NAGE, UNIT 6, MAP/NAGE AND COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION, SUPL-2166 (11/10/81).

(50 Duty to Bargain)
51.11 authority of employer representative
(70 Union Administration and Prohibited Practices)
76. Refusal to Bargain in Good Faith
(90 Commission Practice and Procedure)
92.37 subpoenas and motions to quash

Commissioners Participating:

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

Appearances:

Robert C. Hagopian, Esq. - Representing the National Association of Government Employees, Unit 6, MAP/NAGE

Peter Lyons, Esq. - Representing the Commonwealth of Massachusetts, Commissioner of Administration

DECISION AND ORDER

Statement of the Case

On April 6, 1981, the Commonwealth of Massachusetts, Commissioner of Administration (Commonwealth or Employer) filed a charge with the Labor Relations Commission (Commission) alleging that the National Association of Government Employees (Union) had engaged in prohibited practices within the meaning of Sections 10(b)(2) and (3) of G.L. Chapter 150E (the Law).

Pursuant to Section 11 of the Law, the Commission conducted an investigation of the charge and issued a complaint against the Union on June 5, 1981 alleging that it had violated Sections 10(b)(2) and (3) of the Law by negotiating in bad faith with the Employer for a successor collective bargaining agreement and by refusing to participate in mediation and fact-finding. On June 29, 1981, a formal hearing was conducted by Amy L. Davidson, a duly designated hearing officer of the Commission. All parties were afforded a full and fair opportunity to be heard, to introduce evidence, and to examine and cross-examine witness. Both parties timely filed post-hearing briefs which have been carefully considered. On the basis of the entire record, we conclude that the Union violated Sections 10(b)(2) and (3) of the Law for the reasons set forth below.

Jurisdictional Findings

The Commonwealth of Massachusetts, Commissioner of Administration is a public employer within the meaning of Section 1 of the Law.

The National Association of Government Employees is an employee organization within the meaning of Section 1 of the Law and is the exclusive representative of employees of the Commonwealth in Unit 6.

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Findings of Fact[1]

The Union and the Commonwealth have been engaged in negotiations for a successor

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[1]At the outset of the hearing on this matter, the hearing officer made several procedural rulings on motions to quash subpoenas issued by the Commission at the request of the Union. The facts regarding the procedural history of those motions are set forth below.

The Commission at the request of the Union issued two subpoenas duces tecum. One subpoena duces tecum required Richard Burke, a former negotiator for OER, to bring books, record, correspondence and documents

> "relative to collective bargaining negotiations conducted by you with Unit #6 MAP/NAGE while employed by the Office of Employee Relations, Commonwealth of Massachusetts and acting as its chief negotiator."

The second subpoena duces tecum required John McKeon, Deputy Director of OER, to bring books, records, correspondence and documents

> "relative to collective bargaining negotiations conducted by the Office of OER with Unit 6 MAP/NAGE and more especially the wall plaque which reads 'when you've got them by the balls, their hearts and minds will follow.' Said wall plaque being on the wall of your office and easily detachable."

The Commonwealth filed a motion to revoke the subpoena issued to Burke on the grounds that Burke was not an employee of the Commonwealth during the time period covered in the complaint, which extends from October 1980 when NAGE wrote a letter to Secretary of Administration Edward Hanley until March of 1981 during factfinding between the parties. (Burke left the Commonwealth's employ in September of 1980).

At a preliminary investigation of the motion to revoke, the hearing officer requested an offer of proof from the Union. Robert Hagopian, counsel for the Union, stated that the Union wished to call Burke to testify regarding negotiations up to September 25, 1980 to show the Union negotiated in good faith up to that point. Hagopian also stated that Burke could not testify about anything since October 9, 1980, the time period the complaint covers. Counsel for the Commonwealth stated that it was willing to rest on the record of a companion case between the parties, SUP-2508, with regard to 10(b)(2) allegations of the complaint and all of the testimony of that proceeding would go to the issue of whether either party bargained in bad faith.

Based upon the investigation, the hearing officer granted the motion to quash the subpoena issued to Burke on the grounds that Burke could only testify about the Union's conduct in negotiations prior to October 9, 1980, which was outside the time period contained in the complaint. In addition, the hearing officer noted that the Commonwealth had rested on the record of SUP-2508 on the 10(b)(2) charge.

