

In the Matter of BRISTOL COUNTY SHERIFF'S OFFICE
and

MASSACHUSETTS CORRECTION OFFICERS
FEDERATED UNION

Case No. MUP-1820

- 26. *Statutory Bar*
- 28. *Relationship Between c. 150E and Other Statutes Not Enforced by Commission*
- 54.23 *overtime*
- 54.5115 *disciplinary investigation*
- 54.55 *past practices*
- 67.162 *preemption by other legislation*
- 67.3 *furnishing information*
- 67.8 *unilateral change by employer*
- 82.12 *other affirmative action*
- 82.53 *impact of remedies on other statutes*
- 91.4 *procedures and rules*
- 92.33 *rules of evidence*
- 92.34 *scheduling of witnesses*
- 92.47 *motion to dismiss*
- 92.493 *motion in limine*
- 92.54 *interlocutory appeals of hearing officer's decision*

October 10, 2001

Helen A. Moreschi, Chairwoman

Mark A. Preble, Commissioner

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 Ronald J. Lowenstein, Esq. *Bristol, Bristol County Sheriff's*
 Michael M. Murray, Esq. *Office*

Matthew E. Dwyer, Esq. *Representing the Massachusetts*
Correction Officers Federated
Union

DECISION¹

STATEMENT OF THE CASE

On April 24, 1997, the Massachusetts Correction Officers Federated Union (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) alleging that the Bristol County Sheriff's Office (Sheriff) had violated Sections 10(a)(1) and (5) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charge and, on January 8, 1998, issued its own Amended Complaint of Prohibited Practice

alleging in Count I that the Sheriff had failed to bargain in good faith by failing to provide the Union with requested information that was relevant and reasonably necessary for the Union to perform its duty as the employees' exclusive representative, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commission's amended complaint further alleged in Count II that the Sheriff failed to bargain in good faith by unilaterally changing the criteria for assigning overtime without giving the Union prior notice and an opportunity to bargain to resolution or impasse, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Pursuant to notice, Hearing Officer Ann T. Moriarty, Esq. conducted an evidentiary hearing on January 15, April 1, June 7, July 20, and November 12, 1999. Both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the beginning of the hearing on January 15, 1999, the Sheriff orally moved to dismiss Count I,² which the Union opposed.³ The hearing officer took the motion to dismiss under advisement and proceeded with the hearing. During the January 15, 1999 hearing, the Sheriff requested that the hearing officer impound or take other steps to preserve the integrity of three (3) calendar datebooks in the possession of a Union witness who had not completed testifying in this case. The hearing officer instructed the witness to preserve the integrity of the documents and denied the Sheriff's request. Pursuant to Commission rule 456 CMR 13.03, the Sheriff filed an interlocutory appeal of the hearing officer's ruling, which the Union opposed. On January 15, 1999, the Commission denied the Sheriff's interlocutory appeal because: 1) the Commission is unable to ensure the confidentiality of any document held by it as a written record and, 2) the documents sought to be impounded are available to the Sheriff through a subpoena.

During the July 20, 1999 hearing, the hearing officer overruled the Sheriff's objection and directed Captain Gregory Centeio (Centeio), an investigator in the Sheriff's internal affairs division, to answer the following question on cross-examination: "What were the allegations against Ms. Cruz?" Centeio did not answer the question. On August 23, 1999, the Sheriff filed an interlocutory appeal of this July 20, 1999 ruling and the hearing officer's decision to take the Sheriff's motion to dismiss under advisement. On September 15, 1999, the Union filed its opposition to the Sheriff's interlocutory appeal on both issues. On October 4, 1999, the Commission affirmed these two (2) rulings.⁴

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission issues the decision in the first instance. 456 CMR 13.02(2).

2. The Sheriff moved to dismiss Count I of the complaint on the grounds that: 1) the Commission lacks jurisdiction to order a criminal investigatory body to release information about an on-going criminal investigation; and, 2) any Commission order to release information about an on-going criminal investigation violates the law that prohibits obstruction of justice. The Sheriff also argued that the Commission should dismiss Count I as a matter of law and for public policy reasons. The Sheriff submitted a January 15, 1999 affidavit from Captain Gregory Centeio of the Bristol County Sheriff's Office of Internal Affairs Division in support of its motion to dismiss. The hearing officer marked Captain Centeio's affidavit as an

exhibit for identification purposes only. Captain Centeio's affidavit is not part of the evidentiary record on which these findings of fact are based.

3. The Union opposed the oral motion to dismiss on the grounds that the motion is a request by the Sheriff to re-open or re-litigate the Commission's probable cause determination. Further, the Union asserts that whether the Sheriff's alleged investigation of Correction Officer Janice Cruz is on-going is a question of fact for the Commission to decide after hearing all admissible evidence.

4. The Commission's October 4, 1999 ruling states in part:

"First, the Commission concludes that the hearing officer acted well within her discretion in deciding to defer ruling on the County's motion to dismiss. The issue raised by that motion goes to the ultimate issue in the case:

On October 4, 1999, the Sheriff filed a Motion to Stay the hearing scheduled for October 5, 1999 for thirty (30) days on the ground that the Sheriff intended to appeal the Commission's ruling on the Sheriff's interlocutory appeal in the courts, and the Sheriff needed additional time to file the appropriate pleadings.⁵ The hearing did not proceed on October 5, 1999. On October 18, 1999, the Commission formally notified the parties that it had allowed the Sheriff's motion to stay the October 5, 1999 hearing for a thirty (30) day period. Further, on October 18, 1999, the hearing officer notified the parties that the Commission had directed her to reschedule the hearing to a date after the expiration of this thirty (30) day period, and that the hearing would continue on November 12, 1999. In this same notice, the hearing officer requested that both parties be prepared with their witnesses to conclude the hearing on November 12, 1999.

On October 19, 1999, the Sheriff filed a Motion in Limine "to preclude the Union from questioning any member of the investigations staff of the Bristol County Sheriff's Office about the content of or the existence of allegations of criminal wrongdoing by Janice Cruz, which were the subject of an investigation of Cruz by the Sheriff's Office, or which were discovered during the course of any investigation and any of the actions that the investigators took in investigating those allegations and/or what the investigators did or did not do in the course of that investigation. The grant for the Respondent's motion in that investigation was an ongoing criminal investigation that is not yet complete and revealing information about the investigation would irreparably prejudice the administration of justice. The Union filed its opposition to the County's motion on October 27, 1999. On October 29, 1999, the hearing officer denied the Sheriff's motion on the following grounds: "[b]y its motion, the County effectively seeks to preclude effective cross-examination of its witness on issues that the County itself probed during its questioning of Captain Centeio, like, the existence of the investigation, the length of the investigation, and a December 1996 meeting with Ms. Cruz. Further, to the extent the County's motion is in the nature of a request for me to reconsider my prior ruling, it is denied for the reasons I stated on the record, and for the reasons stated by the Commission in its October 4, 1999 affirmation of my ruling."

On November 9, 1999, the Sheriff filed a Motion for an Interlocutory Appeal of the hearing officer's October 29, 1999 denial of its

motion in limine and requested oral argument on the motion before the full Commission. On November 9, 1999, the Sheriff also filed a Motion to Continue the November 12, 1999 hearing on the grounds that: 1) the hearing date was chosen by the Commission and was not by agreement of counsel and the Commission; 2) Michael J. Murray, Esq. counsel for the Bristol County Sheriff's Office, a party to this case, will be on vacation on that date; 3) Gregory Centeio (Centeio), the witness who was on the stand when the hearing recessed, will also be on vacation on that date; and, 4) the only other witness for the Sheriff, Glenn Sturgeon, will also be on vacation on November 12, 1999. On November 10, 1999, the Commission denied the Sheriff's motion for a continuance and affirmed the hearing officer's ruling on the Sheriff's motion in limine for the reasons stated by the hearing officer in her October 29, 1999 notification to the parties. At the beginning of the November 12, 1999 hearing, the Sheriff renewed its motion for a continuance on the same grounds it had presented to the Commission. The Union opposed the motion absent a prompt rescheduling in November 1999. In light of the Commission's denial of Sheriff's motion to continue, and without a confirmed prompt date to reschedule, the hearing officer denied the Sheriff's renewed motion to continue the hearing.

When the hearing recessed on July 20, 1999, the Union was cross-examining Centeio, an employee of the Sheriff's department. The Sheriff was aware that the Union's cross-examination would continue at the beginning of the November 12, 1999 hearing. Because Centeio did not appear on November 12, 1999, the Union moved to strike all his testimony from the record. The Sheriff objected to the Union's motion because, as it had informed the Commission in its motion to continue, Centeio was on vacation. The Sheriff offered no further explanation for Centeio's absence. The hearing officer granted the Union's motion to strike Centeio's testimony from the record.⁶ At the end of the hearing on November 12, 1999, the Sheriff renewed its motion to dismiss, requested an opportunity to call a rebuttal witness, and moved for a mistrial. The Union opposed the Sheriff's requests and motions. The hearing officer informed the parties that she would continue to take the motion to dismiss under advisement. The hearing officer denied: 1) the Sheriff's request to call a rebuttal witness;⁷ and, 2) the Sheriff's motion for a mistrial.

