
TOWN OF AYER AND LOCAL 346, IBPO, MUP-4829 (10/26/82).

- (50 Duty to Bargain)
54.51151 use of polygraph
- (60 Prohibited Practices by Employer)
67.8 unilateral changes by employer

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

Appearances:

- Robert W. Gardner, Jr., Esq. - Representing the Town of Ayer
- Cynthia S. Denton, Esq. - Representing Local 346, International Brotherhood of Police Officers

DECISIONStatement of the Case

Local 346, International Brotherhood of Police Officers (Union) filed a charge with the Labor Relations Commission (Commission) on April 20, 1982, alleging that the Town of Ayer (Town) had engaged in prohibited practices within the meaning of Sections 10(a)(1) and (5) of General Laws Chapter 150E (the Law). Following investigation of the charge, the Commission issued a Complaint of Prohibited Practice on June 14, 1982, in which it alleged that the Town violated Sections 10(a)(5) and (1) of the Law by unilaterally implementing a requirement that certain of its employees submit to polygraph examinations.

Pursuant to notice a formal hearing was held on July 19 and 20, 1982, before Hearing Officer Robert J. Ambrogi.¹ All parties were given full and fair opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary evidence. Both parties filed post-hearing briefs.

Based upon the record as a whole, and for the reasons set forth below, we find that the Town did not violate Sections 10(a)(5) and (1) of the Law, and we therefore dismiss the Complaint.

Findings of Fact

For approximately eight months during 1979, the Ties Construction Company hired off-duty Ayer police officers to perform private details guarding its large railroad tie manufacturing site in Ayer. For their services, the officers were compensated at a rate one and one-half times their regular pay. Almost all of the fifteen police officers in Ayer performed the Ties detail at one time or another. Near the end of 1979, Ties terminated the private details.

¹Neither party contests the Commission's jurisdiction over this matter.



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On February 25, 1980, the Ayer police department received a report of breaking and entering and malicious destruction of property at Ties. Upon his arrival, investigating officer Stanley D. Randall found that sometime between the close of business on February 23 and the opening of business on February 25, Ties had been broken into and extensively ransacked. Damage estimates ranged from \$25,000 to \$45,000. Among the evidence retrieved by Randall was an unidentified buck knife. The department began an extensive investigation of the crime, but for some time was unable to identify any suspects.

Early in the morning on April 27, 1981, officers Edward Gintner and Leon J. Smith were sitting in a cruiser monitoring for traffic violators. As they were conversing to pass the time, Smith confessed to Gintner that he and other Ayer police officers had once been involved in a criminal offense. Gintner responded by telling Smith that he and three other Ayer police officers--Sergeant James C. Lenney and Officers Domenic A. Pugh and William L. Adamson, Jr.--had "done Ties." Gintner testified that he said this to Smith jokingly. Smith, however, testified that as Gintner said this, he seemed nervous and sincere, and that his eyes were watering. According to Smith, Gintner told him that on the night of the Ties incident, Gintner was assigned to patrol the area of town in which Ties was located. Gintner met Lenney, Pugh and Adamson, who were all off-duty, at the police station, and together they decided to go to Ties and retaliate against it for its termination of the private details. Gintner drove the other three to Ties, dropped them off, and later returned to pick them up. Smith testified that Gintner told him that as they left, Adamson, Jr. turned to him, stuck his index finger into his chest, and said, "If you say anything, I'll kill you."

The next day, Smith was on duty with Randall. He told Randall that he knew who had done Ties. He said that it was someone in the police department, but he made Randall guess who. Randall, Smith said, easily picked three of them, but had trouble guessing Gintner.

About a week later, Randall told Smith that he had better tell Gintner to either talk to someone about what he knew or prepare an alibi. Smith went to Gintner's house, and relayed Randall's message to him. Gintner told Smith to keep his mouth shut about Ties. Smith replied that if Gintner decided to talk, he should go directly to the Attorney General. In his testimony, Gintner denied that this or any subsequent conversations with Smith occurred.

