In the Matter of CAMBRIDGE HEALTH ALLIANCE

and

MASSACHUSETTS NURSES ASSOCIATION

Case No. MUP-08-5162

54.621	*parking privileges*
67.4	*good faith test (totality of employer's conduct)*
67.5	*negotiability of items*

March 24, 2011
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Jerome N. Weinstein, Esq. *Amanda M. Kellar, Esq.*	*For the Cambridge Health Alliance*
Olinda R. Marshall, Esq.	*For the Massachusetts Nurses Association*

DECISION ON REVIEW OF HEARING OFFICER'S DECISION

On September 9, 2010, a duly-designated Division of Labor Relations (Division) Hearing Officer issued a decision in the above-referenced matter concluding that the Cambridge Health Alliance (Alliance) had violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law) by unilaterally imposing parking fees.

The Alliance filed a notice of appeal of the Hearing Officer's decision. Both the Alliance and the Charging Party Massachusetts Nurses Association (Union) filed supplementary statements. For the reasons discussed below, the Commonwealth Employment Relations Board agrees with the Hearing Officer's conclusion that the Alliance failed and refused to bargain in good faith when it insisted on bargaining separately over parking fees at a time when the parties were engaged in successor contract negotiations.

The parties stipulated to all of the facts in this case, which we summarize below.

Before March 1, 2008, the Alliance provided parking facilities at no cost to bargaining unit members. On January 14, 2008, at a time when the parties were engaged in negotiations for a successor to the parties' July 1, 2005-July 30, 2007 collective bargaining agreement (CBA),[1] the Alliance announced its intention to change its current parking policy and begin imposing weekly parking fees at the Whidden Hospital Garage and an off-campus parking lot. The parties' CBA was silent regarding parking and parking fees.

During successor negotiations and in a series of letters/emails that the parties exchanged in the two-week period after the new policy was announced, the Union demanded to bargain over the introduc-

1. Negotiations began sometime in 2007.

tion of the parking policy prior to implementation. The Union also informed the Alliance that it had an obligation to bargain at main table successor negotiations over this issue and invited the Alliance to make a proposal in that forum. The Alliance refused to do so, stating that it was willing to bargain separately over this issue, but disagreeing that it was obligated to do so during successor negotiations. With both sides maintaining their respective positions, the issue of parking fees was neither raised nor discussed by either party at the main bargaining table. The Alliance implemented the proposed parking fees on March 1, 2008.

The Union filed the instant prohibited practice charge on March 7, 2008 alleging that the Alliance violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law) by failing to bargain in good faith by insisting on bargaining over terms and conditions of employment apart from on-going negotiations.

The Hearing Officer's Decision

The Hearing Officer concluded that the Alliance violated Section 10(a)(5) and, derivatively, Section 10(a)(1) by insisting on bargaining separately over parking fees. In so holding, the Hearing Officer rejected the Alliance's various defenses raising both factual and legal grounds for its refusal to discuss the parking cost issue at the main table.

The Alliance's first argument was that its implementation of parking fees did not violate any contract provision and therefore Section 9's obligation to exhaust mediation and fact-finding before implementation did not apply. The Hearing Officer rejected this approach on two grounds. First, she applied the uncontroversial principle that the obligation to bargain extends to contract issues, as well as to issues established by past practice. 37 MLC at 20-21 (citing *City of Newton*, 35 MLC 286, 298 (2009) and *City of Boston*, 35 MLC 289, 291 (2009)). The Hearing Officer did not directly address the Alliance's Section 9 argument, noting that the case arose under Section 10(a)(5), not Section 9. *Id.* at 21, n.6.

The Alliance next claimed that the parties were at impasse, or, in the alternative, that the Association had waived its right to bargain the issue. Relying on principles set forth in *Town of Brookline*, 20 MLC 1570, 1596, n.20 (1994) and its progeny, the Hearing Officer held that matters that are not part of the existing collective bargaining agreement are a proper subject of mid-term bargaining as long as those negotiations do not take place when the parties are engaged in successor bargaining. *Id.* at 21-22. Thus, the Hearing Officer concluded that an employer's insistence on bargaining separately over the parking policy, a mandatory subject of bargaining, constitutes a refusal to bargain in good faith and precludes a finding of impasse. *Id.* at 22 (citing *City of Boston*, 31 MLC 25, 32 (2004))(additional citations omitted).

