LENOX SCHOOL COMMITTEE AND LENOX EDUCATION ASSOCIATION, MUP-3229 (12/10/80). Decision on Appeal of Hearing Officer's Decision.

(10 Definition)
16.2 strike - "work to rule"
(60 Prohibited Practices by Employer)
65.2 concerted activities
(100 Impasse)
108.2 withdrawal of services

Commissioners Participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

J. Norman O'Connor - Counsel to the Lenox School Committee

Ann Clarke - Counsel to the Lenox Education Association

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

The Lenox Education Association (LEA) charges that efforts by the Lenox School Committee (School Committee) to stop a work-to-rule job action constitute interference with employees' protected rights. Hearing Officer Stuart A. Kaufman issued a decision upholding the LEA claim on January 10, 1980, from which the School Committee timely appealed. 6 MLC 1708. The School Committee filed a supplementary statement on February 13, 1980, to which the LEA responded on March 4, 1980. Based upon the entire record and the parties' submissions, we hold that certain aspects of the work-to-rule constituted protected activity and that the School Committee's response to those actions violated Section 10(a)(1) of G.L. c.150E (the Law).

Findings of Fact

No material facts are seriously disputed.[1] We therefore adopt the findings of

[1] The School Committee's supplementary statement included 15 pages of requested findings of fact, but ignored the directive of 402 CMR 13.13(5) that, "A party claiming that the hearing officer has made erroneous findings of fact shall identify the findings challenged and direct the attention of the Commission to the evidence supporting the party's proposed findings of fact." (emphasis added) Under these circumstances, we may accept the hearing officer's statement of facts. In any event, the only substantial departure from the hearing officer's fact findings urged by the School Committee concerns the alleged "passive resistance" campaign of the Association. See Hearing Officer's Decision, fn.3. Resolution of the dispute noted in fn.3 is unnecessary to our determination of this appeal and is therefore not a "material fact" which we must resolve. See 402 CMR 13.13(7).

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the hearing officer, which, for the purposes of this opinion, we summarize as follows:

The School Committee and the LEA commenced bargaining in November, 1977 for a new collective bargaining agreement to succeed the one expiring on August 31, 1978. When no agreement had been reached prior to the beginning of school in September, 1978, the LEA initiated a series of actions designed to apply pressure on the School Committee.

On September 5, about two-thirds of the faculty attended an LEA meeting at the Lenox Holiday Inn. There, John Barrett, chairperson of the LEA Crisis Committee, presented the Committee's recommendation that the faculty engage in a "work-to-rule" job action in order to support the LEA's negotiating committee. Such an action, he explained, would consist of the following: from predesignated places, teachers would enter and leave their school buildings en masse at the beginning and end of the "work day," as that term is defined by the collective bargaining agreement; teachers would no longer engage in light conversation with principals or assistant principals; and teachers would not initiate questions at faculty meetings. The LEA ratified the recommendation of the Crisis Committee. Following the LEA meeting, the teachers belatedly attended the staff orientation meeting scheduled by the superintendent, Roland Miller. The work-to-rule action of the LEA was reported in the September 11 edition of the Berkshire Eagle, a newspaper of general circulation in te Lenox area.

On September 25, 1978, the LEA again met. This time, the Association voted to escalate the work-to-rule. Prior to this meeting, teachers had been leaving the school buildings at the end of the "work day," but had been correcting papers, preparing lessons, and performing other school-related work at home. Escalation meant that teachers would complete all of their obligations within the confines of the "work day."

The LEA initiated other actions as well. For instance, 59 of the 80 teachers in Lenox submitted requests for personal leave for October 3 (all of which were denied by Miller), and substantially increased numbers of teachers made requests to see their personnel files. Two teachers indicated to their principal that they were suspending their duties with respect to certain extra-curricular activities; both teachers, after discussion with the principal, assured him they would resume their activities.

On September 29, Miller issued a memorandum to all faculty addressing the LEA work-to-rule action.[2] He stated, "[I]t has been reported in the media and I have

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[2]The full text is as follows:

TO: All Faculty
FROM: Roland M. Miller
DATE: September 29, 1978

It has been reported to me that there have been instances where faculty members may have used the classroom as a forum to advocate, either directly or indirectly, positions taken by the Lenox Education Association with respect to

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received some student complaints regarding the failure to promptly grade papers and the withholding of other services which have been customarily performed in the past." Miller concluded, "To avoid any misunderstanding, each of you should understand that we shall view the failure to perform duties which have been traditionally performed as a slowdown or withholding of services and, hence, a violation of the Law, and, as Superintendent, I would have to take appropriate action, however distasteful that may be.

On September 27,[3] LEA Secretary Bonnie Carnevale drafted a letter which she intended to sent to parents of her students.[4] In the letter, Carnevale explained to

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current negotiations. This use of the classroom in an attempt to influence the children is very clearly a violation of the law as well as a serious breach of professional ethics. Hopefully, the reports are not accurate and no teacher has engaged in this kind of activity. But, if this were to happen, we would view it as a violation of the law and respond accordingly.

Further, it has been reported in the media and I have received some student complaints regarding the failure to promptly grade papers and the withholding of other services which have been customarily performed in the past. As a strategy, "work to rule" attempts to equate a contract with the rules of employment. Yet, there is little or no relationship between the two because contracts do not attempt to describe teacher work rules in a definitive way. Indeed, teachers are professionals and, by definition, their "work rules" cannot be published in labor contract language. For example, typical contracts do not include any language concerning correcting of tests or evaluating student work, etc. as these are veiwed as part of the teacher's professional obligation. In our situation where the contract has expired and the Committee has extended the terms and conditions of employment that existed last year, the teacher organization has the same obligation under the so-called status quo doctrine. In other words, if the Lenox Education Association is entitled to last year's terms and conditions, is not the school system as well?

Furthermore, Chapter 150E, Section 9A, of the Massachusetts General Laws states that "...no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." To avoid any misunderstanding, each of you should understand that we shall view the failure to perform duties which have been traditionally performed as a slowdown or withholding of services and, hence, a violation of the law, and, as Superintendent, I would have to take appropriate action, however distasteful that may be.

We are in the midst of mediation and following the procedures outlined in the Law to resolve our differences. Hopefully, all will conform to the requirements of the law and will allow the bargaining process to continue without disrupting the educational program.

[3]All dates hereafter refer to 1978 unless otherwise indicated.

[4]The full text is as follows:

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the parents how the work-to-rule would affect her teaching activities. Specifically, Carnevale said, (1) she would not work past 3:15 p.m. on school-related activities; (2) she would cease sending home weekly evaluations; (3) she would cease publication of a monthly newletter to parents; and (4) she would be avilable to meet with parents only during her planning period. As fully explained in the hearing officer's decision, Carnevale used two teaching teachniques, weekly evaluations of the students and a monthly newletter to parents, which were individual to her and not in general use by Lenox teachers. We find from the record and the hearing officer's factfindings, however, that teachers, including Carnevale, made themselves avilable to meet with parents during times other than the planning period, and that "school-related activities" such as correcting papers and lesson preparation often required teachers, including Carnevale, to work past the end of the school day, either at school or at home.[5]

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[4](footnote continued from previous page)
Dear Parents,

As you are probably aware, the Lenox Education Association has been negotiating for the past 10 months with the School Committee to settle on a contract. Despite our sincere efforts to come to an agreement with the School Committee, we have been unable to resolve our differences. It is because of this that the members of the L.E.A. have decided to "work to rule" and will continue doing so until a contract settlement is reached.

