of the Commonwealth, the Commonwealth was relieved of its duty to bargain over changes in health insurance benefits mandated by the GIC. However, the School Committee misconstrues the relationship between the City and the School Committee. Unlike the City, the GIC is not an employer, but rather an independent agency whose purpose is to, *inter alia*, purchase health insurance for employees of the Commonwealth. There is no independent agency analogous to the GIC for purchasing health insurance for municipal employees. Although M.G.L. c.32B gives the City the sole authority to purchase health insurance, that authority does not alter the City's character as an employer or relieve it of its obligations as an employer. *See*, *Id.* at 9, n.3.

Therefore, we find that, as an employer within the meaning of Section 1 of the Law, the City was obligated to refrain from changing the health insurance benefits of members of the bargaining unit represented by the Association until the School Committee gave the Association notice and an opportunity to bargain to resolution or impasse. Moreover, because the City did not challenge the ALJ's finding that it had failed to meet that obligation prior to changing the health insurance benefits for employees represented by the Association, we affirm the ALJ's finding that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the health insurance benefits of members of the bargaining unit represented by the Association.[7]

B. The Parties' Obligation to Honor Contractual Commitments

The City argues that, because the City is not a party to the collective bargaining agreement between the School Committee and the Association, the ALJ erred in finding that the City repudiated that agreement. The School Committee argues that once the City had decided to change the health insurance, the School Committee was statutorily prohibited from providing the contractually required insurance.

As stated above, in the case of school employees, the municipal employer and the school committee, as its collective bargaining representative, "share responsibility for making and fulfilling contractual commitments." *Lawrence School Committee*, 19 MLC 1167, 1170, n.4 (1992). Therefore, even if the City was not a party to the agreement, both the City and the School Committee were contractually obligated to provide health insurance as specified in Section 25.01.02 of the agreement between the School Committee and the Association. Therefore, although, as the School Committee points out, once the City had decided to change health insurance coverage, the School Committee could not provide the contractually required insurance, providing the required health insurance was a shared responsibility between the City and School Committee. Accordingly, we affirm the ALJ's finding that both the City and the School Committee violated Sections 10(a)(5) and (1) of the Law by repudiating the agreement between the School Committee and the Association.[8]

---

6. It is well settled that insurance advisory committee meetings under M.G.L. c.32B do not constitute bargaining within the meaning of Section 6 of the Law. *See*, *Town of Ludlow*, 17 MLC 1191 (1990).

7. We find no merit to the City's argument that the ALJ's decision violates the so-called Home Rule Amendment to the Massachusetts Constitution, Mass. Const. amend. II, by interfering with the internal structure of the City. Contrary to the City's argument, the ALJ's decision does not require the Mayor to usurp the authority of the School Committee by bargaining directly with unions who represent school employees, but rather explains that the relative obligations of the City and the School Committee when dealing with unions who represent school employees requires the School Committee to bargain and the City to refrain from taking unilateral action until the School Committee has bargained to resolution or impasse.

8. In her decision, the ALJ stated:

> The School Committee's failure to protest the City's action, coupled with the arbitrator's finding that the School Committee violated the parties' collective bargaining agreement, is sufficient to demonstrate that the School Committee deliberately refused to abide by the terms of the insurance provision of the parties' collective bargaining agreement.

ALJ Decision at 21-22. However, whether the School Committee repudiated the agreement is a consideration of whether it had a clear understanding of its obligation, but failed to honor that obligation. *See*, *Commonwealth of Massachusetts*, 18 MLC 1161 (1991). Therefore, although we affirm the ALJ's finding that the School Committee repudiated the parties' collective bargaining agreement, we base our decision on a finding that the School Committee had a clear understanding of its contractual obligation to provide BC/BS to members of the bargaining unit and failed to honor that obligation. Whether an arbitrator previously found that the School Committee violated the agreement or whether the School Committee did or did not protest the City's action is not relevant to our consideration.

Conclusion and Order

For the reasons set forth above, we affirm the ALJ's Amended Decision, but modify her amended order.[9]

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City of Malden shall:

1. Cease and desist from:

a. Unilaterally changing the health insurance benefits of bargaining unit members represented by the Association without giving the Association an opportunity to bargain to resolution or impasse.

b. Failing or refusing to bargain collectively in good faith with the Association about proposed changes in health insurance benefits.

c. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

a. Restore the health insurance benefit options that were available to members of the bargaining unit represented by the Association prior to March 1, 1993.

b. Upon request, bargain with the Association in good faith to resolution or impasse before implementing any change in health insurance plans.

c. Reimburse bargaining unit members for any economic losses they may have suffered as a result of the City's unlawful change in health insurance plans, plus interest on any sums owing at the rate specified in M.G.L. c.321, §6B, compounded quarterly.

d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notices to Employees.

e. Notify the Commission within ten (10) days after the date of service of this decision and order of the steps taken to comply with its terms.

IT IS HEREBY FURTHER ORDERED that the City of Malden and the Malden School Committee:

1. Cease and desist from:

a. Repudiating the insurance provision of the collective bargaining agreement between the Association and the School Committee.

b. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Law.

