

TOWN OF LEXINGTON AND LOCAL 377, I.B.P.O., MUP-7757 (4/17/96).

- 28. Relationship between c.150E and Other Statutes
Not Enforced by Commission
- 54.5833 non-smoking policy
- 54.8 mandatory subjects
- 67.15 union waiver of bargaining rights
- 67.8 unilateral change by employer
- 82.4 bargaining orders

Commissioners Participating:

Robert C. Dumont, Chairman
 William J. Dalton, Commissioner
 Claudia T. Centomini, Commissioner

Appearances:

- Peter C. Phillips, Esq. - Representing Local 377, I.B.P.O.
- Philip Collins, Esq. - Representing the Town of Lexington

DECISION

Statement of the Case

On January 25, 1990, the International Brotherhood of Police Officers, Local 377 (Union), filed a charge with the Labor Relations Commission (Commission) alleging that the Town of Lexington (Town) had engaged in a prohibited practice in violation of Sections 10(a)(5) and, derivatively, 10(a)(1) of G.L. c. 150E (the Law) by unilaterally imposing a smoking ban in all police vehicles. Following an investigation of the Union's charge, the Commission issued a Complaint of Prohibited Practice on June 26, 1990, alleging that the Town failed to bargain in good faith in violation of Sections 10 (a)(5) and, derivatively, 10(a)(1) of the Law, by prohibiting smoking in police vehicles without giving the Union prior notice and an opportunity to bargain. Pursuant to notice, John B. Cochran conducted an evidentiary hearing on behalf of the Commission on December 18, 1990, at which time the parties had a full opportunity to examine and cross examine witnesses and to introduce documentary evidence. Both parties filed post-hearing briefs.

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Pursuant to 456 CMR 13.02(1), the Commission redesignated the case as one in which the Commission would issue a decision in the first instance, and the hearing officer issued Recommended Findings of Fact in accordance with 456 CMR 13.02(2) on August 11, 1993. Both parties filed challenges to the recommended findings of fact, which we address below. Based on our review of the record and the legal arguments of the parties, we make the following findings of fact and conclusions of law.¹

Findings of Fact²

The Union is the exclusive collective bargaining representative for a bargaining unit of

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The Town filed a Motion to Admit New Evidence with the Commission on August 17, 1993. Its motion sought to introduce an anticipated study by the Environmental Protection Agency concerning the effects of second-hand smoke from tobacco products. The Union objected to that motion on the grounds that the hearing record had been closed for two years, the hearing officer had already issued his recommended findings of fact, and the new evidence was not relevant because there was no evidence that second-hand smoke had been a problem in the Town's police cruisers. On February 6, 1995, the Town again requested the Commission to open the hearing in this matter to permit the Town to submit Tobacco Control Regulations that became effective on February 15, 1995, and the Union again objected to the Town's request.

Generally, we will allow motions to reopen a record to take additional evidence when the proffered evidence is "newly discovered evidence, which was in existence at the time of the hearing, but of which the moving party was excusably ignorant, despite the exercise of reasonable diligence." Boston City Hospital, 11 MLC 1065, 1075 (1984); see, also, City of Worcester, 5 MLC 1397, 1398 (1978). One of the underlying rationales for this general rule is to promote finality in Commission proceedings. Here, the new evidence proffered by the Town did not even exist at the time the hearing officer closed the record in this matter. Further, a general study about second-hand smoke conducted more than three years after the Town imposed a smoking ban in all police cruisers is not relevant to show the reasons the Town imposed that ban three years earlier because that information was not available to the Town at the time. Therefore, we decline to reopen the record at this time.

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Neither party contests the Commission's jurisdiction in this matter.

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police officers and sergeants employed by the Town of Lexington in its Police Department. The Town employs approximately fifty-three police officers, and about twenty percent of those officers smoke.

There are ten police department vehicles used by members of the bargaining unit represented by the Union, including seven cruisers, two unmarked vehicles, and a Jeep. Police officers patrol the four sectors of the Town, using up to eight vehicles per shift. While on patrol, officers spend the majority of their time in their vehicles. Members of the public, including arrestees and accident victims, are also transported in police department vehicles as needed.

