

In the Matter of NEW ENGLAND POLICE BENEVOLENT  
ASSOCIATION

and

CHIEF JUSTICE FOR ADMINISTRATION AND  
MANAGEMENT OF THE TRIAL COURT

and

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES

Case Nos. SCR-10-2283, SCR-10-2284, and SCR-10-2285

35.9 *judicial employees*  
45.25 *prohibited practice*  
93.13 *blocking charges*

August 6, 2010

*Marjorie F. Wittner, Chair*

*Elizabeth Neumeier, Board Member*

*Harris Freeman, Board Member*

**RULING ON MOTION TO TREAT PROHIBITED PRACTICE  
CHARGE AS BLOCKING CHARGE<sup>1</sup>**

The Ruling

The Commonwealth Employment Relations Board (Board) is granting the National Association of Government Employees' (NAGE) motion to block further processing of cases SCR-10-2283, SCR-10-2284 and SCR-10-2285 (Petitions).<sup>2</sup> As will be discussed below, the Board finds that the scope and character of the allegations in the Prohibited Practice Complaint in Case No. SUP-08-5454 are precisely the type of allegations that have a tendency to interfere with free electoral choice by employees and processing the Petitions is inconsistent with a question concerning representation. Thus, the Petitions will be held in inactive status for now.

Case No. SUP-08-5454

NAGE filed Case No. SUP-08-5454 with the Division of Labor Relations (Division) on December 28, 2008, alleging both that the Employer engaged in regressive bargaining in violation of Section 10(a)(5) of Massachusetts General Laws, Chapter 150E (the Law) and that it refused to participate in good faith fact-finding proceedings in violation of Section 10(a)(6) of the Law. Specifically, NAGE alleged that the Employer bargained regressively when it

withdrew certain economic offers it made during the course of fact-finding after the record was closed, but before the fact-finder issued a decision. Initially, on April 22, 2009, an Investigator dismissed the Charge. On May 26, 2010, however, the Board reversed the Investigator's decision to dismiss the charge and directed that the Investigator issue a Complaint alleging that the Employer violated Sections 10(a)(5) and 10(a)(6), and derivatively Section 10(a)(1) of the Law.

The Board's May 26, 2010 ruling noted that there was no dispute that the Employer withdrew all of its economic proposals shortly before the fact-finder was due to issue recommendations for a successor agreement. The only issue was whether changed circumstances between August 22, 2008, when the Employer submitted the post-hearing brief to the fact-finder, and October 6, 2008, when the Employer withdrew the proposals made to the fact-finder, justify what would otherwise constitute regressive bargaining and/or whether there was evidence that the Employer's actions were motivated by a desire to stymie negotiations or fact-finding. The Board concluded that though there were changed economic circumstances cited by the Employer in defense of its actions, the investigation record did not support the conclusion that the Employer's withdrawal of all of its economic proposals from the fact-finder, without first discussing its intention with NAGE, was the only alternative available to the Employer or was consistent with the Law.

The Motion to Block

On June 4, 2010, NAGE filed a "Supplemental Motion to Block the Conduct of an Election Due to Pending Unfair Labor Practice Charges."<sup>3</sup> NAGE argues that the Employer's conduct as alleged in the SUP-08-5454 Complaint of regressive bargaining with NAGE and failing to participate in good faith fact-finding has prevented NAGE from reaching an agreement and left bargaining unit employees without any contract since 2007. This, NAGE contends, unfairly prejudices the employees' perception of NAGE and infects the election process, requiring that the Complaint in SUP-08-5454 operate to block the Petitions.

On June 11, 2010, NEPBA filed its "Response To Supplemental Motion To Block The Conduct Of An Election Due To Pending Unfair Labor Practice Charges," in which NEPBA contends that because the unfair labor practice and the CERB decision has been well-publicized, members will not blame NAGE for the fact that no contract has been reached. Further, NEPBA asserts that any delay in having an election in a timely manner is fundamentally unfair to the employees and the NEPBA. This is especially true in this

1. The Hearing Officer was initially prepared to issue this Ruling. However, due to the nature of the legal issues involved, including the ruling on reconsideration issued by the Commonwealth Employment Relations Board (Board) in Case No. SUP-08-5454, the Board is issuing this ruling in the first instance.

2. On April 29, 2010, the New England Police Benevolent Association (NEPBA) initially filed SCR-10-2282, but later withdrew that petition and on May 25, filed three separate petitions, seeking to represent all regular full-time court officers employed as court officers in Middlesex County Superior Court (SCR-10-2285), all regular full-time court officers employed as court officers in Suffolk County Superior Court (SCR-10-2283) and all probation officers in charge, probation officers, assistant chief probation officers, first assistant chief probation officers, assistant

probation officers, court officers and associate court officers employed by the Chief Justice for Administration and Management of the Trial Court (Employer), excluding Middlesex County Superior Court and Suffolk County Superior Court (SCR-10-2284).

