

In the Matter of COMMONWEALTH OF
MASSACHUSETTS
AND
MASSACHUSETTS CORRECTION OFFICERS
FEDERATED UNION

Case No. SUP-4485

54.583 *work rules and regulations*
54.8 *mandatory subjects*
67.15 *union waiver of bargaining rights*
67.8 *unilateral change by employer*

January 23, 2002

Helen A. Moreschi, Chairwoman

Mark A. Preble, Commissioner

<i>Carol A. Colby, Esq.</i>	<i>Representing the Commonwealth of Massachusetts</i>
<i>Joseph S. Fair, Esq.</i>	<i>Representing the Massachusetts Correction Officers Federated Union</i>

DECISION¹

On July 2, 1998, the Massachusetts Correction Officers Federated Union (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Commonwealth of Massachusetts (the Commonwealth) had violated Sections 10(a)(5), (3) and (1) of M.G.L.c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on March 19, 1999, alleging that the Commonwealth had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally requiring certain unit members at the Southeastern Correctional Center (the SECC) to audit inmate movement passbooks.²

On October 1, 1999, Margaret M. Sullivan, Esq., a duly designated hearing officer of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties submitted post-hearing briefs on December 22, 1999. On February 27, 2001, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged those findings pursuant to 456 CMR 13.02(2).

Findings of Fact³

Because neither party challenged the Hearing Officer's Recommended Findings of Fact, we adopt them in their entirety and

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. The Commission dismissed those portions of the Union's charge alleging that the Commonwealth had violated Section 10(a)(3) of the Law by suspending certain employees at the SECC, and the Union did not seek reconsideration pursuant to 456 CMR 15.03.

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

summarize the relevant portions. The Union is the exclusive collective bargaining representative for certain employees of the Commonwealth at the Department of Corrections (the DOC) who are in statewide bargaining unit 4. The SECC is a lower level, medium security facility in Bridgewater.⁴ The Union represents employees in the following job titles at the SECC: recreation officer; correction officer I (CO I), the entry-level protective service position; correction officer II (CO II), the first level supervisory position which carries the rank of sergeant; and correction officer III (CO III), the second level supervisory position which carries the rank of lieutenant.⁵

On or about January 20, 1998, James Walsh, Jr. (Walsh), Superintendent at the SECC, sent Stephen Hocking (Hocking), the Chief Steward and a CO I at the SECC, a letter stating that:

Please be advised that I am appointing you to serve on a newly formed committee to review and improve on our systems of Inmate Accountability. Meetings will be scheduled every Wednesday from 1:30 PM to 4:00 PM and will be held at the Operations division conference room.

Approximately one week later, Gary Roden (Roden), then Deputy Superintendent of Operations at the SECC, approached Hocking and inquired whether Hocking was going to sit on the inmate accountability committee (the committee) that Superintendent Walsh referenced in his January 20, 1998 letter. Hocking stated that he was unavailable because of personal reasons.⁶ During the brief conversation, Roden remarked that the purpose of the committee was to explore changes in inmate accountability and to develop new procedures and suggested that it might be a good idea to have another steward sit on the committee if Hocking was unavailable.

Shortly after Hocking and Roden's conversation, two SECC administrators⁷ approached the facility's overtime committee,⁸ of which Hocking was a member, and requested that Hocking receive overtime when he attended the committee meetings. Because Hocking worked the 3:00 PM to 11:00 PM shift, he would earn 1.5

hours of overtime each time that he reported at 1:30 PM for a meeting. Although the overtime committee agreed that Hocking would be eligible to earn overtime if he attended a committee meeting, he never attended any of the meetings.⁹

In early June 1998, unit members heard an announcement at roll call that the SECC planned to lock down its inmates while unit members underwent training for approximately two weeks on a newly codified institutional procedure, 103 DOC 513.¹⁰ 103 DOC 513 codified certain procedures that already had been in place at the SECC as well as certain new procedures. For a number of years, correction officers at the SECC had performed inmate census checks, had completed daily change sheets and had written passes for inmates. However, for the first time, Article IX of 103 DOC 513 required that nightly audits be conducted on the passbooks that correction officers used to monitor the movements of the inmates.¹¹

