In the Matter of TOWN OF WEYMOUTH

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 630

Case No. MUP-8959

* * *

In the Matter of TOWN OF WEYMOUTH

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 407

Case No. MUP-8960

54.611	*health insurance*
67.16	*other defenses*
67.8	*unilateral change by employer*
92.51	*appeals to full commission*

August 16, 1996
Robert Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Katherine McClure, Esq.	*Representing International Brotherhood of Police Officers, Local 630 and Local 407*
Joseph A. Emerson, Jr., Esq.	*Representing the Town of Weymouth*

DECISION ON APPEAL OF ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

On April 15, 1992, the International Brotherhood of Police Officers (the Union) filed two charges with the Labor Relations Commission (the Commission), alleging that the Town of Weymouth (the Town) had violated Sections 10(a)(1) and (5) of the M.G.L. c.150E (the Law) by unilaterally changing its health insurance plan and employee contribution rates. The Union filed the charge in MUP-8959 on behalf of the police patrol officers, and the charge in MUP-8960 on behalf of the superior officers. The facts of both cases are essentially the same and have been considered together.

Following an investigation of the Union's charges, the Commission issued separate complaints of prohibited practice alleging that the Town had violated Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith by unilaterally changing the group health insurance plans and contribution rates of its police patrol and superior officers without bargaining with the Union to resolution or impasse.[1] On April 12, 1994, Robert B. McCormack, Esq. a duly designated administrative law judge issued his decision based on the parties' stipulations of fact, essentially finding that, because the decision to terminate Blue Cross/Blue Shield was beyond the Town's control, the Town had no obligation to bargain and, therefore, had not violated the Law.[2]

The Union filed a timely notice of appeal of the ALJ's decision, and both parties filed supplementary statements which we have duly considered. For the reasons set forth below, we reverse the ALJ's decision.

Statement of Facts

The ALJ based his findings entirely upon the parties' stipulations of fact. We summarize relevant portions of those stipulations as follows:

The Union and the Town were parties to two nearly identical collective bargaining agreements: one covering the police patrol officers and the other covering the superior officers. Both agreements covered the period July 1, 1989 through June 1, 1991, and provided that each would remain in full force and effect until a successor agreement was executed.

Each agreement also contained a provision concerning Blue Cross/Blue Shield. The Patrolmen's agreement stated, at Article XVII:

ARTICLE XVII: BLUE CROSS-BLUE SHIELD

It is agreed by and between the parties that the present Blue Cross-Blue Shield coverage in force and effect will be continued to be covered. It is further agreed that the present compensation and contribution by the Town will be continued in force and effect. Life insurance program will be in force during the life of this Agreement. The Town agrees to apply the premium tax conversion of the so-called cafeteria plan to health and life insurance payments by employees.

Article XII of the Superior Officers' agreement contained a similar provision:

ARTICLE XII: BLUE CROSS-BLUE SHIELD

It is agreed by and between the parties that the present Blue Cross-Blue Shield coverage in force and effect will be continued. It is further agreed the present compensation and contribution by the Town will be continued. A life insurance program will be in force during the life of this Agreement.

Prior to July 1, 1990, the Town contributed the following amounts toward the various health plans:

1. In his decision, the ALJ indicated that the issue concerning the employees' contribution rate was pending before an arbitrator and, therefore, at the request of the parties he would make no finding concerning that issue. Because neither party has made any reference to it in its supplementary statement, we assume that either the matter has been resolved or it will be resolved in another forum.

2. The full text of the administrative law judge's decision is reported at 21 MLC 1189 (1994).

Blue Cross/Blue Shield Master Medical —(50%)

Bay State HMO, Medical East HMO, Pilgrim HMO, and Harvard HMO—a dollar amount equal to its fifty percent (50%) contribution toward Blue Cross/Blue Shield Master Medical health insurance.