On the evening of July 31, 1981, Gintner was picked up at his home by State Police Staff Sergeant Michael J. Norton and driven in an unmarked State Police cruiser to the Ayer Hospital parking lot. Norton identified himself as an agent of the Attorney General investigating the Ties incident. Norton recited to Gintner the Miranda warning, and proceeded to question him regarding his involvement in Ties. Gintner denied any involvement. At the conclusion of the interview, Norton took Gintner back to his home.

Gintner immediately telephoned the police station and told Pugh, who was on duty at the communications desk, what had happened. Lenney was contacted, and he picked up Gintner and brought him to the station. Upon arriving, Gintner,



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together with Pugh and Lenney, met with Police Chief William L. Adamson, Sr.² Gintner told them of his interview with Norton. Although all of these men had heard rumors that the Attorney General was investigating the Ties vandalism, this incident was their first confirmation of the investigation.³

The next day, August 1, Gintner and Smith were again on duty together. Gintner told Smith about his interview with Norton, and he asked him whether he had talked to the Attorney General. Smith said that he had, and that he had told the Attorney General he was willing to cooperate 100%. Again, Gintner denies this conversation.

On August 2, Smith was on duty in the police station when Lenney came in accompanied by Officer McDonald. Lenney asked McDonald to stay and be a witness to what was to follow. He then began asking Smith a series of questions about the Attorney General's investigation, including questions regarding who had initiated the investigation. Lenney concluded by asserting that the accusations against him, Gintner, Pugh and Adamson, Jr. were all lies. That evening, Lenney again encountered Smith. He told Smith he had just come from Chief Adamson's house and that he and the others had decided to take a polygraph examination in order to clear themselves.

Around this time, Chief Adamson took Sergeant Harris for a ride in a cruiser, during which the Chief asked Harris whether he was the one who had initiated the Attorney General's investigation. Harris confirmed that he was.

Sometime during the first two weeks of August, Chief Adamson contacted Sergeant Norton at the Attorney General's office. Adamson was irate about not having been notified of the investigation. He said that he would like to find out more about the investigation and assist in any way he could. As a result, Adamson met on August 18, 1981 with Norton, Assistant Attorney General John Pappalardo and State Police Captain Peter Agnes at the Attorney General's office in Boston. Adamson began by questioning why he had not been notified of the investigation. He was told that a primary reason was that his son was one of the suspects. The parties went on to discuss the investigation in great detail. Adamson made clear that he did not believe Gintner, Lenney, Pugh and Adamson, Jr., were guilty. Toward

²Chief Adamson is the father of Adamson, Jr. Adamson, Jr. resigned from the police department effective July 18, 1981.

³The Attorney General began investigating the Ties vandalism sometime in July, 1981, after receiving information that Gintner, Lenney, Pugh and Adamson, Jr. were responsible for the vandalism. Prior to July 31, the Attorney General had interviewed various residents of Ayer and Ayer police officers, including Smith, Randall and Sergeant James Harris. On July 28, Smith submitted a written report to the Attorney General regarding Ties. Chief Adamson testified that later in the investigation, the Attorney General confirmed rumors that its investigation had been initiated in response to reports received from Smith, Randall and Harris. Smith denied initiating contact with the Attorney General. He said the Attorney General came first to him.



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the end of the meeting, it was suggested that the suspects take a polygraph examination. Chief Adamson testified that the Attorney General suggested that he go back and suggest to Lenney, Pugh, Gintner and Adamson, Jr. that they take a polygraph. Norton testified that it was the chief who suggested that the four men were willing to take a polygraph with the proviso that their accusers also take one.⁴

Upon his return to Ayer, Adamson summoned to his office Gintner, Lenney, Pugh and Adamson, Jr. He told them that the Attorney General suggested they take a polygraph exam. All four declined. Lenney asked Chief Adamson whether he would order them to submit to an exam. Adamson promised he would not. Chief Adamson telephoned Captain Agnes the next morning and informed him of the four men's declinations.

