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

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R1-282, UNIT 6B

Case No. SUP-4503

54.5841	workload
54.8	mandatory subjects
67.8	unilateral change by employer
82.3	status quo ante

December 6, 2000
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Thomas Massimo, Esq.	*Representing Commonwealth of Massachusetts*
Michael Manning, Esq.	*Representing NAGE, Local R1-282, Unit 6B*

DECISION[1]

Statement of the Case

The National Association of Government Employees (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on September 1, 1998, alleging that the Commonwealth of Massachusetts (the Commonwealth) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission

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

issued a complaint of prohibited practice on August 19, 1999. The complaint alleged that the Commonwealth had unilaterally changed the workload of Vanessa Graves (Graves), a member of the bargaining unit represented by the Union, without bargaining to resolution or impasse in violation of Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law. The Commonwealth filed an answer on November 17, 1999.

On January 21, 2000, Cynthia A. Spahl, a duly-designated hearing officer of the Commission (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs on March 6, 2000. The Hearing Officer issued Recommended Findings of Fact on March 14, 2000. Neither party filed challenges to the Recommended Findings of Fact.

Findings of Fact[2]

Work History

The Union is the exclusive collective bargaining representative for employees in statewide bargaining unit 6, including certain employees employed at the Commonwealth's Department of Environmental Protection (DEP) in the position of compliance officer.[3] Graves started working as a Clerk 3 at DEP in the bureau of municipal services in approximately December 1994. On or about February 1995, she was reclassified to the position of Compliance Officer 1 (CO1) and worked in the contract compliance unit. After her reclassification, Valerie Walker (Walker) became Graves's immediate supervisor.[4] One of Graves's job duties was to monitor construction contracts from the letter "A" to the letter "H" of the alphabet to ensure the contract provisions complied with applicable state and federal rules and regulations. The remainder of the alphabet was split between Dan Sanchez (Sanchez) and Ken Langley (Langley) who both held the title of Compliance Officer 2 (CO2). Walker occasionally helped to process incoming contracts whenever a CO was out of the office.

Graves was reclassified to the position of CO2 sometime after March 6, 1996. Langley transferred out of the contract compliance unit and into the labor relations unit in approximately June 1996. Sanchez retired in approximately November 1996. Graves was the only remaining CO2 after Sanchez retired. After Walker left the contract compliance unit in July or August 1997, Henderson became Graves's direct supervisor. At this point, Graves was the only CO in the entire contract compliance unit. In January 1998, the DEP hired Donald Gomes (Gomes) to fill the vacant CO3 position. Graves was injured in an automobile accident in October 1998 and was out of work until February 12, 1999. When Graves returned to work, she learned that the DEP had hired Keisha Eddy (Eddy) as a CO2.

Contract Processing

While Graves worked as a CO1, she processed ten out of forty-six contracts between February 28, 1995 and August 31, 1995 and eleven out of twenty-six contracts between September 1, 1995 and March 1, 1996.[5] After Langley transferred and before Sanchez retired, Graves processed approximately twenty-nine out of sixty-four contracts between May 31, 1996 and November 30, 1996.[6] After Sanchez retired and before Walker left, Graves processed approximately forty-six out of fifty-five contracts between December 1, 1996 and June 1, 1997. After Walker left and before Gomes was hired, Graves processed seventy-six out of eighty contracts between July 1, 1997 and December 31, 1997. After Gomes had commenced his employment and before her accident, Graves processed thirty out of forty-four contracts between January 1, 1998 and April 7, 1998 and seventeen out of sixty contracts between July 2, 1998 and September 30, 1998.[7]

Union Involvement

Sometime between late 1997 and the spring of 1998, Graves approached Chief Steward Daniel Vitt (Vitt) about the increasing number of contracts she processed. On or about May 7, 1998, Vitt sent a letter to DEP Director of Labor Relations Thomas Massimo (Massimo) demanding to bargain about Graves getting "assigned the work of three compliance officers (including herself)." Vitt, Graves, Henderson, and Massimo had a negotiating session on or about July 15, 1998 and primarily bargained over reclassifying Graves to the position of CO3. On or about July 30, 1998, Massimo e-mailed Vitt. The e-mail read in part:

> As you know, we met on Wednesday, July 15, in response to your demand to bargain over an alleged unfair labor practice of assigning the work of three persons to you. In the meeting, your supervisor explained that while the volume of contract compliance that you handle had increased due to the loss of Compliance Officers in your work unit, there were other duties on your Form 30 that were not being done, at least in part because of said volume. After discussion, you stated that your argument was essentially an out-of-grade issue, and a reclassification from Compliance Officer II to Compliance Officer III would remedy the situation.
>
> After careful consideration, I have determined that I will be unable to grant that request. In our meeting, it became apparent that your argument is essentially a volume of work issue, and not an increase in the scope or responsibility of your work. Volume alone cannot justify movement to a higher grade of classification if the work is essentially the same. Further, your supervisor's explanation that other duties were not being performed further weaken the argument that the scope of your work had increased.