Prior to July 31, 1989, the Town permitted members of the bargaining unit represented by the Union to smoke in Police Department vehicles while on duty. If smokers and non-smokers were assigned to the same vehicle, the smokers would accommodate the non-smokers.

Although officers were allowed to smoke in their vehicles, there were certain smoking restrictions in place prior to July 31, 1989. For example, there has been a long-standing provision in the Lexington Police Department's Rules and Regulations prohibiting "conspicuous smoking while on duty." Further, as part of the Pension Reform Act of 1987, the Legislature restricted police officers hired after January 1, 1988 from smoking tobacco products.³ On February 16, 1988, Paul Furdon, the Town's Police Chief, issued a General Order announcing that statutory restriction and prohibiting smoking in the Police Station, except in two designated areas: the locker room and the second floor interview room.⁴ That

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G.L. c.41, Section 101A provides:

Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for the implementation of this section.

4 (see page 1679)

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General Order also announced that, in March 1988, the Town Meeting would be "asked to vote on a new By-Law, (Article 50), prohibiting smoking in many public places including the WORKPLACE." Further, the Legislature enacted the Clean Indoor Air Act, Chapter 759 of the Acts of 1987, which included a restriction on smoking in public buildings, except in areas specifically designated as smoking areas. G.L. c. 270, Section 22. Section 21 of G.L. c. 270 defined a public building as "any enclosed, indoor area that is located in a building owned or occupied by any department or agency of the commonwealth, or any political subdivision thereof." In response to that legislation, Chief Furdon issued a new General Order on October 6, 1988, stating that:

Recent studies have demonstrated that those exposed to smoke from smokers suffer many of the same diseases such as heart disease, emphysema and other respiratory illnesses.

Under the Lexington by-law an absolute ban on smoking in companies and public buildings is permitted and encouraged.

Effective immediately, smoking is prohibited in any portion or place within the Lexington Police Station building.

In March 1989, the Lexington Town Meeting amended its by-laws to include Article XXVI, Section 8, making it "unlawful for any person to smoke in any Workplace, except in specifically Designated Smoking Areas..."⁵

4 (from page 1678)

Chief Furdon's February 6, 1988 General Order provided:

Effective Immediately -- smoking will be prohibited in the Lexington Police station except in two (2) designated areas:

1. Locker Room area
2. Interview Room (2nd floor)

All officers are reminded that rules and regulations of the department prohibit "conspicuous smoking" while an officer is on duty. This means while in uniform, on regular or special duty and in the public view.

5 (see page 1680)

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The Town did not approach the Union about the restriction on smoking by newly-hired employees implemented on January 1, 1988, Chief Furdon's February 16, 1988 General Order limiting smoking at the Police Station to the locker and interview rooms, or the October 6, 1988 General Order extending the smoking ban to the entire Police Station before implementing them. Nor did the Union ever demand to bargain about them, although it was aware of them.⁶ Sometime prior to July 31, 1989, Chief Furdon contacted the State Department of Public Health (DPH) to discuss smoking restrictions. Subsequently, he received a letter from DPH dated July 28, 1989 that stated, in part:

You are able to establish a smoking policy for your department, so the vehicles would also come under your jurisdiction page 3 (section 5) of the Clean Indoor Air Act-I understand the wording is vague, but in essence it says you can make policies that supersede the current legislation.

In addition, DPH provided Furdon with several fact sheets about the negative health effects of indoor smoking and second-hand smoke. One of those fact sheets described some of the

5 (from page 1679)

Section 8.2.c of the new by-law defined workplace as:

"...any enclosed area of a structure or portion thereof in the town in which three (3) or more employees perform services for their employer. The Workplace shall include any space or room, under the control of a public or private employer, which employees normally frequent during the course of employment including, but not limited to, work areas, offices, employee lounges and restrooms, conference rooms, and hallways."

Section 8.3.d defined designated smoking area as:

"the area of a Public Place or Workplace designated by persons having control of the premises in which smoking is permitted. Such areas shall be designated as to minimize exposure of non-smoking employees and the general public to smoking byproducts."

The Town asks that we find as a matter of fact that a police vehicle is a space that employees normally frequent within the meaning of Section 8.2.c. However, the record does not support a finding that this provision of the Town's by-laws was intended to include police vehicles.

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We have made this supplemental finding in response as requested by the Town.

