In the Matter of TOWN OF HARWICH

and

HARWICH POLICE FEDERATION[1]

Case No. MUP-01-2960

54.642	*injury leave*
67.61	*bargaining with individuals*
67.8	*unilateral change by employer*
82.3	*status quo ante*

June 27, 2005
Allan W. Drachman, Chairman
Hugh L. Reilly, Commissioner

Albert R. Mason, Esq.	*Representing the Town of Harwich*
Joseph G. Donnellan, Esq.	*Representing the Harwich Police Federation*

DECISION[2]

Statement of the Case

On April 2, 2001, the IBPO filed a prohibited labor practice charge with the Commission alleging that the Town had violated Sections 10(a)(5) and (a)(1) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charge and, on November 28, 2001, issued its own complaint of prohibited practice, alleging that the Town had failed to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) offering a bargaining unit member a light duty assignment without giving the IBPO prior notice and an opportunity to bargain to resolution or impasse over that assignment; and, 2) bypassing the IBPO and dealing directly with a bargaining unit member over a light duty assignment.

On March 21, 2002, Ann T. Moriarty, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The Town and the IBPO respectively filed post-hearing briefs on April 25 and April 26, 2002. The Hearing Officer issued Recommended Findings of Fact on November 7, 2002. On November 14, 2002, the Town filed challenges to the Hearing Officer's Recommended Findings of Fact. The IBPO did not file any challenges.

Findings of Fact[3]

The Town challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

Prior to January 29, 2004, the IBPO was the exclusive collective bargaining representative for all regular full-time patrol officers employed by the Town in its Police Department, including Jennifer Van Gelder (Van Gelder). The IBPO and the Town were parties to a collective bargaining agreement covering the period July 1, 1997 through June 30, 2000 (1997-2000 contract) that continued in effect until the parties ratified and signed a successor contract. The 1997-2000 contract contains the following provisions:

> *ARTICLE V MANAGEMENT RIGHTS*
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> The Town and the Union recognize that the Town has certain inherent prerogatives of municipal management that are retained by the Town unless specifically abridged by a specific provision of this Agreement. The Town and the Union agree that the exercise by the Town of its inherent management prerogatives will not waive or obviate any right or obligation of the Town and/or the Union under M.G.L. c. 150E.
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> *ARTICLE XII SICK LEAVE*
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> Section 2. Each employee who sustains injury or illness arising out of and in the course of his employment in the Town service shall be entitled to receive his full pay (without loss of sick leave) for the period of his incapacity. If such period exceeds thirty (30) days, the Town may from its own designated physician, require period [sic] written medical testimony supporting the claim of continued incapacity as a condition precedent to its approval of continued payment beyond such period....
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> *ARTICLE XXIV COMPENSATION*
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> Section 3. A K-9 officer, prosecutor or detective shall receive an additional sum of money to be paid weekly. Said sum of money based upon a $1000 annual amount. Temporary assignments to these positions will entitle the officer to receive the weekly differential pay for the duration of the assignment.

The 1997-2000 contract did not contain a temporary modified work program or light duty provision.

In December 1999, the Town and the IBPO started negotiating a successor collective bargaining agreement and, on or about December 7, 1999, the parties agreed on the ground rules for these successor negotiations. Those ground rules, in part, provided that:

> 2. Each side will have full authorization to make commitments and make tentative agreements subject to ratification by the Town and the Union.

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1. Prior to January 29, 2004, the International Brotherhood of Police Officers, Local 392 (IBPO) was the exclusive collective bargaining representative of the regular full-time police officers employed by the Town of Harwich (Town). On January 29, 2004, following a mail ballot election, the Labor Relations Commission (Commission) certified the Harwich Police Federation (Federation) as the exclusive representative of the police patrol officers (Unit A) and dispatchers (Unit B). On June 14, 2005, the Federation filed a motion with the Commission to substitute the Federation for the IBPO as the charging party in this case. The Commission has allowed the Federation's motion. *See generally*, *Suffolk County Sheriff's Department*, Case Nos. MUP-2630/MUP-2747 (slip op. January 9, 2004) [31 MLC 169].

2. 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.

