In the Matter of NEW BEDFORD HOUSING AUTHORTY

and

MASSACHUSETTS LABORORS' DISTRICT COUNCIL OF THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Case No. MUP-1650

54.583	work rules and regulations
54.8	mandatory subjects
67.6	other refusal to bargain
67.8	unilateral change by employer
82.4	bargaining orders
91.11	statute of limitations

September 7, 2000
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Arthur J. Carron, Esq.	*New Bedford Housing Authority*
Richard A. Fairbrothers, Esq.	*Massachusetts Laborers' District Council*

DECISION[1]

Statement of the Case

The Massachusetts Laborers' District Council of the Laborers' International Union of North America AFL-CIO (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on October 16, 1996, alleging that the New Bedford Housing Authority (Housing Authority) had violated Sections 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L.c.150E (the Law) by refusing to bargain over an equipment accountability policy. Following an investigation, the Commission issued a Complaint of Prohibited Practice on March 13, 1997. The Complaint[2] alleged that the Housing Authority had violated Sections 10(a)(5) and (1) by refusing to bargain over implementing of two-way radio policy that imposed employee accountability for loss or damage to the equipment.[3]

On July 8, 1997, Stephanie Carey, an Administrative Law Judge of the Commission (ALJ Carey), conducted a hearing at which both parties were given an opportunity to be heard, to examine witnesses, and to introduce evidence. Following the hearing, both parties

1. In its decision, the Commission dismissed those portions of the Complaint alleging that the School Committee had violated Section 10(a)(2) and, derivatively, Section 10(a)(1) by: 1) allowing the Petitioner to use the interoffice mail system and denying the Association access to that system for union business; and 2) allowing the Petitioner to schedule an organizational meeting to take place during part of the time the School Committee had scheduled a mandatory staff meeting.

2. Although the Commission's Rules and Regulations in effect at the time of the filing of the representation petition in Case No. MCR-4773 provide for the creation of a recognition year bar under certain circumstances, we have not been provided with any information regarding the circumstances surrounding the School Committee's recognition of the Association. Therefore, we decline to speculate as to the appropriateness of creating or extending a recognition year bar. *See*, 456 CMR 1406(3) (1990).

1. Pursuant to 456 CMR 13.02 (2), the Commission designated this case as one in which the Commission will issue a decision in the first instance.

2. The broadly drafted Complaint alleged that the Housing Authority had refused to bargain. However, because that allegation can also be read to embrace a unilateral change in working conditions, and, because the parties fully addressed that issue at hearing and in their post-hearing briefs, we have addressed both the refusal to bargain and unilateral change theories here. See, *Town of Randolph*, 8 MLC 2044, 2050 (1982), citing *City of Worcester*, 5 MLC 1397 (1978) (Commission adopted National Labor Relations Board standard that a violation not specifically alleged in the complaint may be found where the illegal conduct relates to the general subject matter of the complaint and the facts giving rise to the violation have been fully litigated).

3. [See next page.]

submitted post-hearing briefs. ALJ Carey issued Recommended Findings of Fact on January 8, 1998. Neither party submitted challenges to the ALJ's Recommended Findings of Fact pursuant to 456 CMR 13.02(2).

Findings of Fact[4]

The Housing Authority is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for maintenance employees employed by the Housing Authority, including the maintenance supervisor, maintenance mechanics, senior maintenance aides and maintenance aides.

The Housing Authority and the Union were parties to a collective bargaining agreement effective January 1, 1994 through December 31, 1996 that continues in effect pursuant to a continuation clause. At the time of these proceedings, the Housing Authority and the Union were engaged in negotiations for a successor agreement to the 1994-96 collective bargaining agreement. Joseph Calcagno (Calcagno) has been a Union field representative assigned to housing authorities, including the New Bedford Housing Authority, for eight (8) years. He manages contract negotiations and grievance administration. His role in negotiating contracts also includes mid-term bargaining on various issues as required.

