In the Matter of CHIEF JUSTICE FOR THE ADMINISTRATION AND MANAGEMENT OF THE TRIAL COURT

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Case No. SUP-08-5454

67.13	***economic justification***
67.4	***good faith test (totality of employer's conduct)***
67.42	***reneging on prior agreements***
67.45	***regressive bargaining***
68.31	***bad faith bargaining during factfinding***

April 26, 2011
Susan L. Atwater, Hearing Officer

Jean Strauten Driscoll, Esq.	*Representing the Chief Justice for the Administration and Management of the Trial Court*
Michael F. Manning, Esq.	*Representing the National Association of Government Employees*

HEARING OFFICER'S DECISION[1]

Summary of the Case

The issue in this case is whether the Chief Justice for the Administration and Management of the Trial Court (Employer or Trial Court) violated Sections 10(a)(5), 10(a)(6), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by withdrawing the economic proposals that it had offered during a fact-finding hearing before the fact-finder issued his findings and recommendations. I find that the Employer did not violate the Law as alleged.

Statement of the Case

The National Association of Government Employees (Union) filed a charge with the Department of Labor Relations (DLR) on December 29, 2008, alleging that the Employer had engaged in prohibited practices within the meaning of Sections 10(a)(6), 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). A DLR Investigator conducted an investigation on February 12, 2009 and dismissed the charge on April 22, 2009.

The Union subsequently requested review of the dismissal from the Board pursuant to DLR Rule 456 CMR 15.04(3). On May 26, 2010, the Board ruled that there was probable cause to believe that violations had occurred, and it remanded the case to the Investigator to issue a complaint consistent with its ruling.

The Investigator issued a complaint of prohibited practice on June 4, 2010, alleging that the Employer violated Sections 10(a)(5), 10(a)(6) and, derivatively, Section 10(a)(1) of the Law by withdrawing the economic proposals that it had included in its brief to a DLR fact-finder before the fact-finder issued his findings and recommendations. The Employer filed an answer to the complaint on June 14, 2010.

I conducted a hearing on November 18, 2010 and December 20, 2010 at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. The Union and the Employer subsequently submitted a transcript of the hearing, and agreed that the transcript would be the official record of this case. On February 11, 2011, the parties filed post-hearing briefs. After reviewing the record evidence, which consists of stipulated facts, documentary exhibits and witness testimony, and the parties' arguments, I make the following findings of fact and render the following decision.

Stipulations of Fact

1. The Union and the Employer engaged in face-to-face successor negotiations from July 2006 to May of 2007.

2. The Employer made a last best offer to the Union in May of 2007, which included an offer for a 3% wage increase for each of the three years of the proposed agreement.

3. The Union rejected the offer and filed for mediation with the former Board of Conciliation and Arbitration on July 16, 2007.

4. The Union and the Employer engaged in mediation between September of 2007 and February of 2008.

5. The matter proceeded to a fact-finding hearing, which was held on May 30, June 20, and July 11, 2008.

6. On August 22, 2008, the Employer submitted its post-hearing brief to the fact-finder.

7. The fact-finder's recommendations were due 30 days after the record closed, or on or about September 2008. The fact-finder did not issue his recommendation until June 18, 2009.

8. The Trial Court Budget Process:

1. Like the rest of Massachusetts state government, the Trial Court's fiscal year runs from July 1 to the following June 30, and takes its designation from the twelve month period which ends the fiscal year, e.g. FY2010 ran from July 1, 2009 to June 30, 2010.

2. The amount of the Trial Court's budget depends upon an appropriation by the Legislature, made in conjunction with the overall state budget and subject to the State Finance Law, G.L.c.29. See

1. Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission [and] the board of conciliation and arbitration" (former BCA). The Commonwealth Employment Relations Board (Board) is the body within the DLR charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (former Commission).

paragraph 8 below that describes the budget process as it begins with the Governor's budget bill.

3. The judicial branch's budget request is submitted by the Supreme Judicial Court, which requests that the CJAM assist in the budget preparation for the Trial Court portion, and the CJAM does so pursuant to G.L.c.211B, Section 9(i), which states that the CJAM shall have "the responsibility, upon the request of the Supreme Judicial Court, to provide financial management assistance to said court including review of the budget requests and information as submitted by the department chiefs, to make recommendations thereon and otherwise to assist the court in its budgetary preparations."

4. The initial budget request for the Trial Court's portion of the judicial branch budget for an upcoming fiscal year is generally submitted by the Trial Court to the Supreme Judicial Court during October or November, e.g. the budget request for FY2010 would have been submitted to the Supreme Judicial Court for its review during October/November 2008.

5. The Trial Court's Chief Fiscal Officer receives spending plans/maintenance estimates from each court division and office. Each court is also permitted to submit an expansion request, which must also be provided to the Departmental Chief Justice for recommendation prior to approval or disapproval by the CJAM.

6. The Chief Fiscal Officer then compiles the formal budget request for submission to the Supreme Judicial Court for its review, and ultimate inclusion in the judicial branch's budget request to the Governor.

7. The Governor reviews the budget requests and makes his own recommendations that are filed as House 1 in January.

8. Further Summary of the Steps in the Budget Process:

Step 1: Governor's Budget

The budget begins as a bill that the Governor submits in January (or February if at the start of a new term) to the House of Representatives.

