

TOWN OF HULL AND LOCAL 344, IBPO, MUP-7771 (4/20/93).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

- §4.224 sick leave
- §7.14 management rights
- §7.8 unilateral change by employer
- §2.12 other affirmative action
- §2.3 status quo ante
- §2.51 appeals to full commission

Persons participating:

Maria C. Walsh, Chairperson
 William G. Hayward, Jr., Commissioner
 William J. Dalton, Commissioner

Attorneys:

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- James T. Masteralexis, Esq. - Representing Local 344, IBPO

DECISION ON APPEAL OF
 HEARING OFFICER'S DECISION

On February 7, 1990, Local 344, International Brotherhood of Police Officers, filed a charge with the Labor Relations Commission (Commission), alleging the Town of Hull (Town) had violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law). On August 3, 1990, the Commission issued a Complaint of Prohibited Practice alleging that the Town had unilaterally changed its practice of accommodating bargaining unit members who needed additional time after exhausting their accrued sick leave. A hearing was held before Hearing Officer Susan L. Atwater and, on April 16, 1991, she issued her decision that the Town had violated Sections 10(a)(5) and (1) of the Law.¹

The Town filed a timely notice of appeal pursuant to Commission Rule, 456 §5(3). Subsequently, the Town and the Union filed supplementary statements.

For the reasons stated below, we affirm the hearing officer's decision.

Facts

The Union represents a bargaining unit that consists of permanent police officers employed by the Town and specifically excludes the captain, the chief and sergeant, clerical, custodial, special, seasonal and intermittent employees.

The full text of the hearing officer's decision is reported at 17 MLC 1678.

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The Union and the Town were parties to a collective bargaining agreement effective from July 1, 1988 to June 30, 1991. Section 6 of the parties' agreement provides, in relevant part, that:

...[a]fter one year of employment, the period in any one year for which employees shall be paid while absent because of personal sickness shall be fifteen (15) work days plus the amount of any accrued and unused sick leave time in previous years not in excess of ninety (90) work days.

Employees are credited with 15 days of sick leave on their anniversary dates. The collective bargaining agreement does not contain a provision for employees who need additional sick time after exhausting their accrued sick leave.

Sometime prior to August 1989, the Town and the Union began negotiations for the 1988-1991 collective bargaining agreement. Although the parties did not sign the agreement until March 14, 1990, they had reached agreement on the bulk of the contract by December 1989, including a new bereavement leave clause which provided employees with three days of paid leave in the event of the death of certain family members. Previously, employees who had taken a leave of absence as a result of the death of a family member used their sick leave days to avoid losing pay. Upon its implementation, the 1988-1991 contract was applied retroactively, so that the sick leave time used for a death in the family between July 1, 1988, and March 14, 1990 was credited and charged as bereavement leave.

On at least fifteen occasions since 1981, bargaining unit members have exhausted their accrued sick time for a given year and needed to take additional sick time. In each of the instances between April 1981 and December 14, 1989, the Town accommodated the bargaining unit member by allowing the individual to either borrow sick days from the fifteen days they would earn on their next anniversary date, to utilize vacation or personal time, or to work additional days.²

The Town admits that it attempted to avoid docking an employee by accommodating bargaining unit members between 1981 and 1989. In each instance when the Town accommodated a bargaining unit member, Police Chief Brooker and/or Captain DiMarzio assessed each case and based the decision to allow an accommodation on the following criteria: 1) the proximity of the sick day(s) to the employee's anniversary date; 2) the effect on morale; 3) the maintenance of a harmonious

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The Town claims that the hearing officer erred because she failed to make factual findings regarding non-bargaining unit employees who had exhausted their sick leave. We agree with the hearing officer that the Town's practice regarding the non-bargaining unit employees is irrelevant because evidence concerning a practice applicable to non-bargaining unit employees reveals nothing concerning the past practice applicable to unit employees. Therefore, we find no error in the hearing officer's findings.

