COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE/DEPARTMENT OF CORRECTIONS AND MCOFU, SUP-3587 (3/20/95).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

54.22	leave of absence
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Commissioners Participating:

William J. Dalton, Chairman
Claudia T. Centomini, Commissioner

Appearances:

Rosemary Ford, Esq.	- Representing the Commonwealth of Massachusetts
Matthew Dwyer, Esq.	- Representing the Massachusetts Correction Officers Federated Union

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

On November 5, 1990, the Massachusetts Correction Officers Federated Union Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Commonwealth of Massachusetts (Employer) had violated Sections 10(a)5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) by: 1) changing the criteria for granting employees' leave requests, 2) reducing the amount of unscheduled overtime, and 3) eliminating scheduled overtime.

On April 5, 1991, the Commission issued a Complaint of Prohibited Practice alleging

Employer had violated Sections 10(a)(5) and (1) of the Law. A hearing was held earing Officer Tammy Brynie and she issued her decision on March 19, 1992 ıg that the Employer had violated the Law when it changed the criteria for granting :s' leave requests and when it eliminated scheduled overtime. However, she l the allegation that the Employer had unlawfully reduced the amount of led overtime.

ıe Employer and the Union filed timely notices of appeal pursuant to Commission 5 CMR 13.15(3). Subsequently, the Employer and the Union filed supplementary :s.

ır the following reasons, we affirm the hearing officer's decision.

FINDINGS OF FACT

e summarize the hearing officer's findings of fact as follows.[1]

CI Plymouth is a minimum security facility. At the time of the hearing in this case, nouth housed approximately 300 inmates and was staffed by approximately forty personnel in the following ranks: correction officers, sergeants, lieutenants, and The three shifts were staffed in the following manner: midnight to 8:00 a.m. (5 8:00 a.m. to 4:00 p.m. (18 officers), and 4:00 p.m. to midnight (9 officers).

ırgaining unit employees with less than five years of service accrue two weeks of per year. After five years, three weeks of vacation are authorized; employees with n ten years of service earn four weeks of vacation. Typically, the entire security ks their vacations (in one week increments), according to seniority, in March and each year. Thus, a complete correction officers' vacation schedule is established ach fiscal year. By breaking their vacation week, employees may work one day of :duled vacation and, instead, request an individual vacation day at another time. In

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[1]The hearing officer's decision was inadvertently not reported in the Massachusetts ses.

ddition, correction officers receive three personal days per year, which must be used during he year or forfeited. Finally, compensatory time off (CTO) may be earned either by vorking on holidays or beyond a regularly scheduled shift.

To take a personal day, CTO, or an individual vacation day, a correction officer ubmitted a "request for time off" form to the Administrative Lieutenant ten days in advance f the requested leave. With the exception of peak holiday periods, prior to September 990, personal day, CTO, and vacation day requests were routinely granted.[2] An overtime eplacement could then be hired to fill-in for the correction officer on leave.

The inmate population at MCI Plymouth has fluctuated over the years, through the ombined effects of opening new dorm facilities and the double-bunking of prisoners. From 985 until 1987, the facility housed about 100 inmates. By October 1989, the inmate opulation had grown to 300. As the prisoner population expanded, the facility's dministration lobbied for a corresponding increase in security personnel. In about 1989, ix new correction officers were hired. The security staff increase, however, was not ufficient, since it was based on a projection of 150 inmates, rather than the actual total of 00. Therefore, the administration continued to lobby for an increase in authorized security ositions.

In the meantime, the institution compensated for the lack of security staffing through he use of overtime. Two categories of overtime existed at the institution: pre-scheduled nd unscheduled overtime. Pre-scheduled overtime refers to overtime coverage that is ndicated on the advance assignment sheet, often by being pre-printed on the weekly chedule, and provides coverage for anticipated absences, such as, military leaves, industrial ccident leaves, or medical leaves. In addition, pre-scheduled overtime was used in onjunction with peak visiting hours at the institution.

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2 Although the Employer argued that the hearing officer did not consider uperintendent Tucker's testimony regarding the overtime budget, we find that she onsidered Tucker's testimony and determined that it did not contradict Correction Officer sgood's testimony regarding the routine practice of granting leave.