Step 2: House Ways & Means Budget

The House Ways and Means Committee reviews this budget and then develops its own recommendation.

Step 3: House Budget

Once debated, amended and voted on by the full House, it becomes the House budget bill.

Step 4: Senate Ways & Means Budget

At this point, the House passes its bill to the Senate. The Senate Ways & Means Committee reviews that bill and develops its own recommendation.

Step 5: Senate Budget

Once debated, amended and voted on, it becomes the Senate's budget bill.

Step 6: Conference Committee Budget

House and Senate leadership then assign members to a joint "conference committee" to negotiate the differences between the House and Senate bills. Once that work is completed, the conference committee returns its bill to the House for a vote. If the House makes any changes to the bill, it must return the bill to the conference committee to be renegotiated. Once approved by the House, the budget passes to the Senate, which then votes its approval.

Step 7: Vetoes

From there, the Senate passes the bill to the Governor who has ten days to review and approve it, or make vetoes or reductions. The Governor may approve or veto the entire budget, or may veto or reduce certain line items or sections, but may not add anything.

Step 8: Overrides

The House and Senate may vote to override the Governor's vetoes. Overrides require a two-thirds majority in each chamber.

Step 9: Final Budget

The final budget is also known as the General Appropriations Act, or "Chapter nnn of the Acts of 20xx." The final budget consists of the Conference Committee version, minus any vetoes, plus any overrides.

Findings of Fact

Face-to-Face Bargaining and Mediation

The Chief Justice for the Administration and Management of the Trial Court is the statutory employer of court officers, probation officers and related titles and is the Trial Court's bargaining agent. The Union represents a bargaining unit of approximately 2400 - 2500 court officers and probation officers in a variety of positions.[2] The Union and the Employer were parties to a collective bargaining agreement that was in effect from July 1, 2004 - June 30, 2007 (2004 - 2007 Contract).

The Union and the Employer began to negotiate a successor agreement in July of 2006. Don Driscoll (D. Driscoll) was the Union's chief negotiator, and former Director of Human Resources Paul Edgar (Edgar) was the Employer's chief spokesperson. The parties' initial negotiation sessions addressed ground rules and related issues. The parties began substantive discussions on or about the third bargaining session.

Face-to-face bargaining continued through the spring of 2007. On May 3, 2007, D. Driscoll and Edgar signed a document (May 3, 2007 document) primarily containing sections of the 2004 - 2007 Contract in which the parties made no changes or only minor wording changes. Next to his signature, Edgar wrote: "[t]hese proposals are tentatively agreed to with the understanding that there is no final agreement on any item until there is agreement on an entire contract." D. Driscoll initialed Edgar's statement, and Edgar and Driscoll also initialed each provision within the May 3, 2007 document. The May 3, 2007 document did not contain any economic provisions.

2. The titles included in the Union's bargaining unit are: probation officer (PO), associate probation officer (APO), assistant chief probation officer (ACPO), court officer (CO), associate court officer (ACO), and assistant chief court officer (ACCO).

On May 24, 2007, the Employer made a package proposal to the Union, including both economic and non-economic items. Among the economic items was a proposal for annual adjustments to the bargaining unit members' salary schedules to reflect a 3% increase for the fiscal years commencing July 1, 2007, July 1, 2008 and July 1, 2009. The Employer notified the Union at their June 5, 2007 bargaining session that the May 24 offer was its "last, best offer." The Union advised the bargaining unit members on June 20, 2007 that the Employer's proposal was not a tentative agreement between the parties, but it gave them an opportunity to vote on the Employer's offer. The bargaining unit members rejected the offer. D. Driscoll communicated the results of the vote to Edgar on July 16, 2007, and requested continued negotiations.

In response, by letter dated July 25, 2007, Edgar opined that the parties were at impasse and invited D. Driscoll to contact him if the Union believed otherwise. On July 26, 2007, the Union filed a petition for mediation with the former BCA. The BCA appointed a mediator, and the mediator held mediation sessions between September of 2007 and February of 2008. The parties did not reach agreement, and the mediator certified the case for fact-finding. In total, the parties held approximately 25 face-to-face and mediated bargaining sessions.

In the fall of 2007, during the time period that the parties were engaged in mediation, the Trial Court prepared a $607 million budget request for FY2009 (July 1, 2008 - June 30, 2009) and submitted it to the Supreme Judicial Court (SJC). At that time, the Employer had no information suggesting that state revenues would prevent the Legislature from appropriating sufficient funds for the Trial Court budget.[3]

Fact-Finding

The DLR appointed William Hayward (Hayward) as the fact-finder. Before the first day of the fact-finding hearing in May of 2008, Hayward asked the parties to submit a list of outstanding issues. In response, Union representative Richard Anderson, Jr. (Anderson) submitted ten issues. Upon receipt of the Union's list, Employer Labor Counsel Jean Driscoll (J. Driscoll)[4] asked Anderson to clarify whether the Union viewed the ten issues as a package proposal, or whether other proposals tentatively agreed to during the negotiations would be incorporated into the new agreement. Anderson responded by letter dated May 13, 2008, stating that: "[i]t is the position of NAGE that only those issues initialed by the parties' respective spokespersons on May 3, 2007 constitute tentative agreements between the parties." Through the exchange of issues, it became apparent that some of the parties' economic proposals were identical.

