In the Matter of COMMONWEALTH OF MASS/COMMISSIONER OF ADMINISTRATION AND FINANCE/DIVISION OF MEDICAL ASSISTANCE

and

ALLIANCE, AFSCME/SEIU LOCAL 509

Case No. SUP- 4448

67.42 ***reneging on prior agreements***
91.1 ***dismissal***

June 15, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Deborah Drexler, Esq. — *Representing the Commonwealth of Massachusetts*

Susan Jacobson, Esq. — *Representing the Alliance, AFSCME/ SEIU Local 509*

DECISION

Statement of the Case

The Alliance, AFSCME/SEIU, Local 509 (Union) filed a charge with the Labor Relations Commission (Commission) on March 6, 1998, alleging that the Commonwealth of Massachusetts/ Commissioner of Administration and Finance/Division of Medical Assistance (Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (a)(3) and (a)(5) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the Union's charge and dismissed it on December 8, 1998. On January 4, 1999, the Union filed a request for reconsideration. The Commission reconsidered the Union's charge and on March 4, 1999, issued a Complaint of Prohibited Practice, alleging that the Employer violated Sections 10(a)(1) and (a)(5) of the Law by repudiating a settlement agreement dated August 4, 1995 between the Employer and the Union.[1] The Employer filed an answer to the complaint on April 12, 1999.

Pursuant to notice, Hearing Officer Susan Atwater, Esq. held a hearing on October 5, 1999 at which both parties had an opportunity to examine and cross-examine witnesses and to introduce exhibits. Both parties filed post-hearing briefs, and the hearing officer issued recommended findings of fact on February 22, 2000. Both parties subsequently filed timely challenges to the hearing officer's findings of fact, and responses to the other party's challenges. We adopt the hearing officer's findings of fact except where modified, and summarize them below.

1. The Commission dismissed the allegation that the Employer had violated Section 10(a)(3) of the Law.

Stipulated Facts

1. The preamble to the 1994-1997 collective bargaining agreement between the parties defines the employer as the Commonwealth of Massachusetts acting through the Secretary of Administration and his/her Division of Employee Relations.

2. The preamble to the 1997-1999 collective bargaining agreement between the parties defines the employer as the Commonwealth of Massachusetts acting through the Secretary of Administration and his/her Human Resources Division.

3. The designation of the secretary of Administration and his/her Human Resources Division is continued in the agreement effective July 6, 1998 – June 30, 2001.

4. The Division of Medical Assistance (DMA) was created by legislative enactment on July 17, 1993.

5. The settlement agreement referred to in paragraph 5 of the Complaint of Prohibited Practice settled Labor Relations Commission Case No. SUP-3886.

6. The Labor Relations Commission issued its Complaint of Prohibited Practice in SUP-3886 on April 21, 1993 against the Commonwealth of Massachusetts, acting through the Commissioner of Administration and Finance.

7. The Answer to the Complaint of Prohibited Practice in SUP-3886 was filed on October 29, 1993 by Jean Petralia, Director of Labor Relations of the Massachusetts Department of Public Welfare.

8. The Settlement Agreement marked as Joint Exhibit No. 2 was signed for the Office of Employee Relations by Attorney Susan Meyers.

9. At the time the settlement agreement was signed on August 5, 1995, DMA had already selected the following outreach workers for the Springfield region: Marilyn Sibley, Catherine Ivascyn, Robert Gerino and Karen Hatch. Eventually, those four people were placed in Worcester.

Findings of Fact

Prior to July 1993, the Department of Public Welfare (DPW or DTA)[2] administered two Medicaid programs: a long-term care program that applied to nursing home residents, and a community program for others who met certain guidelines. There were forty-two DPW offices across the state.[3] Financial assistance social workers (FASWs) at these offices determined Massachusetts residents' eligibility for the long-term care and community Medicaid programs.[4]

The Legislature created DMA on July 17, 1993 to takeover the Medicaid function from DTA for all Massachusetts residents except those under the supplemental security income program. In 1994, the employees in the Medicaid programs transferred from DTA to DMA as part of this process. Their job duties remained the same but their work locations changed from DTA offices to four regional DMA offices, known as MassHealth Enrollment Centers (MEC), in Springfield, Taunton, Charlestown and Tewksbury. The only exceptions were in Worcester and Barnstable, where DMA employees continued to work in DTA offices.

