
In the Matter of CITY OF BOSTON
and
BOSTON POLICE PATROLMEN'S ASSOCIATION

Case No. MUP-1085

54.589 bargaining unit work
54.8 mandatory subjects
65.9 other interference with union
67.8 unilateral change by employer
92.51 appeals to full commission

March 10, 2000

Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

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Patrolmen's Association

**DECISION ON APPEAL OF HEARING OFFICER'S
DECISION¹**

Statement of the Case

On December 30, 1994, the Boston Police Patrolmen's Association (the BPPA or Union) filed a charge with the Labor Relations Commission (the Commission), alleging that the City of Boston (the City or Employer) had engaged in a

1. The full text of the Hearing Officer's decision is reported at 23 MLC 133 (1996).

prohibited practice within the meaning of Sections 10(a)(1) and (5) of Massachusetts General Laws, Chapter 150E (the Law). On March 13, 1996, the Commission issued a Complaint of Prohibited Practice, alleging that the Employer had refused to bargain in good faith in violation of Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by transferring work previously performed by bargaining unit members to non-unit personnel, without providing the Union prior notice or an opportunity to bargain.

Pursuant to notice, Hearing Officer Susan Atwater (the Hearing Officer) conducted a hearing on May 30, 1996 and June 13, 1996. All parties had a full opportunity to be heard, to examine and cross examine witnesses and to introduce documentary evidence. Both parties filed post-hearing briefs on or about October 8, 1996. On December 4, 1996, the Hearing Officer issued a decision, finding that the City had violated Sections 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by assigning police duties to the Municipal Police officers. The Hearing Officer further determined that the City had not violated the Law by assigning police duties to Boston Housing Authority investigators (BHA investigators). The City filed a timely Notice of Appeal on December 11, 1996, requesting the Commission to review the Hearing Officer's decision. The City filed its supplementary statement on or about December 31, 1996, and the Union filed its supplementary statement on or about January 22, 1997. Upon our review of the record, the Hearing Officer's decision and the parties' supplementary statements, we affirm the Hearing Officer's decision, but modify her reasoning, as explained below.

STATEMENT OF FACTS

The City contested one finding of fact made by the Hearing Officer. After reviewing the City's objection and the record in this case, we adopt the Hearing Officer's findings, and summarize the relevant portions below.

The Boston Housing Authority (BHA) maintains family and elderly housing developments within the City of Boston. In or about 1979, the BHA Police Department hired investigators (BHA investigators or BHA officers) to assist housing development managers with tenant lease investigations and evictions and to supplement the Boston Police officers who patrolled and policed the housing developments. The BHA investigators wore plain clothes, traveled in unmarked cars, carried beepers in lieu of police radios and were unarmed. Initially, the BHA investigators possessed no police powers. However, in 1984, the BHA investigators attended the police academy, obtained full police powers on all BHA property and became special police officers pursuant to Boston Police Department Rule 400. The acquisition of police powers changed the BHA investigators' role by enabling

them to perform police work, like effectuating arrests, in addition to investigatory work.² Although the BHA investigators began to carry .38 caliber handguns when they became special police officers, they did not wear uniforms or patrol in marked cruisers until April of 1994.

In 1978, the Boston Police Department (BPD) established the Team Police Unit (the TPU) and delegated to it the sole responsibility of policing BHA developments. The TPU was composed of Boston Police officers who were assigned exclusively to designated housing developments to maintain security, order, and safety. These TPU officers performed scheduled tours of duty within their developments and their responsibilities included maintaining order and public peace, aiding individuals in danger of physical harm, dispersing gangs, investigating suspected drug activity and other illicit behavior, apprehending offenders where appropriate, conducting foot patrols throughout BHA properties, answering 911-dispatched calls, responding to emergencies, issuing citations for traffic and motor vehicle parking violations, and otherwise upholding and enforcing the laws of the Commonwealth. Creating and maintaining the TPU reflected the Department's overall commitment to the concept of "Neighborhood Policing", which was the operative philosophy of the BPD at that time.³ On June 30, 1993, the BPD disbanded and decentralized the TPU, reassigning the TPU officers to the areas or districts in which the housing developments where they worked were located.⁴ Subsequently, area or district commanders assumed the responsibility for policing the public housing developments within their jurisdictions and coordinated safety issues and concerns with the BHA.

