cal 25's charge against the City, we find that Local 25's request to treat its prohibited practice charge as a blocking charge does not satisfy the requirements of Commission Rule and Regulation 405 CMR 15.12. Therefore, we deny Local 25's request to block the election in the petitioned-for bargaining unit.

Conclusion and Direction of Election

We, therefore, conclude that a question of representation has arisen concerning certain employees of the City of Cambridge and that the following employees constitute an appropriate bargaining unit for collective bargaining within the meaning of Section 3 of the Law.

All regular full-time and permanent part-time non-professional employees of the City of Cambridge who work sixteen (16) or more hours per week in their department in the following units:

A. Public Works (including the non-clerical library and Print Shop employees);

B. Clerical unit;

C. Traffic and Parking unit;

D. Electrical Department;

E. Parking Control Officers;

F. Emergency Communications; and

G. Water treatment plant operators;

but excluding all temporary employees hired for a term not to exceed six months, all high school student pages, student interns, seasonal, casual, managerial and confidential employees, and all other employees.

IT IS HEREBY DIRECTED that an election by secret mail ballot shall be conducted to determine whether a majority of the employees in the above-described bargaining unit desires to be represented by the Committee for Honest and Effective Representation or by Teamsters, Local 25 or by no employee organization. The eligible voters shall include all those persons within the above-described unit whose names appear on the Employer's payroll for the payroll period for the week ending January 18, 2003 and who have not since quit or been discharged for cause. To ensure that all eligible voters shall have the opportunity to be informed of the issues and the statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that two (2) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the City of Cambridge with the Executive Secretary of the Commission, 399 Washington Street, 4th floor, Boston, MA 02108 not later than seven (7) days from the date of this direction of election. This list must be either electronic (e.g. Microsoft Access or Excel) or in the form of mailing labels. The Executive Secretary shall make the list available to all parties to the election. Failure to submit this list in a timely manner may result in substantial prejudice to the rights of the employees and the parties, therefore, no extension of time for filing the list will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election, should proper and timely objections be filed.

SO ORDERED.

* * * * * *

In the Matter of CITY OF NEWTON

and

NEWTON POLICE ASSOCIATION

Case No. MUP-2629

54.23 overtime
54.51151 discipline
67.14 management rights
67.8 unilateral change by employer
91.1 dismissal

February 5, 2003
Helen A. Moreschi, Chairwoman
Peter G. Torkildsen, Commissioner

Keith McCown, Esq. — *Representing the City of Newton*
James Lamond, Esq. — *Representing the Newton Police Association*

DECISION[1]

STATEMENT OF THE CASE

The International Brotherhood of Police Officers (IBPO) filed a charge with the Labor Relations Commission (Commission) on March 1, 2000, alleging that the City of Newton (the City) had violated Sections 10(a)(5) and derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by creating a new form of discipline and changing the basis upon which overtime is distributed without providing the IBPO with notice or an opportunity to bargain over the changes or the implementation or impacts thereof. On May 11, 2000, the Newton Police Association (the Union) succeeded the IBPO as the exclusive bargaining representative for all City police officers below the rank of sergeant. On November 29, 2000, the Commission allowed the Union's Motion to Re-Caption the Case and its Motion to Late File a Reply. Following an investigation, the Commission issued a complaint of prohibited practice on November 29, 2000. The complaint alleged that the City had violated Section 10(a)(5)

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.

and derivatively, 10(a)(1) of the Law by changing the criteria for overtime eligibility and implementing a new form of discipline without providing the Union prior notice and an opportunity to bargain to resolution or impasse. The City filed its Answer on December 22, 2000.

