In the Matter of CITY OF MEDFORD

and

MEDFORD FIREFIGHTERS, LOCAL 1032, I.A.F.F.

Case No. MUP-2389

54.642 injury leave
54.8 mandatory subjects
67.8 unilateral change by employer
91.1 dismissal

October 10, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Paul L. Kenny, Esq. — *Representing the City of Medford*
Paul T. Hynes, Esq. — *Representing Medford Firefighters, Local 1032 I.A.F.F.*

DECISION[1]

STATEMENT OF THE CASE

On April 22, 1999, the Medford Firefighters Local 1032, I.A.F.F. (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the City of Medford (the Respondent or the City) had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's rules, the Commission investigated the Union's charge, and on January 13, 2000, the Commission issued a Complaint of Prohibited Practice. The Complaint alleged that the Respondent had violated Sections 10(a)(5) and (1) of the Law by implementing changes in the criteria for receiving paid injured-on-duty leave benefits, without providing the Union with prior notice or an opportunity to bargain to resolution or impasse. The Respondent filed an answer to the complaint on January 30, 2000.

On March 29, 2000, Sara Berman, Esq. a duly designated Commission hearing officer, conducted a hearing at which both parties had an opportunity to examine and cross-examine witnesses and to introduce documentary evidence. The parties filed post-hearing briefs on May 22, 2000. The Hearing Officer issued Recommended Findings of Fact on February 12, 2001. The parties did not submit challenges to the Recommended Findings of Fact.

FINDINGS OF FACT[2]

The City of Medford is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for all full time fire fighters employed by the City in its Fire Department.

At all relevant times, illness and injury leaves of absence for fire fighters were addressed by the following: Article XXII of the parties' collective bargaining agreement (Agreement), the Medford Fire Department Rules and Regulations of 1968 (Rules and Regulations), Section 42-41 of the Medford City Ordinances (Ordinance 42-41), and General Order 31 of the Medford Fire Department, issued August 17, 1990 (General Order 31). Article XXII of the Agreement addressed sick and injury leaves, but made no particular reference to injuries or illnesses incurred on duty.[3] Article IV of the Agreement ("Management Rights") states the following:

> The city shall not be deemed to be limited in any way by this Agreement in the performance of the regular and customary functions of municipal management, including assignments of personnel, and reserves and retains all powers authority, and prerogatives including the exclusive right to issue reasonable departmental rules and regulations, General and Special Orders governing the conduct of the various fire department operations, provided said rules, regulations and General and Special Orders are not inconsistent with the express provisions of this Agreement.

Article X ("Saving Clause") of the Agreement provides:

> Section 1. This Agreement has not been designed to violate any...Laws, nor shall anything in this Agreement be interpreted as diminishing the rights of the City to determine and prescribe the methods and means by which its operation of the fire department shall be conducted, except those rights may be limited by this Agreement.
>
> Section 2. ...[A]ll job benefits presently enjoyed by members which are not specifically provided for or abridged by this contract shall continue under the conditions upon which they had previously been granted.

The Medford Fire Department Rules and Regulations, issued in 1968, provided in pertinent part:

> Section 8. Members who desire leave of absence on account of sickness or injury shall report to the City Physician for examination when so directed by the chief of the Department...

General Order 31 prescribes Fire Department procedures in the event of injury or illness occurring in the line of duty, and, in pertinent part, states the following:

> 1. Any member who suffers any work related injury must fill out...an injury report...during the shift that the injury occurs...
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> ...
>
> 6) Any member filling out [an injury report form] shall be transported to the Lawrence Memorial Hospital Emergency Room and [be] examined by [the] physician on duty. He must be accompanied by the Deputy Chief...
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> ...
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> 9) The injured member still retains the right to be examined by a physician of their choice, but it shall be understood that the city has an absolute right to the immediate exam by the Lawrence Memorial Hospital since it will, at some time, become liable for medical payments.
>
> ...

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. Neither party contests the Commission's jurisdiction in this matter.

3. Additionally, City Ordinance 42-41 did not address leaves for on-duty injuries.

10) The City may send members for further medical testing if deemed necessary.

Between approximately 1975 or 1976 and late in 1998, the City had relationships with certain facilities and physicians (City physicians)—including a Dr. Bruno, a Dr. Conway, a Dr. Shohan, a Dr. Miller, and a Dr. Doherty—whereby one or more of these physicians or facilities would be available to examine fire fighters who became ill or injured on duty.[4] The examination would take place at some time after the firefighters had received initial evaluation and treatment.[5]

From 1975 or 1976 until mid-August, 1990, when the Fire Department issued General Order 31, fire fighters who were injured or became ill on duty were first seen at the emergency room of Lawrence Memorial Hospital in Medford for initial evaluation and treatment. On at least nine occasions during that period, at least seven injured or ill fire fighters or Department employees were subsequently examined by one of the above-named physicians or some other City physician.[6] Although the record does not establish dates for most of these subsequent examinations, the one fire fighter for whom the examination date is on the record was seen by the City physician approximately thirteen months after he was injured.