By this time, the accusations against Gintner, Lenney, Pugh and Adamson, Jr. and the investigation by the Attorney General had become public knowledge, with predictable effect. The police department had become fragmented and factionalized between the accusers and the accused. One officer testified that although everyone was doing their job, there were hard feelings among people and "there weren't handshakes between shifts."⁵ Outside the department, the people of this small town were concerned. Local newspapers covered the investigation extensively. Townspeople questioned the Selectmen relentlessly. Chief Adamson, because of his relation to one of the suspects, had removed himself from the investigation but, nevertheless, the press and the townspeople were questioning any decision he made.

Several incidents fueled the scandal. On August 27, 1981, two of the accusers, Smith and Randall, took a polygraph examination. Both passed. Shortly after, Chief Adamson disciplined Randall for reasons not explained by the evidence. Early in October, the Selectmen held a hearing on Randall's discipline. Prior to the hearing, the local media accused Adamson of disciplining Randall only to discredit him. Over 400 vocal and largely pro-Randall residents attended the hearing, which one selectmen described as a "mob-scene." One individual wielding a sledge hammer had to be restrained. Not long after this meeting, criminal rape charges were lodged against Randall. The charges were subsequently dropped; however, it was discovered that the alleged rape victim was a friend of Lenney.

All of this led Chief Adamson to believe he was in a no-win situation that prevented him from serving effectively as chief. Therefore, around the middle of October, Adamson resigned, explaining to the Selectmen that he believed it would be in the best interests of the Town if someone else tried to settle the issues surrounding Ties.

⁴Because resolution of this factual dispute is immaterial to this case, we decline to do so.

⁵Factionalization within the department preceded the Ties incident by about ten years. The two dominant factions actually had formed that many years earlier over a Civil Service dispute. According to Chief Adamson, the Attorney General investigation merely fueled this longstanding feud. Gintner, Harris and Smith were not with the department at the time of the Civil Service Dispute.



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The Selectmen responded at first by asking Town Meeting to appropriate the funds to hire an independent prosecutor to investigate Ties. Town Meeting denied the request, however, and the search for a new police chief was instituted. In mid-February, 1982, Phillip Connors was appointed chief.

Shortly after his appointment, Connors, together with the Selectmen, decided that the police department would no longer involve itself in the criminal investigation of the Ties vandalism so as not to interfere with the investigation by the Attorney General. Nevertheless, Connors continued with an internal investigation of the matter. He did so because he believed that the entire Ties matter hampered the effectiveness of the department. Factionalization in the department continued, and a great deal of time was spent discussing Ties rather than other crimes. The matter had spawned public distrust of the police department. Connors testified that townspeople had told him that they would call the department only when certain officers were on duty. Further, townspeople were wary to leave notice with the department that they were going on vacation and leaving their homes.

On April 1, 1982, Lenney, Pugh and Adamson, Jr. appeared at the Middlesex Superior Court in response to a subpoena issued by the Grand Jury investigating the Ties vandalism. Outside the Grand Jury room, Assistant Attorney General Thomas Norton and State Police Trooper Francis M. O'Brien met privately with each of the three men, beginning with Lenney. Previously, an attorney who has been representing the three men entered into an agreement with Assistant Attorney General Pappalardo which provided that because each of the three planned to exercise their Fifth Amendment privilege to remain silent, they would not be called to testify before the Grand Jury. Now, AAG Norton asked Lenney if he would waive that agreement. Lenney said he would not. Norton then asked Lenney whether he would invoke the Fifth Amendment if called before the Grand Jury. Lenney said he would. Norton concluded that Lenney would not be called before the Grand Jury that day, but might be subpoenaed at some future date. Almost identical conversations followed between Norton and Pugh, and Norton and Adamson, Jr.

Also on April 1, Connors telephoned the Attorney General's office. He informed them that he was considering disciplining Gintner, Lenney and Pugh, and he asked whether that would interfere with the Attorney General's investigation. He was told it would not. Around that time, he decided to order the three suspects to take a polygraph examination in order to provide him with additional information to be used in his disciplinary investigation. He believed that the examination was necessary in light of the continuing factionalization within the department and the fact that members of one of the two primary factions had already taken polygraph examinations and passed.⁶

On Friday, April 9, 1982, Connors ordered Gintner to take a polygraph examination which he had scheduled to be given in Boston on April 14. Connors told

⁶ Connors' suspicions were apparently further aroused when, about a month after he came on as chief, he searched for the buck knife taken into evidence at the scene of the Ties vandalism. The knife was nowhere to be found.



