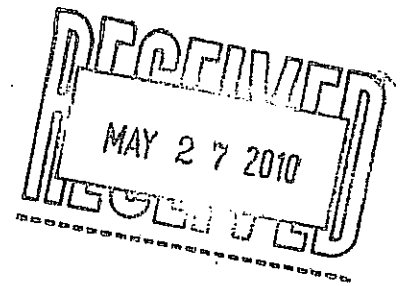




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May 26, 2010

VIA FIRST CLASS MAIL

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Chief Justice for the Admin. & Mgmt. of the Trial Court  
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Boston, MA 02108

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Re: SUP-08-5454, Chief Justice for the Administration and Management of the Trial Court

Dear Ms. Driscoll and Mr. Manning:

The Commonwealth Employment Relations Board (Board) has reviewed the dismissal issued by a Division of Labor Relations (Division) Investigator on April 22, 2009 in the above-referenced matter. After reviewing the record on review pursuant to Section 11 of the Law, as amended by Chapter 145 of the Acts of 2007, and Section 15.04(3) of the Division's rules, the Board reverses the dismissal for the reasons set forth below and remands this matter to the Investigator to issue a complaint consistent with this ruling.

On December 29, 2008, the National Association of Government Employees (Union) filed a charge of prohibited practice with the Division of Labor Relations (Division), alleging that the Chief Justice for the Administration and Management of the Trial Court (Employer or CJAM) had violated Sections 10(a)(6), 10(a)(5) and, derivatively, 10(a)(1) of Chapter 150E of Massachusetts General Laws (the Law). Specifically, the Union alleged that the Employer bargained regressively when it withdrew certain economic offers it made during the course of fact-finding after the record was closed, but before the fact-finder issued a decision.

After conducting an in-person investigation, the Investigator dismissed the Section 10(a)(6) allegation concluding that the record was insufficient to establish probable cause that the Employer's decision to withdraw its economic offers after the fact-finding record closed lacked "reasonableness, integrity, honesty of purpose and a desire to seek a resolution of the impasse." Framingham School Committee, 4 MLC 1809, 1812, 1812-1814 (1978). Rather, the Investigator concluded that the Employer's actions were justified by changed economic circumstances that affected the Employer's proposals.

The Investigator similarly concluded that the Employer had not bargained regressively in violation of Section 10(a)(5) of the Law when it withdrew four economic proposals from the fact-finder's consideration because the Employer had identified a series of negative financial circumstances that would directly impact it and provided evidence that its financial situation was expected to worsen.

The Union filed a timely request for review pursuant to 456 CMR 15.04(3) to which the Employer responded. On review, although the Union concedes that "economic justification might be found for such a maneuver," (referring to the withdrawn proposals) it contends that Board precedent does not permit changed economic circumstances to excuse regressive bargaining. The Union further argues that the Employer's withdrawal of what it characterizes as "agreed economic contract terms" rendered any subsequent decision by the fact-finder "insignificant," and was inconsistent with the Employer's obligations to seek resolution of the impasse or find a basis for agreement. Finally, the Union contends that the Board is obligated to consider the totality of the circumstances in deciding matters of regressive bargaining and that the Board must therefore order a hearing on the Employer's asserted defense before dismissing the case in its entirety.

In response, the Employer disputes the Union's assertion that the parties actually agreed to economic terms and stipulated to present only certain non-economic terms to the fact-finder. Rather, the Employer argues that NAGE's economic terms were still before the fact-finder, along with a number of other proposals. The Employer points out that NAGE itself referred to the changed economic circumstances as a "maelstrom" and that the Union presented no evidence that bad faith, rather than changed economic conditions, was the real reason that the Employer withdrew its economic proposals. To evaluate these arguments, it is necessary to look at what exactly changed in the seven week period between the time the Employer filed its post-hearing brief with the fact-

finder and the time it withdrew its proposals. Some additional background is also necessary and is set out below.

The prior collective bargaining agreement between the parties expired on June 30, 2007. After engaging in successor negotiations from July 2006 to May of 2007, the Employer made a last best offer to the union in May 2007, which included an offer for a 3% wage increase for each of the three years of the proposed agreement. The Union rejected the offer and filed for mediation with the former Board of Conciliation and Arbitration. The matter proceeded to a fact-finding hearing. On August 22, 2008, the Employer submitted its post-hearing brief to the fact-finder. The introduction to the brief stated, among other things, that:

The Trial Court has ... made significant economic offers, in recognition of the valuable work performed by the members of this bargaining unit, but with an understanding of the difficult economic realities of finances in the public sector.

