CITY OF HAVERHILL AND HAVERHILL POLICE PATROLMEN'S ASSOCIATION, MUP-7194 (8/21/90). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

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Commissioners participating:

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

Appearances:

Theodore Xenakis, Esq. - Representing the City of Haverhill

Gerard S. McAuliffe, Esq. - Representing the Haverhill Police Patrolmen's Association

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Hearing Officer Judith Neumann issued her decision in this case on July 6, 1989.[1] She found that the City of Haverhill (City) had violated Section 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally implementing a psychological test as a condition of continued employment for police officers. On July 18, 1989, the City filed a Notice of Appeal and a Motion to Reopen Hearing accompanied by several documents. The Commission referred the motion to reopen the hearing to the hearing officer and held the appeal in abeyance pending the hearing officer's decision on the motion. Both parties submitted position statements and supporting affidavits with respect to the motion.

On September 11, 1989, the hearing officer denied the Motion to Reopen Hearing.[2] On September 28, 1989, the City filed a supplementary statement to appeal both the hearing officer's decision on the merits of the case and the denial of the Motion to Reopen. The Union filed a supplementary statement on October 10, 1989. We have considered both supplementary statements.[3]

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1 The full text of the hearing officer's decision appears at 16 MLC 1077.

2 The hearing officer's ruling is published at 16 MLC 1264 (1989).

3 (see page 1216)

Facts[4]

The City and the Union agreed to waive an evidentiary hearing before the hearing officer and instead stipulated to sixteen factual statements. The parties agreed that the hearing officer would consider their mutual stipulation as the record of the case. The stipulations are recited in the hearing officer's decision and need not be repeated here.[5] The stipulated facts establish that the City's practice, since at least 1984, had been to require psychological testing as part of the application process for police officers, and to offer new police officers employment conditioned upon their successful "completion" of the psychological test. The parties also stipulated that prior to "on or about October 1, 1988, the Union had no notice or knowledge that psychological tests were being administered as a condition of hire or that the results of psychological testing would be used as a basis for terminating any bargaining unit member's employment." These two facts are critical to the consideration of this case and they establish the following: first, the City had a practice of requiring applicants for employment to "complete" a psychological test as a condition of continued employment;[6] and, second, the Union had neither notice nor knowledge of this practice prior to on or

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3 (from page 1215)

On or about November 27, 1989, the Commission received a letter, dated November 21, 1989, from an attorney representing Paul Malone, one of the police officers affected by the City's conduct at issue in this case. The City objected to the Commission's consideration of the letter. Because the letter contains factual representations which were not subject to litigation and because no motion to intervene was ever filed on behalf of Mr. Malone, we decline to admit the letter into evidence and hereby allow the City's motion to strike. Accordingly, the letter has not been considered.

4 The Commission's jurisdiction is not contested.

5 See City of Haverhill, 16 MLC at 1078-1079.

6 The hearing officer properly noted the distinction between conditions of hire and conditions of continued employment, and emphasized that she considered the issue in this case to be the City's right to require successful completion of a psychological test as a condition of "continued employment" rather than the City's right to establish conditions which must be fulfilled prior to hire. 16 MLC 1081-1082. Neither party has appealed this finding by the hearing officer, and we concur in her reasoning for the reasons articulated in her decision. Moreover, we note that were this distinction to be ignored, an employer could establish unilaterally the terms and conditions of employment of bargaining unit employees under the guise of establishing conditions for hire, merely by telling employees at the time of their hire that their employment would continue to be subject to certain conditions. Whether the condition is an obligation to maintain a particular level of physical conditioning, or to maintain certain psychological profile during employment, or even to agree to receive certain wages during the period of

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about October 1, 1988. On November 14, 1988, the Union filed the instant prohibited practice charge protesting the City's unilateral imposition of a requirement that bargaining unit employees successfully complete a psychological test as a condition of continued employment.