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Gintner that the results would not be used against him criminally, but that if he failed to take the examination, the chief would recommend discipline, including dismissal. Gintner asked for a postponement of the examination so that he could have time to consult with a lawyer. Connors denied the request, explaining that it was not a question of whether Gintner wanted to take it or not.

Soon after, Gintner called Lenney in the latter's capacity as president of the Union local and told him of Connor's order. On the following Monday or Tuesday, Gintner, Lenney and Pugh traveled to the Union office in Boston and spent several hours meeting with the Union attorneys. The attorneys advised them to request more time for further legal consultation. On their return, they did so, but Connors refused their request. Also, Gintner attempted over the weekend to contact his private attorney, but because it was Easter weekend, he was unable to do so until late Tuesday afternoon. Gintner's private attorney likewise advised him to request more time. Again, he was refused.

On April 14, the date scheduled for the polygraph, Gintner refused to go to Boston to take the examination. Because of this, Connors immediately suspended Gintner for five days and wrote a letter to the Selectmen recommending that they dismiss Gintner. Connors stated in his letter that if the Selectmen refused to dismiss Gintner, they would destroy his ability to fully investigate the Ties matter.⁷

On the same day, April 14, Connors ordered Lenney and Pugh to take polygraph examinations. Lenney's examination was scheduled for April 20, and Pugh's for April 21.

The Selectmen held a hearing on Gintner's suspension on April 16. Just minutes before the hearing began, Cynthia S. Denton, counsel for the Union, appeared and delivered to the Selectmen a letter which stated in part:

Consistent with its right to negotiate over terms and conditions of employment as set forth in Mass. Gen. Laws Ch. 150E the Union hereby demands that the Town agree to meet and bargain in good faith regarding the conditions for, and use of, polygraph exams for employees of the Police Department and to place Officer Gintner on active duty status pending the outcome of said negotiations. Your attention is directed to a decision of the National Labor Relations Board in Medi-center Mid-South Hospital, 90 LRRM 1576 (1975), which establishes as a mandatory subject of bargaining any requirement that an employee submit to a polygraph examination as a condition of continued employment.

⁷Connors described the situation in his testimony as a "showdown" regarding whether the new chief would be strong enough to deal with the situation surrounding Ties and whether the Selectmen would back him.

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The Selectmen denied the request to bargain. Selectman Thomas S. Casey, Jr. testified that he voted to do so because he felt the request was out of order at that particular time since the opportunity to negotiate had been available all year. He believed that the disciplinary action at hand was paramount to negotiations. Selectman Murray W. Clark, Jr. also voted to deny the request because it was poorly timed. He also believed that the matter seemed impossible to negotiate and that the parties would be unable to reach any agreement.

Gintner's hearing was held. At its conclusion, the Selectmen voted to indefinitely suspend him.

On April 20, Lenney was taken in a cruiser to Boston for his examination. The examiner asked Lenney to sign a waiver releasing the examiner and his company from any claims which might arise from the examination and allowing the results of the examination to be released to Chief Connors. Lenney said he would sign a paper releasing the results to Connors, but he would not sign the release of the examiner and his company. The examiner told Lenney that he would not administer the test unless Lenney signed the release. Lenney asked him several times to administer the test, but he refused unless Lenney signed. The examiner again asked Lenney to sign it, saying it was just a piece of paper that did not mean much. Lenney replied that if it did not mean much, why did he not just give him the test. The examiner told Lenney to leave.

When Lenney reported what had happened to Connors, Connors suspended Lenney for five days. Connors immediately requested the Selectmen to dismiss Lenney for failing to obey his order to take the exam and also for failing to testify before the Grand Jury.

