SUFFOLK COUNTY SHERIFF'S DEPARTMENT

and

SUFFOLK COUNTY JAIL EMPLOYEES, LOCAL 1134, AFFILIATED WITH, AFSCME COUNCIL 93, AFL-CIO

Case Nos. MUP-2630 and MUP-2747

52.63	oral agreements
52.65	"meeting of the minds"
54.23	overtime
54.513	promotion
67.8	unilateral change by employer
82.3	status quo ante

August 19, 2003
Allan W. Drachman, Chairman
Helen A. Moreschi, Commissioner
Hugh L. Reilly, Commissioner

Kathleen M. Cawley, Esq. — *Representing the Suffolk County Sheriff's Department*

Gabriel O. Dumont, Jr., Esq. — *Representing the Suffolk County Jail Employees Local 1134, Affiliated With, AFSCME Council 93, AFL-CIO*

DECISION[1]

Statement of the Case

The Suffolk County Jail Employees, Local 1134 (Local 1134), affiliated with, AFSCME Council 93, AFL-CIO (AFSCME) filed charges of prohibited practice with the Labor Relations Commission (the Commission) on March 2, 2000 in Case No. MUP-2630 and on July 20, 2000 in Case No MUP-2747 alleging that the Suffolk County Sheriff's Department (Suffolk County) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On May 11, 2001, the Commission issued a complaint of prohibited practice in Case No. MUP-2630 alleging that Suffolk County had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating an August 13, 1999 oral agreement that it made with Local 1134 when it posted openings for permanent appointments to lieutenant in February 2000 and by changing the practice of assigning overtime to licensed practical nurses (LPN's) working at the Suffolk County Jail (the Jail) without bargaining to resolution or impasse.[2] Also, on May 11, 2001, the Commission issued a complaint in Case No. MUP-2747 alleging that Suffolk County had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the parties' August 13, 1999 oral agreement when it permanently appointed certain unit members to the rank of lieutenant on May 17, 2000 and by failing to bargain in good faith when it refused to accept and to process 200 grievances that unit members had filed protesting the May 17, 2000 appointments.[3] The Commission consolidated Case No. MUP-2630 and Case No. MUP-2747 for hearing.

On August 27, 2001, Margaret M. Sullivan, Esq., a duly-designated hearing officer of the Commission, conducted a hearing[4] at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.[5] Local 1134 submitted its post-hearing brief on September 12, 2001, and Suffolk County filed its post-hearing brief on October 2, 2001. On January 18, 2002, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

Findings of Fact[6]

Counts I and II of Case No. MUP-2747 and Count I of Case No. MUP-2630

Local 1134 is the exclusive collective bargaining representative for employees in the following job titles at the Suffolk County Jail (the Jail): Jail Officer I's, Jail Officer II's, who hold the rank of corporal, Jail Officer III's, who hold the rank of sergeant, and LPN's, who are designated as an RN-8's. Local 1134 and Suffolk County were parties to a collective bargaining agreement in effect for the period from July 1, 1995 through June 30, 1998 (the 1995-1998 contract). Negotiations for a successor collective bargaining agreement began in the spring of 1998. The following individuals participated in successor contract negotiations: Attorney Gabriel Dumont, Jr. (Dumont) and Terry Zaferakis (Zaferakis), president of the local, represented Local 1134; Jon Goliber, staff representative, and later Cynthia McManus (McManus), area coordinator, represented AFSCME; and Attorney Charles Abate, Jr. (Abate), Attorney James Davin (Davin), Deputy Superintendent Richard Bradley (Bradley), the head of employee relations at the Jail, and at times, Deputy Superintendent Richard Feeney (Feeney), the head of operations at the Jail, represented Suffolk County.

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 the portions of Local 1134's charge alleging that Suffolk County had violated Section 10(a)(5) of the Law by failing to implement a promotional examination agreed to in the 1998-2000 collective bargaining agreement, and Local 1134 did not seek reconsideration pursuant to 456 CMR 15.03.

3. The Commission dismissed the portions of Local 1134's charge alleging that Suffolk County had violated Section 10(a)(5) of the Law by failing to implement an agreed upon process for promotional examinations, and Local 1134 did not seek reconsideration pursuant to 456 CMR 15.03.

4. At the outset of the hearing, Suffolk County filed a motion to dismiss the allegation that it violated Sections 10(a)(5) and (1) by unilaterally changing the method of assigning overtime for the LPN's on the grounds that AFSCME had settled and withdrawn a similar prohibited practice charge involving RN's that it represented at the Jail. Local 1134 orally opposed the motion, and the hearing officer took the motion under advisement. Upon review of the parties' arguments, we deny Suffolk County's motion to dismiss. The LPN's and RN's are in separate bargaining units, and any settlement agreement that AFSCME made on behalf of the RN's will not be imputed to the LPN's.

5. The parties' stipulations of fact are incorporated in the findings below.

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

At a bargaining session on May 27, 1998, the parties agreed to ground rules. Paragraph 10 of the ground rules stated that:

> All agreements on individual items are subject to agreement on the whole. All proposals, which are agreed upon, shall be signed off (in writing) by both parties with the understanding that the agreement is not binding until approved by union local membership and the Suffolk County Sheriff.

However, the parties did not intend to strictly adhere to these ground rules, and they deviated from them as their negotiations progressed.[7] For example, the parties executed an agreement on February 5, 1999 that became effective immediately making certain revisions in the Managing Attendance Policy (MAP) at the Jail in exchange for unit members having greater flexibility to use compensatory or personal leave.