From July 1, 1990 until December 31, 1991, the Town contributed the following amounts towards those plans:

Blue Cross/Blue Shield Master Medical..	50%
Bay State HMO Single Plan Premium ...	78%
Bay State HMO Family Plan Premium ..	63%
Harvard HMO Single Plan Premium	83%
Harvard HMO Family Plan Premium....	69%
Pilgrim HMO Single Plan Premium.....	83%
Pilgrim HMO Family Plan Premium	69%
Medical East Single Plan Premium	90%
Medical East Family Plan Premium.....	69%

In 1991, the parties began to bargain over the terms of successor collective bargaining agreements. The Town proposed that the group health insurance plans it offered be changed to Pilgrim PPO, with the employee contribution set at fifty percent (50%) of the premiums, and Pilgrim HMO, with the employee contribution set at thirty percent (30%) of the premiums. Despite several bargaining sessions throughout the summer and fall of 1991, the parties were unable to reach an agreement concerning the Town's proposal. However, Blue Cross/Blue Shield had informed the Town that it would cancel its indemnity coverage effective January 1, 1992.[3]

On or about November 18, 1991, the parties again discussed health insurance proposals. Specifically, the Union proposed Pilgrim PPO and 70%-30% on HMO's. However, the Town rejected the Union's proposals. At the conclusion of that meeting, the Town informed the Union that the Blue Cross/Blue Shield Master Medical plan would be cancelled on January 1, 1992. The Town also informed the Union that the only plan being offered by the Town would be Pilgrim, and that employees represented by the Union must either enroll in one of the Pilgrim plans or go without health insurance.

On January 1, 1992, Blue Cross/Blue Shield cancelled the Town's indemnity plan and the Town changed its group health insurance program as follows: Bargaining unit members who had previously subscribed to Blue Cross/Blue Shield Master Medical, Bay State HMO, Medical East HMO and Harvard HMO[4] were offered only Pilgrim PPO, with an employee contribution rate of fifty percent (50%) of the premiums and Pilgrim HMO, with an employee contribution rate of thirty percent (30%) of the premiums.[5]

Opinion

An employer violates Section 10(a)(5) of the Law when it unilaterally changes the "...wages, hours, standards of productivity and performance, or any other terms and conditions of employment without first providing the exclusive representative with notice and an opportunity to bargain." *City of Boston*, 22 MLC 1755, 1757 (1996); citing *Comm. of Mass.* v. *Labor Relations Com.*, 404 Mass 124 (1989). Ordinarily, an employer has a duty to bargain over health insurance benefits. *See*, *Mass. Correction Officers Fed. Union* v. *Labor Relations Comm.*, 417 Mass. 7, 8 (1994); *Town of Ludlow*, 17 MLC 1191 (1990). However, when an employer's unilateral action is based upon a decision that was beyond its control, it is not obligated to bargain over those decisions. *Mass. Correction Officers Federated Union* v. *Labor Relations Comm.*, 417 Mass. 7 (1994); *City of Malden*, 20 MLC 1400, 1405 (1994). Nevertheless, an employer who is excused from bargaining over a decision over which it had no control, must still bargain over the impacts that that decision will have on the wages, hours, and other terms and conditions of employment prior to implementing it. *Board of Regents of Higher Education*, 19 MLC 1248, 1265 (1992).

Here, the parties' stipulations disclose that the decision to cancel Blue Cross/Blue Shield Master Medical was beyond the Town's control. However, the impacts of that decision presented issues that required bargaining. The choice of indemnity carrier as well as the premium contribution amount represent appropriate issues for bargaining. *School Comm. of Medford* v. *Labor Relations Comm. & Others*, 8 Mass. App. Ct. 139, 140 (1979) *Aff'd*, 380 Mass. 932 (1980); *City of Everett*, 19 MLC 1304, 1311 (1992). Therefore, we find that, despite its lack of control over the decision to cancel Blue Cross/Blue Shield Master Medical, the Town was required to bargain to resolution or impasse over the impacts that that decision would have on the wages, hours, and other terms and conditions of employment.