On March 26, 2001, Hearing Officer Betty Eng, Esq. conducted a hearing pursuant to 456 CMR 13.02(2) at which both parties had an opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence. On June 14, 2001, the Union filed the Charging Party's Combined Challenges to Hearing Officer's Recommended Findings of Fact and Its Post-Hearing Memorandum of Law. The City filed Proposed Conclusions of Law on June 14, 2001. The City filed City of Newton's Response to Newton Police Association's Challenges to the Hearing Officer's Proposed Findings of Fact on June 25, 2000. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

FACTS[2]

Stipulations

The collective bargaining agreement between the City of Newton and the International Brotherhood of Police Officers, Local 478, dated 1997 -2000 (Joint Exhibit 1) was the relevant collective bargaining agreement between these parties.

The Union is the exclusive collective bargaining representative for all City police officers below the rank of sergeant employed by the City in its Police Department. The Union and the City are parties to a collective bargaining agreement (Agreement) in effect from July 1, 1997 through June 30, 2000. The parties' Agreement remained in full force and effect at all times material to the issues raised in this case. Article VII, *Overtime*, of the parties' Agreement, in part provides:

> 7.01 All Officers will be paid at the rate of time and one-half their base hourly rate for all hours worked in excess of forty (40) hours per week except as follows:
>
> 1. All officers having a work schedule commonly known as "four (4) and two (2)" as described in Article X of this Agreement shall be paid overtime for hours actually worked in excess of their regularly scheduled work week. In any event, no overtime shall be paid until an Officer works in excess of eight and one-half (8 1/2) hours in any tour of duty.
> 2. All officers working the "four (4) and two (2)" schedule as described in paragraph one above, will be paid for overtime for all hours actually worked in excess of forty (40) hours per week.
>
> 7.03 All overtime will be distributed fairly and equally within each bureau. Excluded will be Officers assigned to confidential cases for the period that they are so assigned, provided that there will be a posting when their assignment is concluded.
>
> Overtime records shall be kept and made available for inspections by Officers of the UNION. Police Officers shall be required to work overtime when required by the Office of the Chief. Overtime hours rejected will be counted as overtime worked (not paid) for the purposes of this section only.

Article XII, *Management Rights*, of the parties' Agreement, in part provides:

> 12.01 Except where such rights, powers, and authority are specifically relinquished, abridged, or limited by the provisions of this Contract, the CITY has and will continue to retain, whether exercised or not, all of the rights, powers and authority heretofore had by it, and except where such rights, powers and authority are specifically relinquished, abridged or limited by the provisions of this Contract, it shall have the sole and unquestioned right, responsibility and prerogative of management of the affairs of the CITY and direction of the working forces, including but not limited to the following:
>
> B. To establish or continue policies, practices and procedures for the conduct of the CITY business and, from time to time, to change or abolish such policies, practices or procedures.
>
> C. To discontinue processes or operations or discontinue their performance by employees.
>
> D. To select and to determine the number and types of employees required to perform the City's operations.
>
> E. To employ, transfer, promote or demote employees, or to lay-off, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons when it shall be in the best interests of the CITY or the Department.
>
> F. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the CITY, provided such rules and regulations are made known in a reasonable manner to the employees affected by them.

Article VI, *Paid Details and Overtime Assignment* of the parties' Agreement, in part provides:

> 6.01 The following provisions shall govern the assignment of extra paid details to the Police Officers where said details are to be paid for by a government agency, an outside individual group, corporation or organization and the City of Newton.
>
> 6.05 All assignments to Police details shall be under the supervision of the Captain of the Uniformed Branch and responsible to the Chief of Police. All details will be distributed fairly and equitably as to the number of details and compensation therefor. So far as practicable, details shall be fairly and equitably distributed on a continuing monthly basis.
>
> Where a Police Officer refuses a detail, said detail shall be included as having been worked for the purposes of the above-described distribution. Employees shall be given all reasonable notice possible of detailed [sic] assignments.
>
> 6.06 The Police Department will post all overtime and paid details on a weekly basis. Said posting will contain sufficient information so that hours of work, payment and refusals are reflected....
>
> 6.08 Officers accepting and then failing to fulfill a detail assignment will be removed from the work list for a period of time in accordance with the severity of the violation as determined by the Chief of Police.