On February 19, 1999, the parties entered into a tentative agreement (the February 19, 1999 agreement) that changed the procedure outlined in Article XX, Section 4 of the 1995-1998 contract about how candidates were selected for promotion at the Jail.[8] The February 19, 1999 agreement provided that when making promotions, Suffolk County would select the successful applicant from a list of candidates who would be ranked according to their combined scores based on a promotional examination,[9] an interview and past job performance.[10] Suffolk County would use the formula of 2n+1, with "n" representing the number of positions that needed to be filled, to determine how many candidates from the list would be eligible for promotion.[11] The February 19, 1999 agreement also contained the following language concerning when the new promotional process would take place:

> Assuming that the parties reach agreement on a successor collective bargaining agreement, the Municipal Employer will incorporate examinations into a new promotional process as discussed below. Until such time, the current process, as stated in the 1995-1998 agreement, shall remain in full force and effect.

On June 29, 1999, the parties reached agreement[12] on a successor contract subject to ratification by members of the bargaining unit and the approval of the state OER.[13] Members of the bargaining unit approved the successor contract on July 15, 1999 by a margin of ten votes. On or about July 27, 1999, Abate sent Dumont a first draft of the successor contract (the July 27, 1999 draft) integrating the 1995-1998 contract and the June 29, 1999 agreement. Abate included the following language in Article XX, Section 2 of the July 27, 1999 draft:

> Assuming that the parties reach agreement on a successor collective bargaining agreement, the Municipal Employer will incorporate examinations into a new promotional process as discussed below. Until such time, the current process, as stated in the 1995-1998 collective bargaining agreement, shall remain in full force and effect.

On or about that same date, Dumont, Abate and Davin conferred via telephone regarding the July 27, 1999 draft. Dumont disagreed with certain language that Abate had placed in the July 27, 1999 draft, including the language in Article XX, Section 2 referenced above. Abate agreed during the telephone conversation to provide Dumont with a second draft of the proposed successor contract, which he did on July 30, 1999 (the July 30, 1999 draft). Article XX, Section 2 of the July 30, 1999 draft contained the same language as Article XX, Section 2 of the July 27, 1999 draft. Abate and Dumont subsequently scheduled a meeting to take place at Dumont's office on August 2, 1999 (the August 2, 1999 meeting) to discuss the disputed language in the July 30, 1999 draft.

McManus, Zaferakis and Dumont represented Local 1134 at the August 2, 1999 meeting, and Abate represented Suffolk County. As the parties discussed when the new promotional procedure should take effect, they realized that they interpreted the language in the February 19, 1999 agreement differently. Local 1134 believed that the new promotional procedure would take effect when the parties executed the successor contract. Suffolk County thought that the promotional procedure would not take effect until Suffolk County developed and adopted a procedure for promotional examinations. Local 1134 was concerned that if it accepted Suffolk County's interpretation of when the new promotional procedure would take place, Local 1134 would need to go back and conduct another ratification vote.[14] To avoid the need to hold another ratification vote, Zaferakis made the following proposal: Suffolk County would make any permanent promotions that it

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7. The ground rules also did not reflect the fact that the state Office of Employee Relations (OER) needed to approve any tentative contract that the parties negotiated.

8. Article XX, Section 4 of the 1995-1998 contract stated that:

> Every applicant shall receive an interview for the position applied for before a panel selected by the Sheriff. Applicants will be questioned about topics, including but not limited to, the duties and responsibilities of the position applied for, policies and procedures, the applicant's past job performance, and any other questions related to the operation of the Suffolk County Sheriff's Department. The interview panel shall make the recommendations to the Sheriff based on considerations including but not limited to the following: the interview, the applicant's past record of attendance, prior work performance, training, attitude and demeanor. Whenever qualifications and ability are equal, seniority shall be the determining factor. The Sheriff shall be the sole judge of qualifications and ability, provided that such judgment shall not be exercised arbitrarily, capriciously or unreasonably. The determination of qualifications and ability shall include, but shall not be limited to, the applicant's knowledge and understanding of departmental policies and procedures. Any dispute regarding any promotion pursuant to this Article shall be subject to the grievance and arbitration procedure by only the two- (2) most senior applicants.

9. Paragraph 2 of the February 19, 1999 agreement stated that:

> Applicants for the promotional opportunity covered by this Agreement must successfully pass an examination administered by the Municipal Employer in order to be eligible for an interview and further consideration. What constitutes a passing score shall be decided by a joint committee after the creation of the examination.

10. An applicant's overall score was determined in the following manner: test score 50%, interview score 25% and job performance score 25%.

11. For instance, if Suffolk County had three promotional vacancies to fill, it would consider the seven highest ranked candidates on the promotional list.

12. This proposed collective bargaining agreement contract was the first contract to be negotiated during the administration of Sheriff Richard Rouse (Sheriff Rouse).

13. The parties did not have a specific date when OER would approve or disapprove the proposed successor contract.

14. Prior to the July 15, 1999 ratification vote, Zaferakis had made representations to unit members that the new promotional process would take effect as soon as the parties had executed the successor contract.

needed to make prior to executing the proposed successor contract.[15] After the parties executed the successor contract but before Suffolk County had developed and implemented a promotional examination, any promotions that Suffolk County made would be pursuant to Article IX, the temporary service provision that was contained in both the proposed successor contract and in the 1995-1998 contract.[16] Abate indicated that he would convey Zaferakis's proposal to Bradley.[17]

The parties met again on August 13, 1999 in Dumont's office. Dumont and Zaferakis were present for Local 1134, and Abate, Bradley and Feeney were present for Suffolk County. During the meeting, Bradley indicated that Suffolk County did not expect to make any promotions during the period after the successor contract was executed but before the new promotional examination was developed and implemented. However, Bradley agreed that if Suffolk County needed to assign unit members to perform the duties of a higher rank during that period, it would make those assignments pursuant to Article XI.

