

In the Matter of MILLIS SCHOOL COMMITTEE

and

MILLIS TEACHERS ASSOCIATION

Case No. MUP-9038

54.6131	<i>early retirement incentives</i>
54.8	<i>mandatory subjects</i>
67.15	<i>union waiver of bargaining rights</i>
67.3	<i>furnishing information</i>
67.61	<i>bargaining with individuals</i>
91.1	<i>dismissal</i>
91.131	<i>de minimis violations</i>
92.51	<i>appeals to full commission</i>

October 8, 1996

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

James A. Toomey, Esq.      *Representing the Millis Committee*  
Brian Riley, Esq.         *Representing the Millis Teachers Association, MTA*

## DECISION ON APPEAL OF HEARING OFFICER'S DECISION

### Statement of the Case

The Millis Teachers Association (the Union) filed a prohibited practice charge with the Commission on June 9, 1992, alleging that the Millis School Committee (the School Committee) violated Sections 10(a)(5) and (1) of Chapter 150E of the Massachusetts General Laws (the Law). The Commission investigated the charge and issued a Complaint of Prohibited Practice on October 8, 1992 alleging that the School Committee violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) bypassing the Union by making an agreement with an individual bargaining unit member; and, 2) failing to furnish relevant and reasonably necessary information to the Union. On March 23, 1993, Hearing Officer Robert B. McCormack (the hearing officer) heard the case. On September 3, 1993, the hearing officer issued his decision dismissing both counts of the Complaint.<sup>1</sup>

The Union filed a notice of appeal on September 16, 1993 and filed its supplementary statement on September 29, 1993. The Union's appeal only challenges the hearing officer's dismissal of the bypass allegation in the Commission's complaint. The School Committee filed its responsive supplementary statement on October 12, 1993. Upon our review of the hearing officer's decision and the parties' statements on appeal, we reverse the hearing officer's decision and find that the School Committee failed to bargain in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by

bypassing the Union and dealing directly with an individual employee.

### Statement of Facts

Neither party contested the hearing officer's findings of fact. Therefore, we adopt the hearing officer's findings pursuant to 456 CMR 13.15(5) and summarize them below.

The Union and the School Committee were parties to a collective bargaining agreement that was in effect from September 1, 1989 to August 31, 1992. Article IX(c)(1) of the agreement provides, in part:

An eligible teacher who gives written notice to the Superintendent of his/her leaving the Millis school system three years in advance of the effective date shall be paid each year an additional 10% of the salary position that the teachers' salary schedule indicated he/she would earn for each of the three years preceding the effective date of his/her leaving.

Article IV(c) of the agreement provides, in relevant part:

If a teacher fails to retire on the specified date, the teacher must repay the retirement stipend plus 10% thereof to the Town of Millis.

Bargaining unit member Frank Gubala (Gubala) took advantage of the early retirement incentive, gave written notice of his effective retirement date to the superintendent and began to receive an additional 10% of his salary. However, Gubala later decided that he would remain employed in the school system despite the fact that he was already receiving the early retirement stipend. The superintendent worked out a payment plan with Gubala to enable him to pay back the retirement stipend plus the 10%. The superintendent permitted Gubala to repay this money by working extra days beyond the regular 182 day work year as provided for in Article IV(E-3) of the agreement.<sup>2</sup> According to the agreed plan, Gubala would repay the stipend at the per diem rate of 1/182 of his base salary while he worked extra days during the summer. Gubala normally worked extra days during the summer.

Gubala entered into a written agreement with the School Committee, dated May 21, 1992, that provided that Gubala would pay back \$11,536.03 (the principal plus the 10%) to the School Committee by working additional days in the school performing his regular duties, at a per diem rate of \$227.32. This School Committee approved the agreement on May 19, 1992. The superintendent did not inform the Union of his dealings with Gubala, but after the School Committee executed the agreement with Gubala, he placed a copy of it in the mailbox of Union president Dennis Naughton. The Union filed a prohibited practice charge with the Commission on June 9, 1992.

### Opinion

It is well established that the duty to bargain collectively with the employee's exclusive collective bargaining representative

1. The full text of the hearing officer's decision appears at 20 MLC 1172 (1993).

2. Article IV(E-3) provides that compensation for work beyond the normal 182 day work year for all personnel not on a ratio will be at the rate of 1/182 of the individuals base annual salary.

prohibits the employer from dealing directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. *Blue Hills Regional School Committee*, 3 MLC 1613 (1977); *See also, City of Springfield*, 17 MLC 1380, 1385 (1990); *Town of Randolph*, 8 MLC 2044, 2052 (1982). An employer's direct dealing with the employees in the bargaining unit undermines the effectiveness of the bargaining representative, and creates the possibility of conflict between individually negotiated gains and the terms of the contract. *Lawrence School Committee*, 3 MLC 1304, 1312 (1976). As the record clearly demonstrates, the superintendent worked out the repayment plan directly with Gubala, without involving the Union. Because neither party disputes this fact, the only issue we need to determine on appeal is whether the repayment of the retirement stipend is a matter that is properly the subject of negotiations with the Union.