We next turn to whether the parties had bargained to impasse over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical. In its supplementary statement, the Town alleges that "[t]he implementation of the new health insurance provider occurred *after* the Town tried to negotiate the change" (emphasis in original). Impasse occurs when, despite the parties' good faith, further bargaining would be fruitless. *See*, *Town of Arlington*, 21 MLC 1125 (1994) and cases cited. In determining whether impasse has been reached, we consider: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations. *City of Boston*, 21 MLC 1350, 1360 (1994). Applying those factors to the record before us, we find that the parties had not bargained to impasse prior to the change in health insurance plans. First, although the parties had failed to reach an agreement at several prior bargaining sessions, on November 18, 1991, the parties continued to exchange proposals concerning health insurance and the Union offered a specific proposal. This demonstrates a willingness to explore the matter further. Moreover, the discussions concerning health insurance were part of the parties' negotiations over a successor collective bargaining agreement. Where parties are

3. This cancellation date had been extended from the original date of June 1, 1991.

4. The Harvard HMO was to continue for existing subscribers, until May 30, 1992.

5. Neither the ALJ nor either party make any reference to the Town's action concerning those employees enrolled in plans other than Blue Cross/Blue Shield. It appears that the parties intended this issue to be resolved through arbitration.

negotiating over a successor collective bargaining agreement, the lack of agreement on one issue does not establish impasse. 21 MLC at 1130. Therefore, we find that the parties had not bargained to impasse over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

Conclusion

For the foregoing reasons, we reverse the ALJ's Decision and find the Town violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by failing to bargain with the Union to resolution or impasse over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

Remedy

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct. *Labor Relations Commission* v. *Everett*, 7 Mass. App. Ct. 826 (1979); *Commonwealth of Massachusetts*, 22 MLC 1459, 1464 (1996). To remedy an employer's unlawful unilateral change in a mandatory subject of bargaining, we usually order the restoration of the *status quo ante* until the employer fulfills its bargaining obligation and direct the employer to make whole the affected employees for any economic losses they may have suffered as a result of the employer's unlawful conduct. *See e.g. Newton School Committee*, 5 MLC 1016 (1981), *aff'd sub nom. School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). However, where the employer's bargaining obligation involves only the impact of a decision over which the employer had no control, the appropriate remedy is a bargaining order restoring the economic equivalent of the *status quo ante* during impact bargaining. *Town of Burlington*, 10 MLC 1387 (1984). This remedy recognizes that the employer may not be able to restore the *status quo ante*, but nevertheless attempts to place the parties in the position they would have been in absent the employer's unlawful conduct. *Id.*

Here, we have found that, because the decision to terminate the Blue Cross/Blue Shield plan was beyond the Town's control, its bargaining obligation was limited to the impacts of that decision. Therefore, the appropriate remedy is to order the Town to restore the economic equivalent of the *status quo ante* while the parties bargain over the impacts of the decision to terminate the Blue Cross/Blue Shield plan.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of Weymouth shall:

1. Cease and desist from:

   a. Failing to bargain in good faith with the International Brotherhood of Police Officers, Locals 630 and 407 the over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

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

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

   a. Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the International Brotherhood of Police Officers, Locals 630 and 407 over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical by proposing to meet at a reasonable time and place.

   b. Beginning as of the date of this decision, restore the economic equivalent of the *status quo ante* by compensating affected employees for any losses suffered as a result of the Town's unlawful conduct until one of the following occurs:

      1. Resolution of bargaining by the parties;

      2. Failure of the Union to accept the offer to commence bargaining within five (5) days after notice of the offer;

      3. Failure of the Union to bargain in good faith; or

      4. Good faith impasse between the parties.

   c. Post the attached Notice to Employees in place where employees in both bargaining units usually congregate and leave posted for a period of thirty days.

   d. Notify the Commission within thirty (30) days of the steps taken to comply with this order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the Town of Weymouth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E by failing to bargain to resolution or impasse over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

WE WILL NOT fail to bargain in good faith with the International Brotherhood of Police Officers over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

WE WILL NOT in any like manner, interfere with, coerce or restrain any employees in the exercise of their rights under Massachusetts General Laws, Chapter 150E.

