TOWN OF BRIDGEWATER AND LOCAL 2611, BRIDGEWATER FIREFIGHTERS ASSOCIATION, MUP-5356 (2/7/86). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

54.56 safety
54.581 minimum manning
67.8 unilateral change by employer
82.11 back pay
82.3 status quo ante
92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner

Appearances:

Robert M. Schwartz, Esq. - Representing Local 2611, Bridgewater Firefighters Association

Joseph A. Emerson, Esq. - Representing Town of Bridgewater

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

The issue in this case is whether the Town of Bridgewater (Town) refused to bargain collectively in good faith in violation of Sections 10(a)(5) and (1) of G.L. c.150E (the Law) when it unilaterally reduced the number of fire fighters per piece of apparatus, affecting safety and workload of the fire fighters represented by Local 2611, Bridgewater Firefighters Association (Association), without affording the Association notice or an opportunity to bargain. The hearing officer held that the Town violated the Law when it effectuated this change in working conditions.[1] We agree with the hearing officer's conclusion, but we modify his findings of fact, the reasoning applied to them, and the remedy he ordered.

The case began when the Association filed a charge with the Labor Relations Commission (Commission) on August 30, 1983, alleging that the Town had violated certain sections of General Laws, Chapter 150E. After an investigation, the Commission issued a Complaint of Prohibited Practice, alleging that the Town had violated Sections 10(a)(5) and (1) of the Law. After an expedited hearing on December 5, 1983, at which both parties appeared, and had full opportunity to present evidence, examine and cross-examine witnesses, Hearing Officer Timothy J. Buckalew issued his decision on July 31, 1984, finding that the Town had violated Sections 10(a)(5) and (1) of the Law.

[1] The full text of the hearing officer's opinion is reported at 11 MLC 1089 (H.O. 1984).

The Association appealed from this decision on August 8, 1984, and the Town filed its notice of appeal on August 9, 1984. Both appeals were timely filed. The Association and the Town filed supplementary statements on September 6, 1984.[2]

In its appeal from the hearing officer's decision, the Town argues that 1) there was no evidence on the record which would support a finding that the change in manning per piece of apparatus affected the safety and workload of fire fighters at the scene of a fire, and thus, the change was not a mandatory subject of bargaining; and 2) that the Town was not obligated to bargain about its decision to reduce the minimum manning per piece of apparatus. The Association appealed from the hearing officer's refusal to order the Town to pay lost overtime wages to the fire fighters who would have been called on duty but for the Town's unlawful change.

Findings of Fact

We have reviewed the record below and adopt the hearing officer's findings of fact except where noted.[3] We summarize those facts as follows.

The Fire Department (Department) of the Town operates a single station with 27 fire fighters and a chief, Clarence A. Levy (the Chief). The fire fighters are assigned to four working groups - three groups of seven employees and one group of six.

For a number of years prior to July 7, 1983, with a brief deviation in 1981, the Town maintained a minimum complement of at least six fire fighters for all four groups, by assigning seven persons to each group and calling off duty employees in to work to restore the shift complements to six.

When six fire fighters were on duty they were deployed as follows: two fire fighters operated Engine III; one fire fighter operated the ladder truck; and a driver and one attendant operated the ambulance. One fire fighter remained at the station.[4]

On those occasions when fewer than six fire fighters reported to duty, the Town called in an off-duty fire fighter, usually at overtime pay, to bring the minimum complement to six. With this practice, at least five fire fighters were available to use three pieces of equipment. If the ambulance, its driver and attendant were out on a call at the time of an alarm, the Department sent out three fire fighters on two pieces of equipment: the engine and the ladder truck.

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[2]Neither party contests the jurisdiction of the Commission in this matter.

[3]We have supplemented the hearing officer's findings concerning Lieutenant Poland's testimony.

[4]When the full complement of seven fire fighters was on duty, the seventh person was assigned as a second fire fighter on the ladder truck.

