COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of	*	
COMMONWEALTH OF MASSACHUSETTS	*	Case No. SUP-04-5054
and	*	Date issued: December 10, 2008
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

Michele Heffernan, Esq.	--	Representing Commonwealth of Massachusetts
Richard Waring, Esq.	--	Representing National Association of Government Employees

DECISION[1]

Statement of the Case

[1] Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's (Commission) regulations in effect prior to November 15, 2007, this case was designated as one in which the Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is body within the Division charged with deciding adjudicatory matters. References to the Board include the Commission.

The National Association of Government Employees (Union or NAGE) filed a charge of prohibited practice with the Board on January 22, 2004, alleging that the Commonwealth of Massachusetts (Commonwealth or Employer) had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and 10(a)(1) of M.G.L. c. 150E (the Law). Following an investigation, the Board issued a complaint of prohibited practice on June 3, 2004. The complaint alleged that the Commonwealth had failed to bargain in good faith by unilaterally transferring bargaining unit work to non-unit personnel in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commonwealth filed an answer on June 10, 2004.

On August 27, 2004, the Commonwealth filed a request to clarify the complaint. On September 2, 2004, the Union filed a response to the Commonwealth's request for clarification. On October 6, 2004, the Board denied the Commonwealth's request for clarification.

On October 25, 2004, the parties filed stipulations of fact in lieu of an evidentiary hearing. The Commonwealth and the Union respectively filed their briefs on December 3 and December 6, 2004.

Stipulations of Fact[2]

1. The Commonwealth, acting through the Commissioner of Administration and Finance, is an employer within the meaning of Section 1 of the Law.
2. NAGE is an employee organization with[in] the meaning of Section 1 of the Law.
3. NAGE is the exclusive collective bargaining representative for statewide bargaining unit six.

[2] The Board's jurisdiction is uncontested.

4. The Commonwealth and the Union are part[ies] to a collective bargaining agreement[.]

5. Article 1, "Recognition" reads:

> **Section 1.1**
>
> The Commonwealth recognizes the Union as the exclusive collective bargaining representative [o]f employees of the Commonwealth in job titles in Unit 6, as certified by the Labor Relations Commission in its Certification of Representative dated December 7, 1984 (Case No. SCR-2177) with subsequent amendments.
>
> In order to establish and maintain clear and concise employee/labor relations policy, the parties agree that the Human Resources Division, on behalf of the Secretary for Administration and Finance, is solely responsible for the development and implementation of all employee relations policies. Only the Human Resources Division has the authority to make commitments or agreements with respect to wages, hours, standards of productivity, performance, and any other terms and conditions of employment with NAGE as the exclusive union representative for Bargaining Unit 6.
>
> **Section 1.2**
>
> A. As used in this contract [the] term "employee" or "employees" shall include:
>
> Full time and regular part-time persons employed by the Commonwealth in job titles in the bargaining unit included in Section 1 above, and seasonal employees whose employment is for a period of (90) consecutive days or more.
>
> B. Exclusion:
>
> 1. all managerial and confidential employees;
>
> 2. all employees employed in short term jobs established by special federal or state programs such as summer jobs for underprivileged youths; and
>
> 3. all intermittent employees (except as defined by HRD Regulations); and

4. all "03" or "07" consultants in accordance with past practice and the understanding of the parties.

C. A full-time employee is an employee who normally works a full work week and whose employment is expected to continue for twelve (12) months or more, or an employee who normally works a full work week and has been employed for twelve (12) consecutive months or more.

A regular part-time employee is defined as an employee who is expected to work fifty (50%) or more of the hours in a work week of a regular full-time employee in the same title.

An intermittent employee is defined as an employee who is neither full-time nor a regular part-time employee a[n]d whose position has been designated as an intermittent position by his/her Appointing Authority.

6. Article 14, "Promotions" reads in pertinent part:

All vacancies, excluding those reasonably anticipated to be for less than one (1) year, shall be posted but will not limit the Employer from hiring from outside the Department/Agency after all applicants within the Appointing Authority have been considered.