WE WILL offer to bargain with the International Brotherhood of Police Officers over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical.

WE WILL compensate affected bargaining unit members for any losses suffered as a result of our failure to bargain in good faith over the impacts of the cancellation of Blue Cross/Blue Shield Master Medical until the earliest of the following events: 1) the parties resolution the issues through bargaining; 2) the International Brotherhood of Police Officers fails to timely accept the offer to bargain or fails to bargain in good faith; or 3) the parties have bargained to impasse.

[signed]
TOWN OF WEYMOUTH

* * * * * *

In the Matter of TOWN OF BURLINGTON

and

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

Case No. MUP-9784

67.42 reneging on prior agreements
91.11 statute of limitations

August 19, 1996
Diane M. Drapeau, Esq.

Leo Peloquin, Esq.	*Representing the Town of Burlington*
Steven A. Torres, Esq.	*Representing AFSCME, Council 93, AFL-CIO*
William J. Lafferty, Esq.	*Representing the Burlington Police Patrolmen's Association*

ADMINISTRATIVE LAW JUDGE'S DECISION

Statement of the Case

This case involves an allegation by the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (AFSCME) that the Town of Burlington (Town) has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) by repudiating an oral agreement.

AFSCME filed its charge with the Labor Relations Commission (Commission) on March 15, 1994. The Commission issued its Complaint of Prohibited Practice on September 22, 1994. Prior to the commencement of the hearing, the Commission allowed the Burlington Police Patrolmen's Association (BPPA) to intervene to address remedial issues that could affect the BPPA's interests. A hearing was conducted on February 26, 1996 by Diane M. Drapeau, a duly designated administrative law judge of the Commission.[1] All parties were afforded a full and fair opportunity to present testimonial and documentary evidence. In addition, all parties filed post-hearing briefs on June 28, 1996.

FINDINGS OF FACT

Thomas L'Italien (L'Italien) is a staff representative for AFSCME and the chief negotiator for the bargaining unit of traffic supervisors employed by the Town. In early 1993, Helen Bulman (Bulman), the chapter chairperson for the traffic supervisors, informed L'Italien that the Town would be hiring permanent intermittent police officers. Since the traffic supervisors performed paid detail assignments along with police officers, the hiring of permanent intermittent police officers could affect the number of paid detail assignments the traffic supervisors would receive. The permanent intermittent police officers are included in the recognition clause of the BPPA's collective bargaining agreement with the Town. Article 13 of that agreement specifies that "[a] roster of all weekly details to include industrial traffic and other permanent details shall be set up to include all permanent and full-time, permanent intermittent officers on an hours offered basis." Between approximately December 1988 and January 7, 1993, there were no permanent intermittent police officers employed by the Town and eligible to perform road/traffic details.

L'Italien had several conversations with David Owen (Owen), the Town Administrator, regarding the impact of the hiring of the permanent intermittent police officers on the detail work assigned to traffic supervisors. Owen, along with Pat Mullin, the town accountant, has always acted as the Town's representative for purposes of collective bargaining with all of the Town's bargaining units, including the traffic supervisors. At some point when L'Italien was conversing with Owen about the paid detail issue, Owen told L'Italien to "Go see the Chief".[2] All police officers and traffic supervisors are supervised by Police Chief William Soda (Chief Soda). Owen had never previously referred L'Italien to a department head to resolve a collective bargaining matter.

