

TOWN OF SOMERSET AND JOHN D. O'NEIL, MUP-6404 (3/9/89). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

- 54.671 differentials
- 63.7 discrimination -- union activity
- 82.11 back pay
- 82.3 status quo ante
- 92.34 scheduling of witnesses
- 92.51 appeals to full commission

Commissioners Participating:

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

Appearances:

- Paul J. Hodnett, Esq. - Representing John D. O'Neil
- Joanne M. Sollecito, Esq.
- Manuel Kyriakakis, Esq. - Representing the Town of Somerset

DECISION ON APPEAL OF
 HEARING OFFICER'S DECISION

Statement of the Case

The issue in this case is whether the Town of Somerset (Town) eliminated John D. O'Neil's differential pay in retaliation for his concerted, protected activities, in violation of Sections 10(a)(3) and (1) of Massachusetts General Laws, Chapter 150E (the Law).

On October 3, 1986, O'Neil filed a charge with the Labor Relations Commission (Commission) alleging the Town's violation of Sections 10(a)(3) and (1) of the Law. After an investigation, the Commission issued a Complaint and Notice of Hearing on January 29, 1987, alleging that the Town had violated Sections 10(a)(3) and (1) of the Law. After the April 22, 1987 hearing, the hearing officer issued her decision on October 27, 1987 finding the Town to be in violation of the Law, and ordering the Town to make O'Neil whole for any loss of benefits and wages he suffered as a result of the Town's unlawful decision to decrease his pay.¹

On November 2, 1987, the Town filed a timely notice of appeal, pursuant to 86 CMR 13.13. On December 2, the Town submitted its supplementary statement challenging certain findings of fact made by the hearing officer and contending that she had failed to make other material factual findings. It further argues that the

The full text of the hearing officer's decision can be found at 14 MLC 1262 (H.O. 1987).



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It does not support a finding that the Town violated the Law. Specifically, the Town contends that O'Neil did not prove two elements of his prima facie case, that the Town's actions were adverse to him, and that the Town was unlawfully acted in eliminating the differential pay. The Town also maintains that it had sufficient evidence of its lawful motivation for the action taken, and O'Neil failed to demonstrate by a preponderance of the evidence that the Town not have taken the adverse action "but for" his protected activities. O'Neil in his supplementary statement on December 22 arguing that the hearing officer's decision is supported by substantial evidence in the record and based upon proper provisions of law. For the reasons discussed below, we affirm the hearing officer's decision, although we modify her reasoning.

Findings of Fact

As noted above, the Town filed an extensive supplementary statement asserting that the hearing officer had erred in making and in failing to make certain factual findings. We have reviewed the entire record and hereby make the following factual findings.

The Town promoted O'Neil, a fourteen-year police officer for the Town, to sergeant in September 1983 and to detective in September 1984. Prior to his assignment to the detective bureau, O'Neil, assigned to the night shift, had been receiving night differential pay of \$22.50 per week. When O'Neil was assigned to the detective bureau, he also was assigned to the day shift. Police Chief Peter Kerrigan told O'Neil at the time of his assignment to detective that although O'Neil would be working the day shift, he would continue receiving the differential pay in lieu of requesting payment to cover "minor" overtime he would work (i.e., less than four hours). This continued a prior arrangement that the Chief had maintained with O'Neil's predecessor, patrol officer Miller. From September 1984 until September 1986 O'Neil received the differential pay weekly.

During the fall of 1985, the Chief told O'Neil that the Board of Selectmen intended to discourage O'Neil from working for free in excess of his regularly scheduled hours. In early 1986 the Massachusetts Municipal Association warned the Town that encouragement of voluntary overtime might violate the Federal Labor Standards Act (FLSA), 29 U.S.C. §§201 et seq. As a result the Board began to require that all employees, including O'Neil, be paid for all overtime worked. For example, when O'Neil needed extra detectives to work with him on a special investigation, called "Some-Fail," extending from the fall of 1985 through 1986, the Board required to pay the detectives all the overtime they had worked in accordance with the decision of the United States Supreme Court decision in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Nonetheless, the new payment of overtime to O'Neil for all hours he worked did not affect O'Neil's differential pay. O'Neil continued to receive his weekly pay differential in addition to payment for his scheduled hours.