Three groups of DMA employees continued to work at the DTA office in Worcester. The first group consisted of Annie Brathwaite-Hunt (Braithwaite-Hunt), Charles Latino (Latino), Lorraine Brunell (Brunell) and Jean Isaac (Isaac), disabled employees who requested and received a disability accommodation enabling them to stay in the Worcester DTA office.[5] On February 2, 1996, DMA entered into an agreement[6] with DTA to allow those four employees to continue working in the Worcester DTA office provided that they remained employed by DMA and that their Worcester assignments remained administratively feasible in the opinion of either agency. DMA agreed to pay DTA $1,800.00 annually for each of those four employees. Eventually, DTA refused to allow the four disabled employees to remain at the Worcester DTA office. Latino transferred to Springfield MEC on July 29, 1996 and Brathwaite-Hunt transferred to Charlestown MEC on April 4, 1996. Brunell and Isaac continued to work at the DTA office as of November 12, 1997, and they were relocated at a subsequent point in time.[7]

The second group of DMA employees to remain working in the DTA Worcester office was comprised of three other FASWs, George Bosco (Bosco), Sue Moran (Moran) and Robert Guerino (Guerino). They continued to work at the Worcester DTA office on a temporary basis until DMA transferred them to regional offices in early 1996.[8] The third group was comprised of two health benefits managers (HBM's), Mara Rivera (Rivera) and Kathleen

2. The Department of Public Welfare (DPW) became known as the Department of Transitional Assistance (DTA) in 1996.

3. Prior to September 29, 1992, there were two DPW offices in Worcester; one for long-term care work and one for the community programs. On September 29, 1992, DPW closed the Worcester long-term care office and transferred the employees to the Springfield long-term care unit. At some point prior to July 1993, DPW also closed the Lawrence office.

4. At the Union's request, we have modified the hearing officer's finding of fact to more clearly reflect the record evidence.

5. DMA thought that changing work locations could create a hardship for DMA employees with disabilities. Consequently, DMA asked employees to explain any hardships they anticipated from the changed work locations and told them that it would attempt to accommodate those hardships. The record does not reflect whether employee John Stockman (Stockman) received an invitation to apply for a hardship transfer to the Worcester DTA office but it is clear that he did not request one. We have declined the Union's request to modify this finding of fact because it is accurate and explains the placement of the four individuals with disabilities in the Worcester DTA office.

6. The February 2, 1996 agreement was an addendum to the Interdepartmental Service Agreement between DTA and DMA dated July 1, 1995. The Agreement also allowed two employees assigned to the Barnstable DTA office to continue working in that office.

7. We have modified this finding of fact to more accurately reflect the record evidence.

8. Bosco left the Worcester office on January 20, 1996 and Moran left the Worcester office on February 1, 1996. Guerino received an outreach worker position and transferred to UMass Medical Center on Feb. 1, 1996.

O'Day (O'Day), whom DTA permitted to work at its Worcester office.[9]

At the time that DMA transferred the Medicaid workers to the regional offices, DMA created a position entitled outreach worker. In May and June 1995, DMA posted vacancy announcements for twenty-four outreach worker positions. Prior to August of 1995, DMA hired eight individuals and assigned them to the Springfield area. DMA assigned four of the eight newly-hired employees, Marilyn Sibley (Sibley), Catherine Ivascyn (Ivascyn), Robert Guerino (Guerino) and Karen Hatch (Hatch), to the Worcester area. DMA temporarily placed Guerino in the Worcester DTA office until it transferred him to a new location.[10] DMA transferred Guerino and Hatch to the UMass Medical Center on February 1, 1996. DMA promoted Ivascyn, transferred her to the central office on January 20, 1996 and subsequently decided not to fill her position.[11]

Below is a summary of the DMA employees working at the Worcester DTA office:[12]

August, 1995		Feb. 9, 1996
Disabled workers		**Disabled Workers**
Braithwaite-Hunt		Braithwaite-Hunt
Latino		Latino
Brunell		Brunell
Isaac		Isaac
Temporary Holdovers		**Temporary Holdovers**
Bosco	transferred Jan. 20, 1996	
Moran	transferred Feb. 1, 1996	
Guerino	received outreach position, transferred Feb. 1, 1996	
Health Benefits Managers		**Health Benefits Managers**
No evidence of presence in August, 1995		Rivera O'Day

