

CITY OF TAUNTON AND FIRE FIGHTERS ASSOCIATION OF TAUNTON, LOCAL 1391, MUP-5198  
(1/17/85). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

54.5831 relaxation on the job  
67.15 union waiver of bargaining rights  
67.8 unilateral change by employer  
82. Remedial Orders  
82.3 status quo ante  
92.51 appeals to full commission

Commissioners participating:

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

Appearances:

John F. McMahon, Esq. - Representing the Fire Fighters Association  
of Taunton, Local 1391  
Robert D. Dolbec, Esq. - Representing the City of Taunton

Decision on Appeal of  
Hearing Officer's Decision

Statement of the Case

On December 2, 1983, Hearing Officer Amy L. Davidson issued her decision in the above-captioned matter holding that the City of Taunton (City) has violated Section 10(a)(5) and (1) of G.L. c.150E (the Law) by changing the hours of desk watch duty at the City's central fire station for certain employees represented by the Fire Fighters Association of Taunton, Local 1391 (Association).<sup>1</sup> On December 19, 1983, the City filed a timely Notice of Appeal. On January 13, 1984, the City filed a supplementary statement which has been carefully considered in reaching the following conclusions of law and findings of facts.

The City argues that the Hearing Officer erred by failing to find that the Chief had made special assignments concerning the care and maintenance of equipment in the past and also erred by failing to conclude that the Union had waived the right to bargain about the changed hours of desk watch. We have reviewed the Hearing Officer's Decision and affirm the Hearing Officer's findings and conclusions. Nonetheless, we modify the remedy ordered by the Hearing Officer, as described below.

Facts

The Association is the exclusive bargaining representative for a unit of fire fighters employed by the City's fire department, headed by Chief George Dexter

<sup>1</sup>The decision is reported in full at 10 MLC 1334 (H.O. 1983).



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(Dexter). The record shows that Dexter customarily parked his cruiser, identified as car #3, in the Central Fire Station (Station).

On the night of April 1, 1983, a person or persons unknown vandalized the Chief's car while it was parked in the Station by putting several live chickens (with food and water) in the car. The record does not reveal the amount of damage, if any, caused by the vandalism.

Chief Dexter reacted to the incident by issuing an order on April 2, 1983, that instituted a "24 hour desk watch" at the Station for the indefinite future. The practice had been for employees to work a desk watch, on a rotating basis, only between the hours of 8:00 a.m. to 10:00 p.m. Assignment to the desk watch required sitting at the front desk of the fire station, situated in the open on the main floor of the station. The duties of fire fighters so assigned were to give directions to visitors who came by the Station and generally to maintain a watch over the Station and its equipment. They were also required to file written reports about the condition of the Chief's car and other fire apparatus at the end of each shift. Except in emergency situations, fire fighters were not assigned to the desk watch after 10:00 p.m. or before 8:00 a.m.

Fire fighters not assigned to the desk watch were on non-active duty time and were free to sleep, relax, or watch TV in quarters while awaiting an alarm. The effect of the Chief's April 2, 1983, order was to eliminate this non-active duty time for those fire fighters assigned to the desk watch between 10:00 p.m. and 8:00 a.m.

The Union received no advance notice of the change in the hours of the desk watch. Upon receipt of the Chief's order, the Union made repeated demands, detailed in the Hearing Officer's decision, that the Chief retract the order. The Chief refused to do so.

On July 15, 1983, several weeks after the Commission issued the instant complaint, the Chief retracted the disputed desk watch order and the former hours of the desk watch were re-established.

#### Opinion

It is a violation of Section 10(a)(5) of the Law for a public employer to change a pre-existing condition of employment affecting a mandatory subject of bargaining without affording the exclusive bargaining representative notice and a reasonable opportunity to bargain. City of Boston, 8 MLC 1419, 1433 (1981).

The Hearing Officer correctly noted that the Commission has previously held that requiring uniformed fire fighters to perform desk watch or floor patrol during what had previously been non-active duty time affects their conditions of employment within the meaning of the Law and is a mandatory subject of bargaining. City of Everett, 2 MLC 1471 (1976), enforced sub nom., Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979).



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It is undisputed that the Chief's order of April 2, 1983, creating a twenty-four hour desk watch, was implemented without prior notice to the Association, was maintained despite repeated demands that the former conditions of employment be restored, and converted non-active duty time to active duty time.

The Association and the City are signatories to a collective bargaining agreement effective from July 1, 1982 to July 30, 1983. The City contends that the Hearing Officer should have found that the Association waived its right to bargain over the expansion of the hours of the desk watch to eliminate non-active duty time when it agreed to the following contract article:

Duties

The duties of the members of the Fire Department shall include control and extinguishment of fires, fire prevention, saving and protection of life and property; driving and operation, care and maintenance of all apparatus [sic] and equipment; care of station or quarters; inspections, drills, desk watch or patrol; and to perform all related work as may be directed by the Chief or Acting Chief of the Fire Department and in accordance with all Civil Service Rules and Regulations and the Ordinances of the City of Taunton as the same now exist or may be amended.

