

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

In the Matter of

CHIEF JUSTICE FOR THE ADMINISTRATION*
AND MANAGEMENT OF THE TRIAL COURT *

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES

Case No.: SUP-08-5454

Date Issued:
June 10, 2011

Board Members Participating:

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

Appearances:

Jean Strauten Driscoll, Esq. - Representing the Chief Justice for the
Administration and Management of the
Trial Court

Michael F. Manning, Esq. - Representing the National Association
of Government Employees

DECISION ON APPEAL OF HEARING OFFICER'S DECISION¹

Summary of the Case

1 On April 26, 2011, a duly-designated Department of Labor Relations
2 Hearing Officer issued a decision in the above-referenced matter. The Hearing
3 Officer concluded that the Chief Justice for the Administration and Management

¹ Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations.

1 of the Trial Court (Employer or Trial Court) did not fail to bargain in good faith in
2 violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L c. 150E
3 (the Law) when it withdrew the economic proposals that it had offered during a
4 fact-finding hearing before the fact-finder issued his findings and
5 recommendations. This conclusion was based on the Hearing Officer's
6 determination that changed economic circumstances negatively impacted the
7 Employer's ability to support the economic proposals and that overall, the
8 Employer's conduct was consistent with its good faith bargaining obligations
9 under Sections 6 and 9 of the Law.

10 Pursuant to Section 11 of the Law and 456 CMR 13.01(j), the National
11 Association of Government Employees (NAGE or Union) filed a timely appeal of
12 the Hearing Officer's decision challenging certain findings and her conclusions of
13 Law. Both the Employer and the Union filed supplementary statements. On
14 June 9, 2011, NAGE filed a Motion to Stay Consideration of the Charging Party's
15 Appeal for Thirty Days. The Commonwealth Employment Relations Board
16 (Board) hereby denies this motion.²

17 The Board has reviewed the record and parties' supplementary
18 statements and affirms the Hearing Officer's decision in its entirety. The Board

² In support of its motion, the Union asserts that the parties have reached agreement on a tentative agreement that is in the process of being ratified by Union membership. However, the mere fact of a ratification vote provides no basis to stay this decision because it has no impact on the outcome of the instant prohibited practice charge.

1 also adopts the parties' stipulations and the Hearing Officer's findings of fact in
2 their entirety³ and reprints them below.⁴

3 Findings of Fact

4 Face-to-Face Bargaining and Mediation

5 The Chief Justice for the Administration and Management of the Trial
6 Court is the statutory employer of court officers, probation officers and related
7 titles and is the Trial Court's bargaining agent. The Union represents a
8 bargaining unit of approximately 2400 – 2500 court officers and probation officers
9 in a variety of positions.⁵ The Union and the Employer were parties to a
10 collective bargaining agreement that was in effect from July 1, 2004 - June 30,
11 2007 (2004 – 2007 Contract).

12 The Union and the Employer began to negotiate a successor agreement
13 in July of 2006. Don Driscoll (D. Driscoll) was the Union's chief negotiator, and
14 former Director of Human Resources Paul Edgar (Edgar) was the Employer's
15 chief spokesperson. The parties' initial negotiation sessions addressed ground
16 rules and related issues. The parties began substantive discussions on or about
17 the third bargaining session.

³ The Union's challenges to certain factual findings are addressed below.

⁴ The parties' stipulations of fact, including their budget process summary, are set forth in Appendix A.

⁵ The titles included in the Union's bargaining unit are: probation officer (PO), associate probation officer (APO), assistant chief probation officer (ACPO), court officer (CO), associate court officer (ACO), and assistant chief court officer (ACCO).

1 Face-to-face bargaining continued through the spring of 2007. On May 3,
2 2007, D. Driscoll and Edgar signed a document (May 3, 2007 document)
3 primarily containing sections of the 2004 – 2007 Contract in which the parties
4 made no changes or only minor wording changes. Next to his signature, Edgar
5 wrote: “[t]hese proposals are tentatively agreed to with the understanding that
6 there is no final agreement on any item until there is agreement on an entire
7 contract.” D. Driscoll initialed Edgar’s statement, and Edgar and Driscoll also
8 initialed each provision within the May 3, 2007 document. The May 3, 2007
9 document did not contain any economic provisions.

10 On May 24, 2007, the Employer made a package proposal to the Union,
11 including both economic and non-economic items. Among the economic items
12 was a proposal for annual adjustments to the bargaining unit members’ salary
13 schedules to reflect a 3% increase for the fiscal years commencing July 1, 2007,
14 July 1, 2008 and July 1, 2009. The Employer notified the Union at their June 5,
15 2007 bargaining session that the May 24 offer was its “last, best offer.” The
16 Union advised the bargaining unit members on June 20, 2007 that the
17 Employer’s proposal was not a tentative agreement between the parties, but it
18 gave them an opportunity to vote on the Employer’s offer. The bargaining unit
19 members rejected the offer. D. Driscoll communicated the results of the vote to
20 Edgar on July 16, 2007, and requested continued negotiations.

21 In response, by letter dated July 25, 2007, Edgar opined that the parties
22 were at impasse and invited D. Driscoll to contact him if the Union believed

1 otherwise. On July 26, 2007, the Union filed a petition for mediation with the
2 former BCA. The BCA appointed a mediator, and the mediator held mediation
3 sessions between September of 2007 and February of 2008. The parties did not
4 reach agreement, and the mediator certified the case for fact-finding. In total, the
5 parties held approximately 25 face-to-face and mediated bargaining sessions.

