TOWN OF ANDOVER AND ANDOVER FIREFIGHTERS UNION, LOCAL 1658, IAFF, MUP-2358 (5/11/77).

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Hearing Officer: Frederick V. Casselman, Esq.

Appearances:

Michael C. Gilman, Esq.)
Joseph W. Ambash, Esq.) - Counsel for Town of Andover

William J. Lafferty, Esq. - Counsel for the Andover Firefighters Union, Local 6158, I.A.F.F., AFL-CIO

DECISION

Statement of the Case

On October 14, 1975 the Andover Firefighters Union, Local 1658, International Association of Fire Fighters, AFL-CIO (Union) filed with the Labor Relations Commission (Commission) a complaint of prohibited practice alleging that the Town of Andover (Town) committed a violtion of Sections 10(a)(1) and (5) of G.L. c.150E (the Law). After preliminary investigation the Commission issued its own complaint on March 25, 1976 based on the Union's charge.

Pursuant to notice, an expedited hearing was conducted before Frederick V. Casselman, Hearing Officer, on May 20, 1976 at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce testimony. Briefs timely filed by the parties have been carefully considered.

Findings of Fact

1. The Town of Andover is a municipal corporation located in the county of Middlesex in the Commonwealth of Massachusetts and is a public employer within the meaning of section 1 of the Law.

2. The Andover Firefighters Union, Local 1658, International Association of Fire Fighters, AFL-CIO is an employee organization within the meaning of section 1 of the Law.

3. The Andover Firefighters Union, Local 1658, International Association of Fire Fighters, AFL-CIO is the exclusive representative

for the purposes of collective bargaining of all employees of the Andover Fire Department except the chief and deputy chiefs.

The Andover Fire Department operates in four shifts, with eleven firefighters assigned to each shift. Prior to April 14, 1975 one of the eleven would be assigned to dispatching duties on a rotating basis, the remaining ten remained available for firefighting duties. There has been a Fire Department practice for thirty-three years to maintain the shift at full complement by replacing absentees on a one-for-one basis. Thus, if any one of the eleven firefighters were absent, he would be replaced by an off-duty firefighter paid at overtime rates.

On February 7, 1975, Assistant Town Manager Sheldon Cohen submitted a report to the Town Manager which indicated that if the Town hired additional firefighters, and filled only the second and successive absences on a shift, it would reap a net savings as compared to paying overtime. Expanding on this recommendation, the Town Manager desired to use civilians to perform dispatching work for several reasons, including additional savings due to a lower wage rate and an awareness of firefighters' dissatisfaction of dispatching work.

Funds were available from the Comprehensive Employment and Training Act[1] (CETA) Administration to hire four employees and the Town decided to use CETA funds to pay dispatchers until January, 1976, at which point funds would be included in the Town budget. A job description for the new position was prepared by March 4, 1975.

In early April, the Town Manager held what the Town characterizes as an "informational" meeting attended by the Chief, and at least one union officer, Mr. Robert Demers, the President of the Local. They were informed of the Town's plan to create a civilian dispatching position and that two CETA employees had been interviewed two weeks perviously and were to begin work two weeks hence. The Town Manager did not inform the Union of his plan to reduce the overtime. Demers protested the Town's action, claiming that the proposed hirings were illegal. The Town Manager indicated that despite this objection the Town was going to do it; Demers testified that he did not think the Town Manager had any thought of bargaining. Demers also testified that the union never requested bargaining as to the wages, hours, and terms and conditions of employment of the civilian dispatchers, nor specifically about the reassignment of work.

The first two civilian dispatchers began work on April 14, 1975. Some time thereafter the Town stopped filling absences one-for-one but replaced only the second and successive absences. It appears that this change occurred in April, although one Union witness placed the change as late as July. There is a similar dispute as to the date of a second meeting between Town and Union officials, although the substance of the meeting does not appear to be in question. The Union presented the Town Manager with copies of Chapter 828 of the Acts of 1974 and various rules and regulations of the CETA program. The

[1] 29 U.S.C. 801 et seq.

