CITY OF SALEM AND AFSCME, COUNCIL 93, MUP-2637 (11/2/78; not previously reported). Decision on Appeal of Hearing Officer's Decision.

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Commissioner participating:

James S. Cooper, Chairman
Garry J. Wooters
Joan G. Dolan

Appearances

George F. McInerny, Esq. - Counsel to the City of Salem

Wayne Soini, Esq. - Counsel to Council 93, American Federation of State, County and Municipal Employees, AFL-CIO

DECISION ON APPEAL OF HEARING OFFICER

Statement of the Case

On August 11, 1977, Hearing Officer Sharon Henderson Ellis issued her Decision in the above-captioned matter holding that the City of Salem (City) had failed to and refused to bargain in good faith with Council 93, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME or the Union) in violation of sections 10(a)(1) and (5) of General Laws Chapter 150E (Law).[1] From that determination the City appeals. The appeal was processed in accordance with section 11 of the Law, and Article III, section 28 of the then current[2] Rules and Regulations of the Commission.

The Hearing Officer filed a written Statement of the Case, and timely supplementary statements have been received from the City and the Association.

OPINION

Upon the record on appeal, we find no error in the Hearing Officer's findings of fact, rulings, or conclusions of law, and we affirm.

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[1]The full text of the Hearing Officer's Decision is reported at 4 MLC 1196 (1977).

[2]The Commission has since promulgated new Rules and Regulations. Appeal of Hearing Officer Decisions is now governed by MLRC Rules, 402 CMR 13.13. The amendment of the Rules does not impact this case.

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a. Procedural Objections

The hearing in this matter was conducted before an agent of the Commission pursuant to the Expedited Hearing procedure described by section 11 of the Law and Article II, section 28 of the Commission rules. The City moved that the hearing be re-designated a Formal Hearing. From the denial of that motion by the Hearing Officer, the City appeals. There was no error in the ruling.

Under the expedited procedure, a hearing is conducted before a single member of the Commission, or an agent. The testimony is preserved by tape recording. The single member or agent renders the decision in the case, which may be appealed to the Commission. The Commission will review only those findings of fact which are specifically contested by one of the parties to the case. Town of Dedham, 3 MLC 1332 (1977); City of Medford, 3 MLC 1584 (1977); 402 CMR 13.13(5). All issues of law are open on appeal.

The City argues that the expedited hearing procedure sacrifices the rights of the parties to the goal of administrative expediency

> ...[T]he Sabbath was made for man, not man for the Sabbath (Mark XI:27). The procedures in the statute of Chapter 150E were designed to safeguard the rights of the parties to actions before the Commission, and do not exist for the convenience of the Commission. The parties should not be expected to defer their rights to the convenience of the Commission. Supplementary Statement of the Employer at 2.

While we do not dispute the authority cited by the Employer, we doubt that it stands for the proposition urged.[3] Administrative "expediency" does not equate to administrative "convenience". Nor is expediency detrimental to the rights of litigants. As we have noted in prior decisions, the expedited procedure is designed to reduce litigation delay and expense. See Town of Dedham, 4 MLC 1720, 1722 (1977); Town of Sharon, 3 MLC 1052 (1976). It provides no "convenience" for the Commission. We, like the City, would prefer the luxury of a stenographic transcript in every case. It is a luxury that can no longer be afforded given limited agency resources. The procedure does not sacrifice any "rights" of litigants before the Commission. Tape recordings provide an accurate memorialization of the testimony. They may be reproduced quickly and at minimal expense. Since the litigation in this matter, the procedure has been specifically approved by the legislature. See Ch. 788, Acts of 1977. There was no error in the use of the expedited procedure.

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[3] "There is more than enough scripture upon the subject to enable any devil to cite some part for his purpose." Shattuck Denn Mining Company v. NLRB, 62 LRRM 2401, 2403n.12 (6th Cir. 1966). "The Devil can cite scripture for his purpose" Wm. Shakespeare, "The Merchant of Venice", Act I, Scene III, L. 99.

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b. Substantive Matters

The remainder of the Supplementary Statement of the City deals with substantive issues raised by the case. In order to discuss these claims, we summarize the relevant facts.