After the ruling was made, counsel for the Union stated that he took exception to the hearing officer's granting the motion to quash on the grounds that only Burke and not the Commonwealth could move to quash the subpoena. This argument was not made to the hearing officer prior to the ruling. In response to this, the hearing officer stated that counsel for the Union could call Burke as voluntary witness if it so wished. Burke had left the hearing and the Union did not call him as a witness.

The Commonwealth also filed a motion to quash the subpoena duces tecum issued to John McKeon requiring him to bring the plaque. An investigation on this motion to quash was held by the hearing officer. The motion to quash as to the plaque

(footnote continued on following page)

collective bargaining agreement for Unit 6 employees since May of 1980.[2]

The Union's bargaining team consisted of James McCloskey, President of Unit 6, NAGE/MAP and the Executive Board of the Local. The Commonwealth's chief negotiator for 25 sessions until September 25, 1980 was Richard Burke, who was assisted by William Hayward and Paul Waystack. The last bargaining session at which the parties exchanged positions occurred at a September 25, 1980 meeting among Burke, McCloskey and two other members of the Union's negotiating team. At that point, McCloskey believed that the Union had an agreement with the Commonwealth on a wage package.

The wage package was contingent upon wrap-up of the entire contract. Burke told McCloskey on September 25 that he would run the figures on the economic package by Edward Hanley, Secretary of Administration and Finance, for approval.

Burke was scheduled to leave the employ of the Office of Employee Relations at the end of September. Burke told McCloskey on September 25 that they could "wrap the contract up." Burke also allegedly said he would return to finish the negotiations with the Union and consummate an agreement for the Commonwealth on a consultant basis.[3] Shortly thereafter, Burke left the employ of the Commonwealth and did not return. Donn Berry was later appointed to replace Burke and conclude negotiations for the agreement.

Two weeks after the September 25 meeting between the parties, the Commonwealth informed the Union that the economic agreement had been rejected by Secretary Hanley. In response to this, on October 9, 1980, McCloskey sent a letter to Hanley, which stated:

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[1](Footnote continued from previous page)
was denied on the basis that the Union represented that the plaque had affected its conduct throughout negotitions. The motion to quash relative to documents regarding collective bargaining was allowed in part and denied in part. The hearing officer allowed the motion to quash with regard to information relative to collective bargaining negotiations occurring prior to October 9, 1980 on the grounds that that matter was litigated in SUP-2508 and it fell outside the scope of the complaint in the instant case. The hearing officer denied the motion to quash with regard to information relative to collective bargaining which occurred on and after October 9, 1981.

[2]The background facts on the negotiations are contained in the record of SUP-2508 which was incorporated into this proceeding by the Commission and which is summarized in the Findings of Fact here. See Commonwealth of Massachusetts and National Association of Government Employees, Unit 6, MAP/NAGE, Case No. SUP-2508, issued on the same day as this opinion.

[3]According to Commonwealth negotiator Paul Waystack, Burke never promised the Union that he would return to finish the negotiations. Waystack said that Burke said that if the parties were close to an agreement he would be receptive to staying on with the stipulation that he would only stay if the conclusion of the negotiations would require a very short time. We do not necessarily find any factual discrepancy.

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> This Union has been negotiating with the Office of Employee Relations since April 1980 for the purpose of concluding a collective bargaining agreement for members of state wide Bargaining Unit 6. An economic agreement had been agreed to by the Office of Employee Relations and the Union that was subsequently rejected by you. Our Bargaining Committee had made certain commitments and concessions during the negotiating process that brought us to agreement on the economic terms that you rejected.
>
> It is obvious to me and this union that the Office of Employee Relations is not authorized to conduct meaningful negotiations. Therefore, I and the Unit 6 Bargaining Committee will be at your office on Wednesday, October 15, 1980 at 9:00 AM to conduct negotiations with you and you only. (Emphasis added).