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possible impacts of secondhand smoke and noted that "an employer can prohibit smoking entirely in company facilities and in company-owned vehicles." A second issued by the United States Environmental Protection agency discussed some of the possible public health implications of passive smoking.

On July 31, 1989, Chief Furdon issued a General Order providing that:

Effective immediately smoking is prohibited in any Lexington police vehicle.

These vehicles are an enclosed daily workplace for our personnel, most of whom are non-smokers. This order is intended to safeguard the health of our personnel by keeping our vehicles free from second-hand smoke which is known to contain harmful chemicals including carcinogens.

Chief Furdon attached a fact sheet on secondhand smoke he had received from DPH to the Order. Prior to issuing that General Order, neither Chief Furdon nor any other representative of the Town contacted the Union about the smoking ban in Police Department vehicles.⁷

Union President Edward O'Brien sent Furdon a letter dated October 22, 1989, stating that the Union considered Chief Furdon's July 31, 1989 Order to be a unilateral change in working conditions and demanding to bargain to resolution or impasse about the issue.⁸

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The Union asks that we amend the hearing officer's recommended findings of fact to reflect Chief Furdon's testimony that an officer who violates a Department rule or regulation could be subject to discipline, including a rule prohibiting "conspicuous smoking while on duty." Because the record supports that additional finding, we amend the findings of fact accordingly.

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Although O'Brien testified that he spoke with Furdon about the July 31, 1989 Order before sending Furdon the Union's demand to bargain in October, the only details O'Brien recalled about that discussion was that it was a one-minute conversation concerning the dangers of smoking. Union Secretary Robert Simmons recalled only that O'Brien had related to him a casual conversation that O'Brien had had about the no-smoking policy with the

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Further, O'Brien's letter requested that the Chief not enforce the no-smoking policy until the parties had completed negotiations over it. Chief Furdon responded by letter dated October 27, 1989 stating that, according to DPH, state and local laws permitted the smoking ban in police vehicles. Chief Furdon further expressed his opinion that the issue was not negotiable, but indicated that he was "happy to discuss any Department issues with the Union at any agreed upon date and time." After receiving Chief Furdon's October 27 letter, no member of the Union's executive board spoke with Chief Furdon about the smoking ban in department vehicles because the Union did not view his letter as an offer to bargain.⁹

On June 13, 1990, the Union submitted the following proposal to Chief Furdon:

Smoking in police owned vehicles shall be prohibited except vehicles occupied by smokers only.

All smoking in vehicles will cease one hour prior to the end of the shift.

While occupant is smoking vent system must be on.

8 (continued)

Town Manager, and the Chief did not recall having any conversations with Union officials about the July 31 Order between the date it issued and the date he received O'Brien's October 22, 1989 demand to bargain. Further, O'Brien's October 22, 1989 letter to Chief Furdon did not reference any earlier discussions with the Chief.

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The Town challenges this finding on the ground that it is irrelevant why the Union did not contact the chief after receiving his October 27 letter. However, because we find that the Town's argument on this point goes more to the weight we should give that evidence, we do not disturb the hearing officer's finding. Further, we find that, even if the Union's attorney initially questioned whether the July 31, 1989 General Order involved a mandatory subject of bargaining, O'Brien testified that the reason no member of the Union's executive board spoke with the Chief was because the Union did not view Furdon's letter as an offer to bargain.

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Chief Furdon responded by letter dated June 15, 1990 rejecting the Union's proposal and outlining the reasons for that position.¹⁰

Opinion

The issue before us here is whether the Town violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law when its Police Chief issued a General Order on July 31, 1989 prohibiting smoking in police vehicles. It is well-settled that a public employer unilaterally alters a condition of employment involving a mandatory subject of bargaining without first giving a union representing its employees prior notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); City of Fall River, 20 MLC 1352, 1357 (1994). Therefore, a threshold issue we must consider is whether Chief Furdon's July 31, 1989 General Order prohibiting smoking in police vehicles was a mandatory subject of bargaining.

