In the Matter of CAMBRIDGE PUBLIC HEALTH COMMISSION d/b/a CAMBRIDGE HEALTH ALLIANCE

and

MASSACHUSETTS NURSES ASSOCIATION

Case No. MUP-10-5888

54.611	*health insurance*
54.613	*pension and retirement*
67.13	*economic justification*
67.165	*bargained to impasse*
67.82	*implementing changes after impasse*
91.42	*seeking injunctive relief*
92.361	*postponements*
92.6	*time limits*
108.62	*changes prior to mediation and fact-finding*

August 18, 2010
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

James Lamond, Esq.	*Representing the Massachusetts Nurses Association*
Jerome N. Weinstein, Esq. *Andrew Fuqua, Esq.*	*Representing the Cambridge Health Alliance*

RULING ON MOTION FOR SUMMARY DECISION[1]

Introduction

This ruling requires the Commonwealth Employment Relations Board (Board) to consider: 1) whether an employer's declaration of impasse in the course of successor contract negotiations permits it to implement any or all of its final offer without first filing a petition and completing the collective bargaining process, including mediation and fact-finding, set forth in Section 9 of M.G.L. c. 150E (the Law); and 2) whether an employer's affirmative defense of economic exigency provides an exemption from Section 9 obligations.

We conclude that in circumstances where, as here, one or both parties have filed a petition under Section 9 for mediation of a new or successor agreement with the Division of Labor Relations (Division), an employer may not unilaterally implement any portion of its final offer before completion of the collective bargaining process. In light of the fact that the Union here filed a petition two days before the expiration of the parties' collective bargaining agreement, we do not reach the issue whether or not Section 9 bans unilateral action in the context of successor negotiations, even absent a petition.

We further conclude that an employer is not precluded by Section 9 or any other portion of our Law from raising economic exigency as an affirmative defense to its unilateral action, but must prove the same in accordance with the well-established high standards set forth below.

Statement of the Case

On June 30, 2010, the Massachusetts Nurses Association (MNA or Union) filed a charge of prohibited practice with the Division of Labor Relations (Division) against the Cambridge Public Health Commission d/b/a/ Cambridge Health Alliance (Alliance or Respondent) alleging a violation of M.G.L. c. 150E, Sections 10(a)(5) and 10(a)(1) (the Law) and requested that the Division pursue immediate, emergency injunctive relief. The Alliance filed a response to the charge on July 6, 2010, admitting certain allegations, denying others, and asserting affirmative defenses. Pursuant to Section 11 of the Law and Sections 15.04 and 15.10 of the Division's rules, a Division Investigator held an expedited in-person investigation into these allegations on July 8, 2010. The Investigator found probable cause to believe that a violation had occurred and issued a Complaint of Prohibited Practice on July 12, 2010, alleging that the Alliance had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by sending an email notification to MNA bargaining unit employees on June 24, 2010 stating that it "had gone as far as possible in negotiations with the Union;" that it would immediately implement changes in retiree health insurance benefits; and that employees would have until July 23, 2010 to file retirement paperwork, without first providing the Union with an opportunity to bargain to resolution or impasse. The Alliance filed an answer to the Complaint on July 16, 2010 admitting that it had sent the June 24, 2010 email, as described in the complaint, but denying that, in so doing, it had violated its bargaining obligation. The Alliance also asserted a number of affirmative defenses to its actions, including that, "the parties had reached impasse on all outstanding issues, allowing it to implement a portion of its final offer (relating to changes in the retiree health benefit) before the Union filed a petition under M.G.L. c. 150E, Section 9;" and that "economic exigencies allowed it to implement a change in the retiree health benefit after full and complete negotiations with the Union on the issue. " The Alliance further asserted as an affirmative defense that "the retiree health benefit is a non-contractual benefit and could be unilaterally changed by the Alliance after full negotiations with the Union."

On July 13, 2010, the MNA filed a request, Section 11(f) of the Law and Division Rule 456 CMR 13.02(1)(c), to have the hearing in this matter conducted by the Board in the first instance. That request was granted and a prehearing conference was held on July 27, 2010. The first hearing date was set for August 11, 2010. On August 4, 2010, the Alliance moved to postpone the August 11 hearing and the MNA filed a response opposing that motion. The Board denied the motion to postpone the hearing on August 6, 2010. On August 10, 2010, the parties filed a Joint Pre-Trial Memorandum, including proposed stipulations of fact.

No testimony was taken at the August 11, 2010 hearing.[2] The Board instructed the parties to file briefs by the close of business on August 16, 2010, addressing the issues of: 1) whether Section 9

1. The Board's jurisdiction is not contested.

2. [See next page.]

obligations precluded the Alliance from taking the actions complained of; and 2) whether the Respondent's affirmative defense of economic exigencies possibly provides an exemption from Section 9 obligations. The Board instructed the parties that, after ruling on those legal issues, a further hearing, if necessary, would be held on August 20, 2010.

Stipulations

The parties submitted the following stipulations of fact. Summaries of or quotes from the referenced joint exhibits are added in italics.