McCloskey andmembers of the Union's negotiating team met with Hanley on October 16, 1980. Hanley refused to negotiate with McCloskey and the Union negotiating team and told them to go to the Office of Employee Relations.[4]

On October 15, 1980, Donn Berry from the Office of Employee Relations sent a letter to McCloskey advising him that he had been assigned to conduct negotiations with the Union for the Unit 6 contract and suggesting that the Union call him for dates to continue bargaining. The Union never contacted Berry.

On October 21, 1980 John S. Sullivan, Director of the Office of Employee Relations, sent a letter to McCloskey in which he quoted from the Union's letter to Hanley and stated that the Union's letter "makes it quite obvious that we are at an impasse and we shall move so at the Board of Conciliation and Arbitration."

On October 23, 1980, the Commonwealth filed a petition with the Board of Conciliation and Arbitration (Board) for mediation and factfinding with the Union. The Board appointed Mediator Walter Diehl to investigate the status of the parties' negotiations.

On October 31, 1980, the Union filed a bad faith bargaining charge against the Commonwealth with the Commission (Case No. SUP-2470). The Union alleged in substance that: 1) Burke had represented to the Union that he had final authority to conclude a binding agreement for the Commonwealth; 2) Burke reached an economic agreement on September 25 with the Union and Burke needed only to check it with Hanley; and 3) the Union later learned that Burke did not possess the authority alleged above, when Hanley disapproved the agreement.[5]

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[4] The Office of Employee Relations (OER) is and since 1974 has been the designated representative of the Commonwealth for purposes of collective bargaining.

[5] Following an investigation pursuant to Section 11 of the Law, the Commission dismissed the Union's charge in SUP-2470 on December 30, 1980 on the grounds that the wage agreement was tentative. The Union filed a request for reconsideration of the dismissal with the Commission. The Commission affirmed its dismissal on January 12, 1981, stating:

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Mediator Diehl met with the parties both separately and jointly in October and November 1980. The first joint session between the parties occurred on November 14, 1980. At that meeting, McCloskey stated that he did not want to be at or participate in the mediation session because he had an economic agreement with the Commonwealth. The Commonwealth requested that an impasse be declared because the Union had refused to meet with the Commonwealth over the economic terms of the agreement. Diehl asked the Commonwealth not to move for declaration of an impasse until after it prepared and presented a total contract package to the Union. The Commonwealth prepared a total contract package at the request of Diehl and preented it to the Union at a joint mediation session on November 21, 1980. The Union's attorney, Ira Sutton, told the Commonwealth's negotiating team that the Union would not look at or accept possession of the Commonwealth's contract package offer. The Union's reason for refusing to look at or to accept the package was because it was to appear before the Commission the next day on the charge (SUP-2470) it filed on the economic package it contended it had reached with Burke. McCloskey and Sutton reasoned that if they accepted the November 21 package it would mean that they had agreed that the September 25 offer was a conditional one and negate the merits of their charge before the Commission. This ended the mediation session.

On December 10, 1980, Berry sent a letter to McCloskey containing the November 21 contract package offer which the Union had refused to take possession of at the mediation session. The letter stated that the offer would remain operative until December 17, 1980.

In response to Berry's December 10 letter, on December 17 McCloskey sent a letter to Edward Sullivan, Chairman of the Board of Conciliation and Arbitration, in which he stated:

> "In response to Mr. Berry's letter of December 10, 1980 this Union is willing to negotiate the remaining non-economic issues that remained unsettled as of September 23, 1980.[6]

On December 9, 1980 the Board had declared that an impasse in bargaining had been reached between the parties and sent a list of factfinders to the parties. The Commonwealth followed the procedures set forth in the document for selecting a

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[5](footnote continued from previous page)
All three Commissioners found insufficient evidence that Mr. Burke either represented or that the charging party could reasonably believe that he had final authority to conclude an agreement binding on the Commonwealth. Nor does the information adduced suffiiciently establish bad faith in the manner that the Commonwealth considered the tentative wage agreement.

[6]McCloskey admitted on cross-examination that many economic items were unresolved on September 25, 1980 and were still unresolved on December 10, 1980. Personal leave, sick leave buy back, shift differential, overtime, and the reallocation pool were still on the table according to McCloskey.

factfinder.[7] NAGE failed to comply with the procedures for selecting a factfinder in accordance with the format and time limits required.