7. Article 15, "Contracting Out" reads:

Section 15.1

There shall be a Special Labor Management Committee to advise the Secretary of A & F on contracting out of personnel services. The Committee shall consist of two persons designated by the National President of NAGE and two persons designated by the Personnel Administrator. Said Committee shall develop and recommend to the Secretary of A & F procedures and criteria governing the purchase of contracted services by the Commonwealth where such services are of a type traditionally performed by bargaining unit employees.

Section 15.2

In the event that the NAGE desires to discuss the purchase of services which are the type being provided by employees within a Department/Agency covered by this agreement, the National President of NAGE shall request in writing a meeting of the Special Labor Management Committee established in Section 1.

The Committee shall examine both the cost effectiveness of such contracts and their impact on the career development of NAGE members. In the event that the parties fail to reach an agreement in the Committee, the parties agree to submit the matter to an expedited fact-finding process.

Section 15.3

When a Department/Agency contracts out work which will result in the layoff of an employee who performs the function that is contracted out, the Union shall be notified and the Employer and the Union shall discuss the availability of similar positions within the Department/Agency for which [the laid-off employee is determined to be qualified and the availability of any training programs which] may be applicable to the employee. In reviewing these placement possibilities, every effort will be made to seek matches of worker skills and qualifications with available, comparable positions.

Section 15.4

In the case of 03 contracts with individuals, the Committee shall review them to determine whether the work to be performed is long term in nature, and whether it should more appropriately be performed by regular employees provided nothing in this Article shall limit the authority of the Secretary of A & F to promulgate rules and regulations covering contracting out of services pursuant to Chapter 29, Section 29A.

8. The Office of the Chief Medical Examiner (hereinafter OCME) is an agency of the Commonwealth of Massachusetts organized pursuant to M.G.L. c. 38, § 1 *et seq.* The OCME is responsible for the medicolegal investigations for the Commonwealth of Massachusetts.

9. For a period of time prior to August 9, 2003, Joseph Bryson [(Bryson)] was employed by the OCME as an Administrative Assistant I and was a member of NAGE in bargaining unit six[.] As an Administrative Assistant I, Bryson performed receptionist duties at the OCME. His duties included, but were not limited to, answering the telephone and greeting visitors at OCME's Boston office.

10. The Class Specification [for the Administrative Assistant job series] reads in pertinent part:

> II. Summary of Series
>
> Incumbents of positions in this series monitor assigned unit activities; confer with agency staff; maintain liaison with others; review and analyze data concerning assigned unit activities; prepare reports; respond to inquiries; compile data; and perform work as required.
>
> The basic purpose of this work is to provide administrative support in connection with assigned unit activities such as office services, records control, agency personnel services, etc.
>
> XI. Qualifications Acquired on the Job At All Levels In Series
>
> 2. Knowledge of the proper telephone procedures for making and receiving telephone calls.

11. In or about July 2003, the OCME began reorganization, which resulted in the layoff of several employees. Bryson received a layoff notice from OCME. The notice stated that his last day of work would be August 8, 2003[.] The letter read in pertinent part, "I regret to inform you that the position you currently fill will not be funded and will be eliminated after August 8, 2003 and your services must be terminated at that time."

12. At all times relevant to this case, Theresa McGoldrick [(McGoldrick)] has been president of NAGE Local R1-207, which represents members of bargaining unit six employed at OCME. Her duties include representing Local R1-207 in negotiations with the Commonwealth over terms and conditions of employment, including layoffs and transfer of bargaining unit work.

13. In August 2003, Theresa McGoldrick met with officials of the OCME to discuss the layoffs and bumping issues. Mr. Bryson was the only employee in the agency in the Administrative Assistant I title and had no bumping rights.

14. Because it was not anticipated at that time, no discussion about the use of a temporary employee took place at the August 2003 meeting.

15. Bryson was in fact laid off as of August 8, 2003[.]

16. In the fall of 2003, while the reorganization was being completed, the OCME contracted with the employment agency "Resource Connection" for a temp to answer the phone and direct calls. A temp of this nature is considered an "07" contractor; the employer/employee relationship lies with the employment agency. The temporary employee was not a member of the bargaining unit described in paragraph three of this stipulation. The temp began in September of 2003 and was terminated in August 2004.

17. The Resource Connection is a vendor listed on the statewide contract for Temporary Help Services (ST8J461).

18. The OCME paid the Resource Connection. The Resource Connection paid the temp.

19. The Commonwealth did not notify Ms. McGoldrick or any other representative of NAGE that it intended to contract for the services of a temp to answer the phones.