In particular, what this means for you and me at this time is that I will not be working beyond 3:15 p.m. on school related activities. What I will be doing besides my usual planning and teaching in school is trying to keep up on your children's work and get it out to you. For the time being I will have to give up my weekly evaluations and the upcoming September Highlights newsletter. These are things that I personally do and are not systemwide. They are also something that I could not possibly get done in school and it is with regret that I set them aside for now.

Please be assured that should you need to meet with me or I with you, we could make arrangements to meet during my planning period in school during the day.

I personally feel very strongly about the position the L.E.A. has taken and would welcome any of you to call me to discuss our situation regardless of the fact that you may be for or against this action. I would also urge those of you who are so inclined to call any or all School Comittee members with any questions you feel should be directed toward them.

I am looking forward to the time when our contract is settled and we can return to normal working conditions.

Sincerely,
Bonnie Carnevale

[5]The LEA as charging party has the burden on all elements of its affirmative case.
(Footnote continued on following page)

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For various reasons not germane to our decision, Carnevale never sent the letter to the parents. She did, however, distribute it to various teachers, and it was posted on a bulletin board withthe erroneous inscription, "Bonnie C. sent the following letter to her students' parents." The letter found its way to Miller who, with Principal Marguerite Cameron, entered Carnvale's classroom the morning of October 6. Miller displayed a copy of Carnevale's letter to parents, and asked whether she had sent it out. She said that she had not. He referred to a statement in the letter regarding keeping up with children's work, and asked whether she anticipated doing that. She said that she was keeping up with work. He asked her whether the third paragraph, which said that meetings with parents would take place during the school day, meant that she would not meet with parents after school. That was what it meant, she said. He then asked whether seh ever had, in fact, met with parents after school. She gave some examples of having done so. Finally, Miller asked whether Carnevale intended to stop sending home her weekly evaluations and her monthly newsletter. She said that she did. He asked why. "Because I am in a work-to-rule situation," she responded. He said that those activities were customary and must, therefore, be continued. She argued that the activities were voluntary and had been done on her own time. Miller then asserted that she had to do them. When asked why, he said that work-to-rule was not a legitimate excuse for stopping her activities, adding that had her excuse been a professional one or one related to her home-school communications, it would have been legitimate. They argued further about the effect of work to rule, until finally Miller declared, "Cut the crap." As Cameron followed Miller out of the classroom, she turned to Carnevale, apologized, and said that she had advised Miller not to come.

Later that day, Miller sent a letter to Carnevale, which stated in pertinent part:

> As I explained to you, if you were to take the steps outlined in your letter, you would, indeed, be withholding services that you have customarily provided. Further, your reason for such action, as you have explained, would be to support the "work to rule" action of the Lenox Education Association and that such action would continue "until a contract settlement is reached."
>
> So that there is no misunderstanding, I want you to understand that Marguerite and I expect you to provide those services which you have customarily provided over the years. This is a directive and, specifically applied to the areas mentioned in your letter of September 27, means the following:
>
> 1. You are to "keep up" with the work of the children as you have done in the past. When we met, you assured us this was being done and, thus, I see no problem here at the present time.

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[5] (footnote continued from previous page)
For the reasons elaborated below, we conclude that one such element would be that teacher availability after school was not a duty of employment. The LEA failed to establish this element.

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2. You are to continue with the "weekly evaluations" mentioned in paragraph two.
3. You are to issue your newsletter as you normally have done.
4. You are to accomodate parental requests for conferences and not restrict them to the school day.

I certainly recognize the difficulties that some teachers are having in deciding what is proper and improper in the present situation and, under the assumption that you did not realize that you might be acting improperly, I am not going to put this letter in your personnel file. My reason for visiting with you today and writing this letter is so that you will have clear guidelines as to what is expected of you.

Sometime subsequent to their October 6 meeting with Carnevale, Miller and Cameron decided that Carnevale did not have to prepare her newsletter. Their decision was based, according to Cameron, on the fact that the newsletter was something Carnevale did on her own and had not been requested to do. Cameron phoned Carnevale to tell her this, and Carnevale asked Cameron to put it in writing. On October 20, Cameron sent notice to Carnevale that she was not obligated to issue her newsletter as she normally had done.

On October 4, LEA President Donna Donovan sent a letter to her students' parents describing the impact of work-to-rule on her teaching activities.[6] Specifically, Donovan said, (1) she would correct papers, meet with parents and deal

[6]The full text is as follows:

Dear Parent(s):

As you are probably well aware, the Lenox teachers are at a "work to rule" situation. This is a result of the inability of the bargaining committees of the Lenox Education Association and the School Committee to reach accord over several contract issues.

In an effort to produce the most harmonious understanding between you and I at this difficult time, I will attempt to explain how the above situation will or will not, impact my classroom.

I expect to be as prepared as I have always been, adhering to the highest ethical qualities of my profession. My dedication, like any teacher's, cannot be determined by a timetable. Therefore my performance in the classroom will be, as it has always been, of the highest quality.

I expect to be able to correct assignments during my free period and lunch-time. If you wish to see me for a conference, it will be held at those times. Call the school, leave a message, and I will return the call. Assisting children with individual academic and/or personal problems will be done at recess time(s) also.

There are several areas that go beyond the "normal obligations" of teachers

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with students' special problems only during free periods such as lunch and recess; (2) the coffee hour she planned for parents would be postponed; and (3) she might not be able to make complete comments on students in the take-home folders she prepared twice a month. As the hearing officer found, the coffee hour and the take-home folders were educational practices individual to Donovan and not in general use by Lenox teachers. As we found above with respect to Carnevale, however, teachers generally performed school-related activities such as grading papers and meeting with parents and students beyond the confines of the school day.

At 9 a.m. on October 6, Donovan entered the Center School teachers' room. Waiting there were Miller and Cameron. The principal told Donovan that they wanted to speak to her about the letter that she sent. Miller then took out a copy of the letter,[7] and began to question Donovan about it. He asked her if her statement that she planned to correct assignments during her free periods meant that she was not going to keep up with her work. Her reply indicated that she would keep up. He asked her if her statement that she would hold parent conferences during her free

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[6](footnote continued from previous page)
that I performed in the past. I refer specifically to the attached sheet. This sheet briefly describes my personal program for enhancing home/school communications. It is not a reflection of school policy.

I would normally be planning and communicating to you about the coffee hour. I have decided to postpone this until agreement in bargaining has been reached, and will contact you at that time. (I bring it to your attention now for advanced notice as I do each year.)

Your child will be bringing home a T.H.F. (take-home-folder) twice a month on Mondays. There is a place for both parents and teacher comment. This is something I usually do at home. Therefore if no teacher comment is written it should be understood that I did not have time to do it during the day.

There are other areas in regards to the communications sheet that may need clarification as time goes on. I will work under the assumption that negotiations will be resolved soon, and therefore see no need to mention those areas at this time.

I sincerely hope I can plan, and look forward to, the coffee hour in the very near future. It is one of the most pleasureable ways I have found of getting parents interested in their child's classroom, as well as helping to clear up any present or future misunderstandings about what goes on in the room.

I look forward to meeting each of you and working with you to make your child's year in fourth grade both educationally sound and interesting.

Sincerely,
Donna M. Donovan

[7]Miller received the letter as a parent, having previously requested that his daughter be placed in Donovan's classroom.

