

In the Matter of COMMONWEALTH OF  
MASSACHUSETTS / COMMISSIONER OF  
ADMINISTRATION AND FINANCE

and

MASSACHUSETTS ORGANIZATION OF STATE  
ENGINEERS AND SCIENTISTS

Case No. SUP-4378

51.11	<i>authority of employer representative</i>
52.64	<i>past practices</i>
54.621	<i>parking privileges</i>
67.61	<i>bargaining with individuals</i>
67.8	<i>unilateral change by employer</i>
82.3	<i>status quo ante</i>
82.4	<i>bargaining orders</i>

August 24, 2000

Robert C. Dumont, Chairman  
Mark A. Preble, Commissioner

Dianne E. Rosemark, Esq. *Representing the Massachusetts  
Organization of State  
Engineers and Scientists*

Thomas G. Massimo, Esq. *Representing the Commonwealth of  
Massachusetts*

### DECISION<sup>1</sup>

#### Statement of the Case

On May 8, 1997, the Massachusetts Organization of State Engineers and Scientists (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission), alleging that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (the Employer) had violated Sections 10(a)(1), (2), and (5) of Massachusetts General Laws, Chapter 150E (the Law). On December 11, 1997, following an investigation, the Commission issued a Complaint of Prohibited Practice alleging that the Employer had violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by: 1) unilaterally changing its free parking policy without providing the Union with an opportunity to bargain to resolution or impasse; and 2) bypassing the Union and dealing directly with the employees represented by the Union regarding options for parking.<sup>2</sup> The Employer filed an answer on December 30, 1997.

On September 16, 1998, John B. Cochran, Chief Counsel of the Commission (Chief Counsel), conducted a hearing at which both

parties had an opportunity to be heard, to examine witnesses, and to introduce evidence into the record. The Chief Counsel allowed the Union to introduce evidence at the hearing concerning the Section 10 (a) (2) allegation. The Union and the Employer filed post-hearing briefs on December 2, 1998 and December 7, 1998, respectively. The Chief Counsel issued Recommended Findings of Fact on June 24, 1999. The Employer filed challenges to the Recommended Findings of Fact on or about July 14, 1999. The Union filed a reply on or about August 6, 1999.

#### Findings of Fact<sup>3</sup>

The Union represents a bargaining unit consisting of employees in statewide bargaining unit 9, including certain employees of the Department of Environmental Protection (DEP) who work in the DEP's Central Regional Office (CERO). Prior to November 12, 1996, CERO was located at 75 Grove Street, Worcester, Massachusetts (CERO Grove Street) in a building owned by Parker Realty (the landlord). On November 12, 1996, CERO moved its offices to 627 Main Street, Worcester, Massachusetts (CERO Main Street).

Since at least 1981, unit members who worked at CERO Grove Street were able to park their personal vehicles without charge in a fenced parking lot (the parking lot) located across the street from the DEP offices if they displayed a parking sticker issued by the landlord. State vehicles were also permitted to park in the parking lot free of charge. DEP's landlord provided DEP with parking stickers for the parking lot, and DEP issued the stickers to all of its employees at CERO Grove Street who had a vehicle and wanted to park in the parking lot.<sup>4</sup> When DEP hired new employees, it requested parking stickers from the landlord for those employees. Either Richard Wilson (Wilson), a regional planner IV who also performed the duties of administrative regional manager at CERO and had been a bargaining unit member of the Union since 1989,<sup>5</sup> or his administrative assistant, whom he shared with the DEP regional director, would distribute the parking stickers. Each year, the landlord issued new parking stickers, and Wilson would distribute them to the DEP employees. DEP employees and other individuals who did not drive state vehicles or did not have parking stickers received a time-stamped parking ticket when they entered the parking lot and were charged for parking.<sup>6</sup>

DEP employees could enter and exit the parking lot at any time through unlocked gates, although the lot was occasionally full. A parking attendant was on duty from 7:00 a.m. until 6:00 p.m. daily, and the lot was lighted after dark. Parking was also available in other parking lots and public side streets in the area near CERO Grove Street. However, no other secured parking lots were available within walking distance of CERO Grove Street.

1. Pursuant to 456 CMR 13.02 (2), the Commission designated the hearing in this case as a formal hearing.

2. The Commission did not specifically address the Union's allegation that the Employer's conduct also violated Section 10(a)(2) of the Law.