Union contended that the filling of the dispatching function by CETA employees was illegal. The response of the Town Manager was, in effect, "prove it." The record is unclear as to the exact basis for the Union's charge of illegality. One Union witness testified that the next step in "proving it" was to file the instant unfair labor practice charge. More likely the Union's objection was based upon the CETA regulations and Chapter 828. In any event the Town Manager was emphatic in claiming that the Town had authority to proceed as it had planned and fully intended to go forward. President Demers testified that he felt there was no reason to pursue bargaining any further because the Town Manager was intransigent. While no specific demand was made by the Union, its opposition was clear. Whether the meeting occurred in April or July is of some importance in determining the perseverance of the Union in making its demand to bargain. President Demers testified that the firefighters trained the dispatchers "under protest" for two or three months before the Town started "running short" -- not filling absences one-for-one -- and it was at that point that the Union demanded the second meeting. However, Demers also related that shortly after the first meeting rumors circulated that the Department would be running short. This would tend to place the meeting close to April, inasmuch as other testimony indicates that the Town cut back on overtime immediately upon the hiring of the CETA employees. The Chief of the Department testified that the second meeting was in late April, and another union witness, James Cassidy, also placed the meeting at the end of April. Finally the April date is more consistent with Union efforts, ultimately unsuccessful, to block the hirings through the intercession of Federal and State governments, collective bargaining appearing fruitless.

In May one of the civilian dispatchers became a provisional firefighter and in June the Town hired three more CETA employees, increasing the number of civilian dispatchers to four. One civilian dispatcher was assigned to each shift and the consequent reassignment of firefighters from dispatching to firefighting duties had the effect of increasing from 10 to 11 the size of the complement available for fighting fires. Since the effect of hiring the dispatchers was that the firefighting complement was overstaffed by one person, the Town was able to maintain its prior firefighting complement without filling in for the absence of one firefighter, and only filled in for second and subsequent absences. This change resulted in a significant loss of overtime for Union firefighters.

A fire dispatcher is responsible for answering telephones, keeping a log of all calls and alarms and transmitting messages. Prior to April 15, 1975, firefighters had performed disptaching assignments as a regular part of their duties. Dispatching work was rotated among the firefighters on each shift and occupied fifteen to twenty percent of their work time. Dispatching duties were occasionally assigned outside of the rotation schedule as "light duty" to firefighters who due to illness or injury were not yet ready to return to full active status or when the Chief determined that the particular skills of a firefighter at the dispatching desk were needed at a fire. These assignments were apparently made without negotiating, and without protest by the Union.

The Chief testified that he made other assignments without bargaining, including the reassignment of employees from the ladder truck to duties as a pump operator and restricting ambulance assignments to firefighters who had

qualified as emergency medical technicians. He did, however, negotiate with the union when transferring a firefighter from the main station to a substation.

The collective bargaining agreement between the parties, effective July 1, 1974 to June 30, 1976 contains a management rights clause which reads as follows:

> Article II, Management Rights: Except as otherwise expressly provided by the terms of this agreement, the determination of policy and operations of the Fire Department are vested solely in the Fire Chief, Town Manager, and Board of Selectmen, and their designees. Provided further, that only as otherwise expressly provided by the terms of this agreement, nothing shall be construed to in any way alter, modify, change, or limit the authority of the Fire Chief, Town Manager, or Board of Selectmen, as provided by law or the Charter of the Town of Andover.
>
> In making rules and regulations in the determination of policy and the operations of the Fire Department relating to personnel policy procedures and working conditions, the employer shall give due regard and consideration to the obligations imposed by this agreement.

In the current round of contract negotiations, the Union has made no demand to bargain with regard to the wages, hours or the terms and conditions of employment of the civilian dispatchers. The dispatchers have apparently not joined the Union, nor does the Town deduct agency service fees from the dispatchers' pay. The Union has not sought agency service fee deduction authorization cards from the dispatchers, nor has the Union made a demand upon the Town to discharge the dispatchers for failure to pay the agency fee.

Opinion

This matter raises three substantial issues for decision:[1]

1. May a public employer hire additional employees to perform bargaining unit work without negotiating with the Union?

2. May the public employer, without prior bargaining assign additional employees all or substantially all of the responsibility for the performance of a particular function formerly handled by other bargaining unit employees?