There are approximately thirty-five inmate passbooks at the SECC. CO I's, CO II's and, infrequently, CO III's use these passbooks. The SECC assigned these passbooks as part of the crew kits of certain correction officers who worked the 7:00 AM to 3:00 PM shift and the 3:00 PM to 11:00 PM shift. A correction officer completes a pass (the originating correction officer) for an inmate to travel within the facility at times other than specially designated inmate movement periods. A duplicate copy of the pass remains in the originating correction officer's passbook. When the inmate arrives at the destination, a correction officer at that site (the destination officer) signs the pass and notes the inmate's time of arrival. When the inmate returns to the original area, the destination officer again signs the pass and notes the time of the inmate's departure. Upon the inmate's arrival, the originating officer notes the time of the inmate's return and signs and staples the pass to the duplicate pass in the correction officer's passbook.

Article IX of 103 DOC 513 required the correction officer conducting the audit (the auditing officer) to ensure that there was an original pass attached to every duplicate in the passbook. If a pass was missing, the auditing officer would be required to make every

4. There are three different kinds of inmates at the SECC: minimum security inmates who are near the end of their prison sentences; residents of the addiction center who, although not serving a prison term, have been ordered by a judge to undergo treatment for drug dependency; and medium security inmates, often in protective custody, who make up the majority of the facility's inmates.

5. The Department of Personnel Administration Classification Specification for the positions of CO I, CO II, and CO III describes the incumbents in these positions as maintaining custodial care and control of inmates, patrolling correctional facilities, observing conduct and behavior of inmates and investigating suspicious inmate activity.

6. However, Hocking testified that he did not attend the committee meetings because Walsh addressed the January 20, 1998 to him as a CO I rather than as Chief Steward. Hocking stated that as a CO I that he was not interested in serving on the committee.

7. The record is silent as to the identities of the two administrators who approached the overtime committee.

8. Article 2 H (iv) of the parties' 1998-2000 collective bargaining agreement states that:

Each institution shall establish an overtime committee consisting of an equal number of members from both labor and management. This committee shall oversee the implementation of overtime at the institution

and shall attempt to rectify any discrepancies or disagreements prior to the issuance of a grievance.

9. The record is silent regarding the number of times that the inmate accountability committee met and what issues the committee members discussed at the meetings.

10. The DOC develops new policies and procedures in the following manner. A reviewing authority at the DOC, often a deputy commissioner, drafts a new policy. The Policy Development and Compliance Unit (the PDCU) comments upon the draft policy and the Commissioner of the DOC then decides whether to approve the policy. However, the Director or the Associate Director of Health Services can sign off on certain policies regarding medical issues. Once a policy is approved, a superintendent of a correctional institution will develop a procedure to comply with the new policy and submit it to the appropriate reviewing authority. However, a superintendent often implements a new procedure prior to submitting the new procedure to the reviewing authority. The reviewing authority will make suggestions to the superintendent if a portion of the procedure needs to be revised. The PDCU is the reviewing authority for all safety procedures. Here, Superintendent Walsh wrote to the PDCU on June 2, 1998 seeking to have the PDCU review 103 DOC 513. James Ferreira, Director of the PDCU, signed off on the procedure on July 2, 1998.

11. 103 DOC 513 also mandated other new procedures at the SECC including the performance of inmate accountability checks and the issuance of crew kits for medium security inmates. Previously, the SECC had only issued crew kits for minimum-security inmates.

attempt to locate that pass, starting with the destination point listed on the pass. If the pass was not located, the auditing officer would complete a passbook discrepancy form and forwarded it to the Director of Security. 103 DOC 513 originally required the two CO I's working in the Special Management Unit on the 11:00 PM to 7:00 AM shift¹² to conduct the audits.¹³

The SECC implemented the passbook audits on or about June 15, 1998. During the first week, several of the CO I's in the Special Management Unit refused to perform the audits, and the SECC subsequently suspended these CO I's.¹⁴ If a CO I refused to audit the passbooks, the task usually was not performed. However, in at least one instance, West Patrol Supervisor Lieutenant Mendonca (Mendonca) audited the passbooks when a CO I refused to perform the task. Mendonca performed the audit and later informed his supervisor Captain Robert Couture (Couture) that he had performed the task.