The fact-finding hearing proceeded on May 30, June 20, and July 11, 2008. At the outset of the hearing, the Employer offered the following economic proposals:

- 3% wage increases for each of the three years of the successor agreement;
- application of that increase to the POII differential;
- an additional step for those job titles currently without a Step 8 (Associate Court Officers, Assistant Chief Court Officers and Associate Probation Officers);
- An increase in the court officer uniform allowance and the complement of uniforms provided at the time of hire; and
- An increase in the Employer's contribution to the dental/optical trust.[5]

The Union also proposed a 3% wage proposal for each of the three years of the contract, application of that increase to the POII differential, and the creation of a Step 8 for those bargaining unit titles with only seven steps. After the first fact-finding hearing date, the Union amended its dental/optical trust proposal to conform to the Employer's proposal. At the fact-finding hearing, the parties presented evidence on the proposals on which their positions differed, i.e. the amount of uniform allowance increases, new "steps" on the existing salary schedules, and new salary ranges for certain positions. The parties did not present evidence on the wage increase and Step 8 proposals. The Trial Court submitted a brief to support its positions on the issues in dispute, and the Union advised the fact-finder in its brief that he did not need to make recommendations on issues where the parties' positions were identical.

The parties submitted briefs dated August 22, 2008 to Hayward after the conclusion of the fact-finding hearings, and anticipated that he would issue a report within the statutory 30-day time frame. Hayward did not do so, and when contacted jointly by J. Driscoll and Anderson, requested an additional three weeks to submit his report.[6]

Post Fact-Finding Events

In July and August of 2008, the Commonwealth's revenue collection exceeded prior projections by approximately $44 million. However, in mid September of 2008, the Department of Revenue issued a press release projecting a $200 million revenue shortfall for the first quarter of FY2009. This prompted the Governor to revise revenue estimates downward for FY2009 and request meet-

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3. The Legislature subsequently appropriated $605 million dollars for FY2009: $561.8 million in direct appropriations and $43 million in potential retained revenue. If the Trial Court did not collect sufficient money to realize $43 million from probation supervision fees and general revenue collections, the Trial Court would have to decrease its expenses. The Trial Court also had $244,000 available from funding brought forward from FY08. In late June or early July of 2008, Governor Deval Patrick signed the Commonwealth's $28.2 billion budget containing the $605 million Trial Court appropriation.

Where the testimony at the hearing regarding the Trial Court's original FY09 appropriation and the amount that it agreed to cut from that appropriation varied from the written record of Justice Mulligan's March 16, 2009 testimony before the Joint Committee on Ways and Means, I have relied on the written record.

4. D. Driscoll and J. Driscoll are not related.

5. The Employer estimated that the cost of its economic proposal was $25 - $27 million dollars, and that the cost of the Union's additional economic proposals was $11 million dollars more.

6. The record does not specify the date of the telephone conference call between J. Driscoll, Anderson, and Hayward. Because Edgar's October 6, 2008 letter references the delayed report, the conference call likely occurred between September 23, 2008 and October 3, 2008.

ings with representatives of the Judiciary, the Legislature, and the constitutional offices regarding their budgets.

Governor Patrick met with former SJC Chief Justice Margaret Marshall (Justice Marshall) and the Trial Court's Chief Justice for Administration and Management Robert Mulligan (Justice Mulligan) on October 1, 2008. At the meeting, Governor Patrick explained what he described as the "terrible fiscal situation" that the Commonwealth was facing, projected a $1 - 1.4 billion state budget deficit, and informed Justices Marshall and Mulligan that he was cutting the Executive Branch budget by 7% and asking the Legislature to cut its budget by 7%. The Governor then asked Justices Mulligan and Marshall to cut the Judicial Branch budget by 7%. At the time that they met with the Governor, Justice Mulligan and Justice Marshall were aware that September revenues had fallen dramatically and understood that the Governor was seeking authority under M.G.L. c.29, Section 9C from the Legislature to cut the Judicial budget appropriation himself.[7]

Justices Mulligan and Marshall subsequently discussed Governor Patrick's request and agreed to reduce the Judicial budget by approximately $21.3 million, from $605 million to 583.7 million. They based their decision on the following considerations: 1) the Legislature and the constitutional officers would agree to cut their budgets by 7%, and Justice Mulligan and Justice Marshall did not want to "stand alone like an island," believing that taking a singularly uncooperative stance could have negative implications for future budget requests; 2) they did not want to "show up" the Legislature, particularly where the Legislature could grant the Governor the "9C" powers over the Judiciary that he was seeking; and 3) they did not want to precipitate a constitutional crisis which would ensue if the Governor asserted control over the Judiciary and they challenged the Governor's authority to do so in court.[8] Justices Mulligan and Marshall believed that they were "over a barrel," and that cooperation was the only available course of action.