In early June, 1993, L'Italien and Bulman had a meeting with Chief Soda about the impact of the hiring of the permanent intermittent police officers on the paid detail assignments of the traffic supervisors.[3] Specifically, AFSCME was concerned about the "pecking order" of the assignments, whether traffic supervisors would be called prior to the permanent intermittent police officers. As a result of this meeting with Chief Soda, on June 4, 1993, Chief Soda posted a notice that stated: "This is a reminder that the filling of traffic details shall be in the following order: regular officers, traffic supervisors, permanent intermittent officers, special officers. All command officers shall monitor the details to assure that this policy is being enforced."[4]

Prior to June 4, 1993, traffic supervisors were called to do road/traffic details only after any available regular police officers and after any available permanent intermittent police officers.

After the meeting with Chief Soda, L'Italien told Bulman that he would go to see Owen to inform him about the results of the meeting. Although Owen did not remember meeting with L'Italien about Chief Soda's decision, he later became aware of the Chief's posting and spoke to him about it.

Sometime after the issuance of Chief Soda's June 4, 1993 notice, the BPPA filed a grievance regarding the change in the "pecking order", claiming that the permanent intermittent police officers had the right to paid detail assignments before they were offered to the traffic supervisors. On July 29, 1993, a grievance hearing was held

1. Although the Town submitted a transcript prepared from the tapes of the hearing, I will not designate the transcript as the official record because it does not reflect the entire hearing, such as, opening statements, a discussion regarding the Town's motion to sequester witnesses, and discussions on objections to questions.

2. Owen admits that he told L'Italien to "go see the Chief".

3. Owen did not notify Chief Soda that Owen had suggested that L'Italien speak with the Chief, nor did Owen and Chief Soda converse prior to this meeting.

4. Chief Soda concurs with L'Italien and Bulman that the posting reflects their agreement.

by Owen, acting as the Town's hearing officer. On August 19, 1993, Owen issued a decision finding in favor of the BPPA's position.

Effective August 19, 1993, the police department implemented Owen's decision to place permanent intermittent police officers before traffic supervisors when offering road/traffic details. Bulman became aware of the change in the "pecking order" sometime before the end of August, 1993. On August 23, 1993, Owen and L'Italien spoke on the phone about Owen's decision and, on the same date, Owen sent L'Italien a copy of the decision. On March 15, 1994, AFSCME filed the instant charge with the Commission alleging that Owen's decision violated Chief Soda's agreement with AFSCME.

OPINION

The Town's first defense to the Complaint of Prohibited Practice is that AFSCME's charge is time-barred.[5] Commission Rule and Regulation 456 CMR 15.03 provides that: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Commission." The timeliness of a charge is an affirmative defense which must be proved by the party advancing it. *Town of Wayland*, 5 MLC 1738 (1979). This defense may be raised either at the initial investigation of the charge or at the hearing on the Commission's Complaint. *Woburn Teachers Association*, 12 MLC 1767, 1772 (1986). The Commission has held that the six-month period of limitations will not begin to run until the charging party knew or should have known of the alleged violation. *City of Pittsfield*, 4 MLC 1905, 1908 (1978); *City of Boston*, 10 MLC 1120, 1133 (1983).

In the instant case, the Town has raised the time-bar defense on several occasions: 1) in its response to AFSCME's written submission during the investigation of the charge; 2) in its Answer to the Commission's Complaint of Prohibited Practice; and 3) in its post-hearing brief. In support of its position, the Town argues that AFSCME's charge was untimely filed because Bulman admitted that she was aware of the implementation of Owen's July 29 decision by the end of August, 1993, and it is undisputed that L'Italien became aware of the change in the "pecking order" when he spoke to Owen on August, 23 1993. AFSCME did not file a charge until March 15, 1994, beyond the six-month period of limitations.

The record supports the Town's position that Bulman admitted that she was aware of the implementation of Owen's July 29, 1993 decision before the end of August. Furthermore, L'Italien did not deny that he had a conversation with Owen on August 23, 1993 about Owen's decision and that Owen subsequently sent him a copy of that decision. There are no facts on the record which would support a finding of "good cause" to excuse the failure to file a charge within the six-month period of limitations. Therefore, I find that the charge filed by AFSCME does not fall within the six-month period of limitations as required by the Commission. Accordingly, I dismiss the Complaint of Prohibited Practice.