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whether the County is required under Chapter 150E to provide the Union with the information the Union requested concerning the County's ongoing investigation of Cruz. Therefore, it was entirely appropriate for the hearing officer to take that motion under advisement and to defer ruling on it until she had the benefit of a complete evidentiary record.

Second, the Commission affirms the hearing officer's ruling that the specific question to Centeio challenged by the County is relevant and appropriate. Contrary to the County's argument, the question the County challenges does not go to the ultimate issue here, which is whether any part of the County's investigation into Cruz is privileged from disclosure under Chapter 150E. Rather, that question merely asked Centeio to confirm information that the County itself had put at issue. The question the Union asked Centeio did not delve into the substance of the County's investigation. It merely asked why the County was investigating Cruz, a question that has a bearing on whether the information the Union requested was relevant and

reasonably necessary to its role as Cruz's collective bargaining representative.

5. The Sheriff did not seek judicial review of the Commission's October 4, 1999 ruling on the Sheriff's interlocutory appeal.

6. The Sheriff did not request a subpoena to compel Centeio's attendance at the November 12, 1999 hearing.

7. We have reviewed carefully the Sheriff's request to produce Major Steve Souza (Souza) as a witness to rebut Cruz's November 12, 1999 testimony that Souza told her in 1996 that she was not allowed to sign the overtime availability list because she was not allowed overtime. The Sheriff made an offer of proof that if Souza testified, he would testify that he never instructed Ms. Cruz, never told her, not to sign the availability list. The Union opposed the request on the grounds that: 1) the limited purpose of Cruz's testimony on November 12, 1999 was to address documents and lost overtime opportunities relating to those documents; and, 2) Cruz's testimony at issue, which the Sheriff elicited on cross-examination, was

The Commission received the Union's brief on January 31, 2000 and the Sheriff's brief on February 1, 2000. In accordance with Section 13.02(2) of the Commission's rules, the hearing officer issued recommended findings of fact on April 5, 2001. On April 19, 2001, the Sheriff filed written challenges to the hearing officer's recommended findings of fact.⁸ On April 27, 2001, the Union filed a Motion to Strike Respondent's Challenges to the Hearing Officer's Recommended Findings of Fact. Further, on May 7, 2001, the Sheriff filed a Motion to Strike Charging Party's Motion to Strike on the grounds that the Union's Motion to Strike is not permissible under the Commission's rules. After reviewing carefully the parties' post-April 5, 2001 filings, we have decided to treat the Union's Motion to Strike Respondent's Challenges as its response to the Sheriff's challenges filed pursuant to Commission rule 456 CMR 13.02(2).⁹

The Commission has reviewed the record evidence, adopts the hearing officer's findings of fact, except where noted, and makes additional factual findings as warranted.

FINDINGS OF FACT¹⁰

The Sheriff oversees the operation of the Bristol County House of Correction (the house of correction), the Ash Street Jail (the jail), an inmate pre-release center located on the same grounds as the house of correction, and a drug and alcohol facility.

Bristol County House of Correction

The house of correction houses male and female sentenced inmates. Correction officers bid for days off and shift preferences by seniority,¹¹ but not for job post assignments. Generally, job post assignments are for a thirty (30) day period. At the end of thirty (30) days, the correction officer's assignment is subject to change. The degree of inmate contact experienced by correction officers is tied directly to their job post assignment. Correction officers assigned to the male and female housing units have maximum direct inmate contact. In contrast, correction officers assigned to work security reception, dispatch control, central control, and tower control have minimal direct inmate contact, if any.

The adjacent EA and EB units house about 30 to 40 female inmates. Generally, one (1) correction officer is assigned to work each post on each of the three (3) shifts. One correction officer works primarily in a glass-enclosed unit or bubble in the EA unit, and the other correction officer works primarily in the EB unit which does not have a bubble. Female inmates are permitted to congregate in a general area between the EA and EB units. Correction officers assigned to the EA and EB units exercise direct supervision over the female inmates. If a correction officer observes inappropriate behavior, the officer files a discipline report which could result in inmate punishment after an appropriate hearing. Further, if an inmate has a complaint about another inmate, or is ill and requires treatment, the inmate takes these issues first to the correction officer(s) on duty in the EA and EB units.

The security reception area is located outside the secured facility. One correction officer is assigned to work in the security reception area on the first and second shift. The job post is not filled on the third shift. The correction officer assigned to the security reception area checks in all visitors to the facility, controls the log-in book, distributes visitor's passes and, if a person is there to visit an inmate, the correction officer conducts a pat search of the person and examines the contents of the visitor's pockets and shoes before admitting them to the secured facility. Inmates from the pre-release center clean the security reception area. Correction officers assigned to the security reception area are assigned to conduct strip searches of inmates as needed.¹²

The glassed-in central control area, including SP control, is located just inside the secured facility. Correction officers assigned to work central control observe monitors displaying activity transmitted through video cameras located throughout the facility and control the so-called trap area through which visitors and staff pass. Other glassed-in areas or bubbles that are staffed by correction officers who control doors and cells include ASU control, FA control, and FB control. All bubbles are equipped with devices that facilitate communication with persons outside the bubble and it is possible for an inmate to communicate with a correction officer working central control, FA control and FB control. ASU control is an

7. continued...

irrelevant to her testimony about overtime opportunities under Article XVI, Section G3A and had no bearing on the case. In denying the Sheriff's motion, the hearing officer informed counsel that if there was evidence on the record from prior hearing dates about exchanges between Cruz and Souza, the Sheriff had notice of this testimony and had an opportunity to bring Souza as a rebuttal witness. During a colloquy on the Sheriff's motion to strike this testimony of Cruz, the Sheriff stated that he understood that if there is testimony on previous days of hearing regarding Cruz and Souza, the Sheriff had the opportunity to bring Souza in as a rebuttal witness, and that the Sheriff's concern was with the short piece of Cruz's November 12, 1999 testimony that Souza told her not to sign the availability list. The hearing officer's findings of fact about a December 1996 exchange between Cruz and Souza are based on Cruz's January 15, 1999 testimony, not Cruz's November 12, 1999 testimony. The hearing officer's ruling was well within her discretion and free from prejudicial error. Accordingly, we affirm the hearing officer's ruling.

8. The Commission has reviewed carefully the Sheriff's challenges to the content of the hearing officer's statement of the case. First, to the extent the Sheriff challenges our prior rulings either in the first instance or as part of an interlocutory appeal of a hearing officer's ruling, we affirm all our prior rulings. Second, we consider and rule on the Sheriff's motion to dismiss and the Sheriff's challenge to the hearing officer's ruling regarding rebuttal testimony elsewhere in this decision.

Finally we have reviewed carefully the hearing officer's statement of the case that led to the hearing officer's ruling to strike the testimony of Captain Gregory Centeio from the record, and we affirm the hearing officer's ruling.

9. Commission rule 456 CMR 13.02(2) provides, in part, that: "[w]ithin ten days of receipt of the challenging party's challenge, any other party to the proceeding may submit an original and four copies of a written response to the challenge."

10. The Bristol County Sheriff's Office is a public employer within the meaning of Section 1 of the Law, and the Massachusetts Correction Officers Federated Union is an employee organization within the meaning of Section 1 of the Law.

11. Correction officers staff all facilities seven (7) days a week, 365 days a year. There are three shifts: 1) 7am to 3pm; 2) 3pm to 11 pm; and 3) 11pm to 7am. The shifts are commonly referred to as the first, second and third shift.

12. The hearing officer's finding on this point is in accord with the evidence and we decline to modify it as requested by the Sheriff. Cruz testified on cross-examination that she conducted pat searches of visitors, and that correction officers assigned to security reception would conduct strip searches of inmates if the facility was short-staffed. The Sheriff does not direct our attention to any evidence that would support its proposed finding that the "only strip searches done by security reception personnel were of visitors to the jail."

elevated post and, although equipped with a communication device, conversations between inmates and the correction officer working ASU control are unlikely to occur.¹³

The dispatch control area is located in the receiving area of the house of correction. Working inside an enclosed glass area or bubble, the correction officer controls and operates the doors to the cells in the immediate dispatch area and the gates through which vehicles transporting inmates in and out of the facility pass. The cells in the dispatch area may only be opened from the bubble. Generally, the inmate population in the immediate dispatch area on weekends ranges from as low as one (1) inmate to as many as five (5) inmates. Correction officers assigned to the dispatch control area have contact with inmates housed in the immediate cell area when they: 1) hourly patrol the area to observe the inmates by looking in a glass window in the cell; 2) give the inmates their meals by sliding a meal tray through a slot in the cell; and, 3) accompany the nurse to the cells to give the inmates medications.