1. Cambridge Public Health Commission, d/b/a Cambridge Health Alliance (CPHC), is a public employer within the meaning of Section 1 of the Law.

2. The Massachusetts Nurses Association (MNA) is an employee organization within the meaning of section 1 of the Law.

3. The MNA is the exclusive collective bargaining representative of a unit of approximately 400 registered nurses employed by CPHC at its Cambridge Hospital facility and at its associated health centers and ambulatory sites, nurses working at the Cambridge Health Department, and the nurse midwives employed by the employer at the Birth Center located at 10 Camelia Avenue, Cambridge, Massachusetts, and all per diem nurses and nurses in grant-funded positions who work in the above-referenced locations. This bargaining unit is referred to as "The Cambridge Hospital," or the TCH, bargaining unit.

4. As of June 24, 2010, approximately 325 members of the bargaining unit were members of the Cambridge Retirement System within the meaning of M.G.L. c. 32, § 1.

5. The term of the parties' most recent collective bargaining agreement for the TCH bargaining unit was for the period of July 1, 2007 through June 30, 2010. See Joint Exhibit 1.

> *Article XXX of the Agreement, Duration and Renewal, states:*
>
> *This Agreement shall continue in full force and effect until June 30, 2010. During the period of negotiations for a successor Agreement, this Agreement shall continue in full force and effect.*

6. Since approximately 2003, and at all times relevant to this case, the MNA has employed Cynthia McManus to provide collective bargaining services to the TCH bargaining unit. She served as the spokesperson for the TCH bargaining unit in the negotiations for an agreement to succeed the 2007-2010 agreement and for the two collective bargaining agreements that preceded the 2007-2010 agreement.

7. The MNA is also the collective bargaining representative of two other bargaining units of RN employees of CPHC. One bargaining unit consists of RNs employed at the Somerville Hospital, while the other consists of RNs employed at the Whidden Hospital in Everett, Massachusetts. Each of the three bargaining units has a separate collective bargaining agreement with CPHC. The MNA assigns separate employees to provide collective bargaining services to each of the bargaining units.

8. On January 15, 2010, Joan Bennett sent McManus an email concerning the topic of contract negotiations for the TCH bargaining unit. See Joint Exhibit 2.[3]

> *Bennett asked McManus to check with her "bargaining group and get at least two days a month starting as early as the end of February that we can meet consistently...."*

9. McManus replied to that email by email dated January 26. See Joint Exhibit 3.

> *McManus stated, "[W]e had a request which would help us look at dates for negotiations. Historically we have bargained for 8 hours. This allows us to have substantive discussions and is helpful in addressing scheduling issues. Could you let me know what you are thinking so we can compare dates based on this information."*

10. McManus and Bennett spoke on January 29 about matters related to the negotiations. Following the conversation Bennett sent McManus an email. See Joint Exhibit 4.

> *Bennett said, in part, "[Y]ou are scheduling one meeting with the MNA leadership team to discuss ground rules. You will get back to me with possible dates."*

11. McManus sent Bennett an email on February 1, 2010, proposing that the parties meet on March 5 for their first bargaining session. See Joint Exhibit 4[A]. Bennett was away on a two-week vacation at the time the email was sent, and one Frances Bonardi replied on Bennett's behalf that she would put a "hold" on that date. See Joint Exhibit 5.

12. By email dated February 3, a CPHC representative informed McManus that Jerome Weinstein, who was to be CPHC's chief spokesperson in the negotiations, was not available to meet on March 5. See Joint Exhibit 6.

13. On or about March 3, 2010, CPHC distributed to the leaders of each of the collective bargaining agents of its employees a document bearing that same date. See Joint Exhibit 7.

> *This document asked the Union Leadership to attend a meeting on March 10th "in order that Gordon Boudrow and I [Bennett] can discuss with you the financial state of Cambridge Health Alliance, our FY 11 budget forecasts, and upcoming negotiations. We are also looking at this meeting as an opportunity to have a frank discussion and answer any questions you may have."*

14. On March 10, 2010, CPHC conducted a meeting with the leaders of the various bargaining units. Representatives of the MNA attended. During the meeting CPHC offered to make notes of the meeting and materials used in the course of the meeting available to the attendees.

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2. The MNA offered no witnesses in its case in chief but reserved its right to call rebuttal witnesses. The Alliance asserted that its chief witnesses were unavailable. Thirty joint exhibits were identified and entered into evidence. Both parties made opening statements.

3. The Joint Pre-Trial Memorandum identifies Joan Bennett (Bennett) as a prospective witness and the Senior Vice President of Human Resources for the Alliance. Cindy McManus (McManus) is also identified as a prospective witness and as the MNA's Associate Director.

15. Shortly after March 10, CPHC by email notified those of its non-union employees who were members of the Cambridge Retirement System that it was reducing its retiree health insurance contribution rate from 90% to 50% for all who retired after August 31, 2010.