* * * * * *

In the Matter of HIGHER EDUCATION COORDINATING COUNCIL

and

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL/MTA/NEA

Case No. SUP-4036

67.3	*furnishing information*
67.42	*reneging on prior agreements*
82.12	*other affirmative action*
84.	*enforcement*

August 20, 1996
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Brian A. Riley, Esq.	*Representing the Massachusetts Community College Council/MTA/NEA*
Cynthia Denehy, Esq.	*Representing the Higher Education Coordinating Council*

RULING ON REQUEST FOR ENFORCEMENT OF AN ADMINISTRATIVE LAW JUDGE'S ORDER

On January 6, 1994, the Massachusetts Community College Council (the Union) filed a charge with the Commission alleging that the Higher Education Coordinating Council (the Employer) violated Sections 10(a)(1), (2), (5), and (6) of M.G.L. c.150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the Union's charge and, on July 5, 1994, issued a complaint of prohibited practice, alleging that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) repudiating a settlement agreement; and 2) failing to furnish certain seniority lists. The remaining allegations were dismissed and the Union did not seek reconsideration of that dismissal pursuant to 456 CMR 15.04.

Following a hearing on December 22, 1994, Administrative Law Judge Robert McCormack (ALJ) issued his decision on March 30, 1995 (hereafter, "Decision"), finding that,, although the Employer had not repudiated a settlement agreement, it had violated Sections 10(a)(5) and (1) of the Law by failing to furnish the requested seniority lists.[1] Paragraph 2 of the ALJ's Order states:

5. The BPPA also raises this issue in its brief.

1. The full text of the ALJ's Decision is reported at 21 MLC 1686.

> The Higher Education Coordinating Council shall immediately take the following action which it is found will effectuate the policies of the Law:
>
> a) Immediately complete its agreed task of providing the Union with proper, useful and workable seniority lists. This is to be done within thirty (30) days of receipt of this Decision and Order.

On June 22, 1995, the Union filed a Request for Enforcement pursuant to 456 CMR 16.08, alleging that the Employer had failed to comply with the ALJ's order. On September 15, 1995, the ALJ conducted a compliance hearing, and, on March 5, 1996, issued a Ruling on Request for Enforcement of Order of the Labor Relations Commission (hereafter, ("Ruling").[2] Finally, on March 13, 1996, the Union filed a request to "commence appropriate judicial action" to enforce the ALJ's Order. For the reasons stated below, we decline to commence judicial action to enforce the ALJ's order at this time, and remand the matter to the ALJ to clarify his order.

Findings of Fact

The facts in this case are fully set out on the ALJ's Decision and Ruling and are not in dispute. They can be summarized as follows:

The Employer and the Union are parties to a collective bargaining agreement that provides, inter alia, that the Employer shall annually provide the Union with seniority lists for all "eligible" part-time faculty and professional staff members. On May 22, 1992, the Union filed a grievance alleging that the Employer had failed to furnish the lists as required. At the arbitration hearing, the parties had apparently settled the matter when Carol Colby (Colby), who was representing the Employer, signed a memorandum of agreement providing that the Employer would furnish certain seniority lists. Thereafter, the Employer provided the Union with a number of seniority lists that were in various stages of completion. However, in a letter dated July 6, 1993, the Employer objected to the "proposed agreement" and refused to provide any additional seniority lists to the Union.

Discussion

In his Decision, the ALJ found that, because there was a well established practice of requiring all fifteen (15) college presidents to assent to system-wide settlement agreements, Colby did not have authority to execute the agreement and, therefore, the Employer had not repudiated the settlement agreement. However, the ALJ found that, because the information was relevant and reasonably necessary to the Union's obligation as exclusive representative, the Employer was, nevertheless, obligated to furnish the information. Accordingly, by failing to furnish the information, the Employer violated the Law. In his Ruling, the ALJ found that the Employer had failed to furnish the information as ordered, and ordered the Employer to furnish seniority lists for several years, including 1994 and 1995.