On August 20, 1999, Dumont received from Abate a third draft of the proposed successor contract (the August 20, 1999 draft). The August 20, 1999 draft contained the disputed language that was present in Article XX, Section 2 of the July 27, 1999 and the July 30, 1999 drafts. However, Dumont did not object to the language in the August 20, 1999 draft because he believed that the parties had resolved the controversy surrounding the interpretation of that language at the August 13, 1999 meeting. Shortly thereafter, OER approved the proposed successor contract. On or about August 31, 1999, Abate sent Dumont a fourth and final draft of the proposed successor contract.

On September 9, 1999, the parties executed the successor collective bargaining agreement covering the period from 1998 to 2000. As of January 2000, Suffolk County had not developed and implemented a process for administering promotional examinations and was still considering whether to hire an outside contractor to develop and to administer the promotional examination. On January 29, 2000, Suffolk County assigned four unit members to perform lieutenant's duties (the January 29, 2000 assignments).[18] Dumont telephoned Bradley on January 31, 2000 to verify that those assignments were only temporary assignments made pursuant to Article XI, Bradley confirmed later that same day.[19] On February 1, 2000, Suffolk County posted a notice announcing the temporary assignments of Avant, Colwell, Dilibrero and Gomez to perform lieutenant's duties at the Jail. On February 2, 2000, Dumont sent a follow-up letter to Bradley reiterating Local 1134's assumption that the January 29, 2000 assignments were temporary. Abate replied to the letter on February 4, 2000 by stating in part that:

> The four promotions to Jail Officer/Lieutenant made earlier this week were done in accordance with Article XI, §2 of the collective bargaining agreement between Suffolk County and AFSCME Council 93, Local 1134.
>
> This should not be construed as a change in the department's previous position on the meaning of the language in Article XX, §3. However, as we have discussed, invocation of Article XI effectively defers any further dispute on that issue for the foreseeable future.

On February 9, 2000, Bradley telephoned Dumont and informed him that Suffolk County was reneging on the agreement that it had made on August 13, 1999 to assign unit members to a higher rank using Article XI during the period when the promotional examination was being developed and implemented. Two days later, Suffolk County posted openings for lieutenant. On February 28, 2000, Abate wrote the following letter to Dumont:

> Although I was correct in reporting the elevation of four members of Local 1134 to the rank of lieutenant (JO-4) pursuant to the temporary service language in the collective bargaining agreement (CBA), it appears I was incorrect in my estimation that such action effectively deferred our dispute on the meaning of our agreement. ... Since neither the examinations, nor the new promotional process, which they will engender, have yet been finalized, the department believes that it is within its rights to fill these four vacancies in accordance with the "old" system. While I recognize that we had previously discussed temporary service as a possible means of avoiding a confrontation on this issue, the department has opted to act on its belief. Accordingly, upon completion of the interviews generated by this posting, and the submission of the panel's recommendations, the Sheriff intends to select four individuals for permanent promotion to the rank of Lieutenant (JO-4).

Subsequently, Suffolk County conducted interviews with applicants.[20] On May 17, 2000, Suffolk County posted a notice announcing the appointment of seven unit members to the position of lieutenant (the May 17, 2000 appointments).[21]

On or about May 22, 2000, Local 1134 filed a class action grievance (the May 22, 2000 grievance) protesting the May 17, 2000 promotions. Two days later, Local 1134 filed approximately two hundred grievances (the May 24, 2000 grievances) on behalf of every unit member who would have been eligible to take a promo-

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15. Local 1134 did not dispute Suffolk County's right to make permanent promotions prior to the execution of the contract.

16. Article XI, Section 2 of the 1995-1998 contract contained the following temporary service provision:

> An employee who is performing, pursuant to assignment, temporary service in a position higher than the position in which he performs regular service; other than for the purpose of filling in for an employee on vacation, shall commencing with the sixth consecutive day of actual service in such higher position, be compensated for such service at the rate to which he would have been entitled had he been promoted to such position. Any remedy based on a grievance filed under this section shall be limited in effect to a period not to exceed five (5) days prior to the date of the filing of the grievance in writing.

17. Bradley reported to Special Sheriff John Brassil (Special Sheriff Brassil), who in turn reported to Sheriff Rouse. However, Local 1134 had always dealt with Bradley on labor matters.

18. The four unit members were: Herbert Avant (Avant), Michael Colwell (Colwell), Erik Dilibero (Dilibero) and Jose Gomez (Gomez).

19. On February 1, 2000, Suffolk County posted a notice announcing the assignment of Avant, Colwell, Dilibero and Gomez to temporarily perform lieutenant's duties at the Jail.

20. The record is silent as to whether all applicants received an interview or whether it was only a select number of candidates.

21. Suffolk County promoted Avant, Colwell, Dilibero, Gomez, Scott Geezil (Geezil), Jacqueline Hummons (Hummons) and Matthew Mullen (Mullen).

tional examination for lieutenant.[22] Article VII of the parties' 1998-2000 contract describes Step One of the grievance procedure as follows:

> The Union representative, with or without the aggrieved employee, shall present the grievance orally to the Superintendent, or his designee, who shall attempt to adjust the grievance informally. If they are unable to do so, the Union shall reduce the grievance to writing, within ten (10) working days after the employee or Union had knowledge of should have had knowledge of the occurrence or failure of the occurrence of the incident on which the grievance is based, or it shall be waived. The Superintendent/designee shall respond to the grievance in writing within five (5) days of the Union's written submission of the grievance to him.