3. The Commission's jurisdiction is uncontested.

3. All agreements reached will be tentative, subject to an entire package being reached at the conclusion of negotiations, a memorandum of understanding will be drawn up and signed.

During those successor negotiations, the Town proposed a temporary modified work program, commonly referred to as a light duty provision and, on or about December 4, 2000, the parties reached a tentative agreement that included a light duty provision. The December 4, 2000 Summary of the Tentative Agreement, in part, provides:

10. *Temporary Modified Work Program*

For Section 111F and sick leave on a voluntary basis. After 180 consecutive days on Section 111F, the Town can require light duty.

Article XXX, *Temporary Modified Work Program*, as it appears in the parties' 2000-2003 contract effective in April 2001, in part, provides:

Section 1 Work-related Illness or Injury

(a) If the primary care physician for the illness or injury determines that a police officer is eligible for temporary modified work, the Chief may assign that police officer to a Temporary Modified Work program that adheres to necessary medical restrictions. The physician must be Board certified or a specialist in the field that is directly related to the illness or injury.

(b) Temporary modified work assignments will be on an employee voluntary basis during the first 180 calendar days on IOD status. Starting with the 181st day, the Chief of Police or his/her designee may order the employee to a temporary modified work assignment. Failure of the employee to comply with the Temporary Modified Work Program will result in suspension of IOD benefits.

Section 2 Non-Occupational Illness or Injury (omitted)

Section 3. General Provision

(a) Temporary modified work duties shall be law enforcement in scope related to the official job description including: dispatching, station desk officer, investigative case preparation and follow-up, data entry, report writing, community education, research, training, and other regular functions that can be safely accomplished under prevailing medical restrictions.

(b) The Chief of Police, at his or her sole discretion, may limit the number of police officers on temporary modified work plans at any given time. TMWP shall be reviewed on a periodic basis and notice shall be provided to the police officer whether or not the TMWP is to continue.

(c) The Chief of Police may change the work schedule of the officer if the work assignment clearly requires an alternative shift schedule. Shift modifications will not be arbitrary, capricious, or punitive in nature. Such work shift shall remain only for the period of the TMWP. Schedules may be developed in order to accommodate the officer's need for on-going treatment and demonstrated personal considerations.

(d) Police officers on TMWP will not be utilized to fill entire shifts in communications that would normally be staffed by Unit B employees working on overtime unless those shifts remain open after Unit B employees have had the opportunity to bid those positions.

(e) Police officers on TMWP shall not normally be eligible for or required to fill overtime positions.

For at least nine (9) years prior to April 2001, bargaining unit members who sustained an on-duty injury or illness did not return to work until they were capable of performing all the functions of a patrol officer. Under the parties' ground rules, the temporary modified work program did not go into effect until April 2001, after ratification and execution of the complete successor agreement covering the period July 1, 2000 through June 30, 2003 (2000-2003 contract). Prior to April 2001, the Town did not have a temporary modified work program or a light duty policy in effect. At no time prior to April 2001 did the Town approach the IBPO's negotiator, Garrett Mahoney (Mahoney), with a request or proposal to implement either the agreed-upon temporary modified work program or other light duty program for Van Gelder or any other bargaining unit member.

Officer Jennifer Van Gelder

In September 1998, after working full-time for the Town for about seven (7) years as a police officer, Van Gelder sustained an on-duty injury. Thereafter, Van Gelder received benefits under Section 111F of M.G.L. c. 41 (Section 111F)[4] until February 12, 2001, when the Town terminated both her Section 111F benefits and her employment as a Town police officer effective that date.[5]

At some point after September 1998, during Town Police Chief William F. Greenwood's (Greenwood) tenure, Van Gelder asked Greenwood if the Police Department had light duty. In response, Greenwood told Van Gelder that the Town did not have a light duty policy, and the IBPO did not allow it. Further, at some point between September 1998 and July 2000, Van Gelder filed a claim for accidental disability retirement benefits under M.G.L. c. 32, Section 7 with the Barnstable County Retirement Board (Retirement Board).[6] As part of the disability retirement claim process, Van Gelder submitted to a medical panel examination that, in late July 2000, determined that Van Gelder was not mentally or physically incapable of performing the essential duties of her job as described in the current job description. The Town adopted the medical panel's July 2000 finding that Van Gelder was able to return to full-duty as a police officer.

