

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

In the Matter of

COMMONWEALTH OF MASSACHUSETTS/
COMMISSIONER OF ADMINISTRATION
AND FINANCE

and

COALITION OF PUBLIC SAFETY

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Date issued:

September 30, 2014

Case No.: SUP-10-5593

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

Michelle Heffernan, Esq. - Representing the Commonwealth of
Massachusetts
Alan Shapiro, Esq. - Representing the Coalition of Public Safety

DECISION ON APPEAL OF HEARING OFFICER DECISION

1 SUMMARY

2 The issue before the Commonwealth Employment Relations Board (Board) on
3 appeal is whether the Commonwealth of Massachusetts, acting through the
4 Commissioner of Administration and Finance (Commonwealth), violated its duty to
5 bargain in good faith by failing to support the cost items contained in a three-year
6 collective bargaining agreement (CBA) that it entered into with the Coalition of Public

1 Safety (COPS) in 2009. The focus of this case is a letter that the Secretary of
2 Administration and Finance, Jay Gonzalez (Gonzalez), sent to the Legislature
3 requesting that it consider funding this agreement and containing certain additional
4 information regarding the contract's terms and bargaining history. The Legislature did
5 not fund the agreement and COPS filed a charge with the Department of Labor
6 Relations (DLR) alleging that the Commonwealth violated Massachusetts General Laws
7 Chapter 150E (the Law) by failing to unconditionally support the agreement.

8 After an investigation, the DLR issued a complaint alleging that the
9 Commonwealth's actions violated its statutory duty to bargain in good faith under
10 Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E.¹ The parties
11 waived a hearing and agreed to submit the matter on a stipulated record. On January
12 31, 2014, a DLR hearing officer issued a decision holding that the Commonwealth had
13 violated the Law as alleged and ordered the Commonwealth to resubmit the agreement
14 to the Legislature for an appropriation to fund the cost items.

15 The Commonwealth filed an appeal with the Board, arguing, among other things,
16 that the Hearing Officer's determination that the Commonwealth had a duty to
17 unconditionally support the collective bargaining agreements it submits to the
18 Legislature unlawfully infringes on the Governor's constitutional prerogative, as the
19 Commonwealth's "Supreme Executive Magistrate" to inform the Legislature of the

¹ This matter was consolidated for hearing and decision with Case No. SUP-10-5612, Commonwealth of Massachusetts and the Massachusetts Correction Officers, (MCOFU) and the Hearing Officer found that the Commonwealth had violated the Law with respect to both COPS and MCOFU. However, after the Commonwealth appealed the decision, MCOFU filed a motion seeking to withdraw its charge and asking the Board not to enforce that portion of the remedy that related to MCOFU. The Board granted the motion. Therefore, this decision addresses only those aspects of the appeal that pertain to COPS and Case No. SUP-10-5593.

1 financial ramifications of funding a collective bargaining agreement. The
2 Commonwealth also argued that the Hearing Officer misconstrued Chapter 29, Sections
3 3 and 3A.

4 For the reasons set forth below, we agree with the Hearing Officer's analysis and
5 conclusions and reject any claim that the Law imposes a different or lesser duty on the
6 Commonwealth to support and secure funding to support agreements that it has
7 reached with the exclusive representative of its employees than it does upon the other
8 public employers who are subject to Section 7(b) requirements.

9 Facts

10 As stated above, the parties waived their right to a hearing and stipulated to all
11 facts and exhibits. A copy of the Hearing Officer's decision containing those facts and
12 summarizing some of the exhibits is attached as Appendix A. Because no material
13 facts are challenged on review,² we incorporate the facts set forth in the Hearing
14 Officer's decision, including the parties' stipulations and the Hearing Officer's recitation
15 of "Facts from Exhibits and Relevant Statutes" and summarize them very briefly below.

16 COPS and the Commonwealth were parties to a collective bargaining
17 agreement for the period of July 1, 2007 through June 30, 2009. On April 28, 2009,
18 COPS and the Commonwealth reached a Memorandum of Understanding for
19 Successor Agreements for the periods of July 1, 2009 through June 30, 2010, and July
20 1, 2010 through June 30, 2013 (2010-2013 Agreement). The 2010-2013 Agreement
21 included certain wage increases.

² The Commonwealth challenged only the date on which the parties agreed to waive a hearing and submit the matter on a stipulated record. The Board takes administrative notice that this event took place sometime after November 18, 2011, and not on February 18, 2011, as stated in the decision.

1 By letter dated June 9, 2010, Gonzalez requested that the Legislature consider
2 funding the 2010-2013 Agreement. This letter stated in pertinent part:

3 In addition to previous requests, I am fulfilling my statutory obligation to
4 ask your consideration of the attached additional collective bargaining
5 items in Section 2 of H.2, the Governor's fiscal year 2011 budget proposal.
6 These items fund the collective bargaining agreements negotiated some
7 time ago with [MCOFU] (Unit 4) and [COPS] (Unit 5). We are submitting
8 them now because their costs first occur in fiscal year 2011.
9

10 These line items provide for collective bargaining salary increases similar
11 to contracts that were not funded during calendar year 2009. We have
12 worked with the MCOFU and COPS leadership to reach agreement on
13 contracts similar to those signed by other unions for this fiscal year and
14 have failed to reach an agreement. Funding of these items will trigger a
15 reopener in collective bargaining agreements that the Legislature recently
16 did fund only because they contained delays in the salary increases.
17