On March 20, 1986, O'Neil sent a letter to Police Chief Kerrigan describing the need for a second detective to help with the workload and recommending patrol



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officer Brian Leonard for the position. Chief Kerrigan told O'Neil that he was seeking approval for a second detective and suggested that O'Neil write directly to the Board of Selectmen. On April 30, O'Neil wrote to the Selectmen recommending Leonard for the position.

On May 1 the Selectmen chose patrol officer Donald Dube as the second detective to help O'Neil with the growing workload. O'Neil protested the selection of Dube in a letter to the Selectmen dated May 8, 1986. Dube began his duties as second detective in early July 1986.

During this period the Town was conducting a reclassification survey which would impact O'Neil's salary. O'Neil supported the Town's adoption of the Massachusetts Municipal Association Survey which would be more favorable to him than the Town's own survey. On May 19, 1986, O'Neil and Officer Leonard attended the Town Meeting. After Selectman Healey outlined the Town's proposed reclassification system at the Town Meeting, O'Neil and Leonard were the only dissenters in the voice vote in favor of adopting the Town's reclassification plan. O'Neil's attempts to discuss the issue prior to the vote were thwarted when the Town moderator did not recognize him as a speaker and when the Selectmen prevented any discussion of the plan after the vote had been taken.

On May 19, 1986, the Town adopted a new Consolidated Personnel Bylaw, which went into effect on July 1, 1986. This personnel bylaw was the Town's first formalized pay classification plan for non-union employees. After July 1, 1986, the new personnel bylaw governed the terms of Sergeant O'Neil's employment.² The personnel bylaw contains no provision for special "detectives pay" other than that expressly provided for a "detective sergeant" in the Wage and Salary Gradings.³

Following Town Meeting a local newspaper published an article which contained statements of the Selectmen and Town Administrator Marchand in response to O'Neil's criticisms of the adoption of the Town's reclassification and wage plan. In that article, Marchand criticized O'Neil's opposition both to the new bylaw and to pay increases to be awarded certain Town employees, and specifically suggested

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In July 1986 sergeants, including O'Neil, were neither represented by a union nor included in the patrol officer's bargaining unit, and thus, O'Neil's position was not subject to the collective bargaining agreement.

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We note our disagreement with the Town's requested finding on appeal that because the bylaw did not expressly provide for the differential pay previously paid to O'Neil, the town could no longer pay the differential. The personnel bylaw did not cover all police benefits. It is silent on certain existing benefits such as the police educational incentive pay (Quinn Bill benefits), premium pay for the firearms instructor, longevity pay and night shift differential for superior officers required to work nights. Furthermore, Town Administrator Arthur Marchand testified that the existence of the bylaw did not prohibit the Town from paying a "detective" payment or differential if authorized by the Chief.



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O'Neil apologize to the Selectmen's administrative secretary for having
 and the amount of her salary increase.

While a patrol officer, O'Neil had been president of Local 518 of the International Brotherhood of Police Officers (IBPO) for several years. During the
 of 1986, after having been promoted to sergeant, O'Neil discussed joining a
 with the other sergeants. In May 1986 O'Neil informed Marchand that the
 units were interested in joining Local 518. Marchand told O'Neil to put his
 it in writing. On June 2, 1986, O'Neil sent to Marchand and the Selectmen the
 original letter, signed by O'Neil and three of the five other sergeants:

By virtue of those signatures written below, it is our desire to join
 the union of the International Brotherhood of Police Officers, Local
 518 (IBPO). Please forward to us at your earliest possible opportunity
 your recommendations.

On 12 Marchand responded by suggesting that the sergeants follow "the proce-
 steps outlined in Massachusetts General Law, Chapter 150E." That same day
 requested that the IBPO file a representation petition with the Commission.⁴

During the second week of July, O'Neil noticed that his differential pay was
 included in his paycheck for the prior week's work. He asked Captain Robert
 and Marchand about the discrepancy, but they had no knowledge of it.
 discussing the matter with the Selectmen, Marchand informed O'Neil that they
 information about the elimination of his differential pay. Marchand
 led no discussion about O'Neil's differential pay by the Board of Selectmen
 O'Neil questioned him concerning the absence of pay in his first July pay-
⁵

After a new Town Accountant had taken office in April or May 1986, she asked
 various town departments to review their payrolls in light of the new bylaw,
 submit the payrolls to her for inspection. She also reviewed all of the
 collective bargaining agreements and payroll records. However, there was no
 information presented as to who made the initial decision to terminate O'Neil's
 differential pay, or the reasons for that decision.⁶

⁴
 On September 24, 1986 the IBPO filed a petition seeking to represent a unit
 including the sergeants. At a December 17, 1986 election, a majority of the ser-
 geants voted to be represented by the IBPO. Since sometime thereafter a collective
 bargaining agreement between the IBPO and the Town has governed the sergeants'
 working conditions and compensation.