6 In the fall of 2007, during the time period that the parties were engaged in
7 mediation, the Trial Court prepared a \$607 million budget request for FY2009
8 (July 1, 2008 - June 30, 2009) and submitted it to the Supreme Judicial Court
9 (SJC). At that time, the Employer had no information suggesting that state
10 revenues would prevent the Legislature from appropriating sufficient funds for the
11 Trial Court budget.⁶

12 Fact-Finding

13 The DLR appointed William Hayward (Hayward) as the fact-finder. Before
14 the first day of the fact-finding hearing in May of 2008, Hayward asked the parties

⁶ The Legislature subsequently appropriated \$605 million dollars for FY2009: \$561.8 million in direct appropriations and \$43 million in potential retained revenue. If the Trial Court did not collect sufficient money to realize \$43 million from probation supervision fees and general revenue collections, the Trial Court would have to decrease its expenses. The Trial Court also had \$244,000 available from funding brought forward from FY08. In late June or early July of 2008, Governor Deval Patrick signed the Commonwealth's \$28.2 billion budget containing the \$605 million Trial Court appropriation.

Where the testimony at the hearing regarding the Trial Court's original FY09 appropriation and the amount that it agreed to cut from that appropriation varied from the written record of Justice Mulligan's March 16, 2009 testimony before the Joint Committee on Ways and Means, the Hearing Officer relied on the written record.

1 to submit a list of outstanding issues. In response, Union representative Richard
2 Anderson, Jr. (Anderson) submitted ten issues. Upon receipt of the Union's list,
3 Employer Labor Counsel Jean Driscoll (J. Driscoll)⁷ asked Anderson to clarify
4 whether the Union viewed the ten issues as a package proposal, or whether
5 other proposals tentatively agreed to during the negotiations would be
6 incorporated into the new agreement. Anderson responded by letter dated May
7 13, 2008, stating that: "[i]t is the position of NAGE that only those issues initialed
8 by the parties' respective spokespersons on May 3, 2007 constitute tentative
9 agreements between the parties." Through the exchange of issues, it became
10 apparent that some of the parties' economic proposals were identical.

11 The fact-finding hearing proceeded on May 30, June 20, and July 11,
12 2008. At the outset of the hearing, the Employer offered the following economic
13 proposals:

- 14 • 3% wage increases for each of the three years of the successor
15 agreement;
- 16 • application of that increase to the POII differential;
- 17 • an additional step for those job titles currently without a Step 8 (Associate
18 Court Officers, Assistant Chief Court Officers and Associate Probation
19 Officers);
- 20 • An increase in the court officer uniform allowance and the complement of
21 uniforms provided at the time of hire; and
22
23
24

⁷ D. Driscoll and J. Driscoll are not related.

- 1 • An increase in the Employer's contribution to the dental/optical trust.⁸

2 The Union also proposed a 3% wage proposal for each of the three years
3 of the contract, application of that increase⁹ to the POII differential, and the
4 creation of a Step 8 for those bargaining unit titles with only seven steps. After
5 the first fact-finding hearing date, the Union amended its dental/optical trust
6 proposal to conform to the Employer's proposal. At the fact-finding hearing, the
7 parties presented evidence on the proposals on which their positions differed, i.e.
8 the amount of uniform allowance increases, new "steps" on the existing salary
9 schedules, and new salary ranges for certain positions. The parties did not
10 present evidence on the wage increase and Step 8 proposals. The Trial Court
11 submitted a brief to support its positions on the issues in dispute, and the Union
12 advised the fact-finder in its brief that he did not need to make recommendations
13 on issues where the parties' positions were identical.

14 The parties submitted briefs dated August 22, 2008 to Hayward after the
15 conclusion of the fact-finding hearings, and anticipated that he would issue a
16 report within the statutory 30-day time frame. Hayward did not do so, and when
17 contacted jointly by J. Driscoll and Anderson, requested an additional three

⁸ The Employer estimated that the cost of its economic proposal was \$25 - \$27 million dollars, and that the cost of the Union's additional economic proposals was \$11 million dollars more.

1 weeks to submit his report.⁹

2 **Post Fact-Finding Events**

3 In July and August of 2008, the Commonwealth's revenue collection
4 exceeded prior projections by approximately \$44 million. However, in mid
5 September of 2008, the Department of Revenue issued a press release
6 projecting a \$200 million revenue shortfall for the first quarter of FY2009. This
7 prompted the Governor to revise revenue estimates downward for FY2009 and
8 request meetings with representatives of the Judiciary, the Legislature, and the
9 constitutional offices regarding their budgets.

10 Governor Patrick met with former SJC Chief Justice Margaret Marshall
11 (Justice Marshall) and the Trial Court's Chief Justice for Administration and
12 Management Robert Mulligan (Justice Mulligan) on October 1, 2008. At the
13 meeting, Governor Patrick explained what he described as the "terrible fiscal
14 situation" that the Commonwealth was facing, a projected \$1 - 1.4 billion state
15 budget deficit, and informed Justices Marshall and Mulligan that he was cutting
16 the Executive Branch budget by 7% and asking the Legislature to cut its budget

⁹ The record does not specify the date of the telephone conference call between J. Driscoll, Anderson, and Hayward. Because Edgar's October 6, 2008 letter references the delayed report, the conference call likely occurred between September 23, 2008 and October 3, 2008.

