In the Matter of CITY OF LOWELL

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 382

Case No. MUP-2299

54.51	employment security
54.8	mandatory subjects
67.14	management rights
67.15	union waiver of bargaining rights
67.8	unilateral change by employer
82.12	other affirmative action
82.3	status quo ante
91.52	failure to file answer
92.57	motion to dismiss

October 10, 2001
Helen A. Moreschi, Chairwomen
Mark A. Preble, Commissioner

David J. Fenton, Esq.	*Representing the City of Lowell*
Richard K. Sullivan, Esq.	*Representing the International Brotherhood of Police Officers, Local 382*

DECISION[1]

Statement of the Case

On January 5, 1999, the International Brotherhood of Police Officers, Local 382 (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the City of Lowell (the City) had violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law) by unilaterally implementing a domestic violence policy. Following an investigation, the Commission issued a complaint of prohibited practice on June 29, 1999. The complaint alleged that the City had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally implementing a domestic violence policy for bargaining unit members without providing the Union with prior notice and an opportunity to bargain to resolution or impasse. The City filed its Answer in hand on August 24, 1999. On August 24, 1999, a hearing was conducted pursuant to 456 CMR 13.02(2) at which both parties had an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the outset of the hearing, the Union filed a Motion for Summary Judgement arguing that the City had failed to file a timely answer to the Commission's complaint. The Hearing Officer permitted the City to file its answer and informed the parties that the Commissioners would consider the Union's argument on that point along with any other arguments raised in the parties' post-hearing briefs. The Union and the City filed their post-hearing briefs on or about September 24, 1999 and September 29, 1999, respectively. In accordance with Section 13.02(2) of the Commission's rules, the hearing officer issued Recommended Findings of Fact on November 3, 2000. Neither party filed challenges to the Recommended Findings of Fact pursuant to 456 CMR 13.02(2). The Commission has reviewed the record and adopts the hearing officer's Recommended Findings of Fact.

Findings of Fact[2]

The Union is the exclusive collective bargaining representative for a bargaining unit of regular police officers in the grade of Patrolman, Policewoman, and Police Chauffeur employed by the City in its police department. The Union and the City are parties to a collective bargaining agreement, effective from July 1, 1997 through June 30, 2000. The parties' collective bargaining agreement contains no language specifically addressing domestic violence. Article XIX of that agreement contains the following Management Rights Clause:

> The Employer shall not be deemed to be limited in any way by this Agreement, in the performance of the regular and customary functions of municipal management, and reserves and retains all powers, authority and prerogatives including, without limitation, the exclusive right of the City Manager and/or the Department head, to issue reasonable rules and regulations, orders and directives, governing the conduct of each department, provided that such rules and regulations, orders and directives are not inconsistent with and do not conflict with the provisions set forth in the Agreement.

Prior to September 29, 1998, the City did not have a policy for employees involved in domestic violence. In particular, the City did not require bargaining unit members to report to the department if they were involved in incidents of domestic violence on City property, on City time, or while utilizing a City vehicle. Nor were bargaining unit members required to report if they were named as a defendant in an action seeking a restraining order for domestic violence. Further, if a unit member was suspected or knew that a fellow unit member was involved in domestic violence, there was no requirement that the officer report it to the department. Similarly, the City did not automatically discipline unit members for domestic violence incidents prior to September 29, 1998. However, the City did require any police officer arrested, named as a defendant in a criminal matter or as the subject of a criminal complaint application to report that fact to the department prior to that date.

At some point prior to April 1998, City Manager Brian Martin requested that the City's Human Relations Department research and develop a domestic violence policy for City employees, and Katherine Tierney (Tierney), the City's Human Relations Manager, began that process in April 1998. After reviewing domestic violence policies from other communities, Tierney prepared and sent a proposed policy to the City Manager, who approved it.

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

2. Neither party contests the jurisdiction of the Commission in this matter.

By letter dated September 29, 1998 and addressed to "All Union Representatives," the City Manager announced that the City had developed a domestic violence policy to provide protection to employees who are victims of domestic violence and to discipline employees who engage in domestic violence in the workplace. That letter also provided that, if any union representatives wished "to discuss [the] policy further," they should contact Tierney by Friday, October 9, 1998 and that copies of the policy would be distributed to all departments and employees after that date. A copy of the policy, captioned "City of Lowell Domestic Violence in the Workplace Policy" was attached to the City Manager's September 29, 1998 letter. Tierney sent a copy of the letter and the accompanying policy to Union President Gerald Flynn, Jr. (Flynn) at the Lowell Police Department. Kristen Leary, the Police Superintendent's Secretary, signed for the letter, which was delivered via certified mail on October 6, 1998. At some point thereafter, Flynn received a copy of the policy via inter-office mail. However, the first time he saw the City Manager's September 29, 1998 letter was after October 9, 1998. No representative of the Union contacted Tierney about the policy after September 29, 1998 or requested to discuss it.