18 The Legislature did not fund the 2010-2013 agreement.

19 Opinion³

20 The Board has long held that a public employer's obligation to seek funding for a
21 collective bargaining agreement under Section 7(b) of the Law goes beyond the
22 ministerial act of submitting the funding article but includes an unconditional obligation
23 to seek funding and to support the funding request. Town of Rockland, 16 MLC 1001,
24 1005-1007, MUP-6620 (June 1, 1989). An employer's failure to take all necessary
25 steps to support and secure funding for a collective bargaining agreement under
26 Section 7(b) of the Law violates its duty to bargain in good faith and constitutes a
27 repudiation of the agreement. Id. at 1005 (citing Mendes v. Taunton, 366 Mass 109,
28 119 (1974); accord Town of Belmont, 22 MLC 1636, 1639, MUP-9875 (April 1, 1996);
29 City of Chelsea, 13 MLC 1144, 1149, MUP-6211 (September 22, 1986).

³ The Board's jurisdiction is not contested.

1 Applying these well-established principles to the facts of this case, the Hearing
2 Officer held that Gonzalez's letter signaled a lack of support for the 2010-2013
3 Agreement by "going out of his way" to tell the Legislature that he had failed in his
4 attempt to get COPS to approve salary increases similar to the contracts the
5 Commonwealth had with other unions, and to tell the Legislature that approval of the
6 funding would trigger a reopener clause and require new rounds of negotiations with the
7 other unions.

8 In so holding, the Hearing Officer rejected the Commonwealth's arguments that
9 Section 7(b)'s requirement of unconditional support for funding an agreement reached
10 during collective bargaining infringed upon the Governor's constitutional role as the
11 "supreme executive magistrate" of the Commonwealth,⁴ because the Governor retained
12 the power to veto any legislation authorizing the funding. The Hearing Officer also
13 disagreed with the Commonwealth's argument that M.G.L. c. 29 §§3 and 3A required
14 the Governor to include the information contained in the June 9th letter.

15 The Commonwealth makes several arguments on appeal. The Commonwealth
16 first claims that Section 7(b) does not require "unconditional" support of collective
17 bargaining agreements and that the Hearing Officer cannot impose this requirement on
18 the Commonwealth where the Legislature has not included this requirement in the
19 statute. We disagree for a number of reasons.

20 First, there can be no dispute that Section 7(b) applies to the Commonwealth.
21 Section 1 of the Law defines "employer" or "public employer" as "the commonwealth
22 acting through the Commissioner of administration." Section 7(b) further requires the

⁴ See Opinion of the Justices to the Senate, 375 Mass. 827, 833 (1978) (citing Mass. Const., Part II, c.2, section 1, art 1)).

1 “employer,” with certain limited exceptions that do not apply here⁵ to “submit to the
2 appropriate legislative body within thirty days after the date on which the agreement is
3 executed by the parties, a request for an appropriation necessary to fund the cost items
4 contained therein.”

5 Further, there is no question that Chapter 150E’s duty to bargain in good faith
6 applies to the Commonwealth, see, e.g., Commonwealth of Massachusetts v. Labor
7 Relations Commission (LRC), 404 Mass. 124 (1989), and that the duty to bargain in
8 good faith includes a duty to uphold, i.e., refrain from repudiating, agreements reached
9 as a result of bargaining. City of Chelsea, 13 MLC at 1149-1150. An employer’s
10 statutory duty to uphold the bargain it has reached begins with the obligation to support
11 and secure funding from the legislative body for its costs. Id. Unless the obligation to
12 seek funding is unconditional, the duty to uphold agreements reached as a result of
13 collective bargaining would be rendered meaningless. See, e.g., Town of Rockland, 16
14 MLC at 1007 (“To permit the employer to negotiate an agreement and, after its
15 finalization, to avoid it by failing to take necessary steps to fund it would permit
16 unilateral repudiation of collective bargaining agreement by public employers.”); see
17 also Local 1642, International Association of Firefighters v. Town of Framingham, 442
18 Mass. 463, 469 (2004) (“Given the plain language of G.L. c. 150E, §7(b), and this case
19 history, we conclude that the town was required to submit a budget that unconditionally
20 and fully funded the staffing provision.”).

⁵ The Board of Higher Education, Board of Trustees of the University of Massachusetts, the chief justice for the administration and management, a county sheriff, the PCA quality home care workforce council, the alcoholic beverage control commission and the state lottery commission are the employers excluded from Section 7(b)’s coverage.