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2. The Commission's jurisdiction is uncontested.

3. We amend the findings of fact to include the scope of the bargaining unit represented by the Union.

4. Walker was a Compliance Officer 3 (CO3) and was directly supervised by Director of Civil Rights Donna Henderson (Henderson).

5. The Hearing Officer counted the contracts on the handwritten contract log form that had initials beside them because she was unable to determine if anyone had signed out the contracts that were uninitialed.

6. The handwritten contract log form appears to have a gap between the March 15, 1996 and the May 31, 1996 entries. Therefore, we make no findings about the number of contracts processed between Graves's reclassification to the position of CO2 and Langley's transfer.

7. The handwritten contract log form appears to have another gap between the April 7, 1998 and the May 11, 1998 entries. Also, there appears to be a gap between the last handwritten contract log entry on May 28, 1998 and the first computerized tracking log entry on July 2, 1998. Therefore, we make no findings about the number of contracts processed between April 7, 1998 and July 1, 1998.

In August 1998, Graves, Vitt, Massimo, Henderson, Dick Fauss (Fauss), and Arnold Sapenter (Sapenter) had a second negotiating session and mainly bargained over reclassifying Graves to the position of CO3.[8] After the August meeting, the DEP again refused to reclassify Graves.[9]

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes a condition of employment that involves a mandatory subject of bargaining. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). 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, 129 (2000). To establish a violation, the charging party must demonstrate that: (1) the employer altered an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and (3) the change was established without prior notice or an opportunity to bargain. *City of Boston*, 26 MLC 177, 181 (2000). Workload is a mandatory subject of bargaining. *See*, *City of Worcester*, 25 MLC 169 (1999).

Here, the Commonwealth does not dispute that Graves processed more contracts after Langley transferred and Sanchez retired and instead argues that it did not: 1) assign Graves new job duties; 2) require her to work additional hours; and 3) give her a negative performance evaluation, although she failed to perform some of her other job duties while she was the only CO in the contract compliance unit. The Commonwealth concludes that, because Graves's net workload did not change, the terms and conditions of her employment did not change. However, the Commonwealth's focus on Graves's job duties, work hours, and performance evaluation is misplaced because the issue presented by this case is whether her workload changed. The record before us shows that Graves processed contracts between the letters "A" and "H" before Langley transferred and Sanchez retired, whereas she processed almost all of the contracts in the contract compliance unit after they left.[10] Therefore, we find that the Commonwealth changed Graves's workload, a mandatory subject of bargaining.

The Commonwealth next asserts that it bargained in good faith with the Union and points to the parties' two negotiating sessions in July and August 1998 in support of this assertion. However, the Law requires an employer to give a union prior notice and an opportunity to bargain before implementing a change in an employee's terms and conditions of employment. *City of Boston*, 26 MLC at 181. Here, Graves's workload began to increase when she became the only CO2 in the contract compliance unit in November 1996. Nevertheless, the Commonwealth did not bargain with the Union until almost two years later. Thus, we find that the Commonwealth failed to give the Union prior notice and an opportunity to bargain before changing Graves's workload.

Conclusion

Based on the record before us, we conclude that the Commonwealth violated Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law by unilaterally increasing Graves's workload without giving the Union prior notice and an opportunity to bargain.

Order

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

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the Union over Graves's workload.

   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. Immediately restore Graves's workload to the level that existed prior to Langley's transfer and Sanchez's retirement.

   b. Upon request, bargain in good faith with the Union over Graves's workload.

   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 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.

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8. The record does not reflect what positions Fauss and Sapenter held.

9. The record does not reflect whether the Union demanded to bargain over Graves's workload after the DEP refused to reclassify Graves a second time.

10. While Langley and Sanchez were still employed in the unit, Graves processed 21.7% of the contracts between February 28, 1995 and August 31, 1995 and 42.3% of the contracts between September 1, 1995 and March 1, 1996. After they left, Graves processed 83.6% of the contracts between December 1, 1996 and June 1, 1997 and 95% of the contracts between July 1, 1997 and December 31, 1997.