3. May a public employer unilaterally discontinue a long-standing past practice of maintaining a shift complement by replacing absences on a one-for-one basis by calling in off-duty firefighters on overtime?

A public employer has an obligation to negotiate in good faith with the exclusive representative of its employees with regard to "wages, hours, standards of productivity and performance, and any other terms and conditions of

[1] The Union makes other allegations which will be considered infra.

employment." G.L. c.150E s.6. This obligation exists not just prior to the execution of a collective bargaining agreement, but for the life of that agreement. City of Boston, 3 MLC 1450 (1977); NLRB v. Jacobs Mfg. Co. 196 F.2d 580, 30 LRRM 2098 (2d Cir. 1952). The exclusive representative's right to bargain during the life of the agreement, however, may be waived either expressly or by implication. Cohasset School Committee, MUP-419 (1/30/74); Radioear Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974). Absent waiver, unilateral action which affects a mandatory subject of bargaining may be a per se violation of the obligation to bargain. City of Everett, 2 MLC 1471 (1976); NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962). Conversely, if no change is made or if a change does not affect a mandatory subject of bargaining, no bargaining obligation arises. Town of North Andover, 1 MLC 1103 (1974). With these principles in mind, the Town's conduct may be evaluated.

Hiring Additional Employees

The initial decision to hire additional employees to perform bargaining unit work constitutes a managerial prerogative about which the employer need not bargain with the exclusive representative. In School Committee of Braintree v. Raymond, Mass. Adv. Sh. (1976) 399, 343 N.E. 2d 145, the Massachusetts Supreme Judicial Court held that it was beyond the power of the School Committee to bind itself not to abolish a supervisory position, but the school committee could bind itself to alleviate the effects of such abolition upon wages, hours, and terms and conditions of employment. The Labor Relations Commission applied a similar analysis in Lawrence School Committee 3 MLC 1304 (1976) where it found that the employer did not violate section 10(a)(5) of the Law by its decision to eliminate existing positions and create a new position, while upholding the school committee's obligation to bargain about the impact of those decisions upon mandatory subjects of bargaining. The Employer's right in this regard is not completely unfettered. For example, an employer cannot discriminate in hiring so as to discourage protected activities, nor hire new employees with the purpose of favoring one union over another in an election. No such motivation is intimated here. Thus the Town had an abstract right to hire additional employees. Had the Town hired more firefighters, paid them firefighter wages, and had them perform firefighter work like other members of the bargaining unit, it would not be seriously contended that the Town had any obligation to bargain with the Union.

Such was not the case, however. The Town hired civilian CETA employees to perform duties historically performed exclusively by firefighters, to fill newly-created jobs with pre-determined job descriptions at a rate of pay less than that of firefighters. All this was accomplished without prior bargaining with the Union. The Union was presented a fait accompli at the first "informational" meeting occurring in early April.

The Union contends inter alia, that the Town's action amounts to a transfer of work outside the bargaining unit, causing a change in terms and conditions of employment which must first be bargained with the Union to resolution or impasse. The Employer argues that it merely expanded the bargaining unit and that such expansion is within its entrepreneurial preorgative. The Town's assertion rests primarily upon the recognition clause of the collective bargaining agreement, "...all employees of the Fire Department, excluding the Chiefs and Deputy Chiefs." Such a unit description on its face

includes the civilian dispatchers. The only suggestion that the dispatchers are not included in the unit is the inference, drawn from the various accounts of the Union's actions at the time of the dispatchers' hiring, that the Union did not at the time consider them part of the bargaining unit. The inference is dispelled, however, by the emphatic assertion of the Union Presdient at the hearing that all employees of the department are in the bargaining unit and the Union has not agreed since that time to the exclusion of any jobs. As it is not inappropriate to include the civilian dispatchers in a predominantly firefighters unit and there is little evidence that they are not included, I find that the civilian dispatchers are employees of the Town of Andover represented for the purposes of collective bargaining by the Andover Firefighters Union.[2]

The Change in Job Duties and Assignment of Work

When the Town hired the civilians and assigned them virtually all of the dispatching work, it changed the job duties of bargaining unit personnel and altered the method of assignment of work. Historically, dispatching work was assigned to firefighters on a rotating basis, occupying from 5% to 20% of working time. Now firefighters perform dispatching only when the civilian is

[2]As I have found that the civilian dispatchers are members of the bargaining unit, the Union's contention that the Town illegally transferred work out of the bargaining unit no longer pertains. I note, however, that were the unit restricted to firefighters, the Union would have made out a violation.