As early as 1980, the Housing Authority has maintained a policy of holding all employees accountable for their equipment, particularly equipment that is designated for the employee's use on the job and that the employee may take home at the end of the shift (accountability policy). On March 4, 1980 Joseph Jacintho (Jacintho), a maintenance employee, signed a form acknowledging receipt of a tool box and assuming responsibility for the care and maintenance of the tool box and its contents (acknowledgement form). In signing the 1980 acknowledgement form, Jacintho also assumed responsibility for the replacement of tools due to loss, breakage, or any other reason. Although Jacintho remembers signing the March 1980 acknowledgement form, he does not recall receiving a copy of that form. In August 1981, the Housing Authority sent maintenance personnel a reminder that they were solely responsible for their tool boxes and contents and that the Housing Authority was not responsible for the loss of those items.

In 1995, the Housing Authority issued the maintenance employees hand-held two-way radios (radios) for communicating with other employees and supervisors. On March 27, 1995, the Housing Authority issued its employees a memorandum related to the security and maintenance of department radio equipment. The Housing Authority considered that policy a disciplinary policy and did not distribute copies of the policy to Union officials. That policy stated, in part:

> A written report of damaged, defective, or lost radios and/or associated equipment must be immediately submitted to the Superintendent of Maintenance with a copy to the Manager of Security. Employees will be personally accountable for any damage, defect, or loss of assigned equipment as a result of misuse or negligence.

Joseph S. Finnerty (Finnerty), Executive Director of the Housing Authority, ordered the notice sent to supervisors and told the supervisors to post the notices in all shops including the maintenance shop and property office. This was the same procedure the Housing Authority utilized in posting previous notices. Although Finnerty ordered this posting, neither Calcagno nor Jacintho can recall seeing this memorandum in March 1995.

On April 10, 1995, the Housing Authority convened a meeting of all maintenance employees to issue instructions on how to operate the radios. At the conclusion of that meeting, all maintenance employees, including Jacintho, signed the acknowledgment form for receipt of a hand-held two-way radio with battery and antenna, holster and charging unit. In signing this form, the employees also acknowledged responsibility for replacing the radio in case of breakage, loss or any other reasons. Neither Jacintho nor the other maintenance employees received a copy of this form after signing it and the Union was not aware that the Housing Authority utilized this acknowledgment form and required employees to sign it.

In November 1995, Jacintho lost his radio while working a weekend night shift. He reported the loss to his supervisor at the end of the shift. He subsequently worked the next two days without a radio. The following day, when he reported to work, his supervisor told him that he could not work until he replaced his radio. Jacintho informed Calcagno that, as result of his inability to find his two-way radio, the Housing Authority would not allow him to report to work, and would consider him unfit for duty until he produced it, replaced it or paid the Housing Authority for its loss. Prior to his conversation with Jacintho, Calcagno was unaware of the Housing Authority's accountability policy particularly as it pertained to an employee's inability to work pending replacement of equipment. As a result, he asked Finnerty about the policy. Finnerty informed him that it was the policy of the Housing Authority to consider an employee unfit for duty if the employee could not produce his/her radio.[5] After that conversation with Finnerty, Calcagno advised Jacintho to pay for the radio and file a grievance. Jacintho then paid the Housing Authority $597.00 for a replacement radio and subsequently filed a grievance on February 12, 1996. Specifically, Jacintho grieved the Housing Authority's demand that he pay for a replacement radio and the loss of a regular day of pay and one day of overtime pay.

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3. The Commission dismissed that portion of the Union's charge alleging that the Housing Authority had violated Section 10(a)(4) of the Law by discriminating against employees for their role in Chapter 150E proceedings and the Union did not seek reconsideration pursuant to 456 CMR 15.03.

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

5. Although ALJ Carey found at page 6, lines 7-9 in her Recommended Findings of Fact that " ... the Union first became aware of the Employer's regular use of the acknowledgment form and the accountability policy after Jacintho's Step 2 grievance hearing in 1996.", this finding is unsupported by the record evidence because both Calcagno and Finnerty testified at the hearing that Finnerty told Calcagno it was the Housing Authority policy to consider an employee unfit for duty without his/her two-way radio at the workplace. Therefore, the findings of fact have been modified to more accurately reflect the record.