3. The parties have not contested the Commission's jurisdiction over this matter.

4. For example, Mary Richards received a sticker to park in the parking lot in 1994 from the secretary to DEP's regional director.

5. The Employer challenged the Hearing Officer's omission of a finding that Wilson had been a bargaining unit member of the Union since 1989. The record supports the Employer's challenge, and we have modified the finding accordingly.

6. Occasionally, CERO Regional Director Gail Suchman (Suchman) drove her personal car to work at CERO Grove Street and parked in the parking lot. Suchman did not have a parking sticker and was charged for parking a number of times. However, the attendant did not always require Suchman to pay for parking.

Wilson has worked for the DEP since 1987, and, until 1998, he worked at the DEP's CERO in Worcester. His duties included interfacing with the landlord of the CERO Grove Street property regarding parking stickers and related problems. For example, in 1993 when the DEP became a tenant-at-will at CERO Grove Street, Wilson dealt with the landlord because the landlord was making noises about charging DEP employees for parking at the lot. Wilson pointed out to the landlord that free parking was an important factor in choosing the CERO Grove Street site, and the landlord agreed to continue providing free parking at the lot.

According to Wilson, he did not have the authority to enter into a lease agreement with the landlord of the CERO Grove Street building on behalf of DEP, and DEP Deputy Commissioner for Administrative Services Daniel McGillicuddy (McGillicuddy) was the only employee to whom the Employer had delegated the authority to execute leases for CERO Grove Street. Therefore, Wilson's discussions with the landlord about employee parking took place outside of the formal lease negotiations for the premises at CERO Grove Street. Further, it was Wilson's understanding that DEP could not include free parking for employees in its lease with the landlord and that free parking was not part of the lease for CERO Grove Street. Therefore, the agreement regarding free parking for DEP employees at CERO Grove Street was a handshake agreement that existed outside of the DEP's lease with the landlord. Although Wilson did not know the particulars of that handshake agreement, he knew that DEP did not pay the landlord to allow DEP employees to park in the lot.

McGillicuddy has been the DEP deputy commissioner of administrative services since 1980. In that capacity, he is the only DEP official with the authority to negotiate leases on behalf of DEP. McGillicuddy negotiated the leases for CERO Grove Street, and those leases did not provide for free parking for DEP employees at that location but only provided for reasonable access or proximate parking. Nor did he authorize anyone else to negotiate for free parking for those employees. McGillicuddy had no knowledge about the parking sticker program for employees at CERO Grove Street until the Union filed its charge in this matter.

Gail Suchman (Suchman) became the regional director for CERO in June 1996. At the time she assumed that position, DEP had already negotiated and executed a lease for the new CERO Main Street location. Shortly after becoming regional director, Suchman learned that employees were concerned about parking at the new CERO Main Street location, and, at a staff meeting in the fall of 1996, there was a discussion about the lack of parking at the new location. Mary Richards (Richards), a CERO employee and member of the bargaining unit represented by the Union, was present at the staff meeting and said that the Employer needed to bargain with the Union concerning any changes in free parking. At the meeting, Suchman asked for volunteers to form a parking committee to investigate parking at the new CERO Main Street

location.<sup>7</sup> A number of DEP employees, including members of unit 9 represented by the Union, volunteered to participate in the parking committee, and unit member Daniel Hannon volunteered to head the committee because he had grown up near the site of the new CERO Main Street office.

Following the staff meeting, Richards told Union counsel Ann Looney (Looney) that Richards was concerned that free parking would no longer be available after CERO moved to the Main Street location. Further, Richards informed Looney about the parking committee and told Looney that she did not think it was a good idea for employees to work directly on the committee.

On October 15, 1996, Looney wrote a letter to Michael Coughlin (Coughlin), the DEP Human Resources Director, informing him that any change from the free parking provided to unit members at CERO Grove Street would constitute a change in terms and conditions of employment. Looney also requested that Coughlin provide the Union with formal notice and an opportunity to bargain over the impacts of any change in providing free parking for the unit members. Further, Looney informed Coughlin that the Union did not condone having bargaining unit members participate on committees whose substantive goal is to change terms and conditions of employment. Looney received no response to her October 15 letter.

In October 1996, the parking committee gave CERO employees a document captioned "Parking Recommendations," which contained a list of parking options available near CERO Main Street. The only free parking on the list was available on a first-come-first-serve basis in a parking lot adjacent to the Registry of Motor Vehicles owned by the Department of Public Works (the Public Works lot), which was located across the street from CERO Main Street. However, the recommendations noted that there was no guarantee that free parking would always be available at the Public Works lot, particularly in the winter months because the highway department stored sand and salt in that lot. The recommendations also noted that the Registry of Motor Vehicles used the Public Works lot for overflow when its own parking lot was full.