Collective Bargaining Agreement

The Union is the exclusive collective bargaining representative for certain correction officers employed by the Sheriff.¹⁴ On June 23, 1997, the Union and the Sheriff signed a collective bargaining agreement (the agreement) covering the periods: July 1, 1994 – June 30, 1997, and July 1, 1997 – June 30, 2000. Article XVI *Overtime* of the agreement provides, in part.

G. Overtime Selection Procedure:

The overtime procedure for all Correctional Facilities of the Bristol County Sheriff's Office shall be as follows:

1. No employee shall work more than sixteen (16) consecutive hours per day. There is established a twenty-four (24) hour cap on forced overtime per officer, per workweek. No officer may work more than 24 hours of forced overtime per work week, and further, no officer shall be compelled to work overtime on two consecutive days. These overtime caps in no way waive the Sheriff's Office's right to force or mandate overtime work of any time limit or duration in emergency situations or when the public safety needs of the institution require it.

2. The Sheriff's Office shall post each week, at each facility, an overtime availability sign-up sheet for all three (3) shifts. Overtime from the List shall be awarded by strict union seniority. Employees may also sign up for days that they are off, or on vacation or on another shift. Employees holding the rank of Lieutenant shall be

eligible to sign up for any hospital detail overtime which occurs during their non-working hours. Lieutenants shall also be eligible for overtime for out-of-New Bedford hospital details occurring during their working hours.

3. A. Overtime at all Correctional Facilities shall first be offered to the shift presently on duty. Overtime on the 3-11 shift shall be first offered to those on the 7-3 shift, by strict union seniority. Overtime on the 11-7 shift shall first be offered to those on the 3-11 shift, by strict union seniority. Overtime on the 7-3 shift shall first be offered to employees on the 11-7 shift, by strict union seniority.

B. If the overtime positions are not filled by the steps outlined in paragraph 3A, overtime will be awarded by strict union seniority to any officer who placed his/her name on the overtime availability sheet, described in paragraph 2. A.

Article VI *Seniority:Promotion:Transfer And Decrease Or Increase Of The Working Force* of the agreement provides, in part:

10. Where the public service needs of the institution, as determined by the Sheriff, require it, employees shall perform such service or services as assigned by the Sheriff.¹⁵

The overtime selection procedure contained in the parties' agreement reflects the procedure in place at all times material to the issues raised in this case. The agreement does not define the term restricted duty, nor does it contain any procedure for placing correction officers on restricted duty, or the criteria for job post assignments and overtime while the correction officer's conduct is under investigation by the Sheriff's office of internal affairs.

*Sheriff's Office of Internal Affairs - Restricted Duty*¹⁶

The Sheriff's Office of Internal Affairs investigates alleged wrongdoing by inmates and staff, including correction officers. Glenn Sturgeon was first hired as a correction officer in about 1981. Between 1981 and 1990, Sturgeon advanced up the ranks to lieutenant, captain, and captain-investigator. In 1990 Sturgeon was appointed deputy superintendent, a position he held until the Spring of 1998 when he was named superintendent of the correction facilities. As deputy superintendent, Sturgeon was responsible for the overall security of the facilities, personnel assignments, and implementing the terms of the collective bargaining agreement covering correction officers. When Sturgeon was deputy superintendent, the director of internal affairs would tell him when correction officers were under investigation. Relying on this information, Sturgeon would adjust the correction officer's job assignments for

13. Cruz testified that ASU is a bubble, that it is up high, and that inmates cannot talk to you [the correction officer staffing ASU] there. The Sheriff does not direct our attention to any rebuttal or inconsistent testimony on this issue. Further the hearing officer specifically found that all bubbles are equipped with communication devices. Based on the record, the hearing officer's finding is in accord with the evidence, and we decline to modify it as requested by the Sheriff.

14. We take administrative notice of the Commission's records in Case No. MCR-4473 *Bristol County Sheriff's Office* and MCR-4358 *Bristol County Sheriff's Office*. On August 9, 1996, the Commission certified the Union as the exclusive representative of all full-time and regular part-time correction officers employed by the Sheriff's Department of the County of Bristol, excluding the Sheriff, deputy superintendents, assistant deputy superintendents, captains, training lieutenant, K-9 officers and all other employees. Prior to the Union's certification on August 9, 1996, the correction officers were represented by the Bristol County Correctional Officers Association as evidenced by the Commission's April 6, 1995 certification of representatives covering the same bargaining unit.

15. The Sheriff requests a finding that "restricted duty, in addition to being a past practice, is permitted by Article VI, paragraph 10 of the contract." This requested finding is a mixed question of fact and law, and we decline to amend the hearing officer's findings of fact. To the extent the Sheriff raised this issue in its brief, it is addressed in the opinion section of this decision.

16. The Sheriff does not challenge the hearing officer's findings about restricted duty, but rather requests further findings that are mixed questions of fact and law. We discuss these further findings in the opinion section of this decision.

their regular tour of duty and for overtime.¹⁷ This adjustment in a correction officer's assignment is referred to as restricted duty, like no female inmate contact, no male inmate conduct, or no inmate contact.¹⁸

Correction officers who are placed on restricted duty are eligible to work overtime consistent with their work restrictions. For example, if a correction officer's restricted duty is no female inmate contact, the officer's regular job assignment would not include the EA or EB housing units or other job posts where the correction officer would be in contact with female inmates. Further, this correction officer would not be eligible to work any overtime in the EA or EB housing units, or at any job post where the officer would have contact with female inmates. Generally, an officer remains on restricted duty for the duration of the investigation.

In early September 1995, Sturgeon sent a memo to then Sheriff Nelson about Correction Officer Roger St. Pierre (St. Pierre). Subsequently, St. Pierre was placed on restricted duty with no inmate contact pending an investigation of the issues raised by Sturgeon. St. Pierre remained on restricted duty until he resigned in late August 1996.¹⁹ Between early 1996 and mid-1998, other correction officers were placed on restricted duty including Officer Russell Mello, Officer Lance Brightman, Officer Cheryl Swain, Officer Ralph Machado, and Officer Doris Loranger. Restricted duty for these correction officers ranged in length of time from about one month for Loranger to about 15 months for Swain.²⁰ At some point, the director of internal affairs told Sturgeon that Correction Officer Janice Cruz (Cruz) was under investigation. Cruz was placed on restricted duty with no inmate contact.²¹ And, at some point, the director of internal affairs told Sturgeon that Cruz continued to be under investigation.²² According to Sturgeon, Cruz was eligible to work overtime while on restricted duty if the overtime opportunity was at a post with no inmate contact, like dispatch, central control, and the tower, and if Cruz was next in seniority to be offered the overtime opportunity under the terms of the parties' agreement.

There is no written policy that addresses restricted duty, like the criteria for placing correction officers on restricted duty, the criteria for determining the scope of restricted duty or any other issues that may implicate employees' working conditions.²³ In Sturgeon's opinion, based on his 17.5 years experience working in a corrections environment and his familiarity with investigatory techniques, restricted duty is necessary to ensure the security of a corrections facility, the safety of inmates and staff, and the integrity of an investigation. Further, in Sturgeon's opinion, if information about an investigation became known to the correction officer under investigation, the correction officer would then know the identity of inmate(s) that were testifying against her/him. According to Sturgeon, this could result in: 1) an unfair treatment of inmates; and, 2) inmates aligning themselves on behalf of the officer under investigation and pressuring the inmates who have testified, thereby impacting the security of the facility.²⁴

Correction Officer Janice Cruz

Janice Cruz (Cruz) is a member of the Union's bargaining unit and has worked as a correction officer since September 1993. Cruz has worked in all areas of the house of correction, including male and female housing units. In late Fall 1995, Cruz worked in the EA and EB units on the second shift (3:00 p.m. to 11:00 p.m.) with correction officers Loranger and Swain. In or about late November or early December 1995, Cruz heard that a female inmate was spreading rumors in the house of correction that Cruz was doing her favors. After talking about the rumors with Swain, Cruz and Swain went to the Sheriff's office of internal affairs in late November or early December 1995, and Cruz relayed these rumors directly to Colonel Thomas Hodgson, then head of internal affairs, now Sheriff Hodgson.²⁵ During this one-hour meeting, Hodgson told Cruz not to worry and that rumors exist in a correction facility. Hodgson advised Cruz to motivate herself as a correction officer and to suppress any tendency she may have to be friendly with others. In or about early January 1996, female inmates informed

17. The record is unclear whether the director of internal affairs fully informed Sturgeon of the nature of the allegations against a correction officer and Sturgeon decided the appropriate duty restrictions, or whether the director of internal affairs decided the appropriate duty restrictions and relayed this directive to Sturgeon to implement, or whether any other procedure, like a joint decision, was used.