The Municipal Police force was created in 1979 to secure City-owned buildings and park land against vandalism, arson and theft. Municipal Police officers possess special police powers pursuant to Rule 400 and deter criminal activity on City property by patrolling buildings, parks and parking lots and by monitoring an alarm system connected to over 300 City buildings. Prior to 1994, Municipal Police officers did not patrol the BHA housing developments.

In 1994, Mayor Thomas Menino issued a directive to various public officials to develop and implement a plan to improve the level of public safety at the housing developments. This directive led to the creation of the Special Police Division (SPD) within the Bureau of Field Services of the BPD. In September 1994, the BPD, BHA and Municipal Police formed a partnership, and as a result, Municipal Police officers were temporarily deployed to perform police functions in the housing developments.⁵ Consequently, three separate groups of police officers, the Boston Police officers, Municipal Police officers and the BHA investigators, were empowered and assigned to perform essentially the same police

2. Rule 400 does not authorize special police officers to obtain search warrants or issue citations for moving violations under G.L. c.90.

3. Neighborhood Policing is a method or style of policing whereby officers permanently assigned to a particular neighborhood or community create a partnership with residents of that area to identify, aggressively attack, and successfully solve problems that are engendering crime, disorder and fear.

4. The BPD met with the Union at various times to discuss the decentralization of the team police. At no time did the BPD state that it intended to deploy Municipal Police officers to work in the housing developments.

5. The partnership agreement provided that the Municipal Police officers will be deployed outside of the housing developments when the complement of Boston Police officers in the housing developments reached a specified level.

duties in the housing developments.⁶ The exceptions are minimal: neither BHA investigators nor Municipal Police officers can obtain search warrants or issue citations for moving violations under Chapter 90, and the BPD is supposed to be the primary responder to all 911 calls. All three groups wear similar uniforms, travel in similarly-marked patrol cars and carry the same kind of service revolver and police radio.

Initially, the Municipal Police officers had a separate radio channel and frequency. Eventually, however, they received Boston Police radios, which enabled them to monitor the Boston Police channels to be aware of emergencies and to provide a greater degree of safety. Although the Municipal Police officers are not authorized to use the Boston Police channels or respond to calls dispatched to the Boston Police, on occasion, they have used the channels and responded to calls without authorization.

The City did not give the Union prior notice or an opportunity to bargain over the establishment of the SPD or the deployment of Municipal Police officers to perform police duties in the housing developments. In January 1994, the Union first learned that the BPD planned to deploy City employees outside the BPPA bargaining unit to perform police functions in the BHA housing developments. By letters dated February 3, 1994 and August 18, 1994, the Union demanded to bargain over any decision involving policing the housing developments by employees outside the BPPA bargaining unit. The City did not respond to these letters. However, by letter dated October 26, 1994, the City indicated to the Union that the work of policing the housing developments had historically been shared between agencies and was not exclusively Boston Police patrol officers' work. The City and the Union did not subsequently bargain over any issue surrounding the policing of the housing developments pursuant to the creation of the Special Police Division.

The chart below approximates the number of officers deployed in the housing developments at various relevant times:

Number of Officers	1978 Creation of Team Police	1993 Decentralization of Team Police	1994 Creation of SPD	1996
BHA	44	21	24	38
BPO	77	17	17	20
MPO	N/A	N/A	33	33

The deployment of Municipal Police officers to the Housing developments did not restrict the number of Boston police officers assigned to the developments because manpower and budgetary restrictions which existed at the time the SPD was created prevented the Boston Police Department from increasing the number of Boston Police Officers assigned to the developments. However, if a need had arisen to deploy additional Boston police officers to the

housing projects, the BPD would have done so on an overtime basis.⁷

DECISION

In its supplementary statement, the City contends that the Hearing Officer erred in finding that the City had unlawfully transferred a portion of bargaining unit work belonging to the BPPA to the Municipal police. Specifically, the City argues that there was no transfer of bargaining unit work and that the Hearing Officer erred in finding that there was an adverse impact to the bargaining unit based on the alleged transfer. The City further argues that the Hearing Officer's decision constitutes an impermissible infringement upon the Boston Police Commissioner's broad statutory authority.