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periods meant that she would refuse to meet with parents at other times. She replied that if the conference could not be held during her free period and was serious enough, she would not refuse to accommodate a parent who requested an after-school conference, and that she had in fact handled three conferences at her own initiative over the phone in the evenings. Miller then asked whether her statement that she would assist children with personal problems at recess times meant that she was neglecting the needs of the children. She assured him that she would deal with problems as they came up and in the most direct way possible. Upon Miller's inquiry, Donovan confirmed that her coffee hour had been postponed. He asked whether this had anything to do with collective bargaining, and she said that it did. According to Donovan, there was some discussion about her assertion that these activities were voluntary and therefore could be curtailed during work-to-rule. Miller asserted that they were customary and must, therefore, be provided. Miller also expressed his belief that what Donovan had told him contradicted the implications of her letter to parents. Miller testified that he left indicating that he would have to think more about Donovan's letter. Donovan testified that Miller left asserting that Donovan's failure to perform customary activities was a withholding of services and that he took the letter as a serious offense about which he would have to do something.

On October 12, an advertisement appeared in a local newspaper. At the top was bannered, "Notice!! Lenox Taxpayers." Below that was a body of text, and at the bottom was the note, "Paid for by Lenox Education Association," followed by the names of Donovan, Carnevale, and two other LEA officers. The text read, in part, as follows:

> The Lenox Education Association would like to clarify what "working to rule" indicates. It means that the traditional work of the teacher, that is, correcting papers, planning lessons, conferring with parents, recording grades, etc. will be done during the confines of the school day. Unfortunately, this does not leave time for the many personal contributions and involvements that teachers voluntarily bring to their classrooms. However, we want to assure you that Lenox teachers will continue to adhere to the highest ethical qualities of our profession. Our dedication cannot be determined by a timetable. Therefore, our performance in the classroom will be, as always, of the highest quality.

The next day, an article in the Berkshire Eagle reported that the School Committee had issued a strong statement of support for the superintendent. The article alleged that the statement came in response to an LEA vote to condemn Miller for his stated disagreement with Donovan and Carnevale.

On the same day, Miller issued a memorandum to all faculty. It stated:

> It has come to the attention of the School Committee that one or more members of the faculty intend to write and deliver letters to parents which directly or indirectly refer to the collective bargaining process or to what the Lenox Education Association refers to as "work to rule."

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> On instructions of the School Committee, I am hereby advising you of the following:
>
> 1. School children are not to be used for the delivery of such correspondence;
>
> 2. Such correspondence is not to be prepared on school time or with the use of school facilities or materials.
>
> You are further advised that such correspondence if otherwise delivered to parents is not to substantially indicate that you are or that you anticipate the withholding of any services contrary to the law.
>
> The School Committee feels that the law provides appropriate means for the resolution of collective bargaining issues and has asked me to convey to each of you that it hopes that you will permit that process to function.

Also on October 13, Miller sent a letter to Donovan. It read:

> Following my inquiry of you on October 6, 1978, concerning your October 4 letter to the parents of your fourth grade class, I have discussed the contents with Principal Marguerite Cameron and have decided to issue this as a letter of reprimand to be placed in your personnel file. This reprimand is written for what, in my opinion, is conduct unbecoming a teacher for the writing and distribution of your October 4 letter and for possible insubordination with respect to my memo to the faculty of September 29.
>
> As an alternative to having this reprimand placed in your file, I will extend to you the following option. You may, if you choose, write a second letter to your parents to clear up several points. First, the fourth paragraph is, in my judgment, very misleading with respect to parent conferences. You state, "I expect to be able to correct assignments during my free period and lunchtime. If you wish to see me for a conference, it will be held at those times" (underlining mine). Both Miss Cameron and I, prior to our conference with you, interpreted those statements to mean that you would refuse to meet with a parent for whom an after-school conference was the only reasonable possibility. However, during our meeting, you stated to us that you would indeed make arrangements that would accomodate such a request from a parent. Therefore, if you choose to write another letter to parents, you must make it clear that you will accomodate parents who request an after-school meeting.
>
> Second, you state at the end of paragraph four: "Assisting the children with individual and/or personal problems will be done at recess times also." While one could read this statement to mean that you would restrict such assistance to recess times, you stated at our

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> October 6 meeting that you would continue to assist children at any time which, in your professional judgment, would be most effective in dealing with the issue. Again, if you choose to write a second letter, it must make clear that assistance to children will be provided as you have customarily odne. Finally, such a letter must also assure parents that you plan to provide written comments on the "Take-Home Folders" to the same extent as in the past.
>
> With reference to the School Committee's directive of October 13 concerning letters to parents, you may send the letter home with the children and you may prepare it on school time and with the use of school facilities and materials. However, you may not indicate that you are or that you anticipate the withholding of any services contrary to the law.
>
> If you choose to write the letter, it is to be distributed no later than the end of the school day on Friday, October 20, with a copy sent to Miss Cameron and to me. Otherwise, you are to sign the enclosed copy of this letter and return it to be placed in your personnel file. If I receive neither a copy of a second letter to parents nor a signed copy of this letter by Monday, October 23, this letter shall be placed in your file and shall be considered by the administration and School Committee as a letter of reprimand. (emphasis in original).

Because Donovan became ill, Miller extended until October 27 the time in which she was to write the clarifying letter.

Donovan did not, however, write the letter. Instead, on October 27, she wrote to Miller that she felt it was her obligation as a teacher to keep her students' parents informed of all that went on in her classroom, and that she had always done so.

> To have parents draw conclusions based on heresay (sic) and inadequately documented newspaper articles, without a more articulated explanation from myself, can only foster unfounded assumptions that could be injurious to the learning environment. I therefore think it would be conduct unbecoming a teacher <u>not</u> to communicate to them that their child's education was indeed not being neglected.

Donovan went on to accuse Miller of insulting her both professionally and personally. She said that she considered the reprimand to be without basis in fact and an attempt at harassment and intimidation in violation of her rights.

Miller mailed a response to Donovan on November 2. He wrote:

> [T]o suggest that the doctrine of academic freedom gives you the right to advocate the position of the LEA and to support the withholding of services is to use the guise of <u>academic</u> freedom

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> as a conduit for what is essentially a political statement to parents. (Emphasis in original).

He then reiterated his belief that her letter to parents was misleading based on what she said during their October 6 meeting. He confirmed that the reprimand would be placed in her personal file, and invited her to submit for the file a written answer. On November 8, Donovan placed in her file a notice that Miller had granted her request to attach to the reprimand Miller's September 29 memorandum to all faculty, her October 4 letter to parents, Miller's letter granting her an extention of time to prepare a clarifying letter, her October 27 response to the reprimand, and Miller's November 2 reply to her response.

Opinion

The hearing officer found that Carnevale and Donovan were engaged in lawful, concerted activity protected by Section 2 of the Law in drafting and/or sending the letters and in restricting their activities as they did. He therefore found that Miller's actions, specifically his September 29 memorandum to all faculty, his October 6 meetings with Donovan and Carnevale, his October 6 letter to Carnevale, and his October 13 and November 2 letters to Donovan, constituted interference, restraint, and coercion in violation of Section 10(a)(1) of the Law because he threatened disciplinary action if the teachers persisted in engaging in their protected activity.

The School Committee argued to the hearing officer and reiterates on appeal that Donovan's and Carnevale's actions, as part of the LEA work-to-rule, constituted a strike within the meaning of Section 9A(a) of the Law. Their actions were therefore not protected under Section 2, and the employer was entitled to discipline them. The School Committee further argues that there is no proof of unlawful motivation on Miller's part.

The Commission now has before it several cases involving "work-to-rule" activity. In each of these cases, including this one, public employees, in an attempt to bring pressure on their employer, have threatened to cease or actually ceased certain activities while continuing to perform the bulk of their usual work. In each case the Commission must determine whether such actions are proscribed under Section 9A(a) of the Law, which reads:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

Section 1, the definitional section of the Law, defines "strike"; however, "work stoppage," "slowdown," and "withholding of services," as used in Section 9A, are undefined.