2. Take the following affirmative actions that will effectuate the purposes of the Law:

a. Make whole any employees in the bargaining unit represented by the Malden Education Association for any economic loss suffered by the repudiation of the health insurance provision in the collective bargaining agreement between the Malden School Committee and the Malden Education Association.

b. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notices to Employees.

c. Notify the Commission within ten (10) days of receiving this decision of the steps taken to comply herewith.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has determined that the City of Malden has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E, by unilaterally changing the health insurance benefits of school employees represented by the Malden Education Association without giving the Association an opportunity to bargain to resolution or impasse.

WE WILL NOT unilaterally change the health insurance benefits of the bargaining unit members represented by the Association without giving the Association an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain collectively in good faith with the Association about proposed changes in health insurance benefits.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL restore the health insurance benefits previously offered to the Association's bargaining unit members and, upon request, bargain with the Association in good faith to resolution or impasse before implementing any change in health insurance plans.

WE WILL reimburse bargaining unit members for any economic losses they may have suffered as a result of the City's unlawful change in health insurance plans, plus interest on any sums owing at the rate specified in M.G.L. c.321, §6B, compounded quarterly.

[signed]
Mayor, City of Malden

NOTICE TO EMPLOYEES

The Labor Relations Commission has determined that the City of Malden and the Malden School Committee have violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E by repudiating the insurance provisions of the collective bargaining agreement between the Association and the School Committee.

WE WILL NOT repudiate the insurance provisions of a collective bargaining agreement between the Association and the School Committee.

---

9. Although the ALJ correctly found that the traditional remedy in cases where an employer has unilaterally changed a term and condition of employment is to order the employer to restore the *status quo ante*, we find that the ALJ's amended order is not sufficient to accomplish that remedy. Therefore, we have modified the ALJ's amended order to reflect an order to fully restore the *status quo ante*.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL make whole any employees in the bargaining unit represented by the Malden Education Association for any economic loss suffered by the repudiation of the health insurance provision in the collective bargaining agreement between the Malden School Committee and the Malden Education Association.

[signed]
Mayor, City of Malden

[signed]
Chairman, Malden School Committee

* * * * * *

In the Matter of TOWN OF FALMOUTH

and

AFSCME, Council 93, AFL-CIO

Case No. CAS-3075

34.2	***community of interest***
34.91	***accretion***
35.7	***supervisory and managerial employees***

February 20, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Steven A. Torres, Esq.	*Representing AFSCME, Council 93, AFL-CIO*
James S. Tobin, Esq.	*Representing the Town of Falmouth*

DECISION

Statement of the Case

On February 25, 1994 the American Federation of State, County and Municipal Employees, Council 93 (Union) filed a petition with the Labor Relations Commission seeking to accrete the position of director of assessing into a bargaining unit of administrative and supervisory employees of the Town of Falmouth (Town). The Town opposes that petition.

The Commission conducted an investigation of the petition and, on October 31, 1994, ordered that a hearing be held. A duly designated administrative law judge of the Commission held a hearing on March 6, 1995, at which time the parties had a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to present oral arguments for the record. The Union filed a post-hearing brief on April 20, 1995. The Employer did not file a brief but relies on the oral argument it presented at the hearing.

The administrative law judge issued her recommended findings of fact on November 28, 1995. Neither party has filed challenges to those recommended findings.

Findings of Fact[1]

We summarize the uncontested findings of fact made by the administrative law judge. However, we have modified those facts where noted to more accurately reflect the entire record before us.

The Town and the Union were parties to a collective bargaining agreement covering the period of July 1, 1992 through June 30, 1995. In Article I of that agreement, the Town agreed to recognize the Union as the exclusive collective bargaining representative for a bargaining unit that included the following positions:

> Public Works Inspector, Administrative Assistant, Board of Appeals, Assistant Town Planner, Parking Meter Attendant (Effective December 1, 1992), Deputy Assessor, Director of Natural Resources, Harbor Master, Health Agent, Assistant Town Accountant, Assistant Town Clerk/Treasurer, Assistant Town Collector.

Among the positions included in that unit were the following two positions in the Assessing Department: the deputy assessor-grade 15 (deputy) and the assistant assessor - grade 14 (assistant).[2] Jack Kiely (Kiely) held the position of deputy until he retired in November 1993, and Jo Kousa Innamorati (Innamorati) was the assistant until December 1993.

In 1993, the Town reorganized the Assessing Department. As part of that reorganization, the Town created the position of director of assessing and transferred the duties of the deputy and the supervisory duties of the assistant to the new director position. It also eliminated the deputy assessor position and downgraded the assistant position from a grade 14 to a grade 12. In December 1993, the Town appointed Innamorati to the newly-created director position.

The new director supervises more employees than the deputy used to supervise. As deputy, Kiely supervised only one employee, and the assistant supervised four. Kiely did not have the authority to terminate employees. However, as director, Innamorati has the primary responsibility for supervising employees and supervises seven employees.[3]

---

1. Neither party contests the Commission's jurisdiction in this matter.

2. Although the recognition clause of the parties' collective bargaining agreement does not specifically reference the position of Assistant Assessor-Grade 14, the ALJ made an uncontested finding that, prior to November 1993, the position of Assistant Assessor-Grade 14 was in the unit.

3. If the director is absent, the assistant - grade 12 supervises the other employees in the department.