20. Bryson has not been recalled to work at OCME or any other agency of the Commonwealth.

21. On or about March 11, 2004, Bryson filed a Complaint with the United States District Court alleging a violation of M.G.L. c. 149, § 185, the whistleblowers statute[.]

22. M.G.L. c. 149, § 185 reads:

Retaliatory Action Against Employees Prohibited; Conditions; Exceptions

(a) As used in this section the following words shall have the following meanings:

(1) "Employee", any individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(2) "Employer", the commonwealth, and its agencies or political subdivisions, including, but not limited to, cities, towns, counties and regional school districts, or any authority, commission, board or instrumentality thereof.

(3) "Public body", (A) the United States Congress, any state legislature, including the general court, or any popularly elected local government body, or any member or employee thereof; (B) any federal, state or local judiciary, or any member or employee thereof, or any grand or petit jury; (C) any federal, state or local regulatory, administrative or public agency or authority, or instrumentality thereof; (D) any federal, state or local law enforcement agency, prosecutorial office, or police or peace officers; or (E) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraphs of this subsection.

(4) "Supervisor", any individual to whom an employer has given the authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or who has been designated by the employer on the notice required under subsection (g).

(5) "Retaliatory action", the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

(b) An employer shall not take any retaliatory action against an employee because the employee does any of the following:

(1) Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or of another employer with whom the employee's employer has a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee

reasonably believes poses a risk to public health, safety or the environment;

(2) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes poses a risk to public heath, safety or the environment by the employer, or by another employer with whom the employee's employer has a business relationship; or

(3) Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment.

(c) (1) Except as provided in paragraph (2), the protection against retaliatory action provided by subsection (b) (1) shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment, to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.

(2) An employee is not required to comply with paragraph (1) if he: (A) is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer and the situation is emergency in nature; (B) reasonably fears physical harm as a result of the disclosure provided; or (C) makes the disclosure to a public body as defined in clause (B) or (D) of the definition for "public body" in subsection (a) for the purpose of providing evidence of what the employee reasonably believes to be a crime.

(d) Any employee or former employee aggrieved of a violation of this section may, within two years, institute a civil action in the superior court. Any party to said action shall be entitled to claim a jury trial. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided herein. The court may: (1) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violation of this section; (2) reinstate the employee to the same position held before the retaliatory action, or to any equivalent position; (3) reinstate full fringe benefits and seniority rights to the employee; (4) compensate the employee for three times the lost wages, benefits and other remuneration, and interest thereon; and (5) order payment by the employer of reasonable costs, and attorneys' fees.

(e) (1) Except as provided in paragraph (2), in any action brought by an employee under subjection (d), if the court finds said action was without basis in law or in fact, the court may award reasonable attorneys' fees and court costs to the employer.

(2) An employee shall not be assessed attorneys' fees under paragraph (1) if, after exercising reasonable and diligent efforts after filing a suit, the employee moves to dismiss the action against the employer, or files a notice agreeing to a voluntary dismissal, within a reasonable time after determining that the employer would not be found liable for damages.

(f) Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or regulation, or under any collective bargaining agreement or employment contract; except that the institution of a private action in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the rights and remedies available to him, or the actions of the employer, under any other contract, collective bargaining agreement, state law, rule or regulation, or under the common law.

(g) An employer shall conspicuously display notices reasonably designed to inform its employees of their protection and obligations under this section, and use other appropriate means to keep its employees so informed. Each notice posted pursuant to this subsection shall include the name of the person or persons the employer has designated to receive written notifications pursuant to subsection (c).

23. In June 2004, the OCME posted two Administrative Assistant II positions[.] These positions took over the phone answering duties. Once filled, the temp position was discontinued. An additional three Administrative Assistant II positions were filled at the same time.

