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TOWN OF HOLBROOK AND IBPO, MUP-6344 (11/3/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

28. Relationship Between G. 150E and Other Statutes Not Enforced by Commission  
63.21 discrimination -- filing a grievance  
82.3 status quo ante  
92.51 appeals to full commission

Commissioners participating:

Maria C. Walsh, Commissioner  
Elizabeth K. Boyer, Commissioner

Appearances:

- Charles A. George, Esq. - Representing the Town of Holbrook  
Marc J. Miller, Esq. - Representing the International Brotherhood of Police Officers

DECISION ON APPEAL OF  
HEARING OFFICER'S DECISION

Statement of the Case

On February 25, 1987, Hearing Officer Robert B. McCormack, Esq. issued a decision in the above-captioned case, holding that the Town of Holbrook (Town) had violated G.L. c.150E (the Law), Sections 10(a)(3) and (1) by discriminating against Sergeants Scannell, Keegan and Fitzgerald because they engaged in protected, concerted activity within the meaning of Section 2 of the Law. The Town filed a timely notice of appeal. On April 5, 1987, the Town filed a supplementary statement challenging the legal basis of the hearing officer's decision and remedy as well as certain of his factual findings. The Union filed no supplementary statement.

Facts<sup>1</sup>

We affirm the hearing officer's findings of fact and supplement them as follows.

The Town of Holbrook is governed by a Board of Selectmen, whose Chairman also serves as Town Manager. Since 1981 the Chairman and Town Manager has been Frank W. McGeedy. The Town has elected to have a "strong chief," pursuant to G.L. c.41, Section 97A. Since 1983, the Chief of Police has been Richard White. At all times relevant to this case, the four sergeants in the Holbrook Police

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Neither party contests the Commission's jurisdiction in this matter. Therefore, no jurisdictional facts are set forth.



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ment were William Keegan, Paul Scannell, Thomas Fitzgerald, and Donald White.

The duties of a police sergeant are set forth in Rule 111 of the by-laws of the Town of Holbrook and include, *inter alia*, being in command of the shift to which he is assigned, performing regular inspections of the patrolmen on duty on shift, serving patrol duty, giving certain reports to the Chief, taking charge of the scene of serious crimes, and acting as court officer. At all times relevant, Sergeant White, the Chief's brother, has regularly acted as court officer, and the three other sergeants have performed the remaining duties set forth above. Prior to June 1986, the sergeants never regularly performed desk duty, that is, sitting at the desk at the police station, answering police radios and dispatching, answering the telephones. Desk duty was, as a matter of course, exclusively assigned to patrolmen.

On January 13, 1986, the Chief issued an order which stated:

Effective this date, sergeants will work for sergeant's [sic] shifts. Sergeants will work for patrolmen's shifts only after all patrolmen have been called.<sup>2</sup>

Assignments of sergeants and patrolmen were made in conformance with this order until May, 1986. In May, Sergeant White went on vacation and was replaced in his court officer duties by a patrolman.

On June 11, 1986, Sergeants Scannell and Fitzgerald signed and mailed to the Chief a grievance initiated by Sergeant Keegan, grieving the assignment of court officer work to a patrolman on the ground that the assignment violated two provisions of the collective bargaining agreement as well as a separate agreement between the parties.

On June 16, the Chief went to see Sergeant Scannell, who was then working at the site of a private detail. The Chief had never previously sought out Scannell while he was on a private detail. The Chief asked Scannell whether he signed the grievance. Scannell stated that he did sign the grievance and explained his reasons. The Chief then asked how Scannell would like being assigned permanent desk duty. Scannell said he would not like it but would do the work ordered to do so. When Scannell returned to the station, he told Sergeant Keegan that his [Keegan's] grievance was going to get them all assigned to desk duty.

In a notice dated June 24, 1986, the Chief upheld the grievance, stating:

I will comply with my order of January 13, 1986 wherein I stated that sergeants will work for sergeants and patrolmen will work for patrolmen and, therefore, you will receive 13 hours of pay at the rate of time and one-half.

<sup>2</sup>The circumstances which gave rise to this order are not set forth in the order.

On or about June 27, 1986, the Chief posted a schedule for the month of July assigning Scannell, Keegan and Fitzgerald to desk duty. On June 30 the Chief posted an order which assigned them permanently to desk duty. As previously noted, sergeants had never before been regularly assigned to desk duty.

At the hearing, Scannell and Fitzgerald both testified on cross-examination that they had no objection to being assigned to desk duty. Although not specifically noted by the hearing officer, the record also establishes, however, that Scannell testified that he regarded the assignment as punishment.

