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In the Matter of TOWN OF WINTHROP

and

INTERNATIONAL BROTHERHOOD OF POLICE  
OFFICERS, LOCAL 397

Case No. MUP-2288

54.232 *police paid details*  
54.8 *mandatory subject of bargaining*  
67.14 *management rights*  
67.8 *unilateral change by employer*  
82.3 *status quo ante*

January 4, 2002

Helen A. Moreschi, Chairwoman

Mark A. Preble, Commissioner

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Howard L. Greenspan, Esq. *Representing the Town of  
Winthrop*

Jean Zeiler, Esq. *Representing the International  
Brotherhood of Police Officers,  
Local 397*

**DECISION<sup>1</sup>**

Statement of the Case

On December 24, 1998, the International Brotherhood of Police Officers, Local 397 (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) alleging that the Town of Winthrop (the Town) 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 February 18, 2000, issued its own Complaint of Prohibited Practice, alleging that, on or about July 1998, the Town changed the past practice of allowing bargaining unit members to perform paid police details in other municipalities without giving the Union prior notice and an opportunity to bargain, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

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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.

On May 15, 2000, Ann T. Moriarty, Esq. a duly designated hearing officer of the Commission, conducted a hearing, at which both parties had an opportunity to examine and cross-examine witnesses and to introduce documentary evidence. The Town and the Union filed post-hearing briefs on June 14, 2000, and June 26, 2000, respectively. The Hearing Officer issued Recommended Findings of Fact on February 2, 2001. The parties did not submit challenges to the Recommended Findings of Fact.

## FACTS<sup>2</sup>

Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions. The Union is the exclusive collective bargaining representative for all police patrol officers, sergeants, captains, and lieutenants employed by the Employer in its police department. Bargaining unit members are assigned to work private paid details after all shifts are fully staffed through overtime assignments. The Town bills the private vendor for all in-Town details worked by both Town police and by police officers from other communities. Town police officers receive payment for private paid detail work as part of their regular paycheck.

Between 1978 and 1990, Officer Ronald J. Vitale processed all requests for police paid details and assigned a police officer to perform the detail. Officer Vitale first ensured that all in-Town details were covered before he filled other municipalities' requests for bargaining unit members to work private paid details in other cities or towns.

### *Private Paid Detail Assignments — Outside the Town's Geographic Limits*

From about the early 1980s to about 1995, the Town offered bargaining unit members the opportunity to work the below-listed private paid details outside the Town's geographic limits.

- ◆ At the request of the City of Chelsea police department, bargaining unit members regularly worked a private paid detail at a bridge construction site in the City of Chelsea for about six (6) months in the early 1980s. Further, for about a two-year period in the early 1980s, bargaining unit members worked at this same bridge construction site in the City of Chelsea on a sporadic basis.
- ◆ At the request of the Town of Nahant police department, Officer Vitale worked several details in the Town of Nahant in the early 1990s up to and including 1994 or 1995. Further, Lieutenant Frank Scarpa was offered, but declined to work paid private details in the Town of Nahant in the early 1990s.
- ◆ At the request of the City of Boston police department, bargaining unit members worked a one-week paid private detail in the Orient Heights area of the City of Boston in late 1992 or 1993.

Police officers received payment for these out-of-Town private paid details in their regular Town paycheck. Police officers wear their Town-issued uniform when working all private paid details, both in-Town and out-of-Town.

### *Town of Nahant, July 1998 Request*

In or about July 1998, the Town of Nahant police department requested the assistance of three (3) uniformed Town police officers to work a private paid detail in the Town of Nahant. The Town denied the Town of Nahant's request. By letter dated July 27, 1998, the Union notified the Town's Board of Selectmen that it intended to file a charge with the Commission over the Town's decision to deny bargaining unit members the right to work details outside the Town. The Union offered to first meet with the Board of Selectmen to resolve the issue short of filing the complaint with the Commission. The Town did not respond to the Union's July 27, 1998 letter, nor did it offer the Union any reason for denying the Town of Nahant's request for bargaining unit members to perform this private paid detail in the Town of Nahant.

