

CITY OF MEDFORD AND MEDFORD SUPERIOR OFFICER'S ASSOCIATION AND PAUL J. O'RIORDAN,
KENNETH DIBLASI, WILLIAM A. PADULA, et al., SI-165 (7/6/84).

92.31 notice
108.21 refusal of overtime
108.22 sick-out

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner
Maria C. Walsh, Commissioner

Appearances:

Paul L. Kenny, Esq.	- Representing the City of Medford
Jeffrey H. Fisher, Esq.	- Representing the Medford Police Superior Officer's Association and its officers in their official capacities
Paul O'Riordan	- <u>pro se</u>

RULING ON MOTION TO DISMISS

On July 3, 1984, the City of Medford (City) filed a petition with the Labor Relations Commission (Commission) under G.L. c.150E, Section 9A(b). The City alleged that, beginning on or about June 27, 1984, the Medford Police Superior Officer's Association (Superior Officer's Association or Association) was engaging in, or is about to engage in, a strike, work stoppage, slowdown or withholding of services. The City alleged that the Association was condoning, encouraging or inducing a strike by the Association and/or the Medford Police Patrolmen's Association, the union representing the patrolmen and that specific named superior officers were on strike.

On July 3, 4, 5 and 6, 1984, an investigation was conducted by the Commission. At the close of the City's case, the Superior Officer's Association moved to dismiss the City's petition. After careful consideration of the evidence introduced by the City, we grant the motion to dismiss. Our ruling is based upon the following findings:

1. The City is a public employer within the meaning of G.L. c.150E, Section 1.
2. The Superior Officer's Association is an employee organization within the meaning of G.L. c.150E, Section 1.
3. The officers of the Superior Officer's Association are Paul J. O'Riordan, President; Kenneth DiBlasi, Vice-president; William A. Padula, Secretary/Treasurer.
4. The City has recognized the Superior Officer's Association as the exclusive



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bargaining representative of members of the City's police department holding the ranks of Captain, Lieutenant and Sergeant.

5. All members of the Superior Officer's Association employed by the City are public employees within the meaning of G.L. c.150E, Section 1.
6. The City and the Association were parties to a collective bargaining agreement which expired by its own terms on June 30, 1981.
7. The agreement contained, in part, the following provision regarding the assignment of overtime:

"In emergencies or as the needs of the service require, employees may be required to perform overtime work . . . Employees . . . shall have the option of declining offered overtime; but in the event that sufficient personnel do not accept such offered overtime on a voluntary basis, or in the event of emergency situations where time is of the essence in executing the overtime job, such additional personnel as are deemed necessary by the City may be required to work overtime on an assigned bases [sic]."
8. The City and the Association have been negotiating the terms of a successor collective bargaining agreement for approximately one and one-half years.
9. The daily work schedule in the City's police department consists of three shifts; 7:45 AM to 3:45 PM; 3:45 PM to 11:45 PM; 11:45 PM to 7:45 AM.
10. The normal complement of superior officers is two per shift.
11. On June 26, 1984, Paul J. O'Riordan spoke with the Assistant City Manager Richard Lee in the presence of Lieutenant Padula. O'Riordan said, in effect, that "the police won't work overtime and the City can't force them to. The patrolmen's union rejected their contract offer and have voted not to accept overtime." O'Riordan also told Lee that he had spoken with John Cantalupa, firefighter's union president, and had told Cantalupa "never to mention the work strike in public - that was dumb and he wouldn't do it."
12. It has been several months since the Superior Officer's Association has had a membership meeting.
13. On June 28, 1984, John C. Kirwan, the City's Chief of Police, issued the following order:

Effective this date, all Commanding Officers will adhere to the following instructions:



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1. As the needs of the Public Service requires, all officers will be ordered to perform overtime service.
2. In the event an officer performing overtime service turns in sick, the Commanding Officer will order him to remain on duty until a replacement can be found. It will be the duty of the Commanding Officer to find a replacement.
3. In the event the Commanding Officer is on overtime duty, he is specifically instructed, in the event he becomes sick to remain on duty until he is replaced or relieved.
4. All Commanding Officers are ordered to report in writing to me all cases of reported sickness among overtime Personnel.
14. On June 29, 1984, Chief Kirwan issued a supplementary order concerning overtime. The supplementary order provided that officers requesting to leave their shift because of illness or calling in sick may be ordered to remain on or report for duty until relieved. It further specified a procedure for calling in replacement officers and for reporting to the Chief about absence due to illness.
15. Pursuant to Kirwan's order, Captains worked overtime as directed and ordered other superior officers to appear for, and work, ordered overtime.
16. On the 11:45 PM - 7:45 AM shift on June 27, 1984, Sgt. Alan Doherty was ordered to work overtime after having worked the prior shift. At 12:45 AM on that day Doherty signed out sick with a toothache.
17. On June 27, 1984, three superior officers were ordered to and did work overtime at the firing range.
18. On June 28, 1984, five superior officers were ordered to and did work overtime at the firing range.¹
19. On the 3:45 PM to 11:45 PM shift on June 29, 1984, Lieutenant O'Riordan was ordered to work overtime after having worked the previous shift. At 8:45 PM on that date O'Riordan signed out sick and proceeded to a local hospital where he was diagnosed as having an upper respiratory infection.