In most work-to-rule cases, as in this one, the employer does not contend that the employees are engaged in a full-fledged strike. Rather, the claim is made that the employees are engaged in a "withholding of services" or "slowdown" proscribed by Section 9A(a). Our task is to coordinate the Section 1 definition of strike with the Section 9A prohibitions, and to interpret the different sections in a harmonious

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not contradictory, manner, Commissioner of Banks v. McKnight, 281 Mass. 467, 183 N.E.2d 720 (1933), while preserving the vitality of the words of the statute, Commonwealth v. Wade, 372 Mass. 91, 360 N.E.2d 867 (1977).

The Definition of Strike

We begin our inquiry by analyzing the definition of strike contained in Section 1:

> a public employee's refusal, in concerted action with others, (1) to report for duty, or his (2) willful absence from his position, or his (3) abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike;.... (numbers supplied for later reference).

As noted by number above, the definition has three distinct elements. The first, refusal to report for duty, covers the traditional concept of the full-fledged strike. With respect to this element, we need only note that the refusal to report for duty would constitute a strike only when there is a correlative right of the employer to require attendance. Similarly, employees' absence from their positions, the second aspect of the definition, would be a strike only when their presence may be required. The third element of the definition proscribes both total and partial refusals to perform duties of employment and meticulously delineates the circumstances under which an employer may require employees to report or to be present at their positions. It reads: "absence in whole or in part from the performance of duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike." See Town of Milford, 6 MLC 1327 (1979); City of Beverly, 3 MLC 1229 (1976). We have departed from this construction only when a public emergency has been involved. Town of Arlington, 3 MLC 1276 (1976).[8]

We have had little occasion to consider the breadth of the three criteria by which duties of employment are to be measured. Two extremes may be rejected.

One extreme is that the Legislature intended to preclude by the strike definition all forms of withholding of services. Two factors lead us to the conclusion that the Legislature had no such intent. First, the definition is carefully drawn by reference to what has been done in the past, either by agreement of the parties or by long-standing employer practice. Second, in developing the current strike definition, the

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[8] In Town of Arlington, employees protested working conditions by refusing to sand icy streets. In finding the protest to constitute a strike, we held, "We believe that a public employer has certain residual authority, in an emergency situation, to protect the public interest by requiring the performance of services which would otherwise be voluntary." 3 MLC at 1277.

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Legislature rejected an apparently more comprehensive definition.[9]

The other extreme, advocatdd by the LEA here, is that the definition must be read literally, and the definition of duties includes only those expressly stated in writing in a collective bargaining agreement or in personnel policies. Such a construction would frustrate both the common sense and the obvious intent of the Legislature to ensure the delivery of basic public services. Collective bargaining agreements often fail to define duties of employment expressly. The contract may nowhere say that a teacher shall teach, that a fire fighter shall fight fires. Nevertheless, some duties are so essential to the very nature of the job as to require no explication. Others are necessarily implied in the collective bargaining agreement under which the employees work.

We concur with the policies of both courts and arbitrators that implied in collective bargaining agreements is an obligation to continue certain customs and past practices of the parties. The following extracts are typical of the views of arbitrators:

> "It is generally accepted that certain, but not all, clear and long standing practices can establish conditions of employment as binding as any written provision of the agreement."

Alpena General Hospital, 50 LA 48, 51 (1976) (D. Jones, Arbitrator).

> "It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations."

Metal Specialty Co., 39 LA 197, 198 (1947) (M. Volz, Arbitrator).

> "Custom can, under some circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that the customary action would continue to be taken, such customary action may be an implied term."

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[9]Specifically, the strike definition in Senate Doc. 1771(1973) was rejected. The discarded language read:

(8) "Strike" shall mean a public employee's refusal, in concerted action with others, to report for duty, or his willful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of employment.

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Lenox School Committee and Lenox Education Association, 7 MLC 1761

Esso Standard Oil Co., 16 LA 73, 74 (1951) (W. McCoy, Arbitrator).[10]

In order to constitute a past practice enforceable as a "duty" of employment, the practice must be long-continued, well understood, and mutually concurred in by the parties.[11] Columbia Broadcasting Corp., 37 LA 330 (1961), cited with approval, Great Atlantic and Pacific Tea Co., 46 LA 372 (1966). The origin of the practice is not decisive. Whether it began on the instructions of the employer or was instituted "voluntarily" by the employees is not determinative if the practice is longstanding and has been regularly performed. In determining past practices, we are concerned only with group, not individual, practices. It is the union which is party to the contract, not individual members of the bargaining unit. To find otherwise would discourage individual employees from doing additional or creative tasks, since they would thereby become obligated to continue such extra work at the risk of discipline or discharge. Therefore, individual performances which are superior to, or individual techniques which are different from, the bargaining unit's generalized level or means of performance cannot be considered enforceable past practices [12] for purposes of determining required duties in a strike or work-to-rule context.

The New York Public Employment Relations Board (PERB) and the New York courts have taken a similar approach in determining those duties which public employees must perform to avoid committing an illegal strike as defined by Section 210(a) of the New York Civil Service Law (Taylor Law). Strike is defined by Section 210(a) to mean "any strike or other concerted stoppage at work or slow down by public employees." Town of Hempstead v. Bellmore-Merrick United Secondary Teachers, Inc., 85 Misc.2d. 282 (Superior Court, Nassau County 1975) involved a refusal by teachers to attend a "Back to School Night"--an annual event where teachers meet parents. The court found that despite the absence of any reference to the affair in the applicable collective bargaining agreement:

> ...the fair, reasonable and obvious inference to be drawn from the mutual conduct of the parties is that this once-a-year after hours program has, by custom and usage, been regarded by both the administration and by the union members as part of their teaching duties and professional responsibilities and it is too late in the day for the teachers to maintain that they have an absolute, unilateral right to refuse any further participation in the program. In short, the court holds that the long standing conduct of the parties establishes quite plainly that attendance at the 'Back-to-School-Night' is an activity which the parties have considered to be an integral part of professional

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[10] Accord, Steelworkers v. Warrior and Gulf Navigation Co., 80 S.Ct. 1347, 1351-1352 (1960).

[11] As noted above, fn.8, we have enunciated an exception to this rule where an emergency substantially affecting public health or safety requires employee response out of the ordinary course.

[12] This approach is similar to that taken by arbitrators in past practice decisions in multi-employer settings. See, e.g. National Brewing Company of Michigan, 31 LA 300 (1958) (M. Kahn, Arbitrator).

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> duties of the teachers and the teachers do not have the option to refuse to participate therein. 85 Misc.2d. at 286 (emphasis supplied).

See also Suppa v. New Rochelle, 11 PERB 7538 (1978); Amalgamated Transit Union, Local Division, 580, 8 PERB 3056 (1975); Yonkers Firefighters, Local 62, I.A.F.F., 12 PERB 3067 (1979) ("the concerted failure by public employees to perform voluntary services in the usual and customary manner constitutes a strike....") 12 PERB at 3117.

To conclude: "duties of employment," abstinence in whole or in part from which constitutes a strike, include not only those duties specifically mentioned in existing or recently expired collective bargaining agreements (or personnel policies in effect for more than one year), but also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a sustained period of time.

The Section 9A(a) Prohibition

Section 9A(a) reads as follows:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

Section 9A(b) provides recourse to the Commission "(w)hen a strike occurs or is about to occur."