⁵
 Marchand had been chair of the Board of Selectmen from 1976 through 1984,
 continues to attend Board meetings in his capacity as Town Administrator.

⁶
 The Town correctly disputes the hearing officer's finding that the Chief
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On July 24 O'Neil received the following memorandum from Marchand:

The Board of Selectmen, after consulting with Chief Peter J. Kerrigan, has determined that as a result of your assignment to the day shift, you are not eligible to receive night shift differential on a regular weekly basis. On those occasions however, when it is necessary for you to work a minimum of eight (8) consecutive hours between 5:00 P.M. and 9:00 A.M. you will receive night shift differential. In addition, when you are authorized to work any hours beyond your normal day shift you will receive 1-1/2 times your normal rate of hourly pay for those hours worked in excess of your regular shift. (emphasis in original)

Since July 1986 O'Neil has not received the differential pay.

Discussion

To establish a prima facie violation of Section 10(a)(3), O'Neil must produce evidence to support each of the following elements: (1) that the employee engaged in protected, concerted activity; (2) that the employer knew of the employee's activity; (3) that the employer took adverse action against the employee; and (4) that employer animus to the employee's protected activity played a role in the adverse action. If O'Neil meets that prima facie burden, the Town must demonstrate a legitimate motive for having taken the adverse action. After the Town has established the existence of legitimate motives, O'Neil may still prevail if he proves that "but for" the unlawful motive, the Town would not have taken the adverse action. Provincetown School Committee, 13 MLC 1396, 1398 (1987); Boston City Hospital, 11 MLC 1065, 1071 (1984); cf. Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981).

1. The Prima Facie Case

The Town admits that O'Neil's activities protesting the reclassification plan and his participation in the unionization of the sergeants were concerted protected activities, of which it had knowledge.

The Town contends on appeal that O'Neil failed to establish that the Town took adverse action against him or that the elimination of the differential pay was unlawfully motivated. The Town does not dispute that it eliminated the twenty-two dollars and fifty cents differential pay that O'Neil had received in his paycheck

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told Marchand that he had reduced O'Neil's pay "at the request of the Town Accountant because she thought O'Neil should not be receiving the differential pay." Hearing Officer Decision at 1264. In fact the record establishes only that the Town Accountant generally urged Town departments to conform their payrolls to the new bylaw. There is no evidence to establish that the Chief had either recommended or been involved in the decision to stop O'Neil's differential pay.



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the time he became a detective in September 1984 until July 1986. Nonetheless, it argues that in place of the differential pay, O'Neil was told in Marchand's letter of July 24, 1986, that he would receive time and one half pay for overtime hours worked in excess of his regular shift. The Town argues that use of O'Neil's job continues to require much overtime, for which he will be paid time and one-half rate, it is possible that O'Neil will not be adversely affected by the Town's action.

We reject the Town's contention for the following reasons. First, the record does not support a finding that the differential pay was eliminated because the Town decided to pay O'Neil for all overtime hours worked. Although the payment originally have been justified as a substitute for "minor" overtime O'Neil would have worked as a detective, it was paid to him regardless of the number of hours worked and was essentially a continuation of the amount of the night differential pay he had received before his assignment as a detective on the day shift. Moreover, during some period of time prior to Marchand's July 24 memorandum, O'Neil had been receiving overtime compensation at time and one-half pay for all extra hours worked, in addition to the differential pay. Therefore the evidence does not support a necessary premise of the Town's contention: that is, that the Town intended to pay full overtime payments to O'Neil as a substitute for the elimination of the differential pay.

We also reject the Town's corollary argument that O'Neil was not adversely affected by this substitute arrangement because he likely can earn, in overtime hours, as much or more than the amount of the differential pay. O'Neil can earn an amount equivalent to the differential pay only by working extra overtime, and even prior to July 24, 1986, he had received the differential pay whether or not he worked any additional hours. Therefore we conclude that O'Neil established the "adverse action" element of his prima facie case.