Opinion

Generally, a public employer violates Section 10(a)(5) of the Law when it unilaterally transfers work performed by bargaining unit members to either an outside contractor or to other non-bargaining unit personnel without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. City of Boston, 26 MLC 144, 146 (2000), aff'd sub nom., City of

Boston v. Labor Relations Commission, 58 Mass. App. Ct. 1102, further rev. den'd, 440 Mass. 1106 (2003); Board of Regents of Higher Education, 19 MLC 1485, 1487-1488 (1992), citing, City of Quincy, 15 MLC 1239, 1240 (1988); Town of Danvers, 3 MLC 1559, 1576 (1977). To prove that an employer violated Section 10(a)(5) of the Law, a union must establish that: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of the work had an adverse impact on either individual bargaining unit members or on the bargaining unit itself; and 3) the employer did not provide the exclusive bargaining representative with prior notice and an opportunity to bargain over the decision to transfer the work. Commonwealth of Massachusetts, 27 MLC 52, 55 (2000), aff'd sub nom., Commonwealth of Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831, 833 (2004); Town of Bridgewater, 25 MLC 103, 104 (1998) and cases cited.

Here, the parties' stipulations establish all three elements of the Union's transfer of bargaining unit work claim. First, Stipulations 9 and 10 demonstrate that answering the telephone at OCME is exclusive bargaining unit work. Second, Stipulations 15 and 16 show that both Bryson and the Union suffered an adverse impact as a result of the Commonwealth's decision to contract out that unit work. In particular, Bryson lost his job, and the Union lost an Administrative Assistant I position. See, City of Gardner, 10 MLC 1218, 1220-1221 (1983) (Board found layoffs constituted adverse impact to individual unit members due to deprivation of work opportunities and to union due to denial of the opportunity to bargain about recalling the affected unit members to perform unit work). Third, the Commonwealth admits in Stipulation 19 that it did not notify McGoldrick or any other Union representative that it intended to contract for the services

of a temporary employee to answer telephones at OCME. The Commonwealth also concedes in Stipulation 14 that the parties did not negotiate over using a temporary employee at OCME during their meeting in August of 2003. Nevertheless, the Commonwealth raises several defenses to justify its actions. We turn to examine them.

Decision to Lay Off Bryson

The Commonwealth argues that the decision to lay off Bryson is a managerial prerogative that does not trigger a statutory bargaining obligation. Alternatively, the Commonwealth asserts that it satisfied any existing duty to negotiate in August of 2003, when OCME officials met with McGoldrick to discuss the layoffs and the bumping issues. The Commonwealth also points out that the lapse in time between Bryson's layoff in July of 2003 and the decision to contract out his telephone answering duties in September of 2003 demonstrates that the Commonwealth did not lay off Bryson for the purpose of contracting out his job duties.

The Commonwealth, however, misapprehends the nature of the allegation before us. The sole issue in this case is whether the Commonwealth unlawfully transferred bargaining unit work to non-unit personnel. The propriety of the decision to lay off Bryson is not under our consideration. Consequently, there is no need to discuss the Commonwealth's arguments on this point.

Calculated Displacement Analysis

The Commonwealth next contends that the Union's transfer of bargaining unit work claim must fail, because the evidence does not show a calculated displacement of that work. Although the Commonwealth concedes that it hired a temporary employee to answer OCME's phones, the Commonwealth asserts that it did not intend to remove

this work permanently from the Union's bargaining unit. The Commonwealth draws the Board's attention to the fact that the Commonwealth posted and filled two Administrative Assistant II positions at OCME in June of 2004 and filled three more Administrative Assistant II positions at the same time. The Commonwealth argues that, in addition to returning the telephone answering duties at OCME to Statewide Bargaining Unit 6, the Commonwealth has expanded the Union's bargaining unit. The Commonwealth concludes that the Board cannot find a calculated displacement of bargaining unit work under these circumstances.

The Commonwealth's focus is misplaced here. The Board only examines whether a calculated displacement of bargaining unit work has occurred when the disputed job duties are shared with non-unit employees. When bargaining unit members exclusively perform the work at issue, then it is unnecessary to perform a calculated displacement analysis. See, Commonwealth of Massachusetts, 27 MLC at 56 (on appeal of administrative law judge's (ALJ) decision, Board found ALJ had not erred by failing to perform calculated displacement analysis, because disputed job duties were not shared work). As noted above, Stipulations 9 and 10 show that answering the telephone at OCME is exclusive bargaining unit work. There is no evidence in the stipulated record demonstrating that non-unit employees historically had performed those duties too. Without that evidence, we cannot conclude that the disputed duties constitute shared work. Therefore, we find that the Commonwealth's contentions lack merit.