## OPINION

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 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); *City of Holyoke*, 13 MLC 1336, 1343 (1986). 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 Boston*, 16 MLC at 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

The issue here is whether the Town violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by implementing a decision to prevent bargaining unit members from performing paid police details in other municipalities. To establish a violation, the Union must show that: 1) the Town altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the Town implemented the change without giving the Union prior notice and an opportunity to bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994); *City of Boston*, 20 MLC 1603, 1607 (1994).

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

2. The Commission's jurisdiction is uncontested.

3. In about 1985, the Town assigned the private paid detail billing duties to police clerk Patricia Wall. Ms. Wall credibly testified that she did not recall billing any municipality directly for details worked by bargaining unit members. Her testimony was consistent with the testimony of former patrol officer George Doig, Officer Ronald J. Vitale, and Lieutenant Frank Scarpa that they worked

out-of-Town private paid details for which they received payment in their Town paycheck after 1985. Ms. Wall only testified about her billing practices for in-Town private paid details performed by both bargaining unit members and police officers employed by other municipalities. There is no evidence about the billing practices for private paid details for the City of Chelsea, the Town of Nahant, or the City of Boston.

conditions of employment. The Commission has held that changes to the assignment of non-municipal details directly impacts “wages and hours” and are, therefore, mandatory subjects of bargaining. See *Town of Hudson*, 25 MLC 143, 146 (1999); *City of Boston*, 10 MLC 1238, 1242 (1983); see also *Town of Saugus*, 4 MLC 1218, 1221 (H.O. 1977) (a change in the rules governing eligibility for extra paid details affects the wages a policeman might earn as a result of employment on extra details) citing *City of Chelsea*, 1 MLC 1299, 1303 (1975); and *City of Worcester*, 4 MLC 1378, 1382 (1977) (employer may not unilaterally abolish paid details and thus cause a reduction in wages for members of a bargaining unit).

Here, the record contains no evidence that the Town provided the Union with notice and an opportunity to bargain over the decision to eliminate paid municipal details. Therefore, the only issue remaining is whether the Town changed an existing practice or instituted a new one when it denied bargaining unit members the opportunity to work a private paid detail in the Town of Nahant.

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). The Town first asserts that a past practice does not exist because it was not aware that bargaining unit members were working details outside the Town. The Town argues that its lack of knowledge is supported by the hearing testimony of a police department clerk responsible for processing bills for the Town’s details since approximately 1985, who testified that she did not recall billing directly any municipality for details worked by bargaining unit members. The record establishes, however, that the clerk’s testimony concerned only her billing practices for in-Town private paid details performed by bargaining unit members and police officers employed by other municipalities. The clerk’s testimony does not rebut the bargaining unit members’ testimony that they worked out-of-Town private paid details for which they received payment in their Town paycheck after 1985. Further, other facts demonstrate that the Town was clearly aware of bargaining unit members performing out-of-Town details. Officer Vitale, a bargaining unit member, testified that he assigned officers to out-of-Town details only after all in-Town details were covered and all shifts were fully staffed through overtime assignments. Moreover, the record establishes that bargaining unit members were paid for private detail work as part of their regular Town paycheck. Therefore, because the Town was responsible for assigning officers to details and paid them for working details through their Town paychecks, it cannot persuasively disclaim knowledge of the practice.

Additionally, the Town asserts that it has not changed a pre-existing condition of employment that members of the bargaining unit would reasonably expect to continue, arguing that the private paid