18. Sturgeon's testimony about placing correction officers under investigation by internal affairs on restricted duty was based on his personal knowledge of the procedure he followed as deputy superintendent, and the hearing officer credited Sturgeon's testimony on this point. Although Union representative Paul Reynolds testified that he was unfamiliar with the term restricted duty, he also testified that other Union employees also worked with this bargaining unit. Moreover, Janice Cruz testified that she was familiar with the term restricted duty and that officers were placed on restricted duty if they were under investigation by internal affairs.

19. Although Sturgeon has no personal knowledge of the specifics of the internal affairs division investigation of St. Pierre, Sturgeon had sufficient personal involvement in initiating the St. Pierre investigation with its attendant restricted duty to credit his testimony on these points. Further, because the documents used to refresh Sturgeon's recollection about the date the St. Pierre investigation began and the date St. Pierre resigned consisted of Sturgeon's own memorandum and St. Pierre's resignation letter, both records kept in the normal course of business, my findings include these dates despite Sturgeon's vague memory as to the exact dates.

20. Sturgeon had an independent memory of the identity of certain correction officers who were placed on restricted duty and the approximate time and length of the restricted duty. However, because Sturgeon had no independent memory of the exact dates these other correction officers were placed on restricted duty but

relied exclusively on a hand-written document, that he did not prepare nor assist the author in preparing, to refresh his recollection, the hearing officer made no findings on the exact dates.

21. Sturgeon has no personal knowledge of an internal affairs investigation of Correction Officer Cruz. The findings of fact reflect only what the director of internal affairs told him in his capacity as deputy superintendent and he relied on this information in making personnel assignments.

22. The text of the footnote just above is repeated here. Further, the record is unclear on the date the director of internal affairs told Sturgeon that Cruz continued to be under investigation.

23. Sturgeon testified that he did not believe there was any written policy on restricted duty, nor any written policy that discussed the circumstances under which officers were placed on restricted duty, the length of time officers should remain on restricted duty, or specific posts officers should be assigned to when placed on restricted duty. The hearing officer credited Sturgeon's un rebutted testimony on this issue. As deputy superintendent and superintendent he was and is in a position to know if a written policy exists that addressed restricted duty.

24. The Sheriff requests a finding, based on Superintendent Sturgeon's testimony and Union Representative Paul Reynolds' testimony that "the disclosure of investigatory material to the target of an investigation prior to the completion of that investigation could compromise that investigation." We have reviewed the record and make additional findings of fact.

25. At some point between late 1995 and June 23, 1997, Hodgson became Sheriff of Bristol County. The record is unclear on the exact date.

Cruz that internal affairs investigators were questioning inmates about her dealings with female inmates and her sexual preference.

On or about June 3, 1996, Cruz was called to the internal affairs office and questioned by Hodgson and Captain Gregory Centeio (Centeio) about a December 1995 incident involving a female inmate who fell down stairs. A Union representative was present during this questioning. Cruz informed the investigators that she was aware of the incident but had no further information about it because she was on vacation on the date it happened. At some point during the questioning, Hodgson told Cruz that if she was helping an inmate defraud the county by withholding information, she would be subject to perjury charges. At Hodgson's request, Cruz placed her statement in writing. Cruz then returned to her assignment in the EB female housing unit.

Between June 1996 and August 1996, certain female inmates in the EA and EB housing units told Cruz that internal affairs investigators had questioned them about her.²⁶ In late July 1996, Cruz began to hear rumors that a female inmate was saying that Cruz had sexually molested her. In late July 1996, Cruz talked with Major Souza about these rumors. Major Souza is in charge of security for the facility. Cruz continued to work the EB housing unit until August 30, 1996 when Captain Dennis assigned her to another unit and told her that she was restricted from working the EA and EB units. From September 1, 1996 until early November 1996, Cruz worked various job post assignments, including job posts with direct inmate contact, but not the EA or EB female housing units.

On or about November 3, 1996, Sturgeon saw Cruz in the yard of the house of correction while she was walking to her assignment in HA, a male housing unit. Cruz observed Sturgeon and Captain Pitman talking to one another. Pitman then approached Cruz and reassigned her to the security reception area, a post where Cruz would have minimal inmate contact.²⁷ Cruz asked Pitman about this reassignment, and Pitman told her that Sturgeon had directed it. In December 1996, Cruz was placed on restricted duty with no inmate contact.

Cruz worked in the security reception area from on or about November 3, 1996 until April 1, 1997 when she was assigned to the dispatch area.²⁸ Cruz continued to work in the dispatch area through at least mid-November 1999.²⁹ Over the weekend of

December 13, 1997, seven (7) inmates were incarcerated in the dispatch cell area, including three (3) male inmates clothed only in paper johnnies who were on a fifteen (15) minute watch.³⁰ Cruz completed an incident report form regarding the events of this weekend because she understood that she was on restricted duty with no inmate contact. Cruz sent a copy of this report to the Union and to Sturgeon, among others.

On or about December 16, 1997, Centeio telephoned Cruz and told her to report to his internal affairs office the next day and to bring an attorney with her. Cruz reported to Centeio's office on or about December 17, 1997 with Attorney Christine Nickerson (Nickerson) and Michael Boyd, a Union representative. They went to the conference room of the Sheriff's wing in the house of correction where they met with Centeio and Peter Larkin, another internal affairs investigator. The investigators first read Cruz her Miranda rights and stated that they had questions for Cruz. The investigators asked Cruz to sign a document. Nickerson asked to review the document and asked why Cruz was under investigation. The investigators refused to show Nickerson the document they wanted Cruz to sign and further declined to state why Cruz was under investigation. Nickerson informed the investigators that Cruz would not sign the document until she had seen it. At some point during this meeting, Centeio stated that he had sufficient evidence to fire Cruz. Centeio ended the meeting by stating that he would report to the Sheriff and that Cruz would be fired the next day. By letter to Sheriff Hodgson dated December 18, 1997, Nickerson recounted the events of this December 17, 1997 meeting. Further, Nickerson's letter to the Sheriff contains the following paragraph:

If you are prepared to arrange for Officer Cruz to be provided with transactional immunity, she is prepared to meet with you to respond to questions as part of the ongoing investigation. In the meantime, please be advised that Officer Cruz elects to exercise her rights under Article XII of the Massachusetts Declaration of Rights to remain silent absent an enforceable promise of effective immunity. This is without waiver of, Officer Cruz's rights under G.L. c.150E, s.4 to have a union representative present for any future meetings.

The Sheriff did not offer Cruz transactional immunity after December 17, 1997. Cruz made no statements during the December 17, 1997 meeting, and has not met with Centeio since the December 17, 1997 meeting.³¹

26. We have reviewed the evidence and determine that the hearing officer's finding accurately reflects that it was the inmates who first approached Cruz and reported to her that they had been questioned by the Sheriff's office of internal affairs about her. The Sheriff does not contend that this finding is inaccurate. Rather, the Sheriff seeks a further finding that "Cruz knew she was violating the rules and regulations of the Sheriff's Office when she interrogated at least eight inmates under her supervision." This additional finding is not material to the outcome of this case.

27. Cruz had some contact with inmates from the pre-release center who clean the security reception area.

28. From at least mid-1995 until at least mid-November 1999, Cruz worked the second shift at the house of correction, 3:00 pm to 11:00 pm.

29. From September 1997 until late December 1998, Cruz worked alone in the dispatch area on Sundays. In late December 1998 Cruz's schedule changed to Monday through Friday with Saturday and Sunday off.

30. Generally, a male correction officer is assigned to an area where male inmates are in paper johnnies, and a female correction officer is assigned to an area where

female inmates are in paper. However, in emergencies and when short staffed, the Sheriff may depart from this general rule. If an inmate is on a fifteen (15) minute watch, the correction officer is required to physically go to their cell every fifteen (15) minutes to visually check on them. A fifteen (15) minute watch is generally ordered for suicide prevention or security reasons.

31. The Sheriff requests a finding that the investigation of Cruz was ongoing at least through November 12, 1999. The hearing officer's findings of fact demonstrate that Cruz was under investigation by the Sheriff's internal affairs office for alleged misconduct. The hearing officer makes no finding that the investigation was ongoing, completed, stalled or in any other stage. The hearing officer found at footnotes 21 and 22 that Superintendent Sturgeon had no personal knowledge of the internal affairs investigation of Cruz and that the record is unclear on the date the director of internal affairs told Sturgeon that Cruz continued to be under investigation. The Sheriff does not direct our attention to the specific testimony of Superintendent Sturgeon, or any other witness, that supports a finding that the Cruz investigation was ongoing at least through November 12, 1999. Therefore, we decline to make this finding as requested by the Sheriff.