As to the Alliance's final argument, that the Board's decision was based on a flawed reading of the Law and that public policy requires employers to react quickly to changed circumstances, the Hearing Officer stated:

> The Board, entrusted to interpret public sector law, has previously weighed public policy concerns and determined the balance between union and employer interests in collective bargaining. Here the Employer violate[d] the Law, ignore[d] Board precedent and disregard[ed] public policy when it refused to bargain with the Association over the parking policy at the main negotiating table, insisted on bargain apart from on-going successor contract negotiations and unilaterally implementing parking fees.

Id.

Opinion

The Alliance makes essentially the same arguments on appeal as it did in its post hearing brief. Only the Alliance's main argument, that it was allowed to insist on bargaining over a non-contractual term apart from on-going negotiations, warrants our further discussion because it presents an erroneous and overly-narrow reading of the Law and relevant precedent.

The Alliance first turns to Section 9 of the Law to support its argument. Section 9's first sentence states, "After a reasonable period of negotiation over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse." The Alliance claims that the phrase "over the terms of an agreement" applies only to existing contract terms, and, therefore, an employer does not have to exhaust the statutory mediation and fact-finding procedures before making changes to non-contract terms. To support this construction, the Alliance cites *Massachusetts Community College Council MTA/NEA (MCCC)* v. *Labor Relations Commission*, 302 Mass. 352, 354 (1988), where the Supreme Judicial Court upheld the Board's[2] conclusion that Section 9's impasse procedures did not apply to impasses occurring during a collective bargaining agreement's term.

The Alliance misreads both *MCCC* and Section 9. The Board's decision construed the phrase "negotiation over the terms of a collective bargaining agreement" as limiting the application of mediation and fact-finding to situations where the parties are negotiating an initial or successor collective bargaining agreement. *Massachusetts Board of Regents of Higher Education*, 13 MLC 1540, 1542-1543 (1987). In so holding, the Board made no distinction between negotiations over terms already included in a collective bargaining agreement and non-contractual terms and conditions of employment

The Supreme Judicial Court affirmed the Board's statutory construction. 302 Mass. at 354. Like the Board's decision, the SJC ruling in no way distinguishes between contract and non-contract terms when discussing the meaning of the phrase "terms of a collective bargaining agreement." Rather, the Court construes this phrase as meaning *any* issues that were "raised [or] bargaining for" during initial or successor negotiations, which are subject to Section 9's procedures, as compared to issues that were first raised after an agreement is finalized, which are not. *Id.*

2. References to the Board include the former Labor Relations Commission.

More to the point, if, as the Alliance claims, Section 9 impasse procedures were limited only to terms contained in a collective bargaining agreement, then those procedures could never be utilized during first contract negotiations, when no contract terms yet exist. Because Section 9's procedures unquestionably apply to first contract negotiations, *see Massachusetts Board of Regents*, 13 MLC at 1542-1543, we decline to adopt a statutory construction that would narrow the reach and efficacy of this integral part of our Law's collective bargaining principles.

The CHA also argues that public policy supports its claim that it should be allowed to address the parking fee issue separate and apart from ongoing successor bargaining. Specifically, the Alliance contends that allowing separate dealings on non-contract matters balances two competing interests: the public employer's need to react quickly to changing circumstances and the need to protect public employees from changes to their collective bargaining agreement in light of their inability to strike. To put it simply, the Alliance argues that, as a matter of public policy, an employer's right to implement changes after notice and an opportunity to bargain to resolution or impasse should not turn on *when* those changes are bargained, but only on *whether* the changes are covered by the contract.