In or about late August 2000, at the Retirement Board's request, the medical panel clarified and affirmed its July 2000 opinion. The

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4. Under Section 111F, Van Gelder received 100% of her regular compensation as a patrol officer.

5. A grievance was filed challenging Van Gelder's termination. In an award dated December 20, 2001, an arbitrator decided that the Town did not have just cause to terminate Van Gelder. The arbitrator ordered the Town to reinstate Van Gelder retroactively to her status as an employee on job-related injury leave, commencing with the date of her termination and ending with the date her disability retirement became effective, and to compensate Van Gelder on a make-whole basis for any back pay and compensatory fringe benefits she would have received had she not been terminated. By letter dated January 14, 2002, the arbitrator decided that the award did not require clarification. The Town has filed an action in Superior Court seeking to vacate the arbitrator's award.

6. An application for disability retirement is filed with the local retirement board. The local retirement board, in turn, requests the Public Employee Retirement Administration Commission (PERAC) to convene a medical panel.

Retirement Board did not accept that medical panel's determination, as clarified, and requested that PERAC convene a second medical panel to review Van Gelder's claim.

Based on the first medical panel's determination and clarification, Article XII, Section 2 of the 1997-2000 contract, and advice received from counsel, Police Chief William A. Mason[7] (Chief Mason) notified Van Gelder by letter dated November 9, 2000, that the Town was adopting the July 2000 medical panel opinion. Further, in that letter that referenced the termination of Van Gelder's Section 111F benefits, Chief Mason offered Van Gelder a return to full duty on her next regular shift and rotation beginning November 20, 2000. Chief Mason's November 9, 2000 letter did not contain any offer to Van Gelder to return to work in a restricted duty or light duty capacity.

Van Gelder did not return to work and, on December 6, 2000, the Town, through its agent, Town Administrator Wayne Melville (Melville), conducted a hearing to determine whether the Town should terminate Van Gelder's Section 111F benefits and terminate Van Gelder's employment with the Town.[8] During the December 6, 2000 hearing, Chief Mason offered information about certain duties in the Police Department that could be performed on a light duty basis like dispatch functions.[9] Chief Mason never discussed light duty with Van Gelder. Rather, Chief Mason provided information to the Town's counsel, including a section of the Police Department's rules and regulations entitled Line-of-Duty Disability.[10]

At the end of the December 6, 2000 hearing, the Town, through its attorney, Attorney Albert B. Mason (Attorney Mason),[11] offered Van Gelder the option of returning to work on a modified duty schedule.[12] In response, Van Gelder told Attorney Mason that the Police Department did not have a modified duty policy, that she had talked with Greenwood about it in the past, and that the Town and the IBPO did not have a light duty policy. Attorney Mason stated that he was offering it to her now. Van Gelder then stated "for me, especially", or words to that effect. Attorney Mason responded "yes, for you," or words to that effect. Van Gelder's attorney interrupted at that point and said "absolutely not, it doesn't exist," or words to that effect.

Immediately after December 6, 2000, Van Gelder told some of her fellow police officers and IBPO Representative Mahoney that the Town had offered her light duty. Van Gelder asked these individuals whether things had changed and the Police Department had a light duty policy. Generally, in response, the police officers told Van Gelder that there was no light duty policy; however, a light duty policy was part of the contract negotiations, but it was not yet agreed to or ratified.

On or about January 10, 2001, Melville recommended that the Town's Board of Selectmen take the following action:

> 1. I recommend that the Board of Selectmen vote to terminate the Chapter 41, Section 111F compensation currently being paid to Officer Van Gelder, based upon an adoption of the unanimous medical opinion of the impartial three-member medical panel that examined Officer Van Gelder to determine if she was able to perform the functions of a police officer. Their determination was that she was not so disabled.
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> 2. I recommend that the Board vote to terminate Officer Van Gelder's employment with the Town based upon her failure to return to duty, given the medical panel's opinion that she is not disabled and in conjunction with Chief Mason's offer of a return to duty.
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> 3. I recommend that the Town continue to pay Officer Van Gelder's medical expenses in accordance with Chapter 41, Section 100, until a final determination has been reached concerning Officer Van Gelder's medical appeal.