Waiver By Contract

The Commonwealth further argues that the Union waived its right to bargain here in Articles 1, 14, and 15 of the parties' applicable collective bargaining agreement (NAGE Agreement). The Board has long held that an employer asserting contractual waiver as an affirmative defense must show that the parties consciously considered the situation that has arisen, and that the union knowingly waived its bargaining rights. Central Berkshire Regional School Committee, 31 MLC 191, 202 (2005); Commonwealth of Massachusetts, 26 MLC 228, 231 (2000); Town of Marblehead, 12 MLC 1667, 1670 (1986). The waiver needs to be clear and unmistakable. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 569 (1983); City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 175 (1999). If the language to the contract is ambiguous, the Board will review the parties' bargaining history to determine their intent. Massachusetts Board of Regents, 15 MLC 1265, 1269 (1988). In particular, the Board must analyze whether the contract language expressly, or by necessary implication, confers upon the employer the right to make a change in a mandatory subject of bargaining without first giving the union notice and an opportunity to bargain. Id.

The Commonwealth argues that the Union waived its right in Article 1, Section 1.2(B)(4) of the NAGE Agreement to negotiate over using temporary employees to perform bargaining unit work by agreeing to exclude all "03" and "07" consultants from Statewide Bargaining Unit 6. According to the Commonwealth, the Board may infer from this contractual provision that the parties contemplated utilizing outside contractors to perform bargaining unit work. We disagree.

After reading Article 1, "Recognition", of the NAGE Agreement in its entirety, it is clear that the parties merely desired to define the scope of the Union's bargaining unit in that contractual provision and nothing more. Indeed, Article 1 of the NAGE Agreement is silent regarding transfers of bargaining unit work to non-unit personnel. Thus, we decline to make the inference suggested by the Commonwealth. See, City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. at 176 (silence on an issue, without more, does not constitute a waiver).

The Commonwealth also relies on Article 14 of the NAGE Agreement, entitled "Promotions", to demonstrate waiver by contract. The Commonwealth interprets that provision to mean that the Union waived the right to bargain over positions in existence for less than one year. Because the Commonwealth claims that it intended the temp position at OCME to exist for less than one year, the Commonwealth reasons that it had no obligation to negotiate with the Union.

We fail to understand, though, how a contract clause that solely and unambiguously pertains to promotions within the bargaining unit can be read as an unmistakable waiver of the right to negotiate over transfers of bargaining unit work. See, id. Accordingly, we conclude that the Commonwealth's reliance on Article 14 of the NAGE Agreement is unfounded.

The Commonwealth next asserts that the language in Article 15 of the NAGE Agreement shows that the parties consciously considered the issue of contracting out bargaining unit work, and that the Union knowingly waived its bargaining rights on that topic. The Commonwealth points out that Article 15 does not prohibit contracting out bargaining unit work. Rather, the Commonwealth contends that Section 15.1 of that

article establishes a Special Labor Management Committee (SLMC) to determine the procedures and criteria for doing so and also includes expedited fact-finding as a dispute resolution mechanism. The Commonwealth argues that these procedures evince the parties' intention to forego bargaining over contracting out bargaining unit work. The Commonwealth further notes that the Union failed to request, in writing, to convene the SLMC to discuss the temp at OCME contrary to Section 15.2 of Article 15. The Commonwealth contends that the Union cannot now demand to bargain to overcome its failure to follow agreed-upon contractual procedures.

In Commonwealth of Massachusetts, 21 MLC 1029 (H.O. 1994), aff'd, 26 MLC 161 (2000), the Board examined language in Article 15 of the 1990-1993 collective bargaining agreement between AFSCME, Council 93, AFL-CIO (Council 93) and the Commonwealth (AFSCME Agreement) that is virtually identical to Article 15 of the NAGE Agreement.[3] The legal issue in that case was whether the Commonwealth had

[3] Article 15 of the AFSCME Agreement states in part:

> **Section 1**
>
> There shall be a Special Labor Management Committee to advise the Secretary of A&F on contracting out of personnel services. The Committee shall consist of four persons designated by the Chairman of the Alliance and four persons designated by the Director of OER. Said Committee shall develop and recommend to the Secretary of A&F procedures and criteria governing the purchase of contracted services by the Commonwealth where such services are of a type traditionally performed by bargaining unit employees.
>
> **Section 2**
>
> In the event that the Principal(s) of the Alliance who represent(s) the affected employees, desire(s) to discuss the purchase of services which are of the type being currently being provided by employees within a department/agency covered by this Agreement, that Principal(s) shall

unlawfully transferred bargaining unit work to non-unit personnel by contracting out the dietary and housekeeping functions at the Fernald State School. 26 MLC at 161.