DISCUSSION

The Motion to Reopen the Hearing

On July 6, 1989, the hearing officer ruled that the imposition of a psychological test as a condition of continued employment is a mandatory subject of bargaining, and that the City had an obligation to bargain with the Union before implementing the requirement. The Hearing Officer noted that the City's obligation to notify the Union and to bargain upon request arose in 1984. Because she found that the Union had received no notice of the City's imposition of a psychological testing requirement as a condition of employment until October 1988, the hearing officer concluded that the City had implemented the requirement unlawfully and that the Union's November 1988 prohibited practice charge was a timely protest of the unilateral requirement.

The substance of the City's motion to reopen the hearing is detailed in the hearing officer's Ruling on the motion, 16 MLC at 1265, and we need not repeat it here. On September 11, 1989, the hearing officer denied the City's request to reopen the hearing to receive the City's evidence, concluding not only that the City had failed to demonstrate that it could not have discovered the evidence prior to the hearing with the exercise of reasonable diligence, see Boston City Hospital, 11 MLC 1065, 1075 (1984), but also that the evidence which the City sought to introduce would not have affected the disposition of the case. City of Haverhill, 16 MLC 1264 (1989) (hearing officer's Ruling on motion to reopen). The City represents that after the issuance of the hearing officer's decision it learned from its own personnel records that certain employees, including certain Union officers, had taken the psychological exam prior to their employment by the City,[7] and had been notified that their employment was conditional upon passage of the psychological

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6 (continued)
employment, once the condition is imposed upon an employee (rather than upon an applicant) it becomes a condition of continued employment rather than a condition of hire. The exclusive bargaining representative of the bargaining unit has a right to negotiate with the employer prior to imposition of terms and conditions on bargaining unit employees, including conditions that will determine whether an employee will continue employment. E.g., Town of Dedham, 10 MLC 1252, 1258 (1983).

7 The City's evidentiary proffer would directly contradict paragraph 10 of the parties' stipulation which specified: "[n]one of the present officers of the Union have taken the psychological examination."

screening. In response to the City's motion the Union submitted affidavits of the referenced employees which dispute the City's evidence.[8]

It is undisputed that the evidence which the City sought to introduce after the close of the hearing consisted of personnel record information which, at all material times, had been in the control of the City. Further, the City's explanation for its failure to search for or to introduce certain records at the hearing convinces us that the City at all times relevant to this case had the ability to produce the evidence in a timely fashion at the hearing in this case had it exercised reasonable diligence in its search for records in preparation of the case. Instead, the City relied upon the records which it chose, and freely stipulated to certain facts. The City's current claim that its stipulation was mistaken does not meet the City's burden of proving that it was "excusably ignorant, despite the exercise of reasonable diligence" of the evidence it now seeks to introduce. See Boston City Hospital, 11 MLC at 1075.[9] Like the hearing officer, we perceive the potential for a great waste of public resources if every party who loses a case is permitted to reopen the record of the hearing and to retry the case on evidence that could have been available at the time of the original hearing merely with the exercise of reasonable diligence. In this case the evidence was not offered because the City did not search for it. In another case evidence might be omitted because counsel mistakenly believes the evidence to be immaterial. As frustrating as it may be for a losing party to speculate whether their omitted evidence might have changed the outcome of the case, the parties and the Commission must be able to rely on the finality of a proceeding except in extraordinary circumstances.

The City seems to argue that extraordinary circumstances may exist in this case when it alleges that the union officers present at the hearing made certain off-the-record representations concerning their understanding of the past practice and thereby induced the City to enter into the factual stipulations which form the basis of the decision in this case. The facts of the alleged representations by the Union officers are recited in the hearing officer's Ruling on the motion to reopen. Id. at 1267.

The City has offered no evidence that either of the two Union officers

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[8] For the purposes of ruling on the City's motion the hearing officer accepted the alleged facts as true. For the purpose of reviewing the hearing officer's ruling we shall do the same.