On July 7, 1983, when five fire fighters reported to duty in group three, the Chief did not authorize the use of an off-duty fire fighter to bring the shift complement up to six. Instead, the Chief limited authorization for use of off-duty fire fighters to shifts of four or fewer persons. In August 1983, the Chief restored group three to a minimum complement of six persons, but authorized a reduction in the minimum shift complement of group four from six to five fire fighters. The reduction of the minimum shift complement from six to five persons in group four necessitates that only one fire fighter be assigned to the ambulance.[5]

The ambulance is equipped with medical equipment, forcable entry equipment, fire extinguishers, and hydraulic pumps. Fire fighters assigned to the ambulance have two functions at the scene of a fire: first, to search for and rescue victims; second to help to fight the fire by ventilating the burning building and helping to pump the hose. When only one fire fighter is assigned to the ambulance, that fire fighter performs the search and rescue work in the burning building alone when the fire fighter on the ladder truck is engaged in operating the aerial ladder. The fire fighter assigned to the ambulance is also responsible for handling the fire fighting equipment carried in the ambulance, e.g. fire extinguisher and hydraulic pump, without the assistance of other fire fighters. In addition, fire fighters assigned to the ambulance transport injury victims from the scene of a fire.

Two fire fighters are required to transport an injured individual by ambulance. Thus, when only one fire fighter is operating the ambulance, a second fire fighter must be assigned to assist the transport of any injured person. The reassignment of one fire fighter to the ambulance leaves only two fire fighters to fight the fire. Because the engine requires two fire fighters, the aerial ladder must be taken out of service.

Lieutenant Poland, Commander of Group Four, testified that since August 1, 1983, seventy-five percent (75%) of his shifts have been run with five fire fighters and twenty-five percent (25%) of the shifts have been run with six fire fighters.[6]

When necessary, the department can recall off-duty fire fighters by use of a "tone in" system. If, in the judgment of the superior officer on duty, a call or alarm is known in advance to be sufficiently serious to require additional fire fighters, the superior officer may call back any, or all, of the off-duty fire fighters from other groups. The "tone in" may be implemented upon receipt of a call or alarm, or from the scene of a fire. When alerted by a "tone in," the recalled fire fighters report first to the station, pick up equipment, prepare for the fire and then report to the fire. The total response time from sounding a "tone in" to availability at a working fire ranges from 10 to 20 minutes depending on weather,

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[5]Two firefighters are always assigned to Engine 111, one fire fighter is assigned to the ladder truck and one fire fighter remains in the station.

[6]We correct the hearing officer's findings that this shift was run with five fire fighters only fifty percent (50%) of the time.

traffic conditions, and time of day. If people at the scene of a fire are in danger, however, the fire fighters who are present must go to their rescue, and are not allowed to wait until reinforcements arrive.

As of the date of the hearing, no fire fighters had been seriously injured on the job and no group three or four fire fighters had been trapped in a building when the ladder truck was not available subsequent to the Town's reduction in the minimum shift complement. During the same period, there were no fires which required the use of the aerial ladder for rescue.

Opinion

The issues raised by this appeal are: 1) whether there was evidence on the record which would support a finding that the change in manning per piece of apparatus affected the safety and workload of fire fighters at the scene of a fire; 2) whether the Town was obligated to bargain about its decision to reduce the minimum manning per piece of apparatus; and 3) whether the Town should be ordered to pay lost overtime wages to the fire fighters who would have been called on duty but for the Town's change in working conditions.

The Town contended that there was no evidence on the record which would support a finding that the change in manning per piece of apparatus affected the safety and workload of fire fighters at the scene of a fire, and thus, the change was not a mandatory subject of bargaining. Therefore, the Town was not obligated to bargain about its decision to reduce the minimum manning per piece of apparatus. We do not agree.

The Association argued that as a result of the Town's unlawful change in working conditions, the fire fighters should be compensated for lost overtime opportunities because this would constitute a make-whole remedy which is necessary to deter future unlawful conduct and prevent unjust enrichment. As specifically limited in the discussion below, we do agree that a make-whole order is appropriate.

To satisfy its burden in this case, the Association was required to prove that, without prior notice and opportunity to bargain, the Town unilaterally took action affecting terms of employment which constitute a mandatory subject of bargaining. Town of Billerica, 8 MLC 1957, 1960 (1982). The record establishes that the Town altered its practice of calling in an off-duty fire fighter when necessary to maintain a six person shift complement and reduced its manning levels per shift and its manning levels per piece of apparatus. The Town implemented these changes without first providing the Association notice and an opportunity to bargain.[7]

Issues affecting workload and safety are mandatory subjects of bargaining while issues that concern the level of public service to be delivered are permissive

[7]The Town does not appeal the hearing officer's finding that neither the 1981 agreement nor the subsequent adoption of the "tone in" system constituted a waiver of bargaining rights.

