In the Matter of TOWN OF HUDSON

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 363

Case No. MUP-1714

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| *54.232* | *police paid details* |
| *54.8* | *mandatory subjects* |
| *67.15* | *union waiver of bargaining rights* |
| *67.8* | *unilateral change by employer* |
| *76.* | *Refusal to Bargain in Good Faith* |
| *82.3* | *status quo ante* |
| *92.47* | *motion to dismiss* |

*April 1, 1999*
*Robert C. Dumont, Chairman*
*Helen A. Moreschi, Commissioner*

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| *Jean E. Zeiler, Esq.* | *Representing the International Brotherhood of Police Officers* |
| *D. M. Moschos, Esq.* | *Representing the Town of Hudson* |

## DECISION[1]

On December 24, 1996, the International Brotherhood of Police Officers, Local 363 (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission). The charge alleged that the Town of Hudson (the Town) had violated Sections 10(a)(5) and (1) of Chapter 150E of Massachusetts General Laws (the Law). On August 8, 1997, following an investigation, the Commission issued a Complaint of Prohibited Practice alleging that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by implementing a new paid detail policy without bargaining with the Union to resolution or impasse.

On March 3, 1998 and March 18, 1998, Commissioner Claudia Centomini, acting as a hearing officer (the Hearing Officer), held a hearing in which the parties had a full opportunity to present documentary and testimonial evidence, and to make oral arguments for the record. At the hearing on March 18, 1998, the Town filed a Motion to Dismiss for Unclean Hands.[2] The Town and the Union filed post-hearing briefs on April 21, 1998 and April 24, 1998, respectively. On May 1, 1998, the Town filed a Motion to Strike Certain Portions of the Union's Post-Hearing Brief. On August 19, 1998, the Hearing Officer issued her findings. On September 2, 1998, the Town filed challenges to the findings, and, on September 8, 1998, the Union filed a response to the Town's challenges to the findings. We have considered the parties challenges to the findings, their argument, and the record in this matter. Based on that review, we make the following findings of fact and conclusion of Law.

### Findings of Fact[3]

The Union represents a bargaining unit consisting of regular and reserve patrol officers and sergeants employed by the Town in its police department. Prior to June 16, 1996,[4] the police department assigned non-municipal paid details in the following manner: any officer who was willing to work a non-municipal paid detail would voluntarily sign the officer's name on an availability roster for the particular day and shift the officer wished to work.

Sergeant David Stephens (Sergeant Stephens), who was the Union's president in 1996, was responsible for filling detail requests. Sergeant Stephens scheduled the officers to work a detail if they were on the detail schedule on a particular day that a detail was requested. If several officers were on the detail availability roster for a particular day or time, Sergeant Stephens would select the officer whose name was highest on the list to an available detail. When an officer was assigned to a detail, Sergeant Stephens would move that officer's name to the bottom of the availability roster. An officer would be ineligible for an overtime detail assignment if the overtime assignment, coupled with the hours previously worked by the officer, resulted in the officer working more than sixteen (16) hours in a one day period.[5] Sergeant Stephens would then bypass that officer and select the next officer from the availability roster to fill the detail assignment. If an officer wished to cancel (referred to by the police department as "booking-off") a detail for which the officer had been scheduled, the officer could call an hour before the scheduled detail to cancel the detail. Subsequently, Sergeant Stephens would assign the next officer whose name appeared on the availability roster to that detail. If an officer missed a detail or did not report (no-show) for a detail, Sergeant Stephens would attempt to call the officer at home and locate the officer to determine why the officer did not report for the detail. Sergeant Stephens was usually able to locate the no-show officers, and the officers would respond to the details. Although Sergeant Stephens never had difficulty locating a no-show officer for a scheduled detail, if it did occur, he would have tried to locate the next officer on the roster who was available to accept the detail assignment.

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

2. During the hearing, the Hearing Officer took the Town's motion under advisement. In her Recommended Findings of Fact (findings), the Hearing Officer indicated that, because the Town's motion requires a full consideration of the facts of the case, the Commission would address the motion in its final decision. We address the Town's motion below.

3. The Commission's jurisdiction in this matter is uncontested.

4. The Town argues that the assignment of non-municipal paid details remained in effect until June 16, 1996, when the Town implemented a new paid detail policy. Further, the Town argues that the Hearing Officer's findings, as written, imply that a change in detail policy occurred in February 1996. The Town's argument is supported by the record, and we have clarified the findings accordingly.