The National Labor Relations Board has long held that preservation of unit work is a mandatory subject of bargaining. The issue often arises in the context of restricting the extent to which supervisors can perform unit work. See, e.g., Site-Con Industries, 200 NLRB 46, 82 LRRM 1230 (1972). The underlying rationale has been most fully explored in cases dealing with subcontracting. See, e.g., Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2609 (1964), where the Supreme Court held that an employer is required to bargain about the decision to contract out in-house maintenance operations previously performed by unit personnel. If the dispatchers are not in the unit, the effect on the bargaining unit is the same as in Fibreboard, even though they are Town employees. While the Commission in Town of Danvers MUP-2292, 3 MLC 1559 (1977) did not reach the question of whether the decision to subcontract (in addition to its impact) is mandatorily bargainable, there seems no compelling reason why a town should not be required to bargain about the decision to assign dispatching work to civilian non-unit personnel. The same work continues to be performed in the same manner at the same location; the only differences are that the dispatcher does not wear a uniform and gets paid less. Such is not the stuff of core governmental decisions.

The Employer's waiver defenses, unavailing on its own theory, would be similarly unavailing here.

absent. While the change may not seem momentous, it does change working conditions, and it can have a serious impact on the firefighters. For example, a firefighter might have to fight a particular fire, instead of staying at the dispatching desk, or fight more fires over a period of time; and dispatching work is no longer regularly available as "light duty". The Town responds that the firefighters do not like the dispatching work, and that the Town was making a change which benefitted the employees; that does not relieve it of its obligation to bargain. NLRB v. Katz, 369, U.S. 736, 50 LRRM 2177 (1962). Nor does the Town's claim of management prerogative lie. In Town of Danvers, MUP-2292, 2299, 3 MLC 1559 (1977), the Labor Relations Commission held that job duties, as a general matter, are mandatory subjects of bargaining. The Commission quoted with approval the statement of the New York Public Employment Relations Board that "the long established duties of unit employees are so intertwined with 'terms and conditions of employment' as to be a mandatory stuject of negotiation." Town of Danvers, Sl. op. at 29,30, quoting Bemus Point Central School District, 6 PERB 4550, 4557 (1973). While disclaiming the notion that an employer must bargain about whether a firefighter must fight fires, the Commission indicated that the employer lacks the freedom to unilaterally change job duties at will. While it is true, as the Town argues, that firefighters still perform some dispatching work occasionally, and such work remains a part of the job description, the Town agrees that it now occupies less than 1% of a firefighter's time. While an employer has the usual management function of directing the manner in which work is to be performed, and may do so without bargaining, it may not unilaterally institute changes which go beyond the day-to-day routine. Compare Little Rock Downtowner, Inc., 145 NLRB 1286, 55 LRRM 1156 (1964) with Little Rock Downtowner, Inc., 148 NLRB 717, 57 LRRM 1052 (1964). Excising one function from the firefighters job duties goes beyond directing employees in the performance of their work, and requires bargaining. The violation is compounded where the change in job duties was wrought by the reassignment of work within the bargaining unit, which constituted a change in the method of assignment of work. Work assignments, such as dispatching and opportunities for overtime, were previously made according to a pattern. The Town, by assigning all dispatching work and no overtime work to the civilians altered the method of assignment of work. Such a change is analogous to that alleged in Oneita Kintting Mills, Inc., 205 NLRB 500, 83 LRRM 1670 (1973), where the union charged that the employer had discontinued its practice of rotating its machine operators on all types of machines and instead assigned employees to particular machines for long periods of time. There the employer avoided liability only because (1) the General Counsel failed to show that the persons who ordered the change were supervisors and (2) no employee complained to a supervisor about the change. No such failure of proof exists in the instant case.