2. The Commission's jurisdiction is uncontested.

In January 1993, Acting Chief Frank R. Gorgone (Chief Gorgone) was appointed the City's Chief of Police. Some of Chief Gorgone's responsibilities include setting policy, preparing budgets and discipline. Officer Donald Crehan (Officer Crehan) is a member of the bargaining unit assigned to the Patrol Bureau, which is the uniformed department within the Police Department providing day-to day 24-hour street coverage. The Patrol Bureau assigns City police officers (officers) to a particular area using a rotation of three eight-hour shifts and officers may patrol their assigned areas in police cruisers or on foot patrol.

Officers are eligible to work overtime and paid detail assignments according to rotation lists maintained by the Police Department. Officers cannot work paid details and overtime assignments at the same time. Officers must inform the Police Department that they wish to be considered for paid detail assignments on a particular day. Officers have no such discretion in placing their names on the overtime list. The paid detail list is maintained on a departmental-wide basis. The availability of overtime is grouped by the various bureaus within the Police Department and each bureau maintains its own overtime list. Both the Police Department overtime and paid detail lists are recorded either as hours worked or as refusals.[3] When overtime and paid detail opportunities become available, they are offered first to the officer on the corresponding list[4] with the lowest combined total hours worked and hours refused.[5] The rate of pay for paid detail assignments is $28.00 per hour and the overtime rate is time and a half the officer's base hourly rate. For Officer Crehan, the overtime rate is $28.79 per hour.

The City has on four or five occasions ordered that officers be removed from the detail list for varying periods of time in connection with their having failed, in one way or another to have fulfilled the detail assignment. [6] For example, a detective was removed from the paid detail list after submitting a court card to the Police Department for court time pay along with receiving the paid detail pay for the same period of time. The City took another officer off the paid detail list after he was observed sitting in his car when he was supposed to be on a paid detail directing traffic.

On or about February 8, 2000, Chief Gorgone issued Officer Crehan written notification of a five-day suspension and removal from the Patrol Bureau overtime list for 120 days for an incident that occurred on or about January 12, 2000.[7]

Chief Gorgone issued this recommendation without providing the Union with notice or an opportunity to bargain to resolution or impasse.[8] Officer Crehan was disciplined for violating the Newton Police Code of Conduct, Article V, sec. 7, Insubordination, Article V, sec. 9, Neglect of Duty, and Conduct Unbecoming an Officer. Specifically, Chief Gorgone cited Officer Crehan for failing to conform to a previous order that Lieutenant Vincent Taylor issued on June 2, 1999 when Officer Crehan was ordered not to leave his assigned post during the tour of duty and not to make unauthorized visits to fire stations. Chief Gorgone imposed the February 8, 2000 discipline on Officer Crehan because: the officer had violated a direct order from his superior (Lieutenant Taylor) to refrain from unauthorized visits to fire stations during his tour of duty; he was away from his tour of duty for at least the second time; and he was on an overtime assignment at the time of the January 12, 2000 incident. Chief Gorgone also discussed the matter with Captain Boudreau, the Patrol Bureau Commander, prior to issuing Officer Crehan's discipline.[9, 10] As a result of the January 12, 2000 disciplinary letter, Officer Crehan served a five-day suspension on February 22, 23, 24, 25 and 26, 2000 and was removed from the overtime rotation for 120 days.