After the SECC disciplined the CO I's in the Special Management Unit, Hocking met with Superintendent Walsh and requested that: 1) the SECC cease and desist from implementing the passbook audits until the SECC bargained over implementing the procedure; 2) the SECC rescind the discipline that it issued to the CO I's; and 3) Superintendent Walsh issue a memo stating that no correction officer would be disciplined as a result of any discrepancy that might be discovered during a passbook audit. On June 24, 1998, Superintendent Walsh issued a memorandum entitled Pass Book Audit/Clarification. This memorandum stated in part that: "The purpose of auditing passbooks is not to discipline security staff but to ensure that inmates are complying with the procedure." Michael Boyd, Executive Secretary for the Union, wrote to James Wolfgang in the Commonwealth's Office of Employee Relations (OER) on June 26, 1998 stating that: "A practice has started at SECC on the 11-7 shift that directly impacts the working conditions of employees." Boyd then requested that the Commonwealth cease and desist from implementing the procedure until the parties negotiated the issue. On June 29, 1998, Hocking filed a class action grievance protesting the SECC's alleged unilateral implementation of 103 DOC 513.¹⁵

During the last two weeks of June 1998, a correction officer died in the line of duty at MCI-Shirley. The correction officer's death shocked and saddened the members of the Union and the administration at the SECC, and both groups resolved to work together to improve the climate of labor relations at the facility. As part of this effort, the SECC suspended its requirement that correction officers complete passbook audits for approximately two weeks. During

that period of time, the parties met on July 3, 1998 to discuss the inmate passbook procedure. Hocking and Boyd represented the Union and Union Vice-President Steven Donnelly joined them at some point during the meeting. Assistant Deputy Commissioner Ronald Duvall and Roden represented the SECC at the meeting. The Union again requested that the SECC cease and desist from implementing the inmate passbook audits until the parties had negotiated the issue to resolution or impasse and rescind any discipline that it had imposed against correction officers in the Special Management Unit. The parties agreed at the July 3, 1998 meeting that the SECC would transfer the responsibility for auditing the inmate passbooks from the Special Management Unit to the Officer In Charge of the Orientation Unit¹⁶ and that the Operations Division would then shred the used passes.¹⁷

Several days later, the Officer in Charge of the Orientation Unit began performing the passbook audits and was later succeeded by a CO I. One of these CO I's, Lance Martin (Martin), refused to perform a passbook audit and was subsequently suspended for three days.¹⁸ The SECC has never disciplined a correction officer for failing to accurately maintain a passbook and has not required a CO I to counsel another CO I about how to properly fill out a passbook. However, a CO III retrained a correction officer when a discrepancy was discovered in the correction officer's passbook. On or about July 1, 1999, Lieutenant Goldrick spoke at roll call and informed bargaining unit members that they must properly complete inmate passes to avoid discipline.

Opinion

A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing its employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as those conditions of employment that are established through a collective bargaining agreement. *Commonwealth of Massachusetts*, 27 MLC 1, 5 (2000); *City of Gloucester*, 26 MLC 128, 129 (2000); *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1697 (1983). To establish a violation, the Union must show 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 or an opportunity to

12. The SECC assigned the passbook audit duty to the 11:00 PM to 7:00 AM shift because that shift was the only shift not using the passbooks.

13. The Special Management Unit East Officer audited the passbooks of correction officers working in the east area of the facility, and the Special Management Unit West Officer audited the passbooks of correction officers working in the west area of the facility.

14. The CO I's in question appealed their suspensions to the Civil Service Commission. At the hearing for the Civil Service appeals, the parties reached an agreement rescinding the suspensions.

15. On July 31, 1998, Jeffrey Bolger, Director of Employee Relations at the DOC, denied the class action grievance at Step 2 by stating in part that: "The requirement

that officers audit inmate passbook discrepancies is consistent with the duties and responsibilities contained in the [Department of Personnel Administration] classification specification." The Union processed the grievance to Step 3 on September 8, 1998.