The policy defines domestic violence as "a pattern of assaults and controlling behavior that restricts the activity and independence of another individual [including] physical, sexual, and psychological attacks, and economic control." In pertinent part, the domestic violence policy provides that:

> [T]he City of Lowell will have zero tolerance for domestic violence in any form in the workplace...The City will take actions of discipline up to and including dismissal against an employee who commits an act of domestic violence on City property, on City time or utilizing a City vehicle.

The policy provides that "any member of the Police Department must notify the Chief of Police if that individual is involved in any of the above [domestic violence] circumstances or named as a defendant on a restraining order." It further states that "[a]ll employees who commit or threaten to commit acts of domestic violence at the workplace will be disciplined by their Department Head or City Manager. Such discipline may include suspension without pay or dismissal...[A]cts of domestic violence [may be considered] in promotion and other work-related determinations." Finally, the policy provides that "[e]mployees are required to cooperate in any investigation or complaint." The domestic violence policy is not limited to those named as criminal defendants or as subjects of criminal complaint applications. By memorandum dated October 26, 1998 and addressed to "All Departments," City Manager Martin announced that the City had adopted the domestic violence policy and requested that all employees be provided a copy of the policy and asked to acknowledge in writing receiving the policy.

Pursuant to the domestic violence policy, unit members are required to report to the department domestic violence matters in which they are personally involved, taking place on public property, on City time or while utilizing a City vehicle, and are required to notify the department if they are named as a defendant in a restraining order in a domestic violence matter. If an officer suspects that a co-worker is involved in domestic violence, the officer is obliged to report it to the department. Further, unit members involved in domestic violence incidents are subject to mandatory discipline. Since the domestic violence policy became effective the City has placed at least one officer on administrative leave because he was allegedly involved in an incident of domestic violence.

In late October 1998, Tierney received a letter dated October 29, 1998 from Union counsel, Richard Sullivan. Sullivan's letter demanded to bargain concerning the domestic violence policy and the impacts of implementing it. The parties did not bargain about the policy, either before or after the City received Sullivan's October 29, 1998 letter.

Opinion

Motion for Summary Judgment

In its post-hearing brief, the Union argued that the Hearing Officer should have granted its summary judgment motion because the City failed to provide an Answer to the Commission's Complaint in a timely manner. The Commission's mission is to provide a fair process to the parties before it and to promote stable labor relations, and absent evidence of prejudice or undue constraints on Commission resources, the Commission will not find that the Hearing Officer abused his/her discretion by failing to decide a matter on purely technical grounds. *City of Lawrence*, 23 MLC 213, 214 (1997).

Here, the Union acknowledges that, after the City provided an Answer to the Commission's Complaint at the hearing, the Hearing Officer offered to continue the hearing to allow the Union additional time to prepare its case. Although the Commission's rules contemplate that the respondent file a timely Answer to Complaints, the Commission has not been inflexible when a party seeks to file an Answer beyond the time specified in 456 CMR 15.06(1). *Commonwealth of Massachusetts*, 21 MLC 1515, 1517 (1994). Additionally, there is no evidence here that accepting the City's Answer prejudiced the Union or unduly affected the Commission's resources. *Id.* Therefore, because the record does not demonstrate that the Union was prejudiced by the action of the City, or that the Hearing Officer abused his discretion, the Hearing Officer's decision to deny the Union's Motion for Summary Judgment is affirmed.

Unilateral Change

The issue here is whether the City unilaterally implemented a domestic violence policy for bargaining unit members, without providing the Union with prior notice and an opportunity to bargain to resolution or impasse. A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment that involves a mandatory subject of bargaining, without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Commonwealth of Massachusetts*, 27 MLC 11, 13, (2001); *City of Newton*, 27 MLC 74, 81 (2000); *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *City of Boston*, 16 MLC 1429 (1989). To establish a finding of unilateral change,

the charging party must demonstrate that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain. *City of Boston*, 26 MLC 177, 181 (2000).

