NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 88-7299

NOTICE SENT 3/21/90
C.M.
G.F.
S.K.

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 254

vs.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY, et al.[1/]

MEMORANDUM AND ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BACKGROUND

On December 5, 1988, the defendants, Massachusetts Bay Transportation Authority (MBTA) and Fairview Company, Inc. (Fairview), executed a contract to furnish janitorial services at MBTA commuter facilities. The plaintiff, Service Employees International Union, Local 254 (Union), filed this suit claiming the contract violated both G.L. c. 149, § 27H and a letter agreement between the MBTA and the Union dated January 23, 1985. The Union seeks declaratory and injunctive relief preventing the MBTA from contracting in derogation of G.L. c. 149, § 27H.

MBTA and Fairview move for summary judgment. The motion is based upon the following: (A) G.L. c. 149, § 27H does not apply to the MBTA; (B) plaintiff has not exhausted its administrative remedy; (C) the Union has no standing to raise a claim either under

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[1/] Fairview Company, Inc.

G.L. c. 149, § 27H or as representatives of Fairview Employees who are not Union members; and (D) the letter agreement states that the MBTA has the power to determine a prevailing wage.

DISCUSSION

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c). Once the moving party meets the burden of establishing that there is no issue for trial, the opposing party must respond and allege specific facts which show that there is a genuine triable issue or summary judgment will be entered against him. Davidson v. Commonwealth, 8 Mass. App. Ct. 541, 545 (1979). In ruling on the motion, the court must view the evidence in the light most favorable to the party opposing the motion. Id.

A. G.L. c. 149, § 27H

The MBTA was created by statute as a body politic and corporate and a political subdivision of the Commonwealth. G.L. c. 161A, § 2.[2/] The Legislature conferred upon it the power to contract (§ 3); to develop, finance and operate the mass transportation facilities and equipment (§ 5); to assess and receive payment for the services rendered to the participating cities and towns (§ 11); to borrow from the Commonwealth to meet

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[2/] The MBTA is empowered to hold property, sue and be sued and shall be liable for its debts and obligations.

existing obligations when there are insufficient funds (§ 13).

The Union claims that notwithstanding the provisions of G.L. c. 161A, § 1 et seq., MBTA is bound by the provisions of G.L. c. 149, § 27H. That section provides:

> "No agreement or contract providing for the cleaning and maintenance of public buildings or space rented by the commonwealth, shall be entered into or given by the commonwealth unless said contract or agreement contains a stipulation requiring prescribed rates of wages. . ." (emphasis supplied)

The statutory language is clear and unambiguous. It pertains only to contracts entered by the Commonwealth. In this context, the Commonwealth consists of its agencies and departments.[3/] G.L. c. 6A, § 1. The Legislature did not create the MBTA as a state agency. Not only does the enabling legislation of c. 161A demonstrate this fact, but the language of G.L. c. 6A, § 19 clearly segregate state agencies from the MBTA.[4/] The MBTA is "independent from the Commonwealth with a separate corporate existence." Okongwu v. Stephens, 396 Mass. 724, 731 (1986), citing Kargman v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 51, 56-57, 57 n.7 (1984).

Where there is no express provision for political subdivisions in the plain language of the statute, this court will not extend the statute to cover the MBTA. Summary judgment must be ALLOWED.

[3/] "State Agency" is defined as any department, office, commission, committee, council, board, division, bureau, institution, officer or other agency.

[4/] After identifying the state agencies within the executive office of transportation and construction, G.L. c. 6A, § 19 adds the sentence: "The MBTA . . . shall also be within the executive office of transportation and construction."

B. Exhaustion of Administrative Remedy

On December 28, 1988, the Union notified the Commissioner of Labor and Industries of the alleged violation of the statute. The MBTA and Fairview assert that the complaint must be dismissed because without a determination by the Commission, the Union has failed to exhaust its administrative remedies. The statute itself provides that the department shall enforce the provisions of the statute with all the necessary powers. G.L. c. 149, § 2. There is no other enforcement power stated in G.L. c. 149, § 27H or under the sub-heading of Public Employment G.L. c. 149, §§ 25-44, which applies to § 27H. Without a statutory directive to the contrary, "administrative remedies should be exhausted before resort to the court." Gordon v. Hardware Mutual Insurance Company, 361 Mass. 582, 587-88 (1972).

For these reasons, the defendants' motion for summary judgment for failure to exhaust its administrative remedies is ALLOWED.

C. Standing of the Union

The MBTA and Fairview assert that the Union is not a proper party to this suit; they have no standing either under G.L. c. 149 or as representatives of the Fairview employees.

General Laws c. 149, § 27H does not apply to the contract. Therefore, the defense of lack of standing is inapplicable. Similarly, the defendants assert that the Union does not have standing because it: (1) does not represent any Fairview employees; and (2) is not a party to the contract. Saunders v. Saunders, 154 Mass. 337 (1891). Based on the foregoing arguments and undisputed

facts, the Union does not have standing.

However, the letter agreement (to be discussed in the following section) of January 23, 1985 has as its intended beneficiaries, not only the Union, but also the employees of any company which contracts for cleaning services with the MBTA. The Fairview contract may be a violation of this letter agreement and may constitute a breach to the intended beneficiaries, Fairview employees and the Union. See generally, Rae v. Air Speed, Inc., 386 Mass. 187 (1982). Therefore, the plaintiff, Union, has standing to assert a violation of the letter agreement.

D. **The Letter Agreement**

The MBTA and Fairview claim that the Union by signing the letter agreement of January 23, 1985 agreed that the MBTA would establish a prevailing wage rate for all future cleaning contracts. The contract at issue (E-0491) provides in section 3.18 that "the contractor shall pay . . . no less than the prevailing level of wages . . . is currently $6.15 per hour . . . fringe benefits . . . amounts to an additional 15.0 percent of the hourly wage rate . . . [MBTA] shall determine the prevailing level of wages . . . on or about September 1 of each year."[5/]

The Union claims that the letter agreement required the MBTA to set a prevailing wage rate equal to the then existing Union rate. However, a review of the letter agreement does not support

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[5/] The request for proposals (RFP) for the cleaning contract was dated August 17, 1988. The Union's maintenance contractors agreement established a prevailing rate as of August 17, 1988 at $6.30. (Exhibit 2 Affidavit and E.W. Buffum).

the position of the Union. The agreement is devoid of any reference or requirements that the prevailing wage determined by the MBTA equal the Union rate. There is no ambiguity in the terms of the agreement. It must be construed in the ordinary and usual sense.

CONCLUSION

Based upon the foregoing, it is **ORDERED** and **ADJUDGED** that judgment be entered for the defendants, Massachusetts Bay Transportation Authority and Fairview Company, Inc., and that the complaint of the plaintiff, Service Employees International Union Local 254, be **DISMISSED** without costs.

Elizabeth Bowen Donovan
Justice of the Superior Court

Dated: March 13, 1990