CITY OF BOSTON AND IAFF, LOCAL 718, MUP-2646; CITY OF BOSTON AND BOSTON POLICE PATROLMEN'S ASSOC., MUP-2647 (2/4/77).

(50 Duty To Bargain)
53.5 other influences on bargaining
54.222 union business
54.8 mandatory subjects
(60 Prohibited Practices By Employer)
64.1 assistance to union
67.15 union waiver of bargaining rights
67.8 unilateral change by employer

Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner.

Appearances:

Philip G. Boyle,Esq.)
Paul Edgar, Esq.) - Counsel for the City of Boston

E. David Wanger, Esq. - Counsel for Local 718, International Association of Firefighters, AFL-CIO

Frank J. McGee, Esq. - Counsel for Boston Police Patrolmen's Association, Inc.

DECISION

Statement of the Case

On December 28, 1976, Local 718, International Association of Firefighters (Local 718 or Firefighters) filed with the Labor Relations Commission (Commission) a Complaint of Prohibited Practice against the City of Boston (City) alleging that the City had violated Sections 10 (a) (1) and (5) of General Laws c. 150E (the Law). Local 718 alleged in pertinent part:

> By consistent past practice, the incumbent of the Office of President, Local 718, has been relieved from active duty during such incumbency to engage in the daily administration of the Employer-Employee organization contract and to participate in and supervise the labor relations activities of the approximate 2,000 person units. Such practice has included Respondent's [City's] maintenance of the President's compensation and benefits as required by contract. ***Respondents, by letter of December 20, 1976 unilaterally ordered termination of the practice and a return of the incumbent of the Office of President, Local 718, to active duty. By their failure to make a timely proposal relative to the practice as the parties engaged in bargaining and mediation, by their refusal to negotiate with Local 718 on such topic, by their unilateral termination of such practice and by related conduct, Respondents have vioated the Act as aforesaid.

On December 28, 1976 the Boston Police Patrolmen's Association, Inc. (Association of Police or BPPA) filed with the Commission a Complaint of Prohibited Practice alleging that the City had violated Sections 6 and 10 (a) (5) of the Law. The Association alleged in pertinent part:

> 3. From 1968, as the result of collective bargaining and negotiation the Chairman and Vice-Chairman of the Boston Police Patrolmen's Association have worked full time as the duly elected leaders of said Association in lieu of performing their regular police duties. From 1968 the parties have mutually agreed that this agreement was mutually beneficial in that it promoted stability between the parties.
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> * * *
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> 6. By letter dated December 20, 1976 . . . Chester J. Broderick and John F. Bilodeau were informed that the agreement as described in paragraph 3 above would be terminated notwithstanding the fact that the matter was presently on the bargaining table having been placed there by the City of Boston.
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> 8. . . . [T]he City of Boston is promulgating [the letter of December 20, 1976] is blatantly and unlawfully attempting to unilaterally change and/or alter an agreement about which it is duty bound to negotiate.
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> 9. All of the foregoing is a violation of Sections 6 and 10 (a) (5) of M.G.L. Chapter 150E.

The parties have waived the issuance of Commission Complaints and Hearings and agree that the Commission shall act on the charges filed by Local 718 and the Association based upon stipulated facts.

Findings of Fact

1. The City is a municipal corporation located in the County of Suffolk in the Commonwealth of Massachusetts and is a public employer within the meaning of Section 1 of the Law.

2. Mayor Kevin H. White is the chief executive officer of the City within the meaning of Section 1 of the Law.

3. Local 718 is an employee organization within the meaning of Section 1 of the Law and is the exclusive representative for the purposes of collective bargaining of employees of the City's Fire Department.

4. The Association is an employee organization within the meaning of Section 1 of the Law and is the exclusive representative for the purposes of collective bargaining of employees of the City's Police Department.

The Firefighter Negotiations

Local 718 is the exclusive bargaining representative of all uniformed employees of the City's Fire Department and all members of the Fire Alarm Division other than the Chief of the Department. Local 718 represents approximately

2,000 employees. Local 718 and the City have entered various subsequent collective bargaining agreements covering the period from October 12, 1966 to June 30, 1974. The current collective bargaining agreement between Local 718 and the City ocvers the period July 1, 1974 to June 30, 1976, but remains in full force and effect until a successor contract is executed and implemented.

Since October, 1966 the incumbent presidents of Local 718 have been relieved from active duty, during the period of active incumbency, with all pay and benefits. The presidents have not been required to report for duty, account for activities or justify time spent in any way.

Local 718 and the City commenced negotiations for a collective bargaining agreement for fiscal year 1977 in June 1976. Mediation efforts took place in September 1976 and the parties are currently engaged in the statutory impasse procedures. Factfinding hearings are being scheduled.

During the course of the current negotiations, neither the City nor Local 718 made bargaining proposals concerning either a change in the language of Article XVI, Section 8 of the agreement[1] or new language concerning time off for incumbent union presidents.

The Police Negotiations

The Association is the exclusive bargaining representative for all Boston police officers except those who are specifically excluded by agreement or by law. The Association and the City have negotiated collective bargaining agreements since 1968. The current agreement between the City and the Association will remain in effect until 31 days after the issuance of the factfinder's report under the atatutory impasse procedures.

In September 1972, the members of the Association elected Chester Broderick and John F. Bilodeau as Chairman and Vice-Chairman, respectively. Since that time Broderick and Bilodeau have been paid a full City salary while working full time on union matters. Neither Broderick nor Bilodeau have worked a tour of duty since September 1972. From 1969 to 1972 Daniel Sweeney was the Chairman of the Association. During that time he represented the Association in collective bargaining, attended meetings between labor and management, and attended grienvance hearings pursuant to Article IV, Section 2[2] of the collective bargaining agreement.