Request for information

At some point after the Union was certified as the correction officers' exclusive representative in August 1996, Cruz talked with Union Field Representative Paul Reynolds, an employee of the Union. Cruz told Reynolds about her working conditions at the house of correction and expressed her belief that she was under investigation by internal affairs and that her rights under the collective bargaining agreement, like job assignments and overtime opportunities were being violated. On September 5, 1996, Reynolds directed a written request to Sheriff David Nelson for "any and all information pertaining to any investigation of Officer Janice Cruz." The Sheriff did not respond to the Union's September 5, 1996 request for information. On January 1, 1997, Reynolds directed a second written request to Sheriff Nelson for "any and all information pertaining to any investigation of Officer Janice Cruz. If no investigation exists, please notify me as such." The Sheriff did not respond to the Union's January 1, 1997 request for information.

In September 1997, Reynolds, Attorney Matthew Dwyer, and Michael Boyd, the Union's Executive Secretary, met with Sheriff Hodgson and Attorney Michael Murray to discuss a number of outstanding issues between the Union and the Sheriff.³² During this meeting, the Union asked about the Cruz investigation. Sheriff Hodgson told the Union that Cruz was the subject of an investigation. Further, Sheriff Hodgson asked the Union to wait for a few weeks, that the matter would be concluded very shortly, that it was a very serious issue involving a number of agencies, and that the Union would be surprised at the outcome. After this meeting, Reynolds heard nothing further from the Sheriff's office about the Cruz investigation, nor did he receive any information or response to his two requests for information.

Overtime

From on or about December 16, 1996, the Sheriff did not permit Cruz to work overtime in positions where she would have contact with inmates.³³ On or about December 16, 1996, Cruz asked Major Souza, an officer superior to her in rank who oversees security in

the facility, about an overtime opportunity the previous night that Cruz believed should have been first offered to her. In response to her question, Major Souza told Cruz that all her rights to overtime were denied per order of Colonel Sturgeon.³⁴ On February 4, 1997, Cruz filed a grievance alleging that the Sheriff violated Article XVI of the agreement when it denied her overtime on February 1, 1997. Further, on March 29, 1997, Cruz filed a grievance alleging that she was not offered overtime on March 19, 1997 in violation of Article XVI of the agreement. The Sheriff denied the grievances.

Except for one occasion,³⁵ between mid-December 1996 and mid-November 1999, Cruz has not been offered any overtime opportunities pursuant to Article XVI, Section G3A of the agreement.³⁶ On two occasions between April 1997 and January 29, 1999, two different 3:00 p.m. to 11:00 p.m. shift officers, junior to Cruz in seniority, Officer Trevor Machado and Officer Scott Silva, relieved Cruz at the end of her 3:00 p.m. to 11:00 p.m. shift. On both these occasions, Cruz was not first offered the opportunity to continue working the dispatch post on an overtime basis.³⁷ Between mid-December 1996 and February 1999, there have been numerous overtime opportunities on the 11:00 p.m. to 7:00 a.m. shift that were offered and assigned to correction officers who worked with Cruz on the preceding shift, 3:00 p.m. to 11:00 p.m. Although Cruz had more seniority than some of the correction officers who were offered and assigned this overtime, the watch commander did not first offer these overtime opportunities to Cruz pursuant to Article XVI, Section G3A of the agreement. These overtime opportunities arose at various job posts in the house of correction, including dispatch on January 18, 1998.³⁸

*OPINION**Sheriff's Motion to Dismiss Count I: Refusal to Provide Information*

Count I of the Commission's amended complaint alleges that the Sheriff failed to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the Union with requested information that was relevant and reasonably necessary for the Union to perform its duties as the

32. Other representatives of the Union and the Sheriff may have been present at this meeting.

33. This fact is not in dispute. The Sheriff requests a finding that Cruz did not sign the overtime availability list under Article XVI, Section G3B of the parties' agreement. The hearing officer's findings of fact about available overtime are specific to Article XVI, Section G3A. Therefore, the finding requested by the Sheriff is not material to the outcome of this decision.

34. On January 15, 1999, Cruz testified in detail about this conversation with Major Souza and the hearing officer credited this testimony that the exchange took place, and that Major Souza told her that she was denied all overtime per order of Colonel Sturgeon. Cruz has no personal knowledge that Souza and Sturgeon discussed her eligibility to work overtime around December 16, 1996, and the record contains no evidence that Sturgeon told Souza to deny Cruz all overtime. The findings of fact reflect that Cruz had this exchange with Souza and Souza's response, including his stated explanation or rationale for telling her she was denied all overtime.

35. On December 24, 1997, Sturgeon called Cruz and offered her overtime on that date at the jail. Cruz refused the overtime.

36. The hearing officer credited Cruz's un rebutted testimony that, except for December 24, 1997, she has not been offered any overtime opportunities pursuant to Article XVI, Section G3A of the agreement.

37. The hearing officer credited Cruz's January 29, 1999 un rebutted testimony on this point.

38. These findings about overtime opportunities between mid-December 1996 and March 1999 are based on the house of correction's daily shift duty rosters completed by the shift commander, and Cruz's identification of which officers regularly worked the 3:00 pm to 11:00 pm shift with her and which of these officers were junior to her in seniority. Daily shift duty rosters are records kept in the normal course of business at the house of correction. The Sheriff does not dispute that the daily shift duty rosters in evidence are authentic business records. Shift commanders make contemporaneous notations on these daily shift rosters including entries like OT aside a correction officer's name with a further notation like 8 hrs. or 2300/0700, or OT 2300/0100, and the like. These daily shift rosters show numerous overtime opportunities at various posts on the 11:00 pm to 7:00 am shift that were offered and assigned to correction officers who regularly work with Cruz on the 3:00 p.m. to 11:00 p.m. shift, but are junior to Cruz in seniority. Because certain working conditions, like shift assignments and overtime opportunities, are controlled by strict seniority, it is logical and reasonable to believe that correction officers are fully aware of their seniority rank among officers working their same shift. The hearing officer credited Cruz's direct, unhesitating testimony about the identity of officers whom she outranked on the basis of seniority. The Sheriff contends that hearing officer erred in relying on the Sheriff's daily shift rosters to evidence Cruz's lost overtime opportunities and requests a finding that the Union has not proved that Cruz has lost any overtime opportunities.

employees' exclusive representative. After the hearing opened on January 15, 1999, the Sheriff orally moved to dismiss Count I of the Commission's amended complaint on the grounds that: 1) the Commission lacks jurisdiction to order a criminal investigatory body to release information about an on-going criminal investigation; and, 2) any Commission order to release information about an on-going criminal investigation violates the law that prohibits obstruction of justice. The Sheriff also argued that the Commission should dismiss Count I as a matter of law and for public policy reasons. The Sheriff submitted a January 15, 1999 affidavit from Captain Gregory Centeio of the Bristol County Sheriff's Office of Internal Affairs Division in support of its motion to dismiss.

The Union opposed the Sheriff's motion to dismiss on the grounds that the motion is a request to re-open or re-litigate the Commission's probable cause determination. Further, the Union asserts that whether the Sheriff's alleged investigation of Cruz is ongoing is a question of fact for the Commission to decide, not on the basis of hearsay information contained in an affidavit, but after hearing all admissible evidence subject to cross-examination. The hearing officer took the motion to dismiss under advisement and proceeded with the evidentiary hearing. On August 23, 1999, the Sheriff filed an interlocutory appeal under Commission rule 13.03 of the hearing officer's decision to take the Sheriff's motion to dismiss under advisement. On September 15, 1999, the Union filed its opposition to the Sheriff's interlocutory appeal.

On October 4, 1999, we affirmed the hearing officer's decision to take the Sheriff's oral motion to dismiss under advisement. Our ruling states in relevant part:

First, the Commission concludes that the hearing officer acted well within her discretion in deciding to defer ruling on the County's motion to dismiss. The issue raised by that motion goes to the ultimate issue in the case: whether the County is required under Chapter 150E to provide the Union with the information the Union requested concerning the County's ongoing investigation of Cruz. Therefore, it was entirely appropriate for the hearing officer to take that motion under advisement and to defer ruling on it until she had the benefit of a complete evidentiary record.

The motion to dismiss is now before us for decision with the benefit of an evidentiary record. For the reasons stated below, we deny the Sheriff's motion to dismiss.

