

bargain the impacts of that decision. On April 16, 1997, Commissioner Claudia Centomini, serving as the Administrative Law Judge (the ALJ), conducted a hearing in which the parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On June 2, 1997, the parties filed post-hearing briefs. On July 14, 1997, the ALJ issued her Recommended Findings of Fact. The Employer filed its challenges to the Recommended Findings of Fact on September 15, 1997, and the Union filed its response to those challenges on September 17, 1997. After reviewing the Employer's challenges and the record, we adopt the ALJ's findings of fact with certain modifications noted below.

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In the Matter of TOWN OF MANSFIELD

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

Case No. MUP-1567

54.25	<i>work shifts</i>
54.31	<i>impact of management rights decisions</i>
54.8	<i>mandatory subjects</i>
67.14	<i>management rights</i>
67.15	<i>union waiver of bargaining rights</i>
67.8	<i>unilateral change by employer</i>
82.3	<i>status quo ante</i>
82.4	<i>bargaining orders</i>

August 4, 1998

*Robert C. Dumont, Chairman*  
*Claudia T. Centomini, Commissioner*  
*Helen A. Moreschi, Commissioner*

*Michael C. Lehane, Esq.*      *Representing Town of Mansfield*  
*Stephen B. Sutliff, Esq.*      *Representing International Brotherhood of Police Officers*

**DECISION**

Statement of the Case

On July 1, 1996, the International Brotherhood of Police Officers (the Union) filed a charge with the Commission alleging that the Town of Mansfield (the Employer) had violated Sections 10(a)(1) and 10(a)(5) of M.G.L. c. 150E (the Law). On March 5, 1997, the Commission issued a complaint alleging that the Employer violated the Law by eliminating three patrol officer positions from the Police Department's split shift without providing the Union with notice or an opportunity to

Findings of Fact

The Union represents a bargaining unit consisting of patrol officers and sergeants employed in the Town of Mansfield's police department. There are four shifts that are available to these police officers. They are: (1) 12:00 a.m. to 8:00 a.m.; (2) 8:00 a.m. to 4:00 p.m.; (3) 4:00 p.m. to 12:00 p.m.; and (4) the split shift. Officers bid on their shifts on an annual basis. The chief of police posts a notice entitled "Shift Bidding" listing the different shifts with spaces below each shift. The notice is posted for approximately two weeks. The officers would write their names on the shift bidding notice to indicate which shift they wish to work the following year.

The split shift includes a 4:00 p.m. to 12:00 a.m. shift the first day, a 4:00 p.m. to 12:00 a.m. shift the second day, and another shift of 12:00 a.m. to 8:00 a.m. immediately following the 4:00 p.m. shift. The police officer would then report the following day for a shift of 12:00 a.m. to 8:00 a.m.<sup>1</sup> The Employer established the split shift in the mid-1970's, and the split shift has been in existence up to this date. Prior to January 19, 1996, three patrol officers, one sergeant and one dispatcher were assigned to the split shift. The dispatcher is not in the bargaining unit with the patrol officers and the sergeants.

On January 2, 1996, Police Chief Arthur O'Neill (the Chief) posted a memorandum with the annual shift bid. The memorandum stated that the split shift would no longer exist as it currently exists and only a sergeant and a dispatcher would be assigned permanently to that shift. The closing date for the annual shift bid was January 9, 1996 and the new assignments became effective on January 19, 1996. Because of the memorandum, none of the patrol officers signed up for the split shift. The Union did not make a demand to bargain.<sup>2</sup>

The chief is a "strong chief" under M.G.L. c. 41, Section 97A.<sup>3</sup> It has always been in the chief's discretion to determine shift strength

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1. The Employer challenges the ALJ's finding that the split shift allowed the officers more continuous time off between shifts. The Employer argues that the Union's representative stated in his testimony that working with other officers on the split shift created an "esprit de corps" but made no mention of the split shift allowing for more continuous time off between shifts. Because the Commission does not require a change to negatively affect working conditions when determining whether a violation has occurred, this finding is not relevant to our final decision. See Commonwealth of Massachusetts, 22 MLC 1459 (1996). Thus, we have eliminated this finding from our findings of fact.

2. The ALJ made the finding that "the Chief did not provide the Union with notice or an opportunity to bargain." The Employer argues that the Union had notice because the Chief's memo was posted on January 2, 1996 and the change was not implemented until January 19, 1996. Upon review, we conclude that this finding is not necessary to make our final decision. Therefore, we have modified the ALJ's finding accordingly.