[9] The City argues that the standard applied in Boston City Hospital to decide whether to reopen a record is inapposite because the City submitted its motion to reopen more quickly after issuance of the hearing officer's decision then did the moving party in the Boston case. As the hearing officer correctly observed, the critical issue is the procedural stage when the motion is received and the reason that the evidence was previously unavailable. The amount of time following issuance of the hearing officer's decision is not significant.

present at the hearing intentionally misrepresented the application of a psychological testing requirement (i.e., there is no evidence that either Mr. Roberts or Mr. Bednez was employed before having passed, and conditional upon later passing, the psychological exam or that either man was aware of the fact that others had been so employed).[10] The City seeks to question what was at best hearsay evidence from the two Union officers that no other Union officers had been conditionally employed. That the City allegedly chose to rely on this alleged, unsworn hearsay representation does not now warrant reopening the hearing. Therefore, we affirm the ruling of the hearing officer denying the City's motion to reopen the record of the hearing in this case.

The City's Appeal from the Hearing Officer's Decision

The City points to two errors in the hearing officer's decision. First, the City argues, the hearing officer erred when she found that neither the Union nor its officers knew that psychological screening was a condition of continued employment. In addition, the City argues, the hearing officer erred when she "found as a matter of fact that even if the Association or any of its officers knew that psychological screening was a condition of continued employment that such knowledge did not amount to a waiver by the Association."

Because the City's motion to reopen the hearing has been denied, the City's first argument fails for lack of evidence. The stipulated record of the hearing in this case contains no evidence that the Union or its officers knew that psychological screening was a condition of continued employment. To the contrary, the City stipulated that "[p]rior to on or about October 1, 1988, the Union had no notice or knowledge that...the results of psychological testing would be used as a basis for terminating any bargaining unit member's employment." City of Haverhill, 16 MLC at 1079. Therefore, we will not disturb the findings of the hearing officer which are amply supported, in fact compelled, by the record in this case.

The City's second argument is apparently a reference to the last paragraph of the hearing officer's Ruling on the motion to reopen the hearing in which the hearing officer noted that the evidence proffered by the City would be unlikely to alter the outcome of the case. In so noting the hearing officer opined that notice to applicants for employment that they must pass a psychological exam as a condition of continued employment would not constitute notice to a union if and when the applicant later is elevated to union office. While we agree with the conclusion reached by the hearing officer we rely on different reasons. The City's offer of proof alleged that it would prove that at least two current and one prior Union officer had been psychologically tested. No contention is made in this case that the City changed its practice of requiring psychological testing as a pre-condition of hire. Therefore, evidence that individuals, who later became Union officers,

10 Cf. Hampden County Registry of Deeds, 9 MLC 1860, 1861 (1983).

knew that they would not be hired unless they passed the psychological test is irrelevant to the issues presented in this case. At issue is whether the Union, through its officers, had received notice that the City was imposing on current employees, as a condition of continued employment, a requirement that they pass the psychological test.[11] The City does not offer to prove that the three referenced Union officers were informed that they would be hired by the City before the results of their tests were reported, or that their continued employment with the City would be conditioned upon passage of the psychological test. Nor does the City offer to prove that individual Union officers knew that the City had notified other individual employees that their continued employment was conditional upon passage of the psychological exam. As far as the City's offer of proof establishes, the Union could have reasonably assumed that the City did not hire anyone until after having received the psychological test results.[12] Therefore, assuming arguendo that the City's post-decision evidentiary proffer could be accepted by the Commission, we agree with the hearing officer that it would not change the outcome of this case.

The City's appeal is not based on the evidence presented at hearing, but on additional evidence which the City sought to present through its Motion to Reopen Hearing and which we have ruled inadmissible. Therefore, on the basis of the evidence in the record we affirm the factual findings of the hearing officer.

