
**CITY OF BOSTON AND BOSTON POLICE SUPERIOR OFFICERS
FEDERATION, MUP-7976 (5/20/94).**

54.23 overtime
54.581 minimum manning
54.5841 workload
67.8 unilateral change by employer

Commissioners Participating:

William J. Dalton, Chairman
William G. Hayward, Jr., Commissioner
Claudia T. Centomini, Commissioner

Appearances:

Alan Shapiro, Esq. - Representing the Boston Police
Superior Officers Federation

Susan M. Whalen, Esq. - Representing the City of Boston

DECISION¹

Statement of the Case

The Boston Police Superior Officers Federation (Union), filed a prohibited practice charge with the Labor Relations Commission (Commission) against the City of Boston (City). After an investigation, the Commission issued a complaint alleging that the city had unilaterally changed a practice of ensuring that two patrol supervisors were assigned to each of the five lettered areas within the City, which affected both the workload and safety of bargaining unit employees in violation of Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law).

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Pursuant to 456 CMR 13.02(1), the Commission has redesignated this case as one in which the Commission shall issue a decision in the first instance.

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Hearing Officer Victoria B. Caldwell conducted an evidentiary hearing on behalf of the Commission at which the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce documentary evidence.

The Union and the City subsequently filed briefs and challenges to the hearing Officer's Findings of Fact. Having considered these, we modify her findings and issue this opinion.

Findings of Fact

The Union represents all uniformed superior officers in the ranks of Sergeant, Lieutenant and Captain employed in the City's police department. The police department has various bureaus responsible for specific police functions. The Bureau of Field Services is responsible for the department's patrol operations in each of the five areas (A through E) of the City. There are currently two district stations in each area.² Patrol Officers and their supervisors are assigned to one of the five areas, not to a particular district within one of those areas. However, officers are instructed about which and to which station they must report at the beginning of their shifts; this is typically where the officers would maintain their lockers. No written transfer is required when moving an officer from one district to another within the same area.

When an officer reports for a shift,³ the duty supervisor (typically a lieutenant) reads off the duty list and the patrol supervisor (typically a sergeant) performs the inspection of patrol officers to ensure they are fit for duty and properly equipped. After roll call, the

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Although there are currently two district stations in each area, these district stations had previously been closed and were in the process of being reopened during the late 1980s. The record reflects that, by January 1989, four of the areas had two district stations. By 1990, District 6 in Area C had reopened and all five areas had two district stations.

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The department maintains three shifts for patrol officers and their supervisors: the day shift (7:30 to 4:00), "first halves" (4:00 to midnight) and "last halves" (midnight to 7:30).

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patrol supervisors issue radios and vehicle keys to officers and are responsible for recording which officer received which equipment. The patrol supervisors are also responsible for ensuring that vehicle inspection forms have been submitted for each vehicle being used during the shift. The patrol supervisors must collect these items and must sign officers' Activity Logs before they are dismissed from duty.

Although the duty supervisors remain at the stations, the patrol supervisors are responsible for performing routine supervision of patrol officers. Routine supervision includes responding to 911 emergency calls and all other serious calls and generally checking on officers during the course of the shift. Because they are often the only supervisors at the scene of a crime or emergency situation, patrol supervisors are responsible for organizing the scene and setting up a command post and supervising the scene until a higher ranking officer, if any, arrives. Patrol supervisors are also generally responsible for police officers who are working paid details within the geographical area.⁴ In addition, patrol supervisors must perform routine checks of licensed premises. If two patrol supervisors are on duty in a given shift in one area, each reports to a different station and is responsible for supervising patrol officers in roughly half the area. The patrol officers assigned to the areas are roughly divided in half between the two stations.

When only one patrol supervisor is on duty in an area, he or she is responsible for supervising all of the patrol officers in the entire area, but only attends the roll call and inspects the patrol officers at one station. When there is only one patrol supervisor, that supervisor must frequently drive between the two stations for various paperwork and housekeeping needs as well as drive longer distances between calls. In some areas, the increased driving has reduced the number of calls to which a supervisor can respond. Having only one patrol supervisor per area significantly increases the number of patrol officers' reports to sign, paid details to monitor, and the number of licensed premises within the supervisor's area of responsibility. Supervisors are generally busier during the course of the shift when they must cover both districts.