Further, at some point after December 6, 2000, Van Gelder talked with Richard L. Barry (Barry), the IBPO's Chief Counsel, about the Town's light duty offer and its implications. On February 1, 2001, Barry sent the following letter to Melville, with copies to Van Gelder, Chief Mason, and Attorney Mason, among others.

> On December 6, 2000 you acted as a hearing officer for the purpose of reviewing the M.G.L. Chapter 41, s.111F benefits of Jennifer Van Gelder, a Harwich Police Officer. Officer Van Gelder was represented by her personal attorney at the hearing. During the hearing,

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7. William A. Mason started working as the Town's Police Chief on June 26, 2000.

8. At the time of the December 6, 2000 hearing, Van Gelder's claim for accidental disability retirement remained pending before the Retirement Board. During the December 6, 2000 hearing, the Retirement Board's representative stated that the Retirement Board intended to request a second medical panel to examine Van Gelder. In or about mid-December 2000, the Retirement Board did request PERAC to form and convene a second medical panel.

9. Bargaining unit members do not regularly perform dispatch functions as part of their job duties. However, if a dispatcher, who is not a member of the Federation's bargaining unit, is not available to perform dispatch functions, the Town, through its Police Chief, asks bargaining unit members working that shift to volunteer to perform the dispatcher's job duties. Absent volunteers, the Police Chief, or his designee, assigns a patrol officer to perform the dispatcher's job duties on a reverse seniority basis.

10. On or about October 16, 1994, during Greenwood's tenure, Van Gelder acknowledged that she had completed her review of the Police Department's policies and procedures manual. That manual, in part, stated:

> 20. Line-of-Duty Disability - Any injury, no matter how minor it may seem at the time, illness or disability incurred in the line of duty shall be reported, in writing, by the officer concerned to his Commanding Officer, and this report will be properly investigated by said Commanding Officer. The Commanding Officer shall submit a report to the Chief with the results of his investigation detailing sufficient facts to determine if the injury or illness was in fact the result of a legitimate line of duty function. Final disposition as to line of duty injuries, illnesses or disabilities shall be made by the Chief after consultation with a physician. In each case of illness, injury or disability incurred in the line of duty, no officer shall be returned to duty until his ability to be placed on full duty status is certified by proper medical authority. Light house-duty may be approved by the Chief at his discretion.

The Town did not reference this policy when it offered Van Gelder light duty.

11. Attorney Albert Mason attended the December 6, 2000 hearing as counsel to Chief Mason and the Town's Police Department.

12. While she was receiving Section 111F benefits, three physicians issued three separate medical reports on February 14, 2000, March 6, 2000, and May 9, 2000 indicating that Van Gelder was not medically released to perform the full duties of a police officer, but could perform light duty as a police officer. All three medical reports were provided to the Town. The Town never approached Van Gelder about returning to work in a light duty or restricted duty capacity at any time before December 6, 2000. This request to return to light duty that the Town made on December 6, 2000 occurred after the Town had received and adopted the first medical panel report dated July 2000.

> Officer Van Gelder was offered a return to modified or restricted duty at the Harwich Police Department. The issue of modified or restricted duty is a mandatory subject of bargaining. The Union and the Town of Harwich have conducted successor contract negotiations specifically addressing the issue of light duty.
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> The Town of Harwich, as the employer, may not deal directly with employees in a bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative. An employer that does bypass a union to deal directly with individual employees violates the duty to bargain in good faith as required by M.G.L. Chapter 150E. The representatives of the Town of Harwich committed a prohibited practice, as defined by M.G.L. 150E, by attempting to negotiate the issue of light duty directly with Officer Van Gelder.
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> The Union will take appropriate action should the Town of Harwich persist in its attempts to negotiate a modified or restricted duty with an individual officer.

