16.1 impasse
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67.6 other refusal to bargain
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Commissioners participating:

Maria C. Walsh, Chairperson
Haidee A. Morris, Commissioner
William G. Hayward, Jr., Commissioner

Appearances:

Robert Garrett, Esq. - Representing the Town of Stoughton

Michael F. Manning, Esq. - Representing the International Brotherhood of Police Officers

DECISION

Statement of the Case

The International Brotherhood of Police Officers (Union) filed a charge with the Labor Relations Commission (Commission) on November 22, 1986, alleging that the Town of Stoughton (Town) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (5) and (6) of Massachusetts General Laws, Chapter 150E (the Law).

After the Commission investigated the Union's charge, it issued a Complaint of Prohibited Practice on February 13, 1987, alleging that the Town had violated Sections 10(a)(5), (6) and (1) of the Law by implementing a light duty proposal before bargaining to impasse or resolution with the Union, and by refusing to participate in mediation, fact-finding, and arbitration procedures set forth in Sections 8 and 9 of the Law by implementing its light duty proposal after the Union had petitioned the Joint Labor Management Committee.

Pursuant to notice, a hearing was scheduled for April 9, 1987. In lieu of a hearing, the parties jointly submitted an agreed statement of facts on May 22, 1987. The parties later submitted briefs on October 23, 1987. The Professional Firefighters of Massachusetts filed a brief as amicus curiae.

Findings of Fact

The following facts are those to which the parties stipulated. The parties also stipulated to the introduction into evidence of certain relevant documents, including the applicable collective bargaining agreement and the proposals exchanged by the parties that are referenced in the factual stipulations.

1. The Town of Stoughton is a public employer within the meaning of Section 1 of Chapter 150E ("the Law").

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive representative for the purpose of collective bargaining of a bargaining unit of police officers employed by the Town.

4. The Union and the Town were parties to a collective bargaining agreement covering the bargaining unit referred to in paragraph 3, above, effective July 1, 1986 - June 30, 1987. A Memorandum of Agreement reflecting the understanding of the parties was signed on April 1, 1986.

5. During negotiations for the collective bargaining agreement for the period July 1, 1986 - June 30, 1987, neither party submitted proposals regarding light duty.

6. On or about June 18, 1986, after the parties had entered into the collective bargaining agreement referred to in paragraph 4, above, the Town submitted a proposal to the Union concerning paid leave for employees injured on duty, containing, inter alia, a proposal for light duty for injured employees (the "light duty proposal").[1]

7. The parties met on July 22, 1986 to bargain over the proposal submitted to the Union in June, 1986. The Union reacted to the Town's proposal

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[1] Specifically, the Town's proposal required employees to accept light duty assignments, permitted the Town-designated physician to determine an employee's ability to perform light duty, and specified certain "light duty" tasks. The proposal would include only base salary, holiday pay, education pay and longevity pay as payment while on injury leave, would eliminate accrual of vacation and sick leave while on injury leave, and would limit outside employment in which employees on leave could engage without the Chief's approval. Finally, the proposal specified certain notice and documentation requirements which would be applicable to employees on injury leave, and proposed that paid leave would be denied if the employee's negligence contributed to the injury.

by indicating that it would prefer to bargain over the issues during successor contract negotiations, but that it would not refuse to bargain mid-term. The Union noted that the Town's proposal would alter, among other things, the existing contractual agreement regarding accumulation of sick and/or vacation time during the period an employee was on paid injury leave and that it did not want to deal with those issues already dealt with in the contract.[2] The Town wished to continue bargaining at that time and further sought to treat comprehensively the issue of light duty and injured on duty leave in general. The Union agreed to submit counterproposals at the next meeting.

8. On August 8, 1986, a second bargaining session was held at which the Union presented its counterproposals and its rationale for them. A discussion of those issues ensued. The Union's counterproposals concerning injured on duty leave was limited to the issue of light duty, and it reiterated its position that it did not wish to negotiate over injured on duty leave in general or any change in existing contractual provisions concerning the same.[3]

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2 Article XIII, section 1 of the parties 1986-87 collective bargaining agreement provides:

> When an employee(s) is absent from duty because of an injury of illness sustained in the line of duty for which he would be entitled to compensation, he will receive compensation under the provisions of M.G.L. Chapter 42, Section 111F. Employees hired prior to January 4, 1986 shall continue to enjoy what contractual rights they had as of that date to accumulate sick and/or vacation leave while absent from duty and on leave pursuant to M.G.L., Chapter 41, §111F; notwithstanding any provisions of this agreement to the contrary. Employees hired after January 4, 1986 shall not be entitled to accumulate either sick or vacation leave while absent from duty and on leave pursuant to said Section 111F.