In March 1996, two maintenance workers recovered a radio in the boiler room and turned it in. It was later discovered that the recovered radio belonged to Jacintho's working partner, who, in turn, had Jacintho's radio that had been in his possession since November 1995. The Housing Authority reimbursed Jacintho for the payment he had previously submitted for the lost radio. The Housing Authority denied Jacintho's grievance through Step 3 of the grievance procedure, and, as a result, the Union filed a demand for arbitration on April 30, 1996.[6]

At Jacintho's Step 2 grievance hearing in April 1996, Calcagno asked Finnerty to bargain over the accountability policy and Jacintho's loss of work time and overtime opportunities as a result of the Housing Authority's disciplinary action.[7] Finnerty refused to discuss the Housing Authority's use of discipline in circumstances involving the employee's loss of radio equipment. On July 9, 1996, Calcagno repeated this request and asked Finnerty to reconsider and Finnerty again refused.

On September 30, 1996, Richard Fairbrothers, attorney for the Union, sent a letter to the Housing Authority's counsel, Arthur Carron, that reads, in part:

> Joe Calcagno tells me that the New Bedford Housing Authority's executive director has refused Mr. Calcagno's numerous requests to bargain regarding the Housing Authority's employee radio lost/stolen policy. Could you please look into this matter and let me know formally whether the Housing Authority is willing to bargain in this matter. Failing a response, I will be forced to file an unfair labor practice charge with the MLRC over this issue...

When the Housing Authority failed to respond to that letter, the Union filed the unfair labor practice charge now before the Commission.

On September 16, 1996, the parties began negotiations for a successor agreement. On October 15, 1996, the Union submitted proposals to the Housing Authority, none of which referred to the accountability policy.

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 affording 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, 127 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (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 Everett*, 19 MLC 1304 (1992). Here, the Union alleges that the Housing Authority unilaterally changed its employee accountability policy when it made possession of a two-way radio a requirement for fitness for duty. The Housing Authority argues that the Union's claim is untimely.

Section 15.03 of the Commission's regulations, 456 CMR 15.03, states that: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six (6) months prior to the filing of a charge with the Commission." A charge of prohibited practice must be filed with the Commission within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party, except for good cause shown. *Felton* v. *Labor Relations Commission*, 33 Mass. App. Ct. 926 (1992). The Housing Authority argues that the Union's charge here is untimely because the Union had notice of the accountability policy since at least November 1995, therefore, that portion of the charge filed on October 16, 1996 alleging the Housing Authority unilaterally implemented that policy is untimely.

There is no dispute that the Housing Authority had previously required employees to sign an acknowledgement form for employer-issued equipment. Under the 1980 accountability policy relative to employer-issued tool boxes, employees signed acknowledgement forms. In 1996, the employees signed acknowledgment forms that were identical in wording except for the reference to an employer-issued walkie talkie radio instead of a toolbox. The March 27, 1995 memorandum to all Housing Authority employees set forth the policy for the daily use of the two-way radios (i.e., professional conduct, no profanity, etc.) and stated the personal liability of each employee for the two-way radio: " ... Employees will be personally accountable for any damage, defect, or loss of assigned equipment as a result of misuse or negligence."The change implemented by the Housing Authority occurred in November 1995, when Jacintho was declared unfit for duty because he failed to have his two-way radio at the workplace, not when the employees signed the acknowledgement forms in 1980 and 1996 and not when the the Housing Authority distributed the March 27, 1995 memorandum. The record shows that the employee-signed equipment receipt acknowledgement forms were essentially the same for two-way radios as it was for tool boxes. It was not until Jacintho lost his two-way radio that a change in working conditions occurred. There is no evidence that, prior to the Jacintho incident, any other employees had been considered unfit for duty and unable to work because they failed to possess employer-issued equipment at work. The record indicates that the Union had notice that the Housing Authority had begun linking fitness for duty with possessing employee-issued equipment when Calcagno received the phone call from Jacintho in November 1995 seeking advice because his supervisor advised him that he would be unable to continue work without his two-way radio. Calcagno testified at the hearing that he been unaware that the Housing

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6. At the time of these proceedings, the parties had not proceeded to arbitration.