¹ The City's records show that these officers were on overtime at the firing range. There was testimony that Lt. O'Riordan was scheduled to be on vacation leave at the same time but he performed the firing range duty because it had been previously scheduled. Therefore he received overtime pay for those hours.



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20. On the 7:45 AM to 3:45 PM shift on June 29, 1984, Sgt. Groves was working his regular shift. He was ordered to work overtime on the next shift. At 3:30 PM he signed out sick with an upset stomach.
21. On June 29, 1984, six superior officers were ordered to work overtime at breathalyzer training or the firing range.
22. On June 29, 1984, two Captains worked overtime as directed - one on the 3:45 PM to 11:45 PM shift and one on the 11:45 PM to 7:45 AM shift.
23. On June 30, 1984, no superior officers below the rank of Captain were ordered to perform overtime. One captain worked overtime as directed on the 3:45 PM to 11:45 PM shift.
24. On July 1, 1984, Sergeant Robert Murphy was ordered to perform overtime on the 7:45 AM to 3:45 PM shift. Sergeant Murphy worked the entire shift.
25. On July 1, 1984, one Captain worked overtime as directed on the 11:45 PM to 7:45 AM shift.
26. On July 2, 1984, no superior officers below the rank of Captain were ordered to perform overtime. Two Captains worked overtime as directed, one on the 3:45 PM to 11:45 PM shift and one on the 11:45 PM to 7:45 AM shift.
27. On July 3, 1984, no superior officers below the rank of Captain were ordered to perform overtime. One Captain worked overtime as directed on both the 3:45 PM to 11:45 PM and 11:45 PM to 7:45 AM shifts.
28. On July 3, 1984, Superior Officer's Association President O'Riordan conversed with Richard Lee while they were leaving the Commission's offices at about 8:00 PM after proceedings in this case. O'Riordan said, "If you think you have problems now, just wait."
29. On July 4, 1984, Sergeant Merullo was ordered to perform overtime on the 11:45 PM to 7:45 AM shift. At 3:55 AM Sergeant Merullo was injured in the line of duty. Merullo reported that he had been injured in a high speed car chase.
30. On July 4, 1984, one Captain worked overtime as directed on the 11:45 PM to 7:45 AM shift.
31. On July 5, 1984, Sergeant O'Brien was ordered to perform overtime on the 11:45 PM to 7:45 AM shift after working the previous shift. He signed out sick at 2:35 AM.
32. Between June 27, 1984 and July 5, 1984, an unspecified number of superior officers below the rank of Captain were offered the opportunity



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to work voluntary overtime. None of the officers asked accepted the voluntary overtime. The declination of voluntary overtime is unusual.

33. During the time period June 26, 1983 to June 26, 1984, there were a total of 1,968 eight-hour overtime shifts in the Medford police department. All of these shifts involved voluntary overtime. There is no evidence to indicate how many of these shifts were performed by superior officers. During the 1,968 voluntary overtime shifts, one employee signed out sick during one shift.
34. Sometime during the Spring of 1984, eight police department employees of unspecified rank were ordered to perform overtime. All eight employees signed out sick during their shifts.

OPINION

We grant the Superior Officers Association's motion to dismiss the City's petition on four grounds. First, there is insufficient evidence to support the allegations of the petition that the Superior Officer's Association has engaged in or is about to engage in a strike, or that certain individual officers have engaged, or are about to engage, in a strike. After several days of hearing, the City has failed to show that the four superior officers who signed out sick after they were ordered to perform overtime -- Doherty, O'Riordan, Groves and O'Brien -- were not legitimately ill. The evidence as to O'Riordan from the City's own witness, the Chief of Police, is that O'Riordan, the Association's president, was diagnosed at a local hospital as suffering from an upper respiratory disorder at the time he signed out sick. Although there was no evidence introduced during the City's case to indicate that Doherty, Groves or O'Brien, who hold no offices in the Association, sought or received any medical diagnoses of their illnesses, there is also nothing from which we can infer that their illnesses were feigned.² The City produced evidence that a total of 1,968 voluntary eight-hour overtime shifts were worked in the Police Department during the period June 26, 1983 through June 26, 1984. No evidence was offered to distinguish between overtime shifts worked by patrolmen and those worked by superior officers. Although the record reveals that only one officer left one of those overtime shifts due to illness, there is no indication of whether the officer was a patrolman or a superior officer. In addition, evidence was adduced to establish that 8 mandatory overtime shifts were ordered during the same period, but all eight employees left their overtime shifts early due to