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he institution's overtime logs reflect that a total of 4,359 hours of custodial overtime d during the period from January 1, 1990 through September 15, 1990, for an of 117.8 combined pre-scheduled and unscheduled overtime hours per week. ; pre-scheduled overtime totaled 80.78 hours per week: first shift - 34.65 hours; hift - 29.67 hours; and third shift -19.16 hours.[3] Unscheduled overtime is used to overage for absences due to illness, use of personal days, individual vacation days Unscheduled overtime averaged 37.02 hours per week during the same time period ove.

n September 17, 1990, Superintendent Tucker posted a memorandum concerning , addressed to all institution staff, stating as follows:

ffective immediately, there shall be no overtime approved until further notice with e exception of filling in behind a person who is out sick. This includes pre-heduled/pre-approved overtime.

dditionally, requests for personal days, CTO days and vacation days will be proved it does not require the use of overtime.

lays later, Tucker issued a "Revised Notice", which provided:

ffective immediately, there shall be no overtime or comp (compensatory) time ithout approval of the Deputy Superintendent or myself. This order is all-inclusive.

llocation figures received in my office today show we are already seriously ficient in our payroll and overtime accounts according to the latest revised figures.

sputed that both memos issued without the Union having been afforded prior notice portunity to bargain about the overtime issues.

The Employer claimed that the hearing officer's analysis of the statistical data was However, the Employer does not articulate what methodology and what period of hearing officer should have used to average out the overtime hours.

Superintendent Tucker indicated that he had several reasons for issuing the September memos. First, newly hired correction officers would be reporting for work, which would mitigate the need for overtime security coverage. Second, by that point, the fiscal year's overtime accounts had been substantially depleted. Finally, the Superintendent and Deputy Superintendent wished to personally oversee overtime matters, rather than continuing to delegate that responsibility to the Administrative Lieutenant.

As a result of the issuance of the September memos, all pre-scheduled overtime was eliminated and unscheduled overtime was reduced. The overall overtime hours dropped from 117 hours per week to 20.54 per week. Furthermore, requests for military leave, personal days, CTO or individual vacation days were denied if the use of such leave would require overtime staff coverage.

OPINION

We agree with the hearing officer that the Employer unilaterally changed the criteria for granting leave requests. It is well-established that a public employer may not change the wages, hours, or terms and conditions of employment of its employees without first providing the exclusive representative of those employees notice and an opportunity to bargain to resolution or impasse. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1988). The employer's obligation extends to working conditions that are established either through past practice or specified in a collective bargaining agreement.[4] Town of Wilmington, 9 MLC 1694, 1699 (1983). The Commission has previously determined that the criteria for granting leave requests is a mandatory subject of bargaining. City of Boston, 3 MLC 1450, 1459 (1977).

In the instant case, the record reflects that, prior to September 1990, the Employer's

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4 Although the Employer attached a copy of the parties' collective bargaining agreement to its supplementary statement, that agreement was not a part of the record before the hearing officer and may not be considered on appeal. Contrary to the Employer's assertion, the hearing officer was not obligated to solicit a copy of the agreement from the parties.

was routinely to grant all leave requests, except during peak holiday periods. After er 1990, the Employer changed its leave practice by only granting leave contingent availability of existing security staff coverage. It is also undisputed that the Union provided with prior notice and an opportunity to bargain over the change in the or granting leave requests. Therefore, the Employer violated Sections 10(a)(5) and ilaterally changing the criteria for granting leave requests.

'e also agree with the hearing officer's conclusion that the Employer unilaterally :d pre-scheduled overtime. The Commission has concluded that scheduled is a term and condition of employment and, thus, a mandatory subject of ıg. Town of Tewksbury, 19 MLC 1189, 1191 (1992). It is undisputed that :ndent Tucker's September memorandum eliminated pre-scheduled overtime providing the Union prior notice or an opportunity to bargain. The Employer :ized its pre-scheduled overtime as consisting of coverage for long-anticipated for vacations, military leaves, industrial accident leaves, medical leaves, and for certain peak visiting hours. Although the Employer claims that the hearing iiled to take into consideration the fact that there was no money left for overtime in er 1990, the Employer did not identify any record evidence to support this y argument. Moreover, the Employer did not provide sufficient evidence to rate that the Union was aware that the practice of providing bargaining unit with overtime pay was temporary and due solely to a short-term staff shortage to lied in the near future. Had the Employer produced sufficient evidence regarding ;etary problems and the transient nature of the overtime practice, we may have a different conclusion. However, based on the record, we conclude that the :r violated Sections 10(a)(5) and (1) of the Law when it eliminated pre-scheduled

addition, the Union has appealed that portion of the hearing officer's decision that the Employer did not violate the Law when it unilaterally reduced luled" overtime. "Unscheduled" overtime provided coverage for unforeseen or)ated absences. The Commission has previously determined that "unscheduled" is not a mandatory subject of bargaining. Town of Tewksbury, supra. Although ın requests that we re-examine the Commission's decisions in this area, we see no o disturb the rationale articulated in the Tewksbury decision concluding that luled" overtime is not a mandatory subject of bargaining.