After Justice Mulligan and Justice Marshall decided to reduce the FY09 appropriation by $21.3 million, they immediately put a variety of cost-saving measures in place.[9] On October 2, 2008, Justice Marshall and Justice Mulligan publicized their plans in a Joint Statement on Financial Challenge, stating:

> As you know from the news media, the Commonwealth is confronting a significant fiscal challenge, due to a major shortfall in state tax revenues and the lack of credit caused by the national financial crisis.
>
> We have been in consultation with the Executive and Legislative branches to assess the scope of the problem and to review possible action plans. We fully understand the magnitude of the issue and recognize the importance of sharing the burden presented by this fiscal challenge.
>
> We met with Governor Patrick yesterday and committed our cooperation and support. We recognize that all three branches of government must work collaboratively in the face of such a difficult financial situation.
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> In anticipation of this situation the courts have carefully controlled and limited hiring and other expenditures since the spring. Now, we will launch a full review of all aspects of court operations to identify potential cost reductions, as we maintain core functions and protect constitutional rights.
>
> We will need your suggestions and support in identifying cost saving measures. Working together creatively we know that we can best determine how to respond to this fiscal challenge.

In addition to the FY09 budget reductions to which he and Justice Marshall had agreed, Justice Mulligan decided to withdraw the economic proposal that was on the table to the Union. Justice Mulligan decided to withdraw the Trial Court's economic proposal because he believed that the credibility of the Judiciary and its managers was essential in dealing with the Governor and the Legislature, and that reducing the budget by $21.3 million while simultaneously contracting to pay an additional $25 - $27 million would be inconsistent, underhanded, and close to "mendacious." Justice Mulligan also believed that the Legislature would not fund the agreement.

Retraction of the Economic Offer

Justice Mulligan instructed Edgar to write to the Union. Edgar did so on October 6, 2008, addressing the letter to Anderson and copying Hayward simultaneously. Before transmitting the letter, Edgar notified Anderson that the letter was coming. The record does not contain the date that Edgar telephoned Anderson or any other details of their conversation.[10] Anderson and Edgar did not discuss the prevailing economic situation at any time between the August 22, 2008 submission of the fact-finding briefs and the transmission of the October 6, 2008 letter.

Edgar's October 6, 2008 letter stated in relevant part as follows:

> Along with the Union, the Chief Justice and Trial Court negotiation team have been awaiting the fact-finder's report and recommendations to assist us all in our continued contract deliberations. We understand that we now cannot expect that report for several more weeks, and in the meantime the economic situation has changed dramatically.
>
> As you know, our contract negotiations started in July, 2006. When the Trial Court made a "last best offer" to the Union in 2007, including wage and benefit increases, the Commonwealth's fiscal circumstances appeared to be sufficiently strong to support those increases for this bargaining unit. The Union's rejection of that offer led us to mediation and fact-finding. In mid-July, just after the fact-finding hearings concluded, the Governor signed the fiscal year 2009 state budget, vetoing over $122 million and seeking an expansion of emergency 9C powers in preparation for a potential decline in state tax revenues. In its August post-hearing brief, the Trial Court noted

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7. A July 13, 2008 press release posted on the website for the Office of the Governor stated that the Governor was asking the Legislature for expanded "9C" authority to be able to make equitable spending reductions during the year.

8. The Trial Court had researched the issue, and Justice Mulligan believed that the Trial Court had a strong argument.

9. The reduced budget was $3.1 million over the FY08 appropriation, some of which needed to fund escalating costs stemming from wage step or rent increases.

10. Anderson testified that Edgar gave him a "head's up" that the letter was coming so that Anderson "would not die of a heart attack when [he] opened it and read it."

> that there was now a time of "economic difficulty and uncertainty." Recently, the Commonwealth's Treasurer announced that the state would be required to borrow money at a higher than usual interest rate and that it would also be necessary to tap the state's rainy day fund. The Governor has announced the need for significant spending cuts across all sectors of the Commonwealth, and there is now daily news of even more serious shortfalls in the fiscal picture. The Trial Court must prepare for this budgetary impact and curtailed spending. These events of the last several weeks, with national as well as local effects, have required a reassessment of the bargaining position of the Trial Court and the responsible wage and benefit increases that can be offered to employees at this time. Regretfully, because of the deteriorating economic condition of the Commonwealth, the Trial Court cannot continue to maintain its prior economic offers, specifically including a three percent cost of living increase for each of the three years of the agreement, the application of that increase to the POII differential, a Step 8 for those titles that did not receive a Step 8 in July, 2000, any increase in the court officer uniform allowance or increased compliment of uniforms at the time of hire, or any increase in the contribution to the dental/optical trust.
>
> The management team is prepared to meet and discuss the effects of these difficult changed circumstances and by copy of this letter have (sic) notified the fact-finder. Please contact me at your earliest convenience to schedule our meeting.

Anderson responded to Edgar by letter dated October 8, 2008, which stated in pertinent part:

> I am in receipt of your letter of October 6, 2008, and I am appalled that the Trial Court is engaging in such conduct. Prior to the commencement of fact finding, the official on-the-record position of the Trial Court included wage increases of three percent (3.0%) each year for fiscal years 2008, 2009, and 2010, as well as an eighth step in fiscal year 2008 for those bargaining unit positions that do not currently have an eighth step, an increase in the Trial Court's contribution to the health and welfare fund of $1.00 per week in fiscal year 2009 and an additional $1.00 per week in fiscal year 2010, and an increase of $50 in the uniform allowance.
>
> Your October 6th letter to me removes all of these offers from the Trial Court's position. It is the belief of NAGE that this action by the Trial Court constitutes regressive bargaining, and violates the Trial Court's obligation under M.G.L. c.150E to bargain with the Union in good faith. NAGE intends to pursue all avenues available to it to force the Trial Court to bargain with it in good faith. To that end, NAGE will be filing an unfair labor practice charge against the Trial Court with the Massachusetts Division of Labor Relations.