Factual Background

AFSCME represents a bargaining unit which includes employees of the Shaughnessy (municipal) Hospital as well as other employees of the City of Salem. During the early part of 1976 negotiations took place for an agreement to be effective July 1, 1976. Bargaining continued for eight or ten meetings. During some of these sessions the union attempted to bring forward proposals relating to working conditions at the hospital. The Hearing Officer found[4] that the response of the City negotiator on these occasions was, "Let's take care of the city-wide issues first, we'll get to the hospital situation later." There was no substantive bargaining on these hospital proposals. A mediator entered the negotiations, and on July 19, 1976 the parties signed a memorandum incorporating the basic terms of their agreement. The agreement was subsequently ratified by the union, reduced to writing, and executed on November 17, 1976.[5]

On November 8,[6] representatives of the union had presented to the Hospital Administrator proposals relative to hospital employees. The Administrator indicated that he would be prepared to respond to some of the proposals at the next scheduled meeting. At this point, the City's chief negotiator arrived. He examined the proposals and indicated that there would be no bargaining, as negotiations had been completed. Another meeting was held on November 30, at which time the chief negotiator again declined to bargain the hospital issues. It is this refusal which resulted in the charge herein.

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[4] 4 MLC at 1197. The City does not challenge this finding on appeal.

[5] The City alleges that the Hearing Officer erred in finding that "the contract between the City and the Union was executed on November 17, 1976, thus giving the impression that the contract was not entered into at that time." Supp. Stat. of City at 2. The contract was, in fact, executed on November 17 as found by hte Hearing Officer, and conceded by the City. The City would have us find that the contract was "entered into" when the union committee recommended ratification to the membership on August 18. Neither date affectes the outcome of this case on any theory. We find that agreement was reached at the table on July 19. That agreement was ratified by the union prior to November 17, when the contract was executed.

[6] The Hearing Officer erroneously indicated that the demand for bargaining on hospital issues was made a few weeks "after" execution of the contract. In fact, it was a few weeks prior to execution, on November 8, 1976. The error is harmless.

The Obligation to Bargain

The City contests the Hearing Officer's finding that the City had an obligation to bargain over "all mandatory subjects never bargained nor embodied in a contract." 4 MLC at 1200. In particular, the City argues that the Hearing Officer mistakenly relied on Jacobs Mfg. Co., 94 NLRB 1214, 28 LRRM 1102 (1951), enf'd, 196 F.2d 680, 30 LRRM 2098 (2nd. Cir. 1952). In that case, the employer and the union negotiated a two-year agreement with a re-opener provision on wages only. At the appropriate time the union requested negotiations over wages, and on two other issues over which the contract was silent, pensions and group insurance. Pensions had never been discussed during negotiations. Group insurance had been discussed, and an agreement reached outside of the contract. A plurality of the Board, Members Houston and Styles, read section 8(d) of the Labor Management Relations Act[7] and requiring bargaining on any mandatory matter not incorporated in the contract. Chairman Herzog agreed that the employer had an obligation to bargain over pensions--the issue never discussed at the table--but would not require bargaining on the issue of group insurance since he found that it had been "part of the contemporaneous 'bargain' which the parties made when they negotiated the entire 1948 contract." Thus, there was a Board majority only on the issue of the obligation to bargain on subjects not bargained or incorporated in the contract. It was only on this finding that the Board sought and obtained enforcement from the Court of Appeals.

The City would have us read the Jacobs case as standing for the proposition that if the contested matters were "raised in any fashion"[8] in the negotiations, they need not be discussed during the term of a contract which is silent as to that issue. This is a misreading of the Jacobs rationale. Chairman Herzog's opinion, which makes up the majority, would only find a waiver of the right to bargain if he could conclude, from the facts, that the contract's silence on the issue over which bargaining was sought constituted "part of the bargain". Thus, later Board cases have found "waiver by bargaining history" only where it may be inferred from the facts that the matter over which bargaining was sought was "consciously explored" and "consciously yielded. See, Press Co, Inc., 121 NLRB 976, 42 LRRM 1493, 1494 (1958) cited by the Hearing Officer, 4 MLC at 1200 n.7.