1 Given this statutory scheme, the Commonwealth's unconditional obligation to
2 support and secure funding for the costs of the collective bargaining agreements it has
3 entered into, if not expressly stated in Section 7(b) of the Law, is clearly implied, and we
4 hold that the Hearing Officer committed no error by imposing the same obligation upon
5 the Commonwealth in accordance with longstanding and well-established Board and
6 judicial precedent.⁶

7 The Commonwealth contends that requiring it to unconditionally support funding
8 for a CBA infringes on the Governor's constitutional role of ensuring the general
9 financial welfare of the Commonwealth and claims the Hearing Officer erred when he
10 held otherwise. We have reviewed this aspect of the Hearing Officer's decision and find
11 no error. The one appellate decision that touches on this issue, Alliance v. Secretary of
12 Administration, 413 Mass. 377 (1992), does not squarely address the issue before us,
13 the scope of the Commonwealth's obligation to support an agreement under Section
14 7(b) and Section 6 of the Law *before* it is funded.⁷ The Court did, however, recognize
15 that while Section 7 of the Law requires the Governor to submit an appropriation
16 request to the Legislature for the cost items contained in CBAs entered into by the

⁶ Further support for the Hearing Officer's conclusion that the Commonwealth must unconditionally support funding for the CBAs it enters into may be found by comparing Section 7(b) of the Law to Section 7(c). To the extent that Section 7(c) explicitly describes the Governor's role in the funding process *prior* to submission to the Legislature, we find it significant that Section 7(b) contains no similar description.

⁷ Although, in that case, the Governor did send a written message to the Legislature asking that the bills be rejected, see 434 Mass. at 380, the lawfulness of this message under Chapter 150E was not at issue in the decision. We therefore decline the Commonwealth's invitation to draw any inferences from the Court's silence on this subject.

1 Commonwealth,⁸ it did not obligate the Governor to sign the appropriation bill once the
2 Legislature approved it because the act of signing is a “constitutionally granted
3 discretionary power” that cannot be abrogated by legislation. Id. at 383-384 and n. 9.
4 In other words, like the Hearing Officer, the Court recognized that the funding process
5 described in Section 7(b) is not at odds with the Governor’s constitutional authority to
6 exercise his discretion with regard to applying the Commonwealth’s resources. The
7 Board agrees.

8 The Commonwealth further cites Teamsters Local Union No. 404 v. Secretary of
9 Administration & Finance, 434 Mass. 651 (2001) in support of its claim that the
10 Governor, in his role as “supreme executive magistrate,” cannot be forced to remain
11 silent about the economic ramifications of a collective bargaining when submitting it to
12 the Legislature and, thus, the Hearing Officer erred by imposing a duty of unconditional
13 support upon the Commonwealth.

14 This decision is inapposite for a number of reasons. First, the statutory employer
15 in that case was the Sheriff of Franklin County, not the Commonwealth. Therefore, the

⁸ Unlike in this case, the Governor directly submitted the appropriations request. 434 Mass. at 380.

1 case arose under Section 7(c), not Section 7(b) of the Law.⁹ As noted above, Section
2 7(c) explicitly sets forth the Governor's duties in the CBA submission and funding
3 process and, as described in that decision, gives the Governor "effective veto power
4 over any collective bargaining agreement that is for whatever reason, not satisfactory"
5 *prior* to it being submitted to the Legislature." *Id.* at 655. Section 7(b) confers no
6 similar authority upon the Governor.

7 Second, the issue in Teamsters was not the scope of the statutory employer's
8 duty to support and secure funding for a CBA from the Legislature, but rather whether

⁹ M.G.L. c. 150E, Section 7(c) states:

The provisions of this paragraph shall apply to the board of higher education, the board of trustees of the University of Massachusetts, the chief justice for administration and management, a county sheriff, the PCA quality home care workforce council, the department of early education and care with regard to bargaining with family child care providers, the alcoholic beverage control commission, Massachusetts Department of Transportation and the state lottery commission.

Every such employer shall submit to the governor, within thirty days after the date on which a collective bargaining agreement is executed by the parties, a request for an appropriation necessary to fund such incremental cost items contained therein as are required to be funded in the then current fiscal year, provided, however, that if such agreement first has effect in a subsequent fiscal year, such request shall be submitted pursuant to the provisions of this paragraph. Every such employer shall append to such request an estimate of the monies necessary to fund such incremental cost items contained therein as are required to be funded in each fiscal year, during the term of the agreement, subsequent to the fiscal year for which such request is made and shall submit to the general court within the aforesaid thirty days, a copy of such request and such appended estimate; provided, further, that every such employer shall append to such request copies of each said collective bargaining agreement, together with documentation and analyses of all changes to be made in the schedules of permanent and temporary positions required by said agreement. Whenever the governor shall have failed, within forty-five days from the date on which such request shall have been received by him, to recommend to the general court that the general court appropriate the monies so requested, the request shall be referred back to the parties for further bargaining.

1 communications made by the Governor's agents to the Sheriff during the Sheriff's
2 negotiations for a successor agreement interfered with the union's collective bargaining
3 rights. Thus, although the Teamsters decision holds that the Governor, acting through
4 his agents, could communicate acceptable pay increase terms to the Sheriff without
5 violating the Law, it does not hold or suggest that the Commonwealth or the Governor
6 can submit an agreement *to the Legislature* for funding under Section 7(b) (or even
7 under Section 7(c)) while at the same time signaling a lack of support for that
8 agreement. Our case law clearly holds that such action violates the Law. See, e.g.,
9 Board of Trustees of the University of Massachusetts (Amherst), 30 MLC 106, SUP-02-
10 4890 (January 21, 2004). The Teamsters decision therefore provides no basis to
11 conclude that, in seeking funding from the Legislature, the Commonwealth's duty to
12 support the contracts it has entered into is less than that of other public sector
13 employers.