The Town's Board of Selectmen considered Melville's recommendations during a *February 12, 2001* meeting and voted to accept all of Melville's recommendations.[13] At some point during this meeting, Van Gelder was asked whether she would return to work on a light duty basis. She declined to return to work on a light duty basis based on her understanding that the Town did not have a light duty policy, and that light duty did not exist, nor had it ever existed, in the Police Department.

Melville responded to Barry's February 1, 2001 letter on February 13, 2001. Melville's response, in part, states:

> 1. Police Officer Jennifer Van Gelder has been offered a restricted duty assignment at the Harwich Police Department and she has refused same.
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> 2. Officer Van Gelder expressed an opinion that she could not accept restricted duty because the contract did not allow it. She was advised that the subject of restricted duty was a subject of collective bargaining in our last contract negotiations and that she could accept a restricted duty position.
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> 3. We have provided an opportunity for negotiations on restricted duty and through negotiations it was agreed that if an individual was in an injured on duty status for 6 months then the individual could, in fact, be "ordered" to report to restricted duty. Officer Van Gelder has been in an injured on duty status well in excess of 6 months and, in fact, she was "offered" a restricted duty assignment not "ordered" to report for such an assignment.
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> 4. [Omitted]
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> 5. We have negotiated restricted duty assignments with the union and an agreement was reached that will be incorporated into our successor collective bargaining agreement if ratified. We have also been advised that this is an "assignment" matter and that "... the power of assignment inheres by implication in the relationship of a police chief to the officers serving under his command." *See, Boston Police Patrolmen's Assn.*, 403 Mass. at 684, 532 N.E. 2d 640. [Other citations omitted].

By letter to Van Gelder dated February 23, 2001, Chief Mason confirmed that the Town had terminated both her employment with the Police Department and her Section 111F compensation status. Further, this letter, in part, stated:

> The termination of your employment status is based on your failure or inability to return to either full or restricted duty as made available to you by the Harwich Police Department, taken in conjunction with the independent three-member medical panel report that indicates a unanimous opinion that you are capable of a return to duty. The termination of your M.G.L. chapter 41 section 111F compensation status is also based on your failure or internally perceived inability to return to either full or restricted duty as offered to you in light of the unanimous report of an independent three-member medical panel.

On March 9, 2001, the IBPO responded to Melville's February 13, 2001 letter. In that response, the IBPO protested the Town's actions surrounding Van Gelder's termination, including the Town's conduct with Van Gelder about light duty.

Opinion

Unilateral Change

An employer violates Section 10(a)(5) of the Law if it unilaterally alters a pre-existing condition of employment or implements a new condition of employment affecting a mandatory subject of bargaining without providing the exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 26 MLC 177, 181 (2000). An employer's obligation to bargain before changing conditions of employment extends not only to actual contract terms but also to working conditions that have been established through custom and past practice. *City of Boston*, 16 MLC 1429, 1434 (1989). To establish a violation, a union must show that: 1) the employer changed an existing practice or instituted a new one; 2) the change had an impact on a mandatory subject of bargaining; and 3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000), *citing*, *City of Boston*, 26 MLC 177, 181 (2000).

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. *Town of Belchertown*, 27 MLC 73, 81

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13. At the time of the meeting, Van Gelder's retirement application was pending before the Retirement Board. On February 12, 2001, before the Selectmen's meeting, the Retirement Board called Van Gelder and notified her that PERAC had ordered a new, second medical panel to review her accidental disability retirement claim. Van Gelder told Melville of this development just before the Selectmen's meeting started. Melville told Van Gelder that it was too late and to "see what happens at the meeting," or words to that effect. During the February 12, 2001 meeting, Van Gelder also informed all those in attendance of this development in her accidental disability retirement claim. After a second medical panel examined Van Gelder, the Retirement Board approved Van Gelder's accidental disability retirement claim on June 26, 2001. On July 26, 2001, PERAC reviewed the Retirement Board's decision to grant Van Gelder's disability benefit and approved it. The retirement benefits approved by PERAC on July 26, 2001, including 72% of her salary as a patrol officer, were retroactive to February 12, 2001. From the date of her termination to August 15, 2001, Van Gelder paid the Town directly for the full amount of her health insurance premium, or $694.03 per month.