Instead of responding to the letter, McCloskey and Hagopian, counsel for the Union, contacted Sullivan and told him that, in their opinion, the parties were not at a good faith impasse. Hagopian told Sullivan that the Union wished to appeal the determination of impasse by the Board. On February 4, 1981, Hagopian wrote to Sullivan requesting that the Board rescind its determination of impasse and hold a hearing on the issue of whether an impasse existed similar to the hearing which is granted to police and firefighters when an impasse is declared by the Board. Sullivan sent a letter in response to Hagopian in which he requested that Hagopian identify the rules of the Board which the Union wished to have applied to its situation.

On February 17, 1981, Hagopian sent a letter to Sullivan in which he cited Board Rule 2.04 providing for hearings in final and binding arbitration in cases involving police and firefighters[8] as authority for the proposition that the Union was entitled to a hearing. In addition, Hagopian stated that, in his opinion, the fact that police and firefighters had the right to a hearing on the declaration of impasse and other employees did not constituted discrimination toward his clients.

Sullivan responded to this request for a hearing on March 18, 1981. He stated that the law did not provide the right to a hearing in non-police and non-firefighter cases and that, in order for police and firefighters to be entitled to a hearing, certain conditions must be met, i.e., factfinding has taken place, 30 days have passed since a report was issued, proceedings before the Commission on a prohibited practice are exhausted, and an impasse exists. Thus, even if the rules were applied to non-police and non-fire cases and encompassed the Unit 6 situation, all of the conditions had not been met in that the parties had not completed factfinding.

Because the Union had failed to comply with the first procedure for selecting a factfinder, the Board developed a second procedure, agreed to by the parties, for selecting a factfinder.[9] The second procedure set forth in a letter from the

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[7]The procedures for selecting a factfinder were set forth in the document by the Board as follows. The letter listed nine names of factfinders and instructed each party to:

> Please (a) cross out no more than 4 of the names listed below who are unacceptable, and (b) designate the remaining factfinders in order of preference.

The letter also asked the parties to return the letter to the Board within ten (10) days and stated that if the Board did not hear from a party within the time indicated, it would "assume that all persons named on the list were acceptable."

[8]Chapter 580 of the Acts of 1980 (Proposition 2½) repealed the final and binding arbitration provisions to which Rule 2.04 speaks.

[9]This was in response to McCloskey's request that if the Union was to be "unilaterally thrown into impasse against itswill" it should have a voice in the factfinders. Sullivan then asked McCloskey if he would be willing to prepare a list of factfinders agreeable to the Union, and McCloskey responded affirmatively.

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Board dated February 13, 1981 entailed the following steps:

(1) the original list would be disregarded

(2) both parties would compile their own list of factfinders and submit the list to me, neither side was to observe the other's list. If the same proposed factfinder appeared on both lists then that person would be selected.

(3) in the event the same name did not appear on the lists discussed in (2), above, I would develop a list of nine (9) names and sent it to the parties. They would select the factfinder from the list utilizing the following procedure:

(a) cross out no more than 4 of the names listed below who are unacceptable, and

(b) designate the remaining factfinders in order of preference.

1. Donald White
2. Jay Kramer
3. David Grodsky
4. Eva Robins
5. Edward Pinkus
6. David Randles
7. Stanley Jacks
8. Peter Blum
9. Milton Nadworny

The Union failed to comply with the second selection procedure adopted by the Board. Instead of crossing out four unacceptable names and designating the remaining factfinders in order of preference as set forth in the Board's February 13 letter, the Union chose only one name which was acceptable. The Commonwealth responded to the letter as the procedure required.

Because the second selection procedure failed, the Board sent a letter to the parties on March 18, 1981 stating that:

> The second selection procedure which the parties had agreed to follow did not work out as planned. (A copy is attached). The Union did not respond as the last part of that process required, namely, to "(a) cross out no more than 4 names listed below (9 names) who are unacceptable, and (b) designate the remaining fact finders in order of preference." The Union did not so select and indicate preferences, rather, it chose just one name which was acceptable. The Employer responded as the plan required.
>
> Since this plan did not work, we are left with what was in place when we agreed to try this second selection process, and that is the original factfinder list. The Union never responded to that list in accordance with the format required and within the time limits set forth.
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> The tradition and normal procedure in such situations is to select from the list a factfinder whose name was not struck by the parties.