Looney wrote to Coughlin again on October 30, 1996 stating the Union's position that the "Parking Recommendations" reflected that DEP was dealing directly with bargaining unit 9 employees concerning changes in conditions of employment. The next day, Coughlin called Looney and told her it was DEP's position that it had never provided parking for CERO employees and that DEP would not bargain over the issue. During that conversation, Coughlin told Looney he was leaving his position and that McGillicuddy would be assuming his duties. McGillicuddy never contacted Looney about parking at the new CERO Main Street location.

7. Suchman testified that she did not solicit volunteers for a parking committee but that there was general consensus that a parking committee would be a good idea. However, Richards testified that Suchman did solicit volunteers. Richards's testimony is buttressed by a letter the Union's general counsel sent to DEP on October 15, 1996 stating that, "MOSES has recently learned that CERO Regional

Director Gayle Suchman asked, at a staff meeting, for volunteers to serve on a "Parking" Committee." Further, Wilson testified that he was present at a meeting at which Suchman asked for volunteers for a parking committee. Therefore, the weight of the evidence convinced the hearing officer that Suchman did solicit volunteers.

On November 4, 1996, Hannon sent an electronic message (e-mail) to employees in the bargaining unit to update them about parking at the new CERO Main Street site. That communication indicated that there would be forty-seven (47) parking spaces in an underground garage at CERO Main Street but that all but five to eight of those spaces would be occupied by state vehicles. Hannon's e-mail also noted that, to encourage car pooling, Suchman had decided to allow those unit members who commute with three or more passengers preference over the remainder of parking spaces available below the CERO Main Street building.<sup>8</sup>

After the DEP moved to the new CERO Main Street site on November 12, 1996, it did not provide free parking for its employees who worked at that location. Although there are parking spaces across the street at the Public Works lot, there are not always enough available parking spaces to accommodate unit members who want to park there, particularly in the winter. For example, Richards attempted to park in the Public Works lot on four occasions in the winter and was unable to do so. Further, unit member Joseph Ellis (Ellis) has been unable to park in the Public Works lot half a dozen times because that lot was full. Moreover, some DEP employees at CERO Main Street have had their cars towed from the Public Works lot. In addition to the Public Works lot, some unit members have paid to park at the CERO Main Street location. For example, Richards has paid \$20.00 a month, Wilson has paid \$23.00 a month, and Ellis has paid \$23.00 a month to park at the CERO Main Street site.

Looney did not receive notice or an opportunity to bargain about parking before DEP moved to the CERO Main Street location on November 12, 1996. Following the move, Looney raised a concern about parking at CERO Main Street at a grievance meeting she attended with Thomas Massimo (Massimo), DEP's Director of Labor Relations. By letter dated March 13, 1997, Massimo addressed Looney's concern by stating the DEP's position that "free parking is not included in any facility leases, and if it had been available prior, DEP (or more properly, the Commonwealth) was not a party to providing it."

#### Opinion

##### *Unilateral Change*

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 16 MLC 1429 (1989). The obligation to bargain extends to working conditions established through past practice as well as to working conditions contained in a collective bargaining agreement.

*City of Gloucester*, 26 MLC 128 (2000); *City of Everett*, 19 MLC 1304 (1992). Parking rates are a mandatory subject of bargaining. *Board of Trustees of the University of Massachusetts*, 21 MLC 1795 (1995).

Here, the Employer argues that it did not unilaterally change a term and condition of employment by not making free parking available at the new CERO Main Street location because the DEP never provided free employee parking for CERO employees at the prior Grove Street location. In support of its position, the Employer relies on DCPO's regulation prohibiting free parking provisions in its leases and on the fact that there was no free parking provision in the CERO Grove Street lease. According to the Employer, these facts demonstrate that it never had a right to or control over any parking facilities at CERO Grove Street. The Employer also points out that McGillicuddy, who was the only DEP official authorized to execute leases for DEP offices, never contracted for free employee parking at CERO Grove Street and did not know that employees parked in the parking lot for free. Therefore, the Employer concludes that, because it never provided free parking to DEP employees at CERO Grove Street, it did not have an obligation to bargain with the Union about any change in the availability of free parking at CERO Main Street.