CONCLUSION

Accordingly, for the reasons expressed by the hearing officer, we affirm the hearing officer's conclusion that the City violated Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by imposing a psychological examination as a condition of continued employment without providing the Union prior notice or an opportunity to bargain.

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[11] We emphasize, as did the hearing officer, the distinction between requiring passage of a psychological exam as a pre-condition of hire and requiring passage of a psychological exam as a condition of continued employment. In the former instance, the employee never begins work because the employer requires the employee to pass the psychological exam before beginning employment. In the latter instance, the employer apparently decides to employ the employee even though the psychological exam has not been passed. If the employer then decides to terminate the employee because of the results of a pre-employment test, the test does not thereby become a condition of hire. Rather, the test is a condition of continued employment to which the bargaining obligation attaches.

[12] We also note that the proffer contains no evidence from which we could conclude that the City received the results of the psychological exam results after an applicant had begun employment. Nor does the proffer contain evidence from which we could conclude that any applicant knew the date when the City received the results of his or her psychological test.

Order

WHEREFORE, pursuant to the foregoing, IT IS HEREBY ORDERED that the City of Haverhill shall:

1. Cease and Desist from:

   a) Failing and refusing to bargain collectively in good faith with the Haverhill Police Patrolmen's Association (Union) over the decision to impose psychological testing as a condition of continued employment and the effects of that decision.

   b) Terminating Stephen Iannalfo (Iannalfo), Paul Malone (Malone), and Michael Walukevich (Walukevich) prior to the occurrence of the earliest of the following conditions:

      i) a negotiated agreement with the Union which permits imposition of a requirement that each employee pass a psychological test as a condition of continued employment;

      ii) a bona fide impasse in the negotiations concerning the imposition of a psychological test as a condition of continued employment and the impacts of such a requirement;

      iii) the failure of the Union to commence bargaining within five (5) days of notice of the City's willingness to bargain and unconditional offer of reinstatement to Iannalfo, Malone, and Walukevich;

      iv) the subsequent failure of the Union to bargain in good faith.

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

2. Take the following affirmative action which will effectuate the purpose of the Law:

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

   b) Offer Iannalfo, Malone, and Walukevich full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of their unlawful terminations, together with interest on any sums owing at the rate and calculated in the manner specified in Everett School Committee, 10 MLC 1609 (1984).

c) Upon request of the Union, bargain collectively in good faith over the decision to implement psychological testing as a condition of continued employment and the effects of that decision.

d) Notify the Commission in writing within thirty (30) days of the service of this decision and order of the steps taken in compliance therewith.

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

After a hearing at which all parties had the right to be heard, the Labor Relations Commission has determined that the City of Haverhill (City) failed to bargain in good faith with the Haverhill Police Patrolmen's Association (Union) in violation of Sections 10(a)(5) and (1) of G.L. c.150E (the Law) when it implemented psychological testing as a condition of continued employment for police officers without first affording the Union notice and an opportunity to bargain and when it terminated certain police officers pursuant to such testing.

Public employees have certain rights guaranteed by G.L. c.150E including the right to form, join and support a union, to engage in other protected, concerted activity, to be free from discrimination based upon union or protected, concerted activity, to refrain from any of these activities, and to be represented for the purposes of collective bargaining about wages, hours, and other terms and conditions of employment by a union. To ensure the protection of these rights the Labor Relations Commission has ordered us to post this notice and to abide by what it says.

WE WILL NOT refuse to bargain in good faith with the Union over a decision to impose psychological testing as a condition of continued employment and over the effects of that decision.

WE WILL NOT terminate employees based on the results of psychological testing without first discharging our duty to bargain with the Union over that issue.

WE WILL NOT in any similar manner interfere with, restrain, or coerce any employees in the exercise of their rights guaranteed under the Law.

WE WILL offer officers Iannalfo, Malone, and Walukevich full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they have suffered as a result of their unlawful terminations.

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Police Chief