14 Further, we agree with the Hearing Officer that the letter, when viewed in its
15 totality, does signal a lack of support for the 2010 – 2013 Agreement. The
16 Commonwealth contends that the letter is “not as nefarious” as the Hearing Officer
17 found because Secretary Gonzalez was merely alerting the Legislature to the fact that
18 the Legislature had considered and failed to fund similar increases for other state
19 bargaining units the prior year. However, because it is reasonable to presume that the
20 Legislature is aware of its prior legislative actions, particularly those that occurred within
21 the last year, the Commonwealth's argument only strengthens the Hearing Officer's
22 finding that the letter goes out of its way to give the Legislature reasons to reject a
23 similar agreement again.

1 The Commonwealth further claims that the letter was merely explaining the
2 impacts of funding contracts to the Legislature, who “cannot be expected to be experts
3 in the nuances of collective bargaining or the contracts’ terms.” However, as the
4 Hearing Officer points out in the next section of his decision, pursuant to M. G. L. c. 29,
5 §3A, the Legislature may request such information from the Commonwealth. Where the
6 Hearing Officer found no evidence here that the Legislature had requested any
7 additional information, we agree that volunteering such information under these
8 circumstances simply highlights the reasons the Legislature should reject it. Ultimately,
9 because these statements were made in the context of a letter that did not otherwise
10 contain any evidence that the Commonwealth supported the agreement it had entered
11 into, we affirm the Hearing Officer’s conclusion that the letter failed to meet the
12 standards of unconditional support.

13 M.G.L. c. 29, §§3 and 3A

14 The Commonwealth finally argues that the Hearing Officer’s interpretation of
15 M.G.L. c 29, Section 3 and 3A are erroneous and that, because those statutes required
16 the Commonwealth to provide the types of information contained in the June 9th letter, it
17 did not violate the Law. We have reviewed the Hearing Officer’s analysis and, finding
18 no error, summarily affirm it.¹⁰

¹⁰ Further support for the conclusion that the Commonwealth was not obligated by statute to provide additional information with its funding request may be found by, once again, comparing Section 7(c) of the Law to Section 7(b). Unlike Section 7(b), Section 7(c) explicitly describes the information and documents that must be appended to funding requests made under this subsection, including “an estimate of the monies necessary to fund [the] incremental cost items” and a copy of the collective bargaining agreement “together with documentation and analyses of all changes to be made in the schedules of permanent and temporary positions required by said agreement.” Section 7(b) contains no similar requirements.

1 Remedy

2 The Hearing Officer ordered the Commonwealth to resubmit the 2010-2013
3 Agreement to the Legislature for an appropriation to fund the cost items and to take all
4 appropriate steps to support it. In response to the Commonwealth's arguments that
5 compelling the Governor to resubmit the appropriation would divest him of his
6 constitutional rights in the legislative process and exceed the DLR's authority, the
7 Hearing Officer stated that he was not ordering the Governor to approve the request but
8 only ordering the statutory employer, the Secretary of Administration and Finance, to
9 submit a request that did not violate the Law. On review, the Commonwealth reiterates
10 the arguments it made to the Hearing Officer. It also argues that because the parties
11 have entered into two successor agreements that have been funded by the Legislature
12 including one that covers the exact period of time it was ordered to resubmit in
13 paragraph 2(a) of the original Order, complying with the Order would leave it in the
14 "absurd" position of having to submit a request for funding with unconditional support
15 and explaining why it has already made an identical request to fund a contract that has
16 expired.

17 We affirm the Hearing Officer's remedy because it satisfies the Board's goal of
18 fashioning remedies to place charging parties in the position they would have been in
19 but for the unfair labor practice. Commonwealth of Massachusetts, 29 MLC 132, 133
20 SUP-4485 (January 22, 2003). To issue a contrary remedy under the circumstances of
21 this case would allow an employer to benefit from its prohibited practice in contravention
22 of the Board's remedial goals. Amesbury School Committee, 13 MLC 1196, 1197,
23 MUP-5254 (1986) (citing City of Everett, 2 MLC 1471, 1477, MUP-2126 (May 5, 1976),
24 enf'd sub nom., Labor Relations Commission v. City of Everett, 7 Mass App. Ct. 826

(1979)). Contrary to the Commonwealth's arguments, and consistent with Section 7(b), the remedy requires the statutory employer, the Secretary of Administration and Finance, not the Governor, to submit the request. As the Hearing Officer stated, the Governor is free to exercise his discretion to apply resources of the Commonwealth however he sees fit should he be presented with legislation authorizing the funding. Finally, nothing in this decision should be read as precluding the Secretary from appending a copy of our decision and the Hearing Officer's decision to his submission to explain why the 2010-2013 Agreement is being resubmitted at this time.

SO ORDERED

Order

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

1. Cease and desist from:

- a. Failing and refusing to take all necessary and appropriate steps to support the 2010-2013 Agreement.
- b. In any similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

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

- a. Submit to the Legislature a request for an appropriation to fund the cost items and take all appropriate steps to support the 2010-2013 Agreement.
- b. Post immediately in all conspicuous places where members of the COPS bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Commonwealth customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

- 1
2 c. Notify the Department within thirty (30) days after the date of service of this
3 decision and order of the steps taken to comply with its terms.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

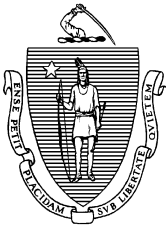
MARJORIE F. WITTNER, CHAIR

ELIZABETH NEUMEIER, BOARD MEMBER

HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations 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
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the Commonwealth of Massachusetts/Commission of Administration and Finance (Commonwealth) violated Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by breaching the statutory duty to support collectively bargained agreements with the Coalition of Public Safety (COPS) in violation of its duty to bargain in good faith.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:
to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by not taking all necessary and appropriate steps to support the collective bargaining agreements.