²We note that the City has adopted an ordinance which specifies that the City may require absent employees to produce a physician's certificate of illness in order to receive sick leave pay. No evidence was offered to indicate that any superior officer who left his overtime shift due to illness failed to supply a physician's certificate. Nor did the City suggest that it was unable to obtain sufficient information concerning the superior officers' illnesses to evaluate whether the illness was genuine.



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illness. Because the evidence does not establish that any of the eight were superior officers, it offers no illumination to our consideration of this case. The City has offered no evidence of the normal absentee rate among the superior officers. Therefore, the record is devoid of statistical information from which we might infer that the illnesses of the four superior officers were unusual, albeit genuine.³

The City relies upon the June 26, 1984 and the July 3, 1984 conversations between Assistant City Manager Lee and O'Riordan. We do not find that these statements, coupled with the illness of O'Riordan, Doherty, Groves, and O'Brien, offer evidence sufficient to demonstrate that a strike of the Superior Officer's Association or of the four named individuals occurred or is about to occur.

Second, there is insufficient evidence that the Superior Officer's Association induced, encouraged or condoned any strike by its own members or by members of the union which represents patrolmen.⁴ The City argues that the June 26 and July 3 conversations between O'Riordan and Lee prove that O'Riordan, both individually and as an officer of the Association was inducing, encouraging and condoning a strike. In addition, the City contends that the silent presence of Lt. Padula during the June 26 conversation demonstrated his encouragement, inducement and condonation as well. In light of the lack of evidence produced by the City in this case, we cannot find that these conversations between a union officer and a representative of the employer are prohibited by Section 9A(a) of c.150E. Statements by a union official to the employer's representative cannot induce or encourage any employee to engage in a strike absent evidence that the statements have been communicated to the employees. There is no evidence that the union or O'Riordan communicated the statements to any employee other than Padula. Moreover, O'Riordan's June 26 statement is ambiguous at best. The City has failed to demonstrate that the statement was intended to refer to any police officer's refusal to perform ordered overtime. Assuming, arguendo, that O'Riordan was referring to ordered overtime, his statement appears to be no more than a prediction. As such it does not constitute evidence that O'Riordan or the Association have or will cause officers to refuse overtime. Lieutenant Padula, the only bargaining unit member present, was not one of the officers who called in sick or left an overtime shift early due to illness. We cannot find that Padula's failure to contradict O'Riordan's prediction constitutes condonation within the meaning of Section 9A(a) of c.150E.

³Had evidence existed to support the argument, the City might have contended, for example, that the superior officers were succumbing to their illnesses in unusually high numbers. The City might then have urged the Commission to infer that the superior officers must be withholding their services.

⁴Whether the patrolmen are engaged in a strike is the subject of a separate proceeding. Therefore, the Commission makes no finding concerning whether or not the patrolmen are engaged in, or are about to engage in, an unlawful work stoppage. Nonetheless, for the purpose of ruling on the Association's Motion to Dismiss, we assume, arguendo, that the patrolmen are engaged in a strike.



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Third, and for the above reasons, we find insufficient evidence that Paul J. O'Riordan, in his individual capacity, induced, encouraged or conconded unlawful strike activity.

Fourth and finally, the City's petition as it names twenty-one individual superior officers alleged to have engaged in a strike must be dismissed because it was not served upon the individual officers as required by 402 CMR 16.03(2). Since the individual officers have had no opportunity to appear and to answer the allegations, the Petition, as it relates to them, must be dismissed.⁵

Therefore, the City's petition is dismissed for all of the above reasons.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman

GARY D. ALTMAN, Commissioner

MARIA C. WALSH, Commissioner

⁵ We note that there was no evidence that any of the named superior officers, with the exception of Doherty, Groves and O'Brien, have failed to fully perform ordered overtime. In addition, we note that some superior officers, such as Sgt. Longo, who were named in the Petition and alleged to have been on strike, are listed in the City's records as being out on injured leave at all times material to this case.