During the time that Officer Crehan was removed from the overtime rotation for 120 days, he was bypassed for the following overtime shifts: April 18, 2000 (8 hours); April 23, 2000 (8 hours); May 30, 2000 (8 hours); June 4, 2000 (8 hours); and June 19, 2000 (4 hours). Based on his past practice of working overtime and paid detail assignments when they were offered, Officer Crehan would have probably worked those overtime shifts if he had been eligible to accept them. During the time of his 120-day ineligibility for overtime opportunities, when Officer Crehan was by-passed for the five overtime opportunities, he was not charged with any refusals. Therefore, when Officer Crehan became eligible to work an overtime assignment after his 120-day ineligibility, he was the first police officer eligible for overtime because he had the lowest number of combined hours and refusals. During Officer Crehan's 120-day ineligibility to work overtime assignments, he was still

3. If an officer is asked to work a paid detail during a time that he did not indicate his interest in working a paid detail, that officer would not be charged with a refusal.

4. We have modified this finding slightly in response to a challenge by the City to more accurately reflect the City's practice of distributing overtime and paid detail assignments.

5. Generally, officers who are offered an overtime assignment but refuse are credited with a "refusal" and the number of hours that were refused are added to the officer's total hours worked. However, officers who have been assigned to a paid detail would not be charged a refusal for overtime if the two instances coincided. Additionally, officers who are on departmental assignments would not be charged with refusals if they were reached on the overtime list and could not work the overtime assignments.

6. We have modified this finding in response to two of the Union's challenges.

7. The Police Department had received a complaint from the City's Fire Department that Officer Crehan, while in uniform and on duty, was sleeping in Station One on January 12, 2000. Chief Gorgone ordered an investigation into the Fire Department's complaint and assigned Sergeant Forbes to investigate the matter. Upon completing his investigation, Sergeant Forbes submitted a memorandum to Chief Gorgone, dated January 27, 2000, indicating that Officer Crehan had admitted to stopping at Station One during his tour of duty in Newtonville Square on January 12, 2000. Officer Crehan had told Sergeant Forbes that he used the men's room and got something from the lunchroom and may have stayed to watch some of the noon news, but denied that he was sleeping. Sergeant Forbes noted in his memorandum that Officer Crehan acknowledged that he was in violation of a written order not to go into the firehouse.

8. We have added this finding in response to two of the Union's challenges.

9. Captain Boudreau received a memo dated January 14, 2000 from Lieutenant C. Marzilli (Marzilli), who had been directed to contact Lieutenant Demeo (Demeo) of the City's Fire Department. Demeo had received a complaint from unnamed firefighters that on January 12, 2000, Officer Crehan was sleeping at Fire Station One while in uniform and on duty. Demeo advised Marzilli that he wanted Officer Crehan to understand that he was not welcome at Station One.

10. The Union challenged this finding as irrelevant to the issues in the complaint or to any affirmative defenses raised by the City. However, because the record evidence supports these facts, we decline to omit them.

eligible to work paid details and he worked paid details on three days for at least eight hours per paid detail shift.

Officer Crehan's removal from the overtime rotation due to a disciplinary action was the first time that Respondent had ever removed an officer from the overtime rotation for any period of time.[11,12] Prior to February 8, 2000, the Respondent had never denied unit members the opportunity to work overtime as a form of discipline or used the disciplinary record of a unit member as a criterion for determining whether the employees was eligible to earn overtime. [13] Chief Gorgone did not recall any other times when a disciplinary infraction had occurred during an overtime assignment.

OPINION

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 572 (1983); *Town of Andover*, 28 MLC 264, 268 (2002); *City of Newton*, 27 MLC 74, 81 (2000). The obligation to bargain extends to working conditions established through custom and practice as well as to working conditions contained in a collective bargaining agreement. *Town of Andover*, 28 MLC at 268, *citing City of Gloucester*, 26 MLC 128, 129 (2000); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

To establish a unilateral change violation, the charging party must establish the following: (1) the employer changed an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and (3) the change was implemented without prior notice or an opportunity to bargain. *Town of Andover*, 28 MLC at 268, *citing Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), *citing City of Boston*, 26 MLC 177, 181 (2000); *Massachusetts Port Authority*, 26 MLC 100, 101 (2000).