It is clear from our interpretation of the definition of strike that a broad range of partial withholdings of services constitutes a strike. The question remains, does the Section 9A(a) reference to "work stoppage, slowdown or withholding of services" regulate job actions not covered by the term "strike"? We think not.

Our construction of the term strike encompasses most notions of the meaning of "work stoppage, slowdown or withholding of services." Certainly "work stoppage" seems to refer to what has classically been understood to be a strike, and whether the work stoppage is continuous or intermittent would be of no importance given the "in whole or in part" language of the strike definition. "Slowdown" presumably means the delayed or slower performance of work, and again, would seem covered by the "in part" language of the strike definition. "Withholding of services" is certainly contained in the strike definition to the extent that "services" relates to "duties of employment." Thus, we conclude that the Section 9A(a) prohibitions are coextensive with the Section 1 definition of strike, which includes traditional ideas of both total and partial refusals to perform required duties.

Work-to-Rule as Protected Activity

Given this construction of Sections 1 and 9A(a) of the Law, we turn to the relationship of these sections to Section 2, which protects the right of employees "to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion."

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Section 2 by its terms affords employees protection similar to that of Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. 151 et seq. (NLRA); cases arising under the NLRA are helpful in interpreting c.150E although we must be mindful of differences between the statutes and the public and private sectors. See City Manager of Medford v. Labor Relations Commission, 353 Mass. 519, 233 N.E.2d 310 (1968). We have generally looked to federal precedent in determining whether certain activity is protected, Commonwealth of Massachusetts, 4 MLC 1415 (1977), or unprotected, City of Boston (Edward Hunt, Sr.), 6 MLC 1096 (1979) (although we do not always follow it, City of Boston (Howard Rotman), 3 MLC 1101 (1976). Activity which is concerted and intended to improve the lot of fellow employees as a group loses its protection when it is unlawful, Southern Steamship Co. v. NLRB, 316 U.S.31, 10 LRRM 544 (1942); violent, NLRB v. Fansteel Metalurgical Corp., 306 U.S.240, 4 LRRM 515 (1939); in breach of a collective bargaining agreement, NLRB v. Sands Mfg. Co., 306 U.S.332, 4 LRRM 530 (1939); or indefensibly disloyal to the employer, NLRB v. Local Union No.1229, IBEW (Jefferson Standard), 346 U.S. 464, 33 LRRM 2183 (1953).

Full-fledged strikes, generally protected in the private sector, are unlawful and therefore unprotected under c.150E. Furthermore, less comprehensive job actions which come within the sweep of Section 1, as discussed above, are also illegal and hence unprotected.[13] However, a withholding of services, engaged in by employees in furtherance of their collective bargaining goals, which is not prohibited by Section 1 of the Law, would gain the protections of Section 2, subject to the normal constraints that the action not be violent, unlawful, in breach of contract, or indefensibly disloyal.

The Merits of this Case

We turn now to the actions taken by Carnevale and Donovan and Miller's responses to those actions.

Carnevale drafted a letter to the parents outlining how the work-to-rule would affect her activities as a teacher. Four aspects of the letter warrant our attention. 1) Carnevale's refusal to work beyond 3:15 p.m. on school-related activities; 2) her cessation of weekly evaluations; 3) her cessation of a monthly newsletter; and 4) her refusal to meet with parents owther than during her planning period.

Under the principles we have described above, we find that the weekly evaluations and the monthly newsletters are activities individual to Carnevale, and are not customary duties which teachers in Lenox are at least implicitly required to perform. We do find, however, that teachers as a group have traditionally been expected to work beyond 3:15 p.m. when required to keep current with their work. We also find that it is the past practice and expectation that teachers be available outside of school hours to meet with parents to discuss students. Thus, were Carnevale as part of work-

[13] We note that under the NLRA, case law has somewhat restricted the right of private sector employees to engage in partial strikes. See UAW Local 232 v. Wis. Emp. Rel. Com'n. (Briggs & Stratton), 336 U.S.245, 23 LRRM 2361 (1949); Lodge 76, Int'l. Assn. of Mach. & Aero Wkrs. v. Wis. Emp. Rel. Com'n., 427 U.S.132, 92 LRRM 2881 (1976). The NLRA is silent on partial strikes, and the restrictions developed in response to that void. Because c.150E specifically prohibits partial strikes, federal case law on the issue is largely irrelevant.

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to-rule to cease production of the weekly evaluations and newsletter, that would be activity protected under Section 2 of the Law. However, refusing to do any work outside of the specified hours of the work day, be it classroom preparation or meeting with parents, would constitute a strike if the refusal were concerted with other teachers.

Carnevale never sent the letter. The only aspects of her letter which she carried out were the cessations of the weekly evaluations and the newletter. Having learned this, Miller responded with a discussion with Carnevale on October 6 and a follow-up letter. In both instances Miller ordered Carnevale to perform all of her duties, including the weekly evaluations and the monthly newsletter. Because we have found that she was protected in her right to refuse to perform those functions, Miller's order, backed by a threat of discipline, constitutes unlawful interference, restraint and coercion violative of Section 10(a)(1) of the Law.[14] The order to perform the other duties, however, was permissible inasmuch as these constituted duties of employment whose cessation is proscribed by Section 9A(a). Because she did not cease to perform those duties, she wasnever reprimanded and there is no further violation.

Donovan's case is somewhat different. She drafted and sent a letter to the parents. Three aspects of the letter are material: 1) Donovan's willingness to correct papers, meet with parents, and deal with students' special problems only during free periods and lunchtime; 2) Donovan's cancellation of her special coffee hour; and 3) the possibility that the twice-monthly take-home folders might be less complete than before the work-to-rule. The clear import of her letter was that Donovan would not work after school correcting papers or assisting parents and children. We have found that this had been a customary practice among teachers in Lenox. Thus, were Donovan, in concert with others, to carry out her intentions in this regard as her part of working to rule, such would constitute a strike within the meaning of Section 1 of the Law. However, the cancellation of the coffee hours and the possibly incomplete take-home folders merely reflect a cessation of practices individual to Donovan and thus, under the principles outlined above, were not required as duties of employment.

Miller responded to Donovan's actions by meeting with her on October 6. Donovan told Miller that she would continue to have conferences after school if required and in fact had done so on her own initiative. She also assured him that she would deal with the problems of the children as they came up. Miller told her that she had to perform all of those duties she had in the past performed, under threat of discipline. We find that his statement to her is a violation of Section 10(a)(1) of

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[14] The School Committee contends on appeal that there was no proof that Miller was illegally motivated in warning Carnevale to continue to perform all previous educational activities. The argument fails. Miller was clearly attempting to require Carnevale t do certain things which we hold she was protected in refusing to do. Furthermore, as the Sixth Circuit of Appeals held in National Cash Register Co. v. NLRB, 460 F.2d 945, 81 LRRM 2001 (6th Cir. 1972), den. cert. 410 U.S.966 (1973), "If the employer acts in good faith but mistakenly assumes that his conduct does not infringe on protected activity,...the employer will be held to have interfered with protected rights without a sufficient justification, and the absence of an improper motive will not exculpate him from a violation of Section 8(a)(1)." 81 LRRM at 2012.

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the Law with respect to the coffee hour and the take-home folders, but does not constitute a violation as to the other duties which were traditionally required of Lenox teachers.

Following the conversation, Miller wrote a letter to Donovan reprimanding her for "conduct unbecoming of a teacher", namely writing and distributing the October 4 letter. The letter gave Donovan the opportunity to avoid the reprimand by writing a letter of clarification to the parents. Donovan refused to write such a clarifying letter and the repimand was entered in her file.