The Chief testified that he first broached the idea of moving the sergeants to full-time desk duty approximately two years earlier, although he did not specify with whom he had spoken, and that he had several conversations with the Board of Selectmen about the topic prior to June, 1986. He testified that the most recent conversation prior to the implementation of the change occurred in May 1986, when he told the Board that he intended to put the sergeants on full-time desk duty in order to have a more efficient department. The Chief further stated that the Board said that they thought it was a good idea. The Chief also testified that in January 1986, he discussed with Keegan the assignment of sergeants to desk duty, and that Keegan thought it a good idea. Keegan confirmed that he and the Chief had conversed about this, but denied that he'd told the Chief it was a good idea.<sup>3</sup>

Frank McGeady, Chairman of the Board of Selectmen, testified that in 1984, he had discussed with the Chief the lack of decorum and professionalism with which the patrolmen were handling the police radios. He did not testify, however, that the discussions included any mention of assigning the sergeants to permanent desk duty. McGeady testified that between 1984 and at least April of 1986, the assignment of the sergeants to desk duty was not discussed with the Chief. McGeady testified that he did discuss with the Chief the assignment of sergeants to desk duty in "April, May, and/or June" of 1986, but that the Chief never discussed the subject at a Board of Selectmen meeting.

The Chief and McGeady recounted various incidents of patrolmen on desk duty mishandling the police radios. In 1984, a problem arose when a certain patrol officer "hollered" into the radio and did not maintain a professional demeanor. The Chief told Sergeant Fitzgerald to take corrective action, and the problem soon abated.

The subject of improper conduct on the police radios was also raised at Board of Selectmen meetings in August and November 1985. McGeady and another Selectman have police band radios and monitor department radio transmission. In August 1985, the Board members discussed their observations that the desk officers were conducting the radio transmissions in an immature and unprofessional manner.

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<sup>3</sup>In fact, after learning in June 1986 of the Chief's intent Sergeant Scannell grumbled to Sergeant Keegan, "Your grievance is now gonna get us on desk duty."



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At the November meeting, the Board members discussed their displeasure at hearing desk officers incorrectly refer to the Public Works Department as the Highway Department or the Water Department. At this meeting, the Board decided to inform the Chief of these improprieties so that he could instruct department personnel on proper use of the radio. No evidence was presented that either the Chief or Board of Selectmen ever decided to remedy the problem by replacing the patrol officers on the desk with the sergeants.

The Chief testified that he had observed the patrolmen and even a sergeant watching cartoons on a television located in the communications room and that on occasion, a patrolman on desk duty watched cartoons instead of answering a ringing phone. The Chief did not specify when this occurred. No evidence was presented that the Chief decided to remedy this problem by placing the sergeants permanently on desk duty.

Although the Chief testified that certain improvements have taken place in the department since the sergeants have been performing desk duty, the Chief did testify that he either anticipated or had planned to achieve any of the cited improvements at the time that he decided to transfer the sergeants to permanent desk duty. The only reason that the Chief gave for his action when it was taken was the general statement that he "thought the department would run much more efficiently."<sup>4</sup>

#### Opinion

The issue presented by this case is whether the hearing officer correctly determined that the Town unlawfully discriminated against Sergeants Scannell, Moran and Fitzgerald in violation of Sections 10(a)(3) and (1) of the Law by transferring them to permanent desk duty because they had filed a grievance. For the reasons stated below, we affirm the hearing officer's decision, although we modify his reasoning.

The Commission applies a three-step analysis to cases alleging a violation of Section 10(a)(3) of the Law. Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981); Boston City Hospital, 11 MLC 1065 (1984); City of Clinton, 12 MLC 1361 (1985). The charging party must first establish a prima facie case by producing evidence to support each of the four elements of violation: a) that the employee engaged in protected activity within the meaning of Section 2 of the Law; b) that the employer knew of this activity; c) that the employer took adverse action against the employee; and d) that the adverse

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<sup>4</sup>The hearing officer noted that the Town's Answer to the Complaint gave the main reasons for the Chief's decision which the Chief's testimony "basically corroborated." Although the Chief described improvements which have resulted from the sergeants' performance of desk duty the evidence does not establish that the Town's motive at the time of the change was to achieve the articulated improvements.

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action taken by the employer was motivated by the desire to penalize or discourage the protected activity. Town of Clinton, supra at 1364.

Once the charging party has established a prima facie case, the employer may rebut it by producing evidence that one or more lawful reasons actually motivated the adverse action. id. If it does so, the Commission will not find the employer's action unlawful unless it concludes that the employer would not have taken the adverse action against the employee but for the employee's protected activity. Boston City Hospital, supra at 1071.

In finding a violation, the hearing officer implicitly concluded that the Union had established a prima facie case. He ultimately concluded that the Town failed to rebut the prima facie case because the evidence was insufficient to establish that the Town had a lawful reason for the action taken.