We first considered the issue of whether smoking policies are mandatory subjects of bargaining in Abington School Committee, 21 MLC 1630 (1995). As we observed in that case, employees have an interest in bargaining about smoking policies that restrict the extent to which they may smoke in the workplace. However, under the test established in Town of Danvers, 3 MLC 1559 (1977), the employees' interest in bargaining must be balanced against the public employer's managerial interest to determine whether a particular smoking restriction is a core governmental decision restricted to the discretion of the public employer. Abington School Committee at 1633. Because the school committee in that case had not shown that its decision to ban smoking resulted from an overriding interest or educational policy concern, we found the smoking policy at issue there to be a mandatory subject of bargaining.

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The Union asks that we supplement the hearing officer's findings to reflect that the Town has never rescinded Chief Furdon's July 31, 1989 order, and the Town asks us to find that, since June 15, 1990, the Union has not sought any further meetings with the Chief or any other Town official. However, because the central issue before us is whether the Town violated the Law by unilaterally implementing the July 31, 1989 General Order, we need not make these additional findings requested by the parties.

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Here, the Town argues that the order prohibiting smoking in police vehicles had only a de minimus impact on working conditions that was outweighed by the Town's concern with public health issues. According to the Town, the evidence shows only that it is inconvenient for officers assigned to police vehicles when they are restricted from smoking in their cruisers and that the restriction does not interfere with the officers' ability to do their jobs. Therefore, when this inconvenience is weighed against the evidence concerning the potential hazards of secondhand smoke, the balance tips in favor of permitting the Town to impose the smoking ban without bargaining with the Union.

Although the Town would have us characterize the impact of the smoking ban on working conditions as de minimus, we recognized in Abington School Committee that the extent to which employees can smoke in the workplace is a benefit that directly affects the conditions under which they work. Accordingly, where, when, or whether an employee is permitted to smoke is a subject about which employees have an interest in bargaining. However, that interest is not absolute. It can be outweighed by evidence that an employer has a management interest that is central to its mission as a governmental entity. Here, the Town submitted evidence describing some of the potential health hazards of secondhand smoke.¹¹ However, absent more definitive evidence that smoking in police vehicles posed a direct public health hazard, we are unable to conclude that the Town's decision to prevent its police officers from ever smoking in police vehicles stemmed from an overriding managerial prerogative. Therefore, the particular smoking ban at issue here was a mandatory subject of bargaining.

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In its post-hearing motions to re-open the record, the Town proffered a study on second-hand smoke by the United States Environmental Protection Agency and Tobacco Control Regulations subsequently adopted by the Lexington board of Health pursuant to M.G.L. c.111, Section 31. Because this post-hearing evidence was not available to or considered by Chief Furdon when he issued his October 31, 1989 General Order banning smoking in police vehicles, it is not relevant to the issue of whether that smoking ban was a mandatory subject of bargaining over which the Town was required to bargain before implementing it in October 1989.

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The Town also defends Chief Furdon's July 31, 1989 General Order on the ground that it was privileged under the Clean Indoor Air Act, St. 1987, c. 759. According to the Town, it had no duty to bargain before implementing the ban on smoking in police vehicles because it implemented that ban pursuant to the Clean Indoor Air Act and that Act is not one of the statutes enumerated in Section 7(d) of the Law, which provides that collective bargaining agreements prevail over the listed statutes. See, Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 126 (1989); Burlington v. Labor Relations Commission, 390 Mass. 157, 163 (1983). The Town's position is that, because the Clean Indoor Air Act is not listed in Section 7(d), the Town had no duty to bargain before complying with the mandate of that Act. The Clean Indoor Air Act prohibits smoking in public buildings, except in designated smoking areas. Further, it defines public buildings as "any enclosed, indoor area located in a building." Therefore, the language of that statute did not mandate the Town to prohibit smoking in its police vehicles. Accordingly, the Clean Indoor Air Act did not impose a ban on smoking in police vehicles that superseded the Town's duty to bargain.¹²

Finally, the Town defends the Chief's action on the ground that the Union waived its right to bargain here. The Town advances two principal arguments in support of that position: 1) the Union did not seek to bargain when the Town proposed or implemented prior smoking restrictions in February 1988, March 1988, October 1988, and March 1989; and 2) waited more than three months after the Chief announced his July 31, 1989 ban on smoking in police vehicles to demand bargaining and subsequently abandoned that demand when the Chief rejected its proposal in June 1990. However, the record does not establish that the Union

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Similarly, G.L. c.41, Section 101A, which prohibits municipalities from appointment smokers as police officers after January 1, 1988 cannot be read as an outright ban on smoking in police vehicles by all officers. Therefore, even though it is not listed in Section 7(d), it did not relieve the Town of its duty to bargain here.