Count I: Refusal to Provide Information

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. *Board of Trustees, University of Massachusetts (Amherst)*,

8 MLC 1148, 1149 (1981). The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration. *Boston School Committee*, 24 MLC 8, 11 (1998), citing *Boston School Committee*, 10 MLC 1501, 1513 (1984). This right extends to information that is relevant to a party's evaluation of whether to file and pursue a grievance. *Boston School Committee*, 8 MLC 1380, 1382 (1981).

The Commission's standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1141. Information about terms and conditions of employment is presumptively relevant and necessary for a union to perform its statutory duties. *City of Lynn*, 27 MLC 60 (2000), citing, *Higher Education Coordinating Council*, 23 MLC 266, 268 (1997). As the exclusive collective bargaining representative of correction officers, the Union has a duty to investigate and make reasoned judgments about the relative merits of employees' grievances. *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355-56 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *fur rev den.* 409 Mass. 1104 (1991). Moreover, the Union's statutory right to information is integral to its duty to police and enforce the terms of the collective bargaining agreement including the Sheriff's compliance with the contractual overtime selection procedure, Article XVI, Section G of the agreement. *Worcester School Committee*, 14 MLC 1682, 1685 (1988).

The Union first requested all information pertaining to any investigation of Cruz on September 5, 1996. Just before this request, Cruz had told a Union representative that she believed she was under investigation by the Sheriff's office of internal affairs and that her rights under the parties' contract, like job assignments and overtime availability, were adversely affected. It is undisputed that internal affairs' investigators had questioned Cruz about an incident involving a female inmate in June 1996. Further, it is undisputed that, on August 30, 1996, the Sheriff removed Cruz from a female housing unit assignment and thereafter restricted her from working the female housing units.

Having received no response to its first request for information, the Union again requested any and all information pertaining to any investigation of Cruz on January 1, 1997. In this second request, the Union also asked the Sheriff to notify it if an investigation existed. About two weeks before this second information request, the Sheriff had placed Cruz on restricted duty with no inmate contact for both her regular tour of duty and any overtime assign-

38. *continued...*

Contrary to the Sheriff's assertion, our review of Superintendent Sturgeon's testimony about the daily shift rosters does not reflect that Sturgeon testified that "the daily shift rosters were merely projections that were subject to change constantly and that they did not reflect the assignment of overtime accurately." Rather, the record reflects that Sturgeon testified on cross-examination that he did not know if there were notations on daily shift rosters about post assignments and whether officers were working that shift on an overtime basis. Sturgeon's

testimony on this issue was consistent on re-direct. Although Sturgeon also testified that the records that accurately reflect which officers worked overtime were the Sheriff's payroll records, there is no evidence that these payroll records also reflect the date, shift, and overtime post worked by the correction officer. Accordingly, based on our review of the evidence, we decline to disturb the hearing officer's findings based on the daily shift rosters and, in part, on the credibility of the witnesses. See, e.g., *AFSCME, Council 93, AFL-CIO*, 23 MLC 279, 280, fn. 7 (1997) (Commission will not disturb a hearing officer's credibility findings absent the clear preponderance of all relevant evidence that the resolutions are incorrect.)

ment because she was under investigation by the Sheriff's office of internal affairs.

The Union asserts that the existence and scope of a good faith internal affairs investigation of Cruz in September 1996 was relevant and reasonably necessary for it to determine whether Cruz's reassignment and subsequent workplace isolation violated the collective bargaining agreement. The Union contends that at the time of its second request, January 7, 1997, the information sought about the existence and scope of the Sheriff's investigation of Cruz was relevant and reasonably necessary for the Union to determine why the Sheriff denied Cruz overtime assignments for which she was otherwise entitled under the contract, and to understand the Sheriff's justification for bypassing Cruz. The record establishes that any restriction on a correction officer's regular tour of duty assignment also restricts that correction officer's overtime assignments. Applying the Commission's relevancy standard here, we find that the requested information is relevant and reasonably necessary for the Union to police and enforce the overtime selection procedure under Article XVI, Section G3A of the parties' contract and to assess whether to file and pursue a grievance on Cruz's behalf.

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the employees' exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns. *Board of Higher Education*, 26 MLC 91, 93 (2000), citing *Boston School Committee*, 13 MLC 1290, 1294-1295 (1986); *Adrian Advertising a/k/a Advanced Advertising*, 13 MLC 1233, 1263 (1986), *aff'd sub nom. Despres v. Labor Relations Commission*, 25 Mass. App. Ct. 430 (1988). If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the case is examined on the facts contained in the record. *Boston School Committee*, 13 MLC at 1295. The employer's concerns are then balanced against the union's need for the information. *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court*, 11 MLC 1440, 1443-44 (1985), citing *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1139 (1981) (Commission adopted the balancing test approach used by the United States Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 100 LRRM 2728 (1979)).

Here, the Sheriff does not contest the relevancy of the requested information and represents in its brief that it will provide the requested materials to the Union or to the proper prosecutorial officer when the Sheriff's office of internal affairs has completed the Cruz investigation. Rather, the Sheriff asserts that its internal affairs investigators are law enforcement officials with all common law and statutory privileges accorded law enforcement personnel. Citing *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976), the Sheriff argues that, under M.G.L. c. 4, Section 7 Twenty-sixth (f), it is absolutely privileged to withhold information about an ongoing criminal investigation when, in its own judgment, disclosure would compromise the administration of justice.

If an employer raises statutory defenses to its failure to provide a union with requested relevant information, the Commission re-

views the cited statutory provisions in light of the employer's obligation under the Law. If the requested information is not exempt from disclosure under the cited statute, it must be furnished to the union unless there exist other legitimate and substantial concerns that outweigh the union's need for the information. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1149-1152 (1981). As we stated in *Board of Trustees, University of Massachusetts (Amherst)*, *supra*, resolution of statutory concerns raised by an employer may require harmonizing statutory schemes, each of which protects a significant public interest. *Id.* Like *Board of Trustees, University of Massachusetts at Amherst*, *supra*, resolution of this issue involves harmonizing M.G.L. c. 66, Section 10, and M.G.L. c. 4, Section 7 with the Law.

General Laws c. 66, Section 10, provides in relevant part:

"(a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee."

General Laws c. 4, Section 7, Twenty-sixth, states in relevant part:

" 'Public Records' shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exceptions in that they are: ... (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest ..."

The record establishes that the Sheriff's office of internal affairs was investigating Cruz in 1996 and 1997, at the time the Union requested information about this investigation. Further, we find that the documentary materials or data made or received by the Sheriff's office of internal affairs during the Cruz investigation are records subject to disclosure under M.G.L. c. 66, Section 10, unless they are exempt from disclosure under M.G.L. c. 4, Section 7, Twenty-sixth (f). See *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792, 796 (2000) quoting *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993). The inquiry under the investigatory exemption is "whether the materials requested are 'investigatory materials necessarily compiled out of the public view,' and, if so, whether the agency resisting disclosure has demonstrated that their release 'would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.'" *Globe Newspaper Company v. Police Commissioner of Boston*, 419 Mass. 852, 858 (1995). It is not a balancing test. *Id.* The Sheriff has the burden of proving that the investigatory exemption applies to its investigation of Cruz. *WBZ-TV4 v. District Attorney for the Suffolk District*, 408 Mass. 595, 603 (1990).

Further, there is a presumption favoring disclosure under M.G.L. c. 66, Section 10c. *Id.*

In *City of Boston*, 22 MLC 1698 (1996), we held that the employer acted unlawfully by refusing to take appropriate steps to provide and/or accommodate the Union's request for information, including information compiled by the internal affairs division of the Boston police department in its investigation of employees. In reaching this decision, we examined the same investigatory exemption in light of the employer's obligation to provide a union with information under the Law that the Sheriff raises here. For purposes of our analysis we again quote from *Globe Newspaper Company v. Police Commissioner of Boston*, *supra*, where the Supreme Judicial Court framed the line of inquiry we follow here.

"The question under the investigatory exemption therefore becomes whether the disclosure ordered would be so prejudicial to effective law enforcement that it is in the public interest to maintain secrecy. In deciding that question, we keep in mind that the exemption aims at 'the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.' *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976). We also keep in mind that '[t]here is no blanket exemption provided for records kept by police departments' solely because they are involved in investigatory work, *Id.* at 65, and that the potential prejudicial effect of disclosure on 'effective law enforcement' is to be considered on a case-by-case basis. *Reinstein v. Police Commissioner of Boston*, *supra* at 290."

City of Boston, 22 MLC 1698, 1708 (1996), quoting, *Globe Newspaper Company v. Police Commissioner of Boston*, 419 Mass. at 859.