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> That procedure is now followed here and the factfinder selected is Parker A. Denaco.

The Union objected to Denaco's appointment as factfinder on the grounds that he was defendant in a court action brought by it.[10] On March 30, 1981, Hagopian sent a letter to Denaco requesting that the Board and he reconsider his assignment as factfinder in the case because of conflict of interest. In addition, Hagopian requested that factfinding be held in abeyance until after a decision was rendered by the Commission on the Complaint in SUP-2508.

Denaco subsequently withdrew as a factfinder and John Higgins was appointed in his place on April 10, 1981. Higgins called an informal meeting between the parties on April 28, 1981 before beginning factfinding. Hagopian indicated several times to Higgins that they had no intention of factfinding and that the Union was there only as a courtesy to him. Nevertheless, Hagopian and McCloskey told Higgins about the prior bargaining which took place between the parties in September, 1980. Higgins and his son, who was assisting him, then met separately with the parties in an effort to mediate the contract dispute. When the parties were brought back together the Union indicated that in order for it to continue bargaining certain prerequisites would have to be met. Specifically, it wished to start bargaining from a particular date in September when it felt certain issues were resolved. John McKeon, Deputy Director of OER, indicated to the Union that he would review the situation, and the Union and the Employer agreed to meet together on May 11, 1981 to explore the possibility of resuming direct negotiations.

The parties met on May 11, 1981 in McKeon's office. Hanging on the wall above McKeon's desk was a sign which read:

> "When you've got them by the balls, their hearts and minds will follow"[11]

In addition, there was another sign with the Serenity Prayer in McKeon's office.[12]

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[10]The Union was involved in appealing an arbitral decision rendered by Denaco.

[11]The Union made extensive arguments that this sign colored the bargaining and reflected the Commonwealth's attitude throughout negotiations.

In fact, the Union called Dr. Nicholas Rizzo, an expert psychiatric witness, to testify about the effect of the sign. The doctor testified that the sign "borders on the despicable and reprehensible." He also stated that it might affect negotiators because despite its humorous first reaction, "I find that humor is truth dressed up in funny clothes, and that a sign of that sort is not conducive to mutual respect."

[12]The Serenity Prayer states:

God grant me the serenity to accept the things I cannot change, courage to change the things I can, and the wisdom to know the difference.

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The parties' accounts of the May 11 meeting differ.[13] According to McKeon, the Commonwealth indicated that it was willing to begin negotiations again with the Union but Hagopian insisted that Burke come back to negotiate with the Union. McKeon told the Union representatives that Burke was no longer working for the Commonwealth. The Union persisted in its demand that Burke be present. Hagopian also stated that he would not go to factfinding and he would not negotiate with anyone but Burke. The meeting ended without any progress in negotiations.

According to McCloskey, the May meeting commenced with his saying that in order to continue bargaining he wanted the Commonwealth to drop certain unilateral changes allegedly made in January, 1981, restore the prior collective bargaining agreement and return to the bargaining position the Commonwealth held on September 10 when represented by Dick Burke. McKeon replied "We don't know where we stood with Burke." McCloskey said, "I know where I stand and where we were on September 10." McKeon said, "Well, we don't know where we stand." McCloskey then told McKeon that Paul Waystack and William Haywood, who were at negotiations, could inform him as to the status of negotiations and "then if you have any problem call up Dick Burke, he can tell you where we were." Then, McKeon and his colleague Manuel Lato got angry and told the Union representatives to leave the office. McCloskey testified that he only wanted Burke to relate facts as to the last position on the table and did not expect him to negotiate.