5. The Hearing Officer found that, if an officer was scheduled to be in court the day of an available detail assignment or had already worked an eight-hour shift, the officer would be ineligible for a detail assignment. The Town contends that an officer's receipt of a detail assignment was not contingent on having worked less than eight hours. Rather, the Town contends, an officer would be ineligible for a detail assignment if the overtime assignment, combined with the hours previously worked by the officer resulted in the officer working more than sixteen hours in a one day period. We find the Town's argument to be supported by the record and have amended the findings to reflect that fact.

Prior to June 16,1996, the police department's disciplinary policy for paid details consisted of giving letters of reprimand to officers who were either late or failed to report for non-municipal paid details. Also prior to June 16, 1996, the detail policy allowed officers to switch from non-municipal details to overtime assignments.[6] The officers' overtime rate of pay is slightly higher than the detail rate.

If a vendor were to cancel a non-municipal detail, an officer may or may not have been paid for that detail. Article XXII of the parties' collective bargaining agreement provides that an officer would not receive pay for a detail if the officer had been notified at least two hours in advance that the detail had been cancelled. However, if a vendor failed to cancel a non-municipal detail at least two hours in advance, the officer would have been paid for four hours.

In or about January 1996, Chief Paul M. Veo (Chief Veo), the police chief for the Town,[7] issued a copy of a new, proposed operating procedure for non-municipal paid details (the proposed detail policy) to Sergeant Stephens. Chief Veo issued the proposed detail policy in response to his concerns that public safety would be jeopardized if the officers failed to report for details and that the police department was encountering problems with officers booking-off or not reporting for details thereby resulting in details not having proper police coverage[8] Further, Chief Veo sought to discourage officers from canceling details without giving reasonable notice. The proposed detail policy provided, in relevant part:

> Effective immediately, any officer who books off a detail with less than three (3) hours notices without a PROVEN emergency (as determined by the Chief of Police), will be removed from the availability roster and Calling Order Board for a period of two (2) weeks. He/she will also be replaced for any other details previously assigned for that two week period and will not be issued IOU's when removed from the schedule. Any preexisting IOU's on the Calling Order Board will remain in place and can be used after the punishment period. The officer's names will be added at the bottom of the Calling Order list at the completion of the disciplinary period. Subsequent offences will receive a punishment double that of the last offence. A notation of any such action will be kept permanently in the employee's personnel folder. After four (4) offenses, the Chief of Police will review the employee's history of infractions and impose disciplinary action which he sees fit.
>
> If an employee fails to show up for a scheduled non-municipal assignment, he/she will be removed from the NND Calling Order and Schedule Boards, as described in the previous section, for a period of one (1) month. A penalty of three (3) months will be prescribed for the second offense and appropriate disciplinary action will be imposed by the Chief of Police for any subsequent violations.
>
> ...Officers are not permitted to cancel non-municipal detail assignments to work Department overtime shifts.

Chief Veo informed Sergeant Stephens that he wanted to negotiate with the Union regarding his desire to implement the proposed detail policy.[9] Subsequently, Chief Veo requested that the Union review the proposed detail policy to determine whether the Union had any recommendations regarding the policy. Sergeant Stephens was concerned that the proposed detail policy was too vague and that it gave the police chief too much discretion in disciplining the officers.[10]

On February 7, 1996, Sergeant Stephens asked Chief Veo to bargain with the Union over the proposed detail policy. Chief Veo complied with Sergeant Stephens's request, and the parties scheduled a negotiating session.[11] The Union's negotiating team included Garrett Mahoney (Mahoney), a national representative for the Union, Michael Shriner (Shriner), the Union's vice president, Tom Bodreau (Bodreau), the Union's secretary-treasurer, and Sergeant Stephens. The Town's negotiating team included Town Counsel D. M. Moschos, Paul Blazer (Blazer), the Town's administrator, and Chief Veo. Prior to meeting with the Town, the Union's membership met to review the proposed detail policy.[12] On March 28, 1996, the parties' negotiating teams met to negotiate[13] the proposed detail policy. At that meeting, the Union offered the following amendments to the proposed detail policy: (1) the three hour notice for cancellations be reduced to two hours; (2) removal from the availability roster be reduced from two weeks to one week; (3) the provision placing an officer's name at the

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6. The Town argues that the assignment of non-municipal paid details remained in effect until June 16, 1996, when the Town implemented a new paid detail policy. The Town argues that the Hearing Officer's findings, as written, imply that the Town implemented a new detail policy in January 1996. We agree with the Town and have amended the findings to reflect the record.

7. Chief Veo is the appointing authority for the Town' s police department. Under M.G.L. c. 31, Section 41, the appointing authority has the responsibility for determining and imposing the appropriate discipline on a civil service employee.

8. The Town contends that the Hearing Officer should have included in the findings the fact that Chief Veo was concerned about details not having proper police coverage when the officers booked-off or failed to report for detail assignments. Upon reviewing the record, we have modified the findings to include this fact because it is relevant to show the rationale behind Chief Veo's decision to implement a new detail policy.