3. On May 19, 2010, NAGE filed a motion to block the election based on allegations in Case No. SUP-10-5587. However, on July 2, 2010, an Investigator dismissed that charge and NAGE did not appeal the Investigator's decision. Accordingly, the May 19, 2010 Motion is hereby denied.

case, NEPBA maintains, since NAGE and the Employer have been bargaining since July 2006, giving NAGE more than a reasonable time during which it was free from interference from rival claims of representative status and during which it could and did educate its members as to the status of negotiations and the pending prohibited practice charge. Finally, NEPBA states that NAGE is simply attempting to delay the employees' right to have a free and unencumbered election, since this is not the first attempt NAGE has made to block the election. NEPBA cites as an example a *Motion to Defer to the AFL-CIO No Raiding Procedure*, NAGE filed initially, despite knowing that NAGE is not an AFL-CIO affiliated union. NEPBA thus questions the timing of this blocking motion.

#### The Law

Any party to a representation petition filed with the Division pursuant to Section 4 of the Law may file a motion requesting that a pending prohibited practice charge block the conduct of an election. The Board's procedure for processing alleged blocking charges, 456 CMR 15.12, requires, except for demonstrated good cause, that: a) the conduct alleged in the prohibited practice charge has occurred; b) the alleged conduct violates the Law; and c) the alleged conduct may interfere with the conduct of a valid election. *Commonwealth of Massachusetts*, 17 MLC 1650, 1652 (1991).

In *Commonwealth of Massachusetts*, the Board noted that as a general policy, "alleged violations of Section 10(a)(2) or (5) involving conduct of significance to the bargaining unit will usually raise these concerns." *Id.* at 1656, n. 9. Further, the Board stated, "except in unusual circumstances, it would be inappropriate to proceed with a pending representation petition after the Board has authorized a complaint alleging a violation of Section 10(a)(2) or (5)." *Id.*

In *Commonwealth of Massachusetts*, 21 MLC 1713 (1995), the Board further analyzed when alleged conduct in a charge may interfere with the conduct of a valid election. Its analysis was guided by the factors the National Labor Relations Board considered in determining whether a fair election could be conducted notwithstanding a meritorious charge because of the nature of the unfair labor practice charge. Those factors included:

the character and scope of the charge and its tendency to impair the employees' free choice; the size of the working force and the number of employees involved in the events on which the charge is based; the entitlement and interest of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to the labor organizations involved in the representation case; the showing of interest, if any, presented in the representation case by the charging party; and the timing of the charge.

*Id.* at 1718.

A pending representation petition that is "blocked" by a prohibited practice charge will be held in "inactive status" until resolution of the prohibited practice complaint which blocks its further processing. *Commonwealth of Massachusetts*, 17 MLC at 1658. During its pendency in inactive status, the petition will not be considered to raise a question concerning representation and will not bar the

employer and the incumbent union from fulfilling their statutory obligation to bargain in good faith. *Id.* The final disposition of the representation petition will depend on the outcome of the prohibited practice charge which rendered the petition inactive. *Id.* If the prohibited practice complaint is dismissed or withdrawn without issuance of a remedial bargaining order or settlement agreement requiring bargaining, the petitioner may file a motion requesting that the Petition be reactivated. *Id.* However, if a prohibited practice complaint results in issuance of a remedial order or settlement agreement that requires the employer to bargain with the incumbent, the petition will be dismissed. *Id.* at 1659; *see also Springfield School Committee*, 27 MLC 20, 21 (2000) (Board dismissed the inactive petition after finding that the employer had refused to bargain over a successor collective bargaining agreement).

#### Case No. SUP-08-5454 Blocks the Petitions

In this case, there is no doubt that the nature of the conduct alleged in the SUP-08-5454 Complaint "may interfere with the conduct of a valid election." 456 CMR 15.12. In this regard, it is reasonable to infer that the Employer's alleged regressive bargaining and failure to engage in good faith fact-finding caused the subsequent expression of employee disaffection with NAGE leading to the Petitions. The alleged Employer conduct occurred during the period prior to the filing of the Petitions and impacted the entire bargaining unit. Compare *Commonwealth of Massachusetts, Commissioner of Administration*, 21 MLC at 1718 (prohibited practice charges did not block representation petitions where, among other things, the alleged conduct impacted only a small minority of a much larger bargaining unit). Furthermore, because Case No. SUP-08-5454 may require a bargaining remedy precluding the existence of the question concerning representation sought by the Petitions, the Petitions must be blocked pending the final decision in SUP-08-5454. *Commonwealth of Massachusetts*, 17 MLC at 1659. We shall nevertheless list NEPBA as an interested party in Case No. SUP-08-5454 for the sole purpose of receiving copies of any Board orders or other documents that dispose of the case. *Id.*

#### Conclusion

For the above-stated reasons, we hereby grant NAGE's Motion and block further processing of cases SCR-10-2283, SCR-10-2284 and SCR-10-2285. These cases will be held in inactive status. As a result, there is no pending question concerning representation.

SO ORDERED.

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