On the next day, a similar scenario took place with respect to Pugh's examination. Connors likewise suspended Pugh and requested the Selectmen to dismiss him because of his failure to obey a direct order and his failure to testify before the Grand Jury.

On April 23, the Selectmen held hearings on the requested dismissals of Lenney and Pugh. The Selectmen voted to dismiss both men for their refusal to obey Connors' orders to take polygraph examinations and for their refusal to testify before the Grand Jury. Subsequently, on May 4, the Selectmen voted to dismiss Gintner for his refusal to obey Connors' order to take the polygraph examination.

Never before in Ayer had a police officer been disciplined or discharged for refusing to submit to a polygraph examination. Once, approximately six and one-half years ago, former police Chief Elmer Whitehead ordered a Sergeant Downing to take a polygraph examination. Downing was driven to Boston for the examination but, upon his arrival, refused to take it. Downing received no discipline for his refusal.

Opinion

At issue is whether the Town violated Sections 10(a)(5) and (1) of the Law by ordering Gintner, Lenney and Pugh to submit to polygraph examinations without



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first bargaining with their exclusive representative.

As a general rule, an employer violates Sections 10(a)(5) and (1) of the Law if it implements a change in a pre-existing condition of employment which affects a mandatory subject of bargaining without first providing the exclusive representative of its employees with an opportunity to bargain over the proposed change. Boston School Committee, 3 MLC 1603 (1977). The Town's order, under threat of discipline, that Gintner, Lenney and Pugh submit to polygraph examinations clearly changed the pre-existing condition of employment. The Town did not bargain over the change with the Union. Thus, the only question before us is whether a requirement that employees submit to a polygraph examination is a mandatory subject of bargaining.⁸ It is a question that we have not before had to decide.

In Town of Danvers, 3 MLC 1559 (1977), we held that an employer's obligation to bargain is mandatory only with respect to those subjects which directly affect wages, hours, standards of productivity and performance, and any other terms and conditions of employment. An employer need not, however, "submit to the negotiating process those core governmental decisions which have only a marginal impact on employees' terms and conditions of employment." 3 MLC at 1571. In Boston School Committee, 3 MLC 1603 (1977), we indicated that we will apply a balancing test to determine whether a subject is a condition of employment and therefore mandatorily bargainable or is a matter reserved to the discretion of the governmental decision-maker. It is such a test that we use here.

In deciding the issue before us, we must take into consideration G.L. c.140, Section 19B, which provides:

Any employer who subjects any person employed by him, or any person applying for employment, including any person applying for employment as a police officer, to a lie detector test, or requests, directly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations. (emphasis added).

In Baker v. City of Lawrence, ___ Mass. ___, 409 N.E. 2d 710 (1979), the Supreme Judicial Court interpreted Section 19B. Baker involved facts closely paralleling those at bar. There, the City ordered police officers suspected of larceny to submit to polygraph examinations as part of an investigation which was described

⁸The Town also argues that the Union waived by inaction its right to bargain. We find no merit to this argument. The Town first ordered one of its employees to submit to a polygraph examination on April 9, 1982. Exactly one week later, the Union demanded negotiations. On these facts, there is no waiver by inaction.

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as both "departmental and criminal." The City told the officers that "while the results of said test would not be used in a criminal prosecution the said results could be used in a disciplinary hearing." 409 N.E. 2d at 712. The Court affirmed the lower court's denial of the injunctive relief sought by the officers. Baker and the instant case are distinguishable only insofar as the police department in Baker was conducting both departmental and criminal investigations while the police department in Ayer was conducting only a departmental investigation.

The Court construed the final sentence of Section 19B as follows:

The situation plainly within the exception is one where a law enforcement agency is conducting an investigation into a crime alleged to have been committed by a person in connection with the duties of his employment, and the agency is permitted, i.e., not forbidden, to administer a polygraph test to that employee. If, then, the employee refuses or indicates hesitance to submit to the test at the agency's request, the employer (relieved of the prohibition of the first sentence of Section 19B) may request that the employee do so, with implied job sanctions if the employee finally declines.

