which the union makes its proposal as in *City of Boston*, could affect the parties' relative positions on any outstanding issues and, coupled with the union's expressed desire to continue bargaining, improve the likelihood of further compromise. See also, *Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518 (1988)(no impasse where hiatus in bargaining and major change in employer's bargaining proposal significantly altered the framework for the negotiations); *Town of Arlington*, 15 MLC 1452 (1989)(no impasse because union membership's rejection of Town's offer changed the dynamics of bargaining and created need for both sides to bargain further); *Town of Plymouth*, 26 MLC 220 (2000)(same); *City of Lawrence School Committee*, 3 MLC 1304 (1976)(no impasse where passage of time created possibility that parties could retreat from earlier positions, allowing for eventual settlement.).

In this case, a review of the history of the parties' negotiations over the use of take-home vehicles leads us to the conclusion that, even if the union was sincere in its expressed willingness to continue bargaining over the matter, there was little likelihood that either party would or could ever present a proposal that would move the parties any closer toward resolution.

Following two "off the record" discussions and one formal bargaining session, the parties agreed to suspend bargaining to permit the City to develop a comprehensive policy concerning the use of take-home vehicles. With that accomplished, the parties met on eight (8) additional occasions, with no resolution. To the contrary, the parties appeared to have become more entrenched at each successive bargaining session. From the outset of the negotiations, the City made it clear that its interest was to limit the number of take-home vehicles to save money—an interest that was diametrically opposed to the Union's apparent interest of maintaining the take-home vehicles. However, other than a proposal to limit the use of take-home vehicles prospectively, which the City rejected and the Union did not pursue, the Union's position at the eighth bargaining session was no different than its position at the first bargaining session: the City's proposal concerning which Police Department employees would be assigned a take-home vehicle was proportionally unfair and was based on inaccurate information. Further, the Union was unreceptive to the City's proposal to substitute some other benefit, like compensatory time, in exchange for eliminating the take-home vehicles.

On March 28, 2000, when the City declared that, in its opinion, the parties were at an "end point," there were no outstanding proposals and no outstanding requests for information. Although the Union objected to the City's "discontinuation of the process," it offered neither a proposal nor any indication that a new proposal was forthcoming.

Conclusion

For the reasons set forth above, we conclude that the City has not failed to comply with the Commission's order dated December 29, 1998. Accordingly, this matter is dismissed.

SO ORDERED.

* * * * * *

In the Matter of PLAINRIDGE RACE COURSE, INC.

and

LOCAL 254, SEIU, AFL-CIO

Case No. UP-01-2647

65.92	***coercion in selection of bargaining representative***
82.12	***other affirmative action***
93.1	***elections***

December 5, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Richard Markey, Esq.	*Representing Plainridge Race Course, Inc.*
Michael Muse, Esq.	*Representing Local 254, SEIU, AFL-CIO*

DECISION[1]

Statement of the Case

Local 254, SEIU, AFL-CIO (Union or Local 254) filed a charge with the Labor Relations Commission (Commission) on March 7, 2001 alleging that the Plainridge Race Course, Inc. (Employer) had engaged in a prohibited practice within the meaning of Massachusetts General Laws, Chapter 150A (the Law). The Commission investigated the charge and issued a complaint of prohibited practice on May 24, 2001. The complaint alleged that the Employer had violated Section 4(1) of the Law by interfering with, restraining, and coercing its employees' freedom of choice in a rerun election to be conducted by the Commission by announcing a 5% retroactive wage increase prior to that election. The Employer filed an answer to the complaint on June 1, 2001. The parties agreed to file stipulations of fact in lieu of an evidentiary hearing. Both parties filed briefs on August 8, 2001.

Stipulations of Fact[2]

1. On September 11, 2000, the eligible voters in a unit of mutuel clerks at the Plainridge Race Course voted nineteen (19) against union representation and ten (10) for union representation by Local 254.

2. On September 15, 2000, objections to the election were filed by Local 254.

3. Prior to and during December 2000, Plainridge management had received numerous inquiries from the mutuel clerks as to when they would be receiving a pay increase. The mutuel clerks were coming up on their second anniversary without a pay increase.

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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.