Although free parking was not part of the lease for CERO Grove Street, Richard Wilson testified that there was a handshake agreement that existed between DEP and the landlord outside of the lease to provide free parking for DEP employees who worked at CERO Grove Street, and Wilson had discussions with the landlord about continuing to provide free parking for DEP employees. Further, the DEP issued parking stickers distributed by the landlord to employees who had a vehicle and wanted to park for free in the parking lot, including new employees, and the DEP distributed updated stickers to employees annually. Additionally, the DEP encouraged Wilson to maintain free employee parking during negotiations with the landlord in 1993. During those negotiations, the landlord mentioned that it might charge DEP employees to park at the lot across from CERO Grove Street. After Wilson pointed out that free parking was an important factor in choosing the CERO Grove Street site, the landlord agreed to continue providing free parking at the lot. Therefore, on the record before us, we find that the Employer played an active role in securing free parking for DEP employees and provided free parking for DEP employees at CERO Grove Street since at least 1981, and that free parking was a term and condition of employment for those employees.

It is undisputed that the Employer did not provide the Union with notice or an opportunity to bargain about free parking before DEP moved to the CERO Main Street location on November 12, 1996. Nor is there any dispute that the Employer did not provide free parking for its employees at the CERO Main Street location. Therefore, we find that the Employer violated Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law by ceasing to

8. The parking committee had recommended to Suchman that employees who car pooled have access to the available spots under the building, and she accepted that recommendation.

provide DEP employees at its CERO Main Street office with free parking.

*Direct Dealing*

The duty to bargain collectively with the employee's exclusive collective bargaining representative prohibits the employer from negotiating directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. *Trustees of the University of Massachusetts Medical Center*, 26 MLC 149, 160 (2000); *Millis School Committee*, 23 MLC 99, 100 (1996). 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. *Id.*

Here, the Union argues that the Employer violated Section 10 (a) (5) by directly dealing with bargaining unit members when Suchman solicited volunteers for the parking committee. However, the record does not demonstrate members of the parking committee negotiated directly with Suchman about parking. Rather, they explored parking options at the new CERO Main Street location and reported those options to DEP employees and to Suchman. Although Suchman accepted the parking committee's recommendation that car poolers have access to available parking spots under the building, there is no evidence of a course of dealing between the volunteer parking committee and Suchman or any other DEP representative that could be characterized as negotiations over employee parking. *Compare, Millis School Committee*, 23 MLC at 100 (employer negotiated and agreed on a repayment plan directly with a bargaining unit member).

The Union also alleges that soliciting volunteers for the parking committee violated Section 10 (a) (2) of the Law. Section 10 (a) (2) makes it a prohibited practice to dominate, interfere, or assist in the formation, existence, or administration of any employee organization. To establish a violation of Section 10 (a) (2), the evidence must demonstrate that the Employer's conduct significantly interfered with the existence and administration of the Union. *See, Town of North Attleboro*, 26 MLC 84, 86 (2000), *citing City of Boston*, 14 MLC 1606, 1618 (1988). However, soliciting volunteers for a parking committee without more does not demonstrate domination, interference, or assistance in the formation, existence, or administration of the Union. *Compare, Blue Hills Regional Technical School District*, 9 MLC 1271 (1982) (employer selected members of union's bargaining team). Accordingly, the Employer did not deal directly with unit members represented by the Union in violation of Sections 10 (a) (5), (2), or (1).

Conclusion

We conclude that the Employer violated Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law by unilaterally changing the parties' past practice regarding free employee parking. We dismiss those portions of the complaint alleging that the Employer violated Sections 10 (a) (5), (2), and (1) of the Law by directly dealing with unit members represented by the Union.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

- a. Failing to bargain collectively in good faith with the Union by unilaterally changing the past practice of providing free employee parking;
- b. In any like manner, interfere with, restrain, and coerce any employees in the exercise of their rights guaranteed under the Law.

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

- a. Upon request, bargain in good faith to resolution or impasse with the Union over free employee parking;
- b. Immediately restore the parties' past practice regarding free employee parking;
- c. Make whole any bargaining unit members for economic losses they may have suffered as a result of the elimination of free employee parking, plus interest on any sums owing at the rate specified in M.G.L. c. 231, Section 6B compounded quarterly from November 12, 1996;
- d. Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, the attached Notice to Employees;
- e. Notify the Commission in writing within thirty (30) days of service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

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