The Town's second argument is that there was insufficient evidence to prove that the Town was unlawfully motivated in eliminating the differential pay. The hearing officer based her finding of unlawful motivation on the fact that the differential pay was eliminated only a few weeks after O'Neil's protestation of the unionization plan at the May 10 Town meeting and in subsequent newspaper articles, and the early June notification to Marchand and the Selectmen about O'Neil's efforts to unionize the sergeants.⁷ While acknowledging that timing is evidence of unlawful motivation, the Town maintains that timing alone is not sufficient to support a prima facie case.

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In addition, the hearing officer also based her conclusion of improper motivation on her finding that the Town's claim that O'Neil's pay was decreased because he used the Town Accountant instructed the Police Chief to correct an error in his payroll was pretextual. As discussed in n. 6, above, the hearing officer erroneously found that Marchand had testified that the Chief took the action pursuant to instructions from the Town Accountant.



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In Southern Worcester County Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414, 418-19 (1982), the Court noted that "to establish a prima facie case an employee need not introduce direct evidence of an unlawful motive such as an anti-union statement. The presence of an anti-union motivation by an employer is a factual matter which the [Commission] may resolve upon circumstantial evidence from the record as a whole." To determine unlawful motivation, the Commission will examine circumstantial factors which include the timing of the adverse action in relation to the protected activity, the insubstantiality of the reasons advanced by the respondent for taking the adverse action, and the employer's shifting explanations for the action. Boston City Hospital, 11 MLC at 1072-73; Everett Housing Authority, 13 MLC 1001, 1006 (1986).

We find, however, that the record in this case contains both direct evidence of unlawful animus and circumstantial evidence of the Town's unlawful motive in the elimination of O'Neil's differential pay. First, there is direct evidence of animus towards O'Neil on the part of Marchand because of his opposition to the new bylaw and pay raises received by certain Town employees. In a newspaper article Marchand publicly criticized O'Neil's opposition both to the new bylaw and to pay raises to be awarded specific Town employees, including the Selectmen's administrative assistant. In the article Marchand specifically demanded that O'Neil publicly apologize to the Selectmen's administrative assistant for opposing the salary set for her position.

The circumstantial evidence suggestive of unlawful motive includes the close timing of the adverse action to O'Neil's protected activity as well as the inconsistent and shifting reasons offered by the Town for eliminating the differential pay. The adverse action occurred the first week of July 1986 following a two-month period when O'Neil had engaged in a considerable amount of protected activities: he had publicly opposed the new bylaw; supported the promotion to detective of Officer Leonard, who also opposed the bylaw; opposed the selection of Office Dube rather than Officer Leonard; and begun to unionize the sergeants. Finally, the record also indicates the inconsistent and pretextual reasons offered by the Town for the elimination of the differential pay. Marchand's July 24, 1986 letter to O'Neil offers, as the reason for elimination of the differential pay: "[A]s a result of your assignment to day shift, you are ineligible to receive night shift differential on a regular weekly basis." This rationale is inconsistent with the fact that since September 1984 O'Neil had worked on the day shift as a detective but nevertheless had been paid the differential. The letter's implication that O'Neil lost the pay differential because he was assigned to the day shift in July 1986 is inaccurate and inconsistent.

The Town asserts on appeal that the appointment of the second detective and the adoption of the bylaw are two of the reasons for eliminating the differential pay. However, the record does not support a finding that these reasons actually motivated the Town's decision. The letter of July 24 does not mention either of these reasons. There is no evidence that the appointment of a second detective was intended to affect O'Neil's differential pay. The record indicates only that the second detective was appointed in order to alleviate O'Neil's increased workload. Although the Town also points to the implementation of the new bylaw as a reason



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ending the pay differential, there was no evidence that the passage of the bylaw was a factor in the decision to eliminate O'Neil's differential pay. We have found that the bylaw is silent on several types of monetary payments which the Town continues to pay such as night shift differential for superior officers, longevity pay, policy educational incentive pay and the premium pay for the firearms instructor. In addition, Marchand conceded that the Chief may authorize a differential to be paid to detectives even though it is not specified in the bylaw. In sum, we find nothing in the bylaw to preclude the payment of differential pay.

The Town's Asserted Lawful Reasons and O'Neil's Burden of Persuasion

In order to rebut O'Neil's *prima facie* case, the Town must state a lawful reason for its decision and produce supporting facts indicating that this was a legally sufficient motive in the decision to eliminate the differential pay. Boston City Police v. City of Boston, 11 MLC at 1073. Once the Town has proposed a lawful reason and presented supporting facts, the burden of persuasion is on the charging party, who must prove by a preponderance of the evidence that the Town would not have taken the adverse action "but for" O'Neil's concerted, protected activity. Town of Stow, 11 MLC at 1319 (1984) *aff'd* 21 Mass. App. Ct. 935 (1985).