9. The Town contends that the Hearing Officer's finding implies that Chief Veo was planning to unilaterally implement the proposed detail policy. Upon reviewing the record, we have amended the findings to clarify that Chief Veo intended to implement the proposed detail policy subject to negotiations with the Union.

10. On May 1, 1998, the Town filed a Motion to Strike certain portions of the Union's post-hearing brief. The Town contends that Sergeant Stephens met with the Union's membership prior to the negotiation session with the Town and that he testified regarding his personal concerns about the proposed detail policy at that time. Further, the Town contends that Sergeant Stephens did not express either the concerns of the membership or his personal concerns about the revised detail policy during the membership meeting on April 17, 1996. In response to the Town's Motion to Strike, the Hearing Officer indicated that her recommended findings reflect: both: 1) the concerns of the membership as supported by the record; and 2) those statements in which Sergeant Stephens testified to his personal concerns.

11. The Town argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

12. The Town argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

13. The Hearing Officer found that the parties had met to discuss the proposed detail policy. The Town argues that the findings should be amended to state that the parties met to negotiate over the proposed policy. After reviewing the record, we have clarified the findings to accurately reflect the record.

bottom of the availability roster at the completion of the disciplinary period be deleted; (4) instead of having punishment double with each subsequent offense, the second offense would cause two weeks' removal from the eligibility list, the third offense would cause three weeks' removal, etc.; (5) the notation of any disciplinary action regarding paid details in an officer's personnel file would be removed after one year, instead of being permanently placed in the personnel file; (6) an officer's failure to report for a detail would result in two weeks' removal from the availability roster, rather than being removed from the roster for one month; and (7) a second no-show offense would result in a one-month penalty rather than a three-month penalty. The Union also wanted the Town to allow officers to cancel non-municipal details for municipal details.

In response to the Union's proposals, the Town made the following counter-proposal[14] to the proposed detail policy (the revised detail policy): (1) an officer's name would not be moved to the bottom of the availability roster following a period of discipline regarding a detail; (2) the notation of any disciplinary action regarding details would be removed after one year instead of being kept permanently in an officer's personnel file; (3) the Town reduced the penalty for a second no-show offense from three months to two months; and (4) the Town would allow an officer to cancel a non-municipal detail assignment to work an overtime shift with a minimum of three hours' notice.

At the conclusion of the meeting on March 28, 1996, the Town and the Union tentatively agreed to the Town's counter-proposal, subject to ratification by a majority of the Union's membership.[15] Everyone present at the negotiation session understood that the Union's acceptance of the revised detail policy was subject to ratification by the Union's membership by a majority vote.[16] Subsequently, the Union's membership met on April 17, 1996 to discuss and vote on the tentative agreement[17] reached at the March 28, 1996 negotiating session between the Town and the Union. The Union's membership, including Officer Shriner, Officer Bodreau, and Sergeant Stephens, who comprised the Union's negotiating team, voted unanimously by a vote of twelve to zero to reject the tentative agreement.[18] Sergeant Stephens informed Chief Veo that the Union rejected the tentative agreement. Although Sergeant Stephens and Mahoney believed that additional bargaining over the detail policy was possible, the Union did not offer any proposals to the Town regarding the revised detail policy. On June 7, 1996, Town Counsel sent Mahoney a letter stating the following:

> This letter follows up on our telephone conversation of June 5, 1996, regarding the negotiations over the proposed Chief's policy relative to extra duty administrative sanctions. The parties negotiated over this policy and reached an agreement, subject to ratification by the Union and by the Town. The Union did not ratify the agreement. Since that event, neither side has changed their position in the matter, and therefore, we are an [sic] impasse over this policy. This is a mid-term bargaining item, and pursuant to the rights of the Town under Chapter 150E of the Massachusetts General Laws, the Chief of Police will implement the unratified agreement, effective Sunday, June 16, 1996.[19]

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14. The Town contends that the Hearing Officer mischaracterized the Town's subsequent proposals as "revisions." In response to the Town's argument, we have reviewed the record and have amended the findings to clarify that the Town's subsequent proposal was a counter-proposal.

15. The Town argues that the Hearing Officer's finding that "the Union advised the Town that acceptance of the revised detail policy was subject to ratification by the Union's membership by a majority vote" is misleading. However, the Union argues that the Hearing Officer's finding is sufficient. We have clarified the findings to accurately reflect the record.