subjects of bargaining. Town of Reading, 9 MLC 1730 (1983). The Commission has applied this distinction to cases involving the working conditions of fire fighters in an effort to balance the interests of employees and their unions with the interests of public employers. Thus, minimum manning per shift hwas been held to be a permissive subject of bargaining because shift coverage in a fire department has a greater impact on the level of delivery of a public service than on the workload and safety of fire fighters. Town of Danvers, 3 MLC 1559, 1574 (1977). In contrast, the number of fire fighters on a piece of fire apparatus when that apparatus responds to an alarm is a mandatory subject of bargaining to the extent that such coverage raises a question of safety, City of Newton, 4 MLC 1282, 1283 (1977). In Town of Billerica, 8 MLC 1957, 1961 (1982), the Commission distinguished the aspects of minimum manning that relate to safety and workload. Minimum manning coverage per piece of apparatus while responding to an alarm was held to be distinct from manning while in the station awaiting an alarm. The Commission will not infer that safety issues are implicated solely from the number of fire fighters manning a piece of apparatus. Town of Reading, supra at 1739.

These principles have led the Commission to examine per piece manning in the context of the nature of the response of the apparatus. Hence, the number of firefighters assigned to a piece of apparatus while that apparatus merely awaits an alarm is a permissive subject of bargaining, since this would be tantamount to minimum manning per shift. Newton, supra at 1283. In the Reading decision, the Commission noted that the evidence showed that apparatus response to mutual aid cover assignments in Reading amounted to "little more than moving from one fire station to another to continue to await alarms of fire." At 1740. Thus the evidence in Reading demonstrated that mutual aid responses in that town demonstrated no greater safety impact than did fire station manning. This fact led the Commission to conclude that minimum manning per piece of apparatus, when that piece of apparatus was responding to a mutual aid cover call in Reading, did not necessarily affect fire fighters' safety since cover calls did not amount to fire alarms. In other words, there could be types of responses, other than alarms, when the number of fire fighters assigned to a piece of apparatus raises no greater safety concerns than does the number of fire fighters scheduled to be in the station during a particular shift.

On July 7, 1983, the Chief reduced the manning level per shift in group three from six to five persons. In August, the Chief reinstated the six person complement in group three but reduced group four's shift complement to five fire fighters. The Chief's reduction in the number of fire fighters assigned to the shift was a permissive subject of bargaining and did not require prior bargaining. See Town of Danvers, supra.

The evidence demonstrates, however, that the Chief's orders periodically result in a reduction in the number of fire fighters on a piece of apparatus when it responds to an alarm. Specifically, the ambulance is sent to a fire with only one fire fighter instead of two. As a result, the single fire fighter assigned to the ambulance is responsible both for operating the fire fighting equipment carried in the ambulance and for performing the search and rescue mission alone when the fire fighter on the ladder truck is engaged in operating the aerial ladder. Although a

"tone-in" system is employed when necessary, the evidence indicates that there is a ten to twenty minute initial period before reinforcements arrive during which the fire fighter assigned to the ambulance must commence the search and rescue at the scene of the fire. There has been no change in the number of fire fighters on either the ladder truck or engine when they respond to a fire scene.

The Commission has found that the safety and workload of a fire fighter are directly and significantly affected when a fire fighter must enter a burning structure alone rather than with additional personnel. An employer must bargain prior to changing manning levels that result in such a direct and significant impact upon safety and workload. Town of Billerica, supra.

In the instant case, the safety and workload of the fire fighter assigned to the ambulance was directly and significantly affected when that fire fighter was required to enter a burning structure to perform a search and rescue mission alone and to handle the fire fighting equipment on the ambulance alone rather than with the assistance of a second fire fighter assigned to the ambulance. The evidence is sufficient to support a finding that this reduction from two to one fire fighter assigned to man the ambulance when responding to a fire directly and significantly affects employee safety and workload and therefore must be negotiated with the Association prior to implementation. Since the Town did not bargain with the Association before changing employee working conditions it violated Sections 10(a)(5) and (1) of the Law.[8]