[1]Article XVI, Section 8 of the Agreement provides: Section 8. Representatives of Local 718 will be given reasonable time off without loss of pay or benefits for the processing of grievances, attendance at arbitration proceedings and, collective bargaining with the City.

[2]Article IV, Section 2 provides in pertinent part: Section 2. The members of the Association Bargaining Committee, not to exceed five (5), shall be granted leave of absence without loss of pay or benefits for all meetings between the City and the Association for the purpose of negotiating the terms of a contract, or supplements thereto. Association officers, shift representatives and Bargaining Committee members, not to exceed five (5) in any instance, shall be granted leave of absence without loss of pay or benefits for time required to discuss and (cont'd.)

During 1970 Sweeney worked 64 tours of duty. During 1971 Sweeney worked nine tours and during 1972 he worked eight tours of duty.

During prior contract negotiations the City proposed modifications of Article IV, Section 2 in July, 1975 and July, 1976. In January, 1976, Robert E. Holland, the City's Supervisor of Labor Relations, requested that the Association assent to a submission to arbitration of the question of the rights and responsibilities of the parties under Article IV, Section 2. The Association rejected this proposal. On January 23, 1976, the City again proposed a modification of Article IV, Section 2 of the agreement. On September 21, 1976, Arbitrator Daniel McLeod issued a decision and award in last best offer proceedings pursuant to c. 1078, section 4 of the Acts of 1973 in which he accepted the City's final offer. The City's final offer did not include a modification of Article IV, Section 2. Therefore, the McLeod award (effective from July 1, 1975, to June 30, 1976) and the current agreement continue the existing language in Article IV, Section 2.

The City and the Association held collective bargaining sessions on December 6, and 14, 1976 and January 13, 1977. The City and the Association dispute whether the meeting of November 17, 1976 was a bargaining session. (See discussion infra at p. 1456.) The City has again proposed modification in Article IV, Section 2.

The Finance Commission Report

During the Fall of 1976 the Finance Commission of the City of Boston (Fincom) conducted an investigation of "personnel irregularities and abuses in the City." The Fincom's investigation centered on an individual not a party to the instant matter, but heard sworn testimony from the City's Supervisor of Labor Relations, Holland. The Fincom issued a Report on "No Show" City Jobs Held by Union Officials on November 15, 1976. The report stated in part:

> Robert E. Holland, Supervisor of Labor Relations, testified that the city bargains with 16 unions. Of these 16, four officials of three of the unions are permitted by written agreement and long standing practice to perform no duties at their city jobs. These officials, their union affiliations, their city jobs and city salaries are as follows:
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> * * *
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> A. Michael Mullane, President, Firefighters Local 718 - Firefighter - $14,567/yr.

2(cont'd.)
process grievances or incidents which could lead to grievances, with the employee or others involved, and to attend all "standing committee" meetings with the City as provided in Article XIV, and may enter any premises of the Department at any reasonable time for such purposes provided they give notice of their presence immediately upon arrival to the person in charge....

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> Chester Broderick, Chairman, Boston Police Patrolmen's Association, Inc. - Patrolman - $14,800/yr.
>
> John Bilodeau, Vice-Chairman, Boston Police Patrolmen's Association, Inc. - Patrolman - $14,600/yr.

The Fincom's Report concluded with the following recommendations:

> The Finance Commission recommends that the following steps be taken to end the practice of permitting union officials to hold and be paid for "no show" jobs and to establish uniform administrative practices for city employees who are also union officials:
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> 1. That the Labor Relations Office notify immediately Thomas J. Kennedy, A. Michael Mullane, Chester Broderick and John Bilodeau that their present no show job status must end at once and that henceforth time off will be granted only in accordance with the terms of the written agreements.
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> 2. That the Labor Relations Office prepare a written policy for the granting and monitoring of all temporary paid leaves of absence of city employees from their jobs while attending to union affairs pursuant to applicable collective bargaining agreements, that it submit such policy statement to the Labor Department for its approval and that it then take steps to have it implemented.
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> 3. That all future collective bargaining agreements set forth in detail the particular union activities which city employees will be permitted to perform during normal work hours, and that they limit any city compensation for periods devoted to union activities to an amount which, when added to all forms of union compensation, does not exceed the full rate of compensation paid by the city to the comloyees. [footnote omitted]

Meetings with Local 718 and the Association

Prior to the issuance of the Fincom report, Holland on November 5, 1976 informed Mullane and Broderick in identically worded letters that the City was reviewing its policy of paying union officials a City salary while they were working full time on union acitvities. The letter set forth three options under consideration[3] and concluded with a request by the City to "discuss this matter with you and your representatives."

[3]Holland's letter listed the following three options.

1. Require union officials to conduct union business during non-working hours.
2. Permit union officials to take a leave of absence without pay. (Presumably their salaries would be paid from the union treasury.)
3. Permit union officials to take a leave of absence with pay if the union reimburses the City in an amount equal to the salary and benefits received by said union cfficials.