3 In addition to a "limited duty" procedure, the Town's counterproposal included: a ten percent across-the-board pay increase; exclusion of employees on light duty from the minimum manning provisions in the contract; improvement to the security of the control room; certain changes in the detail policy; an allowance of all vacation requests if minimum manning is preserved. The Union's "Limited Duty" procedure would compensate employees who are required to perform light duty an additional twenty percent differential in addition to their regular compensation. The procedure specified in the Union's proposal would permit an employee, after being cleared for light duty by the Town physician, to be examined at his own expense by his own physician. If the employee's physician's report does not support the light duty assignment, the procedure provides for an examination by a neutral specialist jointly selected by the parties' physicians and compensated by

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9. On August 22, 1986, the parties met for a third negotiating session. The Town presented its counterproposal which incorporated the Union's concept of a third party neutral physician to determine eligibility for light duty but continued to deal with injured on duty provisions in general. The Town further advised the Union that it was unwilling to agree to any of the Union's money proposals in light of the Town's willingness to agree to a third party neutral physician which it felt was a substantial concession. The Union again objected to dealing with injured on duty leave in general and stated that it would negotiate only concerning the specific issue of light duty. The Union further advised the Town that it perceived implementation of a light duty policy to have an adverse economic impact on the bargaining unit as a whole and particularly on those individuals performing light duty. Thus, the Union continued to press for its economic proposals. The Town counterproposed by dropping all of its demands for changes in injured on duty leave in general and agreeing to limit its demands to the language proposed in Sections 6 through 11 of its August 22, 1986 counterproposal.[4] The Town also indicated it would accept the Union's counterproposal that officers on light duty would not be counted as part of the minimum manning requirements of Article 10, Section 2 of the collective bargaining agreement. However, the Town refused to agree to any additional money compensation, again reiterating its position that its willingness to agree to a third-party neutral physician to determine eligibility for light duty was a significant concession. The Union responded that it felt no agreement would be ratified without some additional monetary or clear benefit to the bargaining unit and that the third-party neutral doctor concession was insufficient to move the Local to agreement. The Union continued to adhere to its remaining proposals.

10. A fourth bargaining session was held on October 28, 1986. The Union

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3 (continued)
the parties. The Union's proposal would also make light duty voluntarily available to employees on long term sick leave, and limit light duty tasks to answering telephones, operating the computer and dispatching.

4 Sections six through eleven of the Town's August 22, 1986 counterproposal provided for determination of an employee's eligibility for light duty by a neutral physician selected by lottery from a pool of physicians selected by the parties. Pending this determination, the employee would be on paid leave, to be deducted from his accumulated sick leave unless the neutral doctor determined that he was incapable of light duty. The employee also could be required to follow a therapeutic program recommended by the neutral physician. The seventeen types of acceptable light duty tasks included those previously proposed by the Town as well as several others. The proposal also continued to prohibit unauthorized outside employment by employees on injury leave.

advised the Town that it still required some concessions to offset what it perceived as the adverse economic impact of the implementation of a light duty policy. The Town reiterated its last position set forth at the August 22, 1986 meeting, namely that it felt that agreement on a third party neutral physician was a substantial concession, and it was unwilling to provide a money benefit. No written counterproposals were exchanged by either side. The Town advised the Union near the conclusion of the meeting that if it did not receive any counterproposals from the Union within ten (10) days, it would unilaterally implement its last proposal made on August 22, 1986. The Union advised the Town that it intended to file a petition with the Joint Labor Management Committee (JLMC). The Town advised the Union that it was willing to participate in further bargaining and mediation over this issue, but was unwilling to delay implementation if the Union continued to demand substantial concessions in addition to those already made by the Town. The Union sought clarification of which proposals the Town intended to implement, if it did so, and the Town responded that it intended to implement its last bargaining position; namely, only Sections 6 through 11 of its written August 22, 1986 proposals and the Union proposal regarding exclusion of officers on light duty from the minimum manning complement.

11. The Union filed a petition at the JLMC on or about October 31, 1986.

12. By letter dated November 7, 1986, the Town advised the Union of its intention to unilaterally implement its last bargaining position as of the close of business, Friday, November 14, 1986, if no counterproposals were received by noontime on that date.[5]

13. The Union made no counterproposals by the designated time.

14. At the close of business, Friday, November 14, 1986, the Town implemented its last bargaining position regarding light duty.

15. From the filing of the petition with the JLMC to the date of the stipulation, no meetings have been scheduled with representatives of the JLMC and the parties.[6]

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[5] The Town's letter affirmed its "read(iness) to participate in further bargaining and mediation over this issue," as well as its unwillingness to delay implementation "if the (Union) continues to demand substantial concessions in addition to those already made by the Town." The letter announced implementation on November 14, 1986, "if no meaningful counterproposal is received" from the Union.

[6] Contrary to the Town's contention in its brief, these facts do not

(continued)

OPINION OF COMMISSIONER HAIDEE M. MORRIS

AND COMMISSIONER WILLIAM G. HAYWARD, JR.

As a threshold matter, this case involves the relationship between the public employee collective bargaining law of G.L. c.150E and the Joint Labor-Management Committee's responsibility over municipal police officer and firefighter collective bargaining under Section 4A of c.1078 of the Acts of 1973 (Section 4A). The Union contends that all determinations of impasse involving police and firefighter negotiations are within the exclusive jurisdiction of the JLMC. The Town takes the contrary position, relying upon the statutory language of Section 4A.