The evidence also indicates that there are times when the ambulance has been deployed with two fire fighters of a five person shift complement. Because one fire fighter must remain at the station, only two fire fighters remain to operate fire fighting equipment. The record reveals that the Engine is sent to the fire and met by the ambulance, but that the ladder truck would not be deployed under such circumstances. Decisions concerning what equipment ought be deployed to fight a particular fire may have a profound effect on employee safety and workload. The availability of two engines, rather than one, or the use of a ladder truck may significantly affect the work of the fire fighter. But the same decisions also significantly affect the lavel of public service that a Fire Department delivers. Whether the citizens of a community are willing to pay for, and desire to use, two engines rather than one, has traditionally been considered a subject beyond the direct reach of the collective bargaining process. Town of Billerica, 8 MLC 1957 (1982); Town of Danvers, 3 MLC 1559, 1573 (1977). When that decision, however, directly and significantly affects the safety and workload of employees, then the impact is a mandatory subject of bargaining. Town of Reading, 9 MLC 1730, 1938-40 (1983); Town of Billerica, supra at 1962 (1982); City of Newton, 4 MLC 1282, 1284 (1977). The

[8] We note that the evidence indicates that once an injured victim is located at the scene of a fire, a second fire fighter is reassigned to the ambulance to accompany the victim in the ambulance. This results in no change in the number of fire fighters operating the ambulance while transporting a victim, and thus, does not constitute a change in per piece manning.

line between what must be bargained and what need not be bargained is a difficult one to draw in this area. Suffice it to say that in this case we are faced with the question of whether a reduction in the number of employees assigned to operate the ambulance when it responds to an alarm is a mandatory subject of bargaining. We hold that it is. Contrary to the hearing officer, however, we reach this conclusion without also holding that the reduction in shift complement, which precipitated the reduction in firefighters assigned to the ambulance, also is a mandatory subject. We recognize that both manning concerns are interrelated in this case, but we do not find them to be inextricable. Rather, the employer could maintain a shift complement of five and then call in a sixth fire fighter upon receipt of an alarm. As long as the ambulance does not respond to the alarm until it is manned by two firefighters the employer will have maintained the per piece manning level. Whether the employer or the citizens of the Town would be satisfied with this level of service is a matter to be debated in another forum.

The Make Whole Remedy

The Association urges us to order the Town to compensate all employees who lost overtime opportunities as a result of the Town's change. We have held that the Town violated the Law by unilaterally failing to bargain about the reduction in the number of fire fighters assigned to operate the ambulance when it responds to an alarm. The employees who ought be made whole are the fire fighters who have been required to operate ambulances alone, without the assistance of the second fire fighter normally assigned to the apparatus. It is their safety which has been affected by the Town's unilateral action. The Association does not suggest that these ambulance drivers be made whole, but rather that other employees, whose safety was not compromised by the unilateral change, be made whole. The Association suggests that the unlawful elimination of the second fire fighter from the ambulance is the proximate cause of a loss of wages to certain fire fighters who would have worked overtime and ridden in the ambulance, but for the Town's unlawful change.

We note that the complaint in this case did not allege that the Town's elimination of overtime opportunities violated the Law and the legality of the Town's unilateral elimination of overtime opportunities is not directly at issue in this case. Cf. Town of Billerica, 8 MLC 1957 (1982) (where Commission concluded that under certain limited circumstances the elimination of "unscheduled" overtime may not have a substantial impact on employee working conditions). The Association argues that its requested remedy does not require any finding that the Town's elimination of overtime opportunities violated the Law. Rather, the Association suggests that the loss of overtime earnings, directly caused by the Town's unlawful reduction in ambulance manning, ought be remedied. In other words, employees ought be "made whole" for the monetary losses sustained as a result of the Town's unlawful conduct. We agree that employees should be compensated for that portion of overtime which the Town was not free to eliminate without bargaining. But such compensation is limited only to the time that the ambulance was manned by a single fire fighter when responding to an alarm. It appears from the record evidence that the length of time during which the ambulance was responding to an alarm with a single fire fighter was brief, at most.

In this case the exact monetary loss sustained by the employees cannot be ascertained from the record. Frequently, remedial orders require facts in addition to what has been incorporated into the record of the underlying unfair labor practice case. For this reason, the Commission has a compliance conference and hearing procedure at which issues concerning the exact amount of overtime, and the recipients of same, can be fully litigated. Thus, we leave to the parties, and if they cannot resolve it, to the compliance stage, the exact determination of the amount of overtime payable to those fire fighters who would have been the second fire fighter in an ambulance, but for the Town's unlawful reduction in manning. But we note that our remedial order does not require the Town to make employees whole for all hours of overtime lost. The loss of overtime for which compensation must be made is limited only to that overtime which was lost as a direct result of the reduction in per piece manning. Specifically, only such time as a second fire fighter would have spent actually manning the ambulance when it responded to an alarm is to be compensated. The overtime for which employees may be compensated is to be calculated up until the point when a second fire fighter was assigned to the ambulance.