Deputy Superintendent Thomas Connolly (Connolly) met with Zaferakis and Local 1134 steward Angelo Rossi (Rossi)[23] in his office on May 24, 2000 and informed them that he refused to accept the 200 grievances that Local 1134 had filed on May 24, 2000. Bradley then joined the meeting via speakerphone and reiterated that Suffolk County would not accept the grievances. Connolly then returned the grievances to Zaferakis and Rossi. The following day Connolly stated that Local 1134 should file a class action grievance rather than filing individual grievances on behalf of more than two hundred unit members, but Local 1134 declined. On May 26, 2000, Rossi filed another grievance protesting Connolly's refusal to accept the May 24, 2000 grievances.

On July 28, 2000, Michael Harris (Harris), a Step 2 hearing officer at the Jail, issued a decision on Rossi's May 26, 2000 grievance finding Suffolk County remiss for failing to accept the request at Step 1, but also found Local 1134 remiss for filing more grievances than it was allowed under Article XX, Section 4 of the 1995-1998 contract.[24]

Count II of Case No. MUP-2630

Suffolk County maintains a separate overtime list based on seniority for LPN's working at the Jail. If a LPN is absent, Suffolk County will offer the other LPN's the opportunity to fill in for the absent LPN on an overtime basis. If no LPN voluntarily accepts the overtime opportunity, then Suffolk County will assign a LPN to fill in for the absent LPN.[25] On January 17, 1996, Special Sheriff Brassil issued a memorandum concerning procedure for drafting nurses (the January 17, 1996 policy).[26] The January 17, 1996 policy stated in part that:

> · The decision to draft shall be based on a reasonably anticipated need for staffing which cannot be resolved by finding staff willing to work overtime.
>
> · Drafting is appropriate when a staffing need occurs without sufficient advance notice (approximately two hours) to permit overtime or draft calls. Coverage shall then be provided by on site staff according to draft rotation.
>
> · The Head Nurse should attempt to plan for staffing needs when it can be anticipated that a staff shortage will exist on any shift.
>
> · When time is a factor and it is not possible to hire an off-duty nurse, the Head Nurse at her option may draft the nurse at the bottom of the overtime list and require him/her to work until a replacement is located.
>
> · Selection of staff shall be coordinated by the Head Nurse to ensure fairness and adherence to the rule that drafting shall be rotated in reverse seniority, drafting the junior nurse first.

As of September 1998, approximately thirteen LPN's worked at the Jail. Five or six LPN's worked the first shift from 7AM to 3PM; four or five LPN's worked the second shift from 3PM to 11PM and one LPN worked the third shift from 11PM to 7AM. More than half of the LPN's had submitted medical notes precluding them from working overtime and making them ineligible to work drafts. The fact that only a small number of LPN's were available to work all of the drafts was a source of controversy among the LPN's. Suffolk County attempted to resolve the controversy by challenging the medical notes of certain LPN's[27] and by changing the draft procedure.

On September 30, 1998, Gerard Horgan (Horgan), Deputy Superintendent of Administrative Services,[28] met with the LPN's and later consulted with Colwell, Local 1134's vice-president, and William McLaughlin, Local 1134's chief steward. On October 19, 1998, Horgan distributed a proposed policy (the October 19, 1998 policy) stating in part that:

> · The Medical Staff member who does the monthly schedule will complete the schedule at least two weeks in advance. This employee will identify any shifts that are vacant after the schedule is complete.
>
> · The overtime list shall be called in order of seniority until the overtime slot is filled. The next overtime slot will be offered to the person ranking next in seniority.
>
> · When an employee accepts or refuses an overtime shift, he or she shall have a box filled.

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22. Prior to May 24, 2000, Local 1134 had filed numerous class action grievances although the contract does not specifically reference class action grievances. Local 1134 had previously filed class action grievances when alleged violations involved at least three unit members, had arisen out of the same facts and alleged the same injury even if the remedy was different. However, even in the absence of a class action grievance, Suffolk County was not precluded from holding a single hearing on multiple individual grievances.

23. Rossi had filed the May 22, 2000 and May 24, 2000 grievances.

24. Article XX, Section 4 of the 1995-1998 contract states in part that: "Any dispute regarding any promotion pursuant to this Article shall be subject to the grievance and arbitration procedure by only the two (2) most senior applicants."

25. The parties refer to these involuntary work assignments as drafts.

26. The January 17, 1996 policy applied to both LPN's and RN's at the Jail. However, Local 1134 does not represent the RN's at the Jail. Instead, AFSCME represents the RN's at the Jail as a stand-alone bargaining unit.

27. One of the medical notes that Suffolk County challenged belonged to a LPN named Christina Luzaitis (Luzaitis). After Suffolk County informed Luzaitis that it was disregarding her medical note, she was drafted to work the 3-11 PM shift on September 21, 1998. Luzaitis refused to work, and Suffolk County issued her a written warning on October 2, 1998.

28. Horgan oversaw the Medical Department at the Jail.

· When the person calling the list is unable to reach an employee at home, that employee will be marked "NA" (not available). A box shall be filled when an employee is "NA".