We begin by considering our responsibility under c.150E. Section 6 of c.150E mandates that "the employer and the exclusive representative shall meet at reasonable times...and shall negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment..." Under Sections 10 and 11 of c.150E, the Commission has jurisdiction to decide whether an employer or exclusive representative has refused to bargain in good faith and to issue appropriate remedial orders. See G.L. c.150E, §§10(a)(5), 10(b)(3) and 11. C.150E contains no provision that limits the Commission's jurisdiction in bargaining disputes involving municipal police officers or firefighters.

Turning then to Section 4A of c.1078 of the Acts of 1973, as amended, which created the Joint Labor-Management Committee, we note the following relevant provisions:

> ...
> (2)(a) The committee shall have oversight responsibility for all collective bargaining negotiations involving municipal police officers and firefighters. The committee, shall, at its discretion, have jurisdiction in any dispute over the negotiations of the terms of a collective bargaining agreement involving municipal firefighters or police officers..."
>
> (2)(c)...when either party or the parties acting jointly to a municipal police and fire collective bargaining negotiations believe that the process of collective bargaining has been exhausted the party or both parties shall petition first the committee for the exercise of jurisdiction and for the determination of the apparent exhaustion of the process of collective bargaining.

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6 (continued)
establish that the JLMC failed to "make a determination within thirty days (of receipt of the petition) whether to exercise jurisdiction over the dispute (so that the petition was to) be automatically referred to the board of arbitration and conciliation...for disposition in accordance with" G.L. c.150E, §9.

> (3)(a) The committee shall have exclusive jurisdiction in matters over which it assumes jurisdiction and shall determine whether issues in negotiations have remained unresolved for an unreasonable period of time resulting in the apparent exhaustion of the process of collective bargaining.

We have not previously had occasion to address the interaction of Section 4A with our jurisdiction and authority under c.150E, but in doing so we are guided by certain well-established principles. The statutes should be read " 'so as to constitute a harmonious whole'...by attributing to the Legislature certain commonsense general purposes." Dedham v. Labor Relations Commission, 365 Mass. 392, 402 (1974), quoting from Mathewson v. Contributory Retirement Appeal Board, 335 Mass. 610, 614 (1957). Therefore, we first consider whether, taken together, c.150E and Section 4A should be construed to mean that the commission lacks jurisdiction over charges involving municipal police officers or firefighters alleging a refusal to bargain in good faith in violation of c.150E, Section 10(a)(5) or 10(b)(1), thus leaving all charges to the sole jurisdiction of the JLMC. The language of c.150E and Section 4A suggests that this result was not contemplated by the Legislature. For example, Subsection (2)(a) of Section 4A provides that the jurisdiction of the JLMC "in any dispute over the negotiations of the terms of a collective bargaining agreement" shall be at the JLMC's "discretion." That subsection also references the JLMC's authority to "determine whether the proceedings for the prevention of any prohibited practices filed with the Labor Relations Commission shall or shall not prevent arbitration pursuant to this section." (emphasis supplied). Further, the JLMC may order the parties to any municipal police and fire negotiations to file with it "notification of all pending unfair labor practice proceedings between the parties." Subsection (2)(b)(3) (emphasis supplied). Under the provisions of Section 11 of c.150E, the Commission "while retaining jurisdiction...may refer to the board (of Conciliation and Arbitration) or a joint labor management committee any matter alleging a refusal to bargain in good faith as required by section 10." (emphasis supplied).[7] Furthermore, it is the Commission, pursuant to its remedial authority under Section 11, that can issue a judicially enforceable remedy for a refusal to bargain in good faith, including a unilateral change, and, where appropriate, can make affected employees whole. The JLMC's procedures are directed at the resolution of disputes over contract terms, which are then subject to funding approval by the public employer's legislative body.

By necessity given these overlapping statutory schemes, the Commission and

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[7] By regulation, the Commission has implemented this provision as follows:

> At any time during the pendency of a charge at the Commission, the Commission may refer the matter to the Board of Conciliation and Arbitration, or in the case of charges involving police or fire fighters, to the Joint Labor Management Committee, for such period of time as the Commission shall determine in order to promote resolution of the issues in the charge.

the JLMC cannot be "oblivious of the actions of the other," Dedham v. Labor Relations Commission, 365 Mass. at 402. We do not read Section 4A, however, to divest the Commission of jurisdiction over municipal police officer and firefighter prohibited practice charges. Rather, the legislative purpose would be fulfilled when the two agencies "with mutual restraint, aided by cooperation of those representing employees and employers...could reach a fair adjustment." Id. The historical relationship between the Commission and the JLMC has indeed been one marked by a common desire to advance labor stability in the Commonwealth. The Commission often refers refusal-to-bargain charges to the JLMC (as well as the Board of Conciliation and Arbitration) when an initial investigation reveals the potential that on-going negotiations, with the JLMC's expertise, may resolve the dispute. There is nothing in Section 4A (or in c.150E) to suggest that the Commission may not assert jurisdiction over these cases merely because the JLMC may also have jurisdiction over the same parties or the same dispute. The Commission's adjudicatory role and the JLMC's conciliatory role may, and do, peacefully co-exist.