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nship with the Union; 4) the likelihood of the employee's continued employ-
th the Town; 5) the employee's history of sick leave use and abuse; 6)
the illness precipitating the need for additional sick time arose from an
or accident; 8) the other recourses available to the employee; and 9)
the employee would receive a credit of sick leave days due to a retroactive
tion of the collective bargaining agreement.³

The first bargaining unit member to require additional sick time was Officer
E. Batts. In April 1981, after having exhausted his earned sick time,
Batts called Chief Brooker to report that he would be unable to work due to
and offered to work additional time at a later date in order to avoid
pay. Chief Brooker agreed to this arrangement and Officer Batts subse-
worked the additional days.

On December 6 and 28, 1986, Officer Gregory Shea (Shea) took two paid sick
ter having exhausted his earned sick leave during the previous November.
ptain DiMarzio updated Shea's record during the first week in January, he
d" or advanced Shea two sick leave days because Shea's anniversary date
e received his 15-day allotment of sick days) fell on January 5.⁴ Shea took
sick day on January 4, 1987, one day prior to his anniversary date. Again,
ptain DiMarzio updated his records the following month, he advanced Shea
sick day due to the proximity between the sick day and his anniversary

Shea again depleted his accrued sick leave in November 1987, and received an
for sick days taken on November 2 and December 31. In that instance,
DiMarzio failed to notice that Shea had previously exhausted his sick time.
ptain DiMarzio realized his error in December, he believed it was too late
ect it and allowed the advance because of the proximity to Shea's anniver-
te.

After sustaining injuries in a car accident in November 1989, Shea again

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The Town objects to the hearing officer's inclusion of the ninth criterion.
cally, the Town argues that since this criterion only applied to one bar-
unit member (Officer Shea), it should not be considered tantamount to an
shed criterion. We disagree with the Town and do not think that the hearing
gave undue emphasis to this criterion. She simply listed the various
considered when the Town granted accommodations to several bargaining unit
, including Officer Shea.

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Not all of the decisions to advance sick time or otherwise accommodate an
e were made contemporaneously with the sick time taken. Captain DiMarzio,
pletates the personnel records for the department, updated the sick leave
one month after the date of sick leave. For example, in January he would
an employee's use of sick time during the prior December.

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exhausted his accrued sick leave. He submitted a written request to the department, requesting payment for those days and was advanced three of the fifteen days he would earn on January 5, his anniversary date.⁵

On January 12, 1989, Officer Marianne Sullivan called in sick after having previously exhausted her earned sick time. Shortly thereafter, Captain DiMarzio spoke with her regarding her sick time usage and she explained that she had expended her accumulated sick leave time during a period of hospitalization. Captain DiMarzio then advanced her one sick day until her anniversary date of May 15.

Officer John Coggins' (Coggins) anniversary date is April 13. By October 4, 1988, Coggins had depleted his accrued sick leave while seeking treatment for a medical condition. Thereafter, Coggins called in sick on October 5, 1988, and January 8 and 9, 1989. On October 5, he was permitted to take a personal day in lieu of a sick day and on January 8 and 9 he was advanced two of the fifteen days he would accrue on his anniversary date. Subsequently, in December 1989, Coggins needed to take another sick day after having used all his accumulated sick leave days. Coggins used a vacation day in lieu of having his pay docked. However, he was not told that his pay would be docked in the future if he took additional sick time after exhausting his earned sick leave.

Officer Richard Bowes' (Bowes) anniversary date is March 26. In February 1987, Bowes called in sick after having exhausted his accrued sick leave in October 1986. He did not request payment for his sick day, but was advanced one day from the 15 days he would receive on his anniversary date in March. In February 1988, Bowes again called in sick after having exhausted his accrued sick leave. Bowes was again advanced a sick day from his anticipated 15-day allotment due in March. On October 30, 1989, Bowes took another sick day after having exhausted his earned sick time. On November 9, Captain DiMarzio allowed Bowes to take a vacation day to compensate for the sick day, but advised Bowes that he would not be permitted to extend sick days as he had in the past, and in the future his pay would be docked for any other sick days he took prior to his anniversary date.

