EVERETT HOUSING AUTHORITY AND EVERETT HOUSING AUTHORITY EMPLOYEES ASSOCIATION, MUP-4579 (2/10/82).

(60 Prohibited Practices by Employer)
68.4 frustrating the contractual grievance procedure

Commissioners participating:

Phillips Axten, Chairman
Gary D. Altman, Commissioner

Appearances:

Sydney S. Rosen, Esq. - Representing the Everett Housing Authority

Lawrence Tuck - Representing the Everett Housing Authority Employees Association

DECISION AND ORDER

Statement of the Case

On September 18, 1981 the Everett Housing Authority Employees Association (Association) filed a charge with the Labor Relations Commission (Commission) alleging that the Everett Housing Authority (Authority) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of General Laws Chapter 150E (the Law). Pursuant to its authority under Section 11 of the Law, the Commission investigated the charge and on November 4, 1981 issued a complaint against the Authority alleging that it had violated Sections 10(a)(5) and (1) of the Law by unreasonably delaying the selection of an arbitrator.

A formal hearing on the complaint was held before Amy L. Davidson, a duly designated hearing officer of the Commission on November 23, 1981. The parties stipulated to most of the facts of the case and entered into evidence a number of joint exhibits. One witness was called by the Authority. In lieu of filing briefs in this matter, the Association and the Authority made closing arguments on the record. On the basis of the entire record, we conclude that the Authority violated Section 10(a)(5) and (1) of the Law for the reasons set forth below.

Findings of Fact

Based upon the stipulations, exhibits and testimony on the record as a whole, we find the following facts.[1]

The Authority and the Association are parties to a collective bargaining agreement which contains the following provision at level four of the grievance arbitration procedure:

[1]Neither party disputes the jurisdiction of the Commission to decide this matter under G.L. c.150E.

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> Article VII. Section 5(b)
>
> The grievance shall be presented to an arbitration committee of three members, one to be selected by the Authority, one by the Association, and the third to be selected by the first two mentioned members of said committee.

In order to resolve a pending grievance, the Authority chose Michael DiOrio as its member of the arbitration committee. The Association chose Ernest Merrill.

On May 8, 1981,[2] DiOrio wrote to Merrill and suggested the names of two persons, Benjamin Gordon and Clarence Richmond, to serve as the third member of the arbitration committee to resolve the grievance. On May 9, DiOrio and Merrill met in DiOrio's office. At that point, Merrill suggested that the parties use the services of the Massachusetts Board of Conciliation and Arbitration to select an arbitrator. DiOrio responded that Merrill could do whatever he wanted to. Merrill, on May 12, wrote a letter responding to DiOrio's May 8 letter suggesting the names of two arbitrators. He stated:

> Dear Mr. DiOrio:
>
> I received your letter of May 8, but I still like your first way, that you suggested of going before the Board of Conciliation and Arbitration.[3]

In addition, Merrill enclosed a copy of the petition he had filed with the Board of Conciliation and Arbitration (Board) on May 12.

On May 13, DiOrio responded to Merrill's letter and refused to use the services of the Board stating:

> Dear Mr. Merrill:
>
> I am in receipt of your letter of May 12, 1981; you state that I suggested going before the Board of Conciliation and Arbitration.
>
> This statement by you is complete falsehood.
>
> You came to my place of business and suggested going to the Board of Conciliation and Arbitration to which I responded, "YOU can do as you please."
>
> On Saturday, May 9, 1981, you called me on the telephone to inform me that you were going to file a petition before the Board of Conciliation and Arbitration.

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[2] All dates hereafter refer to calendar year 1981 unless otherwise noted.

[3] DiOrio denied ever having suggested or agreed to having the Board of Conciliation and Arbitration resolve the grievance. The Association presented no witness to this issue.

> I responded that you could do what you wanted, but I was not going to sign any petition to the Board of Conciliation and Arbitration.
>
> I further told you, that I was sending you two (2) names as suggested, one, to be the third member of the Grievance Board.