On July 1, 1995 and July 1, 1996[13] DTA and DMA signed written Interdepartmental Service Agreements (ISAs). The purpose of these agreements was to continue transferring responsibility from DTA to DMA and to resolve issues created by the reorganization of DTA pursuant to Chapter 161 of the Acts of 1993. Neither of the ISAs precluded DMA employees from working in DTA offices and both of them contained a provision entitled "Local Office Facilities" that delineated the rights and responsibilities of each agency "provided DMA staff remain in [DTA] local offices". The February 2, 1996 addendum to the ISAs specifically allowed the named disabled DMA employees to remain in the Worcester DTA office.[14]

John Stockman (Stockman) is a public employee who works at DMA as a FASW in the long-term care program. Prior to September 29, 1992, Stockman worked in the Worcester DPW long-term care office. When the Worcester long-term care office closed, Stockman transferred to the Springfield long-term care unit.[15] Stockman did not apply for one of the outreach worker positions in 1995.[16]

On August 4, 1995, the Employer and the Union reached an agreement (the Stockman agreement) to settle Commission Case No. SUP-3886. The Agreement provided in pertinent part that: "DMA shall offer Stockman the 'right of first refusal' to any position which may be filled by an employee in Stockman's job title which may, in the future, become open in the Worcester metropolitan area." At the time the parties signed this agreement there were no open positions in the Worcester DTA office.

On February 9, 1996, there were six DMA employees working in the DTA office.[17] On that day, DMA Director of Organizational Management Bert Lourenco (Lourenco) offered to transfer Stockman and the position he held at that time to the Worcester DTA office. Lourenco confirmed his verbal offer with a memo that provided, in pertinent part, as follows:

> As we discussed by telephone today, the Division is pleased to offer you a position working for the Division of Medical Assistance in the Department of Transitional Assistance's Worcester office. If you accept this position, you will retain your current title of MassHealth Enrollment Worker (FASW III) and your current pay and benefits.
>
> This offer satisfies the Division's obligation to offer you the "right of first refusal" for any position which may become open in the Worcester Metropolitan area, as provided in Paragraph 3 of the August 4, 1995 Settlement Agreement between you, the Division of Medical Assistance, Local 509 and the Office of Employee

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9. The record does not explain why these DMA employees were placed in the DTA office and whether DMA intended their placement to be temporary or permanent. The record also does not reflect whether or not they were ever transferred out of the DMA office. The Employer challenged this finding, arguing that the HBMs were employees of Foundation Health, a DMA contractor, and not DMA employees. We decline to modify the finding because it is not supported by the record. These employees are referred to as "staff" along with other DMA employees by DMA Director of Operations, Joanne McDonald.

10. We have modified this finding of fact to reflect that Guerino was the only outreach worker in the Worcester DTA office.

11. Upon review, DMA decided that four outreach worker positions were unnecessary and that three positions were sufficient. The record does not establish when DMA made this decision.

12. The Employer challenged certain facts in this chart and we have made modifications that are consistent with the record evidence.

13. The parties entered an unsigned ISA dated June 10, 1997 into evidence as a joint exhibit. The record reflects that DTA and DMA continued to enter into ISAs but does not establish that the agencies ever signed the June 10, 1997 agreement.

14. The Union urges us to make additional findings regarding the ISA agreements. We decline to do so because the findings sufficiently explain the relevant provisions of the ISAs and the proposed additional details are not germane to our decision.

15. The Union asks us to amend this finding to indicate that Stockman did not choose to transfer from Worcester to Springfield, and to indicate that DPW continued to maintain an office in Worcester after Stockman's transfer which performed Medicaid work in the community based programs. We decline to modify the findings because the requested facts are included elsewhere our findings.

16. The Union asks us to find that the process for the selection of the outreach worker positions occurred in June 1995, before the Commonwealth and Stockman entered into the Stockman agreement. We decline to do so because the findings of fact already state that DMA posted vacancy announcements for twenty-four outreach positions in May and June 1995.

17. The Employer challenges this finding of fact arguing, *inter alia*, that the two HBMs were independent contractors and not DMA employees. As noted in footnote 9, the record does not support this assertion. Accordingly, we decline to modify the finding.