7. The Housing Authority distinguishes between the accountability policy (holding employees responsible for their equipment) and the disciplinary policy (prohibiting employees from reporting to work until they replace their equipment). We make no such distinction.

Authority considered maintenance employees unfit for duty without their two-way radios. When Calcagno called Finnerty about the new fitness for duty/equipment policy in November 1995, he was informed that that it was the Housing Authority's policy to consider an employee unfit for duty if the employee was without his/her radio. Therefore, since the Union had notice of the alleged unilateral change in November of 1995 but did not file its charge until eleven (11) months later, October of 1996, and portion of its charge alleging unilateral change is untimely under Section 15.03 of the Commission's rules.[8]

Refusal To Bargain

Section 6 of the Law requires public employers and unions to "meet at reasonable times ... [to] negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment ..." A party that refuses to bargain in good faith violates Section 10(a)(5) and, derivatively, (a)(1) of the Law. Although there is no precise formula for determining the level of participation in the bargaining process required to meet the requirement of Section 6 of the Law, the Commission has long recognized that refusing to meet is a *per se* violation of Section 10(a)(1) and (5). *Boston School Committee*, 23 MLC 111 (1996), citing *City of Chelsea*, 3 MLC 1169 (H.O. 1976), aff'd. 3 MLC 1384 (1977). Refusing to meet and bargain on demand over mandatory subjects of bargaining is a violation of Section 10(a)(5) of the Law. *See*, *Everett School Committee*, 9 MLC 1308 (1984).

Because fitness for duty standard policies affect employees' terms and conditions of employment, they are mandatory subjects of bargaining, and the Housing Authority had the obligation to bargain on demand over that policy when the Union requested to do so. The Union made demands to bargain over the fitness for duty policy adopted by the Housing Authority in 1995, while it was processing Jacintho's grievance. The record reflects that Calcagno asked Finnerty to bargain over the radio accountability/fitness for duty policy in November 1995, and Finnerty refused. Calcagno repeated his request to bargain on July 9, 1996 and Finnerty again refused. Finally, Union attorney Fairbrothers sent a letter to Housing Authority counsel Carron on September 30, 1996, discussing Finnerty's refusal to bargain and asking again to bargain over the policy. Therefore, the record clearly demonstrates that the Union made several demands to bargain and that the Housing Authority refused these demands. The Union's repeated bargaining demands to Finnerty were to no avail. When the Union, through Calcagno, demanded to bargain over the Housing Authority's linkage of fitness for duty to possessing two-way radios, the Housing Authority had an obligation under the Law to bargain to resolution or impasse, but failed to do so, in violation of Sections 10(a)(5) and (1) of the Law.

Conclusion

For the reasons stated, we conclude that the Union's allegations of unilateral change were untimely, however the Housing Authority violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by refusing to bargain prospectively over the requirement that employees possess their two-way radios to be considered fit for duty.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the New Bedford Housing Authority shall:

1. Cease and desist from:

   a. Failing and refusing to bargain collectively on demand with the Union relative to the fitness for duty standard for two-way radios.

   b. In any similar manner, interfering with, restraining, or coercing 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 with the Union over the fitness for duty standard relative to the two-way radio accountability policy for Housing Authority employees.

   b. Make whole any employees impacted by the fitness for duty standard of the two-way radio accountability policy.

   c. 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 Notice to Employees.

   d. 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.

SO ORDERED.

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8. Because we find the allegations that the Housing Authority unilaterally changed its equipment accountability policy in 1995 are untimely, we need not address the other defenses raised by the Housing Authority, including waiver by inaction and contract waiver based on the management rights clause of the parties' collective bargaining agreement.