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

WE WILL take the following affirmative action to effectuate the purposes of the Law:

1. Submit to the Legislature a request for an appropriation to fund the cost items and take all appropriate steps to support the 7/1/10 – 6/30/13 collective bargaining agreement with COPS.

Commonwealth of Massachusetts/
Commissioner of Administration and
Finance

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 Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

HEARING OFFICER DECISION

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

COMMONWEALTH OF MASSACHUSETTS/
COMMISSION OF ADMINISTRATION
AND FINANCE

and

MASSACHUSETTS CORRECTION
OFFICERS FEDERATED UNION AND
COALITION OF PUBLIC SAFETY

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Date Issued: January 31, 2014

Case Number:

SUP-10-5612

SUP-10-5593

Hearing Officer:

Timothy Hatfield, Esq.

Appearances:

Michele Heffernan, Esq. - Representing the Commonwealth of Massachusetts/
Commission of Administration and Finance

Jun Lim, Esq. - Representing Coalition of Public Safety

Stephen Pfaff, Esq. - Representing Massachusetts Correction Officers
Federated Union

HEARING OFFICER'S DECISION

1 Summary

2 The issue in this case is whether the Commonwealth of Massachusetts
3 (Commonwealth), acting through the Commissioner of Administration and Finance,
4 Jay Gonzalez (Gonzalez), violated Section 10(a)(5) and, derivatively, Section 10(a)(1)

1 of Massachusetts General Laws, Chapter 150E (the Law) by breaching the statutory
2 duty to support collectively bargained agreements with the Coalition of Public Safety
3 (COPS) and the Massachusetts Correction Officers Federated Union (MCOFU) in
4 violation of its duty to bargain in good faith. I find that the Commonwealth violated the
5 Law as alleged.

6 Statement of the Case

7 On June 16, 2010, COPS filed a prohibited practice charge with the Department
8 of Labor Relations (Department) alleging that the Commonwealth violated Section
9 10(a)(5) and 10(a)(1) of the Law. An in-person investigation was conducted on August
10 25, 2010. On September 13, 2010, MCOFU filed a prohibited practice charge alleging
11 the same violations by the Commonwealth. On September 24, 2010, MCOFU filed a
12 Motion to Consolidate, and the Department granted the motion. The Department
13 issued a complaint of prohibited practice on October 25, 2010. The Commonwealth
14 filed its Answer on October 29, 2010. On February 18, 2011, the Department allowed
15 the parties to waive a hearing, pursuant to Section 11 of the Law. On February 13,
16 2012, COPS filed its post-hearing brief. MCOFU filed its brief on May 4, 2012, and the
17 Commonwealth filed its brief on April 13, 2012.

Facts From Exhibits and Relevant Statutes

18 A) Gonzalez's June 9, 2010 letter to the House of Representatives¹¹ and
19 Senate¹² Committees on Ways and Means, which referenced "Additional
20 FY11 collective bargaining items," states in pertinent part:

¹¹ Gonzalez's letter was addressed to Charles Murphy, Chair House Committee on Ways and Means.

1 In addition to previous requests, I am fulfilling my statutory obligation to
2 ask your consideration of the attached additional collective bargaining
3 items in Section 2 of H.2, the Governor's fiscal year 2011 budget
4 proposal. These items fund collective bargaining agreements negotiated
5 some time ago with the Massachusetts Correction Officers Federated
6 Union (Unit 4) and the Coalition of Public Safety (Unit 5). We are
7 submitting them now because their costs first occur in fiscal year 2011.

8
9 These line items provide for collective bargaining salary increases similar
10 to contracts that were not funded during calendar year 2009. We have
11 worked with the MCOFU and COPS leadership to reach agreement on
12 contracts similar to those signed by other unions for this fiscal year and
13 have failed to reach an agreement. Funding of these items will trigger a
14 reopener in collective bargaining agreements that the Legislature
15 recently did fund only because they contained delays in the salary
16 increases.

17
18 My staff and I are ready to respond to any questions. Thank you for your
19 consideration.
20

21 B) Massachusetts General Laws, Chapter 150E, Section 7(b):
22

23 The employer, other than the board of higher education or the board of
24 trustees of the University of Massachusetts, the chief justice for
25 administration and management, a county sheriff, the PCA quality home
26 care workforce council, the alcoholic beverage control commission, or
27 the state lottery commission, shall submit to the appropriate legislative
28 body within thirty days after the date on which the agreement is executed
29 by the parties, a request for an appropriation necessary to fund the cost
30 items contained therein; provided, that if the general court is not in
31 session at that time, such request shall be submitted at the next session
32 thereof. If the appropriate legislative body duly rejects the request for an
33 appropriation necessary to fund the cost items, such cost items shall be
34 returned to the parties for further bargaining. The provisions of the
35 preceding two sentences shall not apply to agreements reached by
36 school committees in cities and towns in which the provisions of section
37 thirty-four of chapter seventy-one are operative.
38

39 C) Massachusetts General Laws, Chapter 29, Section 3
40

41 Every officer having charge of any state agency which receives a
42 periodic appropriation from the commonwealth, including all periodic
43 appropriations to be met from state revenues shall annually, on or before
44 a date set by the commissioner submit to the budget director statements

¹² Gonzalez's letter was addressed to Steven C. Panagiotakos, Chair Senate Committee on Ways and Means.