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

4. Having this in mind, it was decided in December 2000 by Plainridge management that a pay increase would be given [to] the mutuel clerks in the first quarter of the year 2001.

5. Between December 21, 2000 and December 23, 2000, Christmas bonuses were handed out individually to the mutuel clerks and other employees at which time the mutuel clerks were told that a pay increase would be shortly forthcoming. The Christmas bonus was based on one percent (1%) of the year to date earnings for each employee.

6. On February 8, 2001, the Commission ordered a new election among the mutuel clerk[s] several weeks after the pay increase had been promised to Plainridge employees.

7. On March 1, 2001, a memo was given to the mutuel clerks announcing a pay increase. The money room clerks also received a pay increase. The pay increase for both groups was a flat [50 cents per hour]. The mutuel clerks' pay increase became effective on February 25, 2001 and the money room clerks on March 31, 2001. These were the only two classifications that received a pay increase as a group.

8. There have been no allegations that Plainridge management has illegally interrogated the mutuel clerks about union activity on behalf of Local 254; terminated or otherwise disciplined [] employee[s] as a result of their union activities on behalf of Local 254; solicited grievances from the mutuel clerks as a way of interfering with Local 254's effort to be their bargaining representative or threatened that the Plainridge Race Course will be closed if Local 254 is elected as the representative of the mutuel clerks or other Plainridge employees.

9. The charge, the complaint, and the answer in Case No. UP-01-2647 and the ruling in Case No. CR-3721 shall be included in the stipulated record.[3]

Decision

Section 4(1) of the Law provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 3 of the Law. Section 4(1) of the Law parallels the provisions of Section 8 (a) (1) of the National Labor Relations Act (Act), 29 U.S.C. § 157, *et seq*. *Greater New Bedford Infant Toddler Center*, 12 MLC 1131, 1155 n. 42 (1985), *aff'd* 13 MLC 1620 (1987). The decisions of the National Labor Relations Board (Board) and the federal courts provide useful guidance in interpreting state law. *Id.* To determine whether a wage increase granted during a union organizing campaign is unlawful, an inference of improper motivation and interference with employee free choice must be drawn from all the evidence presented and from the respondent's failure to establish a legitimate reason for the timing of the increase. *Holly Farms Corp.*, 311 NLRB 273 (1993), *enf'd* 48 F.3d 1360 (4th Cir. 1995), *aff'd* 517 U.S. 392 (1996).

Here, the mutuel clerks had not received a wage increase for two years. On September 15, 2000, the Union filed objections to the election held on September 11, 2000. While the Commission's ruling on the objections was pending, the Employer told mutuel clerks between December 21 and 23, 2000 that they would receive a pay increase in the near future. The Commission ordered a new election on February 8, 2001. Less than a month later on March 1, 2001, the Employer announced a 50 cents per hour pay increase for mutuel clerks and money room clerks. The raise for mutuel clerks was retroactive to February 25, 2001. The raise for the money room clerks became effective on March 31, 2001. Although the Employer points out that it was unaware that the Commission would order a new election when it told mutuel clerks that they would receive a pay increase in December 2000, the wage increase was both announced and made effective after the Commission ordered a new election. Therefore, the wage increase was granted during the Union organizing campaign.

The Employer argues that it awarded the wage increase to mutuel clerks and to money room clerks because it had reached a level of fiscal viability after two years of operations. The Employer concludes that the raise was lawful because it was granted in the ordinary course of business. However, the stipulated record reflects that, prior to and during December 2000, the Employer had received numerous inquiries from mutuel clerks concerning when they would receive a pay increase. Further, there is no evidence in the record to support the Employer's claim that the Employer granted the raise in the ordinary course of business. Rather, the record leads us to conclude that the raise was linked to the mutuel clerks' inquiries just prior to the rerun election, and the effect of granting the raise at that time was to interfere with the emplyees' free choice in the upcoming rerun election. Because the Employer failed to establish a business reason for the timing of the wage increase, we conclude that the Employer unlawfully interfered with the employees' exercise of free choice.

Conclusion

Based on the record before us, we conclude that the Employer violated Section 4(1) of the Law by granting a retroactive wage increase prior to the rerun election.