The facts in this case are not in material dispute. On or about February 8, 2000, Chief Gorgone issued Officer Crehan a five-day suspension and removed him from the overtime rotation list for one hundred and twenty-days. Prior to February 8, 2000, the Police Department had not used the disciplinary record of a unit member as a criterion for determining whether an employee was eligible to earn overtime. Also prior to February 8, 2000, the City had never denied unit members an opportunity to work overtime as a form of discipline. The City has however, denied unit members the opportunity to work paid details as a result of unit members failing to fulfill the obligations of those details. The City has also removed officers from both the overtime rotation and paid details during the period of serving a suspension. The City defends its actions by arguing that its practice of removing officers from the paid detail list is consistent with its removal of Officer Crehan from overtime due to the various infractions he committed while performing overtime duty. The City also argues that the management rights clause of the collective bargaining agreement permitted it to remove Officer Crehan from the overtime list without having to first bargain to resolution or impasse.

We agree that the management rights clause contained in the parties' collective bargaining agreement gave the City the right to remove Crehan from the Department's overtime list for 120 days without first having to bargain to resolution or impasse over that decision and that the City did not change its existing practice, albeit for different reasons than posited by the City.

Where an employer raises the affirmative defense of contract waiver, it must show that the union knowingly and unmistakably waived its right. *Town of Andover*, 28 MLC at 270, *citing Town of Mansfield*, 25 MLC 14, 15 (1998). The employer bears the burden of proving that the contract clearly, unequivocally and specifically authorizes its actions. *Town of Andover*, 28 MLC at 270, *citing City of Boston* v. *Labor Relations Commission*, 48 Mass. App. Ct. 169, 174 (1999); *see School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569 (a waiver must be shown clearly, unmistakably, and unequivocally and cannot be found on the basis of a broad, but general, management rights clause). Where the parties' agreement is silent on an issue, it must be shown that the matter allegedly waived was fully explored and consciously yielded. *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *citing City of Everett*, 2 MLC 1471, 1475 (1976); *Press Co., Inc.*, 121 NLRB 976, 42 LRRM 1493 (1958). Where contract language exists but is ambiguous, bargaining history or the manner in which the parties have implemented the disputed contract provision are helpful. *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *citing City of Boston*, 3 MLC 1450, 1461, n.13 (1977). However, where contract language contained in a management rights clause is not ambiguous, it is necessary only to examine the specificity of the clause and to determine whether the disputed action is within its scope. *Commonwealth of Massachusetts*, 5 MLC 1097, 1099 (1978), *see Ador Corp.*, 150 NLRB 1658, 58 LRRM 1280 (1965).

Here, the management rights clause in the Agreement was not a broad or general clause, but rather gave the City the right, subject to any clauses in the contract to the contrary, to manage the affairs of the City and direct its work forces. In particular, the parties' Management Rights clause gives to the City the right to "employ, transfer, promote or demote employees, or to lay-off, terminate or otherwise relieve employees from duty for lack of work or other *legitimate reasons when it shall be in the best interests of the City*

11. We have modified this finding slightly in accordance pursuant to one of the Union's challenges to more accurately reflect the record evidence.

12. There have been instances where an officer receiving a suspension has been taken off both the overtime and paid detail rotations for the duration of the suspension.

13. We have added this finding in response to one of the Union's challenges.

or the Department." (Emphasis supplied). That clause also grants to the City the right to "prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirements of the City." Read together, those clauses preserved the City's right to remove Officer Crehan from the overtime rotation without first having to bargain to resolution or impasse. The City imposed discipline based on an investigation in which Crehan admitted to having violated a written order not to go into the firehouse. That investigation had been based on a complaint that Officer Crehan, while in uniform and on duty, had been sleeping in one of the City's fire stations. Moreover, nothing in the Agreement expressly prohibits the Department from removing individuals from the overtime rotation because of disciplinary infractions that occur while that officer is performing an overtime assignment. Although the parties' practice may have been to offer overtime to the officer with the lowest combined total hours worked and hours refused, there is no evidence that, prior to February 8, 2000, the City had ever disciplined an employee for disciplinary infractions that occurred while that employee was performing an overtime assignment. *See City of Lynn* v. *Labor Relations Commission*, 43 Mass. App. Ct. 172, 183-184 (1997)(because fire chief had never before been confronted with the situation that led to his filing an application for involuntary retirement, there was no basis for finding that there was a practice that he would not act in such a situation). Therefore, contrary to the Union's argument, Chief Gorgone's actions did not constitute a deviation from pre-existing conditions of employment. Although this type of discipline has never been used before, the management rights clause grants to the City the right to take actions in furtherance of maintaining department discipline without first having to bargain to resolution or impasse.