(2000). In this case, the evidence demonstrates that the Town did not have a light duty policy when it offered light duty to Van Gelder. The record further shows that, for at least nine (9) years prior to April 2001, bargaining unit members who sustained an on-duty injury or illness did not return to work until they were capable of performing all of the functions of a patrol officer. Thus, the Town's past practice did not require officers who sustained an on-duty injury to return to work in a light duty capacity but, rather, allowed them to remain out of work until they were capable of performing all of the functions of their position.

We next consider whether the Town changed this practice when it offered Van Gelder a light duty assignment and terminated her Section 111F benefits after she had declined that assignment. The Town admits that it offered Van Gelder light duty, but denies that it imposed light duty as a criteria for receiving Section 111F benefits. It contends that it decided to discontinue Van Gelder's Section 111F benefits, because the first disability retirement medical panel determined that she was able to return to full duty as a police officer. However, Chief Mason's letter dated February 23, 2001 belies the Town's argument. That letter states: "The termination of your M.G.L. chapter 41 section 111F compensation status is also based on your failure or internally perceived inability to return to either full or restricted duty as offered to you in light of the unanimous report of an independent three-member medical panel." This statement demonstrates that Van Gelder's rejection of light duty was a decisive factor in the Town's decision to discontinue her Section 111F benefits. Consequently, it was a criterion used to determine eligibility, *see Town of Hingham*, 21 MLC 1237, 1241 (1994) (physician examinations held to be a criterion for continued receipt of 111F benefits when the town relied on them to decide whether to continue or terminate 111F benefits), and it was a change in the Town's past practice.

The third factor in our analysis is whether the change impacted a mandatory subject of bargaining. The Commission has found in previous cases that the eligibility criteria for paid injured-on-duty leave under M.G.L. c. 41, §111F is a mandatory subject of bargaining. *City of Medford*, 28 MLC 136 (2001); *City of Springfield*, 12 MLC 1051 (1985).

Finally, we consider whether the Town implemented the change without giving the IBPO prior notice and an opportunity to bargain to resolution or impasse. Both parties agree that, as of December 2000, they had not reached an agreement on new criteria for receiving injured-on-duty benefits. The Town and the IBPO negotiated the subject of light duty as part of their successor collective bargaining negotiations and reached a tentative agreement on that topic. However, their agreement was subject to ratification. At the time that the Town offered light duty to Van Gelder and terminated her Section 111F benefits for refusing it, the Town had not bargained to impasse or resolution over light duty as a new criterion for receipt of Section 111F benefits. Accordingly, we find that the Town failed to bargain in good faith with the IBPO by unilaterally changing the criteria for receipt of Section 111F benefits.

The Town raises a number of arguments in support of its actions. First, it contends that it did not offer Van Gelder a light duty assignment within the meaning of the newly-negotiated provision but, rather, an assignment to duties that were within the scope of a police officer's regular duties. The Town asserts that the duties offered — dispatching, investigative and administrative work — are duties that police officers routinely perform. Although the evidence may support the Town's factual assertion, its argument is misplaced. The issue here is not whether police officers do or do not perform the functions that the Town offered to assign to Van Gelder. Instead, the issues before us are whether the Town required Van Gelder to perform these duties in order to continue receiving 111F benefits, and whether that requirement changed the past practice. Thus, the fact that patrol officers occasionally performed the duties that the Chief offered to Van Gelder is of no consequence.

Next, the Town argues that it had no obligation to bargain over the restricted duty assignment that Chief Mason offered to Van Gelder, because a police chief's authority to assign police officers to perform particular duties is a public safety matter that is not subject to the collective bargaining process.[14] In *Town of Saugus*, 29 MLC 208 (2003), the town similarly argued that it had no obligation to bargain with the union representing its police officers regarding a decision to assign bargaining unit work outside the unit, because M.G.L. c. 41, §97A gives a police chief a non-delegable, statutory right to assign police personnel in any manner he or she determines best serves public safety, trumping any collective bargaining obligations. We rejected the town's argument, noting that M.G.L. c. 41, §97A is subordinate to the town's collective bargaining obligations by operation of Section 7(d) of the Law, and held that the town was obligated to bargain over the change in duties. *Town of Saugus*, 29 MLC at 210. Similarly here, we find that the Chief's authority to assign duties to police officers does not supercede the Town's obligation to bargain with the Federation before assigning light duty as a new criteria for receipt of Section 111F benefits.