16. Also in its motion to strike, the Town moved to strike those portions of the Union's post-hearing brief that imply that Union's negotiating committee had reserved the right to reject the detail policy at the membership ratification meeting. Contrary to the Town's argument, the Hearing Officer found that the Union's statements suggest that the Union's membership, not the Union's negotiating committee, had final approval of the negotiated detail policy. Therefore, the Hearing Officer denied the Town's motion to strike those portions of the Union's brief that refer to ratification of the detail policy by its members.

17. The Town argues that the Hearing Officer's finding which refers to the parties' tentative agreement as "the revised detail policy" is misleading and requests that the findings be amended to clarify that the Union's membership voted specifically on the parties' tentative agreement. The Union contends that the Hearing Officer's finding is sufficient and should not be modified. Upon reviewing the record, we have clarified the findings accordingly.

18. The Town argues that the Hearing Officer's findings should be amended to indicate that the Union's negotiating team, which tentatively agreed to the Town's counter-proposal during the parties March 28, 1996 negotiating session, voted against the tentative agreement at the Union's membership meeting on April 17, 1996. The Union contends that the Hearing Officer's finding is sufficient and opposes the Town's argument. Upon reviewing the record, we have amended the findings.

19. At the hearing, the Town requested the June 7, 1996 letter be admitted into the record. The Hearing Officer admitted that letter into the record with the understanding that the letter was not being admitted for the truth of the matters asserted in it. The Town also submitted an affidavit from Town Counsel's secretary, Sharon Palinsky, in which she attests to mailing the letter to Mahoney. However, Mahoney did not recall receiving the letter. Subsequently, the Town offered the following additional evidence to show that Mahoney had received the June 7, 1996 letter: 1) a letter addressed to Mahoney from Town Counsel dated April 22, 1996 that Mahoney testified he received in the mail; 2) a letter addressed to Mahoney from Town Counsel dated February 12, 1996 that Mahoney testified he received; and 3) a letter addressed to Mahoney from Town Counsel dated March 13, 1996 that Mahoney testified he received. The Town contends that Mahoney's receipt of the letters enumerated above contains a presumption that the June 7, 1996 letter was also received by Mahoney. The Hearing Officer declined to find whether Mahoney received the letter and deferred that decision to the Commission.

The Town challenges the Hearing Officer's finding regarding the June 7, 1996 letter because it is misleading. Further, the Town contends that the findings should indicate that Mahoney actually received the June 7, 1996 letter from Town Counsel. The Union objects to the Town's challenges regarding the letter.

After reviewing the record, we believe that it supports a finding that Mahoney received the June 7, 1996 letter from Town Counsel. Although "[t]he mailing of a letter properly addressed and postpaid . . . constitutes *prima facie* evidence of delivery to the addressee in the ordinary course of mail . . . [a]s soon as evidence is introduced that warrants a finding that the letter failed to reach its destination, the artificial compelling force of the *prima facie* evidence disappears, and the evidence of non-delivery has to be weighed against the likelihood that the mail service was efficient in the particular instance, with no artificial weight on either side of the balance. . . . The evidence present[s] a pure question of fact." *Hobart-Farrel Plumbing and Heating Co.* v. *Klayman et al.*, 302 Mass. 508, 509-510 (1939). At the Hearing, the Town introduced as evidence an affidavit from Sharon Palinsky (Palinsky), secretary to Town Counsel, stating that she mailed copies of the June 7, 1996 letter to Mahoney, Blazer, and Chief Veo. Further, the evidence reveals that Blazer and Chief Veo received their copies of the June 7, 1996 letter and that Mahoney had received prior correspondence from the Town through U.S. mail. Therefore, we believe that the evidence is sufficient to warrant a finding that the June 7, 1996 letter was, in fact, received by Mahoney. However, we concur with that portion of the Hearing Officer's decision *not* to admit the June 7, 1996 letter into evidence for the truth of the matter asserted. Therefore, we allow the June 7, 1996 letter into evidence to show only that Mahoney had received the letter and that the letter contained the above-referenced statements.

Sometime between June 7, 1996 and June 16, 1996, Chief Veo told Sergeant Stephens that the Town intended to implement the revised detail policy to which the parties had tentatively agreed on March 28, 1996 but the Union's membership had subsequently rejected. On June 14, 1996, by electronic message (e-mail), Chief Veo notified the officers of the revised detail policy and informed the officers that the policy would become effective June 16, 1996. Chief Veo had a printed copy of his e-mail and a copy of the revised detail policy placed in each of the officers' mailboxes.[20] The Union did not reply to Chief Veo's e-mail. On June 16, 1996, the Town implemented the revised detail policy.

Since the Town implemented the revised detail policy, Chief Veo has disciplined two officers in accordance with the new policy. On August 6, 1996, Chief Veo removed one officer from the availability roster because the officer was absent without leave from a non-municipal detail on August 3, 1996. Chief Veo removed another officer from the availability roster for one month from December 7, 1996 to January 7, 1996 for missing a non-municipal detail.

