CITY OF LYNN AND AFSCME, COUNCIL 93, MUP-4502 (6/4/82).

(50 Duty to Bargain)
54.531 implementation of arbitrator's award

Commissioners participating:

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

Appearances:

Joseph McParland, Esq. - Representing the City of Lynn

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

DECISION AND ORDER

The issue presented by this case is whether an employer's repeated refusal to comply with arbitral awards on the eligibility of employees on sick leave for certain contractual benefits constitutes a refusal to bargain in good faith.

Statement of the Case

On July 27, 1981, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (AFSCME or the Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the City of Lynn (City) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of G.L. Chapter 150E (the Law). Following an investigation pursuant to its authority under Section 11 of the Law, the Commission issued a Complaint of Prohibited Practice[1] on October 5, 1981. The Complaint asserted that the City had bargained in bad faith by failing to abide by successive arbitral awards on the same subject matter, thereby violating Sections 10(a)(5) and (1) of the Law. On December 23, 1981, after notice to the parties a formal hearing was held before Timothy J. Buckalew, a duly designated hearing officer of the Commission. At the hearing the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary evidence.

On March 3, 1982, both parties submitted supplementary statements which we have thoroughly considered. For the reasons that follow we hold that the City of Lynn has refused to bargain in good faith in violation of Sections 10(a)(5) and (1) of the Law by refusing to comply with arbitral awards and otherwise frustrating the grievance arbitration process.

[1] The Commission's jurisdiction is uncontested.

City of Lynn and AFSCME, Council 93, 9 MLC 1049

Facts

Though remote in origin the facts of this case are straightforward and, in all salient respects, uncontested. Since the early 1960's AFSCME has represented a City-wide blue collar/white collar unit. Over the years the parties have negotiated collective bargaining agreements, and currently are living under a contract that expires this year.

Since 1975 successive collective bargaining agreements between the parties have included the following provision:

> All employees within the Bargaining Unit shall be entitled to all the benefits of this contract from the date of their appointment to a position within the City of Lynn except as set forth above or set forth in other articles of this contract. (Article 1, Section 3. "Benefits of the Contract.")

Historically, members of the unit represented by AFSCME have been entitled to the fringe benefits common to public sector contracts: vacation time (Article 14 of the current collective bargaining agreement); sick leave (Article 15); personal days (Article 33); and longevity pay (Article 29).

In 1976, a dispute arose concerning the eligibility of employees absent due to injury and out on workers' compensation for personal days, paid sick leave, and vacation benefits. Prior to 1976 it had been the practice of the City to treat all employees out on workers' compensation the same as other employees in terms of eligibility for these benefits. This initial dispute ended in final and binding arbitration before Antonio England, who determined on October 27, 1976 that "... employees out on sick leave and receiving Workmen's Compensation are entitled to the benefits (of the contract) as established by the practice of the City of Lynn in paying same under the collective bargaining contract now in effect." England's decision was based on the finding that the undisputed practice of the City was to pay employees the benefits in question regardless of their status as active employees or employees on leave. He noted that "the type of redress now being sought by the City can be accomplished by negotiations with the Union..." The City did not appeal the award, and reinstituted payment of benefits.

In April, 1978 the parties reached agreement for a successor collective bargaining agreement to be effective from July 1, 1977 through June 30, 1980. Neither the language of Article 1, Section 3 nor the specific benefit articles was materially altered.

Sometime in 1979 the City once again ceased paying the sick leave, personal day, longevity and vacation benefits to employees out on workers' compensation. This time the grievants were two employees absent from work for a number of months and several years respectively. On December 30, 1979 Arbitrator John Teele issued an award that "each Grievant is entitled to benefits relating to the time disabled and unable to work -- but only in accordance with the language of each article. This language in some instances authorizes, and others restricts, such benefits."

Specifically, Teele found that based on the language of the agreement the grievants were not entitled to vacation pay or personal days unless they actually worked during the year preceding the demand for benefits. He did find that they were eligible for sick leave and longevity benefits. This award was not appealed by the City, and again the City paid the disputed benefits.

In June of 1980 the personnel director for the City circulated a memorandum instructing department heads not to pay accumulated sick leave to individuals absent from work on workers' compensation. The City continued, however, to make these benefit payments until sometime late in 1980. During the spring and summer of 1980 the parties were negotiating for a new collective bargaining agreement. The City proposed restricting the payment of benefits to employees who were actually on the job for at least sime time during the year. These proposals, however, were dropped by the City at the last negotiation sessions early in November of 1980. Thus, the language of the agreement currently in effect between the parties is in all salient respects identical to that which served as the basis for Arbitrator Teele's award in December of 1979.

Shortly after the execution of the 1980-82 agreement the City again refused to pay sick leave, longevity, and personal day benefits to certain employees who were on workers' compensation leave. The record does not indicate what, if any, explanation the City gave for cutting off benefits. One witness for the City, John Casey of the Department of Public Works, did testify that he initially stopped the payment of the benefits on the basis of an ordinance adopted by the City Council in April of 1980, which he felt obliged him to deny requests for vacation and sick pay. Subsequent to the denial of benefits to an employee named Ralph Beaton, the City Solicitor, Nicholas Curuby, reversed the decision of the department head and found that Beaton was entitled to vacation pay and longevity benefits. Other than Beaton's case, there is no evidence in the record that any other individuals represented by the Union were denied benefits in 1981.