409 N.E. 2d at 713. The Court elaborated that for a polygraph examination to be permitted under the second sentence of Section 19B,

[i]t is enough that there must be an alleged crime in the picture (not, for example, mere violation of a departmental regulation), and that a requirement of good faith on the side of the department is surely to be implied.

409 N.E. 2d at 715. Applying the Court's interpretation, it is clear that the polygraph tests at issue herein would be permitted under Section 19B, since there is "an alleged crime in the picture" and not a "mere violation of a departmental regulation."

The New York Public Employee Relations Board has decided a number of cases on polygraph examinations and the scope of negotiations. In Buffalo Police Benevolent Association v. Helsby, 9 NY PERB ¶7020 (N.Y. Supreme Ct. 1976), the union appealed a decision of the New York Public Employee Relations Board (PERB) that a prohibition of polygraph tests during investigations of departmental misconduct was a nonmandatory subject of bargaining. The Court noted that the prohibition went only to investigations of alleged departmental misconduct and not to investigations of alleged violations of law. It therefore saw no reason to vary from the holding in Medicenter, and it reversed the PERB. Since then, the PERB has found polygraph examinations mandatorily bargainable only when they are to be used for purposes investigating departmental employee misconduct. The PERB has found to be nonmandatory bargaining proposals which would preclude the use of polygraph tests in investigating possible criminal activity of police officers. The latter, the PERB holds, is beyond the scope of the employment relationship. See, Police Benevolent Assn. of the City of White Plains, Inc., 12 NY PERB ¶13046 (1979); Salamanca Police Unit, 12 NY PERB ¶4053 (H.O. 1979); The Troy Uniformed



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Firefighters Association, Local 2304, IAFF, 10 NY PERB 3015 (1977).

The National Labor Relations Board has held that a private employer's use of a polygraph as a means of investigating employee misconduct is a mandatory subject of bargaining. Medicenter, Mid-South Hospital, 221 NLRB 670 (1975). The Administrative Law Judge, whose opinion the Board adopted, wrote:

The institution of a polygraph test is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and does not impinge only indirectly upon employment security. It is, rather, a change in an important facet of the workaday life of employees, a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary "core of entrepreneurial control."

221 NLRB at 676.

Medicenter may be distinguished from this case, however, on a number of crucial points. Unlike Massachusetts, the state of Tennessee did not have a statute generally prohibiting the use of polygraph examination. The employer in that case was free to use polygraph examinations in a wide variety of situations. The employer, in fact, wanted to administer polygraph examinations to all hospital employees in an effort to deal with a vandalism problem. Since this case does not present the issues of general system-wide use that were involved in the Medicenter case, we do not find the rationale of Medicenter to be controlling.

We find the reasoning of the Court in Baker applicable to the issues at hand. The Court noted that in situations where an employee is suspected of criminal activity,

[t]he Legislature, although generally averse to tests forced by employers upon their employees,...recognized an evident interest of the employer in applying some pressure to assist an investigation leading to exoneration of the employee or the opposite.

409 N.E. 2d at 714. This legislative intent is even more compelling when the employees in question are police officers.

The public employer has a greater responsibility to all citizens of the community than its counterpart in the private sector. The government, as employer, must be responsible not merely to narrow corporate interests but to the overall public interest.

Town of Danvers, *supra* at 1571. We agree with the New York PERB that a police department's investigation of police officers employed by it who are suspected of a criminal activity is a matter beyond the scope of the employment relationship and thus not subject to mandatory bargaining.



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We hold that a police department need not bargain with the exclusive representative of its employees prior to requiring employees suspected of criminal activity to submit to a polygraph examination. As in Baker, our holding is limited to situations where the investigation is of an alleged crime and not simple departmental misconduct. Also as in Baker, we will presume that the public employer acts in good faith in administering the test.

Conclusion

Because the Town's investigation of Gintner, Lenney and Pubh related to alleged criminal activity beyond the scope of the employment relationship, the Town did not violate Sections 10(a)(5) and (1) of the Law by requiring the three officers to submit to a polygraph examination without first bargaining with the Union. The Complaint is DISMISSED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman

GARY D. ALTMAN, Commissioner