In an instance where no employee voluntarily takes the overtime, a draft shall be instituted. Drafts will be done in the order of reverse seniority with the least senior employee drafted first and the next senior employee getting drafted last.[29] An employee who is drafted shall not be drafted again until all other more senior nurses are subsequently drafted. Employees who are drafted may swap with another employee if possible. A box shall be filled for an employee who works a draft.

Horgan also attached a cover letter to the October 19, 1998 policy referencing those instances when Suffolk County had advance notice that an LPN would be absent on a particular date, typically if an LPN was on vacation or using personal leave.[30] In those instances, Suffolk County would temporarily reassign the LPN who had been drafted to the absent LPN's shift on the date in question. LPN's who were temporarily reassigned did not work their regular shifts and did not earn overtime. Shortly thereafter, Suffolk County implemented the October 19, 1998 draft policy and the practice of reassigning LPN's when it was known in advance that a LPN would be absent.[31] Simultaneously, a notice that Head Nurse Connie Osgood (Osgood) had signed[32] was also present on the cork bulletin board near the LPN's and RN's offices, stating that a LPN or RN could refuse one draft per year.[33]

When Horgan transferred to the Suffolk County House of Correction in October 1999, the October 19, 1998 policy and the practice of reassigning LPN's to fill in for absent LPN's was still in effect. For the period between October 19, 1998 and February 24, 2000, Suffolk County did not issue any other policies concerning the procedure for drafting LPN's.

On or about February 24, 2000, Rossi became aware[34] that Suffolk County had scheduled a meeting to discuss the draft policy. Rossi, Walsh, Osgood and Anthony Domagala, the Director of Medical Services at the Jail, were present for the meeting, which lasted approximately fifteen minutes. At the meeting, Walsh presented Rossi with a newly written policy concerning drafts (the February 24, 2000 policy) because Walsh stated that Suffolk County could not find a copy of the October 19, 1998 policy.[35] Rossi informed Walsh that Local 1134 would need to bargain over what Rossi perceived as the differences between this policy and the draft procedure as it currently existed.[36] Walsh responded that the purpose of the meeting was informational only and that Suffolk County had no obligation to bargain. The February 24, 2000 policy contained the following provisions:

1. If an employee reports to work and has not previously volunteered to work an additional amount of time and there is a sick call, he or she can volunteer to stay and cover the next shift. This will not be credited as a draft. If no one volunteers, the next nurse present on duty on the draft list maintained by the Director of Nurses/Nursing Supervisor will be drafted to stay, this includes any employee with a restriction that prohibits them from working more than four (4) extra hours. If said employee works an additional four (4) or more hours that will be credited as a draft.

2. Any nurse who signs up for overtime on the overtime sheet posted will not be credited with a draft shift. When staffing needs are known in advance (i.e. vacation coverage, prolonged illness, etc.) the draft list may be used as is in order of reverse seniority. The Director of Nurses/Nursing Supervisor will communicate the draft (date and time) to the employee while they are at work.

3. The Department will make every effort to avoid using the draft on an employee's scheduled day off, vacation, comp, or personal time. However, should the need for a draft arise, the department will attempt to notify the employee at work in advance. Otherwise, the employee may be drafted by phone. In event of a staffing emergency situation or, if the disaster plan is in effect, the draft may be used on an employees scheduled day off.

4.At the discretion of the Director of Nurses/Nursing Supervisor, when the safety of the institution, its staff or the inmates, is not in jeopardy, consideration will be given to reducing the minimum staffing on a particular shift to avoid the draft.

On February 26, 2000, Zaferakis wrote to Suffolk County protesting the implementation of the February 24, 2000 policy. Feeney responded on February 29, 2000 by stating that the Department had not changed the terms and conditions of employment of unit members but instead merely had reduced the current practice to writing. Feeney also noted that the Department had agreed to make additional changes to the protocol as requested by Rossi and to have a general meeting with the nurses to discuss drafting issues. On February 29, 2000, Domagala issued and implemented a re-

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29. Suffolk County attempted to draft LPN's who were off-duty and to order them to report to work. However, because Suffolk County could not reach the off-duty LPN's by telephone, they could not be ordered to report to work.

30. The cover letter stated in part that: "Employees will be called well in advance for overtime shifts whenever possible. If nobody takes the shift, the nurse who is drafted will often have a couple of weeks notice. The nurse can then plan their schedule accordingly or try to swap with another employee."

31. Zaferakis and Rossi testified that the draft procedure for LPN's at the Jail mirrored the draft procedure for the jail officers, specifically that no LPN would be drafted in advance and that no LPN would be drafted at home. Horgan, however, testified about the development and implementation of the October 19, 1998 draft policy. Although Zaferakis's and Rossi's testimony may be correct as to what the draft procedure was prior to October 19, 1998, the detailed nature of Horgan's testimony convinced the hearing officer that the October 19, 1998 policy superseded the draft procedure that existed prior to October 19, 1998. Therefore, the hearing officer credited Horgan's testimony.

32. Typically, one of the Jail's superintendents rather than Osgood would sign official notices on the bulletin board.

33. Horgan testified that he had not seen Osgood's notice and Gerry Walsh (Walsh), Horgan's successor as Deputy Superintendent of Administrative Services, also testified that he was unaware of Osgood's notice. The straightforward testimony of Zaferakis and Rossi on this point convinced the hearing officer that Osgood's notice was present on the cork bulletin board until it was removed in February 2000. Accordingly, the hearing officer credited Zaferakis's and Rossi's testimony.

34. Sergeant Bergeron, a member of Local 1134's executive board, informed Rossi about the meeting.

35. Walsh ultimately reviewed the October 19, 1998 policy in March 2000 when a member of the nursing staff provided him with a copy.