16. The Officer in Charge of the Orientation Unit was a CO II.

17. On July 22, 1998, the SECC issued an addendum to 103 DOC 513 that reflected these changes. The July 22, 1998 addendum also required the auditing officer to notify the Director of Security if a pass had a discrepancy. Previously, the auditing officer only notified the Director of Security if the auditing officer could not account for a pass.

18. Martin's discipline still stands.

bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994); *City of Boston*, 20 MLC 1603, 1607 (1994).

Here, prior to June 1998, the SECC did not require unit members to perform nightly passbook audits. Instead, unit members were only responsible for maintaining their own passbooks. In June 1998, the SECC required two unit members, who worked the 11PM to 7AM shift, to perform audits of the approximately thirty-five passbooks that unit members at the SECC used each day. The SECC required the auditing officers to verify whether the passbooks contained an original pass as well as a duplicate copy. If an original pass was not attached to the duplicate copy, an auditing officer was required to investigate and locate the missing original. If an auditing officer could not locate a missing pass the SECC required the auditing officer to complete a passbook discrepancy form and to submit the form to the SECC's Director of Security.

Section 6 of the Law requires public employers and employee organizations to negotiate in good faith about wages, hours, standards of productivity and performance, and any other terms and conditions of employment. It is well established that job duties are a mandatory subject of bargaining. *Lowell School Committee*, 28 MLC 29, 33 (2001); *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999); *Town of Danvers*, 3 MLC 1559, 1576 (1977). Upon review of the record, we conclude that the Commonwealth imposed new job duties in June 1998 by requiring unit members at the SECC to conduct nightly audits of their co-workers' passbooks, to investigate missing passes, and to complete passbook discrepancy forms and that these job duties were mandatory subjects of bargaining.

The Commonwealth argues, however, that, even if we find that the SECC changed unit members' job duties by requiring them to perform passbook audits, the Union waived its statutory right to bargain by inaction. If a public employer asserts the affirmative defense of waiver by inaction, it must establish by a preponderance of the evidence that an employee organization had: 1) actual knowledge or notice of the proposed action; 2) a reasonable opportunity to negotiate about the subject; and 3) unreasonably or inexplicably failed to bargain or request bargaining. *Commonwealth of Massachusetts*, 28 MLC 36, 40 (2001); *Town of Dennis*, 26 MLC 203, 204 (2000); *Holyoke School Committee*, 12 MLC 1443, 1452 (1985); *Boston School Committee*, 4 MLC 1912, 1915 (1978). The Law does not require a public employer to provide an employee organization with direct, explicit notice of a proposed change. *City of Cambridge*, 23 MLC 28, 37 (1996); *aff'd*, 47 Mass.App.Ct. 1108 (1999); *Town of Milford*, 15 MLC 1247, 1253 (1988). However, the information conveyed to the employee organization must be sufficiently clear for the employee organization to make a judgment as to an appropriate response. *Town of Hudson*, 25 MLC 143, 148 (1999); *Boston School Committee*, 4 MLC at 1915. An employee organization is not required to respond to rumors of proposed changes, speculation or proposals that are so indefinite that no response could be formulated. *City of Gardner*, 10 MLC 1218, 1222 (1983); *Boston School Committee*, 4 MLC at 1915. Notice will be imputed to a union when a union executive officer with authority to bargain is first made aware of the employer's proposed plan. *Town of Hudson*, 25 MLC at 148; *City of Cambridge*, 5 MLC 1291, 1293, fn 2 (1978).

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 Lowell*, MUP-2299, slip op., p.10 (October 10, 2001); *Boston School Committee*, 4 MLC at 1914. Only a finding of *fait accompli* will relieve the bargaining representative of its obligation to request bargaining. *Boston Water & Sewer Commission*, 12 MLC 1250, 1255 (1986). 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 at 148; *Scituate School Committee*, 9 MLC 1010, 1012 (1982).