The brief then addresses, point by point, the Union's economic and non-economic issues. On the economic issues, the Employer proposed the same annual wage increases as the Union, including a differential for Probation Officer II. With respect to new steps, the Employer agreed to add a new Step 8 effective July 1, 2007, but opposed the addition of a Step 9, or adding any additional steps for probation officers. Regarding uniforms, the Trial Court agreed to increase the court officer uniform allowance from \$300 per year to \$350 per year and to provide an increased complement of uniforms at the time of hire. It opposed other proposed uniform allowance increases. Finally, as to benefits, the Employer agreed to increase its contribution to the dental/optical trust by \$1.00 per week effective July 1, 2008 and by an additional \$1.00 per week effective July 1, 2009. It declined to make any increases to the trust retroactive to July 1, 2007.

Pursuant to Section 9 of the Law,<sup>1</sup> the fact-finder's recommendations were due thirty days after the record closed, or, on or about September 22, 2008. The fact-finder did

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<sup>1</sup> Section 9 states in pertinent part:

After a reasonable period of negotiation over the terms of a collective bargaining agreement, either party or the parties acting jointly may petition the board for a determination of the existence of an impasse. Upon receipt of such petition, the board shall commence an investigation forthwith to determine if the parties have negotiated for a reasonable period of time and if an impasse exists, within ten days of the receipt of such petition, the board shall notify the parties of the results of its investigation. Failure to notify the parties within ten days shall be taken to mean that an impasse exists.

not issue his findings by that date, however, and on October 6, 2008, the Employer sent a letter to the Union's Chief Negotiator and the fact-finder withdrawing all the economic proposals described above. This letter states in pertinent part:

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

As you know, our contract negotiations started in July 2006. When the Trial Court made a "last best offer" to the Union in 2007, including wage and benefit increases, the Commonwealth's fiscal circumstances appeared to be sufficiently strong to support those increases for this bargaining unit. . . . In mid-July, just after the fact-finding hearings concluded, the Governor signed the fiscal year 2009 state budget, vetoing over \$122 million and seeking an expansion of emergency 9C powers in

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Within five days after such determination, the board shall appoint a mediator to assist the parties in the resolution of the impasse. In the alternative, the parties may agree upon a person to serve as a mediator and shall notify the board of such agreement and choice of mediator. Any such mediator shall be empowered to order the parties to provide specific representatives authorized to enter into a collective bargaining agreement to be present at meetings held for said purpose of resolving the impasse and negotiating such an agreement.

If the impasse continues after the conclusion of mediation, either party or the parties acting jointly may petition the board to initiate fact-finding proceedings. Upon receipt of such petition, the board shall appoint a fact-finder, representative of the public, from a list of qualified persons maintained by the board. In the alternative, the parties may agree upon a person to serve as fact-finder and shall notify the board of such agreement and choice of fact-finder. No person shall be named as a fact-finder who has represented an employer or employee organization within the preceding twelve months. The fact-finder shall be subject to the rules of the board and shall, in addition to powers delegated to him by the board, have the power to mediate and to make recommendations for the resolution of the impasse. The fact-finder shall transmit his findings and any recommendations for the resolution of the impasse to the board and to both parties within thirty days after the record is closed. If the impasse remains unresolved ten days after the transmittal of such findings and recommendations, the board shall make them public.

\* \* \*

If the impasse continues after the publication of the fact-finder's report, the issues in dispute shall be returned to the parties for further bargaining.

preparation for a potential decline in state tax revenues. . . . Recently, the Commonwealth's Treasurer announced that the state would be required to borrow money at a higher than usual interest rate and that it would also be necessary to tap the state's rainy day fund. The Governor has announced the need for significant spending cuts across all sectors of the Commonwealth, and there is now daily news of even more serious shortfalls in the fiscal picture. The Trial Court must prepare for this budgetary impact and curtailed spending. These events of the last several weeks, with national as well as local effects, have required a reassessment of the bargaining position of the Trial Court and the responsible wage and benefit increases that can be offered at this time. Regretfully, because of the deteriorating economic condition of the Commonwealth, the Trial Court cannot continue to maintain its prior economic offers, specifically including a three percent cost of living increase for each of the three years of the agreement, the application of that increase to the PO II differential, a Step 8 for those titles that did not receive a Step 8 in July 2000, any increase in the court officer uniform allowance or increased compliment [sic] of uniforms at the time of hire, or any increase in the contribution to the dental/optical trust.

The management team is prepared to meet and discuss the effects of these difficult changed circumstances and by copy of this letter have notified the fact-finder. Please contact me at your earliest convenience to schedule our meeting.

During the investigation, CJAM provided a number of documents in support of its claim that changed economic circumstances justified its actions, including a statement that Governor Patrick made on October 2, 2008. In that statement, Governor Patrick announced a Fiscal Action Plan to deal with what he described as "significant stress to the national economy and the financial system on which it relies." Among other things, the Governor stated:

By the end of September last month, state revenues for the first quarter of this fiscal year are \$223 million below benchmark, excluding non-recurring receipts; when you count those one-time receipts, we are off \$243 million. While these numbers reflect only the first three months of the fiscal year, and are only a fraction of a percent of our total budget, I believe they signal worse news ahead the national economic downturn, tightening credit and its impact on business activity and consumer spending, market volatility and its effect on capital gains all require us to take further steps now to assure a balanced budget.