If the Commission thus possesses jurisdiction over prohibited practice charges involving municipal police officers and firefighters in general, the next level of analysis is to determine whether charges involving a determination of whether parties to such a dispute have reached impasse are not within the purview of the Commission to decide. The Union in this case, as well as the amicus Professional Firefighters of Massachusetts, point to Subsection 2(c) of Section 4A, "when...the parties...believe that the process of collective bargaining has been exhausted (they) ... shall petition first the committee (JLMC) for the exercise of jurisdiction and for the determination of the apparent exhaustion of the process of collective bargaining." (emphasis supplied). This provision, claims the Union, vests exclusive jurisdiction in the JLMC over the determination of impasse, and because the Town in this case implemented its light duty proposal prior to the JLMC's determination, the Commission must find that the Town violated Section 10(a)(5) of c.150E.

For purposes of this case, we need not reach the more troublesome issue of the effect of assertion of jurisdiction by the JLMC over a dispute also constituting a charge of prohibited practice involving a determination of the existence of an impasse at the Commission, and the potential for conflicting agency decisions over that issue. We are, nevertheless, sensitive to the potential for such conflict. The existing system for referral and/or deferral between the two agencies demonstrates that sensitivity and we would, of course, give great deference to a JLMC finding that the parties to a dispute were at impasse. However, in this case, the Union and the Town have stipulated that the relevant facts concerning their contact with the JLMC consisted of the Union's filing a petition with the JLMC "on or about October 31, 1986." Since that time, the parties have not sought to add any facts to this record about the status of that petition at the JLMC. Thus the present posture of this matter before us is one in which the JLMC has not asserted jurisdiction to decide whether there has been an "apparent exhaustion of the process of collective bargaining."[8]

8 (see page 1157)

Turning to the issue presented here, therefore, we must consider whether the potential for JLMC jurisdiction either (1) ousts the Commission of jurisdiction to decide whether these parties are at impasse or (2) requires the parties to exhaust the procedures of Section 4A before the employer may implement a proposal without violating its c.150E obligation. We reject the first alternative because, as previously discussed, w perceive that the statutory relationship between c.150E and Section 4A can accommodate the different roles and responsibilities of the Commission and the JLMC. The Commission's expertise in finding facts and drawing conclusions of law in the context of prohibited practice cases alleging a refusal to bargain in good faith is appropriately brought to bear on charges by a union that a public employer has implemented a bargaining proposal prior to reaching a good faith impasse. See, e.g., Town of Arlington, 15 MLC 1452 (1989); Massachusetts Board of Regents of Higher Education, 14 MLC 1469 (1988). The fact that the public employees involved are either firefighters, or, as in this case, police officers, does not change the public employer's statutory obligations or the legal analysis to be applied by the Commission to decide whether an impasse exists. We also reject the argument that it is a per se violation of c.150E for a municipal public employer of police officers or firefighters to implement a bargaining proposal prior to exhaustion of Section 4A procedures before the JLMC. The Commission has consistently held, in interpreting c.150E, Section 9,[9] that "the exhaustion of mediation and factfinding proceedings is not necessary for an employer to implement changes in working conditions which are reasonably comprehended within its bargaining proposals." Commonwealth of Massachusetts, 8 MLC 1978, 1986 (1982), aff'd sub nom. Massachusetts Organization of State Engineers and Scientists v. Labor Relations Commission, 389 Mass. 920 (1983) ("the MOSES case"). The analysis applied by the Commission to its consideration of Section 9 of c.150E relied upon the statutory language and analogous federal precedent as evidence of Legislative intent. The concerns expressed by the Commission in the MOSES case included the potential lengthy delays between the parties' genuine deadlock and the conclusion of mediation and factfinding, the voluntary nature of the Section9 procedures and the anomalous treatment of changes mid-term in a collective bargaining agreement. MOSES, 8 MLC at 1984. The Legislature subsequently amended c.150E, Section 9 to provide, in relevant part, that "(u)pon the filing of a petition pursuant to this section for a determination of an impasse following negotiations for a successor agreement, an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding or arbitration, if applicable, shall have been completed..." St. 1986, c.198. No similar amendment to Section 4A has been enacted. In Massachusetts Board of Regents of Higher Education, 13 MLC 1540, 1543 (1987), aff'd sub nom. Massachusetts Community College Council/MTA/NEA, 402 Mass. 352 (1988), the Commission addressed Section 9 and that

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8 (from page 1156

Therefore we also decline to decide whether an "apparent exhaustion of the process of the collective bargaining" for purposes of Section 4A is identical to a determination of impasse under c.150E.