Donovan's letter to the parents had the likely and foreseeable effect of convincing them that she would not be performing certain expected and required services. We must consider the legal and factual context of the letter. It came in the midst of a bargaining dispute and during a well-publicized and escalating work-to-rule job action. An employee communicated directly to the parents, indicating which services would be provided and which would not.[15] By its nature, the letter constituted more than a mere threat to wtihhold certain services, because these services are in part triggered by requests from the services' recipients. This turns what might otherwise be viewed as a mere threat into an accomplished fact, because we may reasonably infer that the recipients' expectation that the services will be withheld will reduce demand for such services. See NLRB v. Local Union No.1229, IBEW (Jefferson Standard), 346 U.S. 464, 33 LRRM 2183 (1953). An employee in these circumstances is effectively telling the parents that the employer is no longer offering certain services. Where the employer is entitled to offer (and require its employees to perform) these services, this action is an arrogation of the employer's prerogative. Cf. Honolulu Rapid Transit Co., 110 NLRB 1806, 35 LRRM 1305 (1954). Because Donovan did not actually withhold her services, we cannot find her actions to constitute a strike. We cannot ignore, however, the fact that Donovan's letter accomplished in part the same end--interference with the employer's right to have those services provided. Thus, with respect to her assertion that she would not perform those duties which we have found she was obligated to perform, we find Donovan's letter to the parents to be conduct unprotected by Section 2 of the Law. Miller's reprimand is thus permissible except insofar as he reprimands her for conveying her intention to refrain from performing those functions which do not constitute "duties of employment."

Donovan could have avoided the reprimand by clarifying her letter to the parents. We conclude that when an employee has an obligation to perform a service and creates a credible public impression that that service will not be performed, the employer is entitled to require the employee to retract that public statement and give assurances that the work will be performed. Accordingly, we find that to the extent that Donovan was reprimanded for refusal to clarify her letter to the parents the reprimand was legal.

Remaining for consideration is Miller's memorandum issued to all teachers on

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[15]The mere fact of communicating directly to the parents would not trouble us under these circumstances were the withdrawal of services limited to those not required under our analysis. Donovan's letter was less a political statement than information to the parents about what they could expect of the teacher in the coming year, the type of communication routinely occurring between parent and teacher.

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September 29, which stated in part:

> To avoid any misunderstanding, each of you should understand that we shall view the failure to perform duties which have been traditionally performed as a slowdown or withholding of services and, hence, a violation of the Law, and, as Superintendent, I would have to take appropriate action, however distasteful that may be. (emphasis supplied).

We must determine whether it may reasonably be said that, under the circumstances, the memorandum tended to interfere with the employees' free exercise of their rights under Section 2 of the Law. Bristol County House of Correction, 6 MLC 1582 (1979). It is unclear to what duties the emphasized portion of the memorandum refers. If the memorandum is understood to command performance of only those duties explicitly or implicitly required by the prior collective bargaining agreement, the memorandum would impinge on no protected right. If, however, the memorandum is understood to require the performance of all duties, both those individual to a particular teacher and those in effect system-wide, the memorandum is an overbroad directive violative of Section 10(a)(1). We think the latter interpretation more likely. The work-to-rule was escalating, and two teachers had already disclaimed any intention of performing certain duties with respect to extracurricular activities. We need not determine which aspects of the LEA work-to-rule constituted a strike and which aspects constituted protected activity. It is sufficient to find that the teachers may reasonably have interpreted the memorandum to be an attempt to coerce performance of all duties, whether individually undertaken or collectively required. Thus, we hold that the September 29 memorandum constituted an additional violation of Section 10(a)(1) of the Law.

We conclude with a general comment about the conduct of Superintendent Miller in this case. Miller was faced with a difficult situation as the LEA embarked upon a job action largely untested in this state. As is apparent from our discussion above, many aspects of the work-to-rule might be found to violate Section 9A(a) if the matter were litigated; some aspects we have found to be protected. Miller attempted to keep the situation from getting out of hand, and it is evident from his actions that he wanted the matter settled as amicably as possible. His conduct was directed largely against unprotected activity, and we have held that conduct permissible; we have found violations only where his actions were overbroad.

CONCLUSION

On the basis of the foregoing, we conclude that the School Committee violated Section 10(a)(1) of the Law by interfering, restraining and coercing employees in the exercise of their rights guaranteed by Section 2 of the Law, to the extent that the School Committee sought to require employees to perform duties not explicitly or implicitly required under the most recent collective bargaining agreement.

ORDER

Pursuant to Section 11 of the Law, the School Committee IS HEREBY ORDERED to:

1. Cease and desist from interfering with, restraining and coercing employees in the exercise of their guaranteed rights;

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2. Take the following affirmative action which will effectuate the purposes of the Law:

   a. Remove from Donna Donovan's personnel file all letters of reprimand which were issued as the result of the "work-to-rule."

   b. Immediately post, in plain view, and leave posted for thirty (30) days from the date of posting, in a conspicuous place in each of its school buildings where teachers usually congregate and where notices are usually posted, a signed copy of the Notice attached hereto.

   c. Notify the Commission in writing within ten (10) days of receipt of this Decision, of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, CHAIRMAN
JOAN G. DOLAN, COMMISSIONER
GARY D. ALTMAN, 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 Massachusetts Labor Relations Commission has concluded that the Lenox School Committee engaged in prohibited practices under the public employee collective bargaining law in the Fall of 1978.

Specifically, the Massachusetts Labor Relations Commission has concluded that the actions of the Lenox School Committee constituted an interference with, restraint and coercion of Donna Donovan and Bonnie Carnevale in the exercise of lawful concerted activity.

WE WILL NOT interfere with, restrain or coerce Donna Donovan or Bonnie Carnevale in the exercise of lawful, concerted activity.

Further, WE WILL permanently remove from the personnel files of Donna Donovan all letters of reprimand which were issued as the result of the "work-to-rule."

LENOX SCHOOL COMMITTEE

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CITY OF CAMBRIDGE AND CAMBRIDGE POLICE ASSOCIATION, MUP-3386 (5/6/81). Ruling on Motion to Reassert Jurisdiction in Case Deferred to Arbitration.

(20 Jurisdiction)
22.2 pre-award deferral to arbitration
(90 Commission Practice and Procedure)
91.6 deferral to prior arbitration award

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Michael C. Gilman, Esq. - Representing the City of Cambridge

Robert L. Wise, Esq. - Representing the Cambridge Police Association

RULING ON MOTION TO REASSERT JURISDICTION IN CASE DEFERRED TO ARBITRATION

Statement of the Case

On March 24, 1981, the Cambridge Police Association (Association) filed with the Labor Relations Commission (Commission) a request to reassert jurisdiction in a matter previously deferred to arbitration. We allow the request.

The matter first came before the Commission when, on March 14, 1979, the Association filed a prohibited practice charge alleging that the City of Cambridge (City) had violated Sections 10(a)(5), (3), and (1) of General Laws Chapter 150E (the Law). Following investigation, the Commission issued a Complaint of Prohibited Practice and Deferral Order on April 11, 1979. The Complaint alleged the following:

a. By practice established prior to January 29, 1979, police officers employed by the City were permitted to attend court sessions and receive compensation for such attendance on so-called "short days."

b. On January 29, 1979, the City promulgated and implemented Joint Order No. 1 which, in part, changed the procedure by which police officers could attend court sessions or receive compensation for such attendance on so-called "short days."

c. The Order described in paragraph 3(b), above, was promulgated and implemented without prior consultation or negotiation with the Association.