Further, the City was not relieved of its duty to bargain by the mere existence of a Town by-law restricting smoking in public places and the workplace because Section 7(d) of the Law recognizes that parties can negotiate an agreement that overrides a municipal by-law. See, e.g., Town of Lee, 11 MLC 1274 (1984); City of Worcester, 5 MLC 1414 (1978); City of Springfield, 4 MLC 1517 (1977).

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waived its bargaining rights here. First, the fact that the Union may have acquiesced to prior smoking restriction imposed by the Town does not demonstrate that the Union waived its right to negotiate over the specific order at issue here. See, e.g., Amesbury School Committee, 11 MLC 1049, 1055 (1984)(union did not waive its right to bargain over workloads of high school department heads by not protesting prior changes in workloads of middle school department heads); Burlington School Committee, 7 MLC 1273, 1275 (1980)(union did not waive its right to challenge changes in a performance instrument by not challenging similar changes in a prior school year). Second, the Union had no obligation to demand bargaining after the Chief issued the July 31, 1989 General Order that order effectively presented the Union with a fait accompli, and unions presented with a fait accompli need not engage in futile requests to bargain. See Boston Water and Sewer Commission, 12 MLC 1250, 1255 (1985).

Accordingly, we find that the smoking ban in police vehicles implemented by the July 31, 1989 General Order was a mandatory subject of bargaining and that the Town violated Sections 10(a)(5) and, derivatively, 10(a)(1) by not giving the Union prior notice or an opportunity to bargain before implementing that ban. Therefore, we must consider the appropriate remedy for the Town's action.

Remedy

The traditional remedy for a unilateral change in a mandatory subject of bargaining is an order that the employer restore the status quo that existed prior to the change and bargain to resolution or impasse with the union upon demand. Because we have found that the Town technically violated Sections 10(a)(5) and, derivatively, 10(a)(1) by unilaterally implementing the July 31, 1989 General Order, the appropriate remedy here is to order the Town to rescind that order and to bargain on demand with the Union before implementing a similar smoking ban. However, we recognize that intervening research concerning the direct public health hazards of secondhand smoke on passengers in police cruisers may determine whether a ban on smoking in its police vehicles continues to be a mandatory subject of bargaining. Therefore, our order to bargain is limited to any current obligation the Town may have to bargain about banning smoking in its police vehicles.

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ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Town of Lexington shall:

1. Cease and desist from:
 - a) Unilaterally implementing the July 31, 1989 General Order prohibiting smoking in Lexington police vehicles;
 - b) Failing and refusing to bargain in good faith with the Union about those aspects of smoking restrictions that are mandatory subjects of bargaining;
 - c) In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:
 - a) Rescind the July 31, 1989 General Order prohibiting smoking in Lexington police vehicles;
 - b) Upon request by the Union, bargain in good faith to resolution or impasse about those aspects of smoking restrictions that are mandatory subjects of bargaining;
 - c) Post immediately in all conspicuous places where bargaining unit members usually congregate and where notices are usually posted, and leave posted for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees;

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- d) Notify the Commission in writing within thirty (30) days of receiving this decision and order of the steps taken to comply with it.

**COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION**

ROBERT C. DUMONT, CHAIRMAN

WILLIAM J. DALTON, COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER

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

The Massachusetts Labor Relations Commission has determined that the Town of Lexington (Town) violated Section 10(a)(5) and derivatively Section 10(a)(1) of General Laws, Chapter 150E, the Public Employee Collective Bargaining Law, by unilaterally implementing a General Order on July 31, 1989 prohibiting smoking in all police vehicles without giving Local 377, I.B.P.O. (Union) prior notice and an opportunity to bargain to resolution or impasse about that restriction on smoking.

WE WILL NOT implement smoking restrictions that are mandatory subjects of bargaining without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

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

WE WILL rescind the July 31, 1989 General Order prohibiting smoking in Lexington police vehicles.

WE WILL, upon request by the Union, bargain in good faith to resolution or impasse about those aspects of smoking restrictions that are mandatory subjects of bargaining.

Police Chief