9

G.L. c.150E, Section 9.

recent amendment and determined that the Section 9 dispute resolution mechanisms do not encompass impasses occurring during the term of a collective bargaining agreement.

The Union distinguishes the line of cases interpreting c.150E, Section 9 by relying on the language of Section 4A. First, the Union argues that the Section 4A provision that "(t)he committee...shall determine if a genuine impasse exists and if the processes of collective bargaining have been exhausted,"[10] give the JLMC the sole authority to determine impasse. There is, however, a similar provision in c.150E, Section 9 stating that the Board of Conciliation and Arbitration "shall commence an investigation forthwith to determine if the parties have negotiated for a reasonable period of time and if an impasse exists..." The Commission has previously decided that the Board of Conciliation and Arbitration's declaration of statutory impasse under Section 9 "for the sole purpose of invoking the mediation-factfinding processes...is not in and of itself determinative of whether an impasse exists permitting unilateral employer action." Commonwealth of Massachusetts, 8 MLC 1499, 1512 (1981). Similarly, the JLMC's impasse determination for the purpose of "mak(ing) every effort to encourage the parties to agree on the terms of a collective bargaining agreement or the procedures to resolve the dispute...", Section 4A(2)(d), is not directed at the adjudication of an "impasse" for purposes of c.150E.

Second, the Union argues that the scope of the JLMC's authority over police officer and firefighter collective bargaining is significantly broader than the role of the Board of Conciliation and Arbitration's for other public employees. The Union also points to the JLMC's specialized expertise in these disputes and its unique ability to determine whether the processes of collective bargaining have been exhausted. For purposes of JLMC's own jurisdiction and initiation of its dispute resolution mechanisms, we concur with the Union's description of JLMC's authority and expertise. However, we do not agree that in a case such as the present, in which the record merely shows that the Union filed a petition with the JLMC, exhaustion of those mechanisms is a prerequisite to a public employer's otherwise legally acknowledged right to implement changes at impasse.[11]

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[10] St. 1987, c.589, §1 amended St. 1973, c.1078, §4A in several respects that are not material to our disposition of the issues in this case. The amendment primarily empowers the JLMC to invoke arbitration as mechanism to resolve collective bargaining negotiations over which it has exercises jurisdiction that "have remained unresolved for an unreasonable period of time resulting in the apparent exhaustion of the process of collective bargaining negotiations." The amendment also changes certain language employed in the Section, including referring to "the apparent exhaustion of the process of collective bargaining" rather than to "impasse." Although several of the parties, arguments on the issues presented in this case turn upon the precise language of Section 4A before its amendment, we also would reach the same result in this case under the former provisions of Section 4A.

11 (see page 1159)

Therefore, we now turn to the facts of this case and must decide whether the parties were at impasse when the Town implemented its light duty proposal.

The Commission has adhered to a high standard for the determination of when the bargaining has reached an impasse. Town of Arlington, 15 MLC 1452 (1989); Massachusetts Board of Regents of Higher Education, 14 MLC 1469 (1988). An impasse exists when the parties have bargained in good faith to the point where further negotiations would be fruitless and the parties are deadlocked. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 14 MLC 1518, 1529 (1988); Commonwealth of Massachusetts, 8 MLC at 1982. There is no talismanic point for determining when an impasse occurs. Commonwealth of Massachusetts, 8 MLC at 1512. Rather, we must examine the particular facts surrounding the negotiations in each case. Id. The factors to be weighed in determining whether an impasse exists include: the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues on which the parties disagree, and the contemporaneous understanding of the parties about the state of the negotiations. Commonwealth of Massachusetts, 8 MLC at 1513, quoting Taft Broadcasting Co., 163 NLRB 475 (1967).

In the instant case, we do not conclude that an impasse existed at the time the Town unilaterally implemented its light duty proposal. It is undisputed that the issue of light duty was never raised during the course of the negotiations for the collective bargaining agreement covering the period from July 1, 1986 to June 30, 1987. Less than two months after the Memorandum of Agreement on the terms of the 1986-87 agreement was executed on April 1, 1986, the Town proposed a major amendment to the agreement regarding paid leave for employees who were injured on duty, as well as a new proposal to discontinue paid leave for employees when they are capable of performing light duty.[12]

Although the Town emphasizes that the parties bargained unsuccessfully over a three-month period, there were only four meetings held. The first bargaining session involved only the Union's initial response to the Town's proposal regarding injury leave and light duty. At this session, the Union indicated not only its preference to defer bargaining on the subject until negotiations for a successor to

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11 (from page 1158)

We see no need to address the issue discussed at length by our colleague in her concurring opinion. Although she suggests that the Union has raised a significant issue concerning the definition of impasse for cases involving employers within the jurisdiction of the JLMC, the question did not arise in this case and need not be decided. Rather, that issue would be better left for a future case after the question has been fully briefed by the parties in the context of the circumstances in which it arises.