The Alliance raises valid considerations. However, the Alliance's concern that the Board's existing rule impedes an employer's ability to react quickly to changed circumstances ignores the fact that an employer may raise economic exigency as an affirmative defense to unilateral action during both midterm and successor negotiations. *Cambridge Health Alliance*, 37 MLC 39, 46 (2010); *New Bedford School Committee*, 8 MLC 1472, 1477-80 (1981). Furthermore, an employer's obligation to maintain the status quo during negotiations, even after a contract expires, extends to both contract terms and terms and conditions of employment established by past practice. *Town of Chatham*, 28 MLC 56, 58 (2001) (citing *Chatham* I, 21 MLC 1526, 1529 (1995) and cases cited therein, including *National Labor Relations Board* v. *Katz*, 436 U.S. 736, 743 (1962)). More critically, however, the Alliance's policy argument fails to take into account a fundamental precept of collective bargaining, that, when negotiating a first or successor collective bargaining agreement, the parties:

> [a]re only capable of bargaining intelligently and arriving at mutually agreeable compromises if they are free to explore one another's positions **over the entire range of mandatorily bargainable subjects** which particularly concern them. (Emphasis added).

Town of Rockland, 7 MLC 1653, 1655-56 (1980) (quoted in *Town of Brookline*, 20 MLC 1570, 1595 (1994)). *See also Commonwealth of Massachusetts*, 8 MLC 1499, 1512-13 (1981) (Collective bargaining is "a dynamic process which acts upon and reacts to many variables.").

None of the Alliance's arguments acknowledge this bedrock principle, which is the underpinning for all subsequent decisions relating to an employer's obligation to refrain from piecemeal bargaining during the course of successor negotiations. Accordingly, we reject the Alliance's claim that the Board's decisions to this effect are based on flawed precedent.[3] Once squarely presented with the issue of whether an employer could lawfully insist to impasse on bargaining separately over non-contract terms during successor negotiations, the Board, consistent with this basic tenet of labor law, held they could not. *See, e.g., Town of Arlington*, 21 MLC 1125 (1994) (citing *Town of Rockland* (employer could not lawfully insist on bargaining separately over a defibrillator training program during successor negotiations); *City of Leominster*, 23 MLC 62, 66 (1996), (employer could not lawfully insist that the parties bargain over a proposed change to an indemnity plan not addressed in the parties' agreement apart from the successor negotiations); *Town of Westborough*, 25 MLC 81, 88 (1997) (health insurance); *Town of South Hadley*, (June 12, 2001) (training fee) and *Boston School Committee*, 35 MLC 277, 286 (2009)(health insurance co-payments). The Alliance has presented no persuasive arguments to depart from this longstanding precedent.

The Alliance finally claims that the Board's reasoning is contrary to well-settled NLRB precedent, in particular, *Stone Container Corporation*, 313 NLRB 336 (1993) and *Rangaire Acquisition Corp.* 309 NLRB 1043, 1053 (1992) 1992 WL 496575,*21 (1993). The Alliance claims these decisions recognize the contract/non-contract term distinction it urges the Board to adopt here. Neither case advances the Alliance's claim.

The *Rangaire* decision is inapposite because it pertains to an employer's midterm changes to contractual terms, a situation not presented here. Although the Alliance claims to find support in the ALJ's speculation that the employer's defenses of union waiver and acquiescence "could have merit when applied to a unilateral change in non-contractual terms and conditions of employment," *see Id.* at 1053, this is mere dicta arising out of a non-analogous fact pattern.

Furthermore, *Stone Container* actually supports the conclusion reached here. There, the NLRB held that the employer could implement a proposal regarding a discrete, recurring annual event that occurred during contract negotiations, as long as it gave the union notice and an adequate opportunity to bargain. The NLRB reasoned that, under those circumstances, the bargaining could not await an impasse in overall negotiations, particularly where the employer was not proposing to permanently abandon its annual April wage increase or cease bargaining about the increase altogether. In so holding, the NLRB took pains to distinguish the facts from those in *Bottom Line Enterprises*, which, consistent with the above-cited Board decisions, provides:

> [W]hen parties are engaged in negotiations for a collective bargaining agreement, an employer's obligation to refrain from unilaterally discontinuing an established practice extends beyond the mere duty to give notice and an opportunity to bargain; rather, except for certain circumstances not present here, it encompasses a duty to refrain from implementation at all unless and until an overall impasse has been reached.