## Opinion

A public employer violates Sections 10(a)(5) and (1) of the Law when it unilaterally changes wages, hours, or other terms and conditions of employment without first bargaining to resolution or impasse with the employees' exclusive bargaining representative. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Town or Arlington* 21 MLC 1125 (1994). To establish a unilateral change violation, a charging party must show that: 1) the respondent has changed an existing practice or instituted a new one; 2) the change affected employee wages, hours, or working conditions and thus implicated a mandatory subject of bargaining; and 3) the change was implemented without prior notice or an opportunity to bargain. *See Town of North Andover*, 1 MLC 1103, 1106 (1974).

The Union has established a *prima facie* case of unlawful unilateral change. The preponderance of the evidence demonstrates that the parties' past practice regarding the assignment of non-municipal paid details had remained in effect until June 16, 1996. On June 16, 1996, the Town implemented a new policy that made the following changes to the parties' existing practice regarding non-municipal paid details: (1) the notation of any disciplinary action regarding non-municipal paid details would be removed from an officer's personnel file after one year; (2) the penalty for a second no-show offense would be two months' removal from the availability roster; and (3) the Town would allow an officer to cancel a non-municipal detail assignment to work an overtime shift with a minimum of three hours' notice. The changes to the parties' existing practice regarding the assignment of non-municipal paid details directly impact "wages and hours" and are, therefore, mandatory subjects of bargaining. *City of Boston*, 10 MLC 1238, 1242 (1983); *see also City of Chelsea*, 1 MLC 1299, 1303 (1975) (method of distributing paid details is a mandatory subject of bargaining). However, the Town unilaterally implemented the new non-municipal paid detail policy without bargaining with the Union to resolution or impasse.

In its defense, the Town argues that the Union bargained in bad faith regarding the detail policy because Officers Shriner and Bodreau and Sergeant Stephens failed to support the tentative agreement before the Union's membership during its ratification vote on April 17, 1996. Further, the Town argues that the Union should be barred from bringing the instant action under the equitable doctrine of "unclean hands."[21] The Town contends that it bargained to impasse with the Union because the Union never requested further negotiations, never informed Town Counsel that the Union's membership had rejected the tentative agreement, and never submitted any proposals to the Town following the Union's ratification vote. Consequently, the Town believed that the parties were deadlocked and that impasse existed regarding the detail policy.

Finally, the Town contends that, even if the parties were not at impasse, Chief Veo, as the Town's appointing authority, had the authority to enact disciplinary measures pursuant to M.G.L. c. 31, § 41. Additionally, Article XX of the parties' collective bargaining agreement (agreement) states that "the Town retains full rights of management of the Police Department including...the scheduling and enforcement of working hours; the assignment of overtime;... and the making, implementation, amendment, enforcement of rules and regulations and operating and administrative procedures...." Similarly, Article XXII of the agreement provides that "assignments [regarding non-municipal extra paid details] shall be made by the Chief. . . ." Therefore, the Town argues, Chief Veo acted within his authority to impose particular consequences on those officers who failed to report for assigned details, and none of the provisions of the proposed detail policy constituted mandatory subjects of bargaining.

### *A. Bad Faith Bargaining*

In assessing whether an employer and a union have bargained in good faith, the Commission will look to the totality of the parties' conduct, including acts away from the bargaining table. *King*

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20. The Town contends that the Hearing Officer did not include in the findings the fact that Chief Veo had a copy of the revised detail policy placed in each officer's mailbox. Although the Union opposes the Town's argument, we find that the fact is supported by the record and is relevant to show that the Union had been given notice of the Town's intent to implement the revised detail policy. Therefore, we have modified the findings accordingly.

21. Generally, the Commission does not award parties relief in equity. In determining whether a charging party has standing to challenge the actions of the respondent in a bad faith bargaining case, the Commission examines whether the charging party's actions were *solely* responsible for the respondent's failure to bargain in good faith or prevented the respondent from bargaining in good faith. *Clinton Teachers Association*, 16 MLC 1058, 1064, n. 14 (1989). Here, like the respondent in *Clinton Teachers Association*, the Town does not argue that the Union knowingly prevented the Town from implementing the tentative detail policy by not supporting the policy at the membership's ratification vote, nor does the Town argue that the Union was responsible for the Town's decision to implement the tentative detail policy. Therefore, we deny the Town's motion to dismiss the instant matter for unclean hands. The appropriate means to address an allegation that the Union had failed to bargain in good faith by not supporting a negotiated agreement in the face of its membership is through a charge of prohibited practice against the Union. However, although we deny the Town's motion to dismiss, we will consider the Town's argument regarding unclean hands as a potential affirmative defense to the complaint before us.