On June 18, the Association filed a charge with the Commission in Case No. MUP-4426, alleging that the Authority would not agree to the selection of an arbitrator. During the course of the investigation of the charge on July 21 the Commission agent suggested the names of four arbitrators and subsequently sent a list of their names to the parties. Also during the investigation, Merrill said that any of the four names suggested by the Commission agent would be acceptable to the Association.[4]

On August 4 Sydney S. Rosen, counsel for the Authority, sent a letter to Merrill requesting a response from the Association as to whether or not the two arbitrators previousoy suggested by the Authority on May 8 were acceptable. Soon thereafter Merrill responded to Rosen as follows:

> In reply to your letter under date of August 4, 1981, naming arbitrators, please be informed said arbitrators are not acceptable.
>
> It is also my belief that had we continued on our original course with the State Board of Conciliation and Arbitration this matter would now be behind us. Further delay is obvious.
>
> I wait patiently to hear from you or Mr. DiOrio to advise me of the opportunity to meet and choose one of the names submitted to us by Diane Drapeau of the State Labor Board.

Rosen also sent form letters on August 4 to the four arbitrators suggested by the Commission agent, requesting copies of their resume and information about their fees. On August 6 and 12 respectively, two of the four arbitrators responded to Rosen's letter with the requested information. The Association filed a second charge on September 18 against the Authority which initiated the instant proceeding.

On September 25, Rosen responded to Merrill's request seven weeks earlier to meet with DiOrio and choose an arbitrator from the four names suggested by the Commission agent during the investigation of the prior charge. Rosen's letter stated:

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[4]The Commission dismissed the Association's charge in Case No. MUP-4426, finding no probable cause to believe that by its actions the Authority had violated the Law.

> Please be advised that only two of the four names sent to me by Diane M. Drapeau, Esq. responded to my letter asking them for their qualifications as a labor arbitrator and their per diem charge.
>
> This is to advise that the two attorneys who responded are not acceptable.
>
> Will you kindly submit additional names to me and I will very shortly submit some additional names to you.

On October 20, the Commission conducted its investigation of the charge in this case. Rosen wrote to Lawrence Tuck, President of the Association, on October 22 stating:

> Dear Mr. Tuck: Re: Labor Relations Commission Case No. MUP-4426
>
> Please be advised that I have been in contact with the American Arbitration Association, 294 Washington Street, Boston, Mass., relative to the above entitled matter and the Everett Housing Authority decided to request them to handle this matter.
>
> I have been informed that the entry fee will be $150.00, of which your Association will have to contribute $75.00 and the Everett Housing Authority will contribute the other $75.00. The Association will then send us a list of ten arbitrators with a resume and a notation of what their charges will be. We ought to be able to select an arbitrator from this list.
>
> The Association informed me that in order for this process to take place, it would be necessary for your Association to agree to this process and to be bound by their decision. Likewise, the Housing Authority is to agree to that term.
>
> Accordingly, will you kindly send me a letter addressed to the American Arbitration Association, 294 Washington Street, Boston, Mass., setting forth that you agree to this arbitration proceeding and that you will be bound by the decision of the arbitrator.

The parties stipulated that Tuck had not responded to the above-quoted letter by the date of hearing on this matter.

Opinion

It is well settled that subsumed by the obligation to bargain in good faith under Section 6 of the Law is the obligation to process grievances without unreasonable delay. In Ayer School Committee, 4 MLC 1483 (1977), the Commission stated:

> Just as the parties must bargain over mandatory subjects

> not covered by their contract in conformity with procedures applicable where no contract exists, so they must bargain over the interpretation of their contract in conformity with the procedure to which they have contractually agreed. Id. at 1483.

The obligation to bargain in good faith under Section 6 does not require either party to agree to a particular proposal. Similarly, the obligation to exercise good faith in processing grievances does not compel either party to settle a grievance or agree to a particular arbitrator. Nevertheless, unreasonable delay in processing, answering or adjusting grievances may in the totality of circumstances violate an employer's obligations under Sections 10(a)(5) and (1) of the Law. See, Town of Braintree, 7 MLC 1400 (H.O. 1980); Belmont Management Inc., 7 MLC 2071 (H.O. 1981).