36. Although Rossi was chief steward, he was not a member of Local 1134's executive board and was not authorized to bargain on Local 1134's behalf. Rossi informed Walsh at the February 24, 2000 meeting that he was not authorized to bargain on behalf of Local 1134.

vised version of the February 24, 2000 policy deleting the statement in paragraph 2 that any nurse who signs up for overtime on an overtime sheet posted will not be credited with a draft shift and amending paragraph 3 to state that:

> The Department will not call an employee at home to be drafted on an employee's scheduled day off, vacation comp or personal time, unless an emergency exists at the institution as referenced in S220.13. An emergency is defined as no qualified staff within the institution or when the disaster plan is in effect.

Shortly thereafter, Rossi contacted Melissa Garand, Esq. (Garand)[37] and informed her that he had never agreed to the February 24, 2000 policy. Further, Rossi informed Garand that he had not had the opportunity to speak to Local 1134's executive board about the February 24, 2000 policy.

On March 24, 2000, McManus wrote to Bradley on behalf of the RN's and the LPN's demanding that the February 24, 2000 memorandum be rescinded and that the parties bargain any proposals regarding mandatory overtime. Abate responded on April 7, 2000 by noting that Rossi was present at the February 24, 2000 meeting with Domagala and by reiterating that Suffolk County had not implemented a new policy but instead had memorialized in writing a procedure that had already been in effect for some years.[38] Abate also noted that: "if you still maintain that this procedure is in fact different from what is currently in practice, and wish to meet to discuss these differences, please contact me ... so that I may arrange a mutually-convenient place and time."

Opinion

Repudiation of an Oral Agreement (Two Counts)

The issue in both Count I of Case No. MUP-2630 and Count I of Case No. MUP-2747 is whether Suffolk County failed to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating an August 13, 1999 oral agreement with Local 1134. The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement. *Commonwealth of Massachusetts*, 26 MLC 165, 168 (2000); *citing*, *City of Quincy*, 17 MLC 1603 (1991); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196 (1983). A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of the Law. *Town of Falmouth*, 20 MLC 1555 (1984); *aff'd sub. nom.*, *Town of Falmouth* v. *Labor Relations Commission*, 42 Mass.App.Ct. 1113 (1997). To determine whether the parties reached an agreement, the Commission considers whether there has been a meeting of the minds on the actual terms of the agreement. *See Town of Ipswich*, 11 MLC 1403, 1410 (1985); *aff'd sub. nom.*, *Town of Ipswich* v. *Labor Relations Commission*, 21 Mass.App.Ct. 1113 (1986). If the evidence is insufficient to find an agreement, or if the parties hold differing good faith interpretations of the language at issue, the Commission will conclude that no repudiation has occurred. *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1986). If the language is ambiguous, the Commission examines applicable bargaining history to determine whether the parties reached an agreement. *Id.*; *Commonwealth of Massachusetts*, 16 MLC 1143, 1159 (1989). There is no repudiation of an agreement if the language of the agreement is ambiguous and there is no evidence of bargaining history to resolve the ambiguity. *Commonwealth of Massachusetts*, 28 MLC 8, 11 (2001); *citing*, *Town of Belchertown*, 27 MLC 73 (2000).

Here, Local 1134 argues that on August 13, 1999 Suffolk County orally agreed that if unit members were assigned to perform the duties of higher ranking positions during the period after the execution of the successor collective bargaining agreement but before the implementation of the promotional examination, Suffolk County would make those assignments pursuant to Article XI, Section 2, the temporary service provisions of the 1998-2000 contract. Conversely, Suffolk County contends the parties never had a meeting of the minds on this issue. The Commission has long recognized that a meeting of the minds can occur without anything having been reduced to writing or having been signed by either party. *Town of Ipswich*, 11 MLC 1403, 1410 (1985); *aff'd sub. nom.*, *Town of Ipswich* v. *Labor Relations Commission*, 21 Mass.App.Ct. 1113 (1986); *citing*, *Turner Falls Fire District*, 4 MLC 1658, 1661 (1977). To achieve a meeting of the minds, parties must manifest an assent to the terms of an agreement. *See Commonwealth of Massachusetts*, 26 MLC 211 (2000). Upon review of the record, we conclude that the parties' statements and conduct demonstrated an assent that any assignments of higher-ranking positions would be treated as temporary service pursuant to Article XI, Section 2 during the period between the execution of the successor contract and the implementation of the promotional examination. First, Local 1134 presented unrebutted testimony that Bradley agreed that if Suffolk County assigned unit members to perform the duties of a higher ranking position, the employer would make those assignments pursuant to Article XI, Section 2. Moreover, in response to Local 1134's queries in late January or early February 2000 about Suffolk County's assignment of four unit members to work as lieutenants, the employer assured Local 1134 on two separate occasions that the four unit members were performing those assignments pursuant to Article XI of the contract. Furthermore, Suffolk County's assent to the August 13, 1999 agreement was evinced by Bradley's February 9, 2000 statement to Dumont that the employer was now reneging on that agreement. Finally, consistent with the parties' having reached an agreement, Local 1134 also agreed to withdraw its objections concerning the language in Article XX, Section 2 of the 1998-2000 contract regarding permanent promotions and to execute the collective bargaining agreement. Accordingly, we conclude that the parties entered into an unambiguous and enforceable agreement under the Law.