\* \* \*

[I] have asked the Legislative Leaders, the Chief Justice and the other Constitutional Officers – whose respective budgets I do not control – to reduce their spending voluntarily. As a benchmark, we will reduce the budget in the Executive Office of the Governor by 7%. Each of our

partners in state government has without hesitation expressed, a willingness to work with us and to contribute all they can.

The Employer also provided a joint statement that Chief Justice Margaret H. Marshall and CJAM Administrator Robert Mulligan issued on October 14, 2008, one week after the economic proposals were withdrawn, regarding "savings measures in the judiciary." The announcement stated that "late last week, the Governor requested that we provide a preliminary estimate of proposed spending reductions to reflect a seven percent reduction for the last nine months of the fiscal year, which he also requested across state government. It further noted that, "Measures in the plan include a hiring freeze effective this week, cancellation of departmental conferences, prohibition of out-of-state travel and restriction of in-state travel, as well as other operational savings."

The Employer also provided a number of additional statements made by the Governor and CJAM in January 2009, more than three months after it withdrew its economic offers, about the state of the economy and its impact on all branches of government, including the judiciary.

#### Section 10(a)(5)

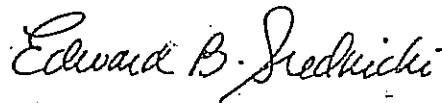
Section 6 of the Law obligates a public employer to "negotiate in good faith with respect to wages, hours, standards of productivity and performance and many other terms and conditions of employment" with the exclusive bargaining representative of its employees. Failure to do so is a prohibited practice under Section 10(a)(5) of the Law. The parties' conduct must always be calculated to move the negotiations forward, toward agreement. Conduct that is designed, or can be reasonably expected to move the negotiations backward is regressive and constitutes a refusal to bargain. Springfield School Committee, 24 MLC 7 (1997). While the Board has held that a party engages in regressive bargaining in violation of its duty to bargain in good faith by withdrawing a wage offer made in an earlier bargaining sessions, Id., it also recognizes that a party does not necessarily engage in regressive bargaining when it introduces proposals resulting from changed circumstances which have arisen during the course of negotiations. Wood Hole, 14 MLC 1518, 1539 (1988), or when it withdraws proposals from fact-finding or bargaining due to changed circumstances; City of Quincy, 6 MLC 2144 (1980). To succeed on this claim however, an employer must demonstrate that it faced a fiscal emergency sufficient to excuse a withdrawal of earlier economic offers. Springfield School Committee, 24 MLC at 8. Where the changed circumstances have an actual impact on an employer's ability to pay or other existing proposals and there is no other evidence that the employer's actions were motivated by a desire to stymie negotiations or fact-finding, no regressive bargaining will be found.

Moreover, the good faith requirement of Section 10(a)(6), which prohibits a public employer from refusing to participate in good faith in proceeding initiated under Section 9 of the Law, "generally contemplates a reasonableness, integrity, honesty of purpose and desire to seek a resolution of the impasse consistent with the respective rights of the parties." Framingham School Committee, 4 MLC 1809, 1812-13 (1978).

In this case, there is no dispute that the Employer withdrew all of its economic proposals shortly before the fact-finder was due to issue recommendations for a successor agreement. Such an act plainly has the effect of moving negotiations backwards, in terms of both time and substance. The question on review, therefore, is whether there is probable cause that changed circumstances between August 22, 2008, when the Employer submitted the post-hearing brief to the fact-finder, and October 6, 2008, when the Employer withdrew the proposals made to the fact-finder, justify what would otherwise constitute regressive bargaining and/or whether there is evidence that the employer's actions were motivated by a desire to stymie negotiations or fact-finding.

Here, although there were changed economic circumstances in 2008, the record at this stage of the proceedings does not support the conclusion that the Employer's withdrawal of all of its economic proposals from the fact-finder, without first discussing its intention to do so with the Union, was the only alternative available to the Employer, or was consistent with its obligations under Sections 5 and 9 of the Law. This is particularly so where the evidence provided by the Employer to justify this unilateral action demonstrates that the Governor, who does not control CJAM's budget, had asked for voluntary, not mandatory, spending reductions from CJAM; moreover the Employer's response to the crisis, as described in the letter to the fact-finder, was still in its nascent stages. Under these circumstances there is probable cause to believe that the Employer has bargained regressively in bad faith in violation of Section 10(a)(5) of the Law and refused to participate in good faith in fact-finding proceedings in violation of Section 10(a)(6) of the Law. The Board therefore remands this matter to the Investigator to issue a complaint consistent with this ruling.

Very truly yours,  
COMMONWEALTH EMPLOYMENT  
RELATIONS BOARD



Edward B. Srednicki  
Executive Secretary