(1) showing in detail the amounts appropriated for the preceding and the current fiscal years; (2) the interchanges during the preceding fiscal year between the subsidiary accounts prescribed in accordance with section twenty-seven; (3) the deficiencies and overdrafts, if any, in appropriations for the latest complete fiscal year and for the current fiscal year; (4) estimates of the amounts required for ordinary maintenance for the ensuing fiscal year, with an explanation of any increased appropriations recommended and with citations of the statutes relating thereto, a statement indicating the priorities assigned to each program by said officer; (5) and statements showing in detail the revenue of the state agency in his charge for the latest complete fiscal year, and the revenue and estimated revenue thereof for the current fiscal year, and his estimated revenue from the same or any additional sources for the ensuing fiscal year, with his recommendations as to any changes in the management, practices, rules, regulations or laws governing such state agency which would effect an increase or cause a decrease in revenue from operations, fees, taxes or other sources, or which would facilitate the collection thereof; (6) together with such other information on the expenditures, revenues, activities, output or performance of any such state agency as may be required by rule or regulation of the commissioner, and any other information, including the priorities assigned to each program by said officer, required at any time by the budget director. Every such officer shall also submit to the budget director a statement showing in detail the number of permanent, temporary, and part-time positions authorized for the state agency in his charge and the volume of work performed in the latest complete fiscal year, and justifying his request for permanent, temporary and part-time positions in the ensuing fiscal year in relation to the volume of work expected to be performed by the state agency.

All such statements, recommendations and estimates shall, to the fullest possible extent, conform with the programs of the state agency as defined by the commissioner, with the advice of the officers responsible for the administration thereof and the officer making the submission to the budget director. The said estimates shall not include any estimate for any new or special purpose or object not authorized by statute.

Copies of all such statements, recommendations, and estimates as they pertain to space rentals and maintenance and construction or repair of capital facilities shall be submitted on or before the aforementioned date to the commissioner of capital asset management and maintenance. They shall include a report detailing the current condition of the using agency's buildings, broken down into individual structural or mechanical components, as defined by rule or regulation of the commissioner. Such report shall specify those individual maintenance and repair items for which monies requested in the operating budget shall be used. The commissioner shall review them and submit his evaluation of the priority,

1 necessity, and feasibility of the request contained therein to the officer
2 making such statements, recommendations, and estimates, the budget
3 director, the house and senate committees on ways and means, and the
4 secretary, if any, having charge of such state agency.

5
6 Before any such statements, estimates, recommendations or other
7 information relating to a state agency shall be so submitted, they shall be
8 submitted to the house and senate committees on ways and means. In
9 addition, each state agency shall submit such statements, estimates,
10 recommendations, and other information to the secretary having charge
11 of such state agency, if any, who shall review the same and make such
12 additions thereto, deletions therefrom and modifications therein as such
13 secretary deems appropriate; provided, however, that prior to making
14 any such additions, deletions or modifications, such secretary shall
15 conduct public hearings, for which he shall give five days' public notice
16 prior thereto, on all items for which he shall submit a recommendation for
17 appropriations to the governor. Said secretaries shall furnish, to the
18 house and senate committees on ways and means and the house and
19 senate committees on post audit and oversight copies of all such
20 statements, estimates, recommendations, and other information and of
21 all such additions, deletions, and modifications.
22

23 D) Massachusetts General Laws, Chapter 29, Section 3A

24
25 Any officer having charge of any state agency which receives a periodic
26 appropriation from the commonwealth, or any officer of a state authority
27 or commission, shall upon the request of any standing committee of the
28 house or senate, or of any joint standing committee of the general court,
29 furnish in writing to such committee, in a format prescribed by such
30 committee, any information requested by such committee that is
31 necessary for the committee to perform its duties. The information shall
32 include, but not be limited to, historical, current or proposed operational
33 costs funded through any appropriation, capital accounts, federal grants,
34 trust funds or other funding sources, the officer's estimate of the cost of
35 proposed legislation affecting activities which are or would be under his
36 supervision, estimates of and reasons for any supplemental funding that
37 is projected to be needed during the fiscal year, estimates of revenue
38 collections, estimates of proposed changes in fees or taxes, and any
39 other such information as may be required by the committee. Such
40 estimates shall be provided to such committee within 10 days of the
41 receipt of such a request by the officer. If the officer fails to respond
42 within 10 days, the matter shall be referred to the house or senate
43 committee on post audit and oversight which shall, in conjunction with
44 the committee that originally requested the information, determine if
45 further action is necessary.
46
47