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Immediately following receipt of the City's letter of November 5th, Local 718 and the Association agreed to meet with the City. Local 718's attorney warned the City that it considered Mullane's time off for Union business to be within the scope of bargaining under Section 6 of the Law and that "any unilateral Employer conduct at variance with contract and practice will be considered as violative of appropriate obligations." Despite such objections, Local 718's attorney agreed to meet with Holland "without waiving any rights in this regard." On December 13, 1976 representatives of Local 718 met with the City's representatives. The substance of that meeting has been stipulated as follows:

> A meeting was held between representatives of the City and Local 718 on December 13, 1976. The City related the following: the situation [of full time off for union activities for Local 718's president] is not a subject for bargaining under G.L. c. 150E, Sec. 6; the City would not bargain about such situation; public pressure resulting from issuance of a Finance Commission report ... has created a negative political image; and, that aspects of the prior situation have been of benefit to the City. The City stated that the current contract does not cover the specific situation [of full time off for union activities for Local 718's president]. The City reiterated the three alternatives of its November 5, 1976 letter.
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> Local 718 initially related that the maintenance of the situation is a proper subject for bargaining and that Local 718 wanted to bargain on such topic within the context of its letter of November 23, 1976. Local 718 then suggested a system of accountability whereby the President's time for which the City was compensating was related to labor relations.
>
> The City related that the time spent was not being questioned and that such accounting would not resolve the political problems emanating from the Finance Commission's report.
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> The City said that it was unwilling to consider the maintenance of the situation [of full time off for Union activities for Local 718's president] with continued city funding; however, the City would reflect upon the accountability approach. The meeting terminated and no further meetings were held between the parties prior to the City's letter of December 20, 1976.

The Association did not respond directly to Holland's letter of November 5, 1976. On November 16, 1976 the Association's attorney wrote to Mayor Keven H. White that the Association "desires to meet with you and your collective bargaining representatives, for the purpose of commencing collective bargaining negotiations between the Association and the City of Boston with regard to wages, hours and conditions of employment for the period commencing at 8:00 A.M., June 30, 1976 ...." The Association's attorney further stated that:

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> The Chairman of the Association...has informed me that...Holland ...has advised him that certain aspects of the recent report and recommendations of the Boston Finance Commission relative to so-called release time whould be the subject matter of negotiations between the City ... and the Association at a meeting of the parties to be held on Wednesday, November 17, 1976 at 1:00 P.M.

Holland had no knowledge of the Association's letter prior to its being hand delivered at the November 17th meeting.

On November 17, 1976 the City and the Association met at City Hall. The exact purpose of the meeting is in dispute. According to the City the purpose of the meeting was two-fold. First, to discuss Holland's letter of November 5, 1976 and second, to schedule further bargaining dates. The Association claims that the meeting was a bargaining meeting called specifically for the purpose of discussing the City's proposal to change Article IV and the practice under that Article of the Chairman and the Vice-Chairman working full time on union matters in lieu of their regular police duties.

Subsequent to Holland's meeting with the representatives of Local 718 on December 13, 1976 and his meeting with the representatives of the Association on November 17, 1976, he informed Mullane, Broderick and Bilodeau by letters dated December 20, 1976 that the City would discontinue the practice of allowing these individuals to work full time on union business while receiving a City salary as of Wednesday, January 5, 1977. Each was instructed to return to their full time duties as of that date.

On January 4, 1977, Local 718 and the Association filed civil actions against the City in Suffolk Superior Court (Docket Nos. 18888 and 18889). The Honorable James P. Lynch, Jr., Associate Justice of the Superior Court, issued a Preliminary Injunction on January 4, 1977 enjoining and restraining the City from altering the routine of allowing Mullane, Broderick and Bilodeau to work full time on union activity in lieu of their regular duties until the close of business February 4, 1977.

Opinion

Sections 5, 6, and 7 of Chapter 150E of the General Laws[4] place an

[4] Section 5. The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership....

Section 6. The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment, but such obligation shall not compel either party to agree to a proposal or make a concession.

Section 7. (a) Any collective bargaining agreement reached between the (cont'd.)

obligation on a public employer to bargain with an employee organization which has been certified or recognized as the exclusive representative of its employees as long as that organization continues to have the support of a majority of employees in the bargaining unit. The heart of this bargaining obligation is that neither the employer nor the employee organization may unilaterally impose its will on the other with regard to these mandatory subjects of bargaining. (See s.6 of the Law supra at n. 4 "but such obligation shall not compel either party to agree to a proposal or make a concession.") For, as the Supreme Court noted in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177, 2180 (1962):

> Clearly the duty thus defined @to negotiate in good faith] may be vioalted without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact - to meet . . . and confer . . . - about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within sec. 8 (d) and about which the union seeks to negotiate, violates sec. 8 (a)(5) though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to that end.

Nor is the obligation to bargain extinguished by the execution of a collective bargaining agreement. NLRB v. Jacobs Mfg. Co., 106 F. 2d, 30 LRRM 2098 (2nd. Cir. 1952); Robertshaw Controls Co. v. NLRB, 386 F. 2d 377, 66 LRRM 2667 (4th Cir. 1967); General Electric Co. v. NLRB, 418 F. 2d 736, 72 LRRM 2530 (2nd. Cir. 1969). "[W]e assume that the Act imposes on the employer the further obligation to meet and bargain with his employees' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation...." NLRB v. Sands Mfg. Co., 306 U.S. 332, 4 LRRM 530, 534 (1939). Thus, neither the employer nor the employee organization[5] is free to unilaterally alter existing terms and conditions of employment unless the circumstances justify a conclusion that the statutory bargaining obligation has been suspended.