Section 10(a)(5) of the Law requires a public employer to give the exclusive collective bargaining representative prior notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel. *Town of Bridgewater*, 25 MLC 103, 104 (1998). To establish that an employer unilaterally transferred bargaining unit work to non-unit personnel, the union must establish the following elements: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of work had an adverse impact on either individual employees or on the bargaining unit itself; and 3) the employer did not provide the exclusive bargaining representative with prior notice or an opportunity to bargain over the decision to transfer the work. *Id.* (citing *City of Gardner*, 10 MLC 1218, 1219 (1983)).

When work is shared by bargaining unit members and non-unit employees, the Commission has determined that the work will not be recognized as exclusively bargaining unit work. *Higher Education Coordinating Council*, 23 MLC 90, 92 (1996) (citing *City of Quincy/Quincy Hospital*, 15 MLC 1239, (1988)). In these shared work cases, the employer is not obligated to bargain over every incidental variation in job assignments between unit and non-unit employees. *Town of Bridgewater*, 25 MLC at 104. Rather, bargaining must occur only if there is a calculated displacement of bargaining unit work. *Higher Education Coordinating Council*, 23 MLC at 92. Therefore, if unit employees traditionally have performed an ascertainable percentage of the work, a significant reduction in the portion of work performed by unit employees coupled with a corresponding increase in the work performed by non-unit employees may demonstrate a calculated displacement of unit work. *Id.* (citing *City of New Bedford*, 15 MLC 1732, 1737 (1989)).

Here, we find that the Municipal Police were assigned to perform duties that were previously performed by the BPPA bargaining unit. The evidence establishes that, prior to September 1994, the BHA

6. The duties and police powers of the BHA investigators did not change with the creation of the special police division. The only change effectuated by the SPD was the issuance of uniforms and marked police cruisers.

7. The City challenges the Hearing Officer's finding that had a need arisen, the BPD would have deployed additional officers to the housing projects on an overtime basis, arguing that the Hearing Officer misconstrued the testimony

presented at the hearing because budgetary and manpower restrictions prevented the City from taking that action. Based on our review of the record, we decline to modify the Hearing Officer's finding because the record clearly supports it. Superintendent James Claiborne testified on cross examination that, if there were a need to deploy additional police officers to the BHA properties or anywhere in the City, he would have to fill that need through overtime. Therefore, we decline to modify the Hearing Officer's findings of fact.

housing developments were patrolled by both the Boston Police and the BHA officers. In September 1994, the Municipal Police were temporarily deployed to perform police functions in the BHA housing developments. The Boston Police, the BHA officers and the Municipal Police are empowered and assigned to perform essentially the same police duties in the housing development. We find no merit in the City's assertion that the work performed by the Municipal Police is actually work that was traditionally performed by the BHA officers and not members of the BPPA's bargaining unit. We find the City's assertion that an increase in the number of Municipal Police would not require the City to bargain with the BPPA because the BHA and the City are two separate employers equally unpersuasive. We note that the fact that the BHA is a separate employer from the City is not relevant to our analysis of whether the City unlawfully transferred BPPA bargaining unit work to the Municipal Police because the Municipal Police are not employees of the BHA. Instead, the Municipal Police are employees of the City, thereby negating any argument that the City may advance regarding its lack of control over the BHA and the decision to increase police presence in the housing developments.