The single ambulance drivers, whose safety may have been compromised are not as easily made whole. The Commission has not previously determined, and the parties to this case do not urge, any formula for quantifying the increased safety enjoyed by a fire fighter accompanied by a second fire fighter in an ambulance. Traditionally, such quantification is left to the bargaining table. When the Town bargains to reduce the manning of the ambulance it can determine the price which it is willing to pay to acquire the privilege of such a reduction. Similarly, the Association can evaluate whether it is willing to accede to the Town's request for a reduction in ambulance manning, and if so, for what other advantage it will trade this compromise. We believe that the purposes of the Law are best served in this case by an order which leaves to the negotiation table this process of quantifying the relative price of maintaining two fire fighters in an ambulance.[9]

Therefore, we shall order that the Town restore the status quo ante by restoring the practice of assigning two fire fighters to the ambulance when it responds to an alarm and to compensate the fire fighters for certain lost overtime opportunities as described above. Prior to any future change in the manning complement of the ambulance, the Town is required to provide the Association with reasonable notice and an opportunity to bargain over safety and workload issues.

Conclusion

We conclude that the Town of Bridgewater violated Sections 10(a)(5) and (1) of the Law by unilaterally reducing the number of fire fighters assigned to a piece of apparatus responding to an alarm.

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[9]For example, the parties may agree to pay a bonus to fire fighters whose workload is increased or whose safety is decreased by a change in the manning of a piece of apparatus responding to an alarm.

Order

WHEREFORE, based upon the foregoing, we order that the Town of Bridgewater shall:

1. Cease and desist from:

   a. Refusing to negotiate in good faith by unilaterally reducing the minimum number of fire fighters assigned to man the ambulance without giving the Association prior notice and opportunity to negotiate safety and workload issues arising when that piece of apparatus responds to an alarm;

   b. In any like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights under G.L. Chapter 150E.

2. Take the following affirmative action which we find will effectuate the policies of the Law:

   a. Make whole the fire fighters who would have been assigned as the second fire fighter on the ambulance when it responded to an alarm from the time when the ambulance first responded to an alarm until such time, if any, as a second fire fighter was assigned to man the ambulance. Such compensation shall include wages and benefits, if any, lost by such "second" fire fighters, including interest at the rate specified in M.G.L. c.231, Section 6B, to be computed in accordance with our decision in Everett School Committee, 10 MLC 1609 (1984).

   b. Restore the prior practice regarding the number of fire fighters assigned to the ambulance responding to an alarm;

   c. Prior to changing the minimum manning levels per piece of fire fighting apparatus, provide the Association with adequate notice and a reasonable opportunity to bargain over safety and workload issues;

   d. Post signed copies of the attached Notice to Employees in conspicuous places where employees represented by the Association usually congregate, or where notices are usually posted, and leave the copies posted for a period of thirty (30) days thereafter;

   e. 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
MARIA C. WALSH, Commissioner

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

The Massachusetts Labor Relations Commission has issued a decision finding that the Town of Bridgewater has violated Sections 10(a)(5) and (1) of General Laws Chapter 150E by failing to bargain over safety and workload issues involved in decisions to change the practice of assigning two fire fighters to man the ambulance when it responds to an alarm.

In compliance with the Commission's order, WE WILL restore the past practice of assigning two fire fighters to the ambulance when it responds to an alarm.

WE WILL provide the Association with adequate advance notice of any intent to change the manning per piece of apparatus and a reasonable opportunity to bargain over the matter prior to changing the number of fire fighters assigned to man a piece of apparatus when it responds to an alarm.

WE WILL make whole those fire fighters who lost overtime opportunities as a result of our change in the manning of ambulances responding to alarms for the time when the ambulance was responding to an alarm without a second fire fighter

WE WILL NOT in any other similar manner interfere with, restrain or coerce employees in their exercise of rights guaranteed by General Laws Chapter 150.

_____
Fire Chief