CITY OF BOSTON AND AFSCME, COUNCIL 93, AFL-CIO, MUP-6270 (9/29/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

54.2221	union meetings during work time
54.53	grievance administration
67.8	unilateral change
92.51	appeals to full commission

Commissioners participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Wayne Soini, Esq.	-	Representing the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO
Susan M. Coyne, Esq.	-	Representing the City of Boston

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

On May 11, 1987, Hearing Officer Margery Williams, Esq. issued her decision in this matter.[1] At issue was whether the City of Boston (City) violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally changing the criteria for granting paid leave time to grievants to attend step three grievance meetings. After considering all the evidence, the hearing officer concluded that the City had violated Sections 10(a)(5) and (1) of the Law.

The City filed a timely notice of appeal pursuant to the Commission's regulations, 456 CMR 13.13(2). Both the City and the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (Union or AFSCME) filed supplementary statements which, together with the record before us, have been carefully considered.[2]

For the reasons stated, we reverse the hearing officer's decision.

FINDINGS OF FACT

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

---

[1]The full text of the hearing officer's decision appears at 13 MLC 1665.

[2]As part of its supplementary statement, the City submitted a transcript of the tapes of the expedited hearing. We have reviewed the tapes of the hearing and find that the transcript accurately represents the taped testimony and therefore we adopt the City's transcript as the official record of the hearing.

Copyright © 1988 by New England Legal Publishers

The Union represents a bargaining unit of employees, including correctional officers, at the Deer Island House of Correction. The parties' most recent collective bargaining agreement includes a four-step grievance procedure. Step three consists of a hearing at the City of Boston's Office of Labor Relations. Step four is arbitration.

At times, AFSCME finds it desirable for grievants to attend step three hearings. For a number of years, AFSCME and the City have used the following procedure for procuring paid release time for grievants whose step three hearings take place during working hours.[3] The Union is required to submit a written request to the superintendent of Deer Island twenty-four hours before the step three hearing, identifying the employees who wish to be released. The superintendent or his designee then grants or denies the request.

Earl W. Hamilton was superintendent of Deer Island at various times between October 1980 and July 1985. Hamilton testified that release time for step three hearings would be based upon the day-to-day operational needs of the institution. Operational needs could be affected by the weather, inmate tensions due to racial confrontations or the number of inmates requiring transportation back and forth to court on any given day. He further testified that the operational needs could change from minute to minute and a lock-down could occur at any time of the day. During Hamilton's tenure as superintendent there was a mutual understanding between him and the Union that there would be 24-hour notice prior to any release time and that granting of release time would be based on the operational needs of the institution. If release time had been granted the previous day, but a problem arose in the morning, prior to the scheduled step three hearing, the release time could be cancelled.[4]

On March 31, 1986, James Kane, president of the Union, submitted a written request for leave time for three employees to attend a step three hearing on April 1, 1986 to Superintendent George D. Romanos.[5] The three employees were Kane and two grievants. Romanos crossed out the two grievants' names and wrote on the request: "Mr. Kane only -- to return to institution within 1 hr. of being

---

[3]There are three shifts at Deer Island: 7:00 a.m. - 3:00 p.m., 3:00 p.m. - 11:00 p.m., and 11:00 p.m. - 7:00 a.m. If the step three hearing does not take place during the grievant's shift, the grievant uses his own time to attend the hearing.

[4]On appeal the City challenged the hearing officer's findings that Hamilton refused requests for paid release time "only where there was a severe problem within the institution" and that the "denial would be so obvious to both parites that no explanation was necessary." The City argued that Hamilton's testimony illustrated several types of situations wherein leave would be denied. After reviewing the record, we have modified the hearing officer's findings by adding the facts as noted above.

[5]Romanos succeeded Hamilton in July 1985.

Copyright © 1988 by New England Legal Publishers

dismissed from hearing." There is no evidence that any emergency was occurring or expected at Deer Island on March 31, 1986.

When Kane received the request form with Romano's notations, he immediately met with Romanos in Romanos' office. Romanos told Kane that the Penal Institution Department had decided that grievants would no longer be granted paid leave time to be at step three grievance hearings; it was felt that Kane's presence alone would be sufficient to prosecute the grievance. Kane protested, but Romanos repeated that the department had decided that it was not necessary to have the grievants at the step three hearing.[6]

Jay Bluestein, captain of administrative services, testified that since March 31, 1986 he had denied perhaps six to twelve requests for leave time and allowed more than a dozen. Romanos testified that he had denied "a couple" of requests, although he did not say how many he had received. Like Hamilton, Bluestein testified that in deciding to allow requests he considered "the operational needs of the institution." Bluestein based his decisions to deny leave time on a broad range of criteria, including the "climate" of the institution, the weather, and whether events such as graduation ceremonies were taking place among the inmates.