For all of the above reasons, we find that the Employer violated Sections 10(a)(5) and (1) of the Law by: 1) unilaterally changing the criteria for granting leave requests and 2) unilaterally eliminating pre-scheduled overtime.

REMEDY

Because the exact monetary loss sustained by the employees cannot be ascertained from the record, we leave to the parties to determine the exact amount of the overtime to be paid to the employees. Frequently, remedial orders require facts in addition to what has been incorporated into the record of the underlying prohibited practice case. See, Town of Bridgewater, 12 MLC 1612, 1619 (1986). For this reason, the Commission has a compliance conference and hearing procedure at which issues concerning the exact amount of overtime and who received it can be fully litigated. Commission Rule and Regulation, 456 CMR 16.08. Thus, we leave to the parties, and if they cannot agree, to the compliance stage, the determination of the exact amount of overtime payable to those bargaining unit members who lost overtime pay as a result of the Employer's unlawful action. Town of Bridgewater, supra.

ORDER

On the basis of the foregoing, IT IS HEREBY ORDERED that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

   a. Refusing to bargain collectively in good faith with the Union by unilaterally changing the criteria for granting leave requests, without first providing the Union prior notice and an opportunity to bargain to resolution or impasse about the change.

   b. Refusing to bargain collectively in good faith with the Union, by unilaterally eliminating pre-scheduled overtime, without first providing the Union prior notice and an opportunity to bargain to resolution or impasse about the decision to eliminate such overtime.

   c. In any like or similar manner, interfering with, restraining or coercing employees in the exercise of their rights under the Law.

Take the following action which will effectuate the purposes of the Law:

a. Rescind the overtime memorandum issued on September 17, 1990.

b. Make whole the members of the bargaining unit for the monetary loss directly attributable to the Employer's unlawful unilateral elimination of pre-scheduled overtime. The monetary loss is to be restored with interest, to be computed at the rate specified in M.G.L. c.231, Section 6B.

c. Within five (5) days from the date of receipt of this decision, offer to bargain with the Union regarding the change in criteria for granting leave requests and the decision to eliminate pre-scheduled overtime, and if the Union accepts within five (5) days of the Employer's offer, bargain in good faith to impasse or resolution.

d. Provide to the Union prior notice of any proposed changes in mandatory subjects of bargaining and, upon request of the Union, bargain in good faith to resolution or impasse about the proposed changes.

e. Post in all conspicuous places where employees represented by the Union usually congregate and where notices to employees are usually posted, and display for a period of thirty (30) days thereafter, a copy of the attached Notice to Employees.

f. Notify the Commission in writing of the steps taken to comply with this decision within ten (10) days after the date of receipt of the decision.

ERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, CHAIRMAN

CLAUDIA T. CENTOMINI, COMMISSIONER

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

The Labor Relations Commission has concluded that the Commonwealth of Massachusetts has violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E, by unilaterally changing the criteria for granting leave requests and by unilaterally eliminating pre-scheduled overtime.

WE WILL cease and desist from refusing to bargain in good faith with the Massachusetts Correction Officers Federated Union by unilaterally changing the criteria for granting leave requests and by unilaterally eliminating pre-scheduled overtime.

WE WILL rescind the September 17, 1990 overtime memorandum.

WE WILL make whole the members of the bargaining unit for the monetary loss directly attributable to the unilateral elimination of pre-scheduled overtime.

WE WILL offer to bargain with the Union regarding the change in criteria for granting leave requests and the decision to eliminate pre-scheduled overtime and, if the Union accepts the offer, we will bargain in good faith to impasses or resolution regarding the issue.

WE WILL provide the Union with prior notice and bargain collectively with the Union upon request regarding any proposed changes in mandatory subjects of bargaining.

WE WILL NOT do anything that interferes with, restrains, or coerces employees in the exercise of their rights guaranteed under Chapter 150E.

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Superintendent, MCI Plymouth