Although the ALJ found that the Employer had not repudiated the settlement agreement, he ordered the Employer to furnish the information it had agreed to furnish. Therefore, because the basis on which the ALJ ordered the Employer to furnish the information was its duty under the Law rather a contractual agreement, the ALJ's Ruling requires clarification to specify the information that the Employer is legally obligated to furnish, without regard to any agreement that may have created a similar or additional obligation.[3]

Further, in its Response to the Union's Compliance Request, the Employer argues that the parties had contractually agreed to what the Employer was obligated to furnish (which, the Employer alleges, did not include the information at issue) and when it was obligated to furnish it. Although it requires a showing of a clear and unmistakable waiver, parties can agree to limit the information to which a union is entitled. See *Board of Regents of Higher Education*, 9 MLC 1799 (1983). The ALJ did not address the Employer's argument in his Ruling.

Finally, the ALJ's Ruling is overbroad because it orders the Employer to furnish information that is beyond the scope of the original complaint, was never litigated and was never discussed in the ALJ's original Decision. Specifically, the complaint alleges, and the ALJ finds, that the Employer failed to furnish the seniority lists for academic years 1991-92 and 1992-93. However, in his Ruling, the ALJ orders the Employer to furnish seniority lists for 1994 and 1995. There is nothing in the record to suggest that the Union even requested the information beyond the 1992-93 academic year.

Conclusion

For the foregoing reasons, we declined to commence judicial action to enforce the ALJ's order at this time, and remand the matter to the ALJ to clarify his order. Specifically, the ALJ is directed to: 1) specify what information the Employer is legally obligated to furnish, without regard to any agreement that may have created a similar or additional obligation; 2) address the Employer's argument concerning parties' agreement about the timing and extent of the Employer's obligation to furnish seniority lists; and 3) limit his order to the time period described in the complaint and fully litigated by the parties.

SO ORDERED.

* * * * * *

2. The ALJ's Ruling is not reported.

3. It is unclear whether the information referred to in the settlement agreement is different from the information referred to in the parties' collective bargaining agreement.

In the Matter of TOWN OF PLYMOUTH and AFSCME, COUNCIL 93, AFL-CIO

Case No. MUP-1295

52.1	*collective bargaining agreement - breach*
67.42	*reneging on prior agreements*
91.15	*pre-hearing dismissal*
91.6	*deferral to prior arbitration award*

August 21, 1996
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Wayne Soini, Esq. *Representing AFSCME, Council 93, AFL-CIO*
Andrew Waugh, Esq. *Representing the Town of Plymouth*

RULING ON MOTION TO DEFER TO ARBITRATOR'S DECISION

On August 10, 1995, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) filed a prohibited practice charge with the Labor Relations Commission (Commission) alleging that the Town of Plymouth (Town) violated Section 10(a)(5) and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's rules, the Commission investigated the Union's charge and issued a complaint and notice of hearing on July 9, 1996. On July 16, 1996, the Town filed its Answer and a Motion to Defer to an Arbitrator's Award.

The complaint alleged that the Town repudiated a March 7, 1995 agreement by using prisoners to perform bargaining unit work at its cemeteries. Specifically, the complaint alleged that on March 7, 1995, the Town and the Union agreed that the Union would drop its grievance related to the use of prisoners at the Burial Hill Cemetery if the Town honored a previous agreement reached on February 6, 1995. The complaint further alleged that on February 6, 1995, the parties agreed that the Town would not use prisoners to perform bargaining unit work at its cemeteries.

In its Answer, the Town denied that, at the February 6, 1995 meeting, it agreed to restrict its use of prisoners in any way and that it merely informed the Union that it would use prisoners at the Town landfill on Mondays, Wednesdays, and Fridays. The Town admitted that on February 22, 1995 it assigned pre-release prisoners to the Burial Hill Cemetery to perform various tasks.