The Town appeals the hearing officer's decision on several grounds. It disputes the hearing officer's conclusion that the Union established two key elements of the prima facie case: the adverse action and prohibited motivation elements. The Town also argues that even if the Union did establish these elements, the hearing officer erred in not finding that the Town rebutted the Union's prima facie case by demonstrating lawful reasons for the assignment which withstand the "but for," or mixed motives, analysis. Finally, the Town contends that the hearing officer exceeded his remedial authority by ordering the Town to reassign the sergeants to their former duties.

A. The Adverse Action Element of the Prima Facie Case.

We agree with the hearing officer that the record contains sufficient evidence to establish that the assignment of the sergeants to desk duty constituted "adverse action." The hearing officer's finding is supported both by Scannell's testimony that when asked by the Chief in June 1986 whether he would like permanent desk duty, he had responded that he would not like desk duty but would perform the work if ordered to do so; and by Scannell's "grumbling" to Keegan that Keegan's grievance was going to get them all assigned to desk duty. The hearing officer specifically declined to credit Scannell's and Fitzgerald's testimony on cross-examination that they did not object to their assignment to permanent desk duty, and we find no cause to disturb that credibility determination. Moreover, Scannell testified that he regarded the assignment as punitive. Accordingly, the Union established this element of its prima facie case.

B. The Town's Motive.

The hearing officer concluded that the Town's assignment of the sergeants to permanent desk duty was unlawfully motivated. On appeal, the Town argues that the Union failed to establish this element of the prima facie case and, in the alternative, that the Town presented persuasive evidence of nondiscriminatory reasons for the assignment. The Town points to evidence in the record that the concept of transferring sergeants to permanent desk duty had been discussed for two years prior to the assignment and that lawful operational concerns motivated the assignment.



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We concur with the hearing officer's conclusion that the evidence establishes prohibited motivation element of the Union's prima facie case.<sup>5</sup> The evidence establishes that the assignment occurred shortly after the grievance was filed and shortly after the conversation with Scannell on June 16 in which the Chief expressed displeasure with Scannell for having filed the grievance and asked if he would like to be transferred to permanent desk duty.

In order to rebut the Union's prima facie case, the Employer must have provided evidence that a lawful reason actually motivated its assignment of the sergeants to permanent desk duty. Trustees of Forbes Library, supra at 566; Boston Hospital, supra at 1073. The Town contends that it adduced evidence that the Chief assigned the sergeants to desk duty for lawful operational reasons, and that the Union did not prove that it would not have made the assignment "but for" the Chief's desire to retaliate against the sergeants for their union activity. Although the hearing officer concluded that the Chief had corroborated in his testimony the specific reasons for the assignment listed in the Town's answer to complaint, the record evidence establishes only that the Chief testified that he made the assignment so the department would run more efficiently. The Chief's testimony contains no further explanation for the change, and merely contains his speculations about the reasons the assignment has improved the department's operations. Even if we accept the Town's contention that the record establishes that the Chief made the assignment because the sergeants were more professional on the streets and radio and had better knowledge of the laws, and department procedures, because the assignment would enhance the department's public image, we cannot conclude from the evidence that the assignment would have been made "but for" the sergeants' protected activity.

We reach this conclusion primarily because of the evidence concerning the Chief's June 16 conversation with Scannell. The Chief visited Scannell at a private detail for no apparent purpose other than to interrogate Scannell about whether he had signed the grievance. The Chief then questioned how Scannell would like being assigned to desk duty. The latter question, in this unadorned context, clearly amounts to a threat by the Chief to assign Scannell to desk duty in reversion of the grievance. The fact that the Chief threatened to make the assignment in retaliation for the grievance, and then did so without any intervening triggering event, goes far to establish that the assignment would not have been made apart from the Chief's unlawful animus toward the grievance. Although the Chief testified that the assignment of the sergeants to desk duty had been discussed with the Selectmen over a two-year period preceding the change, the record does not establish that the issue had been discussed or considered by or with Town

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<sup>5</sup> In so concluding, we reject the Town's contention on appeal that the fact that the Chief upheld the grievance that motivated the retaliatory assignment necessarily establishes that the Chief's assignment was not motivated by discriminatory animus. The Chief's animus toward the sergeants' grievance was demonstrated by his June 16 conversation with Scannell as well as by the timing of the desk duty assignment shortly thereafter. The fact that the Chief resolved the grievance in the sergeants' favor suggests that his expressed animus did not infect his determination of the grievance, but does not establish the absence of animus in his other conduct.



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officials during the several months before the assignment was made.<sup>6</sup> Finally, the problem of radio and telephone misconduct by patrol officers that the Town cites as a reason for the sergeants' assignment occurred, and was apparently resolved, well before the Chief's decision.