Here, the Commonwealth alleges that Walsh's January 20, 1998 letter to Hocking constituted actual notice to the Union of its intent to implement the passbook audit procedure. However, Walsh's letter merely states that Walsh had appointed Hocking to serve on a newly formed committee to review and improve the SECC's systems of inmate accountability. The letter does not inform the Union that the SECC was contemplating changes in the terms and conditions of employment of unit members. See *City of Gardner*, 10 MLC 1222. Also, when Roden encountered Hocking approximately one week later and encouraged Hocking to attend the committee meetings, Roden did not tell Hocking that the purpose of the meeting was to discuss possible changes in the terms and conditions of employment of unit members. *Contra Whitman-Hanson Regional School Committee*, 9 MLC 1573, 1577 (1983). Although Hocking chose not to attend the committee meetings and chose not to send another steward in his place, the SECC still had an obligation to notify Hocking if the SECC intended to implement a proposal that the committee developed that would affect the terms and conditions of employment of unit members. Here, the SECC never notified Hocking that it planned to implement the passbook audits prior to making an announcement at roll call in June 1998 that it was locking down the facility to train unit members on 103 DOC 513, including how to perform passbook audits. Therefore, we find that the Union did not waive its right to bargain by inaction and that the Union was faced with a *fait accompli* regarding the changes in unit members' job duties caused by the implementation of the passbook audits.

Finally, the Commonwealth asserts that, after the SECC implemented the passbook audits, the SECC and the Union bargained to resolution over the changes that the passbook audits caused in employees' job duties. On July 3, 1998, representatives from the SECC and the Union met to discuss the passbook audits. Although the Commonwealth had previously suspended the passbook audits for approximately two weeks after a correction officer at another facility had died, the Commonwealth gave no indication that it was willing to continue to suspend performance of the audits while the parties engaged in bargaining. At the July 3, 1998 meeting, the Union requested that the Commonwealth restore the status quo ante and cease requiring unit members to perform the audits until the parties negotiated to resolution or impasse. Further, the Union requested that the Commonwealth rescind any discipline that unit members had incurred for refusing to perform the passbook audits.

The Commonwealth never agreed to these proposals at the July 3, 1998 meeting. Instead, the parties only agreed that the responsibility for performing the passbook audits would be transferred from unit members in the Special Management Unit to unit members in the Orientation Unit. Therefore, we conclude that the parties did not bargain to resolution at the July 3, 1998 meeting about whether members of the bargaining unit would be required to perform passbook audits.

Conclusion

Based on the record and for the reasons stated above, the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the job duties of unit members when it began requiring that bargaining unit members conduct passbook audits without giving the Union prior notice and an opportunity to bargain to resolution or impasse.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

- a. Failing and refusing to bargain in good faith with the Union by unilaterally changing the job duties of unit members at the SECC by requiring them to perform passbook audits.
- b. Requiring unit members to perform passbook audits prior to the occurrence of the following conditions:
 1. An agreement with the Union;
 2. A bona fide impasse in the bargaining;
 3. The subsequent failure of the Union to bargain in good faith.
- c. In similar 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 purposes of the Law:

- a. Upon request, bargain in good faith with the Union to resolution or impasse over the implementation of passbook audits at the SECC.
- b. Make whole any bargaining unit member who suffered a monetary loss as a direct result of the Commonwealth's unilateral implementation of passbook audits at the SECC, plus interest on any sums owed at the rate specified in M.G.L.c.231, Section 6I, compounded quarterly.
- c. Post in all conspicuous places where its employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
- d. Notify the Commission in writing of the steps taken to comply with this Decision within ten (10) days after receipt of the Decision.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the Commonwealth of Massachusetts has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws,

Chapter 150E (the Law) by changing the job duties of unit members at the Southeastern Correctional Center (the SECC) by requiring them to perform nightly passbook audits, without providing the Union with an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain collectively in good faith with the Union by unilaterally changing the job duties of unit members at the SECC by requiring them to perform nightly passbook audits.

WE WILL NOT require unit members at the SECC to perform passbook audits prior to the occurrence of one of the following conditions: an agreement between the parties, a bona fide impasse in bargaining, or the subsequent failure of the Union to bargain in good faith.

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

WE WILL take the following affirmative action that will effectuate the purposes of the Law.

Make whole any bargaining unit member who suffered a monetary loss as a direct result of the unilateral change in unit members' job duties when the SECC implemented passbook audits, plus interest on any sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

[signed]

For the Commonwealth of Massachusetts

* * * * *