16. At some point after the March 10 meeting, the MNA and CPHC discussed the fact that they each used the same consulting company, Segal, to advise them on pension and benefits matters. The parties agreed that each should be allowed to continue to use their respective Segal advisors to assist in the upcoming negotiations, and Segal was so notified.

17. The parties agreed to the date of April 2 for their first negotiation meeting.

18. On April 1, 2010, McManus called Weinstein and told him that the MNA needed to cancel the April 2 meeting because it needed time to speak to its Segal consultant concerning the topic of retiree [heath] insurance. She also sent an email to Bennett dated April 1. See Joint Ex. 8. Bennett responded to this email by email dated April 1. See Joint Ex. 9.

McManus's e-mail to Bennett states, in part, "[W]e are planning to schedule a meeting with Don Morgan from Segal to answer questions that we have about that GASB report prior to meeting with CHA."

Bennett responded, "I am disappointed to hear this. We had hoped to get agreement on the ground rules at the very least and plan out the dates. I hope our meeting is scheduled in the very near future. Julie, if I can facilitate an exchange of information with Segal, please let me know. CHA stands ready to do whatever needs to be done to get negotiations underway."

19. On April 5, McManus mailed an "information request" to Bennett. See Joint Exhibit 10.

The request contained twelve questions concerning Retiree Health Insurance benefits, including current and future costs, projected budget savings and the age, years of creditable service and hours of work of MNA enrollees in the City of Cambridge Retirement Plan.

20. Weinstein sent McManus a letter dated April 8. See Joint Exhibit 11.

Weinstein's letter states in its entirety:

The parties' current collective bargaining agreement expires June 30, 2010. The Hospital and the MNA were scheduled to begin negotiations for a successor contract on Friday, April 2. The MNA canceled the session with less than twenty-four hours' notice the day before, the ostensible reason being that it first needed to schedule a time to consult with its pension adviser. Since the agenda for the April 2 meeting was to discuss ground rules and schedule future negotiation dates, we do not understand this reason for the cancellation. Since its cancellation, the MNA has not been in contact with the Hospital to propose new dates for negotiations.

As you know, the Alliance is under extreme financial pressures that it feels threaten its very survival; these pressures were explained to all of the Unions, including the MNA, on March 10 by the Alliance's Chief Fiscal Officer. The Hospital is understandably anxious to begin meeting with the MNA as quickly as possible to see if changes in the collective bargaining agreement are necessary to allow the Alliance to address its financial difficulties. Because of the nature of some of the issues challenging the Hospital, it has set as a goal concluding the negotiations by June 27. All of this has been communicated to the MNA previously.

The Hospital reiterates that it is willing to meet as often as reasonably possible between now and June 27 to attempt to reach agreement on the terms of a new contract. We sincerely hope that the MNA will not delay meeting as a strategy to avoid discussing the very difficult issues confronting the parties.[4] *Please contact Joan Bennett as soon as possible with dates when the MNA can be available.*

21. In April 2010, the MNA was also processing an issue concerning the respective seniority rights of the members of the three CPHC RN bargaining units. Through its Executive Director, Julie Pinkham, it was attempting to schedule a meeting of the members of the leaders of each of the three bargaining units, and Pinkham was working with Bennett concerning the employee scheduling aspect of that undertaking. Ultimately, that meeting was set for April 29.

22. Pinkham called Weinstein and spoke with him about his April 8 letter.

23. On April 14, Weinstein sent an email to each of the MNA employees who represented the CPHC MNA bargaining units. It concerned the topic of the "seniority rights" meeting of April 29 as well as the topic of scheduling dates for negotiations with the respective bargaining teams. See Joint Exhibit 12.

Weinstein's e-mail states in its entirety:

As you know, there has been a request for CHA to relieve MNA leadership nurses from their respective bargaining units in order for them to meet as a group on April 29. CHA will do everything that it can to accommodate this request, but we hope that doing so can be accomplished together with the following:

First, please let Joan Bennett know as soon as possible who the bargaining team members are for April 29, and she will coordinate release time with the hospitals.

Second, we would like to schedule meeting dates now for bargaining sessions to begin as soon as possible after April 29. It is no secret that CHA feels an urgent need to try and conclude negotiations by June 25, so that it is anxious to have as much dialogue with the MNA as reasonably possible by that date. Here are dates when CHA can be available: May 3, 6, 10-12, 17 (afternoon), 21, 24-28; June 2 (after 11), 9-11, 14-15, 16 (after 11), 17-18, 23-25. I appreciate that there may be an outstanding question of separate vs. combined negotiations, but either way we would hope that enough dates are available so as to allow for meaningful negotiations.

Third, we would like to see if we can agree on ground rules in advance of the first session between the parties so that we could begin

4. The Board takes administrative notice that the Alliance has not filed a charge of prohibited practice against the MNA alleging a failure to bargain in good faith on the basis of any delay or lack of availability to attend bargaining sessions.

on a substantive note. I'll forward proposed ground rules in advance of your April 29 meeting so that you will be able to have them for review at that time.

CHA looks forward to productive meetings with the MNA!