details were sporadic. However, the Commission has found a past practice to exist where the action or event occurred sporadically but consistently over a period of years. See e.g. *City of Everett*, 8 MLC 1036 (H.O. 1981) *aff’d* 8 MLC 1393 (1981) (past practice existed where City provided paid time off for bargaining unit members assigned to work a shift immediately prior to a promotional Civil Service exam on three occasions over a six-year period).<sup>4</sup> See also *Ware School Committee*, 22 MLC 1502 (1996) (twelve-year history of giving preference to teachers over non-teachers in hiring constitutes a practice); *City of Boston*, 19 MLC 1613 (1993) (nine-year history of allowing union members to address new employees during their orientation constitutes a practice). The Commission has held that 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, 1491-92 (1994) citing *Town of Arlington*, 16 MLC 1350, 1351 (1989); *Town of Lee*, 11 MLC 1274, 1277 n.8 (1984) *aff’d sub nom. Town of Lee v. Labor Relations Commission*, 21 Mass. App. Ct. 166 (1985). Here, officers performed out-of-Town details for over ten years, from the early 1980’s to mid-1990’s. Bargaining unit members worked details outside the Town for periods ranging from six months in the early 1980’s, to one week in 1992 or 1993. Officer Vitale worked several details in the early 1990’s, up to and including 1994 or 1995. Even if these occasions can be considered sporadic, they occurred consistently for over a decade. Thus, from the early 1980’s until 1998, when the Town declined to allow bargaining unit members to work details in the Town of Nahant, the un rebutted evidence establishes that bargaining unit members worked out-of-Town details.

The Town also argues that, even if it has prevented bargaining unit members from working out-of-Town details, the Union has not demonstrated that this action actually changed a pre-existing condition of employment. *Commonwealth of Massachusetts*, 9 MLC 1387, 1393 (1982) citing *City of Boston*, 8 MLC 1419 (1981). However, the uncontroverted evidence demonstrates that the Town unilaterally declined to allow bargaining unit members to perform out-of-Town details, a mandatory subject of bargaining. By prohibiting officers from performing details outside the Town, it effectively changed a pre-existing condition of the officers’ employment.

In the alternative, the Town argues that, even if the Union has established that a past practice existed of allowing officers to perform details in other towns, the Town was not required to bargain over the decision or the impact of the decision to eliminate out-of-Town paid details because they are equivalent to unscheduled overtime. The Town argues that its decision to prohibit police officers from performing details in other towns was a core governmental decision, asserting that it has the managerial prerogative to determine how to deploy its personnel in the most economically efficient manner, relying on *West Bridgewater Police Association*

4. In *City of Everett*, two employees were given time off with pay in 1971; in 1974, seven employees were allowed paid time off, and in 1977, nine firefighters were given time off with pay. *Id.* at 1394.

*v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984). The Town argues that management decisions<sup>5</sup> pertaining to unscheduled overtime do not have a direct impact on terms and conditions of employment and are not mandatory subjects of bargaining. *West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550, 554 (1984), quoting *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 223 (1964) (management decisions fundamental to the basic direction of a corporation enterprise or which impinge only indirectly upon employment security should be excluded from the duty of collective bargaining). The Town argues that details are similar to unscheduled overtime because they provide bargaining unit members the opportunity to earn extra money but are in no way guaranteed by the Town because other towns control what details are available. The Union distinguishes details from unscheduled overtime, arguing that details come from independent companies, agencies or entities, unlike unscheduled overtime, which is within the control of the Town. The Union further argues that bargaining unit members have a reasonable expectation of being able to perform outside details based on the Town's past practice of assigning bargaining unit members to out-of-Town details.

In *Town of West Bridgewater*, 10 MLC 1040 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984), the Commission held that the reduction of unscheduled overtime was not a mandatory subject of bargaining because "there are legitimate management decisions which cause, as their necessary result, the elimination or reduction of overtime opportunities." 10 MLC at 1045. The Commission noted that the availability of overtime was merely a by-product of the Town's staffing patterns and did not constitute a term or condition of employment. *Id.* at 1046. See also *Town of Billerica*, 8 MLC 1957, 1962 (1982) (no duty to bargain where fire fighters' overtime was dictated by "a factor within the sole prerogative of management - - minimum manning levels per shift").