*Philip Regional School Committee*, 2 MLC 1393, 1397 (1976). The Commission has explained the meaning of the "good faith" requirement of Section 6 of the Law:

> . . . Parties to negotiations must bargain with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences. *Commonwealth of Massachusetts (Unit 6)*, 8 MLC 1499 (1981); *Town of Braintree*, 8 MLC 1193 (1981); *King Philip Regional School Committee*, 2 MLC 1393 (1976). In essence, each party must acknowledge and treat the other as a full partner in determining the employees' conditions of employment. Sections 10(a)(5) and 10(b)(2) of the Law, respectively, make it a prohibited practice for an employer or a union to bargain with any lesser degree of commitment. *Commonwealth of Massachusetts (Unit 9)*, 8 MLC 1978, 1983 (1982), *aff'd*, 389 Mass. 920 (1983).

A union's obligation to bargain in good faith mirrors an employer's good faith bargaining obligation under Section 10(a)(5) of the Law. *Massachusetts State Lottery Commission*, 22 MLC 1519, 1522 (1996). Section 10(a)(5) of the Law requires an employer's negotiator to take affirmative steps to support the terms of a collectively-bargained agreement before the deciding legislative body. *See Turner Falls Fire District*, 4 MLC 1658, 1662 (1977) (citing *Mendes* v. *Taunton*, 315 N.E.2d 865 (1974)). It follows, therefore, that a union is required to support the terms of a collectively-bargained agreement before its membership during a ratification vote. It is a prohibited practice for an employer or a union to bargain with any lesser degree of commitment. *Commonwealth of Massachusetts*, 8 MLC at 1983. The Town contends that the Union failed to bargain in good faith with the Town during the negotiating session on March 28, 1996 in which the parties reached a tentative agreement. Specifically, the Town claims that the Union's negotiating team (Officers Shriner and Bodreau and Sergeant Stephens) did not support the parties' tentative agreement before the Union's membership during its ratification vote on April 17, 1996.

Here, the record reflects that the Union's membership, which included Officers Shriner and Bodreau and Sergeant Stephens, voted unanimously twelve to zero against the tentative agreement during the Union's ratification vote on April 17, 1996. Further, because the vote was unanimous, the Union's negotiating team (Officers Shriner and Bodreau and Sergeant Stephens) did not support the tentative agreement at the membership's ratification meeting. However, we are not convinced that either the conduct of the Union or the conduct of its negotiating team during ratification precipitated the Town's decision to unilaterally change the parties' existing non-municipal paid detail policy. Even if the Union's conduct during the ratification process could be characterized as bad faith bargaining, it did not prevent the Town from bargaining in good faith with the Union before it unilaterally implemented the revised detail policy. *See Clinton Teachers Association*, 16 MLC at 1064, n.14. However, the Town chose to unilaterally implement a revised detail policy without bargaining with the Union to resolution or impasse.

*B. Impasse*

We next examine the Town's argument that the parties had reached impasse regarding the detail policy. In cases where the parties have reached an impasse in negotiations, a unilateral change by the employer on an issue under negotiations will not be deemed to be a violation, provided that the change is consistent with the position previously adopted by the employer and communicated to the union. *City of Peabody*, 9 MLC 1447, 1449 (1982). To determine whether impasse has been reached, the Commission considers the following factors: bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issues to which there is disagreement, and the contemporaneous understanding of the parties concerning the state of the negotiations. *Town of Weymouth*, 23 MLC 70, 71 (1996). Further, the Commission focuses specifically on whether the parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be futile because the parties are deadlocked. *Commonwealth of Massachusetts*, 22 MLC 1039, 1051 (1995) (citing *Town of Brookline*, 20 MLC 1570, 1594 (1994)). Applying the above-enumerated factors to the record before us, we find that the parties had not bargained to impasse before the Town changed the detail policy.

The Town contends that it bargained to impasse with the Union because the Union never requested further negotiations, never informed Town Counsel that the Union's membership had rejected the tentative agreement, and never submitted any proposals to the Town following the Union's ratification vote. Consequently, the Town believed that the parties were deadlocked and that an impasse existed regarding the detail policy. Therefore, the Town concludes, it was justified in implementing the revised detail policy on June 16, 1996.