24. Bennett responded to McManus's information request by letter dated April 15, 2010. See Joint Exhibit 13.

25. Bennett sent McManus another letter dated April 15. See Joint Exhibit 14.

Bennett's letter states:

As the parties prepare for negotiations, we note that there has been a formal notice received from the Somerville MNA of modification or termination of the current collective bargaining agreement for that bargaining unit. The Alliance hereby gives such notice of modification or termination in the case of the current collective bargaining agreements for the Cambridge MNA and the Whidden MNA bargaining units.

26. McManus sent Weinstein an email dated April 17 concerning the scheduling of negotiations. See Joint Ex. 15.

27. McManus responded to Weinstein's April 17 email with an email dated April 19. See Joint Exhibit 16.

McManus offered the following dates: May 3, May 25, June 10, June 15 and June 24.

28. Weinstein sent McManus an email dated April 25 and attached a set of proposed ground rules for the parties' contract negotiations. See Joint Exhibit 17.

29. Pinkham sent Weinstein an email dated April 29. See Joint Exhibit 18.

Pinkham's e-mail states in its entirety:

Just to keep you in the loop. I spoke with Joan who was rather concerned/upset that she didn't have dates in hand prior to April 29th and indicated without them she would not release folks. Interesting approach. At any rate I let her know if I failed to understand that quid pro quo then it's on me as I indicated to staff the desire was for you all to be assured dates would be forth coming to ensure initiating negotiations promptly. I did not get any indication that was an issue, but as with the ground rules they intended to review dates as well with the committees who would all be present. Given the lack of clarity on moving forward together or separately - it would seem that discussion would need to occur among them. I anticipate you will get counter(s) on the ground rules and dates together or separate from the groups. Unfortunately it would appear this discussion will eat up the larger purpose of the meeting for which my optimism is tenuous at best - nonetheless the committees will be meeting today.

30. The parties met for negotiations for an agreement to succeed the 2007-2010 agreement on May 13, May 25, June 10, June 15 and June 24, 2010.

31. CPHC gave the MNA its first set of contract proposals on May 3, 2010. See Joint Exhibit 19. That same day, the MNA gave CHA a written proposal relating to ground rules. See Joint Exhibit 20. The parties reached agreement that day on ground rules. See Joint Exhibit 21.

The Alliance proposals contained in Joint Exhibit 19 were titled, "Cambridge Health Alliance/The Cambridge Hospital Proposals For Changes In 2007-2010 Collective Bargaining Agreement With Massachusetts Nurses Association." There were five numbered proposals, including a wage proposal and the following retiree health insurance benefit proposal:

3. The Retiree Health Insurance Benefit for employees on the Cambridge Public Payroll will be changed effective June 25, 2010, as follows:

a. Currently eligible employees who elect to retire and submit the appropriate paperwork on or before July 16, 2010, and who retire by August 31, 2010, will receive the current Retiree Health Insurance Benefit.

b. Eligible employees who elect to retire and submit the appropriate paperwork after July 16, 2010 will receive a Retiree Health Insurance Benefit with these changes:

i. CHA will pay fifty percent (50%) of the Health Insurance Benefit towards plans offered by CHA for under age 65 retirees, and the retiree will pay fifty percent (50%);

ii. The retiree must enroll in Medicare at age 65. CHA will pay fifty percent (50%) of the premium for the low cost Medicare advantage plan offered by CHA, and the retiree will pay fifty percent (50%);

iii. The Medex option will no longer be offered;

iv. CHA will no longer reimburse Medicare B Premiums.

32. The MNA gave CPHC written proposals at the meetings on May 25 and June 10. See Joint Exhibits 22 and 23.

33. CPHC gave the MNA a written proposal at the start of the meeting on June 24. See Joint Exhibit 24.

This proposal, titled "'Package' Offer To Settle All Outstanding Issues In Negotiations With Massachusetts Nurses Association," contained the same Retiree Health Insurance Benefit language included in Joint Exhibit 20.

34. CPHC gave MNA another written proposal later in the day on June 24. See Joint Exhibit 25.

This proposal, titled "Last, Best and Final Offer to Settle All Outstanding Issues in Negotiations with Massachusetts Nurses Association" contained the same Retiree Health Insurance Benefit language included in Joint Exhibits 19 and 24..

35. The parties did not reach agreement on June 24 on the terms of a new collective bargaining agreement.

36. On June 24, CPHC's Chief Executive Officer sent an email to all members of the TCH bargaining unit. See Joint Exhibit 26.

CEO Dennis D. Keefe's email states in its entirety:

Earlier this year, CHA management proposed changes to the retiree health benefit, to affect only future retirees, and communicated that proposal to our employees on the TCH public payroll and their collective bargaining representatives. The proposed changes do not eliminate this benefit but rather help insure that it can be sustained. If enacted by June 30, the revisions will save CHA $9 million this year and similar amounts in future years. The changes are absolutely essential to the system's financial wellbeing. Alternative measures to reduce our labor costs by a similar amount would be damaging to our work force and employee morale, as it would necessitate a reduction of more than 100 full-time employees.