Finally, the Town contends that its decision to terminate Van Gelder's employment was logical, fair and appropriate because: 1) she had refused an offer to return to work to perform light duty; 2) the Police Department could meet pressing staffing needs by filling her position; 3) the Town had offered to continue her medical expenses pending a final determination on her disability retirement appeal; and, 4) the Town would be unable to recover compensation paid to her if she prevailed in her disability retirement appeal. These arguments have no merit. Until it satisfied its bargaining obligation, the Law required the Town to maintain the *status quo* by continuing Van Gelder's Section 111F benefits until she was able to perform full duty. *Town of Easton*, 16 MLC 1407, 1412 (1989). The Town violated the Law by terminating Van

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14. In support of its argument, the Town cites *Chief of Police of Dracut* v. *Town of Dracut*, 357 Mass. 492 (1970). We do not follow the reasoning of *Chief of Police of Dracut*, a case interpreting M.G.L. c. 149, the collective bargaining statute that preceded M.G.L. c. 150E. See generally, *Labor Relations Commission* v. *Town of Natick*, 369 Mass. 431 (1976); *City of Taunton* v. *Taunton Branch of the Massachusetts Police Association*, 10 Mass. App. Ct. 237 (1980).

Gelder's Section 111F benefits because she refused to work light duty. The Town admits that its decision to terminate her employment stemmed from her refusal to work light duty. Because Van Gelder was entitled to remain out of work on injured-on-duty leave until she could perform all of the duties of a patrol officer, the Town could not terminate her employment for refusing to perform light duty. Consequently, the Town's decision to terminate her employment was unlawful, notwithstanding its staffing needs or its potential inability to recoup compensation paid to her. Moreover, the Town's offer to pay her medical expenses after her termination did not redress its unlawful action.

Direct Dealing

The duty to bargain collectively with the employee's exclusive representative necessarily entails the duty to refrain from circumventing the union by dealing directly with bargaining unit members as to mandatory subjects of negotiations. *Town of Ludlow*, 28 MLC 365, 367 (2002), *citing*, *Service Employees International Union, AFL-CIO, Local 509* v. *Labor Relations Commission*, 431 Mass. 710 (2000); *Trustees of the University of Massachusetts Medical Center*, 26 MLC 149, 160 (2000); *Millis School Committee*, 23 MLC 99, 100 (1996). Direct dealing is impermissible for at least two reasons. First, direct dealing violates the union's statutory right to speak exclusively for the employees who have elected it to serve as their sole representative. *Suffolk County Sheriff's Department*, 28 MLC 253 (2002), *citing*, *Service Employees International Union, AFL-CIO, Local 509* v. *Labor Relations Commission*, *supra*. Second, direct dealing undermines the employees' belief that the union actually possesses the power of exclusive representation to which the statute entitles it. *Id.* at 715.

In *City of Lowell*, 28 MLC 157 (2001), the employer directly approached an employee who was out of work on injured-on-duty leave and inquired about the employee's willingness to return to work on a modified schedule. The employee declined the offer. The Commission held that the employer unlawfully bypassed the union and dealt directly with the employee about a matter that was a mandatory subject of bargaining. *Lowell*, 28 MLC at 159. Similarly here, the Town communicated directly with Van Gelder when it offered her the light duty assignment on December 6, 2000. The IBPO was not notified of the Town's discussion with Van Gelder and did not participate in the conversation. As noted above, the criteria for receipt of Section 111F benefits is a mandatory subject of bargaining. Accordingly, we find that the Town violated the Law by dealing directly with Van Gelder about a matter that is appropriately the subject of negotiations with the IBPO.[15] *See also*, *City of Springfield*, 17 MLC 1380 (1990) (employer who discussed an employee's return to work to perform light duty unlawfully bypassed union and dealt directly with employee where the union received no notice of the discussion and did not participate in it).