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3. The Alliance argues that because *Town of Brookline* concerned a contract term, the Board's speculation that the Alliance's insistence on bargaining separately would have been "questionable," even if the term were not part of the contract, is mere dicta. *See Town of Brookline*, 20 MLC at 1595, n. 20.

Stone Container Corp., 313 NLRB 336 (citing *Bottom Line Enterprises*, 302 NLRB 373 (1991)). In a subsequent case applying this limited exception, the NLRB similarly emphasized its continued adherence to "the governing principles of collective-bargaining that disfavor piecemeal bargaining and preclude unilateral implementation of a bargaining proposal unless the parties have bargained to overall impasse for an agreement as a whole." *TXU Electric Company*, 343 NLRB 1404, 1407 (2004).

Here, even if we were inclined to adopt the limited exception to an employer's obligation to refrain from making unilateral changes to terms and conditions of employment until completion of successor bargaining, it would not apply to the facts of this case. The imposition of parking fees was not a discrete recurring event like the annual wage increases in *TXU Enterprises* and *Stone Container* that just happened to occur while bargaining took place. Rather, free parking was a longstanding benefit that the Alliance sought to eliminate permanently at a time when the record reflects no reason why this issue had to be resolved before the completion of the successor collective bargaining process. As such, under both Chapters 150E and the NLRB precedent upon which it relies, the Alliance could not insist upon engaging in piecemeal bargaining over this issue during on-going successor negotiations.

On review, the Alliance reiterates the other defenses that it raised below, that the parties were at impasse and the Union waived its right to bargain. Having found no error in the Hearing Officer's determination that the Alliance could not insist on bargaining separately over parking fees during successor bargaining, we summarily affirm the remainder of her decision for the reasons set forth in the Hearing Officer's decision. Accordingly, we issue the following Order.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Cambridge Health Alliance shall:

1. Cease and desist from:

   a) Collecting parking fees implemented and increased for members of the bargaining unit represented by the Association on March 1, 2008 without giving the Association an opportunity to bargain to resolution or impasse;

   b) Failing to bargain in good faith with the Association to resolution or impasse before increasing parking fees;

   c) Insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement; and,

   d) In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law.

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

   a) Reinstate the parking rate that was in effect immediately before the implementation of parking fees on March 1, 2008;

   b) Upon request by the Association, bargain to resolution or impasse before implementing and increasing parking fees;

   c) Make whole members of the bargaining unit affected by any economic losses they may have suffered as a result of the implementation of parking fees by reimbursing them for every week that they paid the increased parking rate implemented on March 1, 2008, plus interest on any sums owing at the rate specified in M.G.L. c.321, s.6I compounded quarterly;

   d) Post immediately in all conspicuous places where members of the Association's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees; and,

   e) Notify the Division in writing within ten days of receipt of this Decision and Order of the steps taken to comply with it.

SO ORDERED.

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH
EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the Cambridge Health Alliance (Alliance) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith with the Massachusetts Nurses Association (Association) by insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement and by not giving the Association prior notice and an opportunity to bargain to resolution or impasse over the changes in parking and parking fees at the Alliance's Whidden Memorial Hospital facility.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Division of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and to choose not to engage in any of these protected activities.

The Alliance posts this Notice in compliance with the Commonwealth Employment Relations Board's Order.

WE WILL NOT implement parking fees for employees represented by the Association without first affording the Association notice and an opportunity to bargain.

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

WE WILL reinstate the parking rate that was in effect prior to the March 1, 2008 increase.

WE WILL, upon request by the Association, bargain to resolution or impasse before increasing parking fees for employees represented by the Association.

WE WILL make employees represented by the Association for parking fees they paid pursuant to the parking fees implemented on March 1, 2008.

[signed]
For the Cambridge Health Alliance

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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