The Sheriff argues that, the concerns stated by the Supreme Judicial Court in *Bougas v. Chief of Police of Lexington*, 371 Mass. at 62, favoring nondisclosure of the investigatory materials, like preventing disclosure of confidential investigatory techniques, procedures, or sources of information, are present here. Further, the Sheriff contends disclosure would jeopardize effective law enforcement, provide immunity for law enforcement employees covered by collective bargaining agreements, and virtually guarantee destruction of evidence, the intimidation or influence of witnesses, and the construction of fraudulent alibis.

The Sheriff also asserts that because no disciplinary or criminal action has been taken against Cruz, the Union cannot demonstrate a pressing need for the information at this time. However, the facts establish that, effective September 1, 1996, the Sheriff restricted Cruz from working female housing units and, effective December 16, 1996, the Sheriff restricted Cruz from inmate contact for both her regular tour of duty and available overtime assignments. These restrictions impacted directly Cruz's assignment to available overtime under Article XVI, Section 3GA, the overtime selection procedure of the parties' contract. Further, the record establishes that the Sheriff did not respond to the Union's requests for information, nor did the Sheriff make reasonable efforts to provide the Union with as much of the requested information as possible, consistent with its expressed concerns. *See, Worcester School*

Committee, 14 MLC 1682, 1684 (1988) (An employer has an obligation to discuss and explore acceptable alternative ways to provide a union with requested information consistent with its legitimate and substantial concerns.)

Even assuming that: 1) investigators within the Sheriff's office of internal affairs are law enforcement personnel or investigatory officials within the meaning of G.L. c. 4, Section 7, cl. 26 (f); 2) the investigation of Cruz is criminal in nature and is ongoing; and, 3) the Cruz investigatory materials are necessarily compiled out of the public view, we determine that, if certain information is provided to the Union in a manner consistent with the protections in *Boston Police Superior Officers Federation v. City of Boston*, 414 Mass. 458, 461, fn. 5 (1993), the Union's need for information about the Cruz investigation outweighs the Sheriff's expressed concerns. The release of certain information to the Union consistent with the judicially-approved protections harmonizes all applicable statutory schemes by enforcing the employer's obligation to bargain in good faith under the Law, and by protecting the public interest in effective law enforcement under the investigatory materials exemption of the public records law. *See, City of Boston*, 22 MLC 1698 (1996) (Employee's internal affairs division file given to Union counsel to defend employee in a disciplinary proceeding.)

Based on this record, we conclude that the Sheriff has failed to bargain in good faith with the Union by failing to respond to the Union's requests for information, by failing to discuss alternative ways to provide the Union with the requested information, and by failing to provide the Union with the requested information in a manner consistent with its concerns. Therefore, the Sheriff has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Count I - Remedy

In *Boston Police Superior Officers Federation v. Boston*, 414 Mass. 458 (1993), the Supreme Judicial Court affirmed a Superior Court judgment enforcing Commission subpoenas for police department records, including records of the department's internal affairs division. In its decision, the Supreme Judicial Court details the lower court's order that contains safeguards for the internal affairs department's logs, cards, and files. The lower court's order differentiates between closed and open investigations of police officers as follows:

"(2) The IAD files, if any, of closed investigations of officers promoted to lieutenant in March, 1988; and summary sheets, if any, of any open IAD investigations of officers promoted to lieutenant in March, 1988.

Boston Police Superior Officers Federation v. Boston, 414 Mass. at 461, fn. 5. The Commission's ruling at issue in that enforcement action similarly distinguished between open and closed internal affairs investigations. *City of Boston*, Case No. MUP-6957, slip op. at 20 (Dec. 11, 1989). The Commission decided that, for files still subject to an ongoing investigation, the City should provide a summary sheet in lieu of the redacted file ordered provided in closed files. *Id.* The Commission provided further that, if the union believed that the information in the summary sheet was inadequate for its purposes, the Union could argue that its interest in receiving access to a particular open file should outweigh the employer's

interest in maintaining the confidentiality of the open investigation. *Id.*

In Count II of this case we find that there exists a practice of placing correction officers on restricted duty while their alleged misconduct is under investigation by the Sheriff's office of internal affairs and that the restricted duty applies to both their regular tour of duty assignment and overtime. Because this practice impacts directly on Cruz's opportunity to work available overtime, the Union has a right under the Law to information sufficient to verify the existence of an investigation and the alleged misconduct to decide whether to file and process grievance(s) on Cruz's behalf challenging the Sheriff's failure to adhere to the overtime selection procedure contained in the parties' agreement. It is the Sheriff who placed the existence, scope, and nature of an internal affairs investigation at issue by placing Cruz on restricted duty with no inmate contact and the Union has a right to this information to perform its duties as Cruz's exclusive representative.

To remedy the violation, the Union requests that the Commission order the Sheriff to provide the Union with any and all information about the Cruz investigation like it did in *City of Boston*, 22 MLC 1698, 1709 (1996), but without the conditions attached because by openly questioning inmates about Cruz, the Sheriff undermined his own confidentiality concerns. We decline to do so. In *City of Boston*, the internal affairs department information provided to the union was from the investigation that led directly to the employees' discipline. Unlike the facts here, the union needed that information to defend employees in disciplinary proceedings initiated as a direct result of the investigation's findings. Here, the Union's purpose in seeking the information at this time is not to represent Cruz because the Sheriff has disciplined her for the alleged misconduct under investigation. Rather, the Union needs the information to assess whether to file and pursue a grievance on Cruz's behalf while the Sheriff investigated the alleged misconduct because she was placed on restricted duty with all its attendant impacts on her terms and conditions of employment. Further, because the Sheriff has represented that he will provide the Union with the requested information or turn it over to the proper prosecutorial officer when the investigation is completed, the Commission's remedy applies only if the Sheriff has not yet furnished the Union or the proper prosecutorial officer with the requested information.

Therefore, we order the Sheriff to provide the Union with information sufficient to verify the existence of an investigation and a description of the alleged misconduct to determine whether the imposition and nature of the restricted duty that impacts directly Cruz's overtime opportunities under the parties' agreement was warranted and continues to be warranted. If there exists a summary sheet created contemporaneously with the Sheriff's action in the investigation that contains the date the investigation opened, a detailed description of the alleged misconduct under investigation, the date(s) investigators interviewed witnesses and/or took other action on the investigation, provide this summary sheet to the Union after deleting all information identifying any person other than Cruz. The summary sheet must also be redacted to comply with the requirements of the criminal offender record information act and the rape shield law. Further, the information should be provided directly to the Union's counsel with the additional safeguards

provided in *Boston Police Superior Officers Federation v. Boston*, 414 Mass. 458 (1993) and stated in our order.

If no summary sheet exists, or if the summary sheet does not contain the date the investigation opened, a detailed description of the alleged misconduct under investigation, and the date(s) investigators interviewed witnesses and/or took other action on this investigation, provide the Union with all investigatory file documents that contain this information, with all other information, like the substance of the witness statement, deleted. Further, these documents must be redacted in the same manner and with the same safeguards provided in *Boston Police Superior Officers Federation v. Boston*, 414 Mass. 458 (1993) and stated in our order. After hearing and review of this information, the Union may assert that the information is inadequate for its stated purposes in a separate compliance proceeding that is initiated under Commission rule 456 CMR 16.08.

Count II - Unilateral Change in Employee's Working Conditions

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law if it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989). A public employer's duty to bargain includes working conditions established through custom and practice as well as those governed by the provisions of a collective bargaining agreement. *City of Newton*, 27 MLC 74, 81 (2000); *City of Boston*, 16 MLC at 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

The issue here is whether the Sheriff violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it denied Cruz's request to work available overtime on or about December 16, 1996. To establish a violation, the Union must show that: 1) the Sheriff altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and, 3) the Sheriff established the change without giving the Union prior notice and an opportunity to bargain. *See, e.g., City of Newton*, 27 MLC at 81-82 (City unilaterally implemented a new criterion for eligibility to return to work after an off-duty illness.); *Commonwealth of Massachusetts*, 27 MLC 1, 4, (2000) (Commonwealth unilaterally altered its practice in assessing supervisory performance.); *City of Boston*, 26 MLC 177, 181 (2000) (City unilaterally instituted compulsory training for police officers returning to work after an extended absence.)

Section 6 of the Law requires a public employer and an employee organization to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The opportunity to work available overtime is an economic benefit and a term and condition of employment. Therefore, the criteria for eligibility to work available overtime, including procedures that affect eligibility, is a mandatory subject of bargaining. *See, e.g., Commonwealth of Massachusetts*, 17 MLC 1007, 1012 (1990), citing *Town of Ipswich*, 11 MLC

1403, 1411 (1995); *City of Boston*, 10 MLC 1238 (1983). Therefore, the Law requires the Sheriff to give the Union notice and an opportunity to bargain before implementing new criteria or altering existing criteria for eligibility to work available overtime. The record contains no evidence that the Sheriff provided the Union with notice that it proposed to implement new criteria or to change the existing criteria it applied to assigning available overtime to correction officers under the overtime selection procedure found at Article XVI, Section G3A of the agreement. Therefore, the only issue remaining is whether the Sheriff changed an existing practice or instituted a new one when it denied Cruz's mid-December 1996 request to work available overtime after the Sheriff placed her on restricted duty with no inmate contact.