On May 20, 1981 Higgins sent a letter to the parties requesting a status report on the meeting of May 11, 1981. McKeon responded to this request on May 20 indicating that no progress had been made and requesting that fact finding begin. On May 27, 1981 Hagopian responded to Higgins' May 20 request for a status report. Hagopian's letter to Higgins, which we believe deserves reproduction, stated:

> Dear Mr. Higgins:
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> In reply to your letter of May 20, 1981 relative to the above-captioned matter, I believe you recall that I agreed to meet with the office of O.E.R. and their representatives to see if I could find out just where the hang-ups were, without waiving any rights of my clients, which I outlined and enumerated to you at our meeting of May 6, 1981.
>
> Since there had been three chief negotiators for the O.E.R. in the process of the lengthy negotiations, I felt such a meeting might disclose the missing links in the collective bargaining process and as a lawyer, I am always open to any fair compromise.
>
> As agreed, I visited the offices of the O.E.R. on Monday, May 11th, 1981 and met with the Deputy Director of Bargaining John R. McKeon,

[13] There is no need to make a credibility determination as to which of the parties' versions of the May 11 meeting is truthful because acceptance of either does not alter our determination in this case. We note, however, that the account of the meeting contained in Hagopian's letter which is reproduced above consistent with McKeon's allegation that the Union demanded Burke be retained to negotiate the agreement.

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Kevin Preston, Esq., and Manuel S. Lato, Esq.

When I entered the emporium of the O.E.R. I saw an ominous message on the wall in the form of a plaque which read, "When you've got them by the balls, their hearts, and minds will follow." This frightened me as I never expected to meet in an abattoir[14] and since I may be beyond the years of expectation of reproduction, I felt more for the safety of my client, whom I assumed to possess the full capabilities of manhood, and unlike Belshazzar, the son of Nebuchadnezzar, who saw the handwriting on the wall at a bounteous feast, which read, "Mene, Mene, Tekel, Upsharin" ignored it and was slain that very evening, I decided that I would place discretion before valor and beat a hasty retreat and retrieve whatever manly attributes, we may have possessed.

Before leaving, I did request that the original O.E.R. negotiator, Richard Burke be called into the sessions as he had the experience of having attended all the lengthy collective bargaining sessions with the union which the latter two negotiators (with all due respect) did not have. I thought that this request should be honored, if the O.E.R. representatives wanted to discuss matters in good faith.

Their answer to this request was a loud and emphatic, No, unified to such an extent that it resembled Verdi's Anvil Chorus in the opera Il Travatore.

Thenceforth, I beat a hasty retreat from this den of iniquity with my client and please don't ever suggest that I meet in that abattoir on the 10th floor of the McCormack Building again. They seem inclined to augment the slogan, "Make it in Massachusetts" to "Break it in Massachusetts" with the thumbs-down symbol of innocent and unsuspecting peace-makers.

Very truly yours,
s/Robert C. Hagopian

On June 2, 1981, John Higgins sent a letter to the parties notifying them that he was putting factfinding on hold but would continue to maintain jurisdiction. He stated that his reason for this action was premised upon the following:

1. O.E.R.'s letter of May 20, 1981 has in its final paragraph the following request:

   "We therefore request that you schedule hearings on this matter as soon as the Union indicates its willingness to proceed."

[14] An "abattoir" is a slaughterhouse. Webster's New Coll. Dict.

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2. Attorney Hagopian's letter for N.A.G.E. dated May 27, 1981 in which he relates that the meeting between N.A.G.E. and O.E.R. on 5/11/81 did not result in a meeting of the minds to go forward with negotiations. His letter does not indicate a change in N.A.G.E.'s position concerning its reluctance to participate in the Fact Finding process based on its opinion of the status of the negotiations in dispute.

Throughout the period from December of 1980 up to and including the date of the hearing on this matter, the Union has continued to deny that an impasse existed between the parties. The Union has also continued to maintain that it had a right to a hearing before an impasse was declared despite repeated correspondence from Sullivan stating that the rules of the Board did not provide for such a hearing.

The status of negotiations between the parties as of the date of hearing on this matter is as follows. The Commonwealth is ready and willing to commence factfinding. Higgins is on hold awaiting a willingness by the Union to proceed with factfinding.

Opinion

The Union argues that the Complaint in this case should be dismissed on the grounds that the hearing officer erred in granting a motion filed by the Commonwealth to quash Richard Burke's subpoena. We have reviewed the record in this regard, and we affirm the hearing officer's ruling, albeit for reasons different from those on which she relied.