1 by 7%.¹⁰ The Governor then asked Justices Mulligan and Marshall to cut the
2 Judicial Branch budget by 7%. At the time that they met with the Governor,
3 Justice Mulligan and Justice Marshall were aware that September revenues had
4 fallen dramatically and understood that the Governor was seeking authority
5 under M.G.L. c.29, Section 9C from the Legislature to cut the Judicial budget
6 appropriation himself.¹¹

7 Justices Mulligan and Marshall subsequently discussed Governor
8 Patrick's request and agreed to reduce the Judicial budget by approximately

¹⁰ The Union challenges the finding that the Governor told Justices Mulligan and Marshall on October 1, 2008 that the state was facing a projected budget deficit of \$1 - \$1.4 billion. The Union claims that this testimony is refuted by two newspaper articles that the Employer entered into evidence demonstrating that, as of October 1, unidentified state officials believed that FY09 state revenues would be \$400 million less than expected. We decline to disturb the original finding because the articles are not inconsistent with Justice Mulligan's testimony regarding what the Governor told him on October 1, 2008 and because the Union failed to test Justice Mulligan's recollection of this conversation on cross-examination. In any event, in its post-hearing brief, the Union does not dispute that the projected lost revenue figures were "astronomical" or that the Governor asked the Trial Court and other branches of government to cut their budget by 7% in anticipation of these losses.

¹¹ A July 13, 2008 press release posted on the website for the Office of the Governor stated that the Governor was asking the Legislature for expanded "9C" authority to be able to make equitable spending reductions during the year.

1 \$21.3 million, from \$605 million to 583.7 million.¹² They based their decision on
2 the following considerations: 1) the Legislature and the constitutional officers
3 would agree to cut their budgets by 7%, and Justice Mulligan and Justice
4 Marshall did not want to "stand alone like an island," believing that taking a
5 singularly uncooperative stance could have negative implications for future
6 budget requests; 2) they did not want to "show up" the Legislature, particularly
7 where the Legislature could grant the Governor the "9C" powers over the
8 Judiciary that he was seeking; and 3) they did not want to precipitate a
9 constitutional crisis which would ensue if the Governor asserted control over the
10 Judiciary and they challenged the Governor's authority to do so in court.¹³

¹² The Union challenged the Hearing Officer's finding that Justices Mulligan and Marshall agreed to cut the Trial Court FY09 budget by \$21.3 million. The Union argues that this finding is contradicted by Justice Mulligan's testimony that the cuts were in the range of \$23 million and by a letter the Employer issued on October 14, 2008, discussing a "preliminary plan" to save \$30 million. However, the Hearing Officer's finding is based on Justice Mulligan's unrebutted testimony that he and Justice Marshall decided to reduce the Trial Court's budget from \$605 to \$583.7 million after speaking with the Governor on October 1, 2008. Although Justice Mulligan erroneously testified that this resulted in a savings of approximately \$23.4 million, the Hearing Officer accurately found that this constituted a savings of \$21.3 million dollars. Moreover, although the findings do not reflect the exact date the Justices decided to reduce the budget by this amount, the findings are clear that they made this decision before October 6, 2008, when the Trial Court withdrew its economic proposals. See Hearing Officer's decision at p. 13, lines 11-19. Accordingly, the fact that the Trial Court may have proposed a plan to achieve even more savings after that date is immaterial.

¹³ The Trial Court had researched the issue, and Justice Mulligan believed that the Trial Court had a strong argument.

1 Justices Mulligan and Marshall believed that they were "over a barrel," and that
2 cooperation was the only available course of action.

3 After Justice Mulligan and Justice Marshall decided to reduce the FY09
4 appropriation by \$21.3 million, they immediately put a variety of cost-saving
5 measures in place.¹⁴ On October 2, 2008, Justice Marshall and Justice Mulligan
6 publicized their plans in a Joint Statement on Financial Challenge, stating:

7 As you know from the news media, the Commonwealth is
8 confronting a significant fiscal challenge, due to a major shortfall in
9 state tax revenues and the lack of credit caused by the national
10 financial crisis.

11
12 We have been in consultation with the Executive and Legislative
13 branches to assess the scope of the problem and to review
14 possible action plans. We fully understand the magnitude of the
15 issue and recognize the importance of sharing the burden
16 presented by this fiscal challenge.

17
18 We met with Governor Patrick yesterday and committed our
19 cooperation and support. We recognize that all three branches of
20 government must work collaboratively in the face of such a difficult
21 financial situation.

22 In anticipation of this situation the courts have carefully controlled
23 and limited hiring and other expenditures since the spring. Now,
24 we will launch a full review of all aspects of court operations to
25 identify potential cost reductions, as we maintain core functions and
26 protect constitutional rights.

¹⁴ The reduced budget was \$3.1 million over the FY08 appropriation, some of which it needed to fund escalating costs stemming from wage step or rent increases. The Union challenges this finding, claiming it is undercut by Justice Mulligan's testimony that certain leases had been renegotiated. However, the salient point to be gleaned from this finding is that, although the reduced FY 09 budget exceeded the FY 08 budget appropriation, some of the additional money was needed to address certain contractually-mandated costs including "wage steps or rent increases." (Emphasis added). In the absence of any record evidence showing that the amount of the negotiated savings exceeded the amount of the rent increases, we decline to disturb the Hearing Officer's broadly-worded finding.