12

It is undisputed that the criteria for eligibility for receipt of paid injured-on-duty leave is a mandatory subject of bargaining. City of Springfield, 12 MLC 1051 (1985).

the recently negotiated one-year collective bargaining agreement, but also its refusal to negotiate concerning those aspects of the Town's proposal that would change provisions of the recently consummated agreement.[13] However, the Town concluded the meeting by reiterating its intention to amend certain parts of the agreement governing injured leave and to implement a new light duty policy. At the second meeting between the parties, the Union reiterated its position that it did not wish to amend the existing contract. Nevertheless, it offered a counterproposal containing a significant number of substantive items, including a general salary increase for employees, increased pay for employees required to work light duty, changes in the detail and vacation allowance policies and improvements in control room security. In addition, the Union proposed a light duty procedure that greatly differed from the Town's, and an abbreviated list of light duty tasks as compared with the Town's proposal. Thus, after two of the four meetings held, the parties had merely explained their respective initial proposals. In addition, the Town had not abandoned its attempt to amend parts of the newly negotiated agreement despite the Union's repeated opposition.

The third session resulted in major alterations in the Town's initial proposal. At this meeting the Town offered its counterproposal, which still contained provisions relating to injury leave in general. However, the proposed light duty procedure specified that eligibility for light duty be determined by a neutral physician, as the Union had proposed. In other respects the Town's light duty proposal still differed from the Union's counterproposal. Later in the third session, after the Union emphasized the economic impact on employees of the Town's proposal, the Town withdrew its proposed changes in injured-on-duty leave in general, thus reducing its proposal to the new light duty requirement and procedure. It also accepted the Union's counterproposal that employees on light duty not be counted toward the contractual minimum manning guarantee. The Union then asserted that the acceptance of the neutral physician concept was an insufficient concession for the light duty requirement and that some additional monetary or other benefit to employees was needed for the proposal to be acceptable to the unit employees. At the session on October 27, the Union reiterated this position and the Town responded that it would not agree to any monetary benefit. At the conclusion of the final session the Town announced that it intended to implement its final proposal as of August 22 unless the Union offered another counterproposal within ten days. The Town later advised the Union that although it would participate in further bargaining and mediation under the auspices of the JLMC, pursuant to the Union's October 31 petition, it intended to implement the policy on November 14 if the Union "continues to demand substantial concessions" beyond those which the Town had already offered.

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[13] Absent the consent of the union, an employer may not change conditions of employment contained in an existing collective bargaining agreement. Town of Randolph, 8 MLC 2044, 2051 (1982); City of Salem, 5 MLC 1433, 1437 (1978).

We cannot conclude that the parties were hopelessly deadlocked, or their positions irreconcilable, at the conclusion of bargaining on October 27. At their penultimate meeting, the Town had significantly altered its proposal, dropped all proposed changes to the injury leave policy in general, and agreed to two aspects of the Union's counterproposal. This recent moderation of the Town's proposal could have produced, given further time for discussion and exploration of views, changes in the parties' positions. Each party's light duty proposal also involved a number of procedural and substantive issues, such as the types of light duty tasks, which they apparently had neither fully explored nor reached agreement on. Although the Union persevered at the final session in its position that it desired some economic concession for employees, it remained willing to bargain in an attempt to resolve the disputed issues. The Town considers significant the Union's refusal to immediately abandon, after the Town had modified its own proposal, the position seeking some economic benefit for employees in exchange for agreement to the light duty proposal. We find more significant the fact that insufficient time had passed between the date that the Town announced its last offer and the date when the Town implemented the changes encompassed by that offer. On the record presented we are not convinced that the parties had thoroughly explored all areas of dispute between them. See Wood's Hole, 14 MLC at 1529-30. "Where the parties are still negotiating and exchanging substantive proposals, an impasse is not necessarily created by the lack of agreement by one side to the other's position on one or more major issues, even in the face of public statements that a certain issue is critical to settlement." Id. at 1530.

In view of the parties' limited exploration of the issues during limited bargaining on a major issue that was not raised in the recently concluded contract negotiations, we well as the evidence of recent significant movement in the Town's position and the Union's continued willingness to bargain and to participate in mediation by the JLMC,[14] we cannot conclude that the parties had exhausted all possibility of compromise so that further bargaining would be futile. Since we conclude that the parties were not at impasse, we must conclude that the Town violated Section 10(a)(5) and (1) of the Law when it implemented its final proposal concerning light duty on or about November 14, 1986. Therefore, we shall order the Town to restore the status quo that existed prior to implementation of the policy by rescinding the policy and by reimbursing employees for any loss of pay and benefits they sustained as a result of the Town's implementation of the policy. In addition, the Town will be directed to bargain upon request with the Union to impasse or resolution prior to changing policies affecting employee eligibility for paid injury leave, including any light duty policy. The allegation that the Town violated Section 10(a)(6) of the Law is dismissed.