On January 30, 1990, Police Commissioner Francis M. Roache issued a

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Paid details involving three or more patrol officers are required under the terms of the parties' collective bargaining agreement to have one superior officer assigned to the job.

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memorandum to all bureau chiefs informing them of the dire fiscal situation of the City. The memorandum provided, in relevant part, as follows:

...As a department, we can no longer afford to allow any function to be performed on overtime that is not absolutely vital to the public's safety. To that end, I am directing each of you to submit revised overtime plans for the remainder of this fiscal year, as well as next fiscal year. The plans should take into consideration the following departmental guidelines:

...no supervisory overtime (emphasis in original).

On February 2, 1990, Deputy Superintendent Paul F. Bankowski issued a memorandum to all supervisors regarding the new overtime restrictions. This memorandum stated that, "If there is only P.S. for Dorchester and South Boston we will cover the Area -- do not hire additional P.S." The memorandum further stated that if a supervisory shortage occurs, the operations division should be notified "...to see if there are any supervisors available city-wide."

Following the issuance of these directives, in February 1990, patrol supervisors in several areas noticed an increase in the number of shifts where there was only one patrol supervisor assigned to an area. If there were less than two patrol supervisors per shift, fewer patrol supervisors were hired on an overtime basis. On February 20, 1990, the union's counsel sent a letter to Police Commissioner Francis M. Roache informing him that the "...practical effect of the 'no supervisory overtime' edict has been to radically increase the workload of sergeants functioning as patrol supervisors." The Union's counsel requested that the changes in working conditions be rescinded and that the City bargain with the Union before any changes are made. The City did not respond to this letter.

The record reflects that the percentage of shifts covered by one patrol supervisor increased in calendar 1990 from calendar year 1989 by an average of 21.36%. In 1989, 90.38% of all shifts had two or more patrol supervisors assigned per area. In 1990, this percentage dropped to 69.02%. However, the records further indicate that only 67.27% of shifts had two or more patrol supervisors in 1988. The percentage for 1991 was 76.02%.⁵

5 (see page 1607)

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We credit testimony of Superintendent Paul Evans that "supervisory overtime" was not eliminated. However, in 1990 it was diminished so that only essential overtime was used to ensure that accepted levels of police services were maintained in the several areas. City Exhibit 5 (as resubmitted by agreement of the parties) confirms this view. In 1988, 67.27% of the shifts had 2 or more patrol supervisors. It is logical to infer that 32.73% of the shifts deployed less than 2 patrol supervisors per area.⁶

Opinion

It has been clearly established that an employer may not alter terms and conditions of employment without providing the union representing its employees with prior notice and an opportunity to bargain over the proposed changes. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 574 (1983). to establish a violation of Sections 10(a)(5) and (1) of the Law, a union must show that: (1) an employer has changed an existing practice or instituted a new one; (2) the change affected employees wages, hours or working conditions and thus impacted a mandatory subject of bargaining; and (3) the change was implemented without prior notice or an opportunity to bargain. Town of Andover, 1 MLC 1103, 1106 (1974); City of Haverhill, 16 MLC 1077, 1079 (1989). The employer's obligation to bargain extends to working conditions established through past practice, in addition to those contained in a collective bargaining agreement. City of Everett, 19 MLC 1304, 1311 (1992); City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC 1694, 1699 (1983).

Unilateral changes in mandatory subjects of bargaining are per se violations of Section 5 of the Law and the employer's good faith is not relevant. City of Malden, 7 MLC 1188, 1190 (1980), aff'd 7 MLC 1518 (1980); City of Boston, 3 MLC 1450, 1457 (1977);

5 (from page 1606)

These figures were drawn from an agreed summary of police department records that indicate the percentage of total shifts in each area which were covered by only one patrol supervisor.

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See City Exhibit 5 which is appended hereto [Appendix A].

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Town of Wayland, 3 MLC 1724,1731 (H.O. 1977), *aff'd* 5 MLC 1739 (1979). Accordingly, the absence of anti-union animus does not render an employer immune from its statutory duty to bargain in good faith.

The principal question in this case is whether there has been a sufficiently significant change from a past practice to rise to the level of a unilateral change violation. We conclude that the evidence does not support finding a change in past practice.

