

## Town violated labor laws during arbitration, DLR says

*Ex parte contact with panel deemed 'bad faith'*

By: Eric T. Berkman   September 30, 2022

A Department of Labor Relations hearing officer has found that ex parte communications between a town's labor counsel and a member of the panel handling a contract arbitration involving the town and a police union constituted failure to bargain in good faith by the town.

The Joint Labor Management Committee, an executive agency within the DLR, provided a "tripartite" panel consisting of a management representative, a labor rep and a neutral to arbitrate a wage dispute between the town of Chelmsford and Local 20 of the New England Police Benevolent Association.

During the deliberation period, the town's labor counsel, Marc Terry, engaged in private communications with the panel's management representative, Andrew Flanagan. During those discussions, Flanagan allegedly shared details about a draft award, to which town counsel apparently expressed his displeasure.

Terry also apparently authored a dissenting opinion on Flanagan's behalf that ended up being included in the arbitration award. The dissenting opinion was allegedly instrumental in the Chelmsford Town Meeting's eventual refusal to fund the award.

When the union learned of the communications and exchange of materials, it filed charges with the DLR alleging prohibited practices in violation of state labor law.

The town argued in response that the communications were lawful because Flanagan was not neutral and because neither the neutral arbitrator leading the arbitration nor the JLMC itself expressly barred such contact.

But Hearing Officer Sara Skibski Hiller disagreed.

"The JLMC appointed Flanagan to assist with the petition and to serve on the arbitration panel based on his general experience in municipal management," Hiller wrote. "The Town did not choose Flanagan as its representative on the panel [and he] was not an employee or representative of the Town ... . As a Committee Member, Flanagan is charged by Section 4A [the JLMC statute] to 'make every effort to encourage the parties to engage in good faith negotiations to reach settlement through negotiations or mediation ... .'"

Because the member is not, in fact, an advocate, the expectation that that person abstain from ex-parte communication applies regardless of whether the JLMC or neutral arbitrator has informed the parties that such conduct is not permitted, the hearing officer said.

Accordingly, Hiller ordered that the request to fund the award be resubmitted to the town and that each member of the town's Finance Committee and Town Meeting be given a copy of her order.

The 51-page decision is *In re: Town of Chelmsford, et al.*, Lawyers Weekly No. 21-027-22.

### 'Clear condemnation'

The union's attorney, Gary G. Nolan of North Chelmsford, said he was pleased with what he described as the DLR's "strong and clear condemnation" of the misconduct involved in the case.

"In addition to the town's unlawful communications with a willing inside man, the town manager was also found to have misrepresented the true nature of the unlawful dissenting opinion to both the Town Meeting and Finance Committee members, resulting in a vote not to fund the contract award," Nolan said.



*"This case is a very loud reminder that once a client decides to go forward in any formal adjudicatory process, the lawyer's job is to advocate in the traditional sense and then live with the outcome."*

— Gary G. Nolan, North Chelmsford



Nolan also emphasized that public safety employees cannot strike over labor disputes, so the JLMC arbitration process is intended as a fair and objective way to determine appropriate compensation.

"Police unions deal with less than satisfactory contracts all the time," Nolan said. "Ultimately, it is the client's decision whether or not to resolve a case or have their day in court. This case is a very loud reminder that once a client decides to go forward in any formal adjudicatory process, the lawyer's job is to advocate in the traditional sense and then live with the outcome."

Douglas I. Louison, a Boston attorney who represents public employee unions, said while the decision shows the limits of the legal remedies available through the DLR, the finding of lack of good-faith bargaining was appropriate.

"[Parties to a JLMC proceeding] must have absolute confidence that its members are fulfilling their duties without reproach," Louison said. "By the time a negotiation gets to the JLMC stage, the feelings of the parties are often heated, and faith in the fairness of the process is important."

Brian M. Maser of Boston, who represented the town before the DLR, did not respond to requests for comment.

But Terry, who practices in Westborough and served as Chelmsford's town labor counsel during the deliberations in question, said he was disappointed as someone who has practiced before the JLMC for 20 years that the DLR did not more clearly acknowledge the practice of management and union representatives on the arbitration panel communicating throughout the hearing process with, respectively, the municipality and the union and their respective counsel.

Christopher J. Petrini, of Framingham, who represents cities and towns in labor disputes, said the case highlights the uniqueness of JLMC proceedings in that the same personnel who provide voluntary mediation services — during which the DLR encourages management and labor to communicate ex parte with their respective JLMC representatives — issue binding arbitration decisions if mediation is unsuccessful.

That makes the role of management and labor representatives more ambiguous during arbitration and illustrates why the JLMC needs to review its rules, Petrini continued.

"Unless and until the JLMC amends its rules to provide guidance, it is incumbent on counsel for the parties to the arbitration to ask the neutral arbitrator to set guidelines as to when and whether ex parte communications may be permitted in that particular proceeding," he said.