Waiver

The employer made a unilateral change in terms and conditions of employment, namely job duties and method of work assignment. The Town argues that even so, the Union waived its right to bargain through (a) failure to demand bargaining, and (b) waiver in the contract. Neither defense prevails. As the Town stated in its brief, "Once the Town decided to create the full-time dispatching function, the Town Manager scheduled a meeting" with the Union leaders. (Town Brief at 6). The evidence is strong that prior to that

first meeting, the Town Manager had made up his mind on almost all bargainable matters; the job description had been drawn by March 4, 1975, and the first candidates had been interviewed. The Town's own characterization of the first meeting as "informational" points to a fait accompli. Finally, when the Union president protested the Town's action as illegal, the Town Manager restated his intention to proceed regardless. In these circumstances, I cannot find that the Union waived its right to bargain.

The Town's second defense, that the Union waived its rights through the contract, is similarly unpersuasive. The Commission has consistently required that contractual waiver be conscious and unequivocal; at the same time the Commission is committed to giving effect to the parties' agreement. Cohasset School Committee, MUP-419 (1/30/74); City of Boston, 3 MLC 1450 (1977). The defense of contractual waiver is frequently based on a "zipper clause". The purpose of a zipper clause is to define and limit the parties' obligations. An all-encompassing zipper clause will reflect on its face the parties' recognition that they have left some matters uncovered; it will also indicate their agreement that should such matters arise, there is not concomitant bargaining obligation. Such is not the case with the typical management rights clauses, including the one at issue here. The National Labor Relations Board has viewed with some skepticism employer claims that the union has contractually waived its statutory bargaining rights. Where it has sustained such an employer defense, the Board has looked to several factors, including: specificity of the scope of the clause, Ador Corp., 150 NLRB 1658, 58 LRRM 1280 (1965) (contract granted employer right to "establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations...." 150 NLRB at 1659-60); exclusivity of the reservation or grant of power, Consolidated Foods Corp., 183 NLRB 832, 74 LRRM 1374 (1970) (contract granted employer "exclusive right at all times [to take certain action] in its discretion, and in the event of such [action]...the Employer shall be the sole judge of all factors involved...." 183 NLRB at 832); bargaining history, Kennecott Copper Corp., 148 NLRB 1653, 57 LRRM 1217 (1964) (trial examiner found that, "The record discloses that during this entire period [spanning four contract negotiations] the clause was not a sleeper and that the parties consciously realized its scope." 148 NLRB at 1656). In this case the management rights clause does not rise to the level of a waiver. The language of the clause is general and its scope not specifically defined; while the clause purports to grant exclusive authority to management, such grant pales in comparison to that of Consolidated Foods Corp., supra; finally, there was no discussion during negotiations over the type of changes made by the Town nor about the Town's rights as to matters not discussed.

The Employer seeks to bolster its waiver defense by arguing that in the past the Chief has made assignments of work without bargaining with the Union, and the change in the dispatching operation is more of the same. However, the assignments in question tend to be of the routine nature inherent in fire departments, such as designation of a position on the apparatus. Restricting ambulance assignments to firefighters with special training was in anticipation of a legal requirement, and is on an intermittent basis. It is noteworthy that the Chief does consult with the Union before transferring a firefighter from one station to another.

For all of the above reasons I find that the Town of Andover, by unilaterally changing job duties and the method of assignment of work among unit personnel, has violated G.L. c.150E, s. 10(a)(5).

A further violation charged by the Union is that the Employer failed to bargain over wages, hours and working conditions of the new employees, as required by Melrose School Committee, 3 MLC 1299. The Town responds that the Union never requested bargaining. As suggested above, the Union may not have, at the time, considered these employees part of the unit and, in any event, claimed they were illegally in place. The only course the Town could have followed without incurring a bargaining obligation would have been to hire additional firefighters to work within the existing rotation. As this was not the case an obligation did arise. Furthermore, as the Town Manager had resolved virtually all bargainable matters prior to the first "informational" meeting, the Union was presented with a fait accompli, obviating the need for proof of a demand for bargaining. Finally, as found above, the Employer hired the dispatchers in disregard of its obligation to bargain over job duties and assignment of work; to require of the Union a demand for bargaining would force the Union to take inconsistent positions, arguing on the one hand that the dispatchers were in place illegally, and on the other that the Town should bargain as to the terms of their continued employment. Thus I find a further violation of the duty to bargain by the Town.

