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

and

MASSACHUSETTS ORGANIZATION OF STATE
ENGINEERS AND SCIENTISTS

Case No. SUP-4784

54.621 *parking privileges*
67.162 *preemption by other legislation*
67.8 *unilateral change by employer*

October 9, 2003

Allan W. Drachman, Chairman
Helen A. Moreschi, Commissioner

Michele M. Heffernan, Esq. *Representing the Commonwealth
of Massachusetts*
Roger Achille, Esq. *Representing Massachusetts
Organization of State Engineers
and Scientists*

DECISION¹

STATEMENT OF THE CASE

On November 6, 2000, the Massachusetts Organization of State Engineers and Scientists (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Commonwealth of Massachusetts (Employer) had violated Sections 10(a)(5) and (1) of the Law. Following an investigation, the Commission issued a Complaint of Prohibited Practice on August 7, 2001 alleging that the Employer had unilaterally changed the practice regarding parking benefits for bargaining unit members without providing the Union with notice and an opportunity to bargain over the impacts of that decision. The parties filed stipulations of fact and briefs on December 19, 2001.

STIPULATIONS OF FACT

1. The Employer is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Internal Revenue Service (IRS) is an agency of the Federal Government that interprets and enforces the Federal tax laws.
4. The Department of Revenue (DOR) is an agency of the Commonwealth of Massachusetts organized pursuant to M.G.L. c. 14, *et seq.*

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.

5. The Office of the State Comptroller (Comptroller) is an agency within the Executive Branch organized pursuant to M.G.L. c. 7A, *et seq.*

6. Pursuant to Section 132(f) of the Internal Revenue Code (Code), an employer may provide "qualified transportation fringe benefits" in the form of "qualified parking." The provisions of the Code apply to all employees including state employees or statutory employees without exclusion or exception. This section does not apply to independent contractors.

7. Qualified parking pursuant to 26 USC, Section 132(f)(5)(C), is parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work by transportation describe in subparagraph (A), in a commuter highway vehicle, or by carpool. Such term shall not include any parking used by the employee for residential purposes.

8. Employees are not taxed up to the State and Federal thresholds for qualified parking.

9. The Federal qualified parking pre-tax threshold was \$175.00 for the calendar year 2000. The threshold increased to \$180.00 for the calendar year 2001. 27 USC Section 132(f).

10. The Massachusetts personal income tax relies on the provision of the Code for determining Massachusetts gross income. Massachusetts follows a different inflation adjustment than the IRS, which results in a different monthly maximum for the qualified parking fringe benefit.

11. The State "qualified parking" pre-tax threshold is \$185.00 for the calendar year 2000 and 2001.

12. The Federal Law states that when the fair market value of the parking provided exceeds the \$175/month, the IRS considered the excess amount a non-cash benefit subject to taxation. The non-cash parking benefit in excess of \$175.00 will add to the individual's Federal taxable gross and is subject to withholding (IRS Notice 94-3).

13. The State Law requires that when the fair market value of the parking provided exceeds the \$185.00 month exemption, the DOR considers the excess amount a non-cash benefit. The non-cash parking benefit in excess of \$185.00 will add to the individual's state taxable gross and is subject to withholding.

14. The IRS Notice 94-3 states how employers are to determine the value of employer-provided parking:

Generally the value of parking provided by an employer to an employee is based on the cost (including taxes and other added fees) that an individual would incur in an arm's length transaction to obtain parking at the same site. If that cost is not ascertainable, then the value of parking is based on the cost that an individual would incur in an arm's length transaction for a space in the same lot or a comparable lot in the same general location under the same or similar circumstances.

15. On June 2, 2000, the Comptroller placed the Employer's fiscal officers on notice that recent increases in Boston parking garage rates resulted in the valuation of the Employer's parking garages

exceeding the Federal \$175.00 and State \$185.00 thresholds. This triggered the Comptroller's request that department payroll directors report any excess value as gross income for employees receiving free parking.

16. On July 7, 2000, the Comptroller's office issued an implementation memo for non-cash parking fringe benefits directing departments to place employees on notice that Employer-provided parking is subject to taxation as of January 2000.