The Complaint further alleged that by the acts described in paragraphs (b) and (c), above, the City had violated Sections 10(a)(5) and (1) of the Law. Because the alleged conduct of the City appeared to be covered by the collective bargaining agreement between the City and the Association, the Commission deferred the matter to arbitration, but retained jurisdiction.

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City of Cambridge and Cambridge Police Association, 7 MLC 2111

On April 17, 1980, a hearing was held before Arbitrator David M. Grodsky involving the following issue:

> Did the City violate Articles I, Section 1; III, Section 1; IV, Section 2; XI, XX, Section 3 and XXI of the collective bargaining agreement when on January 29, 1979, the Chief of Police issued General Order #1 that no officer, for health and safety reasons, shall request or receive a trial date for a short day unless authorized by the Cambridge Police Prosecutor or members of his staff? If so, what shall be the remedy?

On February 13, 1981, Arbitrator Grodsky issued his award. The arbitrator found that the City did not violate the agreement.

Discussion and Ruling

In Cohasset School Committee, MUP-419 (6/19/73), the Commission adopted the policy first enunciated by the National Labor Relations Board (Board) in Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971), that where conduct complained of in an unfair labor practice charge is also arguably a violation of a collective bargaining agreement between the parties to the dispute, the Commission will defer to the parties' agreed-upon dispute resolution procedures. Cohasset and Collyer involve situations where, at the time the unfair labor practice charge is brought, the issues have not yet been submitted to arbitration. In Boston School Committee, 1 MLC 1287 (1975), the Commission adopted Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955), wherein the Board set forth its deferral policy in situations where, at the time the unfair labor practice charge is brought, the issues have already been the subject of an arbitration award.

Deferral in Cohasset/Collyer cases is appropriate where the conduct complained of is potentially both a violation of the Law and a violation of the collective bargaining agreement between the parties, and where the parties through that agreement have committed themselves to mutually agreeable procedures for resolving their disputes. Deferral in Boston School Committee/Spielberg cases is appropriate where the arbitration proceedings have been fair and regular, all parties agreed to be bound by the proceedings, the decision of the arbitrator is not repugnant to the purposes and policies of the Law, and the arbitration award disposes of the substantially identical issue presented to the Commission. When the Commission defers under Cohasset, it retains jurisdiction pending completion of the arbitration proceedings. If, at that time, a party moves for further consideration by the Commission, the Commission will consider the arbitrator's decision in light of the Boston School Committee/Spielberg standards. See, Cohasset, supra; Collyer, supra; P. Nash, Arbitration Deferral Policy Under Collyer-Revised Guidelines (1973), ( ) 4 Lab. Rels. (CCH) par. 9031.22

We have thoroughly and carefully reviewed the arbitrator's decision in light of the Boston School Committee standards. We are left uncertain of the precise analysis and holding of the arbitrator and are therefore unable to conclude that the arbitrator has disposed of the substantially identical issue upon which we issued a Complaint. When it is unclear whether an arbitrator has resolved the issue pending

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before the Commission, we believe that deferral is inappropriate.[2] Thus, we will not defer to an arbitration award when it cannot be said with reasonable certainty that the arbitrator has resolved the issue pending before us.

Conclusion

WHEREFORE, based on the foregoing, we reassert jurisdiction and order that an Expedited Hearing shall be held on the Complaint on Tuesday, May 26, 1981 at 10:00 a.m.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

[2]Apparently, the Board would agree. See, ITT Continental Baking Co., Case No. 25-CB-11118, 103 LRRM 1499 (Advice Memorandum) (1/24/80).

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COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND AFSCME, COUNCIL 93, AFL-CIO, SUP-2443 (8/20/81). Decision on Appeal of Hearing Officer's Decision.

(60 Prohibited Practices by Employer)
65.91 request for representation at disciplinary interview
(80 Commission Decisions and Remedial Orders)
82.11 back pay
82.13 reinstatement
(90 Commission Practice and Procedure)
92.51 appeals to full commission

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Jerome T. McManus, Esq. - Counsel for the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO

Valerie J. Semensi, Esq. - Counsel for the Commonwealth of Massachusetts, Commissioner of Administration

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On March 25, 1981 Hearing Officer Robert M.Schwartz issued his decision in this matter pursuant to the expedited hearing procedures established by Section 11 of General Laws Chapter 150E (the Law).[1] The hearing officer concluded that the Commonwealth of Massachusetts (Commonwealth) had violated Section 10(a)(1) of the Law by denying an employee union representation.

The Commonwealth filed a timely notice of appeal of the hearing officer's decision pursuant to Commission Rules, 402 CMR 13.13. The Commonwealth submitted a supplementary statement on April 24, 1981. As elaborated below, we affirm the hearingofficer's determination that the Commonwealth violated SEction 10(a)(1) of the Law.

Findings of Fact

The parties have not challenged the hearing officer's findings of fact, and we therefore adopt them in their entirety. See Commission Rules 402 CMR 13.13. We summarize the facts as follows.

In April, 1980 John Bourgois was promoted from the position of Mental Health

[1]For the full text of the hearing officer's decision, see 7 MLC 1963.

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Attendant (MHA) I to the position of MHA IV. He was also transferred from the Northampton State Hospital to the Springfield area office. Before beginning his new duties, Bourgois was required to attend a one-week training program. From the start, the training session did not go well for Bourgois. On May 12, 1980, the first day of classes, Bourgois' supervisor, Louise Flynn, called him into an office and asked him about some of the answers he was giving in class. One of the instructors told Bourgois that he was not taking the training "seriously." Flynn called Frank Robinson, an assistant Area Director, to complain that Bourgois was becoming a "detractor" from the program. The next day Robinson came to the training program and called Bourgois into a meeting. Flynn was also present. Robinson informed Bourgois that he wanted to discuss Bourgois' behavior during the training, and that the discussion would be taped and placed in Bourgois' record. Bourgois demanded that a Union representative be present at the meeting. Robinson replied that the meeting was not disciplinary in nature, that a Union representative would not be present, but that the meeting would not be recorded. Although the testimony of Robinson and Bourgois differed on this latter point, the hearing officer credited Bourgois' testimony that he was assured by Robinson that the discussion would not be placed on his record. Based upon these assurances, Bourgois agreed to participate in the discussion without union representation.

On the following day, May 14, 1980, following a mid-morning break in the training program, Bourgois received a letter from Robinson summarizing the discussion that had taken place on the previous day and concluding with the statement: "This memo will be placed in your personnel file." Bourgois was upset by the letter since it had been his understanding that no reference to the previous day's meeting would be placed in his personnel file. He did not join in the remaining portion of the morning session of the training program.

During the lunch break, Louise Flynn telephoned Robinson to inform him that Bourgois had not participated in part of the training program that morning. Robinson instructed Flynn to order Bourgois' reassignment to the Springfield area office and out of the training program.

Later that afternoon, Bourgois received a letter from Flynn which stated:

> As per our conversation on 5/13/80 regarding your participation and performance in the training program being conducted for the service coordination program staff, you are directed not to attend the remaining training sessions this week. You are hereby reassigned to the 736 State Street facility...This reassignment is being implemented because of your failure to participate constructively in the training being provided and, specifically, your failure to participate appropriately during the training conducted on the morning of May 14.

Bourgois was subsequently demoted to his previously held MHA I position.