3. M.G.L. c. 41, Section 97A, known as the strong chief statute, vests a chief of police with broad discretion in the operation of the police department and empowers him to act in certain matters independently of the Board of Selectmen or other Town government.

and how many officers should be assigned to a shift to ensure sufficient staffing levels. As long as O'Neill has been the police chief, he has determined the appropriate shift strength for a shift. (O'Neill was acting police chief for the Town from June 1993 to September 1994, and he became the chief of police in September 1994.) For example, during the snowstorm of April 1, 1997, the chief put a detective and court officer in uniform because two officers could not report for duty that day. Normally, the chief has not permanently removed officers from a shift.<sup>4</sup>

### Opinion

The issue before us is whether the impacts of eliminating three patrol officer positions from the split shift affected the patrol officers' terms and conditions of employment. If so, the Town would have been obligated to bargain with the Union over the impacts of its decision to eliminate the patrol officer positions from the split shift. The Town essentially raises three arguments: (1) the assignment of police officers is an inherent managerial prerogative; (2) the management rights clause of the collective bargaining agreement permitted the chief to implement the Town's decision without bargaining with the Union; and (3) the Union waived its right to protest the change in the staffing level of the split shift by inaction. We shall address the Town's arguments *seriatim*.

#### I. Mandatory Subject of Bargaining

The Town argues that assigning police officers is an inherent managerial prerogative. The Town suggests that the court in *Chief of Police of Dracut v. Dracut*, 357 Mass. 492 (1970) held that a police chief has the authority to determine staffing levels and to assign officers to particular duties at any given time. In response, the Union argues that changing an employee's hours of work is a mandatory subject of bargaining and, thus, the Town must bargain with the Union over changing the hours of work for those employees who are no longer able to work the split shift.

Beginning with our decision in *Town of Danvers*, 3 MLC 1119, 1573 (1977), we have concluded that decisions regarding the number of employees a public employee hires to deliver a particular service is within the employer's managerial discretion and not subject to collective bargaining. It is also well established that public employers may be required to bargain over the impacts of decisions, even though they are not required to bargain about the

decisions themselves. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). Here, the Town's decision to eliminate three positions on the split shift was essentially a level of services decision over which it was not obligated to bargain. As the Union argues, however, that decision had a direct impact on the working conditions of the patrol officers it represents. The Town's decision to eliminate the positions from the split shift affected the patrol officers' hours of work, a mandatory subject of bargaining. *Holyoke School Committee*, 12 MLC 1443, 1450 (1985). Therefore, the Town had an obligation to bargain with the Union about the decision to eliminate positions from the split shift.

#### II. Management Rights Clause

The Town argues that the management rights clause of the collective bargaining agreement permitted the chief to implement this decision without bargaining with the Union.<sup>5</sup> The Town suggests that the management rights clause should be read with the hours of work provision. Read together, the language of the contract gives management the right to schedule police officers at its own discretion, subject to the restrictions in Article XXVII.

The Commission has consistently held that an employer asserting the affirmative defense of contract waiver must show that the subject was consciously considered and that the union knowingly and unmistakably waived its rights. *Board of Trustees of the University of Massachusetts/University Medical Center*, 21 MLC 1795, 1802 (1995). In determining whether a union has contractually waived its right to bargain, the Commission will first examine the language of the contract. *Town of Marblehead*, 12 MLC 1667 (1986). These articles address the employer's right to determine the appropriate level of services for the Town but the articles do not eliminate the Town's duty to bargain the impact of the Town's decision to eliminate the patrol officer positions from the split shift without bargaining. To the contrary, these articles speak generally of the employer's right to determine the appropriate level of services for the Town. The articles do not, however, eliminate the Town's duty to bargain with the Union over the patrol officers' change in their hours of work by the Town's decision to eliminate patrol officer positions from the split shift.

#### III. Waiver

The Town's final argument is that the Union waived its right to protest the change in staffing level of the split shift by inaction. The

4. The Employer challenges this finding. The Employer argues that this finding misstates the chief's authority in making shift strength determinations. The Town suggests that we add a sentence: "However, during O'Neill's tenure as Chief, the Union has never proposed to guarantee the staffing levels of shifts at the bargaining table nor has the Union challenged the Chief's authority to determine the appropriate staffing levels for the Police Department." We decline to add this proposed finding because that fact is not critical to our final decision.

5. Although the Town argued that the management rights clause allowed the Town to make this change, the provisions of the contract were not introduced into the record at the hearing. However, even if they were part of the record, as stated above, we do not find these provisions of the contract to be dispositive of the case. For purposes of discussion, we note that the relevant provisions cited by the Town are:

Article XVIII. Subject to this Agreement and applicable law, the rights of the Town, all rights, function and prerogatives of the Town formerly exercised or exercisable by the Town, remain vested not, include without being limited to, all rights and

powers given the Town By-Laws the right to operate, manage and control the work of its employees and the use of its properties, facilities and equipment; the right to establish duties, to require such standards of performance as it may deem appropriate and to maintain discipline, order and efficiency; to determine methods and procedures and to direct employees; the right to promote employees and to determine the necessity for filling a vacancy; the right to select and hire to promulgate and force all reasonable rules relating to policies, procedure and operations, safety measures and the right generally to control and supervise the department's operations and affairs.

Article XXVII. (A) The hours of work or shift schedule shall reflect the so-called four and two work schedule and such shall be the permanent work schedule. More specifically, each member of the collective bargaining group shall be scheduled four (4) consecutive days of duty followed by two (2) consecutive days off... The schedule specialty positions may be 5 and 2 or 4 and 2, depending on the operational needs of the department. It is understood that no sergeant or patrolman shall be required to fill the above positions on a permanent basis.