Negotiations regarding the proposed changes have been underway for weeks. Everyone in the process has understood the necessity to reach an end point before June 30, 2010. Regrettably, agreement has not been reached with the Cambridge MNA, although an offer included wage increases over the term of a three-year contract.

Since we have gone as far as possible in our negotiations with the Cambridge MNA, we will immediately implement the proposed changes to the TCH MNA retiree health benefits for the good of CHA, its financial stability and its future prospects.

HR will be offering additional educational and informational sessions to all TCH employees who are eligible to retire and are represented by the MNA and other unions from June 30, 2010 to July 9, 2010. Employees who are members of the TCH MNA bargaining unit will have until July 23, 2010 to file retirement paperwork with the City of Cambridge Retirement Board., and have until August 31, 2010 to retire and still be covered under the current terms of the Retiree Health benefits.

I understand that this is a very difficult decision that will impact a number of current employees, but failing to implement these proposed changes in the current fiscal year would be irresponsible and would place our organization and all current employees into a circumstance of significant financial jeopardy.

37. On June 25, CPHC's Chief Executive Officer sent a memo to all members of the TCH bargaining unit who were members of the Cambridge Retirement System. See Joint Exhibit 27.

*The subject line of the memo was "Changes to Your **Retiree Health Benefits** as of June 30, 2010.["] (Emphasis in original). The memo contained the following topic headings: "History of Retiree Health Insurance Benefit;" "What does this mean for CHA now?;" "What does this mean to you;" "How to learn more about your options;" and "Your Pension Benefit and your Retiree Health benefit are two separate benefits."*

Under the heading "What does this mean to you," the memo provided the following information:

Retiree Health Insurance is important to the employees on the Cambridge public payroll.... We have worked diligently over the past six months to find a way to continue a Retiree Health Insurance plan for our Cambridge public payroll employees that will be both adequate and affordable for our employees and affordable for CHA.

In order to do this, CHA will continue to offer retiree health insurance but we are making changes to the contribution formulas and the retiree insurance offerings beginning in FY 11. We want to give TCH MNA employees who will qualify for retirement by July 23, 2010, as determined by the Cambridge Retirement Board, the option to retire with the current benefit package.

38. Bennett sent McManus an email dated June 28 and attached what she described as a "memorandum of agreement". See Joint Exhibit 28. The MNA did not sign it.

The email states, in its entirety, "Cindy, consistent with the last, best and final offer on June 24, 2010, CHA has prepared the attached memorandum of agreement for execution by the parties. We hope that the MNA will give every consideration to the offer and return a signed copy to me."

The memorandum included provisions regarding duration, steps, the inclusion of bargaining ground rules for the next negotiations and the same retiree health benefits language contained in the prior management proposals.

39. On June 28, the MNA sent CPHC's Chief Executive Officer a letter. See Joint Exhibit 29.

This letter was signed by Roland N. Goff, Labor Counsel/Unit 7 Administrator for the MNA and states:

The Massachusetts Nurses Association (MMA) was extremely disappointed that on June 24, 2010, the Cambridge Health Alliance (CHA) decided to violate the law that governs public-sector labor bargaining in Massachusetts by unilaterally implementing contract terms on MNA bargaining unit members at The Cambridge Hospital (TCH). CHA also failed to bargain in good faith and has also failed to meet its legal obligation under the public section [sic] collective bargaining law to participate in good faith in mediation and fact-finding.

The MNA will, at this time, fulfill its obligations under the state public employee collective bargaining law to seek mediation and fact-finding. The MNA will also take necessary legal action to preserve the rights of its members and to seek damages from CHA that may be due MNA members. The MNA rejects any offer from CHA to agree to the terms that it has unilaterally imposed upon MNA bargaining unit members on June 24, 2010.

40. The MNA filed a "Petition for Mediation and Fact-Finding in Public Employment" on June 28, 2010. See Joint Exhibit 30.

Opinion

We begin with a review of Section 9 of the Law and its amendment and discuss how it has been interpreted and applied by our predecessor body, the Labor Relations Commission,[5] and the Supreme Judicial Court. In this regard, we are mindful of our statutory role to interpret Chapter 150E in order to effectuate its underlying policies and the deference by the courts of our understanding of the Law. *Massachusetts Community Council MTA/NEA* v. *Labor Relations Commission*, 402 Mass. 352, 353-354 (1988).

Section 9 (before the Amendment)

It is well-established that, under Section 10(a)(5) of the Law, a public employer is prohibited from making unilateral changes to bargaining unit members' terms and conditions of employment unless notice is given and resolution or impasse is reached. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). However, because Section 6 of the Law makes clear that the bargaining obligation does not "compel the parties to agree to a proposal or make a concession," the Legislature has recognized that stalemates in negotiations may occur. *Commonwealth of Massachusetts*, 8 MLC 1978, 1983 (1982). For this reason, since its inception, Chapter 150E has contained mediation and fact-finding mechanisms as set forth in Section 9 of the Law.

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5. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Board is the Division agency charged with deciding adjudicatory matters. References to the Board include the former Labor Relations Commission. References in this decision to the Board include the former Labor Relations Commission.