In 1948 Congress determined that the parties to a collective bargaining agreement should not be compelled to bargain over changes in that agreement to be effective during its term.[6] Thus, the National Labor Relations Board and

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[4](cont'd.)
employer and the exclusive representative shall not exceed a term of three years. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the commission by the employer.***

[5]The same logic compels a conclusion that a union which attempts to unilaterally alter existing practices without prior notification to or bargaining with the employer is guilty of a refusal to bargain in good faith. See, NLRB v. Communications Workers of America, Local 1170, 474 F.2d 778, 82 LRRM 2101 (2nd. Cir. 1972); New York District Council No. 9, Int'l. Bhd. of Painters and Allied Trades, AFL-CIO v. NLRB, 453 F. 2d 783, 79 LRRM 2145 (2nd. Cir. 1971).

[6]29 U.S.C. §158 (d), provides in part: [D]uties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the (cont'd.)

the federal courts in interpreting the Labor Management Relations Act[7] (the Act) have concluded that an employer may lawfully refuse to negotiate over a union demand to alter the existing collective bargaining agreement. See Note , supra. and cases cited.

The practice was intended to stabilize the labor management relationship by insuring that parties could rely on contract provisions to govern their aggairs during its term. Plans could be made with greater certainty and employees were assured of the terms which would govern the employment relationship.

Although Chapter 150E contains no equivalent to section 8 (d) of the National Labor Relations Act, the Commission has adopted a similar rationale by decisional law. Thus, in Cohasset School Committee, MUP-419 (1/30/74) the Commission held "[T]he right to bargain during the term of an ag reement may be waived either expressly or impliedly. See, e.g., Ador Corporation, 150 NLRB 1658, 58 LRRM 1280 (1965); State of New York and Civil Service Employees Association, Inc., 6 PERB 4550." Id. at 8. The Commission noted, however, that since the then applicable standard lacked the equivalent of section 158 (d) of the Federal Act, that the obligations of the parties to bargain under the state law might be "even more broad" than under the federal precedents. ID. at 6. The Commission also held that a waiver of the statutory right to bargain will not be lightly implied, and must be "clear and unmistakable."[8] Id. at 10.

This is the basic frame work within which the facts of the instant case must be analyzed. The situation is not unique.

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6 (cont'd.)
terms and conditions contained in a contract for a fixed period, if such modification is to become ffective before such terms and conditions can be reopened under the provisions of the contract.

[7]But compare the prohibitions under the Federal Act, 29 U.S.C. s. 158:

(a) It shall be an unfair labor practice for an employer -

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

With the statutory command of Section 10 of the State Law:

(a) It shall be a prohibited practice for a public employer or its designated representative to: * * *

(5) refuse to bargain collectively in good faith with the exclusive representative as required in section six;

[8]Citing, New York Mirror, 151 NLRB 834, 58 LRRM 1465 (1965).

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> With increasing frequency the waiver issue arises in commection with some form of unilateral employer action, such as subcontracting, where the primary defense is that the subject matter is not a mandatory topic of collective bargagining and the secondary defense is that the union waived whatever right it may have had to bargain. C. Morris, The Developing Labor Law, 332 (1971).

As there is no contention that the action was not taken unilaterally,[9] we reach the "primary" defense - whether the change inpacted a mandatory topic of bargaining.

The disputed practice is that of granting the union officials full time off for union business, without loss of pay or benefits. Because this practice impacts upon the existing grievance procedure established between the parties, it is clearly a mandatory stuject of bargaining.[10] See, Bethlehem Steel Co., 136 NLRB 1500, 50 LRRM 1013, 1014, enforcement denied on other grounds, 320 F.2d 615, 53 LRRM 2878 (3rd Cir. 1963); Crown Coach Co. 155 NLRB 625, 60 LRRM 1366 (1965); Cranston Print Works Co., 115 NLRB 537, 37 LRRM 1346 (1956). Nor is the right to negotiate over this subject matter limited to the procedure itself. The implementation of such a grievance procedure may constitute a past practice over which negotiation is requried before the employer may make a change. In Town of Marblehead, MUP-667, 1 MLC 1140 (1974), the employer unilaterally altered the past practice of allowing the union to use the stationhouse premises to conduct union business, store union materials, and use a telephone for conducting union business. The town argued that the use of the premises was a "privilege" which could be withdrawn at any time. The Commission ruled that the unilateral change impacted mandatory subject matter and that the employer had refused to bargain in good faith when it made the change without prior consultation or negotiation with the union. See also, NLRB v. Metlox Mfg. Co., 83 LRRM 2346 (9th Cir. 1972).

Additionally, it is clear that the practice in dispute involves the hours of Mullane, Broderick, and Bilodeau. The practice of leave, whether for sickness, maternity, personal leave, or leave for union business is clearly a mandatory subject of bargagining. Cf. City of Albany v. Helsby, 8 PERB 7034 (N. Y. App. Div. 1975); NLRB v. Katz, supra.

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[9] Local 718 Stipulation paragraph 13. Association Stipulation, paragraphs 9, 10, and 20. In neither brief do the City's attorneys argue that it has bargained the matter to impasse before instituting the change. See, e.g., Almeida Bus Lines, 333 F.2d 729, 56 LRRM 2548 (1st Cir. 1964); C. Morris, The Developing Labor Law, 330-32. In each case the issue was phrased in terms of the obligation of the City to bargain over this change.

[10] "Numerous topics fall within 'other terms and conditions of employment' as this phrase is used in the Act. Many are now so clearly recognized to be mandatory subjects for bargaining that no discussion is required. Among these topics are the following: provisions for a grievance procedure and arbitration ..." C. Morris, The Developing Labor Law, 404. [footnotes omitted].