Elimination of Overtime

The third major question raised by this case concerns the replacement of absent firefighters. For the past 33 years the Town has maintained a full shift complement by replacing absences on a one-for-one basis by calling in off-duty firefighters at overtime pay rates. With the hiring of the civilian dispatchers the department was over-staffed by one, and was therefore able to maintain the same complement of firefighters by filling only the second and subsequent absences. There is no question but that the change was made; the Union's objection constituted a sufficient demand for bargaining; the sole question is whether the change was in a mandatory subject of bargaining. It was not.

There has been extensive litigation involving overtime practices in the private sector. Most frequently the issue arises where an employer unilaterally eliminates overtime in retaliation for protected activity, such as during or after an organizational campaign. See, e.g. Thermo-Rite Manufacturing Co., 157 NLRB 310, 61 LRRM 1138 (1966). Where an employer illegally subcontracted work, the resultant loss of overtime was also held illegal. Wittock Supply Co. 171 NLRB 201, 68 LRRM 1043 (1968). The Board found a violation where an employer unilaterally changed work schedules so as to substitute mandatory straight-time work for overtime. Dow Chemical Co., 212 NLRB 87 LRRM 1279 (1974). Nor does the NLRB allow an employer to unilaterally change work rules to eliminate overtime. Colonial Press 204 NLRB 852, 83 LRRM 1648 (1973). These cases are generally subsumed in the phrase "opportunities for overtime", and it is considered that "opportunities for overtime" are mandatorily bargainable. See Northeast Metropolitan Regional Vocational School District, 1 MLC 1005 (1974). The thrust of the cases is that the union has the right to bargain over the distribution of any overtime offered, and

the right to protect employees from either losing the work opportunities through illegal employer conduct or subterfuge. However, an employer may unilaterally reduce its need for overtime by, for example, reducing the shift complement, Town of Danvers, MUP-2292, 2299, 3 MLC 1559 (1977), or by expanding the bargaining unit by hiring additional employees. Administrative Ruling of General Counsel, 51 LRRM 1090 (1962). An employer can also unilaterally increase the amount of voluntary overtime offered. Timken Roller Bearing Co., 70 NLRB 500, 18 LRRM 1370 (1946). The synthesis of the cases is that an employer, as a general matter, may increase or decrease the amount of overtime offered, but an employer may not unilaterally change hours and terms and conditions of employment so as to have the direct effect of reducing or increasing the amount of overtime available.

The difference is clear on the facts of Willamette Industries, Inc., 220 NLRB 707, 90 LRRM 1478 (1975), where prior to a unilateral change by the employer, the employees worked a five day week, Monday through Friday, and volunteered for weekend work, getting paid at overtime rates for Saturday work and at premium rates for Sunday work. The employer changed work schedules to a five day week, commencing on a rotating basis, with the result that weekend work was performed on a mandatory, straight time basis. The unilateral change in hours was, of course, a clear violation of the duty to bargain, but the facts also present a change in opportunities for overtime--not simply that overtime is no longer offered, for that is generally a management decision--but that less attractive work (weekends, over 40 hours) is still being performed, but on a mandatory basis at straight time, a result direclty attributable to the change in work schedule.

Such is not the sort of change made by the Town of Andover. While the same work is being performed, the Town accomplished that result by hiring additional employees. The firefighters still have the opportunity to perform overtime, but less overtime is offered; firefighters still fill in for second and subsequent absences at overtime rates. My finding that the Town installed the additional employees in an illegal manner does not alter the result, for while the hiring and the change in offered overtime were linked in the decision-making process, the nature of the illegality of the hiring--the refusal to bargain over job duties and work assignments--does not taint the change in overtime practice. The Town could have, had it desired, simply made the management decision to reduce the shift complement by not filling for the first absence or by hiring more firefighters. See Town of Danvers, supra.