However, we note that, in shared work cases, our analysis focuses on the preexisting pattern of shared work and the impact that any change in that pattern may have on the alleged aggrieved party. We have previously determined that an employer may not unilaterally alter a preexisting pattern of shared work. See, *City of Boston*, 6 MLC 1117 (1979). Nothing in that decision restricts an employer from re-allocating a portion of the work being performed by non-bargaining unit personnel. An employer's decision to distribute work already designated as non-bargaining unit work to a third party does not impact the bargaining unit, as long as the quantity and the quality of work performed by the bargaining unit remains constant. Thus, had the City merely transferred a portion of the work to the Municipal Police that was performed by the BHA investigators, that decision would not have obligated the City to bargain with the BPPA.⁸

Further we find that the transfer of bargaining unit work here adversely impacted the BPPA bargaining unit. Under the second prong of our analysis, we must find that either an individual member of the BPPA bargaining unit or the bargaining unit itself was adversely impacted by the transfer of bargaining unit work. As we have observed previously, an adverse impact on the bargaining unit is established if the evidence demonstrates that individual bargaining unit members have lost an opportunity to perform work on an overtime basis and the bargaining unit as an entity has lost an opportunity to represent future bargaining unit members if the employer decided to hire new employees to perform the work rather than offer it to existing bargaining unit members on an overtime basis. *City of Holyoke*, 26 MLC 97, (2000) (citing *Town of Norwell*, 13 MLC 1200, 1208 (1986)). Similarly, in *Commonwealth of Massachusetts*, 24 MLC 116, 119 (1998), the Commission determined that "a transfer of bargaining unit work, accompanied by no apparent reduction in bargaining unit positions, constitutes a

detriment on the bargaining unit because it could result in an eventual elimination of the bargaining unit through gradual erosion of bargaining unit opportunities."

Here, the BPPA bargaining unit was adversely impacted by the City's decision to transfer the bargaining unit work. Although the Boston Police presence has actually increased since the deployment of the Municipal officers, the BPPA bargaining unit was adversely impacted by the City's decision because of the potential for eliminating the BPPA bargaining unit through a gradual erosion of the BPPA unit's duties. Contrary to the City's assertion, had a need arisen in the BHA development, the City would have had to deploy additional officers on an overtime basis to the BHA properties. In addition to the dangers presented by the possible gradual erosion of the bargaining unit, this loss of potential overtime adversely affected the BPPA bargaining unit. We reject the City's argument that there was no adverse impact to the BPPA because the work at issue would not have been performed at all had it not been performed by the Municipal Police. Although we are mindful of the budgetary and manpower limitations placed on the City, if a need had arisen to deploy additional Boston police officers to the housing projects, the BPD would have done so on an overtime basis. To find otherwise, would require us to conclude that the Municipal Police are performing unnecessary and superfluous tasks. For these reasons, we conclude that the BPPA unit was adversely affected by the deployment of Municipal officers to the BHA properties.

The third prong of the Commission's analysis requires an employer to provide the union with notice and an opportunity to bargain over the decision to transfer the bargaining unit work. Here, neither party disputes that the City did not give the Union prior notice or an opportunity to bargain over establishing the SPD or the deployment of the Municipal police officers to perform police functions in the BHA housing developments. Therefore, we conclude that the City did not give the BPPA notice or an opportunity to bargain over the City's decision to deploy Municipal police officers to the BHA properties.

Finally, the City argues that the Hearing Officer's decision impermissibly infringes on the Boston Police Commissioner's broad statutory authority. The City asserts that St. 1962, c. 322, authorizes the Police Commissioner to assign Boston police personnel to the BHA's housing developments as well as the right to confer geographical jurisdiction upon "special police officers." The City argues that the central issue in this case is the Police Commissioner's ability to assign Boston police officers to the BHA developments at any level he deems necessary, as well as the right to license special police officers and grant them concurrent jurisdictional authority within the developments.

It is well established that a public employer is obligated to give an employee organization notice and an opportunity to bargain before unilaterally altering policies impacting mandatory subjects of bargaining. *City of Boston*, 6 MLC 1117, 1119 (1979) (citations omitted). Similarly, we have consistently held that certain decisions

8. By this, we do not imply that the City would have been relieved of any bargaining obligations with any union if it had decided to transfer a portion of the BHA

investigators' work only. Rather, we note that that decision would not have obligated the City to bargain with the BPPA.

are so fundamental to the management of the public enterprise that they are not considered to be mandatory subjects of bargaining. *Town of Danvers*, 3 MLC 1559, 1577 (1977). In *City of Boston*, we held that, although the decision to increase the strength of a particular complement of the police department and the decision to transfer certain officers to that complement are basic policy decisions reserved to public management, the decision to transfer bargaining unit work to employees outside the bargaining unit is a mandatory subject of bargaining. *City of Boston*, 6 MLC at 1120-1121. We noted that the decision "to have the same work performed, but by employees who will cost the City less money" is a mandatory subject of bargaining. *City of Boston*, 6 MLC at 1121.