It is undisputed that the Sheriff did not adhere strictly to the clear language of Article XVI, Section G3A and accord Cruz the right of first refusal in seniority order to all available overtime on the 11:00 p.m. to 7:00 a.m. shift. The Sheriff asserts that there exists an established practice that correction officers are placed on restricted duty during an investigation of alleged misconduct and that this restriction applies to overtime assignments. The Union argues that Article XVI, Section G3A is unambiguous and without any exception for correction officers under investigation for alleged wrongdoing and, therefore, practice evidence is not admissible to interpret its terms. The Union argues further, that if practice evidence is given weight, the record does not demonstrate that there exists a practice of treating correction officers on restricted duty in the manner in which the Sheriff treated Cruz.

To determine whether a practice exists, the Commission analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. *Commonwealth of Massachusetts*, 23 MLC 171, 172 (1997), citing, *Town of Chatham*, 21 MLC 1526, 1531 (1995). A consistent practice that applies to rare circumstances may become a condition of employment if it is followed each time the circumstances precipitating the practice recur. *City of Boston*, 21 MLC 1487, 1491, 1492 (1994), citing, *Town of Arlington*, 16 MLC 1350, 1351 (1989); *Town of Lee*, 11 MLC 1274, 1277 n.8 (1984).

Here, we find that prior to December 1996, the Sheriff had a practice of placing officers on restricted duty while they were under investigation by the Sheriff's office of internal affairs. Further, the correction officers on restricted duty continued to be eligible to work available overtime consistent with their work restrictions. In mid-December 1996, the Sheriff placed Cruz on restricted duty with no inmate contact while its office of internal affairs investigated Cruz for alleged misconduct. The Sheriff has identified three (3) areas in the house of correction that fall within this no inmate restriction, dispatch, central control, and the tower. We find merit in the Union's argument that the classification of no inmate contact is a misnomer, in part because correction officers, including Cruz, do have inmate contact when working the dispatch post. However, we need not decide that the areas identified by the Sheriff are the only areas the Sheriff would and has assigned a correction officer on restricted duty with no inmate contact for purposes of deciding whether the Sheriff violated the Law.

Here, the evidence establishes that: 1) the Sheriff assigned Cruz to work the dispatch post where she would have minimal contact with inmates while she was on restricted duty; and 2) the Sheriff bypassed Cruz for overtime at the dispatch post for which she was otherwise qualified under Article XVI, Section G3A. Therefore, we conclude that the Sheriff altered the overtime selection procedure under Article XVI, Section G3A as applied to correction officers on restricted duty, by denying Cruz available overtime opportunities consistent with her work restrictions, without giving the Union prior notice and an opportunity to bargain over this change, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

To remedy the violation we order the Sheriff to, in part, make whole Cruz and any other affected bargaining unit member for any loss of pay or benefits she suffered as a result of the Sheriff's unlawful alteration of the overtime selection procedure under Article XVI, Section G3A as applied to correction officers on restricted duty with no or minimal contact with the inmate population, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly, up to the date the City complies with this part of the order. As an integral part of this make whole order, we direct the parties to meet and reach agreement on the identity of the posts that involve minimal contact with the inmate population. If the parties fail to reach agreement on this issue, the Commission will decide it in a separate compliance proceeding that is initiated under Commission rule 456 CMR 16.08.

CONCLUSION

For the reasons stated above, we conclude that the Sheriff has failed to bargain in good faith with the Union by: 1) failing to respond to the Union's requests for information; 2) failing to discuss alternative ways to provide the Union with the requested information; and 3) failing to provide the Union with the requested information in a manner consistent with its expressed concerns. Therefore, the Sheriff has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. Further, we conclude that the Sheriff altered the overtime selection procedure under Article XVI, Section G3A, as applied to correction officers on restricted duty, by denying Cruz available overtime opportunities consistent with her work restrictions, without giving the Union prior notice and an opportunity to bargain over this change, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Bristol County Sheriff's Office shall:

1. Cease and desist from:

- a. Failing and refusing to bargain in good faith with the Union as the exclusive collective bargaining representative of certain correction officers by refusing to provide information relevant and reasonably necessary to the Union's assessment of whether to file and pursue a grievance(s) on behalf of correction officer Janice Cruz.
- b. Changing the overtime selection procedure under Article XVI, Section G3A, as applied to correction officers on restricted duty,

without giving the Union prior notice and an opportunity to bargain in good faith to resolution or impasse over a proposed change;

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

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

a. Upon request of the Union, provide the Union's counsel with information, subject to the following conditions, about the Cruz investigation sufficient for the Union to determine if the imposition and scope of Cruz's restricted duty, that impacts directly Cruz's overtime opportunities under the parties' agreement, was warranted and continues to be warranted. The information provided must include the date the investigation opened, a detailed description of the alleged misconduct under investigation, and the date(s) investigators interviewed witnesses and/or took other action on the investigation. If there exists a summary sheet created contemporaneously with the Sheriff's action in the investigation that contains this information, provide this summary sheet after deleting all information identifying any person other than Cruz. The summary sheet must also be redacted to comply with the requirements of the criminal offender record information act and the rape shield law. If no summary sheet exists, or if the summary sheet does not contain the date the investigation opened, a detailed description of the alleged misconduct under investigation, and the date(s) investigators interviewed witnesses and/or took other action on this investigation, provide the Union with all investigatory file documents that contain this information, with all other information, like the substance of the witness statement, deleted. Further, these documents must be redacted to comply with the requirements of the criminal offender record information act and the rape shield law.

i. The Union's counsel (including all persons to whom the attorney-client privilege would be applicable) shall not disclose the information provided by the Sheriff to anyone but his/her client;

ii. The Union's counsel, the Union, and all of its representatives, are not to use the information for any purpose other than to assess whether to file and process a grievance on Cruz's behalf or directly related proceedings.

b. Refrain from bypassing correction officers on restricted duty for overtime opportunities under Article XVI, Section 3GA, if the overtime opportunity is within their restricted duty.

c. Make whole Officer Janice Cruz for any loss of pay or benefits she may have suffered as a result of the Sheriff's unlawful alteration of the overtime selection procedure under Article XVI, Section 3GA as applied to correction officers on restricted duty with no or minimal contact with the inmate population, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly, up to the date the Sheriff complies with this part of the order. As an integral part of this make whole order, we direct the parties to meet and reach agreement on the identity of the posts that involve minimal contact with the inmate population.

d. 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.

e. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply with this order.

NOTICE TO EMPLOYEES

The Labor Relations Commission has issued a decision finding that the Bristol County Sheriff's Office (Sheriff) committed prohibited practices in violation of Sections 10(a)(5) and (1) of the Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by: 1) failing to respond to the Massachusetts Correction Officers Federated Union's (Union) requests for information, failing to discuss alternative ways to provide the Union with the requested information, failing to provide the Union with the requested information in a manner consistent with its expressed concerns; and, 2) altering the overtime selection procedure under Article XVI, Section 3GA, as applied to correction officers on restricted duty, without first giving the Union prior notice and an opportunity to bargain over this change.

WE WILL NOT fail and refuse to bargain in good faith with the Union by failing and refusing to provide information relevant and reasonably necessary to the Union's assessment whether to file and pursue a grievance(s) on behalf of Officer Janice Cruz.

WE WILL NOT change a mandatory subject of bargaining by unilaterally changing the overtime selection procedure under Article XVI, Section 3GA, as applied to correction officers on restricted duty, without giving the Union prior notice and an opportunity to bargain over a proposed change.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under Chapter 150E.

WE WILL, upon request by the Union, provide it with certain information under the conditions in the Commission's order.

WE WILL refrain from bypassing correction officers on restricted duty for overtime opportunities under Article XVI, Section 3GA, if the overtime opportunity is within their restricted duty, until the Sheriff has bargained with the Union to resolution or impasse over a proposed change.

WE WILL make whole Officer Janice Cruz for any loss of pay or benefits she may have suffered as a result of the Sheriff's unlawful alteration of the overtime selection procedure under Article XVI, Section 3GA as applied to correction officers on restricted duty, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly, up to the date the Sheriff complies with this part of the order.

WE WILL upon request, bargain collectively in good faith with the Union prior to implementing any mandatory subject of bargaining, including changes in the overtime selection procedure under Article XVI, Section 3GA, as applied to correction officers on restricted duty.

[signed]

For the Bristol County Sheriff's Office

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