The Town asserts the following legitimate, non-discriminatory reasons for eliminating O'Neil's differential pay: 1) the enactment of the new personnel bylaw, which governed the terms and conditions of O'Neil's employment after July 1, 1984, did not provide for payment of the differential to a detective sergeant, 2) O'Neil's assignment to the day shift did not permit the payment of a night differential, and 3) the hiring of a second detective to work the night shift was intended to reduce the amount of overtime O'Neil would have to work and eliminate conditions which originally motivated the Chief to agree to pay O'Neil the differential as a substitute for "minor overtime."

We conclude, however, that the Town's asserted reasons were not the real reasons for the action and that the Town would not have eliminated O'Neil's differential pay "but for" his concerted protected activities. Although the Town has proposed reasons for the elimination of O'Neil's pay differential, we have concluded that there is no evidence establishing who made the initial decision to eliminate the pay differential and why.⁸ Although Marchand's letter of July 24, 1984, does offer a reason why the Selectmen and Chief decided to eliminate the pay differential we have already discussed why the record indicates that the reason is pretextual. Moreover, we have already concluded that the other reasons argued by the Town on appeal as lawful reasons for eliminating O'Neil's differential pay were not established in the record, either by witness testimony or documentary evidence,

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It was improper for the hearing officer to draw an adverse inference from the Employer's failure to call the Town Accountant as a witness in the absence of any direct evidence of the Town Accountant's involvement in the decision to eliminate the differential.



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as having actually motivated the Town's decision. Since O'Neil has established a *prima facie* case that the decision was unlawfully motivated, the burden shifted to the Town to adduce evidence establishing one or more lawful reasons that actually motivated its action. Since the Town failed to fulfill that burden, O'Neil prevails.

Therefore, we conclude that O'Neil's concerted, protected activity was the real reason for the Town's decision to eliminate his differential pay. The Town therefore has violated Sections 10(a)(1) and (3) of the Law.

Having found that the Town violated Sections 10(a)(1) and (3), we order the Town to restore the differential pay and to make O'Neil whole for the monetary loss he incurred as a result of the Town's unlawful action, and to post a notice to all employees drawing their attention to our decision.

Conclusion

Based on the entire record, and for the reasons set forth above, we find that "but for" O'Neil's concerted, protected activity, he would have continued to receive the twenty-two dollars and fifty cents (\$22.50) weekly differential pay which he had received since September 1984, and that the Town therefore violated Sections 10(a)(1) and (3) of the Law by eliminating the differential on or about July 1, 1986.

Order

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Section 11 of the Law, that the Town of Somerset 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 its employees in the exercise of any right guaranteed under the Law;
 - d. Discriminating against John D. O'Neil in regard to any term or condition of employment in retaliation for engaging in any concerted activity protected by the Law.
2. Take the following affirmative action which will effectuate the policies of the Law:
 - a. Immediately resume payment of the twenty-two dollars and fifty cents (\$22.50) weekly differential pay to Sergeant John D. O'Neil, and make him whole for the loss of wages he suffered as a result of the Town's decision to eliminate the differential as of July 1, 1986.



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- b. Immediately sign and post a copy of the attached Notice to Employees where notices to employees are usually posted and where employees usually congregate and cause the same to remain posted for a period of thirty (30) consecutive days.
- c. Notify the Commission, in writing, within thirty (30) days of receipt 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 (Commission) has determined that the Town of Somerset violated Sections 10(a)(1) and (3) of the Law by eliminating the twenty-two dollars and fifty cents (\$22.50) weekly differential pay for Detective-Sergeant John D. O'Neil in retaliation for his exercise of concerted, protected activity. The Commission has ordered us to post this Notice and abide by what it says.

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

- To engage in self-organization;
- To form, join or assist any union;
- To bargain collectively through representatives of their own choosing;
- To act together for the purpose of collective bargaining or other mutual aid or protection;
- To refrain from all of the above.

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

WE WILL NOT discriminate against employees to encourage or discourage membership in any employee organization.

WE WILL resume payment of the differential pay to Detective-Sergeant John D. O'Neil and will make him whole for his losses resulting from our decision to terminate the twenty-two dollars and fifty cents (\$22.50) weekly pay differential as of July 1, 1986.

Town of Somerset
Police Chief