On the same date, Anderson forwarded a letter to Hayward asking him to ignore Edgar's October 6, 2008 letter. In his letter, Anderson noted that the fact-finding record was closed, and that any Trial Court statements regarding changed economic circumstances were simply "unsubstantiated assertions." Hayward did not contact the parties in response to the October 6 or October 8 letters and did not forward his fact-finding report at that time.

Decreasing Revenue and Spending Reductions

On or about October 10, 2008, the Governor asked the Judiciary to provide a preliminary estimate of proposed spending reductions. In response, the Trial Court submitted a preliminary plan to reduce spending by over $30 million that included: a hiring freeze; cancellation of departmental conferences; elimination of any upcoming out-of-state travel and restrictions on in-state travel; and other operational savings. In addition, the Employer renegotiated private leases, cut county rents, and eliminated a student intern program. On October 14, 2008, Justices Marshall and Mulligan issued a joint message to the Trial Court staff communicating these cost savings measures.

On October 16, 2008, the Union's bargaining committee met with the Employer. Both parties agreed to continue working together to reach a contract resolution and planned to meet regularly until they did.[11] On October 17, 2008, the Employer convened a "Fiscal Task Force" to identify additional cost savings measures and efficiencies across all court operations.

On November 19, 2008, the Employer notified various Trial Court department heads of the following steps that needed to be taken to meet the identified spending reductions for the FY09 budget: freezing hiring and promotions; prohibiting out-of state travel and restricting in-state travel; reducing expenses for non-employee services like: interpreters, court reporters, investigators and guardians ad litem; restricting spending for new equipment, and reducing energy consumption. Also in November of 2008, Secretary of Administration and Finance Leslie Kirwan (Kirwan) decreased revenue projections by $1.1 billion. The Governor announced that the total revenue gap was $1.4 billion and proposed a solution to the situation that included $655 million in budget cuts; $52 million of which were voluntary cuts from the Legislature, the Judiciary and the Constitutional Officers. Additionally, the Legislature passed Chapter 377 of the Acts of 2008, which reduced the Trial Court's FY2009 budget by approximately $21.4 million.

Issuance of the Fact-Finder's Report

Between October of 2008 and June of 2009, the parties periodically contacted Hayward to inquire into the status of the fact-finding report. Hayward did not give them a date certain, and the parties' resulting frustration prompted them to ask DLR Executive Director Michael Byrnes (Byrnes) for assistance. In March of 2009, Byrnes secured a commitment from Hayward to issue the report within two weeks. No report issued in that time frame.

In June of 2009, Union representative David Bernard (Bernard), Edgar, and Byrnes discussed the matter. The parties were engaged in negotiations at that time and did not want the issuance of the report to impede their efforts. Consequently, they asked Brynes to

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11. The evidence regarding the time frame in which the parties resumed negotiations is somewhat unclear. Anderson testified that he contacted Edgar regarding bargaining after he received the October 6, 2008 letter, but his testimony also suggests that the parties did not begin bargaining until after the DLR Investigator dismissed the charge on April 22, 2009. However, the Union's website stated on October 16, 2008 that the parties met that day, agreed to keep working, and planned to meet regularly thereafter. The Union did not file the charge of prohibited practice until December 29, 2008. Since Anderson's October 8, 2008 letter indicated that the Union intended to file a regressive bargaining charge, it is unlikely that the Union would not have either filed a charge or resumed bargaining immediately after receiving Edgar's October 6 letter. Additionally, in view of the importance of the issues to the parties, it is unlikely that they waited six months to resume their negotiations after agreeing in October to do so. Consequently, I find that the Employer and the Union resumed negotiations in or about October of 2008.

hold Hayward's report when he received it and not transmit it to the parties. Hayward issued the report to Byrnes on June 18, 2009, and Byrnes notified the parties that he would retain the report pending their instructions.

The Employer and the Union continued their negotiations after receiving notice of Hayward's report. They did not cease until the DLR notified the Trial Court that the New England Police Benevolent Association (NEPBA) had filed a petition with the DLR on April 29, 2010 seeking to represent the Union's bargaining unit members.[12] The Employer and the Union did not reach an agreement prior to the cessation of the negotiations.

Opinion

Section 6 of the Law obligates a public employer to "negotiate in good faith with respect to wages, hours, standards of productivity and performance and many other terms and conditions of employment" with the exclusive bargaining representative of its employees. Failure to do so is a prohibited practice under Section 10(a)(5) of the Law. The parties' conduct must always be calculated to move the negotiations forward, toward agreement. Conduct that is designed, or can be reasonably expected to move the negotiations backward is regressive and constitutes a refusal to bargain. *Springfield School Committee*, 24 MLC 7 (1997).