The Union also charges that the assignment of CETA employees to perform functions previously performed by firefighters violates the Comprehensive Employment and Training Act and regulations issued pursuant thereto, and further contends that the manner of filling the new positions violated state Civil Service laws, G.L. c.31 and Chapter 828 of the Acts of 1974. The Union seeks a ruling that such alleged violations also constitute per se violations of the duty to bargain in good faith. This Commission lacks jurisdiction to enforce those statutes, and recourse lies with the Civil Service Commission, and state and federal courts. cf. Commonwealth of Massachusetts, 2 MLC 1400 (1974); Emporium Capwell Co. v. Western Addition Community Organization 420 U.S. 50, 88 LRRM 2660 (1975).[3]

3 (see page 1720)

The Union's final allegation is that the Town committed a prohibited practice by not deducting an agency service fee from the paychecks of the civilian dispatchers. It is dispositive that the Union did not seek any written deduction authorization from the dispatchers, for G.L. c.180, s.178G (as amended by Chapter 1078 of the Acts of 1973) permits such deduction only in the "amount which such employee may specify in writing...." Thus I find no violation on this point by the Town.

Remedy

The only remaining matter is the fashioning of an appropriate remedy. The Town's transgression was in failing to bargain over changes in job duties and work assignment practices occasioned by the hiring of new employees, and by failing to bargain over the wages, hours, and terms and conditions of employment of the new employees. The two are obviously related. It is appropriate under these circumstances to order the restoration of the status quo ante, as only then can bargaining begin afresh, with bargaining power roughly equalized. Thus I will order that the Town, within 10 days of receipt of this decision, cease the practice of using non-firefighters to perform dispatching duties, and refrain from reinstituting such practice until the Town has bargained in good faith with the Union until resoluion or impasse.

The Union seeks as an additional remedy that the firefighters be made whole for wages lost due to loss of overtime. Relying on NLRB subcontracting cases (see fn 2, supra) the Union argues that work was illegally transferred out of the bargaining unit, and that therefore the unit members were deprived of overtime work. For a number of reasons I will not order such back pay. First, because the civilian dispatchers are members of the bargaining unit, no work was lost, as would have been the case had the Town contracted out the work. Second, the nature of the violation--unilateral change in job duties and work assignment--is unrelated to the subsequent loss of overtime; there is no direct effect as there is, for example, where an employer unilaterally changes hours of work. Third, the action which caused the loss of overtime--the hiring of bargaining unit employees--is, if properly executed, within the Employer's prerogatives. Fourth, the Employer could have unilaterally reduced the shift complement by eliminating the overtime. Finally, the objections of the Union were not focused on the Town's bargaining obligation but rather were aimed at matters outside the obligation (the right to hire) or apart from the obligation (the alleged violation of Civil Service laws and CETA regulations). I note that in negotiations for a new contract the Union has not sought to bargain over the dispatching situation.

A lesser monetary remedy is appropriate however. The dispatchers were hired at a rate of pay less than that of firefighters although the collective bargaining agreement provides for only two pay levels, for firefighters and lieutenants. New employees could be hired at only those pay rates without further bargaining. Such pay rates are set in contemplation of performance

[3]After the close of the hearing, the Union moved to reopen the hearing for the purpose of introducing additional evidence in support of its allegation that the Town violated Chapter 828 of the Acts of 1974. In view of my finding that such a violation, even if proved, would not violate c.150E, I denied the Motion to Reopen.

of a whole panoply of firefighter duties, including dispatching. The Union is not seeking as a remedy for the dispatchers the difference between the present dispatcher pay and the starting firefighter rate (and without a request I will not order it) indicating, among other things, that the current dispatcher wage rate is commensurate with the job duties; the Town, by setting the rate, must agree. Thus, the differential between the dispatcher pay and firefighter pay represents compensation for those other duties, more skilled and more dangerous, which are performed by firefighters and not by dispatchers. It is those duties about which the Town should have bargained when it desired to make the change to civilian dispatchers; the burden of those duties now falls exclusively on the firefighters. Therefore, the difference between the salaries of civilian dispatchers and the salaries of an equivalent number of probationary firefighters, computed from the date of commencement to the date of cessation of the use of civilian dispatchers, should be divided among and distributed to the firefighters in the bargaining unit. Thus the employees are made whole and the Town does not beneift by its illegal conduct.

Finally, the Town shall post an appropriate Notice to Employees.