Section 10 of St. 1962, c. 322 provides, in relevant part that "the police commissioner shall have the authority to appoint, establish and organize the police...." St. 1962, c. 322, § 10.

Section 11 of St. 1962, c. 322 provides, in relevant part:

The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department and shall make all needful rules and regulations for the efficiency of said police; provided, however, that no such rule or regulation shall forbid any officer or member of said police from organizing or belonging to any organization composed solely of officers or members...and having among its objectives the improvement of their conditions of employment.... St. 1962, c. 322, § 11.

Here, like *City of Boston*, 6 MLC at 1120-21, the Hearing Officer's decision does not impermissibly infringe on the right of the Police Commissioner to appoint special police officers or to determine the level of services the police department provides. This is not a level of services decision. Rather it is a decision about which City employees will be performing the designated work at the BHA, thus requiring the City to bargain with the Union instead of unilaterally deciding to have the same work performed but by employees that will cost the City less.

CONCLUSION

For the reasons set forth above, we affirm the Hearing Officer's decision, with modifications to her reasoning, and conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith when it unilaterally transferred to the Municipal police a portion of the work of policing the BHA housing developments.

ORDER

WHEREFORE, based on the foregoing IT IS HEREBY ORDERED that the City of Boston shall:

1. Cease and desist from:

9. The record in this case does not establish whether any bargaining unit member suffered a monetary loss as a direct result of the City's unlawful transfer of unit work. Nor does it address the question of whether it would have assigned any of the additional police work to BHA investigators rather than Boston Police officers, see footnote 7, *supra*. However, the Commission has found make-whole remedies to be appropriate in the absence of evidence on monetary loss because restoration

a. Unilaterally transferring the work of policing the BHA housing developments to Municipal Police Officers without first giving the BPPA notice and an opportunity to bargain to resolution or impasse.

b. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

a. Upon request, bargain in good faith with the BPPA to resolution or impasse concerning the decision to transfer a portion of the work of policing the BHA housing developments to Municipal Police officers.

b. Make whole any bargaining unit employee who suffered a monetary loss as a result of the City's decision to transfer a portion of the work of policing the BHA housing developments to Municipal Police officers, plus interest on any sums owing at the rate specified in *Everett School Committee*, 10 MLC 1609 (1984).

c. Post in conspicuous places where employees represented by the Union usually 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 ten (10) days of service of this Order of the steps taken to comply with it.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has concluded that the City of Boston violated Sections 10(a)(5), and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally deploying Municipal Police Officers to perform police work at BHA housing developments following the creation of the Special Police Division.

WE WILL NOT transfer bargaining unit work to non-bargaining unit personnel without first giving the Union prior notice and an opportunity to bargain to resolution or impasse about that decision.

WE WILL NOT refuse to bargain in good faith with the Union over the decision to transfer a portion of the work of policing the BHA housing developments to Municipal Police officers.

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

WE WILL make whole any BPPA employee who suffered a monetary loss as a direct result of the City's decision to transfer a portion of the work of policing the BHA housing developments to Municipal Police officers, plus interest on any sums owing at the rate specified in *Everett School Committee*, 10 MLC 1609 (1984).

of the *status quo ante* includes compensation to make whole affected employees. *Town of Marblehead*, 12 MLC 1667, 1672 (1986). For these reasons, the parties must jointly determine the proper amount of compensation due.

WE WILL, upon request, bargain in good faith with the BPPA to resolution or impasse concerning the decision to transfer a portion of the work of policing the BHA housing developments to Municipal Police officers.

[signed]
For the City of Boston

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