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In the Matter of COMMONWEALTH OF  
MASSACHUSETTS  
AND  
MASSACHUSETTS CORRECTION OFFICERS  
FEDERATED UNION  
Case No. SUP-4485

82.11 *back pay*  
83. *Compliance*

January 22, 2003  
Helen A. Moreschi, Chairwoman  
Peter G. Torkildsen, Commissioner

Elizabeth Day, Esq. *Representing the  
Commonwealth of  
Massachusetts*  
Joseph S. Fair, Esq. *Representing the Massachusetts  
Correction Officers Federated  
Union*

### SUPPLEMENTAL DECISION ON COMPLIANCE

#### Statement of the Case

On July 2, 1998, the Massachusetts Correction Officers Federated Union (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Commonwealth of Massachusetts (the Commonwealth) had violated Sections 10(a)(5), (3) and (1) of M.G.L.c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on March 19, 1999, alleging that the Commonwealth had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally requiring certain unit members at the Southeastern Correctional Center (the SECC) to audit inmate movement passbooks. The Commission dismissed those portions of the Union's charge alleging that the Commonwealth had violated Section 10(a)(3) of the Law by suspending certain employees at the SECC, and the Union did not seek reconsideration pursuant to 456 CMR 15.03.

On October 1, 1999, Margaret M. Sullivan, Esq., a duly designated hearing officer of the Commission, conducted a hearing at which

all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties submitted post-hearing briefs on December 22, 1999. On February 27, 2001, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged those findings pursuant to 456 CMR 13.02(2). The Commission issued a decision on January 23, 2002 finding that the Commonwealth had violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by unilaterally requiring certain unit members at the Southeastern Correctional Center (the SECC) to audit inmate movement passbooks [28 MLC 239]. As part of the remedy, the Commission ordered that the Commonwealth make whole all employees who had suffered losses as a "direct result" of the Commonwealth's unilateral implementation of passbook audits at the SECC.

On August 7, 2002, the Union filed a motion for enforcement of the make whole portion of the Commission's order. The Commonwealth filed its opposition to that Motion with the Commission on September 12, 2002, and on September 25, 2002, the Commission held a compliance conference before Acting Chief Counsel Marjorie F. Wittner at which counsel for both parties were heard.

#### Facts

The sole dispute on compliance is whether the Commonwealth owes any backpay to Correction Officer Lance Martin (Martin) pursuant to the Commission's order.

The Commission's decision reflects that in or around July 1998, Lance Martin, a Correction Officer I refused to perform a passbook audit that had been assigned to him before the parties had bargained to resolution about whether members of the bargaining unit would be required to perform the audit and was subsequently suspended for three days. As of the date of the Union's motion for enforcement with the Commission's order The Commonwealth had not revoked the suspension.<sup>1</sup>

#### Positions of the Parties

The Union contends that to comply with the Commission's order, the Commonwealth must make Lance Martin whole. The Union reasons that the Commission's order requires the Commonwealth to make whole any bargaining unit member who suffered a monetary loss due to Commonwealth's unlawful implementation of the passbook audits. Because the only issues of monetary loss that were involved in this case were the various suspensions that the Commonwealth handed out to Officer Martin and certain other correction officers who declined to perform the audits,<sup>2</sup> if the Commission did not intend for Officer Martin to be made whole, then there would not have been any reason for it to include make whole language in its order.

The Commonwealth argues that the Commission could not have intended to award backpay to Martin as a result of his suspension because it expressly dismissed the 10(a)(3) allegations that the Un-

1. After the Commonwealth first ordered the correction officers to perform passbook audits, it suspended several officers who refused to obey that order. Those correction officers, who apparently did not include Lance Martin appealed their suspensions to the Civil Service Commission, but the parties reached a pre-hearing

settlement. Accordingly, the Commonwealth's backpay obligations with respect to those correction officers, if any, is not before us.

2. See footnote 1 above.

ion had brought against the Commonwealth concerning Martin (and other correction officers' suspensions) and the Union did not file a motion for reconsideration. The Commonwealth claims that the Commission's general make-whole language should not be read as overriding the specific language on the dismissal of charges and scope of hearing. The Commonwealth also argues that Officer Martin was not harmed financially because of the implementation of the audit procedure; rather he was suspended for failing to comply with a direct order in violation of the rules and regulations governing all employees of the Massachusetts Department of Correction.