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[14] The parties have stipulated that the Town advised the Union that it was willing to participate in further bargaining and mediation. There is no evidence that the Town has refused to attend any mediation session or otherwise failed to participate in good faith in the JLMC's mediation or fact-finding procedures, and therefore we dismiss the allegation of the Complaint that the Town violated Section 10(a)(6) of the Law.

ORDER

On the basis of the foregoing, it is hereby ordered that the Town of Stoughton shall:

1. Cease and desist from:

   a. Unilaterally discontinuing paid injury leave to employees who are not capable of returning to the full duties they performed prior to being injured on duty without first affording the Union an opportunity to bargain to impasse or resolution.

   b. Refusing to bargain in good faith, at the Union's request, about proposed changes that may affect employees' eligibility for injury leave, including any proposed policy on light duty.

   c. In any like or similar manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Law.

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

   a. Rescind the light duty policy implemented on November 14, 1986.

   b. Restore the prior practice of allowing employees injured on duty to remain on paid leave until able to perform their full duties.

   c. Upon request, bargain in good faith with the Union about proposed changes that may affect employees' eligibility for injury leave, including any proposed policy on light duty.

   d. Reimburse employees for any loss of pay and benefits they may have suffered as a result of the Town's unlawful implementation of its light duty policy, plus interest on any sums owing, at the rate specified in G.L. c.231, Section 6B, with quarterly compounding.

   e. Sign and post immediately in conspicuous places where employees usually congregate or where notice to employees are usually posted and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.

   f. Notify the Commission within thirty (30) days of service of this Decision and Order of the steps taken to comply with its provisions.

SO ORDERED.

HAIDEE A. MORRIS, COMMISSIONER
WILLIAM G. HAYWARD, JR., COMMISSIONER

CONCURRING OPINION OF CHAIRPERSON MARIA C. WALSH

I concur in the conclusion that the Town of Stoughton (Town) violated G.L. c.150E, §10(a)(5) and (1) by its unilateral implementation of a light duty policy on or about November 14, 1986 and in the Order issued herewith. For the reasons discussed in the opinion signed by my colleagues, I agree that the Town and the International Brotherhood of Police Officers (Union) had not bargained either to agreement or to a good faith impasse as of the date of the Town's implementation of the light duty policy.

I write separately to address the relationship between the law enforcement role of the Labor Relations Commission (Commission) and the mediation role of the Joint Labor Management Committee (JLMC). When read together, G.L. c.150E and Section 4A of chapter 1078 of the Acts of 1973, as amended (Section 4A), reveal that the Commission and the JLMC are responsible for different, albeit related responsibilities.

The JLMC has complete and exclusive jurisdiction to manage the process of bargaining involving municipal police and fire employees when the JLMC asserts its jurisdiction in a bargaining situation. The JLMC has exclusive jurisdiction to determine how and for how long the collective bargaining process shall proceed in all bargaining disputes over which the Committee asserts jurisdiction. See Section 4A(3)(a), as amended by 1987 Mass. Stat. ch. 589, §1. The JLMC specifies the procedural steps that must be taken by the parties to try to reach closure or to exhaust the bargaining process.

In contrast, the Commission has exclusive jurisdiction to investigate, hear and decide whether Chapter 150E has been violated. At times, the conduct which forms the basis of a prohibited practice charge at the Commission arises in the context of negotiations that are supervised by the JLMC. As a consequence, the Commission has discretion to "refer" ... "any matter alleging a refusal to bargain in good faith ..." to the JLMC. G.L. c.150E, §11, 456 CMR 15.13, and frequently has done so. The Commission is responsible for enforcing chapter 150E through the adjudication of litigated cases. If the Commission concludes that a respondent has violated the Law the Commission may order an appropriate remedy, which could include a directive that the respondent participate in good faith in negotiations conducted under the auspices of the JLMC, and could include restoration of the terms and conditions of employment in existence prior to an unlawful unilaterally implemented change. Consistent with the policies of Section 4A, as amended, any remedial order by the Commission requiring bargaining in police and fire negotiations over which the JLMC has asserted jurisdiction should include a requirement that bargaining be conducted under the direction of the JLMC. Thus, the statutory enforcement mechanism of the Commission complements and supports the statutory dispute resolution procedures of the JLMC.

Historically, the agencies have cooperated to ensure that their separate functions are administered in a complimentary fashion. Nothing in Section 4A prohibits the Commission from investigating, adjudicating, and remedying unlawful

conduct in municipal police and fire cases while the JLMC asserts its jurisdiction to supervise the same parties in their contract negotiations.

The degree of deference which the Commission can or should give to a determination by the JLMC concerning the existence of an impasse in a bargaining dispute over which the JLMC has asserted jurisdiction is an important issue. Because this record does not establish that the JLMC asserted jurisdiction over this dispute, my colleagues have concluded that the question need not be resolved in this case. I understand the Union to argue, however, that the Commission cannot find that an impasse has been reached in police or fire negotiations unless the JLMC has determined that the collective bargaining process has been exhausted. In effect, the Union seems to argue that a JLMC determination of impasse is a procedural prerequisite to a Commission conclusion that the parties are at impasse.