After Bowes called in sick again on December 15, 1989, Acting Captain Tompkins advised Bowes that he was out of sick days and would not be paid. In a discussion with Chief Brooker, Town Manager Murphy, and Captain DiMarzio, Bowes asked why the Town was refusing to pay him when it had accommodated Officer Shea one month earlier. Captain DiMarzio explained that the two situations were different because of the proximity between Shea's sick day and his anniversary date, the retroactive sick days that Shea would receive due to the new provision for contractual bereavement leave, and that Shea's sick leave was due to a motor vehicle

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The Town claims that the hearing officer made contradictory findings regarding the reasons why the Town accommodated Shea. It is not necessary for us to resolve this discrepancy since it is not material to our decision.

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He also reminded Bowes that he had previously been warned that he would give an advance for any sick days taken before his anniversary date. Town Murphy denied Bowes' request for an extension of sick leave. Bowes called again on January 22, March 2, and March 17, 1990. He did not request an accommodation and was not paid for any of those days.

Prior to December 15, 1989, the Town did not give the Union notice that it was going to change any practice regarding sick leave. Although the Union was aware that the Town had refused to pay Officer Bowes on December 15, 1989, it did not raise the issue during the ongoing collective bargaining negotiations. On January 17, 1990, the Union filed a prohibited practice charge at the Commission claiming that the town violated the Law by refusing to accommodate Bowes' request for additional sick time.

Opinion

Section 6 of the Law requires, in relevant part, that "[t]he employer and its exclusive representative...shall negotiate in good faith with respect to wages, standards of productivity and performance, and any other terms and conditions of employment...". A public employer violates Section 10(a)(5) of the Law if it unilaterally changes wages, hours, and other terms and conditions of employment affecting mandatory subjects of bargaining without giving the exclusive representative an opportunity to bargain over the change. Athol Regional School Committee, 17 MLC 1670, 1674 (1991); Holyoke School Committee, 12 MLC 1443, 1450 (1985); Town of Randolph, 8 MLC 2044, 2051 (1982). The Commission does not dispute that sick leave is a mandatory subject of bargaining. Boston, 3 MLC 1450 (1977). The town also does not dispute that it failed to give the Union notice and an opportunity to bargain concerning its denial of an accommodation to Bowes. Furthermore, the Town admits that between 1981 and 1989 it failed to provide accommodations for each bargaining unit member who had exhausted his/her sick leave.

The town contends, however, that Officer Bowes' situation differs from all of the other situations and that the Town was not required to make an accommodation for her. Specifically, the Town argues that Bowes did not meet the criteria for an accommodation on December 15, 1989 and January 22, 1990 because she: 1) did not have sick leave credits on those dates; 2) was not close to her anniversary date (January 6, 1990); and 3) did not have any vacation or personal leave credits. Our review of the facts establishes that most of the bargaining unit members pre-anniversary accommodated had exhausted their accrued sick leave, vacation leave, and personal leave. Therefore, the Town's reliance on Bowes' exhaustion of his accrued sick leave, vacation leave, and personal leave to deny him an accommodation distinguishes his situation from most of the other previously-accommodated bargaining unit members. The only remaining reason for the Town's denial to accommodate Bowes is because Bowes' sick days were not in proximity to his anniversary date. However, the evidence demonstrates that the Town accommodated Officer Bowes on January 1989 by advancing sick leave due to be credited to her four

months late on her May 15, 1989 sick leave anniversary date. When Bowes used sick days on December 15, 1989, January 22, 1990, March 2, and March 17, 1990, however, the Town refused to advance sick leave due to be credited to him less than three months later on his March 26 anniversary date. Thus the Town refused to advance to Bowes sick leave that would be credited to him in less than three months despite having advanced to Sullivan sick leave that was not due to be credited for four months. It is this unilateral change in the practice of accommodating employees by advancing sick leave as much as four months that forms the basis of the instant prohibited practice.