It is undisputed that, prior to September 29, 1998, there were no policies pertaining to domestic violence. Although the City had a reporting requirement for any police officer who had been arrested, named as a defendant in a criminal matter or as the subject of a criminal complaint application, the evidence demonstrates an absence of a domestic violence policy or practice. Further, unilaterally implementing a policy that represents a change in working conditions constitutes a mandatory subject of bargaining. *City of Peabody*, 9 MLC 1447, 1452 (1982). The City implemented the domestic violence policy without providing notice to the Union and an opportunity to bargain to resolution or impasse. Therefore, all three elements of the Commission's unilateral change analysis are satisfied.

The City argues that the domestic violence policy did not constitute a change in working conditions and did not have to be bargained with the Union. On the basis of the record before us, it is evident that the City's domestic violence policy, which sets out a reporting requirement for the bargaining unit members, details the disciplinary penalty, and specifies that this policy can be considered in making determinations of promotions, constitutes a mandatory subject of bargaining. *Commonwealth of Massachusetts*, Case No. SUP-4345 (Slip Op. June 29, 2001); *City of Peabody*, 9 MLC at 1452; *Johnson Bateman Co.*, 295 NLRB 180, 183, 131 LRRM 1393, 1397 (1989); *Town of Danvers*, 3 MLC 1559, 1574 (1977). It is well established that an employer may not impose a work rule that affects the terms and conditions of employment without bargaining with the union. *City of Peabody*, 9 MLC at 1452. Moreover, any change in the employees' job duties is a mandatory subject of bargaining. *Commonwealth of Massachusetts*, Case No. SUP-4345 (Slip Op. June 29, 2001); *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000); *Town of East Longmeadow*, 25 MLC 128, 129 (1999). In addition, policies that provide for the discipline and/or discharge of employees who violate them are a mandatory subject of bargaining. *Johnson Bateman Co.*, 295 NLRB at 183. Furthermore, procedures for promotions affect an employee's condition of employment to a significant degree and are a mandatory subject of bargaining. *Town of Danvers*, 3 MLC at 1574.

Here, the City's domestic violence policy contained new procedures and duties for reporting involment in domestic violence, which were mandatory for the members of the bargaining unit. In addition, members of the bargaining unit who had committed or threatened to commit domestic violence would be disciplined for their acts. Moreover, under the policy, acts of domestic violence could be considered in promoting and making other work-related determinations about members of the bargaining unit. Accordingly, we conclude that this domestic violence policy was a mandatory subject of bargaining.

Waiver by Inaction

The City next argues that, prior to formally distributing the domestic violence policy, it provided notice to the Union to discuss any concerns regarding the policy. The Commission has held that a union waives its right to bargain by inaction if a union: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining. *City of Taunton*, 26 MLC 225, 227 (2000); *City of Boston*, 26 MLC at 182; *Town of Mansfield*, 25 MLC 14, 16 (1998); *Holliston School Committee*, 23 MLC 211, 213 (1997).

Notice of a proposed employer action will be imputed to a union when a union officer with authority to bargain is made aware of the employer's proposed plan. *City of Holyke*, 13 MLC 1336, 1343 (1986). Once an exclusive bargaining representative is on notice that an employer contemplates a unilateral change in a mandatory subject of bargaining, the bargaining representative must make a prompt and effective demand for bargaining or be found to have waived the right to negotiate over the proposed change. *City of Boston*, 26 MLC at 182.

The doctrine of waiver by inaction will not apply in cases where a union is presented with a fait accompli. *Commonwealth of Massachusetts*, Case No. SUP-4345 (Slip Op. June 29, 2001). A fait accompli exists only where, under the attendant circumstances, it can be said that the employer's conduct has progressed to the point that a demand to bargain would be fruitless. *Town of Hudson*, 25 MLC 143, 148 (1999). In such cases, the party aggrieved by the unilateral action of the employer is not required to make a demand to bargain to preserve its rights. *Scituate School Committee*, 9 MLC 1010, 1012 (1982). However, if it appears that the union's demand to bargain could still bring about results, the union must make such a demand to preserve its rights. *Id.*

The record here reveals that, prior to September 29, 1998, the City did not have a domestic violence policy pertaining to members of the bargaining unit. In April 1998, the City's Human Relations Manager, began the process of researching and developing a domestic violence policy for City employees. By a letter dated September 29, 1998, addressed to "All Union Representatives," the City Manager announced that the City had developed a domestic violence policy. This letter also indicated that, if any union representatives wished to discuss this policy, that they should contact Tierney by October 9, 1998. Flynn did not receive a copy of this letter until on or after October 9, 1998.

By the City giving the Union notice of the development of the domestic violence policy on approximately October 9, 1998, or even September 29, 1998, when it was already scheduled to be distributed to employee on October 9, 1998, the City presented the Union with a fait accompli concerning this policy. The Union was not obligated to make a demand to bargain to preserve its rights because it was presented with a fait accompli. Therefore, the City has failed to establish the affirmative defense of waiver by inaction.