Opinion

The obligation to bargain in good faith under Section 6 of the Law requires the parties to exercise good faith in processing and adjusting grievances arising under their contract. Ayer School Committee, 4 MLC 1483 (1977). While the obligation to exercise good faith in participating in the grievance adjustment process does not compel either party to settle a dispute, unreasonable conduct in handling grievances through the contractually agreed upon mechanism may, in the totality of circumstances, constitute a breach of an employer's continuing bargaining obligation under the Law. Everett Housing Authority, 8 MLC 1818 (1982). More specifically, the Commission noted in dicta as long ago as 1976 that an employer may violate the Law by requiring employees to submit grievances serially on identical disputes where there is no question of the applicability of a prior arbitration award in the employees' favor. City of Boston Police Department, 2 MLC 1331 (1976).

Under the circumstances of this case, we hold that the City violated its obligation to bargain in good faith by cutting off benefits to employees on workers' compensation leave and attempting to force the Union to arbitrate the issue repeatedly. In the face of two unchallenged arbitration awards on the same

subject matter, and after at least two opportunities at the bargaining table to alter the applicable contract provisions, the City's conduct must be considered unreasonable.

In 1976, Arbitrator England ruled on the basis of the language of the contract and the past practice of the City that eligibility was not restricted because an employee was out on injured status. The City did not appeal that award under G.L. Chapter 150C, but instead resumed paying the benefits. After the issuance of the award the parties entered into a new collective bargaining agreement which contained in all material respects identical language on eligibility. In 1979, the City cut off the payment of the benefits, claiming that injured inactive employees were not eligible for the benefits. Subsequently, Arbitrator Teele ruled that the grievants were entitled to sick leave and longevity benefits, but not personal days or vacation benefits. Neither party sought review of the award under Chapter 150E, and the City again resumed payment. When a new contract was negotiated in the fall of 1980, after an initial proposal the City opted not to insist on changes in the benefits provisions of the new collective bargaining agreement, although it clearly had the opportunity and right to do so.

The only defense raised by the City to its actions in this matter is Chapter 152, Section 69, which, it alleges, is an absolute prohibition on the payment of the contractual benefits sought by the Union.[2] The Union maintains as a matter of statutory construction that the statute does not bar the payment of the benefits since it prohibits only the payment of "wages," not "fringe benefits" like those at issue here.

Since it is not the question before us, we need not decide whether the statute bars enforcement of the contract or whether the benefits sought are "wages" under G.L. Chapter 152, Section 69. The only issue before the Commission is whether the conduct of the City in terms of its pattern of turning on and off the disputed benefits and forcing the Union into repeated arbitrations of the same controversy constitutes abuse of the grievance-arbitration mechanism in violation of Section

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[2]Section 69 provides in pertinent part that:

No cash salary or wages shall be paid by the commonwealth or any such county, city, town or district to any person for any period for which weekly total incapacity compensation under this chapter is payable, except that such salary or wages may be paid in full until any overtime or vacation which the said employee has to his credit has been used, without deduction of any compensation herein provided which may be due or become due the said employee during the period in which said employee may be totally incapacitated, and except that such salary or wages may be paid in part until any sick leave allowance which the employee has to his credit has been used, any other provisions of law notwithstanding. An employee who is entitled to any sick leave allowance may take such of his sick leave allowance payment as, when added to the amount of any disability compensation herein provided will result in the payment to him of his full salary or wages.

10(a)(5) of the Law. We conclude that it does. We note that the City did not raise the statutory bar issue before either arbitrator, nor did it seek to stay the arbitration proceedings or appeal the arbitral awards under G.L. Chapter 150C. It has not even sought a declaratory judgment from an appropriate forum on the Chapter 150, Section 69 issue. Finally, it apparently did not perceive the statute to be a bar to the settlement of the grievance of employee Beaton in August of 1981, less than one month before the defense was raised at the hearing before the Commission. Under these circumstances the City may not avoid its obligation to abide by the parties' grievance-arbitration process in good faith by raising the dubious claim that it is the "slave of duty" to the prohibitions of Section 69 of Chapter 152. See Town of Burlington v. Labor Relations Commission, 1981 Mass. App. Ct. Adv. Sh. 1292.

As remedy for the City's prohibited conduct the Union asks that the Commission order the City to "make whole" employees denied benefits under the contract in addition to the standard cease and desist order. The Commission must decline to issue such an order in light of the Union's failure to show that there remain employees who have not received the disputed benefits. Although the Union referred to injured "employees" in its charge and at the hearing, the only evidence of an employee actually being denied benefits concerned the case of employee Beaton, whose grievance was settled in August. A "make whole" order is inappropriate and uncalled for where the charging party has failed to prove that there exist injuries to be remedied.

Conclusion

Based upon the foregoing, we conclude that the City of Lynn has refused to bargain in good faith by refusing to honor successive arbitration awards on the same subject matter and otherwise frustrating the grievance-arbitration procedure in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Order

WHEREFORE, pursuant to the Authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the City of Lynn shall:

1. Cease and desist from:

   a) Refusing to bargain in good faith by failing to comply with the arbitral awards of Antonio English and John Teele, Case Nos. 1139-0809-76, 1139-0810-76 and 1139-0498-79, respectively.

   b) In any like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under G.L. Chapter 150E.

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

a) Post in conspicuous places where employees represented by the Union usually congregate, or notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

b) Notify the Commission within ten (10) days of the service 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

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

Following a hearing, the Massachusetts Labor Relations Commission has determined that the City of Lynn has violated Massachusetts General Laws, Chapter 150E, by refusing to comply with arbitral awards concerning the eligibility of certain employees receiving workmen's compensation for benefits under the collective bargaining agreement.

WE WILL NOT bargain in bad faith by refusing to comply with arbitral awards on this subject or otherwise frustrate the grievance-arbitration procedure.

WE WILL NOT interfere with, restrain or otherwise coerce employees in the exercise of rights guaranteed by G.L. Chapter 150E

MAYOR, CITY OF LYNN