1
2 We will need your suggestions and support in identifying cost
3 saving measures. Working together creatively we know that we
4 can best determine how to respond to this fiscal challenge.
5

6 In addition to the FY09 budget reductions to which he and Justice Marshall had
7 agreed, Justice Mulligan decided to withdraw the economic proposal that was on
8 the table to the Union. Justice Mulligan decided to withdraw the Trial Court's
9 economic proposal because he believed that the credibility of the Judiciary and
10 its managers was essential in dealing with the Governor and the Legislature, and
11 that reducing the budget by \$21.3 million while simultaneously contracting to pay
12 an additional \$25 - \$27 million would be inconsistent, underhanded, and close to
13 "mendacious." Justice Mulligan also believed that the Legislature would not fund
14 the agreement.

15 **Retraction of the Economic Offer**

16 Justice Mulligan instructed Edgar to write to the Union. Edgar did so on
17 October 6, 2008, addressing the letter to Anderson and copying Hayward
18 simultaneously. Before transmitting the letter, Edgar notified Anderson that the
19 letter was coming. The record does not contain the date that Edgar telephoned
20 Anderson or any other details of their conversation.¹⁵ Anderson and Edgar did
21 not discuss the prevailing economic situation at any time between the August 22,
22 2008 submission of the fact-finding briefs and the transmission of the October 6,
23 2008 letter.

¹⁵ Anderson testified that Edgar gave him a "head's up" that the letter was coming so that Anderson "would not die of a heart attack when [he] opened it and read it."

1 Edgar's October 6, 2008 letter stated in relevant part as follows:

2 Along with the Union, the Chief Justice and Trial Court negotiation
3 team have been awaiting the fact-finder's report and
4 recommendations to assist us all in our continued contract
5 deliberations. We understand that we now cannot expect that
6 report for several more weeks, and in the meantime the economic
7 situation has changed dramatically.

8
9 As you know, our contract negotiations started in July, 2006. When
10 the Trial Court made a "last best offer" to the Union in 2007,
11 including wage and benefit increases, the Commonwealth's fiscal
12 circumstances appeared to be sufficiently strong to support those
13 increases for this bargaining unit. The Union's rejection of that offer
14 led us to mediation and fact-finding. In mid-July, just after the fact-
15 finding hearings concluded, the Governor signed the fiscal year
16 2009 state budget, vetoing over \$122 million and seeking an
17 expansion of emergency 9C powers in preparation for a potential
18 decline in state tax revenues. In its August post-hearing brief, the
19 Trial Court noted that there was now a time of "economic difficulty
20 and uncertainty." Recently, the Commonwealth's Treasurer
21 announced that the state would be required to borrow money at a
22 higher than usual interest rate and that it would also be necessary
23 to tap the state's rainy day fund. The Governor has announced the
24 need for significant spending cuts across all sectors of the
25 Commonwealth, and there is now daily news of even more serious
26 shortfalls in the fiscal picture. The Trial Court must prepare for this
27 budgetary impact and curtailed spending. These events of the last
28 several weeks, with national as well as local effects, have required
29 a reassessment of the bargaining position of the Trial Court and the
30 responsible wage and benefit increases that can be offered to
31 employees at this time. Regrettably, because of the deteriorating
32 economic condition of the Commonwealth, the Trial Court cannot
33 continue to maintain its prior economic offers, specifically including
34 a three percent cost of living increase for each of the three years of
35 the agreement, the application of that increase to the POII
36 differential, a Step 8 for those titles that did not receive a Step 8 in
37 July, 2000, any increase in the court officer uniform allowance or
38 increased compliment of uniforms at the time of hire, or any
39 increase in the contribution to the dental/optical trust.

40
41 The management team is prepared to meet and discuss the effects
42 of these difficult changed circumstances and by copy of this letter

1 have (sic) notified the fact-finder. Please contact me at your
2 earliest convenience to schedule our meeting.

3
4 Anderson responded to Edgar by letter dated October 8, 2008, which
5 stated in pertinent part:

6 I am in receipt of your letter of October 6, 2008, and I am appalled
7 that the Trial Court is engaging in such conduct. Prior to the
8 commencement of fact finding, the official on-the-record position of
9 the Trial Court included wage increases of three percent (3.0%)
10 each year for fiscal years 2008, 2009, and 2010, as well as an
11 eighth step in fiscal year 2008 for those bargaining unit positions
12 that do not currently have an eighth step, an increase in the Trial
13 Court's contribution to the health and welfare fund of \$1.00 per
14 week in fiscal year 2009 and an additional \$1.00 per week in fiscal
15 year 2010, and an increase of \$50 in the uniform allowance.

16
17 Your October 6th letter to me removes all of these offers from the
18 Trial Court's position. It is the belief of NAGE that this action by the
19 Trial Court constitutes regressive bargaining, and violates the Trial
20 Court's obligation under M.G.L. c.150E to bargain with the Union in
21 good faith. NAGE intends to pursue all avenues available to it to
22 force the Trial Court to bargain with it in good faith. To that end,
23 NAGE will be filing an unfair labor practice charge against the Trial
24 Court with the Massachusetts Division of Labor Relations.

25
26 On the same date, Anderson forwarded a letter to Hayward asking him to ignore
27 Edgar's October 6, 2008 letter. In his letter, Anderson noted that the fact-finding
28 record was closed, and that any Trial Court statements regarding changed
29 economic circumstances were simply "unsubstantiated assertions." Hayward
30 did not contact the parties in response to the October 6 or October 8 letters and
31 did not forward his fact-finding report at that time.