First, turning to Count I of Case No. MUP-2630, the Union alleges here that Suffolk County repudiated the August 13, 2003 agree-

37. Garand worked in the General Counsel's Office.

38. Abate also attached the January 17, 1996 policy and the October 19, 1998 policy.

ment when it posted openings for lieutenant on February 11, 2000. We conclude that the employer did not abide by the August 13, 1999 agreement because the openings were for permanent appointments to the position of lieutenant rather than for temporary assignments. Moreover, in a February 28, 2000 letter, Suffolk County reiterated that it would not fill the vacancies pursuant to Article XI, Section 2 but instead would permanently appoint individuals to those positions. Therefore, Suffolk County repudiated the August 13, 1999 agreement in violation of Sections 10(a)(5) and (1) of the Law.

Next, in Count I of Case No. MUP-2747, the Union alleges that Suffolk County's May 17, 2000 promotion of seven unit members to lieutenant repudiated the parties' August 13, 1999 agreement. The record reveals that Suffolk County permanently appointed the individuals to the position of lieutenant rather than temporarily assigning them to the position pursuant to Article XI, Section 2. Because Suffolk County permanently appointed those individuals, it did not adhere to the August 13, 1999 agreement that all assignments to a higher rank would be made pursuant to Article XI, Section 2 until Suffolk County implemented the new promotional examination. Accordingly, Suffolk County repudiated that agreement in violation of Sections 10(a)(5) and (1) of the Law.

Refusal to Accept and Process Grievances

An employer's statutory obligation to meet and bargain with the exclusive representative under Section 6 of the Law necessarily extends to resolution of disputes under the grievance machinery of the collective bargaining agreement. *Suffolk County Sheriff's Department*, 28 MLC 253, 261 (2002); *Ayer School Committee*, 4 MLC 1478, 1483 (1977). Here, it is uncontested that Suffolk County refused to accept and to process the approximately 200 grievances that Local 1134 filed on May 24, 2000 protesting the permanent appointments that Suffolk County made on May 17, 2000. Suffolk County defends its refusal to process the grievances on the grounds that the Union's filing of multiple grievances is contrary to the basic tenets of the parties' collective bargaining agreement, namely cooperation and efficiency, and that Local 1134 should have filed a class action grievance. However, notwithstanding the fact that Local 1134's manner of filing the grievances may have been frustrating and inexpedient, Suffolk County did not have the right under the Law to refuse to process the grievances and demand that Local 1134 file a class action grievance instead. *See Suffolk County Sheriff's Department*, 28 MLC at 261. If an employer elects not to file a prohibited practice charge against an employee organization for what it perceives to be an attempt to frustrate the grievance-arbitration process, it is not justified in resorting to self-help by unilaterally and arbitrarily insisting that its own view is the correct one, thus bypassing its duty to negotiate with its employees' exclusive representative. *Town of Framingham*, 19 MLC 1661, 1663 (H.O. 1993), *aff'd*, 20 MLC 1563 (1994); *Town of Hudson*, 25 MLC 143, 147 (1999). Further, the record reveals that, even in the absence of a class action grievance, Suffolk County still could have held a single hearing on multiple individual grievances. Finally, Suffolk County insists that the 200 grievances were both procedurally and substantively defective. However, Suffolk County should have raised those defenses during the grievance process rather relying upon alleged flaws in the grievances as bases for refusing to accept the grievances. Accordingly, we conclude that Suffolk County has violated Sections 10(a)(5) and (1) of the Law by failing to bargain in good faith when it refused to accept and to process the grievances that Local 1134 filed on May 24, 2000.

Unilateral Change

A public employer violates Sections 10(a)(5) and (1) of the Law when it implements a change in a mandatory subject of bargaining without first providing the 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*, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as 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 unilateral change violation, the charging party 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 bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1984); *City of Boston*, 20 MLC 1603, 1607 (1994). 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. *Swansea Water District*, 28 MLC 244, 245 (2002); *Commonwealth of Massachusetts*, 23 MLC 171, 172 (1997); *Town of Chatham*, 21 MLC 1526, 1531 (1995). A condition of employment may be found despite sporadic or infrequent activity where a consistent practice that applies to rare circumstances is followed each time the circumstances precipitating the practice recur. *Commonwealth of Massachusetts*, 23 MLC at 172.

The issue here is whether Suffolk County unilaterally altered the method of assigning overtime to the LPN's at the Jail in violation of Sections 10(a)(5) and (1) of the Law when the employer implemented its February 24, 2000 draft policy. Specifically, Local 1134 asserts that as a result of the February 24, 2000 draft policy that: 1) Suffolk County even made off-duty LPN's subject to being drafted; 2) the employer no longer temporarily reassigned those LPN's who had been drafted in advance; and 3) Suffolk County no longer permitted LPN's to refuse one draft per year. As a preliminary matter, we must consider how Suffolk County made involuntary overtime assignments to LPN's prior to February 2000. Prior to that period, the October 19, 1998 draft policy was in effect at the Jail and that policy provided that Suffolk County could draft LPN's in the order of reverse seniority. Although Suffolk County attempted to draft off-duty LPN's to fill vacancies, the employer usually could not reach the LPN's via telephone. If Suffolk County had advance notice that an LPN would be absent on a particular date and that another LPN would need to be drafted to fill that vacancy, the employer would temporarily reassign the LPN who had been drafted to the absent LPN's shift. However, LPN's who were

temporarily reassigned did not work their regular shifts and did not earn overtime. Also, on or about October 1998, a notice from Osgood was posted on the bulletin board near the LPN's and RN's offices stating that a LPN could refuse one draft per year.