Article XVI(j) of the collective bargaining agreement in effect at the time of these events, contained the following provision:

> Subject to the operating needs of the House of Correction as determined by the Commissioner, leave of absence without loss of pay will be permitted for the following reasons:
>
> *****
>
> (j) Reasonable time for the processing of grievances by one employee's representative on each shift. The Union shall provide and keep updated a list of such representatives.

This provision has remained unchanged in the contract since 1977 and has not been discussed since then.

OPINION

To prevail in a case alleging an unlawful unilateral change, the charging party must show by a preponderance of the evidence that the employer unilaterally changed established working conditions or created new working conditions without

---

[6] On appeal the City challenged the hearing officer's decision to credit Kane regarding this conversation rather than Romanos, who denied that it had occurred. The Commission has held that it will not overrule a hearing officer's credibility determination unless the clear preponderance of the relevant evidence indicates that the determination is incorrect. Massachusetts Board of Regents of Higher Education, 14 MLC 1397, 1399 (1987); Boston School Committee, 10 MLC 1501, 1511 (continued)

Copyright © 1988 by New England Legal Publishers

affording the exclusive representative notice and an opportunity to bargain before the change. The change must affect a mandatory subject of bargaining. City of Boston, 10 MLC 1189, 1193 (1983). A change in the criteria for granting paid leave to employees to attend grievance meetings affects two mandatory subjects of bargaining: paid leave time and the administration of the grievance procedure. City of Boston, 3 MLC 1450, 1459 (1977).

We disagree with the hearing officer's conclusion that after March 31, 1986, the City changed its criteria for granting paid leave for grievants to attend step three grievance meetings. The record demonstrates that the City's existing practice was to allow paid leave for grievance meetings subject to the discretionary determination by the superintendent or his designee of the prison's operating needs. Former Superintendent Hamilton testified that there were a variety of circmustances which could arise unexpectedly to impact on the needs of the institution and that the granting or denying of leave time was based on his determination of the situation. Even if leave time had been previously granted, it could be cancelled at the last minute if certain situations arose. When Romanos succeeded Hamilton, he delegated this discretionary authority at times to Bluestein. Like Hamilton, Bluestein exercised his discretion by considering various criteria which would impact on the operational needs of the institution. The hearing officer's conclusion that since March 31, 1986, Bluestein has denied release time based on a broader range of criteria than previously used is insufficient to establish that the City has altered the existing practice. Since the practice involves discretionary consideration of prison operating needs rather than rigid application of a set of fixed criteria as the standard for granting leave, the criteria may vary according to the judgment of the individual who exercises his discretion. The practice, however, has remained the same -- the superintendent, or his designee, exercises discretion to decide when leave time will be granted. Accordingly, we conclude that the City did not change the practice by which it determined whether to grant leave time.

Notwithstanding our determination that the City has not violated the Law, we note that Romanos' intemperate statement to Kane that "the department had decided that it was not necessary to have the grievants at the step three hearing," understandably led the Union to conclude that Romanos was announcing an unlawful, unilateral change in the existing practice. The evidence does not establish that a unilateral change occurred, and therefore we must dismiss the Complaint. But we caution the City that the case might have been avoided had the City been more sensitive to the Union's interest in the issue of leave time. The City appears to intrude impermissibly into the Union's domain when it announces to the Union which participants are necessary to process a Union grievance. While the City has the right to control when employees take leave, it may not substitute its judgment about who is necessary to a grievance for that of the Union.

---

6 (continued) (1984); Bellingham Teachers Association, 9 MLC 1536, 1543 (1982). Having reviewed the record, we will not overrule the hearing officer's credibility finding in this instance because it is not contradicted by a clear preponderance of the relevant evidence.

Copyright © 1988 by New England Legal Publishers

Finally, in concluding that there was insufficient evidence that the City changed its practice with respect to granting paid release time for grievance meetings, we note that the City has in fact permitted release time unless its operating needs demanded otherwise. In those instances where relief time is determined to be inconsistent with operating needs, discussion between the City and the Union about the reasons for the decisions will both permit the parties to consider alternative arrangements consistent with those needs and promote cooperation between them.

CONCLUSION

WHEREFORE, based upon the facts found and the reasons stated above, the Commission hereby dismisses the Complaint in this matter.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

Copyright © 1988 by New England Legal Publishers

Copyright © 1988 by New England Legal Publishers