Those procedures and the prohibition of unilateral changes once those procedures are underway apply only in the context of negotiations for new or successor collective bargaining agreements. *Massachusetts Board of Regents of Higher Education* 13 MLC 1540, 1543 (1987), *aff'd sub. nom. Massachusetts Community Council MTA/NEA* v. *Labor Relations Commission*, 402 Mass. 352 (1988).

Pursuant to Section 9, "[a]fter 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." Receipt of a petition requires that investigation be commenced forthwith to determine if the parties have negotiated for a reasonable period of time and to determine if impasse exists. *Id.* A determination of impasse results in mediation to assist the parties in the resolution of impasse and empowers a mediator to order the parties to provide authorized representatives to be present at meetings held to resolve impasse and negotiate an agreement. *Id.* If mediation does not result in a break in impasse, either party may petition to begin the fact-finding process. Upon completion of fact-finding, the results are transmitted to the parties and if impasse remains unresolved ten days after the transmission of the fact-finding process, the results are made public. *Id.* If impasse continues after the publication of the fact-finders report, the issues in dispute "shall be returned to the parties for further bargaining." *Id.*

In 1982, the former Commission addressed the question of whether Section 9 evinced a legislative intent to prevent a public employer, after a determination of impasse by a mediator, from changing working conditions prior to the exhaustion of mediation and fact-finding proceedings. *Commonwealth of Massachusetts*, 8 MLC at 1983. The union had urged the Commission to "adopt a legal principle whereby an employer may lawfully implement changes in working conditions only following completion of [Section 9's] mediation and fact-finding proceedings." *Id.* By a two to one vote, however, the Commission found that the parties had "reached a good faith stalemate in their efforts to agree" on the terms of a new contract and held that the employer's unilateral implementation of work rule changes while the parties were in mediation was lawful. *Id.* at 1987-1988. The majority relied on NLRB precedent and, its own rulings, most specifically, *Hanson School Committee*, 5 MLC 1671 (1979), for the proposition that Chapter 150E permits an employer to unilaterally implement changes in conditions of employment once impasse is reached as long as these changes were reasonably comprehended within its pre-impasse proposals. *See id.* at 1982 (citations omitted). In so holding, the majority opined that the enactment of Section 9 was not intended to limit the employer's freedom to take unilateral action and implement its last best offer, but indicated that the protections the union argued for - a freeze on any unilateral action pending the outcome of mediation and fact-finding - was not for the Commission to provide but rather, must be sought from the Legislature. *Id.* at 1986.

Commissioner Gary Altman dissented from this view and would have held that a finding of impasse was not called for "where the parties have just begun in good faith to use the statutory dispute resolution mechanisms" of Section 9. *Id.* at 1988 (dissenting). Rejecting the employer's right to unilaterally implement its last best offer, the dissent stated that: "When negotiations are continuing, albeit in a different forum, it cannot be said that the bargaining obligation is fulfilled, or that further talk would be fruitless." *Id.* at 1991. The dissenting opinion drew a distinction between the rules governing impasse under the economic realities of NLRA's private sector jurisdiction and the obligation of public sector employers and unions to make use of state-sanctioned mediation and fact-finding to resolve impasse. *See id.* at 1990. To find otherwise, Commissioner Altman argued, would be to ignore the Commission's obligation to balance the Law's multiple purposes: peaceful settlement of labor disputes, the concomitant policy of unions and employers participating as equal partners in the collective bargaining process, and the prevention of interruption to the flow of government services. *Id.* For these reasons, the dissent favored a rule "that prohibits the employer from taking self-help measures where both parties are in good faith using the statutory dispute resolution mechanism." *Id.* at 1991-1992. On appeal, the Supreme Judicial Court affirmed the majority's decision in its entirety. *Massachusetts Organization of State Engineers and Scientists (MOSES)* v. *Labor Relations Commission*, 389 Mass. 920 (1983).

Section 9 as Amended

In 1986, in an apparent response to the *MOSES* decision, the Legislature amended Section 9 of the Law by adding the following ninth paragraph:

> Upon the filing of a petition for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact-finding or arbitration, if applicable, shall have been completed. The terms and conditions of employment shall continue in effect until the collective bargaining process including mediation, fact-finding or arbitration, if applicable, shall have been completed. The parties may extend the terms and conditions of the collective bargaining agreement by mutual agreement for a longer period of time than that set forth above.

St. 1986, c. 198.

Whether or not public employers must file a Section 9 petition for a declaration of impasse with the Division before unilaterally implementing changes following successor negotiations is an important issue that has never been squarely addressed by the Board. Over the years however, the former Commission has suggested, albeit in dicta, an interpretation of the Section 9 amendment that is consistent with the Union's argument and not the Alliance, who argues that Section 9 does not require employers to commence dispute resolution proceedings before making unilateral changes. For example, in *Town of Hudson*, 25 MLC 143, 147, n.22 (1999), a case analyzing, among other things, whether the affirmative defense of unclean hands permitted the employer to unilaterally implement a paid detail policy, the Commission refused to sanction the employer's "self-help," noting that the Legislature had amended Section 9 in response to the *MOSES* decision "to state that an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding, or arbitration have been completed."