17. On or about July 14, 2000, employees of the Employer were notified about the tax reporting requirements for employees with a non-cash fringe benefit of parking. Employees were presented with a non-cash parking benefit tax option selection form. Specifically, this form permitted employees to choose the following options for the one-time lump sum for retroactive amount for parking benefit received in calendar 2000 through June 30, 2000: 1) I want tax withheld on this amount; 2) I do not want tax withheld on this amount; and 3) I will add an additional amount to my bi-weekly tax data to ensure withholding on this amount. Amount per pay period \$ _____. In addition, this form permitted employees to choose the recurring tax amount to be withheld beginning for July 2000: 1) add to taxable gross first pay period only; 2) add to taxable gross second pay period only; and 3) add to taxable gross first and second pay period.

18. Some Union employees receive parking that is a qualified transportation fringe benefit.

19. The Employer did not notify the Union before the July 14, 2000 memorandum was distributed.

20. Prior to the implementation of the Comptroller's memorandum, parking was not reflected in employees' income.

21. On or about August 14, 2000, the Union objected to the implementation of the fringe benefit tax and requests an opportunity to meet with the employer through a letter to the Massachusetts Highway Department.

22. The Employer has not met with the Union to discuss the "qualified parking fringe benefit".

OPINION

A public employer violates Section 10(a)(5) of the Law when it unilaterally alters a pre-existing condition of employment or implements a new condition of employment affecting a mandatory subject of bargaining without providing the exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Newton*, 29 MLC 186, 189 (2003), citing *Commonwealth of Massachusetts*, 27 MLC 1, 5 (2000); *City of Gloucester*, 26 MLC 128, 129 (2000). To establish a violation, the Union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and (3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse. *City of Newton*, 29 MLC at 189, citing *Commonwealth of Massa-*

achusetts, 20 MLC 1545, 1552 (1984). Here, it is not disputed that, prior to July 14, 2000, bargaining unit members' parking benefits were not treated as income for tax purposes. It is also not disputed that the Employer did not provide notice and an opportunity to bargain prior to implementation, and, furthermore, did not respond to the Union's request to bargain.

Although the Union concedes that the Employer had no obligation to bargain over the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit, the Union argues that the Employer still had an obligation to bargain over the impact of that decision. If a third party mandates changes in employee's working conditions that are outside the control of the public employer, the public employer is nevertheless required to negotiate over the non-mandated areas of the changes and the impact of the changes on mandatory subjects of bargaining prior to implementation. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989); *Commonwealth of Massachusetts*, 24 MLC 113, 114 (1998), and cases cited therein. See also, *Massachusetts Correction Officers Federated Union v. Labor Relations Commission*, 417 Mass. 7 (1994). Here, the tax change affected the wages of the Union's bargaining unit members and, therefore, the Employer was obligated to bargain over the impact of the decision prior to implementation. Therefore, we find that the Employer failed to provide the Union with notice and an opportunity to bargain over the impacts of the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit of the Union's bargaining unit members.

CONCLUSION

Based on the record and the reasons stated above, the Employer has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing bargaining unit members' wages without providing the Union notice and an opportunity to bargain over the impacts of the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit of the Union's bargaining unit members.

ORDER

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

1. Cease and desist from:

- a. Unilaterally changing the wages of the Union's bargaining unit members without providing the Union notice and an opportunity to bargain over the impacts of the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit of bargaining unit members.

- b. In any like manner, interfering with, restraining and coercing any 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 with the Union in good faith to resolution or impasse prior to implementing any change affecting wages of the Union's bargaining unit members.
- b. 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.
- c. Notify the Commission within thirty (30) 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 determined that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (Employer) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally changing the wages of bargaining unit members represented by the Massachusetts Organization of State Engineers and Scientists (Union) without providing the Union notice and an opportunity to bargain over the impacts of the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit of bargaining unit members.

WE WILL NOT unilaterally change the wages of the Union's bargaining unit members without providing the Union with notice and an opportunity to bargain over the impacts of the Comptroller's application of IRS and DOR regulations mandating withholding tax for the non-cash parking benefit of bargaining unit members.

WE WILL NOT in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL, upon request, bargain with the Union in good faith to resolution or impasse prior to implementing any change affecting the wages of the Union's bargaining unit members.

[signed]
Commonwealth of Massachusetts, Commissioner of Administration and Finance

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