The Union sought Burke's testimony to prove that the parties had engaged in good faith bargaining culminating in a wage agreement on September 25, 1980. The Union would then show, through Burke or other witnesses, that the Commonwealth breached that agreement when Secretary Hanley rejected the package, thereby justifying the Union's subsequent conduct which is the basis for this charge. We hold that Burke's subpoena could properly be quashed for his testimony "does not relate with reasonable directness to any matter in question." G.L. c.30A, §12(4). The legality of the Commonwealth's conduct with respect to the September 25 "agreement" and its rejection by Hanley has already been determined by the Commission in SUP-2470 (see footnote 5), and cannot serve as a basis for justifying the Union's subsequent conduct. Even were we to conclude that Burke would testify about other matters not covered by our dismissal of SUP-2470, and that the hearing officer's ruling was error, we would find such error to be harmless. Regardless of what occurred between the Union and Burke prior to September 25, the nature of the Union's conduct after that date went far beyond the parameters of whatever reasonable or legitimate expectations the Union may have had with respect to the September 25 agreement. The record establishes that many economic items such as personal leave, sick leave, overtime and shift differential remained open as of September 25, yet the Union refused to negotiate anything but non-economic items. Finally, we note that even after the Union's charge relating to the September 25 agreement was dismissed by the Commission in January of 1981, the Union continued to refuse to participate in mediation and fact-finding with the Commonwealth.

For all of the above reasons, we find that the hearing officer did not

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exceed her authority in quashing Burke's subpoena.[15]

The complaint in this case encompasses charges that the Union, by the totality of its conduct: 1) refused to bargain in good faith with the Commonwealth, and 2) refused to participate in good faith in mediation and factfinding. Since many of the operative facts and mode of analysis for each aspect of the charge are the same, we consider them together.

Section 6 of the Law requires the employer and the exclusive representative of employees to "meet and negotiate in good faith with respect to wages, hours, standards of productivity and performance...." We have defined the good faith requirement of Section 6 of the Law to mean that "the parties enter into discussions with an open and fair mind, have a sincere purpose to find a basis of agreement and make reasonable efforts to compromise their differences." King Philip Regional School Committee, 2 MLC 1393 (1976); Berlin-Boylston Regional School Committee, 3 MLC 1700 (H.O. 1977); City of Chicopee, 2 MLC 1071 (H.D. 1975); Plainville School Committee, 4 MLC 1461 (H.O. 1977). In assessing "good faith", we look to the totality of the parties' conduct, both at and away from the bargaining table. Berlin-Boylston, supra; King Philip, supra.

In addition, the Commission has stated that with respect to mediation and factfinding:

> Conformity with the good faith requirement of Section 10(b)(3) and of its counterpart, Section10(a)(6), specifically contemplates compliance with MBCA rules, and generally contemplates a reasonableness, integrity, honesty of purpose and a desire to seek a resolution of the impasse consistent with the respective rights of the parties. IAFF Local 1009, 2 MLC 1238, 1245.

In the instant case, the record demonstrates that the Union's conduct from October 9, 1980 onwards failed to meet the good faith requirements enunciated above.

First, on October 9, 1980 the Union demanded to bargain with Hanley, and only Hanley, rather than Berry, who was the designated representative of the Employer for the purposes of collective bargaining. In addition, the Union failed to respond to Berry's requests to meet with the Union to continue negotiations. This constitutes

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[15]The Union also contends that the hearing officer's allowance of the motion to quash violated Rule 402 CMR 13.10(5)(a) which states in pertinent part: "Any witness under subpoena may file...a motion for revocation or modification of any subpoena." (emphasis added). The Union argues that only Burke and not the Commonwealth had standing to file the motion and the hearing officer's allowance of the Commonwealth's motion. The Union raised this objection, however, only after the hearing officer had quashed the subpoena, thereby waiving the objection. Witnesses, of course, may move to quash through counsel or other representative, so the simple fact that someone other than Burke signed the motion to quash is irrelevant. There is no suggestion in the record that the Commonwealth, in moving to quash the subpoena, was not acting on Burke's behalf or at his direction.

an outright refusal to bargain by the Union.

After that, the Commonwealth petitioned the Board of Conciliation and Arbitration for declaration of an impasse. At the first joint session between the parties on November 14, 1980, McCloskey stated that he did not wish to participate in mediation because he believed he had an economic agreement with the Commonwealth.