Union did know of the change prior to the date in which the new assignments for the split shift were announced. In response, the Union argues that the Chief's memorandum of January 2, 1996 was posted along with the annual shift bid and, thus, presented a *fait accompli* to the Union.

The question then becomes whether a demand to bargain at that point would have been fruitless. *Holliston School Committee*, 23 MLC 211 (1997). The affirmative defense of waiver by inaction must be supported by evidence that a union had actual knowledge and a reasonable opportunity to negotiate over the proposed change, but unreasonably or inexplicably failed to bargain or to request to bargain. *Id.* at 213. Here, the Chief posted a memorandum on January 2, 1996 that the patrol officers could no longer bid for the split shift and, along with the memorandum, the Chief posted the annual shift bid. The bargaining unit members had until January 9, 1996 to sign up for the shifts and the new shifts became effective January 19, 1996.

The Town argues that the Chief has always been receptive to the Union's requests in the past and that the Union representative could not state any instances in which the Chief refused to bargain with the Union when the Union had made a demand to bargain.<sup>6</sup> To determine whether the union has been presented with a *fait accompli*, however, the Commission must consider whether, under all the facts, it can be said that the employer's conduct has progressed to the point at which a demand to bargain would be fruitless. *Scituate School Committee*, 9 MLC 1010 (1982). Given the short period of time that the bargaining unit members had to apply for their shifts, we find that the Union rightfully believed that the Town presented it with a *fait accompli* and acted accordingly.

Therefore, for the above state reasons, we find that the Town violated the Section 10(a)(5) of the Law by failing to bargain over the impacts of eliminating patrol officer positions from the split shift.

#### IV. Remedy

The Union requests an order to restore the *status quo* for the bargaining unit members affected by the Town's decision to eliminate positions from its split shift. The Commission seeks to fashion appropriate remedies to place employees in the position they would have been in but for the unfair labor practice. *Amesbury School Committee*, 11 MLC 1049, 1058 (1984); *City of Gardner*, 10 MLC 1218, 1222 (1983), and the traditional remedy for violations of the duty to bargain in good faith is an order restoring the *status quo* until the bargaining obligation has been fulfilled. *Natick School Committee*, 11 MLC 1387, decision, but to the impact of the decision upon mandatory subjects of bargaining, the Commission will fashion a remedy that will restore the *status quo* of the affected mandatory subjects, rather than the decision itself. *Town of Burlington*, 10 MLC 1387-1389 (1984).

In *Town of Burlington*, we found that the Town has failed to bargain about the impacts of its managerial decision to re-assign police

prosecutorial duties. Accordingly, we ordered the Town to offer to bargain with the Union over the impact of its decision to reassign those duties and to pay the affected employees the wages and benefits they would have received during the prospective period of impact bargaining. The facts here are analogous to those in *Town of Burlington*, and we believe that they warrant a similar remedy. Therefore, we will order the Town to offer to bargain with the Union over the impacts of the decision to eliminate three positions from the split shift. In addition, the Town will pay any affected patrol officers the wages and contract benefits they would have received if they had continued to work their former hours as long as the parties are engaged in impact bargaining. This remedy attempts to place the Union and the affected employees in the position they would have been in absent the Town's unlawful conduct.

#### Order

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

#### 1. Cease and desist from:

- a. Failing to bargain collectively with the Union over the impact of the Town's decision to eliminate patrol officer positions on the split shift.
- b. In any like or similar manner, interfere with, restrain, or coerce any employees in the exercise of their rights guaranteed under the Law.

#### 2. Take the following affirmative action to effectuate the purposes of the Law:

- a. Upon request of the Union, bargain collectively in good faith over the impact of eliminating three patrol officers' positions from the split shift.
- b. Beginning on the date of receiving this decision, pay the employees affected by the decision to eliminate the split shift any additional wages or contract benefits they would have received if they had continued to work their former hours on the split shift.
- c. Post in conspicuous places where employees congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
- d. Notify the Commission in writing within thirty (30) days of this decision and order of the steps taken to comply.

SO ORDERED.

#### NOTICE TO EMPLOYEES

WE WILL NOT refuse to bargain with the International Brotherhood of Police Officers over the impact of the decision to eliminate patrol officer positions on the split shift.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce employees in the exercise of their rights under the M.G.L. c. 150E.

6. Although the Town argued this point in its brief, no findings have been made on this issue. However, it is not necessary to supplement the findings of fact with the

testimony on this issue because, as explained above, the issue is not relevant to our final decision.

## MLRC Administrative Law Decisions—1998

WE WILL, upon request of the International Brotherhood of Police Officers, bargain collectively in good faith the impact of the decision to eliminate patrol officer positions on the split shift.

WE WILL, beginning on the date of receiving this decision, pay the employees affected by the decision to eliminate the split shift any additional wages or contract benefits they would have received if they had continued to work their former hours of the split shift.

[signed]  
Chief of Police

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