Conclusion

For the reasons set forth above, we conclude that the Town violated Sections 10(a)(5) and, derivatively, (a)(1) of the Law by unilaterally changing the criteria for receipt of benefits pursuant to M.G.L. c. 41, §111F, and by bypassing the IBPO and dealing directly with Van Gelder on a mandatory subject of bargaining.

Order

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

1. Cease and desist from:

   a. Unilaterally requiring the performance of light duty by police officers who have been determined to be injured on duty within the meaning of M.G.L. c. 41, §111F without first affording the employees' exclusive collective bargaining representative an opportunity to bargain to resolution or impasse.

   b. Dealing directly with employees represented by an exclusive collective bargaining representative over matters that are properly the subject of negotiations with the employees' exclusive collective bargaining representative.

   c. In any like manner, interfering with, restraining and coercing its employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative actions that will effectuate the purposes of the Law:

   a. Reinstate the prior practice of permitting police officers who have been determined to be injured on duty within the meaning of M.G.L. c. 41, §111F to remain on paid injured-on-duty leave until able to perform their full duties.

   b. Upon request by the Federation, bargain in good faith to resolution or impasse before changing the criteria for eligibility for benefits pursuant to M.G.L. c. 41, §111F.

   c. Make police officer Jennifer Van Gelder whole for any economic loss or loss of benefits she may have suffered as a result of the Town's unlawful requirement that she perform light duty after she was determined to have been eligible for benefits under M.G.L. c. 41, §111F, plus interest as specified in M.G.L. c. 231, §6I, compounded quarterly.[16]

   d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.

   e. Notify the Commission within ten (10) days of receiving this decision of the steps taken to comply herewith.

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15. The Town argued that it did not interfere with, coerce or restrain Van Gelder into giving up her Section 111F benefits. The Commission's Complaint alleged that the Town's actions derivatively interfered with, restrained and coerced its employees in the exercise of their rights under M.G.L. c. 150E, not M.G.L. c. 41, §111F. We have not addressed this argument because it was not pleaded as a violation in the Commission's Complaint.

16. We decline to order the Town to reinstate Van Gelder's employment. Van Gelder applied for an accidental disability retirement at some point prior to July 2000, before the Town raised the issue of light duty. PERAC accepted her application in July 2001. The Federation does not argue that she was coerced into applying for retirement, nor do the facts suggest it. Accordingly, Van Gelder's voluntary retirement precludes reinstatement to her position. See *City of Newton*, 6 MLC 1701 (1980) (in the absence of a constructive discharge, an employee who voluntarily resigns his position is not entitled to reinstatement and back pay.)

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has ruled that the Town of Harwich has violated Sections 10(a)(5) and (1) of General Laws Chapter 150E (the Public Employee Collective Bargaining Law) by: 1) unilaterally changing the criteria for receipt of benefits under M.G.L. c. 41, §111F and, 2) dealing directly with employees represented by the Harwich Police Federation (Federation) over matters that are properly the subject of negotiations with the Federation.

WE WILL NOT unilaterally change the criteria for receipt of benefits under M.G.L. c. 41, §111F without first bargaining with the Federation to resolution or impasse.

WE WILL NOT deal directly with employees represented by the Federation over matters that are properly the subject of negotiations with the Federation.

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

WE WILL reinstate the prior practice of permitting police officers who have been determined to be injured on duty within the meaning of M.G.L. c. 41, §111F to remain on paid injured-on-duty leave until they are able to perform their full duties.

WE WILL provide the Federation with prior notice of any proposed change in the criteria for receipt of benefits under M.G.L. c. 41, §111F and, upon request, bargain in good faith to resolution or impasse before changing the criteria for eligibility for paid injured-on-duty leave.

WE WILL make police officer Jennifer Van Gelder whole for any economic loss or loss of benefits she may have suffered as a result of the Town's unlawful requirement that she perform light duty after she was determined to have been eligible for benefits under M.G.L. c. 41, §111F, plus interest as specified in M.G.L. c. 231, §6I, compounded quarterly.

[signed]
For the Town of Harwich

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