Prior to 1986, the Commission analyzed whether successor contract negotiations were at impasse based upon evidence of the conduct of the parties, the length and significance of their negotiations, and their contemporaneous understanding of the state of their negotiations. E.g., Commonwealth of Massachusetts, 8 MLC 1499, 1513 (1981). The Commission continues to apply that analysis to mid-term negotiations, to negotiations in the private sector, and in this case.

In 1986 the General Court amended G.L. c.150E, §9 to prohibit employer unilateral changes during successor negotiations until the Board of Conciliation and Arbitration (BCA) had certified that the collective bargaining process had been completed. 1986 Mass. Stat. ch. 198. By its action, the Legislature provided a simplified procedural prerequisite to an employer's lawful implementation of a unilateral change during successor negotiations. No change could be made until after the BCA had certified the completion of the collective bargaining process. Instead of analyzing the conduct of the parties and the progress of their negotiations, the Commission now need only ascertain whether the BCA has certified the completion of the collective bargaining process.[15]

The Union argues that the Commission should apply a similar procedure to police or fire disputes. Employers should not be permitted to make unilateral changes (i.e., the Commission should not find an impasse to exist) unless the JLMC has declared negotiations to have been exhausted. Application of this procedural prerequisite to employer unilateral changes in police and fire disputes would not only provide a consistent policy in public sector negotiations, but also would simplify litigation of these cases before the Commission.

The language of the statutes differs in important respects, however; and in the absence of a legislative amendment similar to 1986 Mass. Stat. ch.198, the

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[15] It is possible that following the BCA's certification of the completion of the collective bargaining process the parties might renew negotiations and thereby remove the impasse; but such a situation is rare.

Commission has no statutory basis to view JLMC action as a procedural prerequisite to a determination of impasse. Where the parties choose not to petition the JLMC to assert its jurisdiction, or where the JLMC has not asserted jurisdiction, the statute imposes no procedural impediment to the implementation of a unilateral change following a good faith impasse in successor negotiations. In such situations, the Commission must continue to apply its traditional analysis to determine whether an impasse existed at the time of the employer's change.

The Commission's role in determining the existence of an impasse for the purposes of deciding whether to excuse an employer's unilateral change differs from the role of a mediation agency in making a determination of impasse. Specifically, the Commission must determine whether the employer has bargaining in "good faith" to an impasse at the time that the employer took the alleged unilateral action. The Commission's analysis focuses on a particular point in time. With the passage of time, however, the relative positions of parties in most bargaining disputes change, and an impasse that once existed could be broken.[16] As a result, a mediation agency that supervises the negotiations over time likely will have a different perspective than will the Commission.

The parties and the process benefit from the application of consistent standards. Through adoption of an evidentiary test that relies on the JLMC's expertise and that ensures that the Commission will act consistent with the JLMC's determination of whether an impasse exists, the Commission can ensure application of a uniform analysis, and can incorporate the expertise of the mediation agency into the Commission's action. Therefore, if and when the JLMC determines that the process of collective bargaining has been exhausted that determination should be dispositive of the Commission's analysis. Similarly, if the evidence reveals that the JLMC has determined that the parties had not exhausted the process of collective bargaining at the time that the employer made its unilateral change, the Commission should not contradict that determination.[17] When, as in this case, the JLMC has not yet determined that the process of collective bargaining has been exhausted, the Commission must exercise its separate responsibility to determine whether the employer has acted unlawfully by analyzing the evidence of the parties' conduct to determine whether an impasse existed.

MARIA C. WALSH, CHAIRPERSON

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[16] In some circumstances it is possible that an employer's post-impasse unilateral change broke the impasse and made further bargaining fruitful.

[17] Application of a consistent analysis requires evidence of the JLMC's assessment as of the date that the employer made the change. Evidence of subsequent JLMC action would not necessarily be relevant since the employer's implementation of a change may have broken an impasse that existed.

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 opportunity to present evidence, the Massachusetts Labor Relations Commission has issued a decision finding that the Town of Stoughton has violated Sections 10(a)(5) and (1) of Massachusetts General Laws Chapter 150E by unilaterally implementing a light duty proposal on or about November 14, 1986, thus changing employees' eligibility for paid injury leave.

WE WILL NOT unilaterally discontinue paid injury leave to employees who are not capable of returning to the full duties they performed prior to being injured on duty without first affording the International Brotherhood of Police Officers an opportunity to bargain to impasse or resolution or in any like or similar manner, interfere with, restrain or coerce employees in the exercise of their rights under G.L. c.150E.

WE WILL rescind the light duty policy implemented on November 14, 1986, restore the prior practice of allowing employees injured on duty to remain on paid leave until able to perform their full duties, and make employees whole for any loss of pay and benefits they may have suffered as a result of the implementation of the light duty policy.

WE WILL, upon request, bargain in good faith with the International Brotherhood of Police Officers about proposed changes that may affect employees' eligibility for injury leave, including any proposed policy on light duty.

For the Town of Stoughton