Opinion

The Commonwealth's arguments on appeal are three-fold. First, the Commonwealth

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alleges that the hearing officer would have concluded that the May 13, 1980 meeting was held in compliance with the Law had he considered the Commonwealth's post-hearing brief in formulating his decision.[2] Second, the Commonwealth argues that the hearing officer exceeded his authority in ordering that the ten percent (10%) interest added to the back pay order be computed quarterly. Finally, the Commonwealth argues that the hearing officer improperly ordered the posting of a "Notice to Employees" for sixty (60) days rather than for the thirty (30) days most commonly ordered by the Commission.

We conclude that the hearing officer's failure to consider the Commonwealth's post-hearing brief has resulted in no prejudice whatsoever. The Commission has considered the brief in deciding the case on appeal. In addition, it is our responsibility to engage in a de novo review of all the legal issues raised in this case. Hadley School Committee, 7 MLC 1632, 1634 (1980). Furthermore, as noted above, the Commonwealth on appeal has not challenged the facts as found by the hearing officer.[3]

In assessing whether it was a violation of the Law for the employer to deny Bourgois' request to have a Union representative present at the May 13 meeting, we generally apply the principles set forth in NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975) and Commission decisions decided thereunder.[4] Under Weingarten an employee's right to union representation on request is limited to situations in which the employee reasonably believes that the interview with the employer will result in discipline. The test is whether a reasonable person in the employee's situation would have believed that adverse action would follow. Amoco Chcmical Corp., 237 NLRB 69, 99 LRRM 1017 (1978).

The right to have a union representative present does not attach unless the meeting is investigatory in nature. Thus, where a meeting is not held to elicit information from an employee or to support a further decision to discipline an employee but is merely convened so that the employer can deliver a warning, Weingarten protections do not apply. Baton Rouge Water Works, 103 LRRM 1056 (1980); NLRB v. Certified Grocers of Calif., 587 F. 2d 449, 100 LRRM 3029 (9th Cir. 1978).

Applying these criteria to the instant case, we conclude that the employer should have granted Bourgois' request to have a Union representative present.

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[2]The Commonwealth submitted a timely post-hearing brief, which was apparently misfiled, and was not considered by the hearing officer in reaching his decision.

[3]We deem the Commonwealth's assertion that the May 13, 1980 meeting complied with the Law to be a legal conclusion. In any event, the statement does not address "specific evidence warranting either a contrary finding on a material issue or an additional material finding not made by the hearing officer." Hadley School Committee, supra.

[4]Commonwealth of Massachusetts, 4 MLC 1415 (1977); Commonwealth of Massachusetts, 5 MLC 1653 (H.O. 1979).

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Bourgois had been previously warned about his behavior at training sessions. He was called to a meeting with his supervisor, at which a higher-level supervisor from another location was present. He was told that the session would be tape-recorded, and that the tape would be placed in his record. These facts support a conclusion that Bourgois was reasonable in his belief that the meeting was scheduled to investigate possible disciplinary action. Additionally, the presence of the tape recorder and the statement that the results of the interview would be placed on Bourgois' record indicate that the purpose of the meeting was to gather information about Bourgois' attitude toward the training program.

The Commonwealth asserts that by consenting to proceed with the May 13 meeting despite the denial of his request to have a union representative present, Bourgois waived his right to protest that denial. According to the facts as found by the hearing officer, however, he did so only after Robinson assured him that the meeting was not disciplinary, that it would not be tape-recorded, and that a record of the discussion would not be placed in his record.

We will not find a waiver of an employee's Weingarten rights where such waiver was obtained through false assurances that no adverse consequences would result from the hearing.

The Remedy

For the foregoing reasons we affirm the hearing officer's ruling that the Commonwealth violated Section 10(a)(1) of the Law. Based upon all of the facts, we conclude that such violation is directly linked to the Commonwealth's subsequent decisions to place a letter in Bourgois' personnel file, transfer him back to the Springfield office, and demote him to an MHA I level position.

Despite the Commonwealth's argument that Bourgois' transfer and demotion were occasioned by his failure to fully participate in the training program on May 14, 1980, rather than by the interview which took place the previous day, we conclude that the various disciplinary actions taken by the Commonwealth are inextricably linked to the interview at which Bourgois' request for union representation was denied. The letter informing Bourgois of his transfer out of the training program began with the words "as per our conversation on May 13, 1980 regarding your participation and performance in the training program." Robinson testified that the "bottom line" regarding his expectations of Bourgois, discussed during the May 13 interview was the basis for his decision to transfer Bourgois on May 14. Finally, Bourgois was transferred and demoted because of concerns the employer had regarding his attitude, which was the very subject discussed at the meeting on May 13. Because we find that the disciplinary action taken against Bourgois was linked to the interview at which his request for a union representative was denied, the appropriate remedy is to return Bourgois to the status he enjoyed prior to the Commonwealth's violation of the Law. We therefore order that he be reinstated to the MHA IV level position, after which, of course, he may be required to satisfactorily complete any necessary training for that position. He is also entitled to back pay for losses suffered as a result of his wrongful demotion. Additionally, we deem it appropriate that the Commonwealth expunge from Bourgois' personnel record all notations of his transfer and demotion and all related documents.

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The Commonwealth raises objections to only two aspects of the hearing officer's remedial order. First, the Commonwealth challenges the hearing officer's computation of interest due Bourgois on the back pay he lost by virtue of his demotion. More specifically, it argues that the quarterly compounding of interest goes beyond the level of interest allowed under General Laws, Chapter 231, Section 6C.[5] That statute, however, sets the rate of interest to be added to damages in contract actions by the clerk of courts if no rate is set by the contract. It is not controlling in this case. Moreover, the Commission has regularly ordered the interest added to back pay orders to be compounded quarterly.

Finally, the Commonwealth opposes the hearing officer's order that it post a notice to employees for sixty (60) days rather than thirty (30) days. Although the Commission customarily orders a thirty-day posting, the hearing officer's action was unquestionably within his discretion.

ORDER

WHEREFORE, IT IS HEREBY ORDERED:

1. The Commonwealth of Massachusetts shall cease and desist from restraining, coercing, and intimidating employees in the exercise of rights protected by Section 2 of the Law;

In order to effectuate the purposes of the Law, IT IS HEREBY FURTHER ORDERED that the Commonwealth of Massachusetts shall take the following affirmative action:

1. Immediately reinstate John Bourgois to his former position as MHA IV and make him whole for any loss of wages or other benefits which he has suffered as a result of his wrongful demotion, together with interest on any sums owing computed at ten percent (10%) and compounded quarterly from the date of demotion;

2. Expunge from John Bourgois' personnel records all notations of his transfer and demotion and all related documents;

3 Post in conspicuous places where employees of the Department of Mental Health of the Commonwealth of Massachusetts usually congregate, and leave same posted for a period of not less than sixty (60) consecutive days, the attached Notice to Employees;

4. Notify the Commission within ten (10) days of receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION
PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

[5] The Commonwealth does not contest the award of back pay itself.

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

After a hearing at the Massachusetts Labor Relations Commission at which all parties were given an opportunity to be heard, the Commonwealth of Massachusetts has been found in violation of Section 10(a)(1) of the Law by the denial of union representation to John Bourgois leading to his demotion and transfer from MHA IV to MHA I.

WE WILL NOT, in any like manner, restrain, coerce, or intimidate employees in the exercise of rights guaranteed by Section 2 of the Massachusetts General Laws Chapter 150E.

WE WILL reinstate John Bourgois to his former position as MHA IV and make him whole for any rights, benefits, privileges, and monies lost by him as a result of the demotion from MHA IV to MHA I.

COMMONWEALTH OF MASSACHUSETTS

FRANK ROBINSON
ASSISTANT AREA DIRECTOR
DEPARTMENT OF MENTAL HEALTH

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