Remedy

The Commission typically remedies violations of Section 4(1) of the Law by ordering a respondent to cease and desist the unlawful practice and to post a notice. *See*, *Ogden Suffolk Downs*, 7 MLC 1919 (1981), *aff'd* 8 MLC 1256 (1981). Here, however, the Union requests that the Commission issue a *Gissel* bargaining order because the pay increase granted by the Employer constituted egregious conduct that destroyed any possibility of the Commission conducting a fair rerun election. *NLRB* v. *Gissel Packing Co.* 395 U.S. 575 (1969). The Employer denies that its conduct, if unlawful, precludes the Commission from conducting a fair election. Further, the Employer reminds the Commission that the Commission has

3. The ruling in Case No. CR-3721 is reported at 27 MLC 117 (2001).

never issued a *Gissel* bargaining order and urges the Commission to exercise restraint in this case.

Although we have not previously had occasion to consider whether to adopt the precedent developed under the National Labor Relations Act relating to bargaining orders without an election, we believe that those cases provide useful guidance in considering the Union's requested remedy here. In *Gissel*, the United States Supreme Court identified two kinds of employer misconduct that may warrant imposing a bargaining order: "outrageous and pervasive unfair labor practices" (Category I) and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (Category II). *Id.* at 613-614. The case currently before the Commission falls within Category II. In a Category II case, the following elements must be established before requiring an employer to bargain with a union: 1) the union had a majority at one point; 2) the employer's unfair labor practices have a tendency to undermine the union's majority strength and to impede the election process; and 3) the possibility of erasing the effects of the unlawful conduct and ensuring a fair election by using traditional remedies is slight and, therefore, previously expressed employee sentiment is better protected by a bargaining order than by a second election. *Id.* at 613-615. In determining the propriety of a bargaining order, the seriousness of the violations and the pervasive nature of the conduct is examined, considering factors like the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 147 (1999).

Without disclosing the number of authorization cards filed with the Commission here, the Union had support from a majority of employees in the petitioned-for bargaining unit when it filed the representation petition in Case No. CR-3721. Granting a wage increase has a coercive effect on employee freedom of choice because it eliminates a primary reason for union organizing. *See*, *Montgomery Ward & Co.*, 288 NLRB 126, 129 (1988), *enf. denied on other grounds* 904 F.2d 1156 (7th Cir. 1990). Further, wage increases have a potential long-lasting effect because of their significance to employees and because the Commission's traditional remedies do not require a charging party to return benefits conferred as a result of an employer's unlawful conduct. *See*, *e.g.*, *City of Gardner*, 26 MLC 72 (2000) (health insurance); *Commonwealth of Massachusetts*, 22 MLC 1459 (1996) (catastrophic illness leave bank); *Commonwealth of Massachusetts*, 14 MLC 1322 (1988) (wage increase). Moreover, because wage increases regularly appear in paychecks, they are a continuing reminder that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Thus, the wage increase granted by the Employer had a tendency to undermine the Union's majority strength and to impede the election process. We next turn to examine the final element of this Category II case.

In recent cases where the Board issued *Gissel* bargaining orders, employers have engaged in numerous unfair labor practices rendering it impossible to eradicate the effects of the prohibited conduct and to conduct a fair election by using the Board's traditional remedies. For example, in *Garvey Marine, Inc.*, the employer committed thirty pre-election violations of Section 8 (a)(1) of the Act including threatening discharge, loss of jobs, business closure, physical injury, stricter work rules, loss of benefits, and refusal to negotiate with the union. The employer also promised to increase pay and benefits if the union was not elected, conducted coercive employee interrogations, and created the impression of surveillance of union activities. 328 NLRB at 147. Similarly, the employer in the *Overnite Transportation Company* case committed extensive unfair labor practices including: 1) granting an unprecedented wage increase; 2) threatening the loss of jobs and closing the business; 3) asserting it would be futile to select the union as the employees' representative; 4) promising employees better benefits; 5) participating in employee committees to determine how benefit dollars would be spent if employees voted to keep out the union; 6) threatening stricter discipline, adherence to work rules, more onerous working conditions, and the loss of pension benefits if the employees voted in the union; 7) inviting employees to quit working for the respondent if they wanted to have a job with a "union company;" 8) discriminatorily denying employees access to company bulletin boards to post pro-union information; and 9) soliciting and promising to remedy employee grievances. 329 NLRB 9 (1999). Likewise, Holly Farms engaged in a significant amount of unlawful conduct including: 1) threatening to cause the arrest of any employees caught distributing union literature in nonwork areas on company property during nonwork time; 2) maintaining and enforcing an unlawful broad no access/no distribution rule prohibiting union activities in nonwork areas of company property during non work time; 3) granting an unlawful pay raise four weeks before the representation election; 4) threatening an employee-union activist with discharge and giving that employee a written warning; 5) repeatedly interrogating employees concerning their union sentiments; 6) repeatedly soliciting, promising to remedy, and actually remedying employees' grievances by expanding the workweek; 7) impressing employees with the futility of supporting the union; 8) informing employees that if the union was selected, the company would know how they had voted; 9) threatening unspecified retaliation for wearing a union insignia; and 10) discriminatorily removing and excluding union materials from company bulletin boards. *Holly Farms Corp.*, 311 NLRB at 273.