32 **Decreasing Revenue and Spending Reductions**

33 On or about October 10, 2008, the Governor asked the Judiciary to
34 provide a preliminary estimate of proposed spending reductions. In response,

1 the Trial Court submitted a preliminary plan to reduce spending by over \$30
2 million that included: a hiring freeze; cancellation of departmental conferences;
3 elimination of any upcoming out-of-state travel and restrictions on in-state travel;
4 and other operational savings. In addition, the Employer renegotiated private
5 leases, cut county rents, and eliminated a student intern program. On October
6 14, 2008, Justices Marshall and Mulligan issued a joint message to the Trial
7 Court staff communicating these cost savings measures.

8 On October 16, 2008, the Union's bargaining committee met with the
9 Employer. Both parties agreed to continue working together to reach a contract
10 resolution and planned to meet regularly until they did.¹⁶ On October 17, 2008,
11 the Employer convened a "Fiscal Task Force" to identify additional cost savings
12 measures and efficiencies across all court operations.

13 On November 19, 2008, the Employer notified various Trial Court
14 department heads of the following steps that needed to be taken to meet the

¹⁶The evidence regarding the time frame in which the parties resumed negotiations is somewhat unclear. Anderson testified that he contacted Edgar regarding bargaining after he received the October 6, 2008 letter, but his testimony also suggests that the parties did not begin bargaining until after the DLR Investigator dismissed the charge on April 22, 2009. However, the Union's website stated on October 16, 2008 that the parties met that day, agreed to keep working, and planned to meet regularly thereafter. The Union did not file the charge of prohibited practice until December 29, 2008. Since Anderson's October 8, 2008 letter indicated that the Union intended to file a regressive bargaining charge, it is unlikely that the Union would not have either filed a charge or resumed bargaining immediately after receiving Edgar's October 6 letter. Additionally, in view of the importance of the issues to the parties, it is unlikely that they waited six months to resume their negotiations after agreeing in October to do so. Consequently, the Hearing Officer found that the Employer and the Union resumed negotiations in or about October of 2008.

1 identified spending reductions for the FY09 budget: freezing hiring and
2 promotions; prohibiting out-of state travel and restricting in-state travel; reducing
3 expenses for non-employee services like: interpreters, court reporters,
4 investigators and guardians ad litem; restricting spending for new equipment, and
5 reducing energy consumption. Also in November of 2008, Secretary of
6 Administration and Finance Leslie Kirwan (Kirwan) decreased revenue
7 projections by \$1.1 billion. The Governor announced that the total revenue gap
8 was \$1.4 billion and proposed a solution to the situation that included \$655 in
9 budget cuts; \$52 million of which were voluntary cuts from the Legislature, the
10 Judiciary and the Constitutional Officers. Additionally, the Legislature passed
11 Chapter 377 of the Acts of 2008, which reduced the Trial Court's FY2009 budget
12 by approximately \$21.4 million.

13 **Issuance of the Fact-Finder's Report**

14 Between October of 2008 and June of 2009, the parties periodically
15 contacted Hayward to inquire into the status of the fact-finding report. Hayward
16 did not give them a date certain, and the parties' resulting frustration prompted
17 them to ask DLR Executive Director Michael Byrnes (Byrnes) for assistance. In
18 March of 2009, Byrnes secured a commitment from Hayward to issue the report
19 within two weeks. No report issued in that time frame.

20 In June of 2009, Union representative David Bernard (Bernard), Edgar,
21 and Byrnes discussed the matter. The parties were engaged in negotiations at
22 that time and did not want the issuance of the report to impede their efforts.

1 Consequently, they asked Byrnes to hold Hayward's report when he received it
2 and not transmit it to the parties. Hayward issued the report to Byrnes on June
3 18, 2009, and Byrnes notified the parties that he would retain the report pending
4 their instructions.

5 The Employer and the Union continued their negotiations after receiving
6 notice of Hayward's report. They did not cease until the DLR notified the Trial
7 Court that the New England Police Benevolent Association (NEPBA) had filed a
8 petition with the DLR on April 29, 2010 seeking to represent the Union's
9 bargaining unit members.¹⁷ The Employer and the Union did not reach an
10 agreement prior to the cessation of the negotiations.

11 Opinion¹⁸

12 At issue here is whether the Hearing Officer properly found that the
13 Employer did not engage in bad faith bargaining when it withdrew the economic

¹⁷ On April 29, 2010, the NEPBA filed SCR-10-2282, but later withdrew that petition and on May 25, filed three separate petitions (Petitions), seeking to represent: 1) all regular full-time court officers employed as court officers in Middlesex County Superior Court (SCR-10-2285); 2) all regular full-time court officers employed as court officers in Suffolk County Superior Court (SCR-10-2283); and 3) all probation officers in charge, probation officers, assistant chief probation officers, first assistant chief probation officers, assistant probation officers, court officers and associate court officers employed by the Chief Justice for Administration and Management of the Trial Court (Employer), excluding Middlesex County Superior Court and Suffolk County Superior Court (SCR-10-2284). The Board ruled on August 6, 2010 that the complaint in this case would block further processing of the Petitions. Because we are affirming the Hearing Officer's decision to dismiss the instant matter, the complaint no longer blocks further processing of the petitions. As set forth in the August 6 ruling, and a letter the Department has sent to all interested parties this day, the NEPBA may now file a motion to reactivate the Petitions.

¹⁸ The Board's jurisdiction is uncontested.