While the Board has held that a party engages in regressive bargaining in violation of its duty to bargain in good faith by withdrawing a wage offer made in earlier bargaining sessions, *Id.*, it also recognizes that a party does not necessarily engage in regressive bargaining when it introduces proposals resulting from changed circumstances which have arisen during the course of negotiations, *Wood Hole, Martha's Vineyard, and Nantucket Steamship Authority*, 14 MLC 1518, 1539 (1988), or when it withdraws proposals from fact-finding or bargaining due to changed circumstances. *City of Quincy*, 6 MLC 2144 (1980). To succeed on this claim however, an employer must demonstrate that it faced a fiscal emergency sufficient to excuse a withdrawal of earlier economic offers. *Springfield School Committee*, 24 MLC at 8. Where the changed circumstances have an actual impact on an employer's ability to pay or on other existing proposals, and there is no other evidence that the employer's actions were motivated by a desire to stymie negotiations or fact-finding, no regressive bargaining will be found.

The issues in this case are whether changed circumstances between August 22, 2008, when the Employer submitted its post-hearing brief to the fact-finder, and October 6, 2008, when the Employer withdrew the economic proposals from the fact-finder, justify what would otherwise constitute regressive bargaining, and/or whether the Employer's actions were motivated by a desire to stymie the negotiations or fact-finding. I address these issues *in seriatim*.

As a threshold matter, I find that the relevant circumstances in this case changed significantly between August 22 and October 6, 2008. When the Trial Court submitted its fact-finding brief in August, state revenues exceeded prior projections. In mid-September of 2008, the DOR publicized a projected revenue shortfall of $200 million for the first quarter of FY09, prompting the Governor to ask the Trial Court and other governmental entities to cut their FY09 appropriations by 7%. By the time that Edgar withdrew the economic proposals on October 6, the first quarter revenues were down significantly, the Trial Court knew that the Governor had projected a $1 - 1.4 billion budget deficit, the Governor had asked the Trial Court to cut approximately $42 million from its budget and was seeking statutory authority to reduce the Trial Court's budget unilaterally, and the Trial Court had agreed to cut its appropriation by $21.3 million. The Union, while arguing that the changed circumstances were minimal, acknowledges that the revenue shortfall was "astronomical."

Further, the evidence demonstrates that the Trial Court faced a fiscal emergency that negatively impacted the Employer's ability to pay the proposed wage and other economic increases. Edgar's October 6 letter explained that the Trial Court could not maintain its economic proposals because of the deteriorating economic condition of the Commonwealth and the Trial Court's need to curtail spending. The evidence of the Employer's fiscal condition at that time supports Edgar's statement. Justice Mulligan and Justice Marshall had agreed on October 2 to cut $21.3 million from the Trial Court's FY09 appropriation. This left the FY09 budget only $3.1 million over the FY08 appropriation, some of which was needed for escalating costs stemming from wage step or rent increases. The $21.3 million reduction required the Trial Court to immediately reduce its operational expenses by, among other things, freezing hiring and promotions, eliminating or restricting travel, reducing rents, and cancelling departmental conferences. The Trial Court's economic offer would have increased the Trial Court's expenses by $25 - $27 million at the same time that the Trial Court was reducing operational expenses to meet the $21.3 million appropriation reduction.

The impact of this fiscal emergency distinguishes this case from *Springfield School Committee*, *supra*, where the Board found that the School Committee's existing appropriation was sufficient to fund the first year of the proposed agreement. The Trial Court could not have funded its economic proposal from its shrinking FY09 appropriation. Rather, here as in *City of Quincy*, *supra*, the evidence shows that the Employer withdrew its economic proposals during fact-finding because it learned that its revenue was decreasing and would prohibit it from funding the cost items that it had previously proposed.[13] Therefore, I find that the emergent fiscal crisis justified the Employer's withdrawal of its economic proposals from the fact-finder's consideration because the fiscal emergency impeded its ability to support the economic proposals.

12. The NEPBA amended its petition on May 25, 2010. The CERB ruled on August 6, 2010 that the complaint in this case would block further processing of the NEPBA's petition.

13. Although the Trial Court's economic proposals were not conditional like the wage offer at issue in the *City of Quincy*, *supra*, the Board's determination that the City of Quincy bargained in good faith focuses in large part on the City's motive for withdrawing its prior wage offer.

Further, here as in *Wood's Hole, supra*, other events which arose during bargaining permitted the Employer to lawfully change its negotiating posture. In *Wood's Hole*, four events that occurred during the negotiations—denial of an interest arbitration request, issuance of an arbitration award that could potentially increase labor costs, a proposal to exclude a vessel from the provisions of the collective bargaining agreement, and hiring hall referral problems—prompted the employer to demand new concessions from the union twenty-one months into the negotiations. Some of these proposals stemmed from legitimate business considerations occurring during the negotiations, and others resulted from the sequence of bargaining. In affirming the hearing officer's conclusion that the employer could lawfully offer the new concessionary proposals, the Board noted that introducing new proposals resulting from changed circumstances arising during negotiations does not necessarily constitute regressive bargaining. *Wood's Hole*, 14 MLC at 1539.

Although the Trial Court did not reserve a right to amend its proposals, as previously noted, the economic and political situation—including political pressure to pare its appropriation in solidarity with other governmental entitles—differed significantly between August and October of 2008. As in *Wood's Hole*, the record does not suggest that these are not matters of legitimate concern to the Employer. Together, they support the conclusion that the Employer did not violate the Law by amending its proposals to address the changed circumstances.