In the instant case, the record demonstrates that the Authority's conduct from August 1981 onward failed to meet the good faith requirements enunciated above. On July 21, in the course of the investigation of the charge in Case No. MUP-4426, the Commission agent suggested the names of four arbitrators to the parties. At the investigation, the Association stated that any of the four arbitrators would be acceptable to it. Approximately two weeks later, on August 4, the Authority's attorney sent form letters to the four arbitrators requesting copies of their resumes and information about their fees. Although the Authority received responses from two of the four arbitrators on August 6 and 12, it failed to respond to the Association's August 6 request to meet and choose one of the four suggested arbitrators until September 25, seven weeks later, the response came one week after the Association filed the charge in this case. At that time, the Authority rejected, without any explanation, both of the arbitrators who responded to its letter. Nor did it suggest any alternative arbitrators to the Association until October 26, one month later and one week after the Commission issued a complaint against the Authority.

Such delays by the Authority, which are unexplained in the record, indicate that the Authority was not taking a good faith approach to timely resolving the grievance.[5] We therefore conclude that the Authority violated Sections 10(a)(5) and (1) of the Law by unreasonably delaying the selection of an arbitrator.

Remedy

A typical remedy for an employer's unreasonable delay in processing a grievance is an order both requiring the employer to cease and desist from such practices and directing it to meet with the union and process the grievance. See Belmont Management Inc., supra; and Town of Braintree, supra.

In the instant case, such a remedy would include an order requiring the employer to meet with the Association and select an arbitrator. Because the Authority

[5]Nor does the Authority's belated offer in October of 1981 to proceed with the selection of an arbitrator through the American Arbitration Association (AAA) moot or cure its earlier unlawful conduct. See City of Boston, 7 MLC 1707 (1981).

lacked any good faith explanation for its unreasonable delay in selecting an arbitrator, however, and in order to provide some minimal assurance that the arbitrators suggested by the Authority will be acceptable to the Association, additional remedial measures are appropraite. Therefore in addition to ordering the Authority to meet with the Association and select an arbitrator, we also order the Authority to submit to the Association the names of ten arbitrators which are acceptable to the Authority, all of whom are qualified to be factfinders under Section 9 of the Law.[6]

ORDER

WHEREFORE, on the basis of the foregoing, IT IS HEREBY ORDERED pursuant to Section 11 of the Law, that the Everett Housing Authority shall:

1. Cease and desist from:

   (a) Refusing to bargain in good faith by unreasonably delaying the selection of an arbitrator to resolve a grievance it has pending with the Everett Housing Authority Employees Association.

   (b) In any like manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Law.

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

   (a) Immediately, upon receipt of this decision, meet with representatives of the Everett Housing Authority Employees Association and engage in good faith effort to select an arbitrator. If, within one week of receipt of this decision, the Authority and the Association are unable to reach agreement of an arbitrator, the Everett Housing Authority shall submit to the Association a list of ten names of arbitrators qualified to be factfinders under Section 9 of the Law, all of whom are acceptable to the Housing Authority for resolution of the pending grievance.

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

[6] In order for an arbitrator to be qualified as a factfinder under Section 9 of the Law, she or he cannot have represented an employer or employee organization in any capacity within the preceding twelve months. A list of arbitrators who are qualified to be factfinders under Section 9 is available by contacting Mr. Edward Sullivan, Chairman of the Massachusetts Board of Conciliation and Arbitration, Saltonstall Building, 100 Cambridge Street, Boston, MA 02202, Tel: (617) 727-3466.

(c) Notify the Commission within ten (10) days of receipt of this decision and order the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman

GARY D. ALTMAN, Commissioner

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 held that the Everett Housing Authority violated Section 10(a)(5) and (1) of General Laws Chapter 150E by unreasonably delaying the selection of an arbitrator in a grievance it has pending with the Everett Housing Authority Employees Association.

WE WILL NOT in any like or similar manner, unreasonably delay the selection of an arbitrator.

WE WILL NOT in any like or similar manner interfere with, restrain or coerce employees in the exercise of their rights under G.L. c.150E.

WE WILL immediately meet with representatives of the Everett Housing Authority Employees Association (Association) and engage in a good faith effort to select an arbitrator.

WE WILL submit to the Association a list of ten arbitrators qualified to be factfinders, all of whom are acceptable to the Housing Authority within one week of receipt of this decision if we cannot reach agreement with the Association on an arbitrator before that date.

_____
Director
Everett Housing Authority