The ALJ found that Sections 1 and 2 of Article 15 of the AFSCME Agreement did not unambiguously permit the Commonwealth to unilaterally transfer bargaining unit work to non-unit personnel. The ALJ reasoned:

> Although the parties appear to agree that no such [special labor management] committee existed at the time of the events at issue, the provision for such a committee, and particularly for fact-finding in the absence of an agreement, does not make sense were no bargaining to take place between the Union and the Commonwealth about decisions to contract out. Even if the committee were viewed as an agreed upon alternative bargaining procedure, the contract language does not indicate, either expressly or by necessary implication, that the Commonwealth has the unfettered right to contract out services where the committee has not been established. In light of these provisions, I cannot find that the Union knowingly conceded its right to bargain concerning the decision to contract out bargaining unit work without any discussion of how the problems to be addressed by a private contractor might be resolved by the state work force.

21 MLC at 1041 (citations omitted).

On appeal to the Board, the Commonwealth argued, among other things, that Council 93 had waived its right to bargain by failing to create a SLMC under Article 15, Section 1 of the AFSCME Agreement. 26 MLC at 164. However, the Board found that the opportunity to create a SLMC under that portion of the AFSCME Agreement did not relieve the Commonwealth of its duty to bargain with Council 93 before transferring

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> request in writing a meeting of the Special Labor Management Committee established in Section 1. The Committee shall examine both the cost effectiveness of such contracts and their impact on the career development of Alliance members. In the event that the parties fail to reach an agreement in the Committee, the parties agree to submit the matter to an expedited fact-finding process.

26 MLC at 161.

bargaining unit work. Id. The Board concluded that Council 93 had not waived its right to bargain about contracting out unit work in Article 15 of the AFSCME Agreement. Id.

We are persuaded by the analysis in Commonwealth of Massachusetts and see no reason to depart from this precedent here, especially where the contractual language and legal issues in that case are nearly indistinguishable from the case before us. Consequently, we conclude that Article 15 of the NAGE Agreement does not constitute a valid waiver of the Union's right to negotiate over transfers of bargaining unit work to non-unit employees.[4]

In sum, we reject the defenses proffered by the Commonwealth and find that they do not excuse its failure to bargain in good faith with the Union over the decision and impacts of contracting out telephone answering duties at OCME on bargaining unit employees' terms and conditions of employment. Accordingly, we determine based upon the preponderance of the record evidence that the Commonwealth's actions were unlawful.

Conclusion

For the foregoing reasons, we conclude that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring work from the bargaining unit represented by the Union to non-unit personnel.

[4] We note that Article 15, Sections 15.3 and 15.4 of the NAGE Agreement are inapplicable to the case before us. Specifically, Section 15.3 pertains to situations where contracting out work will result in the layoff of a bargaining unit member. Here, Stipulation 14 demonstrates that the Commonwealth did not anticipate contracting out Bryson's job duties at the time of his lay off, and Stipulation 16 shows that the Commonwealth did not do so until the fall of 2003 after it had laid off Bryson. Additionally, Section 15.4 of Article 15 deals with 03 contracts, whereas Stipulation 16 indicates that the Commonwealth hired a 07 contractor to answer the phone at OCME.

Remedy

Section 11 of the Law grants the Board broad authority to fashion appropriate orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979); Millis School Committee, 23 MLC 99 (1996). The traditional remedy where a public employer has unlawfully refused to bargain over a decision to contract out unit work is an order to restore the status quo until the employer has fulfilled its bargaining obligation and to make all affected employees whole for any economic losses they may have suffered. School Committee of Newton v. Labor Relations Commission, 388 Mass. at 557; Commonwealth of Massachusetts, 26 MLC at 164.