The City argues (City Brief in MUP-2646 at 11) that "A careful distinction must be made between granting employees time off with pay and benefits to attend union business which directly involves and effects the City and granting full time off to attend strictly union business." While conceding that "in the private sector, the payment of union employees for time spent in negotiations with the employer is a common practice," (Id.) it argues that such a practice may permit the employer to unlawfully assist or dominate the union. The cases offered by the City do not support this assertion. In fact, in Hesston Corp., 175 NLRB 96, 70 LRRM 1492 (1969) the Board concluded that the action of the employer in permitting a union to conduct internal union business on company time, on company premises was not a violation of section 8(a)(2)[11] of the Act. Thus, the Board has not considered critical the distinction which the City urges that we adopt. Other cases cited by the employer are similarly wide of the mark. In Clapper's Mfg., Inc., 186 NLRB 324, 75 LRRM 1349 (1970) a violation of Section 8(a)(2) was found where, in addition to paying the union officials (of a house union) for time spent on union activities the employer assisted in the formation of the committee, set up the structure of the committee, and controlled its composition. These factors are of considerably greater significance than granting time off for union business.

What is clear from these cases is that granting time off for union business is a common practice. "It is only when management's activities actually undermine the integrity of the employee's freedom of choice and independence in dealing with the employer that such activities fall within the proscriptions of the Act. Managerial cooperation with a labor organization which does not have that effect of inhibiting self-organization and free collective bargaining is encouraged under the Act." Federal-Mogul Corp. v. NLRB, 394 F.2d 915, 68 LRRM 2332, 2333-34 (6th Cir. 1968). Such cooperation, where the dealings between employer and employee organizations are at arms length, is often considered to be an affirmative indication of good faith bargaining. See, e.g. Duquesne University, 198 NLRB 891, 81 LRRM 1091 (1972); Federal-Mogul v. NLRB, supra. To say that an illegal contract provision could be negotiated with regard to a particular subject matter does not make that subject matter non-mandatory. A wage provision which specified that blacks would receive a lower wage than whites would be illegal. This argument could not operate, however, to deprive a union of the right to bargain over wages. We conclude that the practice of granting full time off for union business is a mandatory subject of bargaining. The practice which was discontinued is neither unlawful on its face or in its application,[12] and is a mandatory subject of bargaining.

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[11] The language of section 8(a)(2) of the federal Act is nearly identical with section 10(a)(2) of the State Law.

[12] In this regard we note that the Boston Finance Commission concluded that the City lacks the "legal authority" to maintain the current practice. (Boston Finance Commission, Report on 'No Show" Jobs held by Union Officials, at p. 6; Firefighters Stip., Exhibit D. BPPA Stip. 14.) Although no defense of illegality is raised by the City in either case, we reach the issue in order that our decision not foster an illegal practice. We do not know upon what record the Finance Commission made its determination, but it is clear that on the record before us we may not find the practice unlawful.

(cont'd.)

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All parties concede that the current practice of allowing these union officials full time off, with no accounting for the time spent, is not required by the contract.[13]

12 (cont'd.)
On the stipulated record in these matters we find that Mullane, Broderick and Bilodeau spend their time on union matters while receiving full pay and benefits from the City. (Firefighter Stip. at par. 7; BPPA Stip. at par. 14). The City of Boston derives a benefit from this arrangement. (Firefighter Stip. at par. 13; Finance Commission Report at p. 4). It was because of political pressures, including the issuance of the Finance Commission Report, that the City took action to end the practice. (Firefighter Stip. at par. 13; BPPA Stip. at par. 22).

The Finance Commission is of the belief that the present practices do not "confer a sufficient public benefit to make them legitimate." Boston Finance Commission Report at p. 8. We submit that the Finance Commission's conclusion concerns the wisdom of the practice, not the legality. The Finance Commission viewed the matter as raising a question of a possibly illegal gratuity. However, in Allen v. Town of Sterling, Mass. Adv. Sh. (1975) 1697, 329 N.E. 2d 756, cited by the Finance Commission, the Court found lawful a sick leave bank proposal, terming it not unreasonably generous when viewed as part of a total collective bargaining package. See also, Fitchburg Teachers Association v. School Committee of Fitchburg, 360 Mass. 105, 271 N.E. 2d. 646 (1971). We take administrative notice that numerous public sector collective bargaining agreements provide for apid leave for union activities, and that the Commonwealth of Massachusetts permits paid leave for union officials to attend conventions and legislative hearings. See Rules and Regulations Governkng Vacation Leave, Sick Leave, Travel, Overtime, Military Leave, Court Leave, Other Leave, Charges to State Personnel, Accident Prevention, (the "Redbook"), Rules LO-7, LO-8.

When considered in a collective bargaining context, on the record now before us, and in the basence of an assertion by the City of illegality, we cannot find the current practice to be illegal. We express no opinion as to the wisdom of the practice.

[13]It could be concluded that the parties, by re-enacting the same contract language with regard to "reasonable time off" in successive contracts over an extended period of time, intended to and did incorporate that practice into their contract. Where the language of a contract is ambiguous, one guide to the intent of the parties is the manner in which they have implemented the disputed contract provision. Elkouri & Elkouri, How Arbitration Works, 389 (3rd Ed. 1974). Viewed in this light, the employer's unilateral alteration of the contract practice would be a contract breach. While not every breach of a collective bargaining agreement is a prohibited practice, where the breach affected the union officers so directly, and arguably interfered with the administration of the entire contract, the conduct could be viewed as a violation of sections 10 (a)(1) and (5) of the Law. See Mendes v. City of Taunton, Mass. Adv. Sh. (1974) 1291, 1300, 315 N.E. 2d 865, 873 (1974).