The National Labor Relations Board (NLRB) similarly recognizes that a party does not necessarily engage in bad faith bargaining when it alters or withdraws proposals resulting from changed economic circumstances. In *Oklahoma Fixture Company*, 331 NLRB 1116 (2000), the NLRB stated that: "the withdrawal of previous proposals or tentative agreements does not in and of itself establish the absence of good faith. However, withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) where the proposal has been tentatively agreed upon or acceptance by the Union appears to be imminent." *Id.* at 1118 (citing *Mead Corp* v. *NLRB*, 697 F.2nd 1013, 1021 (1983)). In *Glenmar Cinestate, Inc.*, 264 NLRB 236 (1982), the NLRB focused on an employer's declining revenue and the uncertainly of profitability during the negotiations, and held that an employer that had proposed significant wage and benefit decreases did not bargain in bad faith where demonstrated economic reversals dictated its bargaining posture. *See also Rescar Inc.*, 274 NLRB 1, 2 (1985) (no violation where the withdrawal and substitution of alleged regressive economic terms occurred in the context of changes in the economy of the industry and the relative strengths of the participants.)

Here, as in *Glenmar Cinestate Inc.*, the Employer's action must be scrutinized in light of its deteriorating economic condition. As noted above, the Commonwealth's revenue was declining, the Trial Court had cut its FY09 appropriation by $21.3 million, and it withdrew its economic proposals at the same time that it instituted other budget-cutting measures. Viewed in this light, it is clear that the Trial Court's economic reversals dictated its bargaining conduct and justified withdrawal of its economic offer.

I next consider whether the evidence demonstrates that the Employer withdrew its economic proposals to frustrate the negotiation or fact-finding process. The Union asserts that the Employer pulled the rug out from under it by withdrawing its economic proposals after the fact-finder requested one fairly standard extension of time to issue his report. Although Edgar's letter does not explain how the fact-finder's delay factored into the Employer's decision, Edgar's letter specifically states that the Trial Court could not maintain its offer because of the deteriorating economic condition of the Commonwealth. As previously noted, the substantial evidence of the Employer's deteriorating financial condition supports Edgar's statements, and the Employer's implementation of simultaneous budget-cutting measures demonstrates a singular purpose. In short, the Union does not argue that other considerations prompted the Employer's actions, and the record evidence shows no other motive.

The Union argues in reliance on *Town of Bellingham*, 21 MLC 1441 (H.O. 1994) that the Employer's conduct violated the Law because it predictably reversed the parties' negotiating progress and because withdrawing the economic proposal was not the only possible course of action. The Union further maintains that the Employer usurped the legislative function by determining unilaterally that it could no longer afford its economic proposal. I am not persuaded by these arguments.

First, I decline to follow the theory that the Union gleans from *Town of Bellingham* that a bargaining posture that is predictably unacceptable or enlarges the gap between the parties' economic proposals is uniformly unlawful. Unappealed hearing officer decisions are binding only on the parties to the case in which the decision issues. They do not constitute precedent for subsequent decisions and do not necessarily reflect the Board's view of the Law. *Town of Ludlow*, 17 MLC 1191, 1196 (1990). The Board has recognized that the withdrawal of prior economic proposals does not always constitute unlawful regressive bargaining. *City of Quincy, supra*. Consequently, the fact that the Trial Court's action was forseeably unacceptable to the Union does not necessarily make its conduct unlawful. *Compare Framingham School Committee*, 4 MLC 1809 (1978) (totality of the circumstances, which included a predictably unacceptable employer proposal along with evidence that certain school committee members did not intend to conclude an agreement, showed a failure to bargain in good faith.)

I also find no precedential case support for the contention that unlawful regressive bargaining will be found in these circumstances unless withdrawal of a proposal was the only alternative. However, even if the Law compels that conclusion, the evidence here does not show that the Trial Court had other viable options. On October 1, 2008, the Governor asked Justice Marshall and Justice Mulligan to cut the FY09 Judicial appropriation by $42 million. At the time of the Governor's request, Justices Mulligan and Marshall knew that the Governor was seeking 9C authority from the Legislature to cut the Trial Court budget himself. They did not want to show up the Legislature by refusing the Governor's request, thereby giving the Legislature an opportunity to arm the Governor with 9C authority to cut the Judicial budget himself. Justices Mulligan and Marshall also believed that failing to cooperate could

have negative consequences for future budget requests. Therefore, even though the Governor requested—rather than mandated—the budget reduction, the Justices believed that they were "over a barrel" and that cooperation at that time was not optional.[14]

In its brief, the Union argues that the Employer could have discussed layoffs, furloughs, job sharing arrangements or re-opening the fact-finding process. However, this contention ignores Justice Mulligan's concern that cutting the budget by $21.3 million while simultaneously continuing to offer $25 - $27 million more in wages and benefits would be inconsistent and underhanded. In view of Justice Mulligan's belief that the credibility of the Trial Court's managers and its relationship with the Governor and the Legislature was at stake, the Trial Court had no credible alternative, and as previously discussed, no economic alternative.