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 term and condition of employment. It is well established that the manner in which an employer assigns overtime is a mandatory subject of bargaining. *See Commonwealth of Massachusetts*, 17 MLC 1007, 1012. Upon review of the record, we conclude that Suffolk County's implementation of the February 24, 2000 policy changed the employer's method of assigning overtime because the policy did not permit LPN's to refuse one draft per year as was described in Osgood's notice that had been posted at the nurses' station since at least 1998. However, the evidence does not demonstrate that Suffolk County changed its method of assigning overtime by drafting off-duty LPN's and by ceasing to temporarily reassign LPN's who were drafted in advance to fill a future vacancy as a result of the February 24, 2000 policy.

Finally, it is undisputed that Suffolk County did not provide Local 1134 with an opportunity to bargain to resolution or impasse before instituting this change in a mandatory subject of bargaining. Therefore, we conclude that Suffolk County violated Sections 10(a)(5) and (1) of the Law by unilaterally changing the method of assigning overtime without bargaining to resolution or impasse.

Conclusion

Based on the record and for the reasons stated above, we conclude that Suffolk County violated: 1) Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the August 13, 1999 agreement with Local 1134 when Suffolk County posted openings for permanent appointments to lieutenant in February 2000; 2) Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the August 13, 1999 agreement with Local 1134 when Suffolk County permanently appointed seven bargaining unit members to lieutenant on May 17, 2000; 3) Section 10(a)(5) and, derivatively, Section 10(a)(1) by refusing to accept and process grievances that Local 1134 filed on May 24, 2000 protesting the May 17, 2000 appointments; and 4) Section 10(a)(5) and, derivatively, Section 10(a)(1) by changing the method of assigning overtime without bargaining to resolution or impasse.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Suffolk County Sheriff's Department shall:

1. Cease and desist from:

a) Failing to bargain in good faith by repudiating the August 13, 1999 agreement with Local 1134. The August 13, 1999 agreement provided that during the period after the parties executed the 1998-2000 collective bargaining agreement until Suffolk County developed and implemented a promotional examination that any assignment of a unit member to perform duties of a higher rank would be made pursuant to Article XI, Section 2 of the 1998-2000 collective bargaining agreement.

b) Failing and refusing to process grievances filed by Local 1134 pursuant to the parties' contractual grievance and arbitration procedure.

c) Changing the manner of assigning overtime to LPN's by not allowing LPN's to refuse one overtime draft per year prior to the occurrence of the following conditions:

1) An agreement with the Union

2) A bona fide impasse in bargaining.

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

d) In any like manner, interfering, restraining and coercing its 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) Immediately adhere to the parties' August 13, 1999 agreement.

b) Upon request from Local 1134, rescind the May 17, 2000 permanent appointments to lieutenant that were made to Avant, Colwell, Dilibrero, Gomez, Geezil, Hummons and Mullen.

c) Process grievances filed by Local 1134 pursuant to the parties' grievance-arbitration procedure.

d) Make whole any LPN who suffered a monetary loss as a direct result of Suffolk County's change in the manner of assigning overtime when it no longer permitted LPN's to refuse one overtime draft per year, plus interest on any sums owed at the rate specified in M.G.L. c.231, Section 6I, compounded quarterly.

e) Sign and post immediately in all conspicuous places where bargaining unit members represented by Local 1134 usually congregate, or where notices are usually posted, and display for a period of 30 days thereafter, signed copies of the attached Notice to Employees.

f) Notify the Commission within 30 days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has held that the Suffolk County Sheriff's Department (Suffolk County) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: 1) repudiating the August 13, 1999 agreement with the Suffolk County Jail Employees, Local 1134 (Local 1134), affiliated with, AFSCME Council 93, AFL-CIO, when Suffolk County posted openings for permanent appointments to lieutenant in February 2000; 2) by repudiating the August 13, 1999 agreement with Local 1134 when Suffolk County permanently appointed seven bargaining unit members to lieutenant on May 17, 2000; 3) by refusing to accept and process grievances that Local 1134 filed on May 24, 2000 protesting the May 17, 2000 appointments; and 4) by changing the method of assigning overtime without bargaining to resolution or impasse when it no longer permitted LPN's to refuse one overtime draft per year.

WE WILL NOT fail to bargain in good faith by repudiating the August 13, 1999 agreement with Local 1134. The August 13, 1999 agreement provided that during the period after the parties executed the 1998-2000 collective bargaining agreement until Suffolk

County developed and implemented a promotional examination, any assignment of a unit member to perform duties of a higher rank would be made pursuant to Article XI, Section 2 of the parties' collective bargaining agreement.

WE WILL NOT fail and refuse to process grievances filed by Local 1134 pursuant to the parties' contractual grievance and arbitration procedure.

WE WILL NOT change the manner of assigning overtime to LPN's and will continue to permit LPN's to refuse one overtime draft per year 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 Local 1134 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 that are protected under the Law.

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

Immediately adhere to the parties' August 13, 1999 agreement.

Upon request from Local 1134, rescind the May 17, 2000 permanent appointments to lieutenant that were made to Avant, Colwell, Dilibero, Gomez, Geezil, Hummons and Mullen.

Process grievances filed by Local 1134 pursuant to the parties' grievance-arbitration procedure.

Make whole any LPN who suffered a monetary loss as a direct result of Suffolk County's change in the manner of assigning overtime when it ceased to allow LPN's to refuse one overtime draft per year, plus interest on any sums owed at the rate specified in M.G.L. c.31, §6I, compounded quarterly.

[signed]
For the Suffolk County Sheriff's Department

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