CONCLUSION

For the reasons stated above, we conclude that the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by 1) changing the criteria for overtime eligibility and 2) implementing a new form of discipline without providing the Union prior notice and an opportunity to bargain to resolution or impasse. Accordingly, the complaint of prohibited practice is dismissed.

SO ORDERED.

* * * * * *

In the Matter of LYNN SCHOOL COMMITTEE

and

AFSCME, COUNCIL 93, AFL-CIO

Case No. MUP-2367

67.8 ***unilateral change by employer***
91.1 ***dismissal***

February 10, 2003
Helen A. Moreschi, Chairwoman
Peter G. Torkildsen, Commissioner

John C. Mihos, Esq.	*Representing the Lynn School Committee*
Alison L. Forbes, Esq.	*Representing AFSCME, Council 93, AFL-CIO*

DECISION[1]

Statement of the Case

On March 29, 1999, AFSCME, Council 93, AFL-CIO (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Lynn School Committee (the School Committee) had violated Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law). Following an investigation into the Union's charge, on May 3, 2000, the Commission issued a complaint of prohibited practice, alleging that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to give the Union prior notice and an opportunity to bargain to resolution or impasse over the method by which transfers are made, and the impacts of its decision to transfer a member of the bargaining unit represented by the Union.[2] On June 26, 2000, Mark A. Preble, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. At the outset of the hearing, the parties offered certain joint stipulations of fact, which were incorporated into the Hearing Officer's recommended findings of fact. Following the hearing, the Hearing Officer left the record open for the purpose of accepting a certain Civil Service Commission decision, which the School Committee filed on July 3, 2000. The Hearing Officer also left the record open to allow the Union to file a motion to admit certain additional evidence.

On June 29, 2000, the Union filed a motion to admit evidence. In its motion, the Union argued that, although the School Committee was supposed to furnish the Union with certain documents relating to alleged prior involuntary transfers before the hearing, it did not produce those documents until the day of the hearing. Therefore, the Union argues, it did not have sufficient time to collect re-

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. We have modified the statement of the case to more accurately reflect the Commission's complaint.

buttal documents prior to the hearing. The Union attached various documents that were purportedly related to some of the exhibits that the School Committee had introduced during the course of the hearing and argued that it should be entitled to submit those rebuttal documents. The School Committee opposed the Union's motion on the ground that the documents were submitted to the Union prior to the hearing.[3] The Hearing Officer allowed the Union's motion. The Union and the School Committee filed their post-hearing briefs on August 24, 2001. The Hearing Officer issued Recommended Findings of Fact on September 18, 2001. Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

Findings of Fact[4]

A. Background

The City of Lynn (the City) is a public employer within the meaning of Section 1 of the Law. The School Committee is the representative of the City for the purpose of dealing with its school employees. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative for all Civil Service employees of the Lynn School Department, including custodians, houseworkers, clerks, cabinet makers, roofers, painter-glaziers, cafeteria personnel, storekeepers, mason-plasterer, plumber, motor equipment operator/truck driver, electrician, graffiti/small motor repair, principal computer operator, systems accounts supervisor, mail carrier/messenger, apprentice, and construction handyman.