Similarly, in *Town of Stoughton*, 19 MLC 1149, 1164 (1992), in a concurring opinion analyzing the impact of Joint Labor Management Committee impasse procedures on an employer's ability to implement unilateral changes during successor negotiations, Commissioner Walsh described the effect of the Section 9 amendment as prohibiting "employer unilateral changes during successor negotiations until the [former] Board of Conciliation and Arbitration . . . had certified that the collective bargaining process had been completed." Commissioner Walsh stated that this approach provided a "simplified procedural prerequisite to an employer's lawful implementation of a unilateral change during successor negotiation." *Id.* In Commissioner Walsh's opinion, "[n]o change could be made until after the BCA had certified the completion of the collective process."

The Union argues that further support for its argument that completion of the Section 9 mediation and fact-finding procedures are a necessary pre-condition of unilateral action can be found in the 2002 edition of "A Guide to the Massachusetts Public Employee Collective Bargaining Law,"[6] which described the 1986 amendment as follows:

> M.G.L. c. 150E is amended to forbid employers from unilaterally changing employees' wages, hours, and working conditions until the collective bargaining process (including mediation, fact-finding and arbitration, if applicable has been completed.

Here, there is no dispute that the Union invoked the Section 9 processes by filing a petition on June 28, 2010. Accordingly, there is no need for us to reach the issue of whether Section 9 obligated the Alliance to file a petition and complete the collective bargaining process before it could lawfully make a unilateral change. Instead, we limit our analysis here to whether the Union's June 28 petition barred the Alliance from unilaterally changing its retirement health benefits, notwithstanding the email it sent to employees on June 24, 2010 and, if so, whether the Board should recognize the Alliance's claims of economic exigency as an affirmative defense to a unilateral change occurring in the midst of successor negotiations.

The June 28 Petition

Our analysis of whether the June 28 petition barred unilateral changes, including change to retirement health benefit contributions, begins with the well-established principle that the Law does not mandate that a party to a collective bargaining agreement bargain during the term of a collective bargaining agreement over subjects that were part of the bargain when the parties negotiated the agreement. *City of Leominster*, 23 MLC 62, 65 (1996). The corollary of that principle is that matters that are not part of the existing collective bargaining agreement, i.e., non-contractual, are a proper subject for bargaining during the term of the agreement as long as those negotiations do not take place when the parties are or have historically engaged in successor bargaining. *Id.* (citing *Town of Brookline*, 20 MLC 1570, 1596, n.20 (1994)). After good faith mid-term negotiations have exhausted the prospects of an agreement, an employer may implement changes to matters not covered by an agreement that are reasonably comprehended in pre-impasse proposals. *Id.;* cf. *Massachusetts Board of Regent of Higher Education*, 13 MLC 1340 (1987) *aff'd sub nom. Massachusetts Community Council MTA/NEA* v. *Labor Relations Commission*, 402 Mass. 352 (1988) (Dispute resolution procedures provided for under Section 9 of the Law do not encompass impasses that occur during the term of a collective bargaining agreement). An employer may not however, insist upon bargaining separately over non-contractual items apart from successor negotiations. *Id.*

Here, the Alliance chose to include retirement health benefit contributions as part of its successor negotiations, even if they were not, as the Alliance asserts in its Answer to the complaint, a contractual benefit under the 2007-2010 Agreement. *See* Joint Exhibits 1, 19, 24 and 25. Having proceeded in this manner, the Alliance was obliged to refrain from implementing changes to those benefits until it had bargained to impasse over *all* the outstanding issues in its negotiations for a successor agreement. *City of Leominster*, 23 MLC at 66.

The Alliance argues that if the parties were at impasse in their negotiations as of June 24, 2010, as it alleges, it could lawfully implement its final offer without petitioning first for mediation and fact-finding pursuant to Section 9. We need not address this argument however because, prior to July 1, 2010, - the earliest possible date the Alliance could have implemented its proposed changes to the Agreement even assuming impasse had been reached[7] - the Union filed a petition under Section 9. At that point, because the Alliance could not insist on bargaining separately over retiree health insurance contributions, *Id.* at 66, and by operation of the plain language of Section 9, the Alliance was barred from implementing unilateral changes to *all* matters encompassed by its successor bargaining negotiations, including contract changes and changes to retirement health benefit contributions, until the Section 9 process was completed.[8]

Having determined that the Alliance's assertion of impasse did not permit it to make unilateral changes once the Union filed the Section 9 petition, we must next consider whether the Alliance's arguments concerning economic exigency can potentially excuse its

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6. The Guide was a joint publication of the Donahue Institute for Governmental Studies and the former Labor Relations Commission. It was last updated in 2002, and appears on-line at: http://www.mass.gov/lrc/gb_toc.htm (website last visited on August 17, 2010).