Contract Waiver

The City also argues that it had the right under the Management Rights Clause of the collective bargaining agreement to enact a City-wide domestic violence policy which was not inconsistent with and did not conflict with the terms of this collective bargaining agreement. When a party raises the affirmative defense of contract

waiver, it must show that the subject was consciously considered by the parties, and that the union knowingly and unmistakably waived its right. *Town of Mansfield*, 25 MLC at 15. The Commission will first consider the language of the contract to determine whether a union has contractually waived its right to bargain. *Town of Marblehead*, 12 MLC 1667, 1670 (1986). If the language of the contract is ambiguous, then the parties must present evidence of the bargaining history. *Id.* The bargaining history must demonstrate that the parties mutually intended the contract language to act as a waiver. *Id.* A broad management rights clause, is not an effective waiver of bargaining subjects that were never discussed by the parties. *Springfield School Committee*, 20 MLC 1077, 1082 (1993).

An examination of Article XIX of the collective bargaining agreement (*Management Rights Clause)*, indicates that the parties' collective bargaining agreement does not expressly or by necessary implication allow the City to implement a domestic violence policy without first bargaining with the Union to resolution or impasse. Moreover, the Management Rights Clause does not reference domestic violence and contains no specific waiver of the Union's bargaining rights. Further, the record contains no evidence of bargaining history. Therefore, the City cannot prevail on its contractual waiver defense.

Conclusion

For the above stated reasons, we conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by implementing a domestic violence policy without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

Order[3]

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the City shall:

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the Union over the domestic violence policy.

   b. Implementing a domestic violence policy that impacts terms and conditions of employment, until the occurrence of the earliest of the following conditions:

      1. An agreement by the Union that a domestic violence policy that impacts the terms and conditions of employment may be implemented;

      2. A bona fide impasse in bargaining; or

      3. The subsequent failure of the Union to bargain in good faith.

   c. In any like 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. Immediately rescind the domestic violence policy, as well as any and all personnel actions taken as a result of the policy.

   b. Make whole the affected bargaining unit members for all economic losses, including lost wages, and all other economic and contractual benefits, if any, they would have received had the City not unilaterally implemented the domestic violence policy, plus interest on any sums due calculated at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly.

   c. Upon request of the Union, bargain collectively in good faith to resolution or impasse prior to changing any mandatory subject of bargaining, including the implementation of a domestic violence policy.

   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 in writing, of the receipt of this decision and order of the steps taken in compliance therewith.

SO ORDERED.

NOTICE TO EMPLOYEES

The Labor Relations Commission has ruled that the City of Lowell committed a prohibited practice in violation of Massachusetts General Laws, Chapter 150E, Section 10(a)(5) and, derivatively, Section 10(a)(1), by unilaterally implementing a domestic violence policy without first giving the International Brotherhood of Police Officers, Local 382 notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT refuse to bargain collectively in good faith with the International Brotherhood of Police Officers, Local 382 over the domestic violence policy.

WE WILL NOT implement a domestic violence policy that impacts terms and conditions of employment, until the occurrence of the earliest of the following conditions: 1) an agreement by the International Brotherhood of Police Officers, Local 382, that a domestic violence policy that impacts terms and conditions of employment may be implemented; 2) a bona fide impasse in bargaining; or 3) the subsequent failure of the Union to bargain in good faith.

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

WE WILL immediately rescind the domestic violence policy, as well as any and all personnel actions taken as a result of the policy.

WE WILL make whole the affected bargaining unit members for all economic losses, including lost wages, and all other economic and contractual benefits, if any, they would have received had the City of Lowell not unilaterally implemented the domestic violence

---

3. The Union has requested the Commission to reimburse it for costs and attorney's fees incurred by it in processing this action. However, M.G.L. c. 150E, Section 11 does not authorize the Commission to award attorney's fees. *City of Boston*, 8 MLC 1113 (1981), *rev'd sub nom. City of Boston* v. *Labor Relations Commission*, 15 Mass. App. Ct. 122 (1983) (further appellate review denied).

policy, plus interest on any sums due calculated at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly.

WE WILL, upon request of the International Brotherhood of Police Officers, Local 382, bargain collectively in good faith to resolution or impasse prior to changing any mandatory subject of bargaining, including the implementation of a domestic violence policy.

WE WILL notify the Commission within ten (10) days in writing, of the receipt of this decision and order of the steps taken in compliance therewith.

[signed]
City of Lowell

* * * * * *