I also find no merit in the Union's contention that the Trial Court was not permitted to assess the prevailing economic conditions and usurped the Legislature's funding role and responsibility by withdrawing its economic offer. The Law does not permit an employer to refuse to bargain over economic issues because the employer assumes that the legislative body will ultimately reject a funding request. *Middlesex County Commissioners*, 3 MLC 1594, 1599 (1977). However, the Law does permit an employer to assess its ability to pay for collectively bargained benefits while the employer is negotiating an agreement. During that time, the employer is free to use its best judgment to negotiate an agreement that protects the public employer's interests. *City of Lawrence*, 16 MLC 1760, 1762 (1990). As previously noted, an employer facing a fiscal emergency that prohibits it from maintaining prior economic offers may lawfully withdraw those offers. *City of Quincy*, *supra*. An employer could only do so if it could lawfully consider and respond to changing economic conditions during bargaining.

At the time that Edgar withdrew the Trial Court's economic offer, the parties were still in the bargaining process and had not reached an agreement.[15] Consequently, the Trial Court could still lawfully evaluate the affordability of its economic proposals in light of existing economic pressures, and it was not obligated to defer its assessment to the Legislature at that point in time. *See also*, *Brockton School Committee*, 19 MLC 1120, 1123 (1992)(school committee could lawfully offer a zero wage increase if it did not reasonably anticipate being able to afford anything higher or if it was philosophically or politically opposed to an increase.)

Finally, I find that the Employer's conduct was consistent with its obligations under Sections 6 and 9 of the Law to bargain in good faith. The Board tests a party's good faith in negotiations by examining the totality of the conduct exhibited at the bargaining table and the nature of the bargaining rather than isolated deeds or the merits of the parties' proposals. *Harwich School Committee*, 10 MLC 1364, 1367 (1984); *King Philip Regional School Committee*, 2 MLC 1393, 1397 (1976). Moreover, the good faith requirement of Section 10(a)(6), which prohibits a public employer from refusing to participate in good faith in proceedings initiated under Section 9 of the Law, "generally contemplates a reasonableness, integrity, honesty of purpose and desire to seek a resolution of the impasse consistent with the respective rights of the parties." *Framingham School Committee*, 4 MLC at 1812-13. My review of the totality of the parties' conduct persuades me that the Trial Court complied with these obligations.

The parties engaged in approximately 25 face-to-face and mediated bargaining sessions between July of 2006 and February of 2008, and there are no allegations of unlawful conduct during that period of time. Before Edgar withdrew the economic proposals from the fact-finding process, he notified Anderson. Edgar invited the Union to meet and discuss the effect of the changed circumstances that Edgar described in his letter and asked Anderson to contact him to schedule a meeting. The Trial Court met with the Union promptly on October 16, 2008, and both sides agreed to work together to seek a contract resolution. Bargaining continued through 2009, both before and after the issuance of the fact-finder's report,[16] ceasing only after the NEPBA filed a representation petition. As previously discussed, a fiscal emergency restricted the Employer's ability to pay the economic proposals, and events arising after submission of its fact-finding brief permitted the Employer to change its negotiating posture. There is no evidence that the Employer withdrew the economic proposals to stymie the fact-finding process. Because changed circumstances justified rescission of the Employer's economic proposals, and there is no other evidence of bad faith bargaining, I find that the Employer did not violate the Law notwithstanding any adverse impact that the Employer's withdrawal of its economic offers may have had on the negotiation process.

Finally, because the record does not support the allegation that the Employer failed to bargain in good faith in violation of Section 10(a)(5) by engaging in regressive bargaining during the fact-finding process, I decline to find that the Employer violated Section

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14. Although the Trial Court could have refused to cooperate, thereby forcing the Governor's hand, the Justices sought to head off the constitutional crisis that they believed would ensue if they challenged to the executive's authority to intrude on the powers of the judicial branch of government.

15. The fact that the Union and the Employer submitted some identical proposals to the fact-finder does not alter this conclusion or demonstrate the existence of an agreement. In May of 2007, the parties agreed that the non-economic proposals contained in the May 3, 2007 document were "tentatively agreed to with the understanding that there is no final agreement on any item until there is agreement on an entire contract." On June 20, 2007, the Union notified bargaining unit members that the Employer's proposal, including its economic offers, was not a tentative agreement between the parties. In May of 2008, when J. Driscoll asked Anderson to clarify his list of outstanding issues for fact-finding, Anderson advised her that: "it is the position of NAGE that only those issues initialed by the parties' respective spokespersons on May 3, 2007 constitute tentative agreements between the parties." Although the Union asserts that an agreement arose at the beginning of fact-finding when the parties submitted certain identical economic proposals, it is noteworthy that the Union's post fact-finding brief does not characterize those proposals as an agreement. Instead, it describes them as identical. Thus, the parties' May 3, 2007 agreement and subsequent conduct shows that they had not reached an agreement.

16. The DLR's narrowly-drafted complaint alleges that the Employer violated the Law when Edgar withdrew the economic proposals from the fact-finder on October 6, 2008. Therefore, I do not consider whether the Employer failed to bargain in good faith at any point after October 6, 2008.

10(a)(6) by failing to participate in good faith in the fact-finding process.

Conclusion

Based on the record and for the reasons explained above, I conclude that the Employer did not violate Sections 10(a)(5), 10(a)(6), and, derivatively, Section 10(a)(1) of the Law, and I dismiss the complaint of prohibited practice.

SO ORDERED.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.

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