In its Motion to Defer, the Town argues that a January 18, 1996 Award by Arbitrator Arnold Zack has resolved the parties' issues that have been raised by this complaint. In his decision, Arbitrator Zack found: 1) that Article XXIX, Section 4 of the parties' collective bargaining agreement (Agreement) reserves to the bargaining unit, work normally done by unit employees, but does not prevent contracting out; 2) that since 1988, the Town had used non-bargaining unit employees to do bargaining unit work with the Union's acquiescence until 1991; 3) that in an August 17, 1992 decision, Arbitrator Role found that the use of a pre-release prisoner to work in the Town's cemeteries did not violate the Agreement; 4) that the February 6, 1995 meeting did not constitute a renegotiation of the Town's authority under Art. XXIX, Section 4 nor did it constitute a surrender of any rights conferred upon the Town by the Role Award; 5) that the Union failed to present evidence of an agreement to restrict prisoners to landfill work.

The Union filed no opposition to the Town's Motion to Defer to the Arbitrator's Award.

DISCUSSION

In *City of Boston School Committee*, 1 MLC 1287, 1290 (1975), the Commission adopted the National Labor Relations Board's (NLRB) policy for deferral to the arbitration process as articulated in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). In essence, deferral to the arbitration process is appropriate where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding if those proceedings appear to have been fair and regular, if all parties had agreed to be bound by those proceedings, and the decision is not clearly repugnant to the purposes and policies of M.G.L. c. 150E. *City of Boston*, 5 MLC 1155 (1978); *Town of Brookline*, 20 MLC 1570, 1593 (1994). In addition, the arbitration award must dispose of the substantially identical issue presented to the Commission. *City of Cambridge*, 7 MLC 2111, 2112 (1981). The Commission will only defer where the issue posed by the prohibited practice is essentially a question of contract interpretation, the statutory issues raised by the case are well-established, and the resources of the Commission and the parties can be conserved through deferral. *See Whittier Regional School Committee*, 13 MLC 1325, 1331-32 (1986).

In deciding whether to defer, the Commission also considers whether deferral will discourage inconsistent awards. Generally, the Commission defers to the arbitration process prior to conducting a Commission hearing. At a hearing, however, the Commission generally limits its deferral to an arbitration award, thereby minimizing the risk that two forums will issue inconsistent rulings. *Town of Ware*, 17 MLC 1565, 1566 (1991).

Our review of the arbitrator's award persuades us that deferral in this case is appropriate. Here, there are no allegations that the proceedings before the arbitrator were improper, irregular, or unfair to the parties. The arbitrator's award issued prior to the Commission's hearing in this matter, and there is nothing in the record to suggest that either party declined to be bound by the arbitrator's decision.

The issue before the Commission is whether the Town repudiated the March 7, 1995 agreement by using pre-release prisoners to perform work at the Burial Hill cemetery. However, the March 7th agreement was premised upon a February 6, 1995 understanding that Arbitrator Zack found did not constitute an agreement. Arbitrator Zack also found that the Town's use of pre-release prisoners at the Burial Hill Cemetery was within the Town's authority under the Agreement.

After reviewing the arbitrator's award under the principles set forth in *Boston School Committee*, 1 MLC at 1290, the Commission concludes that the arbitrator's award disposes of the identical issues before the Commission, that deferral to that award would not only conserve the Commission's resources but would also discourage inconsistent awards, and that the arbitrator's award is not repugnant to the policies of the Commission.

Therefore, the criteria for deferral to the arbitration award have been met in this case, and we defer to Arbitrator Zack's findings that the Town's conduct in assigning pre-release prisoners to certain cemetery duties on February 22, 1995 did not violate the collective bargaining agreement nor did the February 6 understanding restrict the Town's authority to assign prisoners to cemetery duties.

CONCLUSION

For the foregoing reason, the Town's Motion to Defer to the Arbitrator's Award is ALLOWED. The Commission defers this matter to the arbitrator's award and the complaint of prohibited practice is DISMISSED.

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