Article III, Section 1

We concur with the Hearing Officer that the contract language referred to above does not demonstrate a "clear and unmistakable" surrender of the Association's statutory right to bargain over mandatory subjects of bargaining required by our precedent. Town of Natick, 2 MLC 1086, 1092 (1975). Such a waiver will not be lightly inferred, particularly where, as here, there is no evidence demonstrating that the subject of desk watch hours was ever broached during negotiations. City of Boston, (Administrative Guild), 4 MLC 1912, 1914 (1978); City of Everett, 2 MLC 1471 (1976), enforced sub nom., Labor Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (1979).

The City does not contest the Hearing Officer's finding that the Chief had never extended the desk watch hours during his two years as Chief. The City, however, argues that in the past it was the Chief's practice to create "special assignments" without bargaining. Thus, contends the City, the change in desk watch practice was consistent with past practice. The City has, however, failed to point to specific record evidence in support of this contention. See Town of Amesbury, 10 MLC 1602 (1984); Town of Dedham, 3 MLC 1332 (1976).

The record reveals that there was a past practice to expand desk watch hours only during weather emergencies. The Chief's April 2, 1983, order calling for a twenty-four hour desk watch was not called in response to a weather emergency. There is no evidence that the desk watch assignment had ever been conducted twenty-four hours per day during those emergencies. Nor is there any evidence to support the City's argument that the Chief made special assignments covering the care and maintenance of department equipment analogous to that which occurred here.



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Accordingly, we affirm the Hearing Officer's conclusion that the changed desk watch hours constituted a unilateral change in the past practice.

In sum, we find that the City unilaterally changed working conditions affecting a mandatory subject of bargaining in violation of Section 10(a)(5) of the Law by changing the hours of desk watch at the Station from 8:00 a.m. - 10:00 p.m. to an around-the-clock schedule, thereby eliminating all non-active duty time for fire fighters assigned to such duty. Therefore, we affirm the Hearing Officer's findings of facts and conclusions of law.

We decline to adopt the Hearing Officer's full remedy, however. The Hearing Officer ordered the City to, "Make whole those fire fighters who were required to perform desk watch between 10:00 p.m. and 8:00 a.m. by compensating them in wages, paid time-off or other comparable manner agreed upon by the City and the Union." The purpose of a "make whole" remedy is to compensate employees for benefits lost as a result of illegal employer action. Newton School Committee, 5 MLC 1016, 1027 (1978) enforced sub nom., School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 575-76, 581 (1983); Everett School Committee, 10 MLC 1609, 1611 (1984). The employees affected by this increase in the hours of desk watch, however, have already been paid for each hour they worked, whether in active or non-active duty status, and thus have lost no monetary benefits by being required to work during what had previously been non-active duty time. Under these circumstances, to require the City to pay additional monetary compensation would constitute an unwarranted double payment to the fire fighters. Instead, we find that the appropriate remedy is to require the City to provide "in kind" compensation rather than additional pay. Therefore, we will order the City to give the affected fire fighters compensatory non-active duty time equivalent to the hours of desk watch those employees were actually required to work. Accordingly, we modify the remedy as follows in our order.

#### Order

On the basis of the foregoing, IT IS HEREBY ORDERED that the City of Taunton shall:

1. Cease and desist from:
  - a. Refusing to negotiate in good faith by unilaterally changing the hours of desk watch of fire fighters represented by the Union;
  - b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Law.
2. Take the following affirmative action which will effectuate the policies of the Law:
  - a. Make whole those fire fighters who were required to perform desk watch between 10:00 p.m. and 8:00 a.m. by compensating them with non-active duty time equivalent to the time such employees were required to work;



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- b. Post signed copies of the attached Notice to Employees in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted and leave copies posted for a period of thirty (30) days thereafter;
- c. Notify the Commission, in writing, within thirty (30) days of the service of this decision and order, of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN  
GARY D. ALTMAN, COMMISSIONER  
MARIA C. WALSH, COMMISSIONER

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

Following a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has determined that the City of Taunton violated Sections 10(a)(5) and (1) of General Laws Chapter 150E by unilaterally instituting a twenty-four hour desk watch without prior notice to, or bargaining with, Local 1391, Fire Fighters Association of Taunton. The Labor Relations Commission has ordered us to post this Notice and to abide by what we say in it.

WE WILL NOT refuse to bargain collectively in good faith with the Union by unilaterally changing the hours of the desk watch.

WE WILL NOT otherwise interfere with, restrain or coerce employees represented by the Union in the exercise of their rights under the Law.

WE WILL make whole those fire fighters required to work desk watch between 10:00 p.m. and 8:00 a.m. by providing such employees with an equivalent amount of non-active duty time.

CITY OF TAUNTON

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GEORGE DEXTER  
FIRE CHIEF