Although we understand why the Town would seek to limit its accommodation of bargaining unit members by advancing sick leave credit when employees have exhausted their accrued sick leave, the Town has permitted various accommodations based on a particular individual's needs. Having adopted that practice of accommodating bargaining unit members who have exhausted their accrued sick leave the Town was obligated to bargain with the Union prior to changing it. Indeed, we note that the Town concedes that Bowes' March 2 and 17 sick days were close enough to his anniversary date to have warranted an accommodation. Failure to accommodate Bowes not just on March 2 and 17, but also on December 15 and January 22 constituted a change in the practice which the Town itself had established. As a result we affirm the hearing officer's finding that the Town has violated Sections 10(a)(5) and (1) of the Law, by unilaterally changing a condition of employment of bargaining unit employees by refusing to advance sick leave up to three months ahead of the date when it would be credited to an employee.⁶

Remedy

The Town argues that the Commission should modify the remedy ordered by the hearing officer by imposing a limit on the time during which sick leave must be advanced to an employee. The Commission has concluded that the Town had a practice of advancing sick leave for as much as four months prior to the date when the leave would be credited to an employee. It is the Town, not the Commission, that has established the parameters of the accommodation in this case. While recognizing that the Town's practice included advancing sick leave as much as four months prior to the employee's anniversary date, we note that the remedy in this case requires an advance of sick leave to Officer Bowes of less than three months prior to his anniversary date. The remedial order directs the Town to reinstate its practice and make employees whole for any economic loss resulting from the changed practice. Specifically, the Town must make Officer Richard Bowes whole for the four sick days for which no sick leave was advanced to him. The town, however, is free to propose changes in the sick leave accommodation practice to the Union and to bargain in

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We also note that the Town's practice included other forms of accommodation including permitting employees to work extra days to make up for time absent. The Town's obligation to maintain the status quo ante extends also to these other forms of accommodation.

with the Union concerning the Town's proposals. The Town's unilateral in a working condition compels the instant remedial order. In the future, if the Town properly proposes new working conditions to the Union and bargains in good faith to resolution or impasse, the Town must maintain the status quo ante.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town of Hull do as follows:

1. Cease and desist from:
 - a. Failing and refusing to accommodate bargaining unit members who exhaust their accrued sick leave, without first bargaining to resolution or impasse with the Union;
 - b. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Massachusetts General Laws, Chapter 150E.
2. Take the following affirmative action which will effectuate the purposes of the Law:
 - a. Reinstate the Town's practice of accommodating bargaining unit members who exhaust their accrued sick leave.
 - b. Upon request by the Union, bargain collectively in good faith with the Union to resolution or impasse prior to implementing any change in the Town's practice of accommodating bargaining unit members who have exhausted their accrued sick leave.
 - c. Make Officer Richard Bowes, and any other bargaining unit member whom the Town has failed to accommodate, whole for any economic loss they may have suffered as a result of the Town's unlawful action, together with interest on any sums owing at the rate specified in M.G.L. c.231, §8, compounded quarterly.
 - d. Post in conspicuous places where employees congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

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- e. Notify the Commission in writing within thirty (30) days of service of this decision of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON
WILLIAM HAYWARD, JR., COMMISSIONER
WILLIAM J. DALTON, COMMISSIONER

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

The Labor Relations Commission has determined that the Town of Hull has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E by failing and refusing to accommodate bargaining unit members who exhaust their accrued sick leave, without first bargaining to resolution or impasse with Local 344, International Brotherhood of Police Officers.

WE WILL NOT fail or refuse to accommodate bargaining unit members who exhaust their accrued sick leave, without first bargaining to resolution or impasse with the Union.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce any employees in the exercise of their rights guaranteed under Massachusetts General Laws, Chapter 150E.

WE WILL reinstate the Town's past practice of accommodating bargaining unit members who exhaust their accrued sick leave.

WE WILL make Officer Richard Bowes, and any other bargaining unit member whom the Town has failed to accommodate, whole for any economic loss they may have suffered as a result of the Town's unlawful action, together with interest on any sums owing at the rate specified in M.G.L. c.231, §B, compounded quarterly.

WE WILL, upon request by the Union, bargain collectively in good faith with the Union to resolution or impasse prior to implementing any change in the Town's practice of accommodating bargaining unit members who have exhausted their accrued sick leave.

Chief of Police
Town of Hull