On the facts of this case it cannot be said that the matter of hospital working conditions was "consciously explored" and "consciously yielded". Rather, it appears to have been expressly reserved for future negotiations. The Hearing Officer found that the City negotiator declined to discuss

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[7]Section 8(d) defines the basic bargaining obligation under the LMRA in terms substantially similar to G.L. c.150E, sec. 6, but then adds the proviso that "where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such agreement...." Section 6 of G.L. c.150E lacks a similar proviso.

[8]Supplementary Statement of City at page 7.

hospital issues when they were brought forward, indicating that they would be discussed "later".[9] Thus, the case appears to be indistinguishable from Press Co. Inc., supra, where a Board panel found no waiver.

We have no doubt that, if presented with the facts of this case, the NLRB would conclude that the City has an obligation to bargain with the Union over issues not bargained or incorporated in the collective bargaining agreement. Under our statute, which lacks the "proviso" language of LMRA sec. 8(d), the bargaining obligation should be no more restricted.

We agree with the Hearing Officer that hte general policy expressed by the 8(d) proviso is sound, and ought to be implied as part of G.L. c.150E. Subjects clearly negotiated and included in an agreement may not be renegotiated mid term at the insistence of either party. We need not resolve the theoretical dispute presented by the plurality and concurring opinions in Jacobs, however. Under the logic of either opinion, the refusal by the City to discuss any of the Union's hospital proposals represents a violation of the duty to bargain.

We do not reach the City's contention that some of the Union's proposals are not new matter, but matter already covered by the contract. The argument concedes that the original refusal to bargain was overbroad.[10] An employer may not refuse to bargain over negotiable matters because the union also seeks to bargain non-negotiable subjects. Town of Danvers, 3 MLC 1559, 1576 (1977). Our order in this case directs the employer to bargain in good faith over those terms and conditions of employment of hospital employees which are not covered by the contract executed on November 17, 1976. Which items fall into this category is a matter to be taken up first by the parties, at the bargaining table, and by hte Commission only upon the allegation of a subsequent refusal to bargain.

The Decision of the Hearing Officer is without material error of fact, and without error of law. We affirm the Decision as modified, and affirm the Order as issued.

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[9]The inference that hospital issues were specifically deferred for future consideration is strengthened by the actions of the Hospital Administrator at the November 8 meeting with the Union. He received the Unino's proposals and indicated that a response would be forthcoming. Since the Hospital Administrator was aware of the status of bargaining, his action is inconsistent with the position that hospital issues were settled by the July 19 agreement.

[10]The employer states: "At this point, and with renewed appreciation of the rule in Jacobs, the City cannot say that it would not negotiate with the Union concerning legitimate new subjects which for one reason or another, were overlooked during the general bargaining which led up to the completion of the collective bargaining agreement on November 17, 1976." Supp. Stat. at 14.

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Order

Wherefore, based upon the foregoing, and pursuant to the authority of G.L. c.150E, sec. 11 it is hereby ORDERED that:

1. The City of Salem is hereby directed to bargain in good faith with the American Federation of State, County and Municipal Employees on behalf of the employees of the Robert Shaughnessy Hospital over wages, hours, standards of productivity and performance, and other terms and conditions of employment not embodied in the current collective bargaining agreement executed on November 17, 1976.

2. The City is directed to post the appended Notice to Employees in a conspicuous location, and to leave said notice posted for a period of thirty (30) days.

3. The City is directed to notify this Commission within ten (10) days of receipt of this Decision and Order of the steps taken to comply therewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

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NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Public Employee Bargaining Law, General Laws Chapter 150E, gives all public employees these rights:

To engage in self-organization;
To form, join and assist labor unions;
To bargain collectively through a representative of their own choosing;
To engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection;
To refrain from any and all of these activities.

The City of Salem will not interfere with any of these rights.

More specifically, we will not refuse to bargain with the American Federation of State, County and Municipal Employees on behalf of the employees of the Robert Shaughnessy Hospital about wages, hours and other conditions of employment not already embodied in the collective bargaining agreement executed on November 17, 1976.

We will meet with the American Federation of State, County and Municipal Employees upon request at reasonable times and places to bargain on behalf of employees of the Robert Shaughnessy Hospital.

DATED_____

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MAYOR OF THE CITY OF SALEM