1 proposals that it had included in its brief to a fact-finder before the fact-finder
2 issued his findings and recommendations.

3 Section 6 of the Law requires the employer and union to "meet at
4 reasonable times ...and negotiate in good faith with respect to wages, hours,
5 standards of productivity and performance...but such obligation shall not compel
6 either party to agree to a proposal or make a concession." To meet this
7 obligation to negotiate in good faith, the parties' conduct must always be
8 calculated to move the negotiations forward, toward agreement. Conduct that is
9 designed, or can be reasonably expected to move the negotiations backward is
10 regressive and constitutes a refusal to bargain in good faith. Framingham School
11 Committee, 4 MLC 1908, 1813 (1978). Further, it "is well-settled that the test of a
12 party's good faith in negotiations involves an examination of the totality of
13 conduct." King Philip Regional School Committee, 2 MLC 1391 (1976).

14 Ultimately, as the Hearing Officer correctly set forth, the key question in
15 cases involving changed circumstances and regressive bargaining is whether the
16 changed circumstances have an actual impact on an employer's ability to pay or
17 on other existing proposals. If they do, and there is no other evidence that the
18 employer's actions were motivated by a desire to stymie negotiations or fact-
19 finding, no regressive bargaining will be found. City of Quincy, 6 MLC 2144,
20 2146 (1980).

21 Here, there is sufficient evidence in the record to support the Hearing
22 Officer's finding that the Employer did not engage in regressive bargaining, as

1 alleged by the Union. The evidence establishes that the changed circumstances
2 justified what might otherwise have constituted regressive bargaining and that
3 the Employer had a good faith reason for withdrawing the economic proposals.
4 In reaching this conclusion we rely upon the totality of the Employer's conduct
5 and, in particular, upon the aspects discussed below.

6 First, it is important to note that this is not a case of an employer refusing
7 to execute a contract or to negotiate, pending funding. Thus, this case is
8 distinguishable from cases cited by the Union. In City of Lawrence, 16 MLC
9 1760 (1990), the mayor refused to execute or to submit to the city council for
10 funding an agreed-upon contract that had been ratified by the union. In
11 Lawrence, months after the ratification, the employer sought changes in lieu of
12 wage and other economic provisions previously bargained. The Board held that
13 Section 7(a) of the Law requires that an agreement reached between the parties
14 be "reduced to writing [and] executed by the parties" and that the employer then
15 "submit to the appropriate legislative body within thirty days...a request for an
16 appropriation." Id. at 1762. Here, as of the time the Employer withdrew the
17 economic proposals, no agreement had been reached.¹⁹ What the Union
18 characterizes as dicta in City of Lawrence, i.e., that an "appropriate time for a
19 chief executive...to consider a public employer's ability to pay for collectively
20 bargained benefits is during the negotiation of the agreement," is, rather, an
21 accurate statement of the applicable statutory scheme. Id.

¹⁹ We affirm the Hearing Officer's conclusion, explained in footnote 15 of her decision, that the parties had not reached an agreement.

1 In Middlesex County Commissioners, 3 MLC 1594 (1977), the employer,
2 among other things, refused to bargain concerning economic items and
3 submitted no counter offers to the union's proposals because it assumed that the
4 Massachusetts legislature would not fund a contract including the terms upon
5 which the parties might have agreed. The Board's conclusion that the
6 employer's "conduct, in its totality, indicates a lack of good faith bargaining" was
7 based, in part, upon its holding that an "assumption that the legislative body will
8 ultimately reject a funding request does not excuse an initial refusal to bargain."
9 Id. at 1599.

10 Here, the parties had engaged in direct negotiations commencing in July
11 2006, followed by mediation and a fact-finding hearing. When the Employer
12 withdrew its economic proposals, it, nevertheless, informed the Union that it was
13 "prepared to meet and discuss the effects of these difficult changed
14 circumstances." Therefore, unlike in Middlesex County Commissioners, the
15 Employer here did not condition further negotiations upon any future action by
16 the Legislature and thereby engage in bad faith bargaining. This case is also
17 distinguishable from Brockton School Committee, 19 MLC 1120 (1992), where
18 the Board determined that the School Committee had bargained in bad faith
19 when it refused to negotiate over any economic items until after the City Council
20 finalized its budget.

21 The Union argues that the Employer rushed to avoid a political fight
22 attendant to reporting the proposed contract to the Legislature and that

1 Middlesex County Commissioners dictates that the Board reject this justification
2 for withdrawing its economic package, rather than requesting supplemental
3 funding. This is not the case. As discussed above, the Employer did not refuse
4 to bargain. Rather, it sought to take back the economic package on the table
5 and before the fact-finder, and to bargain anew in light of the changed
6 circumstances. Thus, the Employer properly was considering its ability to pay
7 while negotiations were still on-going. See City of Lawrence, 16 MLC 1760
8 (1990).

9 Second, the Hearing Officer found that relevant circumstances changed
10 between August 22, 2008, when the Employer submitted its post-hearing brief to
11 the fact-finder, and October 6, 2008, when the Employer withdrew its economic
12 proposals. We agree. Those changes included the DOR's mid-September 2008
13 publication of a projected revenue shortfall of \$200 million for the first quarter of
14 FY09. That projection prompted the Governor to ask the Trial Court, and all
15 other government entities, to reduce FY09 appropriations by 7%. Thereafter, the
16 Governor informed the Trial Court that projections were even worse, i.e., a
17 budget deficit of \$1 - 1.4 billion for FY09. At that point, Justice Marshall and
18 Justice Mulligan decided to accede to the Governor's request for budget
19 reduction in FY09 by cutting their budget from \$605 million to \$583.7 million.
20 This caused an immediate \$21.3 million reduction in operational expenses. The
21 Employer's economic package, then before the fact-finder, would have increased

1 expenses by \$25-27 million, a figure significantly more than it had just agreed to
2 cut.