#### Opinion

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct. *Labor Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826 (1989); *Millis School Committee*, 23 MLC 99 (1996). The Commission has consistently recognized that remedies for violations of the Law should be fashioned to place charging parties in the position they would have been in but for the unfair labor practice. *Natick School Committee*, 11 MLC 1387, 1400 (1985). The traditional make whole remedy in unilateral change cases includes an order that the *status quo ante* be restored until the employer has fulfilled its bargaining obligation, *City of Newton*, 16 MLC 1036, 1044 (1989), *Newton School Committee*, 5 MLC 1016, 1027 (1982), *enf'd sub nom., School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983), and that employees who have sustained any economic loss of wages or benefits as a direct result of the unlawful unilateral change be reimbursed for those losses. *City of Gardner*, 10 MLC 1218, 1223 (1983) *Commonwealth of Massachusetts*, 27 MLC 1,5 (2000).

Therefore, to determine Martin's eligibility for backpay in this proceeding, we must consider whether Martin sustained an economic loss as a direct result of the Commonwealth's unilateral assignment of passbook audits. The Union does not address this issue directly, but argues merely that because the suspensions were the only economic matters litigated before the Commission, the Commission would not have ordered a make whole remedy had it not intended to award Martin backpay for his three day suspension. The Union reads too much into the Commission's order however, because, as noted above, make-whole remedies are part of the Commission's traditional remedy in unilateral change cases. The Commission leaves it to the parties, and barring agreement, to compliance proceedings, to determine the exact amount of backpay, if any, owed in a particular matter. *Commonwealth of Massachusetts*, 21 MLC 1637, 1643 (1995).

Because Martin refused to perform the passbook audits, this matter can be distinguished from those unilateral change cases where it is self-evident that the respondent's unlawful unilateral change directly caused the affected bargaining unit members to lose wages or other forms of compensation. *See e.g. Newton School Commit-*

*tee, supra* (backpay awarded to compensate employee affected by school committee's unilateral implementation of layoffs); *City of Gloucester*, 26 MLC 128 (2000) (making whole student officers who lost wages as a result of employer's unilateral change to parties' past practice regarding compensatory time for student officers); *City of Gardner*, 10 MLC 1218, 1223 (1983) (ordering make whole remedy to compensate bargaining unit members for lost work opportunities resulting from City's unilateral action). Here however, unlike the bargaining members in the previously cited cases, Martin did not suffer a loss of pay solely because the Commonwealth made an unlawful unilateral change, but because he refused to perform the unilaterally imposed duties. There was no evidence that, if Martin had not refused to perform the audits, he would still have suffered a loss of pay nor was there any evidence that Martin was otherwise provoked or coerced into refusing to perform the audit. *Cf. City of Boston*, 4 MLC 1033, 1041 (1977) (employer may not provoke an employee into acts of insubordination and utilize that misconduct to justify discipline); *Commonwealth of Massachusetts*, 9 MLC 1337, 1341 (1982) (ruling that an individual who had resigned after the Commonwealth had unilaterally and unlawfully ordered him to give up his outside law practice was ineligible for backpay, because there was no evidence that individual was coerced into resigning). Moreover, there is no evidence, and the Union does not argue now<sup>3</sup> that Martin's refusal to perform the audits was protected activity. The Commission has previously opined that failure to obey a command may be grounds for discipline even if the order was improper. *Town of West Springfield*, 8 MLC 1041, 1047 (1981).

#### Conclusion

Because we find that Martin was suspended because he refused to perform the audits and not as a direct result of the Commonwealth's unilateral implementation of passbook audits at the SECC, we conclude that Martin is ineligible to be made whole pursuant to our Order. There is no need for further enforcement proceedings in this matter.

SO ORDERED.

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3. As noted above, we dismissed the Union's allegations that the Commonwealth violated Sections 10(a)(3) and derivatively, 10(a)(1) of the Law by suspending Martin and the Union did not seek reconsideration of that dismissal.