> Relations. The Division shall have no further obligation to you under such Paragraph 3.

Lourenco offered the transfer opportunity to Stockman because he knew that only six of the initial seven DMA employees were still working at the Worcester DTA office. Lourenco believed that DMA had initially requested space for seven employees and he assumed DTA would not object to placing Stockman there. However, Lourenco did not seek or receive DTA approval to transfer Stockman to the Worcester DTA office before he offered Stockman the transfer opportunity. Stockman responded to Lourenco's memo on February 13, 1996 and asked Lourenco whether he had notified DTA of his intention to place Stockman in the Worcester DTA office and whether he had received written approval confirming Stockman's placement.

Lourenco subsequently inquired into the availability of space for Stockman at the Worcester DTA office. DTA responded that the February 2, 1996 agreement was restricted to the names in it and that the agency was unwilling to house any more DMA employees. When Lourenco received this information, he and DMA attorney Deborah Drexler met with Stockman on or about February 22, 1996. Lourenco told Stockman that there had been a mistake and that there was no position available. They subsequently discussed the outreach worker position vacated by Ivascyn and Lourenco told Stockman that DMA did not intend to fill the position. Stockman, Lourenco and Drexler also discussed the fact that certain DMA employees were working at the DTA Worcester office because they were disabled. Stockman stated that he should work in the Worcester DTA office because he was certified by the Registry of Motor Vehicles as having a disability. He subsequently sent Lourenco a copy of his handicapped parking permit and a memorandum stating: "[p]erhaps the enclosed will help you in your decision to fill the outreach position in Worcester."[18]

Opinion

To establish that an employer repudiated an agreement, a union must show that the employer deliberately refused to abide by an unambiguous agreement. *City of Waltham*, 25 MLC 59,60 (1998). To show that a respondent acted deliberately, a charging party must show that the respondent engaged in a pattern of conduct designed to ignore the parties' agreement, or purposefully intended to disregard the agreement. *Commonwealth of Massachusetts*, 26 MLC 87,89 (2000). If the evidence is insufficient to find an agreement underlying the matter in dispute or if the parties hold differing good faith interpretations of the terms of the agreement, the Commission will find that no repudiation has occurred. *City of Everett*, 26 MLC 25 (1999). When language in an agreement is ambiguous and there is no record evidence of bargaining history, the Commission will not find a repudiation. *Town of Belchertown*, 27 MLC 73 (2000).

The agreement at issue in this case provided that "DMA shall offer Stockman the right of first refusal to any position which may be filled by an employee in Stockman's job title which may, in the future, become open in the Worcester Metropolitan area". The pivotal question is whether there was an open position in the Worcester DTA office in February 1996, when Lourenco offered Stockman a space in the DTA office and then retracted the offer. For the following reasons, we conclude that the Employer did not deliberately refuse to abide by the Stockman agreement.

The Commission has recognized that, even if the language of an agreement appears to be unambiguous, there is no repudiation where the parties hold differing good faith views of the application of that language in a specific context. In *Town of Duxbury*, 25 MLC 22 (1998), Article IX of the collective bargaining agreement between the Employer and the Union required the Employer to notify custodians of certain complaints lodged against them by "any parent, student or other person". When the Employer failed to notify two custodians that it had observed them leaving work before the time indicated on their time cards, the Union argued that the Employer repudiated the Article IX. The Employer disagreed, and maintained, *inter alia*, that Article IX did not apply to information gleaned from an administrator's personal observation. The Commission noted that the parties held differing good faith interpretations of the applicability of Article IX when custodians falsified time cards and, as a result, concluded that the Employer did not deliberately refuse to abide by Article IX.

In this case, the parties dispute whether there was an open DMA position in the Worcester DTA office because they hold different views of how to apply the agreement in the context of DMA employees working in DTA offices. Lourenco assumed that there was an open position because he believed that DMA initially requested space for seven DMA employees in the DTA office and he counted only six people in the DTA office on February 9, 1996. The Union shares Lourenco's assumption that there was an open position in February, 1996 because there was one less person in the DTA office than there was in August, 1995. DTA contended that it was not obligated to allow Stockman space in the DTA office because he was not one of the disabled individuals named in the ISA and was not an HBM or manager. The Employer argues that Lourenco was mistaken and there were no open positions in February 1996 because each position was eliminated as it was vacated. It draws a distinction between an open position and a space at the DTA office and argues that DMA could not force DTA to offer Stockman a space because DTA controlled the space and was not bound to the settlement agreement. Here, as in *Town of Duxbury*, the parties hold differing good faith views of how to apply the agreement in the context of DMA employees working in a DTA office and thus, we cannot conclude that the Respondent deliberately refused to abide by the Stockman agreement.