*West Bridgewater* is distinguishable from the facts of the instant case however, because it concerned an employer's core management decision to alter its method of assigning work, resulting in a potential loss of unscheduled overtime. Unlike the Town of West Bridgewater, the Town here did not have an inherent management right to eliminate out-of-Town details. Moreover, unscheduled overtime was reduced as a by-product of West Bridgewater's decision to alter its manner of assigning work. Here, in contrast, eliminating out-of-Town details did not result from a core management decision by the Town. The Commission has recognized that, despite the often sporadic and inconsistent nature of out-of-Town details, they constitute a mandatory subject of bargaining. See e.g., *Town of Hudson*, 25 MLC 143 (1999). Further, bargaining unit members have an expectation that they will have the opportunity to work out-of-Town details when they arise, as long as their shifts and in-Town details are covered. Here, the Town of Nahant presented an opportunity for three officers from the Town of

Winthrop to work a paid detail. However, the Town unilaterally foreclosed bargaining unit members from working that detail without providing the Union with notice and an opportunity to bargain. The Town's unilateral restriction on the ability of bargaining unit members to work out-of-Town details, therefore, violated Sections 10(a)(5) and derivatively, 10(a)(1) of the Law.

## CONCLUSION

For all of the above reasons, we conclude that the Town violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by preventing bargaining unit members from performing out-of-Town details, without first giving the Union notice and an opportunity to bargain to resolution or impasse.

## ORDER

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

### 1. Cease and desist from:

- a. Failing and refusing to bargain in good faith with the International Brotherhood of Police Officers, (I.B.P.O.) Local 397 over the decision to prevent officers from working paid private details outside the Town;
- b. Preventing officers from working paid private details outside the Town of Winthrop without giving the I.B.P.O., Local 397 prior notice and an opportunity to bargain in good faith to resolution or impasse over the decision to prevent officers from working paid private details outside the Town;
- 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 which will effectuate the policies of the Law:

- a. Immediately restore employees represented by the I.B.P.O., Local 397 to the status quo prior to July 1998 by allowing officers to work paid private details outside the Town;
- b. Upon request by the I.B.P.O., Local 397, bargain to resolution or impasse over the decision to prevent officers from working paid private details outside the Town;
- c. Make whole any employees represented by the Union for any loss of earnings suffered as a result of the Town's unlawful unilateral change in preventing officers from working paid private details outside the Town, 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 Town complies with this part of the order;
- d. Post in conspicuous places where employees represented by the I.B.P.O., Local 397 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.

5. The Town argues further that it has the managerial prerogative to prevent officers from working details in other towns to limit its insurance liability expenses and ensure the availability of personnel. However, the Town's interest in limiting its liability expenses should not supercede its duty to bargain with the Union over its

employees' terms and conditions of employment. The Town should instead address any concerns about limiting its financial accountability and potential liability through collective bargaining.

SO ORDERED.

**NOTICE TO EMPLOYEES**

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Relations Commission are appealable to the Appeals Court Commonwealth of Massachusetts. To claim such an appeal, an appealing party must file a notice of appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. Notice of Appeal need be filed with the Appeals Court.

The Labor Relations Commission has issued a decision finding the Town of Winthrop (the Town) committed a prohibited practice 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 implementing a decision to prevent officers from performing paid private details outside the Town without first giving the International Brotherhood of Police Officers (I.B.P.O.), Local 397 notice and an opportunity to bargain to resolution or impasse. In compliance with the Labor Relations Commission's order,

WE WILL NOT fail or refuse to bargain with the I.B.P.O., Local 397 over the decision to prevent officers from performing private details outside the Town.

WE WILL NOT change a mandatory subject of bargaining by implementing a decision to prevent officers from working private details without giving the I.B.P.O., Local 397 prior notice and an opportunity to bargain in good faith to resolution or impasse over any proposed change.

WE WILL make whole any employees represented by the I.B.P.O., Local 397 for any loss of earnings suffered as a result of the Town's unlawful unilateral change in preventing officers from working paid private details outside the Town as a result of the Town's unlawful refusal to bargain, plus interest on all sums owed at a rate specified in M.G.L. c. 231, Section 6B, compounded quarterly up to the date the Town complies with this part of the order.

WE WILL upon request by the I.B.P.O., Local 397 bargain cooperatively in good faith to resolution or impasse prior to implementing a decision to prevent officers from working paid private details outside the Town of Winthrop.

[signed]

For the Town of Winthrop

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