Stipulations of Fact

- 1
2 1. The Commonwealth is a public employer within the meaning of Section 1
3 of the Law.
- 4
5 2. MCOFU and COPS (collectively "the Union") are employee organizations
6 within the meaning of Section 1 of the Law.
- 7
8 3. Both Unions are the exclusive bargaining representatives for certain
9 employees employed by the Employer.
- 10
11 4. COPS and the Commonwealth are parties to a collective bargaining
12 agreement for the period of July 1, 2007 through June 30, 2009.
- 13
14 5. On April 28, 2009, the COPS and the Commonwealth reached a
15 Memorandum of Understanding for Successor Agreements for the
16 periods of July 1, 2009 through June 30, 2010 (2009-2010 Agreement)
17 and July 1, 2010 through June 30, 2013 (2012-2013).
- 18
19 6. The 2010-2013 Agreement referred to in paragraph 5 provided for wage
20 increases.
- 21
22 7. MCOFU and the Commonwealth negotiated a collective bargaining
23 agreement for the period of July 1, 2010 through June 30, 2013.
- 24
25 8. The 2010-2013 agreement referred to in paragraph 6 provided for wage
26 increases.
- 27
28 9. By letter dated June 9, 2010, the Secretary of Administration and
29 Finance, Jay Gonzalez (Gonzalez), requested that the Legislature
30 consider funding the 2010-2013 Agreement and stated, in part:
31
32 These line items provide for collective bargaining salary
33 increases similar to contracts that were not funded during
34 calendar year 2009. We have worked with the MCOFU and
35 COPS leadership to reach agreement on contracts similar
36 to those signed by other unions for this fiscal year and have
37 failed to reach an agreement. Funding of these items will
38 trigger a reopener in collective bargaining agreements that
39 the Legislature recently did fund only because they
40 contained delays in the salary increases.
- 41
42 10. The Legislature did not fund the negotiated agreements referred to in
43 paragraphs 5 and 7 above.
- 44

Opinion

This case involves the question whether the Commonwealth breached its duty to bargain in good faith by failing to comply with the statutory duty to support a collectively bargained agreement under M.G.L. c. 150E, Section 7(b).

M.G.L. c. 150E, Section 1 defines “public employer” as “the commonwealth, acting through the commissioner of administration.” All employer obligations created by the act of reaching an agreement, during collective bargaining, fall to the commissioner of administration and finance in his statutory role of “public employer”.

The duty to bargain in good faith obligates a party to a negotiated agreement to take necessary steps to support and secure funding for the agreement. See e.g., Town of Rockland, 16 MLC 1001, 1005 (1989); Town of Belmont, 22 MLC 1636, 1639 (1996); Local 1652, Int'l Assoc. of Firefighters v. Town of Framingham, 442 Mass. 463 (2004).

Once an agreement has been reached, the employer's obligation to seek funding is unconditional, and its failure to take all necessary steps to support and to secure funding for the agreement violates its duty to bargain in good faith and constitutes repudiation of the agreement. Town of Belmont, 22 MLC 1636, 1639 (1996); Town of Rockland, 16 MLC 1001,1005 (1989); City of Chelsea, 13 MLC 1144, 1149 (1986).

The obligation to seek funding for a negotiated agreement applies during the term of an agreement as well as at the outset. Lawrence School Committee, 19 MLC 1167 (1992). In the present matter, the Commissioner upon reaching an agreement with the Unions became obligated to seek funding unconditionally, and to take all necessary steps to support and to secure funding for the agreements.

An employer's obligation to seek funding for an agreement goes beyond the ministerial act of submitting a funding article to the legislative body and includes an

1 obligation to support the funding request. See Town of Rockland, supra. Here, the
2 Unions argue that Gonzalez's letter fails to meet the standards of unconditional
3 support. In particular, Gonzalez's letter fails to show any support for or attempts to
4 persuade the Legislature to fund the agreement. Upon review of Gonzalez's letter, I
5 agree. A plain reading of the letter shows that Gonzalez highlights the reasons that
6 the Legislature should reject the agreement. He goes out of his way to tell the
7 Legislature that he had failed in his attempt to get the Unions to approve salary
8 increases similar to the contracts the Commonwealth had with other unions, and then
9 goes on to warn the Legislature that approving of the funding would trigger a reopener
10 clause and would require new rounds of negotiation with the other unions.

11 The Commonwealth argues that the Governor and executive branch officials,
12 acting on his behalf, should not be held to the same standard as municipal public
13 employers in the application of M.G.L. c. 150E because there are vast differences in
14 the the sovereignty of the Governor as opposed to municipal public employers. In their
15 governmental function, cities and towns only exercise the sovereignty which has been
16 delegated to them by the legislature. City of Cambridge v. Commissioner of Public
17 Welfare, 183, 186 (1970). Under the Constitution of the Commonwealth of
18 Massachusetts, the Governor serves as the "supreme executive magistrate" of the
19 Commonwealth. Opinion of the Justices to the Senate, 375 Mass. 827, 833
20 (1978)(citing Mass. Const., Part II, c. 2, section 1, art. 1.). In this role, the Governor
21 has administrative oversight of the collection of taxes and expenditures from the
22 treasury, and has a duty to exercise discretion with regard to applying the resources of
23 the Commonwealth. Opinion of the Justices, 211 Mass. 632, 634 (1912); Opinion of
24 the Justices, 375 Mass at 832.