The Union and the School Committee are parties to a collective bargaining agreement covering the period July 1, 1997 through June 30, 1999 (the Agreement). Article I of the Agreement, entitled "Recognition," states, in part, at paragraph C:

> The employer shall not be deemed to be limited in any way by this agreement in the performance of the regular and customary functions of management, and prerogatives, including without limitation, all exclusive rights of the School Department, provided that such rules and regulations are not inconsistent with the express provisions of this agreement.

Article VI of the Agreement, entitled "Employee Conditions," states, in part, at paragraph A: "Any change in conditions of wages, hours of work or conditions of employment shall be subjected to mutual agreement."

Article VII of the Agreement, entitled "Civil Service," states, in part, at paragraph A: "The Employer and the Union shall recognize and adhere to all Civil Service and State Labor Laws, rules and regulations relative to seniority, promotions, leaves of absences, transfers, discharges, removals and suspensions."

B. Prior Transfers of Bargaining Unit Employees

Since 1987, the School Committee has transferred members of the bargaining unit represented by the Union on several occasions. Although each transfer was handled somewhat differently, the Union filed a grievance whenever a member of the bargaining unit was involuntarily transferred.[5]

Eugene Landry

On July 1, 1987, representatives of the School Committee and the Union met with Eugene Landry (Landry) to discuss Landry's job performance. At that meeting, the parties agreed that: 1) the School Committee would reassign Landry from his position on the second shift at Eastern Junior High School to the day shift at English High School; 2) Landry would be suspended, without pay, for two (2) days; and 3) Landry was to seek counseling and submit bi-weekly reports to the supervisor of maintenance. Deputy Superintendent Alfred E. Bresnahan (Bresnahan) memorialized the agreement in a letter to Landry dated July 1, 1987. The Union was listed among those individuals who were to receive a copy of the letter.

Dan Wolentarski

On January 10, 1992, representatives of the School Committee met with Dan Wolentarski (Wolentarski) about certain complaints that other building custodians had allegedly made about him. At that meeting, Wolentarski was informed that, for the good of the Department, he was being involuntarily transferred from his position at Eastern Junior High School to a position at O'Keefe. Although Wolentarski did not agree to the transfer, the Union agreed that the transfer would be without prejudice.[6] In a memorandum to Superintendent James T. Leonard (Leonard) dated January 10, 1992, School Business Administrator Stephen C. Upton (Upton), described the meeting and informed Leonard about the transfer. Both the Union and Wolantarski were listed among those individuals who were to receive a copy of the memorandum.

Russell Perry

In a letter dated January 4, 1993, Leonard informed Russell Perry (Perry) that, "in the best interest of the system," he was being involuntarily transferred to Lynn Classical High School as senior

---

3. The Hearing Officer found that the School Committee did not oppose the Union's motion to admit evidence. The School Committee contends that it did object to the Union's motion. We find that the School Committee did oppose the Union's motion and have amended the statement of the case accordingly.

4. Neither party contests the jurisdiction of the Commission in this matter.

5. Union Recording Secretary, Susan McFarland (McFarland), testified that the Union files a grievance whenever a member of the bargaining unit is involuntarily transferred and then withdraws the grievance if the employee "accepts" the transfer. Although the Union offered few examples of such grievances, with the exception of the events concerning Thomas Greeley (Greeley), who was transferred after the events that gave rise to this complaint, McFarland's statement was unrebutted.

6. As part of its motion to admit evidence, the Union offered a Commission dismissal letter dated March 3, 1993, dismissing a prior charge of prohibited practice concerning whether the Union breached its duty of fair representation by the manner in which it handled Wolentarski's transfer. However, the Hearing Officer decided that statements made in a Commission dismissal letter in a prior case are not sufficiently reliable upon which to base a recommended finding of fact. Therefore, although the record supports a finding that the Union had agreed that Wolentarski's transfer would be without prejudice, the Hearing Officer declined to make any further findings based upon the statements made in the dismissal letter.