We must first consider whether the waiver provisions in M.G.L. c. 149, §185(f) (Whistleblower Statute) limit the Board's remedial authority here. Citing City of Everett v. IBPO, 16 Mass. L. Rep. 126 (2003), 2003 WL 1699353 (Mass. Super.), the Commonwealth argues that the Legislature, by enacting the waiver provision, has limited an individual's ability to recover a remedy from any other state law. The Union contends that, because the legal rights at issue here belong to the Union rather than to Bryson, the waiver provision in Section 185(f) of M.G.L. c. 149 does not apply to this case. As a result, the Union asks the Board to award a posting as well as Bryson's reinstatement. The Union cites to Bennett v. City of Holyoke, 230 F. Supp. 2d 207, 221 (D. Mass. 2002), aff'd, 363 F.3d 1 (1st Cir. 2004), in support of its contention.

We agree with the Union that the waiver provision of the Whistleblower Statute does not preclude the Board from ordering a remedy in this case. By filing this charge, the Union sought to enforce its right, under Section 10(a)(5) of the Law, to be given

notice and opportunity to bargain before the Commonwealth transferred work outside the bargaining unit. Because the "public object of such charge[] is the vindication of the union's bargaining rights and preservation of its excusive representation status," it is well-established that individual employees lack standing to bring charges before the Board alleging a violation of the duty to bargain in good faith. Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1372 (1989), aff'd sub. nom. Pattison v. Labor Relations Commission, 309 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991). In contrast, the rights protected by the Whistleblower Statute belong solely to the aggrieved employee under the plain language of M.G.L. c. 149, §§185 (d) and (f).[5]

In Bennett v. City of Holyoke, supra, the Court construed the scope of the waiver provision and concluded that if an individual could not have brought a particular cause of action against a defendant under the Whistleblower Statute, the waiver provision in Section 185(f) cannot be invoked to bar the claim when raised in another count, or in this case, forum. 230 F. Supp. 2d. at 221. Here, not only could Bryson not have brought a claim alleging an unlawful transfer of bargaining unit work under the Whistleblower Statute, he could not even have brought it at the Board because he lacked standing to do so. Thus, such "rights and remedies" as contemplated by the Whistleblower Statute cannot be deemed "available" to the individual employee plaintiff at issue in the instant case because he has no standing to bring the instant charge

[5] M.G.L. c. 149, §85(d) states that: "Any employee or former employee aggrieved of a violation of this section, may within two years, institute a civil action in the superior court." As noted in the stipulations: Section 185 (f) states:

> The institution of a private action in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the rights and remedies available to him for the actions of the employer, under any contract, collective bargaining agreement, state law, rule or regulation or under the common law.

before the Board and because he could not have brought the same action under the Whistleblower Statute.

The Commonwealth nevertheless argues that the Whistleblower Statute limits an individual's ability to recover any remedy from any other state law that he or she could be awarded under the Whistleblower Statute. We disagree. The make-whole, restoration of status quo remedies that the Board traditionally orders in unlawful transfer of bargaining unit cases are designed to restore the situation as nearly as possible to that which would have existed but for the unfair labor practice. Framingham School Committee, 4 MLC 1809, 181 (1978). Although the remedy awarded in this case may benefit Bryson individually, that does not change the fact that the Board's remedies are designed and intended to vindicate public rights and interests that effectuate the purposes of the Act. Town of Dedham v. Labor Relations Commission, 365 Mass. 392, 405 (1974). Therefore, the Board's remedies in unlawful refusal to bargain cases cannot appropriately be construed as "rights and remedies available to [the plaintiff] for the actions of the employer..." under the Law as is explicitly required for any waiver of remedies to be effective under Section 185(f).

The City of Everett decision does not cause us to reach a different result. In that case, two union members who had filed lawsuit under M.G.L. c. 149, §85 elected, along with their union,[6] to arbitrate whether there was just cause under the terms of the collective bargaining agreement for suspensions that also formed the basis of their whistleblower claim. Under those circumstances, the court held that although the union could go forward with the arbitration to give "meaning and content to the collective

bargaining agreement for the benefit of all its members," 2003 WL 1699353 at *4, citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960), the waiver provision of the Whistleblower Statute prevented the arbitrator from awarding the grievants/plaintiffs any remedies, such as back pay or removal of discipline from personnel records, that directly affected them. In this case, however, Bryson had no standing to allege an unlawful refusal to bargain, nor was his consent required before the Union brought the instant charge. Therefore, although he may have some interest in the outcome of this case, unlike the plaintiffs in City of Everett, he had no control over the Union's decision to file its claim with the Board the first instance.