Next, on November 21, 1980 the Union refused to look at or take possession of the total contract proposal presented to it by the Commonwealth because it had charges pending before the Commission on SUP-2470 and did not wish to prejudice its rights before our agency.

After an impasse was declared on December 9, 1980, the Union failed to comply with procedures for selecting a factfinder. After a second selection procedure, agreed to by the parties, was instituted, the Union again failed to comply with the procedure. Instead, it demanded to have a hearing on the impasse even though no such right exists under the Law. After the first factfinder was selected, the Union requested that factfinding be held in abeyance until the resolution of its charges before the Commission in Case No. SUP-2508.

When factfinder Higgins was finally selected and met with the parties, the Union continued to maintain that it would not participate in factfinding. In addition, the Union told Higgins that it would only bargain with the Commonwealth if the Commonwealth returned to its bargaining position as of September 1980.

Finally, the Union has continued until the date of hearing on this matter to refuse to participate in factfinding because it continues to maintain that no impasse exists between the parties.

It is clear that the totality of the Union's conduct in this case does not comport with the good faith requirement embodied in Chapter 150E.

The Union's insistence on negotiating only with Hanley, its refusal to negotiate with Berry, its later insistence on negotiating only with Burke, its continued insistence on bargaining only on non-economic items based upon the economic agreement it believed it had in September, 1980,[16] and its refusal even to take possession of the Commonwealth's contract package constitute a refusal to bargain in violation of Section 10(b)(2) of the Law.

In addition, the Union's failure to comply with the MBCA procedures and its continued refusal to participate in factfinding after an impasse was declared constitute a violation of Section 10(b)(3). See IAFF, supra.

[16] We note that even if the Union could have reasonably relied upon the wage agreement reached with Burke up until the time when the Commission dismissed the charge based upon that agreement in SUP-2470 (see footnote 6), the Union's actions in insisting on negotiating with Hanley and in limiting any negotiations to non-economic items were overbroad.

NAGE, Unit 6, MAP/NAGE and Commonwealth of Massachusetts, Commissioner of Administration, 8 MLC 1484

Conclusion and Order

On the basis of all of the evidence, we conclude that the Union, by the totality of its conduct, refused to bargain collectively in good faith with the public employer in violation of Section 10(b)(2) of the Law. In addition, the Union has refused to participate in good faith in mediation and factfinding procedures in violation of Section 10(b)(3) of the Law.

WHEREFORE, IT IS HEREBY ORDERED that:

1. The National Association of Government Employees, Unit 6, MAP/NAGE shall cease and desist from:

   a. Refusing to bargain in good faith with the Commonwealth of Massachusetts, Commissioner of Administration;

   b. Refusing to participate in good faith in mediation and factfinding procedures set forth in sections eight and nine of the Law.

2. The National Association of Government Employees, Unit 6, MAP/NAGE shall take the following affirmative action which will effectuate the purposes of the Law:

   a. Immediately engage in good faith mediation and factfinding procedures;

   b. Post in conspicuous places on bulletin boards where employee and Union notices are usually posted, and leave posted for not less than thirty (30) days, the attached Notice to Employees;

   c. 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

NAGE, Unit 6, MAP/NAGE and Commonwealth of Massachusetts, Commissioner of Administration, 8 MLC 1484

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

The Massachsuetts Labor Relations Commission has held that the National Association of Government Employees, Unit 6, MAP/NAGE (NAGE) violated Sections 10(b)(2) and (3) of General Laws Chapter 150 by refusing to bargain in good faith with the Commonwealth of Massachusetts, Commissioner of Administration (Commonwealth) in negotiating a successor collective bargaining agreement for Unit 6 employees and by refusing to participate in good faith in mediation and factfinding after an impasse was declared by the Massachusetts Board of Conciliation and Arbitration.

WE WILL NOT in any like manner, refuse to bargain in good faith with the Commonwealth.

WE WILL NOT in any like manner, refuse to participate in mediation and factfinding procedures.

WE WILL immediately engage in good faith in mediation and factfinding with the Commonwealth.

JAMES MCCLOSKEY, President
Unit 6, MAP/NAGE