The totality of the circumstances in this case indicate that: 1) the parties only negotiated over the detail policy once, on March 28, 1996; and 2) neither the Union nor the Town proposed to negotiate further after the Union's membership voted not to ratify the revised detail policy. We do not condone the conduct of the Union's negotiating team in not supporting the tentative agreement before the Union's membership. A union violates its duty to bargain in good faith with an employer under Section 10(b)(2) of the Law if it fails to support an agreement. *See Massachusetts State Lottery Comm'n.*, 22 MLC 1519, 1522 (1996) (a union's obligation under Section 10(b)(2) of the Law to bargain in good faith mirrors that of an employer under Section 10(a)(5) of the Law); *see also Turner Falls Fire Dist.*, 4 MLC 1658, 1662 (1977). However, that matter is not before us in this case. The Town could have filed an appropriate charge challenging the Union's conduct. Instead the Town engaged in self help by unilaterally implementing the revised detail policy. *See* M.G.L. c. 150E, § 9.[22] Therefore, because we

22. In response to the Commission's decision in *Commonwealth of Massachusetts*, 8 MLC 1978 (1982) that an employer may unilaterally implement a change in a mandatory subject of bargaining if the parties had reached good-faith impasse but were involved in mediation, fact-finding, or arbitration, the legislature amended M.G.L. c. 150E, § 9 to state that an employer shall not implement unilateral changes until the collective bargaining process, including mediation, fact finding, or arbitration have been completed.

do not find that the parties were deadlocked or that further negotiations over a new detail policy would have been futile, the parties had not reached impasse when the Town implemented the revised detail policy on June 16, 1996.

Waiver

*1. Waiver by Inaction*

The Commission has consistently held that a union waives its right to bargain by inaction if a Union: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining. *Town of Milford*, 15 MLC 1247, 1252-54 (1988) (citing *Amesbury School Committee*, 11 MLC 1049 (1984); *Scituate School Committee*, 9 MLC 1010 (1982)). Notice will be imputed to a union when a union executive officer with authority to bargain is first made aware of the employer's proposed plan. *City of Cambridge*, 5 MLC 1291, 1293, n. 2 (1978).

We will not lightly infer that a union has waived its right to bargain by inaction. *City of Boston School Committee*, 4 MLC 1912, 1916 (1978) (citing *Town of Natick*, 2 MLC 1086 (1975); *Revere School Committee* 3 MLC 1537 (1977)). The information that an employer conveys to the union must be sufficiently clear for the union to make an appropriate response and must be received *far enough in advance* to allow effective bargaining to occur. *Boston School Committee*, 4 MLC 1912, 1915 (1978). The Commission does not sanction a short time period where meaningful bargaining could not occur before the change. *See Holyoke School Committee*, 12 MLC 1443, 1452, n. 10 (1985).

Further, a public employer must notify the union of a potential change before it is implemented so that the bargaining representative has an opportunity to present arguments and proposals concerning the proposed alternatives. *City of Chicopee*, 2 MLC 1071 (1975). However, an employer's duty to notify the union of a potential change before it is implemented is not satisfied by presenting the change as a *fait accompli* and then offering to bargain. *City of Everett*, 2 MLC 1471 (1976). A *fait accompli* exists only where, "'under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless.'" *Holliston School Committee*, 23 MLC 211, 212-13 (1997) (quoting *Scituate School Committee*, 9 MLC 1010, 1012 (1982)). The Commission will not apply the doctrine of waiver by inaction in cases where a union is presented with a *fait accompli*; however, if it appears that the union's demand to bargain could still bring about results, the union must make such a demand to preserve its rights. *Scituate School Committee* 9 MLC at 1012, 1013.

Here, the Town contends that the Union neither contacted the Town nor made any counter proposals to the Town during the two month period between April 17, 1996, when the Union's membership rejected the tentative agreement at the ratification vote, and June 16, 1996, when Chief Veo implemented the revised detail policy. The Town claims that it continued to support the revised detail policy and sent the June 7, 1996 letter to Mahoney indicating that the Town planned to implement the policy effective June 16, 1996. Additionally, on June 14, 1996, Chief Veo notified the police officers by e-mail that the revised detail policy would take effect on June 16, 1996. The Union did not respond to either the Town's June 7, 1996 letter or the June 14, 1996 e-mail.