7. Article XXX of the Agreement, Duration and Renewal, states that it shall continue in full force and effect until June 30, 2010 and during the period of negotiations for a successor agreement. On April 15, 2010, Bennett sent a letter to McManus giving notice of the modification or termination of the current collective bargaining agreement for the Cambridge MNA. See Stipulation 25 referencing JX 14. Therefore, assuming without deciding that this was a valid termination of the Agreement in light of Article XXX, July 1, 2010 was the earliest date the Alliance could have made any changes to the Agreement even absent a petition.

8. To the extent the Alliance argues that Section 9's ban on unilateral changes is triggered once a Section 9 petition is filed but not before, we note that Keefe's June 25, 2010 memo to bargaining unit members states that the retirement health benefit changes would go into effect as of June 30, 2010 and/or at the beginning of FY 11. See Joint Exhibit 27. This provides further support for our conclusion that the Union's petition, filed on June 28, 2010, barred the unilateral change at issue here.

implementation of the increased retirement health benefit percentage.

The Economic Exigencies Defense

The Board has recognized a narrow exception to the rule against changing working conditions without resolution or impasse where circumstances beyond the employer's control require immediate action, so that bargaining after the imposition of a change may satisfy the employer's bargaining obligation. *Town of Brookline*, 20 MLC at 1595 (citing *City of Malden*, 8 MLC 1620, 1625 (1981); *New Bedford School Committee*, 8 MLC 1472, 1477-80 (1981). An employer relying on this exception has the heavy burden of demonstrating that circumstances beyond its control require the imposition of a deadline for negotiations and that the deadline imposed was reasonable and necessary. *City of Brookline*, 20 MLC at 1595.

The Board has not before had the opportunity to decide whether it would recognize this exception to the rule against unilateral changes at a time when the employer was otherwise prohibited from making changes under the 9th paragraph of Section 9 of the Law. The Union urges the Board not to recognize an exception, arguing that to do so would be to add an exception to the Law where there is no evidence that one was intended. It further argues that the absence of an exception is rational, because piecemeal implementation of contract proposals would be inherently destructive of the process of reaching agreement. The Alliance argues on the other hand that its economic exigencies defense does not require that the parties be at impasse before the change occurs, and therefore, that Section 9 is not applicable in circumstances where economic exigencies exist.

We agree with the Alliance for the following reasons. Clearly, as the Union points out, Section 9 does not contain a clause limiting its blanket prohibition against unilateral change once the Section 9 processes have been invoked. However, neither does Section 6 of the Law. Section 6 requires employers to negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment, and also precludes - without express exception - unilateral action without bargaining to resolution or impasse. Nevertheless, it is uncontroversial that for decades, the Board has, with judicial approval, recognized affirmative defenses to the Section 6 obligation to bargain. In addition to the economic exigency affirmative defense described above, these include the affirmative defenses of waiver by contract, *see, e.g.*, *City of Boston* v. *Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (1999) (citing *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569, n. 8(1983); *Accord Massachusetts Board of Regents*, 15 MLC 1265, 1270-71 (1988); the affirmative defense of waiver by inaction, *see, e.g.*, *Commonwealth of Massachusetts* v. *Labor Relation Commission*, 404 Mass. 124, 128 (1989) (citing *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 573)); *City of Boston School Committee*, 4 MLC 1912 (1978); and the affirmative defense of unclean hands, *Town of Hudson*, 25 MLC at 143, n.21.

Given the number of long-recognized affirmative defense "exceptions" to a public employer's statutory bargaining obligation, we are not persuaded by the Union's argument that to recognize an exception when the parties are participating in mediation and fact-finding here would be to rewrite Section 9. To the contrary, because our Complaint alleges that the Alliance violated Section 10(a)(5) of the Law by announcing it would implement changes to retiree health benefits without first bargaining to resolution or impasse, we are affording to the Alliance the same opportunity to defend its actions as we would any other employer who is alleged to have violated Section 10(a)(5).

Further, as a policy matter we note that in his dissenting opinion in the *MOSES* decision, former Commissioner Altman stated that he would not "sanction a wholesale restriction [on unilateral changes] that would be unduly injurious to the business of government." 8 MLC at 1992. Under this approach, when an employer raises an exigency defense to a charge alleging a refusal to bargaining in good faith, the Board is required to examine specific circumstances of each case to determine whether there were compelling reasons that justified the employer's change before fulfilling the bargaining obligation. *Id.* We agree with this approach and decline to hold that participation in Section 9 proceedings precludes an employer from making unilateral changes short of completing the collective bargaining process if the employer is able to demonstrate that externally-imposed circumstances required unilateral action by a date certain. We therefore order a hearing pursuant to the attached Notice of Hearing. At this hearing, the Alliance will be required to establish the following elements of its affirmative defense that: 1) circumstances beyond its control require the imposition of a deadline for negotiations; 2) the MNA was notified of those circumstances and the deadline; and 3) that the deadline imposed was reasonable and necessary. *See New Bedford School Committee*, 8 MLC at 1478.

SO ORDERED.

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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[1]

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).[2] 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."[3] 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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