Further, we are unable to find on the record before us that there was an open position for a DMA employee in the DTA office. In *Higher Education Coordinating Council*, 23 MLC 275 (1997), the terms of two agreements required the Employer to list the unit status of bargaining unit positions on vacancy postings. When the Employer failed to include a statement regarding unit eligibility in a posting

18. The Union asks the Commission to make findings on the distance between Stockman's home and the Springfield and Worcester offices, as well as the toll fees he incurs in his current commute. We decline to do so because these facts are not material to our decision.

for a technical assistant/registered nurse position, the Union argued that the Employer repudiated the agreements. The parties did not dispute that the language of the agreements required the Employer to indicate the unit status of the position on a notice of job vacancy, but disputed whether the position was in the Union's bargaining unit. The Commission found no repudiation because it could not determine whether the position at issue was in the bargaining unit. Similarly, we cannot conclude here that there was an open position for a DMA employee in the DTA office. DTA's obligation to house DMA employees was based on the ISA agreements it negotiated with DMA. DTA maintained that the ISA agreement was restricted to the four named disabled individuals and that it was not obligated to allow Stockman space in the DTA office because he was not one of the named individuals and was not an HBM or a manager. The Union disputes this interpretation and argues that the ISA agreements between DMA and DTA did not limit the number of DMA employees that could occupy space in DTA's Worcester office. Based on the record before us we are unable to determine whether the ISA agreements did permit the DMA to have more than the four named disabled individuals occupy space in DTA's Worcester office. Therefore, we cannot find that there was an open position for a DMA employee in the Worcester DTA office in February 1996.

In addition, there is no evidence that DMA ignored, or intentionally disregarded the Stockman agreement. Rather, Lourenco tried to place Stockman in the Worcester DTA office. His efforts revealed he was attempting to comply with the agreement based on his belief that there was an open position. Consequently, we conclude that the Employer did not deliberately refuse to abide by the agreement.[19]

Finally, we decline to order the Employer to implement the agreement over DTA's objection. Citing *Cambridge School Committee*, 14 MLC 1440, 1443 (1988) and *Board of Regents of Higher Education*, 10 MLC 1196,1205 (1983), the Union argues that internal difficulties do not vitiate the Commonwealth's obligation to aggressively implement the Stockman agreement. However, we distinguish the case at hand from *Board of Regents*, where the Commission ordered the Employer to implement a settlement agreement over the objection of an individual college. In *Board of Regents*, the Commission relied on the provisions of G.L c.150A s.10(a), as well as s. 1 of c.150E to determine that the Regents could require, and not merely recommend, the Trustees of the college to comply with a settlement agreement. Although the parties to the Stockman agreement in this case are Union and the "Commonwealth of Massachusetts, Commissioner of Administration and Finance, acting through OER and DMA", the Stockman agreement only required DMA to offer Stockman the right of first refusal. DMA tried to place Stockman in the DTA office but DTA thwarted its efforts by refusing to take him. Moreover, there is no evidence demonstrating that DMA could require DTA to house Stockman in one of its offices, any more than DMA could require DTA to pay Stockman the financial compensation agreed to in another provision of the settlement agreement.

Conclusion

For the foregoing reasons, we are not persuaded that the Employer deliberately refused to abide by the Stockman agreement. Consequently, we find that the Employer did not violate the Complaint in the manner alleged and the Complaint is dismissed.[20]

SO ORDERED.

* * * * * *

19. We find no merit in the Union's argument that the Employer repudiated the agreement when it decided not to fill the outreach position that Catherine Ivascyn vacated. Ivascyn's January, 1996 departure did not create an open position because DMA decided not to fill her position and advised Stockman of its decision in February 1996. The position was never filled.

20. Because Lourenco retracted his initial offer and told Stockman that there was no position available, DMA has not satisfied its obligation to offer Stockman the first open position in Stockman's job title which may, in the future, become open in the Worcester Metropolitan area.