Moreover, in City of Everett the "actions of the employer" that were at issue, the plaintiffs' suspensions, were identical in both the arbitration and the whistleblower cases. There is no similar identity of employer action in this case, as the crux of the Board's complaint and decision is the Commonwealth's transfer of bargaining unit work outside the bargaining unit and not the reorganization that caused Bryson's layoff in the first place. Under these circumstances, the fact Mr. Bryson has elected to pursue certain remedies available to him under the Whistleblower Statute related to the elimination of his job does not preclude the Board from exercising its statutory authority under M.G.L. c. 150E to enforce and remedy violations of an employer's statutory duty to bargain in good faith.

We therefore proceed to determine the appropriate remedy in this matter. The sole issue in this case, the unlawful transfer of bargaining unit work, was of limited duration. It began sometime in the fall of 2003, when the temp assumed Bryson's

[6] The arbitration agreement required both the union and the employee to assent to the

telephone duties, and ended in June 2004, when OCME discontinued the temp position and posted two administrative Assistant II positions that took over the phone answering duties that Bryson had performed. Accordingly, we do not order the Commonwealth to reinstate Bryson to his former position because Stipulation 23 reflects that the Commonwealth has since redistributed his duties to other bargaining unit members.[7] For the same reason, we decline to order the Commonwealth to restore the duties formerly performed by Bryson to the bargaining unit. Rather, to remedy the unlawful transfer of bargaining unit work in this case, we order the Commonwealth to make whole any employee who has suffered economic losses as a direct result of the unilateral transfer of job duties of the Administrative Assistant I at OCME to non-unit members from the fall of 2003 until June 2004.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth shall:

1. Cease and desist from:

   a. Unilaterally transferring the job duties of the Administrative Assistant I at OCME to non-unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision.

   b. In any like manner, interfering with, restraining, and coercing its employees in any right guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

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arbitration process. City of Everett v. IBPO, 2003 WL 1699353 at *4.

[7] As we note above, the propriety of the Commonwealth's decision to lay off Bryson and/or reorganize OCME is not before us.

a. Make whole any employee or employees who suffered economic losses as a direct result of the Commonwealth's decision to transfer the job duties of the Administrative Assistant I at OCME to non-unit members, including interest calculated in accordance with M.G.L. c. 231, s.6I, compounded quarterly.

b. Upon request, bargain in good faith with the Union to resolution or impasse concerning the decision and impacts of transferring the job duties of the Administrative Assistant I at OCME to non-unit employees.

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

d. Notify the Board in writing within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS
BOARD

Marjorie F. Wittner

MARJORIE F. WITTNER, CHAIR

Elizabeth Neumeier

ELIZABETH NEUMEIER, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Division of Labor Relations, Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISON OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF
THE MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has determined that the Commonwealth of Massachusetts (Commonwealth) has violated Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally transferring the job duties of the Administrative Assistant I at the Office of the Chief Medical Examiner (OCME) to non-unit members without first giving the National Association of Government Employees (Union) notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision.

The Commonwealth posts this Notice to Employees in compliance with the Commonwealth Employment Relations Board's Order.

WE WILL NOT unilaterally transfer the job duties of the Administrative Assistant I at OCME to non-bargaining unit members without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of the decision.

WE WILL NOT in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL upon request, bargain in good faith with the Union to resolution or impasse concerning the decision and impacts of transferring the job duties of the Administrative Assistant I at OCME to non-unit employees.

WE WILL make whole any employee or employees who suffered economic losses as a direct result of the Commonwealth's decision to transfer the job duties of the Administrative Assistant I at OCME to non-unit members, including interest calculated in accordance with M.G.L. c. 231, s.6I, compounded quarterly.

_____ _____

Commonwealth of Massachusetts Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: 617-626-7132).