3 Third, we agree with the Hearing Officer's legal conclusion that the actual
4 impact on the Employer of the changed circumstances was sufficient to excuse
5 the withdrawal of its economic proposals. We are not persuaded by the Union's
6 attempts to argue otherwise.

7 In Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority,
8 14 MLC 1518 (1988), the changed circumstances included judicial disposition of
9 the union's request for binding interest arbitration, the issuance of a grievance
10 arbitration award, a plan for the purchase and leaseback of a steamboat and
11 recent hiring hall incidents. Id. at 1539. The Board found that those changed
12 circumstances were matters of legitimate concern, and that it was appropriate for
13 the Authority to bring those concerns to the bargaining table by introducing new
14 proposals and modifying its position with respect to certain items already on the
15 table. Id. The Board found no such legitimate concerns in Springfield School
16 Committee, 24 MLC 7 (1997), where the Board found that, although the School
17 Committee claimed that it no longer had the revenues to fund the wage offer, the
18 School Committee had, and continued to have, enough funds in its FY 1996
19 appropriation accounts to fund the first year of its proposal. In that case, the
20 Board concluded that the School Committee had not demonstrated that it faced
21 the kind of fiscal emergency that might have excused a withdrawal of their earlier
22 wage proposal. Id.

1 In City of Quincy, 6 MLC 2144 (1980), the employer specifically reserved
2 the right during bargaining to withdraw a proposal in the eventuality the
3 Legislature passed a tax cap. They did and the employer waited to see the
4 impact before notifying the union of its intention to withdraw the proposal. Id. at
5 2145-2146. The Board found that the record did not support a finding that the
6 City had engaged in bad faith bargaining by withdrawing its wage offer.

7 Our ruling is thus consistent with the Board's prior decisions on changed
8 circumstances even though this case presents facts that are somewhat different
9 from the situations described above. Clearly, once the Employer agreed to cut
10 its budget by \$21.3 million, there were not enough funds left in the FY09
11 appropriation to cover the first year of the contract, as proposed by the Employer
12 in May 2007.²⁰ Thus, this case is distinguishable from Springfield School
13 Committee, supra, where the Board's determination of bad faith bargaining
14 rested on the fact that such funds were available, at least in the first year. 24
15 MLC at 8.

²⁰ In its attempt to distinguish Woods Hole, supra, the Union claims that the Employer never had any intention of funding any of the economic proposals from its FY09 appropriation, shrinking or otherwise. This claim is based upon testimony presented before the legislature's Joint Committee on Ways and Means for which CJAM included funds in the FY10 budget proposal to fund the cost of the OPEIU Local 6 collective bargaining agreement that made no mention of budgeting funds for the Union, only noting that negotiations were ongoing. There is no basis on this record to conclude that, absent the changed circumstances, the Employer would not have followed its normal course of requesting a supplemental appropriation for the first year of a new contract, as described by both parties, with funding for subsequent years to be included in future appropriations.

1 The Union nevertheless argues that the Employer's bargaining was in bad
2 faith because there was no legal impediment to the filing of the supplemental
3 request that the Employer already planned to submit to cover the costs of the
4 Union's new contract. Regardless of whether such a legal impediment existed
5 however, this case is unique, given the dynamics of the relationship between the
6 Employer, the Governor and the Legislature, described above. The sudden and
7 dramatic decline in state revenues in the first quarter of FY09 meant that there
8 would be a powerful budgetary impact on all three branches and all levels of
9 government. Moreover, while the Employer mentioned in its brief to the fact-
10 finder that this was a "time of economic difficulty and uncertainty," the dramatic
11 changes that unfolded in September and October 2008, including the Governor's
12 request for cuts from all three branches of government, created an unanticipated
13 impact on the Employer's FY09 budget. To this extent, this matter is
14 distinguishable from City of Quincy, where the City's advance notice of potential
15 tax cap legislation enabled it to draft bargaining proposals addressing this
16 contingency. 6 MLC at 2146.

17 Here, the Employer was immediately and squarely faced with a decision
18 regarding how to respond to the fiscal crisis and made the judgment that
19 acceding to the Governor's request for a reduction in the current fiscal year's
20 appropriation, i.e., FY09, would be the better course. The alternatives appeared
21 to be acceding to the Governor obtaining authority from the Legislature to make
22 9C cuts, or challenging that authority, thereby instigating a constitutional crisis.

1 Given these facts, the Employer's decision to suffer these cuts was not as
2 voluntary as it may have appeared at first blush. Moreover, the Employer's
3 subsequent decision to withdraw its economic proposals was a direct result of its
4 decision to make these cuts, which, as the Hearing Officer found, affected its
5 ability to pay for the proposed increases.²¹ Accordingly, we agree with the
6 Hearing Officer that these changes were matter of legitimate concern
7 appropriately brought to the bargaining table. Wood Hole, 14 MLC at 1539.

8 As such, we conclude the course of action taken, i.e., notifying the Union
9 and the fact-finder that its economic proposals were withdrawn and
10 simultaneously offering to meet and discuss the effects of the difficult changed
11 circumstances, were made in furtherance of its obligation to bargain in good faith,
12 and not as an effort to stymie the fact-finding process.