We decline to rest our decision on these grounds. To do so would lock in the City to the full time off requirement for an indefinite period. In the firefighters case, no proposal for change in the reasonable time off provision has been submitted to the factfinder. Thus, it is likely that the same language will appear in the next contract. In the police case, a holding that the contract (cont'd.)

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In each case there is a contractual provision requiring "reasonable time off" for certain labor relations business, overlayed by a long-standing past practice of permitting certain union officials full time off for conduct of such union business as they deemed appropriate. For the purpose of our analysis we conclude that some part of the practice of granting Mullane, Broderick and Bilodeau full time off without accounting for that time is not required by the contract.

The basic contention of the City is that the unions, by agreeing to contract proposals embodying less than the actual practice with regard to time off for union activity have waived their right to bargain over this subject matter during the term of the existing agreement.

The City further argues that the Stablility of Agreement language in each contract represents an express reservation to the employer to the right to retreat to the contractually required minimum requirement of "reasonable time off".

We believe that these cases must be analyzed in the context of the ongoing negotiations between the parties, rather than as a unilateral change during the term of an existing collective bargaining agreement.

In the case of both the firefighters and the patrolmen, the existing agreement has passed its fixed termination date (June 30, 1976 in each case). The Firefighter contract provides, however, that it will remain in effect until a successor is negotiated. The Police Association contract remains in effect until thirty-one days after the issuance of a fact-finder's report under the statutory impasse procedure established by Chapter 1078 of the Acts of 1973. The firefighters began negotiations for a new contract in June of 1976 to replace the contract whose term expired in July of that year. After several negotiations sessions the parties applied for mediation. An impasse was declared by the mediator whereupon fact-finding proceedings were commenced. Neither party proposed a change in the "reasonable time off" article.

The terms and conditions of the July 1, 1975 through June 30, 1976 contract between the City and the BPPA were not settled until the final offer award of Arbitrator Daniel McLeod of September 21, 1976. By letter of November 16, 1976 to Mayor Kevin H. White counsel for the Association notified the City that it desired bargaining for a new agreement and that one of the matters it wished to discuss was the suggestion made by the City on November 5, 1976, to modify the current practice on granting Bilodeau and Broderick full time off with pay. There is some dispute as to whether the negotiator for the City received the letter prior to a meeting on November 17, 1976. What is clear is that as of November 17, 1976, the City was on notice that the BPPA had reopened negotiations, and wished to discuss the subject matter of full time off with pay.

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13 (cont'd.)
required the full time off practice would lock in the city, at least until 31 days after the issuance of a factfinder's report, and perhaps longer, if they are unsuccessful in negotiating a change in the provision.
Where the theory has not been argued, we decline to risk such a result.

City of Boston and IAFF, Local 718, MUP-2646; City of Boston and Boston Police Patrolmen's Assoc., 3 MLC 1450

Under these circumstances we believe that the December 20, 1976 decision by the City to alter the practice must be considered to have occurred during bargaining. Under the rule of the Supreme Court in NLRB v. Katz, supra, it constitutes a per se violation of the Law. In the police case, the City has taken unilateral action with regard to mandatory subject matter currently under discussion in negotiations. Such action constitutes a 10(a)(1) and (5) violation without regard to whether the prior contract had been extended for some period during negotiations.

The existence or non-existence of a contract, or any terms contained therein, is not critical to the Katz analysis. The court held that to take unilateral action under such circumstances is to refuse to bargain in fact.

> We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of [the requirement to bargain in good faith], for it is a circumvention of the duty to negotiate which frustrates the objectives of sec. 8(a)(5) much as does a flat refusal. NLRB v. Katz, 50 LRRM at 2180.

The action of the employer in sending the December 20, 1976 letter, constitutes a prohibited practice within the meaning of sections 10(a)(1) and (5) of the Act.

Analysis of the fact pattern in the firefighter case is only slightly more troublesome. In those negotiations the parties had reached impasse without either side having proposed a change in the practice of full time off for the union president. While at impasse, the employer proposed changes in the practice through its November 5, 1976 letter. Local 718, while asserting that the proposal was not timely, nevertheless expressed a willingness to negotiate over this subject matter. When on December 13, the parties met, the City announced its new position that the topic was not a mandatory subject of bargaining and that it was not willing to negotiate over the change. The December 20, 1976 letter confirmed the refusal to negotiate.

It has been held that the existence of a legitimate impasse does not terminate the obligation to bargain, but metely suspends it. Local 841, IAFF, MUPL-2075, 3 MLC ___ (1977); Lawrence School Committee, MUP-2287, 2329, 3 MLC ___ (1976). The National Labor Relations Board and the Courts have held that, where a legitimate impasse[14] exists, the employer may make unilateral changes in working conditions. But, those cases emphasize that the change must be consistent with the employer's bargaining position. Falcon Tank Corporation, 194 NLRB 333, 78 LRRM 1587 (1971); NLRB v. Intracoastal Terminal, Inc., 286 F.2d 954, 47 LRRM 2629 (5th Cir. 1961) (where the employer was found to violate section 8 (a) (1) of the Act, when, after reaching impasse with the union it unilaterally equalized wages between whites and blacks, since that subject had not been discussed during negotiations); National Labor Relations Board v. Crompton-Highland Mills, 337 U.S. 217, 24 LRRM 2088 (1949); (unilateral wage increase, greater than offered

[14] NLRB v. Herman Sausage Co., 275 F.2d 229, 45 LRRM 2829 (5th Cir. 1960) (the impasse may not be the result of an unfair labor practice).

to union, violates the Act, though an impasse existed.) Implementation without bargaining of a proposal never made to the union can hardly be considered consistent with the employers negotiating position. Nor can the union be said to have rejected the offer which the employer seeks to implement. As the existence of the impasse does not permit the City to unilaterally alter the pre-existing past practice, whether contained in the contract or not, we conclude that the refusal to negotiate on December 13, and the subsequent letter of December 20, 1976 violate the Law.