After the Fire Department issued General Order 31 in August 1990, the City continued to take or send ill or injured on duty fire fighters to the Lawrence Memorial Hospital emergency room immediately. Between August 1990 and approximately October 1998, at least seven ill or injured fire fighters were subsequently seen by City-associated physicians or facilities. The dates of the examinations by the City physicians varied from approximately nine months to two years after the injuries.

Not all ill or injured fire fighters were seen by City physicians, and some fire fighters did not know of anyone who had been referred for an examination. However, the record contains no evidence of the following: total number of injuries to fire fighters occurring between 1975 or 1976 and late 1998, how many and what percentage of injured fire fighters were seen by a City physician for additional evaluation of their injuries, what the procedures and criteria[7] were for referring fire fighters to City physicians, the number of times a City physician saw a fire fighter who had been referred, whether the City physician visits were mandatory or voluntary, the scope and purpose of the City physician's examination, and whether the City physician prescribed or provided treatment in addition to evaluation.

In or about December 1998 or January 1999, the City of Medford formed a relationship with Occupational Health and Rehabilitation, Inc. (OH&R) in Wilmington, Massachusetts.[8] OH&R is a health care and rehabilitation facility that contracts with numerous municipalities and state agencies to provide a range of occupational health and rehabilitation services. Beginning in approximately December 1998 or January 1999, the City began to send some injured or ill fire fighters to OH&R for evaluation, for OH&R's opinion about the appropriateness of the fire fighter's treatment if he or she were being treated elsewhere, for evaluations of the fire fighter's readiness to return to work after clearance by his or her personal physician, and, additionally, for physical therapy and other rehabilitative treatment. Typically, a fire fighter came to OH&R after an injury and after having been seen at Lawrence Memorial Hospital. OH&R would evaluate the fire fighter's injury, offer an opinion about the diagnosis, make a treatment recommendation, and offer to provide treatment within its own facility.[9] OH&R would offer an opinion about the appropriateness of treatment that a fire fighter might be receiving from his or her own physician. The fire fighter could elect whether to treat with OH&R, either as his or her sole provider or in conjunction with a personal physician. Some fire fighters chose to treat with OH&R and others did not.

There is no record evidence about the number or percentage of injured on duty fire fighters whom the City referred to OH&R, the criteria for referral, or whether visits to OH&R for evaluation or treatment were mandatory or optional. The evidence does not establish whether the City's use of OH&R differed from its previous use of the City physicians, including the numbers of fire fighters referred, criteria and protocols for referral.

There is no record evidence that the City afforded the Union advance notice or opportunity to bargain over the City's referring firefighters who became ill or injured on duty to OH&R.

OPINION

An employer violates the Law if it unilaterally alters a pre-existing condition of employment or implements a new condition of employment affecting a mandatory subject of bargaining without providing the exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 26 MLC 177, 181 (2000); *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999); *City of Worcester*, 25 MLC 169, 170 (1999). The employer's obligation to bargain before changing conditions of employment extends not only to actual contract terms, but also to working conditions that have been established through custom and past practice. *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC

4. There is no record evidence as to whether any of these physicians or facilities provided services after 1998.

5. The record discloses no information about the details of the arrangements between the City and these physicians and facilities, like contracts, payment agreements, the scope of services provided, the time period during which each provided services, the physicians' qualifications and areas of specialization, the number of fire fighters examined and/or treated by these physicians over any period of time, or the criteria or protocols for referring fire fighters to the City physicians.

6. The record shows that one fire fighter was injured and examined three times during that period.

7. The Fire Chief testified that to his knowledge, four of the fire fighters who had been examined by City physicians between 1977 and 1998 never returned to work from injury leave. Rather, these firefighters retired.

8. No written contract between the City and OH&R was offered into evidence. William Patterson, M.D., OH&R's medical director, testified that he was not aware of any document, and that typically, the OH&R's agreements with its clients were oral.

9. OH&R also preformed fitness for return to duty examinations and provided some other services that were unrelated to on-duty injuries.

1694, 1699 (1983). To establish a violation, the Union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and (3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), citing *City of Boston*, 26 MLC 177, 181 (2000); *Town of Hudson*, 25 MLC 143, 146 (1999); *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994).