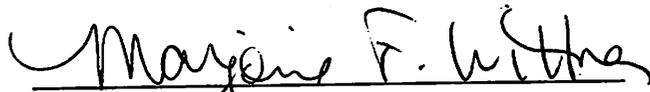
13 Conclusion

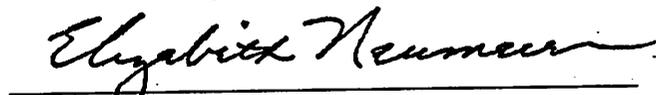
14 Based on the record and for the reasons explained above, the Board
15 agrees with the Hearing Officer's conclusion that the Employer did not violate
16 Section 10(a)(5) Section 10(a)(6) and, derivatively, Section 10(a)(1) of the Law
17 by withdrawing its economic fact-finding proposals. Therefore, the Board affirms

²¹ To the extent the Union asserts that the changed circumstances did not have an actual impact on the Employer's ability to pay, the evidence adduced at the Hearing following the Board's remand, proved differently.

- 1 the Hearing Officer's decision in its entirety dismissing the complaint of prohibited
- 2 practice.
- 3 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER


HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the 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 Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

APPENDIX A

Stipulations of Fact

1. The Union and the Employer engaged in face-to-face successor negotiations from July 2006 to May of 2007.
2. The Employer made a last best offer to the Union in May of 2007, which included an offer for a 3% wage increase for each of the three years of the proposed agreement.
3. The Union rejected the offer and filed for mediation with the former Board of Conciliation and Arbitration on July 16, 2007.
4. The Union and the Employer engaged in mediation between September of 2007 and February of 2008.
5. The matter proceeded to a fact-finding hearing, which was held on May 30, June 20, and July 11, 2008.
6. On August 22, 2008, the Employer submitted its post-hearing brief to the fact-finder.
7. The fact-finder's recommendations were due 30 days after the record closed, or on or about September 2008. The fact-finder did not issue his recommendation until June 18, 2009.
8. The Trial Court Budget Process:
 1. Like the rest of Massachusetts state government, the Trial Court's fiscal year runs from July 1 to the following June 30, and takes its designation from the twelve month period which ends the fiscal year, e.g. FY2010 ran from July 1, 2009 to June 30, 2010.
 2. The amount of the Trial Court's budget depends upon an appropriation by the Legislature, made in conjunction with the overall state budget and subject to the State Finance Law, G.L.c.29. See paragraph 8 below that describes the budget process as it begins with the Governor's budget bill.
 3. The judicial branch's budget request is submitted by the Supreme Judicial Court, which requests that the CJAM assist in the budget preparation for the Trial Court portion, and the CJAM does so pursuant to G.L.c.211B, Section 9(i), which states that the CJAM shall have "the responsibility, upon the request of the Supreme Judicial Court, to provide financial management assistance to said court including review of the budget requests and information as submitted by the department chiefs, to make recommendations thereon and otherwise to assist the court in its budgetary preparations."
 4. The initial budget request for the Trial Court's portion of the judicial branch budget for an upcoming fiscal year is generally submitted by the Trial Court to the Supreme Judicial Court during October or November, e.g. the budget request for

FY2010 would have been submitted to the Supreme Judicial Court for its review during October/November 2008.

5. The Trial Court's Chief Fiscal Officer receives spending plans/maintenance estimates from each court division and office. Each court is also permitted to submit an expansion request, which must also be provided to the Departmental Chief Justice for recommendation prior to approval or disapproval by the CJAM.
6. The Chief Fiscal Officer then compiles the formal budget request for submission to the Supreme Judicial Court for its review, and ultimate inclusion in the judicial branch's budget request to the Governor.
7. The Governor reviews the budget requests and makes his own recommendations that are filed as House 1 in January.
8. Further Summary of the Steps in the Budget Process:

Step 1: Governor's Budget

The budget begins as a bill that the Governor submits in January (or February if at the start of a new term) to the House of Representatives.

Step 2: House Ways & Means Budget

The House Ways and Means Committee reviews this budget and then develops its own recommendation.

Step 3: House Budget

Once debated, amended and voted on by the full House, it becomes the House budget bill.

Step 4: Senate Ways & Means Budget

At this point, the House passes its bill to the Senate. The Senate Ways & Means Committee reviews that bill and develops its own recommendation.

Step 5: Senate Budget

Once debated, amended and voted on, it becomes the Senate's budget bill.

Step 6: Conference Committee Budget

House and Senate leadership then assign members to a joint "conference committee" to negotiate the differences between the House and Senate bills. Once that work is completed, the conference committee returns its bill to the House for a vote. If the House makes any changes to the bill, it must return the bill to the conference committee to be renegotiated. Once approved by the House, the budget passes to the Senate, which then votes its approval.

Step 7: Vetoes

From there, the Senate passes the bill to the Governor who has ten days to review and approve it, or make vetoes or reductions. The Governor may approve or veto the entire budget, or may veto or reduce certain line items or sections, but may not add anything.

Step 8: Overrides

The House and Senate may vote to override the Governor's vetoes. Overrides require a two-thirds majority in each chamber.

Step 9: Final Budget

The final budget is also known as the General Appropriations Act, or "Chapter nnn of the Acts of 20xx." The final budget consists of the Conference Committee version, minus any vetoes, plus any overrides.