Conclusions of Law

Based upon the foregoing Findings of Fact and Opinion I make the following Conclusions of Law:

1. The Town of Andover has failed to and refused to bargain in good faith with the Andover Firefighters Union, Local 1658, I.A.F.F., AFL-CIO by unilaterally changing terms and conditions of employment of firefighters, namely job duties and work assignments, in violation of G.L. c.150E, s.10(a)(5);

2. The Town of Andover has failed to and refused to bargain in good faith with the Andover Firefighters Union, Local 1658, I.A.F.F., AFL-CIO by unilaterally establishing wages, hours and terms and conditions of employment of employees performing bargaining unit work, namely dispatching, in violation of G.L. c.150E, s.10(a)(5);

3. The Town of Andover by taking such unilateral action undermined the representative status of the Andover Firefighters Union, Local 1658, I.A.F.F., AFL-CIO, thereby restraining, coercing and interfering with employees in the exercise of their rights to bargain collectively in violation of G.L. c.150E, s.10(a)(1).

4. The Town of Andover, did not violate the provisions of G.L. c.150E by the act of hiring additional bargaining unit employees, by failing to deduct agency service fee from the paychecks of such additional bargaining unit employees, by allegedly violating laws other than G.L. c.150E, or by unilaterally curtailing the amount of overtime work offered to bargaining unit employees.

Order

WHEREFORE, based upon the above Findings of Fact and Conclusions of Law and pursuant to the powers vested in me by the Labor Relations Commission according to G.L. c.150E, s.11, I enter the following orders:

1. The Town of Andover shall cease and desist from threatening or making unilateral changes affecting mandatory subjects of bargaining until and unless the Town and the Union have bargained over such change to resolution or impasse.

2. The Town of Andover shall within ten (10) days of receipt of this Decision cease and desist from the practice of using non-firefighters to perform dispatching duties, and shall refrain from reinstituting such practice until and unless the Town and the Union have bargained to resolution or impasse the impact of such practice on job duties and work assignment within the bargaining unit and wages, hours, terms and conditions of employment of such non-firefighters.

3. The allegations of the Union that the Town violated the provisions of G.L. c.150E by the act of hiring additional bargaining unit employees, by failing to deduct agency service fee from the paychecks of such additional bargaining unit employees, by allegedly violating laws other than G.L. c. 150E, or by unilaterally curtailing the availability of overtime work to bargaining unit employees, are hereby dismissed.

In order to effectuate the purpose of G.L. c.150E, the Town of Andover is ordered to take the following affirmative action:

4. The Town of Andover shall compensate the firefighters for their losses occasioned by the Town's illegal action, such compensation to be measured by the difference between the salaries of the civilian dispatchers and the salaries of an equivalent number of probationary firefighters, computed from the date of commencement to date of compliance with Order #2, supra, such difference to be divided among and distributed to firefighters in the bargaining unit.

5. The Town of Andover shall post the attached Notice to Employees in conspicuous places in each fire station and in Town Hall and shall keep it so posted for sixty (60) days from the date of posting.

6. The Town of Andover shall notify the Commission within ten (10) days of receipt of this Decision and Order of the steps taken to comply therewith.

Frederick V. Casselman
Hearing Officer

Town of Andover and Andover Firefighters Union, Local 1658, IAFF, 3 MLC 1710

NOTICE TO EMPLOYEES
OF THE TOWN OF ANDOVER FIRE DEPARTMENT

Posted pursuant to an order of an agent of the
LABOR RELATIONS COMMISSION
an agency of the Commonwealth of Massachusetts

The Public Employee Collective Bargaining Law, General Laws Chapter 150E, gives all public employees these rights:

To engage in self-organization;
To form, join and assist unions;
To bargain collectively through a representative of their own choosing;
To engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection;
To refrain from any and all of these activities.

The Town of Andover will not interfere with any of these rights.

We will not refuse to bargain collectively with the Andover Firefighters Union.

We will not make unilateral changes in wages, hours, terms and conditions of employment without bargaining with the Andover Firefighters Union.

We will not restrict all dispatching duties to elected bargaining unit members without first bargaining with the Andover Firefighters Union.

We will divide among and distribute to all firefighters a sum of money equal to the difference between the salaries of the civilian dispatchers and the salaries of an equivalent number of probationary firefighters.

Dated_____

_____
Town Manager

_____
Fire Chief