The eligibility criteria for paid injured on duty leave under G.L. c. 41 § 111F is a mandatory subject of bargaining. *City of Springfield*, 12 MLC 1051 (1985). Further, an employer's requirement that an employee claiming disability leave submit to an examination by a physician designated by the employer rather than an employee is a mandatory subject of bargaining. *Town of Avon*, 6 MLC 1290, 1291-92 (1979). The parties' dispute, however whether the City actually changed the criteria for using 111F benefits by requiring injured fire fighters to OH & R. The Union asserts that the City changed a pre-existing condition of employment when it began referring fire fighters who sustained injury on duty to OH&R beginning in December 1998 or January 1999. The Union argues that referring injured or ill fire fighters to OH&R for evaluation is a mandatory subject of bargaining, and that the City failed to bargain over the referrals to OH&R in violation of the Law. The Union further argues that the City's authority to refer injured or ill fire fighters for medical evaluations was limited to the parties' collective bargaining agreement and the provisions of General Order 31, which only allowed the City to refer firefighters to Lawrence Memorial Hospital in Medford for evaluation. According to the Union, under General Order 31, only Lawrence Memorial Hospital could make medical decisions and order further medical testing.[10]

It is the City's position, however, that it has not changed a pre-existing condition of employment by referring injured or ill fire fighters to OH&R, and thus it did not have a duty to bargain over such referrals. According to the City, the Medford Fire Department has provided for a medical examination of fire fighters injured in the line of duty. The City argues that referring fire fighters to OH&R is no different than its established practice of referring fire fighters to City-designated physicians, which it has done since 1968 through its Department's Rules and Regulations, and through General Order 31, issued in August 1990.

In *Town of Hingham*, 21 MLC 1237 (1994), the Commission determined that the Town did not unilaterally change the criteria for receiving injury leave benefits when it required two police officers receiving G.L. c. 41 § 111F benefits to undergo an examination by a Town-designated physician. The Commission concluded that, because the Town had used its discretion to order officers to be examined by a Town-designated physician on at least two prior occasions, the Town had not changed a pre-existing condition of employment regarding injured leave. *Id.* at 1240. Similarly, in *Town of Weymouth*, 11 MLC 1448 (1985), the Commission found that the Union failed to prove the Town had changed a pre-existing condition of employment when the Chief of Police required officers to submit to a Town-designated physician. The Commission concluded that the Town had established a past practice by demonstrating that, although it did not require every officer on Section 111F leave to be examined by a Town-designated physician, it did require some officers to be examined by a Town-designated physician. *Id.* at 1456.

Here, the record demonstrates that the City has an established past practice of referring fire fighters to City-designated physicians after an examination at Lawrence Memorial Hospital. From 1975 or 1976 until October, 1998, the City referred fire fighters to City-designated physicians on at least sixteen occasions after the fire fighters had been evaluated at Lawrence Memorial Hospital. Beginning in December 1998 or January 1999, the City began referring injured or ill fire fighters to OH&R for evaluation, typically after they were examined at Lawrence Memorial Hospital. However, the evidence does not establish that the City's referrals of fire fighters to OH&R differed in any way from the City's practice of referring fire fighters to City-designated physicians. The record does not reveal that the number or percentage of injured on duty fire fighters the City referred to OH&R was a change from the referrals to other City-associated physicians. There is no evidence to suggest that the evaluation by OH&R differed from examinations by other City-designated physicians. Further, the record does not demonstrate whether visits to OH&R were optional or mandatory, or whether the criteria or protocol for referrals to OH&R varied from that utilized by the City to refer fire fighters to other City-designated physicians.

Accordingly, because the evidence fails to establish that the City changed its established practice of referring fire fighters to City-designated physicians when it began referring them to OH & R, the evidence is insufficient to demonstrate that there has been an actual change in an existing condition of employment.[11]

CONCLUSION

For all of the above reasons, we conclude that the Employer did not violate Sections 10(a)(5) and (1) of the Law, by referring fire fighters injured on duty to OH & R. Accordingly, we dismiss the Complaint of Prohibited Practice in Case No. MUP-2389.

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10. The Union argues in its brief that, even if Paragraph 10 of the General Order 31 could be interpreted to authorize the City to refer fire fighters to OH&R, "it is clear from (General Order 31) that Lawrence General (sic) Hospital will make medical decisions and that only Lawrence General Hospital can order further medical testing." However, the language of General Order 31 is not as limiting as the Union asserts. Paragraph 9 of General Order 31 states that "[t]he injured member still retains the right to be examined by a physician of their choice, but it shall be understood that the city has an absolute right to the immediate exam by the Lawrence Memorial Hospital since it will, at some time, become liable for medical payments." Paragraph 10 of the General Order specifically authorizes the City to "send members for further medical testing if deemed necessary." Therefore, General Order 31, and specifically Paragraph 10, does not provide that *only* Lawrence Memorial Hospital can make medical decisions and order further medical testing for an injured or ill firefighter.

11. The Union argues that the City should not be allowed to rely on the Management Rights' clause of the collective bargaining agreement to obviate its duty to bargain. Because there is insufficient evidence that a change in a condition of employment has occurred, however, we need not reach that issue. *See e.g.*, *Town of Hingham*, 21 MLC at 1240, n.6.