Prior to late January 1990, patrol supervisors generally supervised only one district, not an entire area. The statistics showing the percentage of shifts when an area was covered by one patrol supervisor demonstrate a marked change from the three months surveyed in 1989 to the same three months in 1990. Patrol supervisors in 1989 patrolled an entire area fewer than 10% of their shifts; in 1990, that number increased to over 30% of their shifts.

The City has introduced evidence from 1988 showing an incidence of area-wide patrol supervision similar to that in 1990, with a 1988 average of 32% of the shifts running with one patrol supervisor in the three months surveyed. However, these figures also indicate that September 1988, had far fewer single supervisor shifts than June or February.⁷ In addition, as noted in the findings of act, "...in February 1990, patrol supervisors in several areas noticed an increase in the number of shifts where there was only one patrol supervisor assigned to an area." The affected employees perceived the change.

Superintendent Evans, who has had approximately 14 years of command experience, testified that the police department has not had a policy that would require more than one patrol supervisor per area. Assignment of patrol supervisors has varied depending on the deployment of uniformed officers, the number of 911 calls, the high and violent crime areas, and the balancing of the demand for service with the force available.

Neither the Commission nor the National Labor Relations Board had ever set a definitive length of time required for a practice to become a binding term or condition of

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September, 1988 had 82.45% of the shifts fully staffed with supervisors, compared to 56.44% and 62.76% for June and February, respectively.

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employment. Nor do we believe that it is practical to consider an artificial or arbitrary length of time as a proper standard to be applied in making these decisions. A case-by-case approach appears to be the sensible method.

It appears from all of the credible evidence that the only constant in the police department's deployment of patrol supervisors is that the deployment has been inconsistent. Sometimes they deployed more patrol supervisors than they did in others. We think it inappropriate, however, to seize upon a limited period of high deployment, and rule that it necessarily establishes a "condition of employment" that cannot be varied without meeting a bargaining obligation.

CONCLUSION

Upon the evidence as a whole, the Union has produced insufficient evidence to persuade us that the City has changed an existing condition of employment or instituted a new one. The practice regarding the assignment of patrol supervisors to the various areas fluctuated over the years. There was never a uniform practice in that regard. Because the existence of a unilateral change to an established condition of employment is the sine qua non to finding a violation in cases of this sort, its lack requires dismissal of the complaint. IT IS SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, CHAIRMAN

WILLIAM HAYWARD, JR.,
COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER

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APPENDIX A

BOSTON POLICE DEPARTMENT

	SHIFTS WITH 2 OR MORE PATROL SUPERVISORS				PERCENT OF TOTAL SHIFTS			
	1988	1989	1990	1991	1988	1989	1990	1991
AREA A								
FEBRUARY	48	77	63	75	55.17	91.67	75.00	89.29
JUNE	43	85	42	72	47.78	94.44	46.67	80.00
SEPTEMBER	79	72	58	N/A	87.78	80.00	64.44	N/A
Area A Total	170	234	163	147	63.67	88.64	61.74	84.48
AREA B								
FEBRUARY	63	84	68	73	72.41	100.00	80.95	86.90
JUNE	66	89	73	62	73.33	98.89	81.11	68.89
SEPTEMBER	5	89	75	N/A	5.56	98.89	83.33	N/A
Area B Total	134	262	216	135	50.19	99.24	81.82	77.59
AREA C								
FEBRUARY	47	71	63	76	54.02	84.52	75.00	90.48
JUNE	45	86	53	71	50.00	95.56	58.89	78.89
SEPTEMBER	72	89	59	N/A	80.00	89.89	65.56	N/A
Area C Total	164	246	175	147	61.42	93.18	66.29	84.48
AREA D								
FEBRUARY	65	77	56	67	74.71	91.67	66.67	79.76
JUNE	66	89	57	52	73.33	98.89	63.66	57.78
SEPTEMBER	89	88	72	N/A	98.89	97.78	80.00	N/A
Area D Total	220	254	185	119	82.40	96.21	70.08	68.39
AREA E								
FEBRUARY	50	65	57	57	57.47	77.38	67.86	67.86
JUNE	34	65	42	57	37.78	72.22	46.67	63.33
SEPTEMBER	43	67	73	N/A	47.78	74.44	81.11	N/A
Area E Total	127	197	172	114	47.57	74.62	65.15	65.52
CITYWIDE TOTAL	815	1193	911	662	61.05	90.38	69.02	76.09