We do not find that the Union waived its right to bargain over changes to the detail policy by inaction because the Union did not have sufficient advance notice of the planned implementation of the revised detail policy to allow the parties to bargain over it. The record reveals that Mahoney received Town Counsel's June 7, 1996 letter stating that Chief Veo intended to implement the unratified tentative agreement on June 16, 1996. Further, the record indicates that, sometime between June 7, 1996 and June 16, 1996, Chief Veo verbally told Sergeant Stephens that the Town intended to implement the revised detail policy, and, on June 14, 1996, Chief Veo issued an e-mail to all police officers, including Officers Shriner and Bodreau and Sergeant Stephens, that the detail policy was placed in their mailboxes and would take effect June 16, 1996. Therefore, we find the evidence to demonstrate that, at the very earliest, the Union had notice on approximately June 7, 1996 regarding Chief Veo's intent to implement the revised detail policy. Thereafter, on June 16, 1996—only nine (9) days after the Town first notified the Union that it intended to implement the revised detail policy—the Town implemented the policy. The short period of time—nine (9) days—between the notification of the change and its effective date was insufficient to afford the Union a meaningful opportunity to bargain. *City of Everett*, 2 MLC 1471, 1476 (1976), *enf'd. sub nom, Labor Relations Commission* v. *City of Everett*, 7 Mass. App. Ct. 826 (1979); *cf., County of Middlesex*, 6 MLC 2056 (1980). Further, an employer who notifies the union that an action will take effect on a certain date must justify the deadline thus set upon negotiations. *New Bedford School Committee*, 8 MLC 1472, 1478 (1981).

Here, the evidence does not demonstrate that the Town had imposed a reasonable deadline regarding the implementation of the revised detail policy. Rather, the record reflects that the Town arbitrarily selected June 16, 1996 as the date to implement the revised detail policy, offered no legitimate reason for providing the Union with such short notice, and presented the Union with a *fait accompli* regarding the revised detail policy. The totality of the circumstances indicate that the Town's conduct had progressed to the point at which a demand to bargain by the Union would have been fruitless. *See Scituate School Committee*, 9 MLC at 1010 (1982). Therefore, we find that the Union did not waive its right to bargain by inaction regarding the Town's decision to implement the new detail policy and that the Union was faced with a *fait accompli* regarding the revised detail policy.

*2. Waiver By Contract*

The Commission has long held that a broadly-framed management rights clause is too vague to provide a basis for inferring a clear and unmistakable waiver by the union concerning bargaining. *Newton School Committee*, 5 MLC 1016, 1024 (1978), *aff'd sub nom., School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983). Here, the record reveals that Article XX of the parties' agreement contains a "management rights" clause which reserves to the Town ". . . full rights of management of the Police Department including . . . the scheduling and enforcement of

working hours; the assignment of overtime; . . . and the making, implementation, amendment, enforcement of rules and regulations and operating and administrative procedures. . . ." Similarly, Article XXII of the agreement provides that "assignments [regarding non-municipal extra paid details] shall be made by the Chief. . . ."

Contrary to the Town's argument, although the parties' agreement reserves to the Town the power to schedule and enforce non-municipal extra paid details, the agreement does not constitute a knowing, conscious waiver over changes in the paid detail policy. *Newton School Committee, supra.* Nor does M.G.L. c. 31, § 41 grant that right to the Town. To the contrary, M.G.L c.150E, § 10(a)(5) requires that the Town notify the Union of any contemplated change in a mandatory subject of bargaining and allow the Union an opportunity to bargain to resolution or impasse. Therefore, we conclude that the parties' agreement did not relieve the Town of its obligation to bargain over changes in its paid detail policy, and the Union did not knowingly waive its right to bargain over that topic.

## Conclusion

Based on the record for reasons stated above, we conclude that the Town violated Sections 10(a)(5) and (1) of the Law by unilaterally implementing a new paid detail policy without providing the Union with an opportunity to bargain to resolution or impasse.

## I. ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of Hudson shall:

1. Cease and desist from:

a) failing or refusing to bargain in good faith to resolution or impasse with the Union about changes in the operating procedure for non-municipal paid details;

b) sanctioning two officers and removing them from the non-municipal paid detail roster for one month; and

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

2. Take the following affirmative action that will effectuate the purposes of the Law:

a) rescind the detail policy that the Town unilaterally implemented on June 16, 1996;

b) immediately restore to employees represented by the Union the detail policy in effect immediately prior to June 16, 1996;

c) upon request by the Union, bargain to resolution or impasse over the proposed detail policy;

d) make whole any employees represented by the Union for any loss of earnings suffered as a result of the Town's unlawful unilateral change in the assignment of non-municipal paid details;

e) to pay interest on all sums owed at the rate specified in M.G.L. c. 23, § 6B up to the date the Town complies with this Order;

f) post in all conspicuous places where employees usually congregate and where notices to employees are usually posted, and maintain for a period thirty (30) days thereafter, copies of the attached Notice to Employees; reasonable steps shall be taken to insure that the posted notices are not altered, defaced or covered by any other material; and

g) notify the Commission in writing of the steps taken to comply with this Decision within ten (10) days after receipt of the Decision.

SO ORDERED.

Pursuant to the Supreme Judicial Court's decision in *Quincy City Hospital* v. *Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Commission may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c. 150, § 11. To claim such an appeal, the appealing party must file a Notice of Appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

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