Our findings above make unnecessary a holding on the City's argument that the union had expressly waived its right to bargain over the subject matter here in dispute. Because of the increasing volume and importance of cases in which similar arguments are made, we think it appropriate to express our views on an issue fully briefed and argued by the parties.

The National Labor Relations Board and the federal courts have been reluctant to find a conscious and knowing waiver of the statutory bargaining obligation where the employer has relied on broad management rights clauses[15] or "zipper" clauses.[16] Such clauses were considered to relinquish the right to bargain over a particular subject matter. The current state of these doctrines under the National Labor Relations Act is unclear in light of the Board's recent decision in Radioear Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974). The plurality opinion (Chairman Miller, Member Penello) argued that cases ought to be resolved by reference to the entire bargaining context, rather than mechanical rules of strict application. The dissent (Members Jenkins and Fanning) argues that ". . . [T]he Board and the Courts have time and again made clear that catchall contract clauses do not constitute a waiver of employees' interest in specific existing terms and conditions of employment so as to privilege the employer's termination fo such terms or conditions without bargaining. Rather, such a waiver may be accomplished only by clear and unequivocal language." 87 LRRM at 1333.

Radioear involved the discontinuance by an employer of a previous practice of giving employees a yearly "turkey money" holiday bonus. In the most recent negotiations the union had attempted to secure a clause retaining all existing benefits. The employer refused to agree to such a provision. The agreement contained a "zipper clause" whereby the union waived its right to bargain over issues not explicit in the contract. On these facts the majority concluded that the waiver language was a bargained-for concession and ought to be given effect.

The result reached by the majority, if not its logic in reaching that result, is consistent with Commission policy in this area. We believe that labor stability will be encouraged if parties to a collective bargaining relationship may, by

[15] Leroy Machine Co., 147 NLRB 1431, 56 LRRM 1369 (1964). Tide Water Associated Oil Co., 85 NLRB 1096, 24 LRRM 1518 (1949). Leeds & Northrup v. NLRB, 391 F.2d 871, 67 LRRM 2793 (3rd Cir. 1968), Proctor Mfg. Corp., 131 NLRB 1166, 48 LRRM 1222 (1961).

[16] New York Mirror, supra; Beacon Journal Publishing Co., 164 NLRB 734, 65 LRRM 1126 (1967).

contract, place reasonable restrictions on their bargaining obligations during the term of a contract. Thus, in Cohasset School Committee, supra, the Commission concluded "where the restrictions on the time and manner of negotiations are reasonable, no irreparable harm is done by requiring the parties to negotiate at the times and in the manner prescribed by the contract." MUP-419 at 9. In Cohasset the union had agreed to a contract clause providing:

> This Agreement constitutes the entire agreement between the parties and includes provisions for all matters contemplated by them for the entire effective term of the Agreement. The Agreement will not be reopened, except by mutual consent, on the ground that some matter was not included herein because of a mistake or oversight, until reopening, as provided herein, may lawfully be made. ID. at 4.

This provision clearly indicates that the parties foresaw that not all matters could be included in an agreement. Aware of that possibility, they nonetheless agreed that should an unforseen event occur neither party would be required to bargain. This general waiver of the right to bargain is "knowing and conscious" though the parties do not know at the time of agreement what matters it may cover. We believe that unless the operation of the clause works some substantial and undue hardship which is contrary to the policy and purposes of the Law, the agreement of the parties should be given full effect.

We contrast the Cohasset fact pattern with the contract provisions involved in the instant cases. The Stability of Agreement Articles provide:

> [Firefighters' Contract]
> Section 2. The failure of the City of Local 718 to insist, in any one or more incidents, upon performance of any of the terms or conditions of this Agreement, shall not be considered as a waiver or relinquishment of the right of the City or of Local 718 to future performance of any such term or condition, and the obligations of Local 718 or of the City to such performance shall continue in full force and effect.
>
> [Police Contract]
> Section 2. The failure of the Municipal Employer or the Association to insist, in any one or more situations, upon performance of any of the terms or provisions of this Agreement shall not be considered as a waiver or relinquishment of the right of the Municipal Employer or the Association to future performance of any such term or provision, and the obligations of the Association and the Municipal Employer to such performance shall continue in full force and effect.

In these contract provisions there is no express waiver of rights to negotiate over matters unforseen at the time. Rather, the clear intent of these provisions is to avoid any waiver of rights. To interpret a provision disclaiming any waiver as a "clear and unequivocal waiver" of a statutory right is to strain the meaning of words beyond the breaking point. Our conclusion that the stability of

agreement provision may not be read as a waiver is strengthened, in the firefighter case, by the language in Article I, Recogniztion, which provides:

> Nothing in this agreement is intended to constitute a waiver by Local 718 of its statutory, exclusive representational prerogatives on behalf of the bargaining units noted above.

In the case of the BPPA, the conclusion of no waiver is strengthened by examination of the bargaining history. In each of the past two negotiations, the City proposed changes which would have limited the practice of full time off to one union official, with "reasonable" time off for other officers for union business. In each case the City was unsuccessful iq modifying the contract provision, and the article on leave for union business remained unchanged. The history indicates that the City gave up its proposal to change the current practice, perhaps in return for some bargaining concession. It certainly cannot imply a waiver by the union of the practice of full time off or any future right to bargain in this area.