1 The Commonwealth's argument that M.G.L. c. 150E, Section 7(b)'s requirement
2 of unconditional support for funding an agreement reached during collective bargaining
3 infringes on the Governor's role as supreme executive magistrate is unfounded. The
4 Governor is entrusted with the power to veto bills sent to him by the legislature. The
5 requirement that Gonzalez, as Secretary of Administration and Finance,
6 unconditionally support funding for an agreement he signed on behalf of the
7 Commonwealth does not infringe on the Governor's ultimate power to "exercise
8 discretion with regard to applying resources of the Commonwealth", because the
9 Governor may simply exercise his authority to veto the legislation authorizing the
10 funding. See Alliance v. Secretary of Administration, 413 Mass. 377, 383 (1992)
11 (request for legislative action is not a substitute for exercise of the Governor's
12 independent prerogatives.)

13 The Commonwealth also argues that M.G.L. c. 29 Section 3 and Section 3A
14 require the executive branch to provide exactly the type of information contained in
15 Gonzalez's letter. I find no such requirement in the language of either statute. Section
16 3 requires specific information, such as the amounts appropriated for the preceding
17 and current fiscal years, estimates of the amounts required for ordinary maintenance
18 for the ensuing fiscal year, and the revenue and estimated revenue for the current
19 fiscal year. Nothing in Section 3 requires the Commissioner of Administration and
20 Finance to inform the Legislature of the parties' bargaining history, future bargaining
21 obligations, or previous funding requests. Section 3A requires any officer in charge of
22 any state agency which receives periodic appropriations to provide any information
23 requested by any standing committee of the House and Senate that is necessary for
24 the committee to perform its duties. There is no evidence that the legislature requested

1 any additional information from the Commonwealth. Therefore, I am not persuaded
2 that the language of M.G.L. c. 29 Section 3 and Section 3A require the executive
3 branch to provide the information contained in Gonzalez's letter.

4 Remedy

5 Section 11 of the Law grants the Commonwealth Employment Relations Board
6 (CERB) broad authority and discretion to fashion appropriate orders to remedy
7 unlawful conduct. Labor Relations Commission v. City of Everett, 7 Mass. App. Ct.
8 826 (1979). Remedies should be fashioned to place charging parties in the position
9 they would have been in but for the unfair labor practice. Commonwealth of
10 Massachusetts, 29 MLC 132, 133 (2003). Here, MCOFU seeks a make-whole remedy
11 for wages lost by employees as a result of the Commonwealth's failure to support the
12 agreements. However, an order requiring specific performance of the economic terms
13 of the collective bargaining agreement is not an appropriate remedy here because
14 Section 7(b) of the Law imposes a funding contingency. To satisfy this funding
15 contingency, the appropriate legislative body must approve funding for the cost items
16 of a collective bargaining agreement. If the legislative body declines funding, the cost
17 items would be returned to the parties for further bargaining. It is well established that
18 no cost item in a collective bargaining agreement between a public employer and an
19 employee organization can assume any monetary significance until there is a
20 legislatively established appropriation from which the item can be paid. See County of
21 Suffolk v. Labor Relations Commission, 15 Mass. App.Ct. 127, 132 (1983).
22 Accordingly, I decline to order the make whole remedy sought by MCOFU.

23 The Commonwealth's argument that the CERB cannot require the resubmission
24 of the appropriation request is misplaced. The CERB is not ordering the Governor to

1 approve the appropriation request, but only that the statutory employer, the
2 Commissioner of Administration and Finance submit a funding request that does not
3 violate the Law. The Governor is free to exercise his discretion to apply resources of
4 the Commonwealth however he sees fit should he be presented with legislation
5 authorizing the funding. See Alliance v. Secretary of Administration, 413 Mass. 377,
6 383 (1992) (The Governor was not required to sign the appropriations bills nor could
7 he have been since the act of signing is a constitutionally granted discretionary power.)

8 Order

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

11 1. Cease and desist from:

- 12 a. Failing and refusing to take all necessary and appropriate steps to
13 support the collective bargaining agreements.
- 14 b. In any similar manner, interfering with, restraining, or coercing
15 employees in the exercise of their rights guaranteed under the Law.
- 16 2. Take the following affirmative action that will effectuate the purposes
17 of the Law:
- 18 a. Submit to the Legislature a request for an appropriation to fund
19 the cost items and take all appropriate steps to support the
20 7/1/10 – 6/30/13 collective bargaining agreement with COPS.
- 21 b. Submit to the Legislature a request for an appropriation to fund
22 the cost items and take all appropriate steps to support the
23 7/1/10 – 6/30/13 collective bargaining agreement with MCOFU.
- 24 c. Post immediately in all conspicuous places where members of
25 the COPS bargaining unit usually congregate and where notices
26 to these employees are usually posted, including electronically,
27 if the Commonwealth customarily communicates with these unit
28 members via intranet or email, and display for a period of thirty
29 (30) days thereafter, signed copies of the attached Notice to
30 Employees.
- 31

- 1 d. Post immediately in all conspicuous places where members of
2 the MCOFU bargaining unit usually congregate and where
3 notices to these employees are usually posted, including
4 electronically, if the Commonwealth customarily communicates
5 with these unit members via intranet or email, and display for a
6 period of thirty (30) days thereafter, signed copies of the
7 attached Notice to Employees.
8 e. Notify the Department within thirty (30) days after the date of
9 service of this decision and order of the steps taken to comply
10 with its terms.

11 SO ORDERED.

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS**

**TIMOTHY HATFIELD, ESQ.
HEARING OFFICER**

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.