On appeal, the Union challenges the hearing officer's interpretation of the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962), as standing for the proposition that not all management decisions are bargainable.<sup>3</sup> In particular, the Union disagrees with the hearing officer's conclusion that under *Katz*, the method of repayment is not a bargainable issue. Rather, the Union argues that the method of the repayment of the retirement incentive is a matter of discretion that is subject to collective bargaining. *See Katz*, 369 U.S. at 746.

We do not find the debate over the correct interpretation of *Katz* to be pertinent to this case because the analysis in *Katz* pertains to unilateral change rather than bypass. However, we agree that the method of the repayment of the retirement stipend is bargainable. In *Commonwealth of Massachusetts*, 4 MLC 1869, 1874 (1978), the Commission found that the method by which an employer recovers an overpayment is a mandatory subject of bargaining. In that case, the Commonwealth overpaid its contribution towards employee health insurance. To recover the overpayment, the Commonwealth deducted it from the paychecks of its employees. The Commission found that the Commonwealth violated the Law by failing to provide the Union with notice and an opportunity to bargain over the recoupment of the overpayments. *Id.* at 1873.

Here, although the parties' collective bargaining agreement states that the money shall be repaid with interest in the event that a teacher fails to retire on his or her designated date of retirement, the agreement is silent as to the method of the repayment. Further, there is no evidence that the parties had previously bargained over the method of repayment, or that the Union clearly and unequivocally waived its right to bargain over the method of the repayment.<sup>4</sup> *See Town of Brookline*, 20 MLC 1570, 1597 (1994); *Massachusetts*

*Board of Regents of Higher Education*, 19 MLC 1248, 1268 (1992). Therefore, we conclude that the method of repayment of the retirement stipend is a mandatory subject of bargaining. Accordingly, because we find the method of the repayment of the retirement stipend to be a subject that is proper for negotiations, we find that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it bypassed the Union and negotiated directly with Gubala to determine the method by which he would repay the retirement stipend.

#### Conclusion

For the foregoing reason, we reverse, in part, the decision of the hearing officer and conclude that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by bypassing the Union and forming an agreement directly with Gubala concerning the method of the repayment of the retirement stipend.

#### 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). The Commission usually remedies a unilateral change by ordering the restoration of the *status quo ante* until the employer has fulfilled its bargaining obligation and directs the employer to make whole the affected employee(s) for any economic losses they may have suffered as a result of the unlawful conduct. *Newton School Committee*, 5 MLC 1016 (1978), 8 MLC 1544 (1981), *aff'd sub nom School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). However, in cases where the employer has granted an economic benefit to its employee(s), the Commission declines to order individual employees to return the benefit. Rather, the Commission will give prospective effect to an order rescinding the economic benefit. *Natick School Committee*, 11 MLC 1387, 1400 (1985); *Commonwealth of Massachusetts*, 14 MLC 1322, 1327 (1987); *aff'd sub nom Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989). The Commission has reasoned that the prospective rescission of economic benefits avoids penalizing employees for the employer's illegal action, and avoids alienating employees from the unions that represent them. *Natick School Committee* at 1400.

Here, because Gubala has benefitted from the method of repayment to the School Committee, we will not order the School Committee to rescind Gubala's repayment plan.<sup>5</sup> Therefore, we limit our remedy to an order that the School Committee bargain with the Union over the method by which employees shall repay the

3. *Katz* is the seminal case concerning unilateral change. In that case, the employer unilaterally implemented changes in the sick-leave policy, the merit-wage increase policy and a general wage increase. The Supreme Court held that an employer's unilateral change in a mandatory subject of bargaining constitutes a per se violation of the duty to bargain. However, the Court notes that, although unilateral action will rarely be justified, the Court does not "foreclose the possibility that there might be circumstances which the [National Labor Relations Board] could or should accept as excusing or justifying unilateral action...." It is this portion of the decision on which the hearing officer bases his conclusion.

4. It should be noted that the hearing officer concluded that there was no contractual waiver by the Union of the method of repayment. In making this finding, the hearing officer relied upon the lack of evidence demonstrating any bargaining history pertaining to the method of repayment, in addition to the collective bargaining agreement's silence on the method of repayment. Neither party challenged this finding on appeal.

5. Further, Gubala may already have satisfied his obligation to the School Committee. In that event, an order rescinding Gubala's agreement with the School Committee would be inappropriate.

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retirement stipend in the event that other employees fail to retire on their effective date of retirement. However, to the extent that Gubala has not fulfilled his obligation to repay the retirement stipend, we order that the School Committee bargain with Union over the method by which Gubala will repay his remaining obligation, if any.

### Order

Based upon the foregoing findings and rulings, and pursuant to the authority vested in the Commission by M.G.L. c. 150E, Section 11, it is hereby ordered that the School Committee shall:

Cease from negotiating directly with employees over matters that are properly the subject of negotiations with the Union.

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

Upon request by the Union, bargain in good faith to resolution or impasse the method by which employees shall repay the retirement stipend in the event an employee fails to retire on his or her designated date of retirement, including any remaining obligation owed by Gubala.

Post immediately in all conspicuous places where employees usually congregate and where notices are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the Notice to Employees.

Notify the Commission within ten (10) days of service of this Decision and Order of steps taken to comply therewith.

### APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Labor Relations Commission are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such appeal, the appealing party must file a Notice of Appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

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