We conclude that the contract language in question cannot reasonably be read as a waiver of the unions' statutory rights. Consequently, the unilateral action altering a mandatory subject of negotiations violates section 10 (a)(5) of the Law.

Remaining for consideration is the argument by the Firefighters that, in addition to traditional remedies, the Commission should find that the City may not now seek through bargaining a change in the status of President Mullane, since it was not raised earlier in the bargaining. We disagree. The City's introduction of a single, narrow item at this stage of the negotiations is not so destructive of good faith bargaining as to constitute a prohibited practice within the meaning of Section 10 (a)(5) of the Law. Compare the facts in the present case with those in Lawrence School Committee, MUP-546 (1974), where the employer sought to introduce a totally new series of proposals seven months after bargaining had commenced. Our decision herein would not preclude the firefighters from arguing to a factfinder or a final offer arbitrator that he or she should decline to accept evidence on this item because the City introduced it so late in the bargaining process as to preclude effective bargaining on the subject. See Local 841, International Association of Firefighters, supra. We leave such a decision to the sound discretion of the factfinder or last best offer arbitrator.

Upon the stipulated facts of these consolidated matters the Commission finds that:

1. The City of Boston has failed to and refused to bargain in good faith with Local 718, International Association of Firefighters, AFL-CIO by its decision, embodied in the December 20, 1976 letter from Robert Holland to A. Michael Mullane, to unilaterally alter the pratice of granting the President of said Local 718 full time off without loss of pay or benefits to conduct union business in violation of section 10 (a) (5) of the Law.

2. That the City of Boston, by the conduct described in paragraph one above, has restrained, coerced and intimidated the employees represented by Local

718 in the exercise of their right to bargain collectively, in violation of section 10 (a) (1) of the Law.

3. That the City of Boston, has failed to and refused to bargain in good faith with the Boston Police Patrolmen's Association, Inc. by its decision, embodied in the December 20, 1976 letter from Robert Holland to Chester Broderick to unilaterally alter the practice of granting the Chairman and Vice-Chairman of said Association full time off without loss of pay or benefits in order to conduct union business, in violation of section 10 (a) (5) of the Law.

4. That the City of Boston has restrained, coerced and intimidated the employees represented by the Boston Police Patrolmen's Association, Inc. in the exercise of their right to bargain collectively, in violation of section 10 (a) (1) of the Law.

Wherefore, pursuant to the powers vested in it by section 11 of Chapter 150E of the General Laws the Commission orders:

1. That the City of Boston cease and desist from threatening or taking unilateral action with regard to the past practice of granting the President of Local 718 full time off for union activity, without loss of pay or benefits, until and unless the City and the Association have bargained over any said change to resolution or impasse.

2. That the City of Boston shall cease and desist from threatening or taking unilateral action with regard to the past practice of granting the Chairman and Vice-Chairman of the Boston Police Patrolmen's Association, Inc. full time off without loss of pay or benefits for the conduct of union business, until and unless the City and the Association have bargained such changes to resolution or impasse.

In order to effectuate the purposes of the Law the City of Boston and Local 718, International Association of Firefighters, AFL-CIO are ordered to take the following affirmative action:

3. Negotiate in good faith over the subject matter of the practice of granting the President of Local 718 full time off for union business without loss of pay or benefits, until the matter is resolved or an impasse is reached.

4. Notify the Commission within ten days of the receipt of this Decision and Order of the steps taken to comply therewith.

In order to effectuate the policies of the Law, the City of Boston and the Boston Police Patrolmen's Association, Inc. are ordered to take the following affirmative action:

5. Negotiate in good faith over the practice of granting the Association's Chairman and Vice-Chairman full time off for union business without loss of pay or benefits until the matter is resolved or an impasse is reached.

6. Notify the Commission within ten days of the receipt of this Decision and Order of the steps taken to comply therewith. SO ORDERED.

ITY OF LOWELL AND NATIONAL ASSOC. OF GOVERNMENT EMPLOYEES AND MASS. EMPLOYEES ASSOC. AND COUNCIL 41, AFSCME, AND LOCAL 254, SEIU, AND LOCAL NTERNATIONAL BROTHERHOOD OF TEAMSTERS, SCRE-2004 (2/4/77).

(10 Definitions)
17.1 confidential employee
(30 Bargaining Unit Determination)
35.2 confidential
35.41 clericals

ioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner.

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Statement of the Case

August 6, 1975, the University of Lowell (Employer) filed a petition with te Labor Relations Commission (Commission), pursuant to G.L. c. 150E §4 the Law), seeking to resolve claims of representation by one or more Emrganizations for a unit consisting of all clerical-technical non-proal employees of the University of Lowell. The National Association of ent Employees (NAGE) was the certified bargaining representative of the ssor unit at Lowell Technological Institute. The Massachusetts State Em- Association (MSEA) was the certified bargaining representative of the ssor unit at Lowell State College.

e Commission conducted an investigation pursuant to G.L. c. 150E §4 and . Rules Article II and ordered that an expedited hearing be conducted. 41, American Federation of State, County and Municipal Employees (AFSCME); 54, Service Employees International Union (Local 254, SEIU), and Local ternational Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers ica were found to have sufficient interest to intervene in the proceedings. 28, June 2, June 21 and July 26, 1976 expedited hearings were held before bel, Hearing Officer. The Commission designated the proceedings as a hearing on July 26, 1976. All the parties were afforded the opportunity line and cross-examine the witnesses and to introduce testimony bearing e issues presented. Briefs submitted by the parties have been carefully red. On the basis of all the evidence, the Commission makes the following s of Fact and Conclusions of Law.