For the foregoing reasons, we find that the Employer failed to show that "but for" the sergeants' filing the grievance, the Chief would have assigned the sergeants to permanent desk duty. The evidence, instead, supports a finding that the Town discriminated against the sergeants because they filed the grievance.

### C. The Remedy.

Having found that the Town unlawfully discriminated against the sergeants, the hearing officer ordered the Town to, inter alia, restore the sergeants to their former duties. The Town argues on appeal that the hearing officer's order exceeded his authority because it impermissibly encroached upon the Chief's statutory authority under G.L. c.41, Section 97A, to make personnel assignments. We disagree.

Section 97A of G.L. c.41, popularly known as the "strong chief" law, vests a chief of police with broad discretion in the operation of the police department and empowers him to act in certain matters independently of the Board of Selectmen or other town government. However, the statute does not permit even a "strong chief" to exercise his power in order to unlawfully discriminate against members of his department who are engaging in protected activity.

In similar cases, the courts and the Commission have consistently held that a legislative grant of discretion to a public employer is not license for that employer to infringe upon the rights guaranteed to its employees by G.L. c.150E. For example, in Southern Worcester County Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414 (1982), a school committee refused to rehire non-tenured teachers because of their union activity. After the Commission ordered the school committee to rehire the non-tenured teachers, the school committee argued on appeal that the Commission lacked the authority to override the school committee's authority under G.L. c.71 Sections 41 and 42 to decide not to rehire a nontenured teacher for any reason, provided timely notice is given. In rejecting this argument, the Court stated that the provisions of c.150E, Section 10 limit the power of a school committee to refuse to renew the employment of a teacher, and permit an order reinstating a teacher, even if reinstatement results

<sup>6</sup>McGeady's testimony was actually in conflict with the Chief's concerning the discussions during the two years before the assignment. Although the Chief assertedly discussed the issue several times with the Board of Selectmen, and most recently at a Selectmen's meeting in May 1986, McGeady stated that the Chief never discussed transferring the sergeants at a Selectmen's meeting, and that the Chief mentioned the issue to him once in April, May or June 1986. Even assuming that the subject of assigning sergeants to desk duty had been discussed over the two year period preceding the change, we note that no action was taken until Scannell filed his grievance.



tenure. Similarly, in Town of Clinton, supra, where the employer refused to rehire a fire fighter because of his protected activities, the Commission upheld the hearing officer's order to promote the fire fighter. The Commission rejected the employer's argument that the order exceeded the hearing officer's remedial authority.

On the same reasoning, we uphold the hearing officer's remedy in this case because we conclude that the order is necessary to remedy the Town's unlawful discrimination against the sergeants.

Conclusion

The Town violated Sections 10(a)(1) and (3) of the Law by assigning Sergeants Scannell, Keegan and Fitzgerald to permanent desk duty in retaliation for filing of a grievance. The decision of the hearing officer is affirmed.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of Holbrook shall:

1. Cease and desist from:
  - a. Discriminating in regard to any term or condition of employment to encourage or discourage membership in any employee organization;
  - b. Interfering with, restraining and coercing employees in the exercise of their rights under the Law to file grievances;
  - c. Discriminating against William Keegan, Paul Scannell and Thomas Fitzgerald in regard to any term or condition of employment in retaliation for grievances filed by any employee.
2. Take the following affirmative action which will effectuate the policies of the Law:
  - a. Immediately rescind the orders of June 27 and June 30, 1986 which assigned Sergeants Keegan, Scannell and Fitzgerald to permanent desk duty;
  - b. Immediately sign and post a copy of the attached Notice to Employees in conspicuous places in all places where notices to Police Department employees are usually posted, and cause the same to remain displayed for a period of thirty (30) consecutive days.
3. Notify the Commission, in writing, within thirty (30) days of the service of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
 LABOR RELATIONS COMMISSION  
 MARIA C. WALSH, COMMISSIONER  
 ELIZABETH K. BOYER, COMMISSIONER





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NOTICE TO EMPLOYEES  
POSTED BY ORDER OF  
THE MASSACHUSETTS LABOR RELATIONS COMMISSION  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has determined that the Town of Holbrook violated Section 10(a)(1) and (3) of G.L. c.150E, the Massachusetts Public Employee Collective Bargaining Law, by permanently assigning Sergeants Keegan, Scannell and Fitzgerald to desk duty after a grievance was filed. The Commission has ordered the Town to post this Notice and abide by what it says.

Massachusetts General Laws, Chapter 150E gives public employees the following rights:

To engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection; or to refrain from such activity.

WE WILL NOT do anything that interferes with, restrains or coerces employees in the exercise of these rights.

WE WILL NOT discriminate against our employees because they file grievances.

WE WILL immediately rescind the assignment of Sergeants Keegan, Scannell and Fitzgerald to desk duty if it is still in effect.

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Chief of Police  
Town of Holbrook