#### **Ex parte contacts**

The JLMC, created by statute, consists of a chairman, vice chairman, and "committee members" designated as either management or labor members based on their affiliations and work experience.

When the JLMC takes jurisdiction of a bargaining dispute between a municipality and a public safety union, it appoints a management committee member and labor committee member to mediate.

If mediation fails, the dispute moves to a tripartite arbitration with the panel consisting of the two members and a neutral chair.

In October 2018, when mediation between Chelmsford and the New England Police Benevolent Association over police sergeant wages broke down, the dispute went to arbitration before a panel. Flanagan was the management member, Alan Andrews was the labor member, and attorney Beth Ann Wolfson was the neutral arbitrator.

At the close of the proceeding, the three panelists met privately to discuss their opinions and anticipated award, and Wolfson said she would write a draft award for the panel to review.

She did not, however, give any express instructions about confidentiality during the deliberation period until the award was issued, nor did she tell Andrews or Flanagan not to speak with either party about substantive issues.

Several days later, Terry spoke with Flanagan on the phone about the proceeding and deliberations, and Flanagan apparently shared the wage package Wolfson leaned toward, which the town then addressed in its post-hearing brief.

Two months later, Terry forwarded a draft of the post-hearing brief to Flanagan requesting feedback.

In early January 2019, Wolfson emailed Flanagan and Andrews a draft arbitration award marked "Confidential" for their review and feedback. Flanagan allegedly forwarded it to Terry with the message: "Let's discuss."

Several days later, Terry emailed Flanagan stating, "You have got to be kidding me!" in response to the draft and followed up with an email describing his objections.

Flanagan then apparently sent Wolfson a message with almost identical thoughts to those of the town counsel. Over the next couple of weeks, Flanagan kept Terry updated on his "back and forth" with Wolfson and Andrews.

Terry apparently offered to write a dissenting opinion on Flanagan's behalf calling out the apparent problems with the proposed award, which Flanagan took him up on.

Wolfson issued the award, containing terms Terry and town manager Paul Cohen did not support. The award was signed by Wolfson and Andrews, and by Flanagan with the word "Dissent" next to his name and a dissenting opinion attached in his name, apparently using the language provided by Terry.

The Board of Selectmen followed up by issuing a warrant for a Special Town Meeting in February to authorize funding for the award.

In the meantime, Cohen and Terry apparently provided the dissenting opinion only to the Finance Committee and Town Meeting and did not disclose or clarify the majority opinion or that the award was influenced by the town's conduct.

The Finance Committee and then Town Meeting voted against the funding. According to the union — which, after learning of the communications in a records request, filed a charge with DLR — both entities had been misled into believing the award was reached after a full and fair hearing and an unadulterated deliberation process.

#### **Lack of good faith**

Hiller found that both the ex parte discussions between town counsel and Flanagan, as well as the draft dissent, demonstrated a failure to bargain in good faith under G.L.c. 15E, §10(a).

In so finding, she rejected the town's argument that Flanagan was not a neutral member of the panel and thus nothing barred ex parte communications between him and town counsel.

Specifically, she stated that a committee member's role is not, in fact, to advocate for a party's interest but rather to advocate for the dispute resolution process. That means the expectation that town counsel abstain from ex parte communication with Flanagan applied just as he would have been expected to abstain from such contact with the neutral arbitrator.

"The JLMC and the neutral arbitrator's failure to explicitly inform the parties that ex-parte communications are prohibited does not render the conduct lawful," Hiller said. "I find that the Town acted in bad faith when Town Counsel engaged in ex-parte communications with Flanagan with the intent to gain information about the arbitration panel's confidential deliberations and influence the Award."

Additionally, Hiller said, the town acted in bad faith when town counsel drafted the dissenting opinion and by misrepresenting the award to Town Meeting and the Finance Committee prior to their votes.



## ORDERING FULL TEXT OPINIONS

To search the marketplace for this full text opinion, click the Lawyers Weekly Number below.

21-027-22

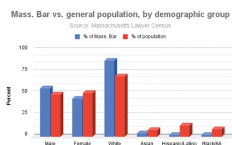
**Please Note:** Supreme Judicial Court and published Appeals Court opinions are not available for purchase, but can be accessed online by clicking on the full-text opinion link under “related articles.”

For information on ordering full text opinions, click [here](#).

Issue:

OCT. 3 2022 ISSUE

## YOU MIGHT ALSO LIKE



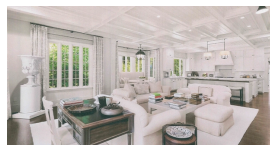
First set of demographic data on Massachusetts bar compiled

September 30, 2022



Does \$1B award portend more ‘nuclear’ verdicts?

September 30, 2022



Ex-girlfriend who changed locks after break-up on hook for \$22K a month

September 30, 2022