Here, however, the only issue before the Commission is a 50 cents per hour pay raise. The parties stipulated that the Employer did not: 1) illegally interrogate the mutuel clerks about their activities on behalf of the Union; 2) terminate or discipline any employee because of Union organizing; 3) solicit grievances; or 4) threaten to close the race course. Even if the Commission considered the conduct described in the ruling on the objections to the election in Case No. CR-3721, that conduct coupled with the pay raise here do not constitute sufficiently serious and pervasive violations of the Law warranting an extraordinary remedy like a *Gissel* bargaining order.[4] Accordingly, because remedying the unfair labor practice and conducting a fair election are possible using the Commission's

4. [See next page.]

traditional remedies, we will issue an order requiring the Employer to cease and desist and to post a notice to employees.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Employer shall:

1. Cease and desist from engaging in conduct that would tend to interfere with, restrain, or coerce employees from exercising their rights under Section 3 of the Law.

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

a. 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 a Notice to Employees.

b. 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.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that Plainridge Race Course, Inc. has violated Section 4(1) of M.G.L. c. 150A (the Law) by granting a retroactive wage increase prior to the rerun election.

WE WILL NOT engage in conduct that would tend to interfere with, restrain, or coerce employees from exercising their rights under the Law.

[signed]
For Plainridge Race Course, Inc.

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4. The unlawful conduct in Case No. CR-3721 concerned a letter dated September 7, 2000 sent by Mutuel Manager John DeFiore (DeFiore) listing the following "reasons why there should not be a union."

"REASON # 1: The shifts right now are pretty flexible in that if you need to go to the bathroom, get a drink or stretch your legs during a quiet period, you are able to take a break. If a union comes in, you will be allowed one (1) 15-minute break per shift. The management would determine the time of the break. All flexibility would be gone! (Smokers had better invest in the patch!)

REASON #2: For those who work a double shift, you are now paid for your dinner breaks. If a union comes in, you will not be paid.

REASON # 3: If you have worked at Plainridge since the beginning (3-17-99) there is no one who has more seniority than you. If a union comes in, you have a very good chance of being #11 or #12 or lower. This could very well affect your working schedule, as shifts will be assigned on a seniority basis. If you are able to work only on certain days of the week or certain nights of the week, you may be forced to reschedule your life to work less shifts depending on where you are on the seniority list. This could also mean the loss of your usual window assignment. Those hired after 3/17/99 will be impacted the most."

DeFiore concluded his letter with the following observation: "This is a good working atmosphere. I have trained most of you in skills necessary to be a good mutuel clerk and especially how to maximize your tips. I care about each and every one of you. But, if the Union wins on September 11th, there will immediately be a wall between you and me. That wall is called Local 254 of the S.E.I.U. I will not be able to deal with you one-on-one as I have in the past. If the Union comes out on top, it will be strictly business between you and me. No more little favors will be extended to you. Everything will be done strictly to protect the bottom line of Plainridge Race Course. For instance, I may start passing out and collecting I.R.S. 'tip income' forms to make sure that everyone is properly reporting their tip income, as they should be anyway."