In the Matter of CITY OF BOSTON

and

BOSTON POLICE PATROLMEN'S ASSOCIATION

Case No. MUP-02-3491

25.	*Preemption*
54.23	*overtime*
54.29	*days worked; length of work week/year*
54.8	*mandatory subjects*
67.11	*contract bar*
67.15	*union waiver of bargaining rights*
67.162	*preemption by other legislation*
67.3	*furnishing information*
67.8	*unilateral change by employer*

June 22, 2006
John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Robert J. Boyle, Jr., Esq. *Stephen B. Sutliff, Esq.*	*Representing the City of Boston*
Bryan C. Decker, Esq. *Patrick Bryant, Esq.*	*Representing the Boston Police Patrolmen's Association*

DECISION[1]

Statement of the Case

The Boston Police Patrolmen's Association (Union) filed a prohibited labor practice charge with the Labor Relations Commission (Commission) on July 3, 2002 alleging that the City of Boston (City) had violated Sections 10(a)(1) and (5) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's rules, the Commission investigated the Union's charge and, finding probable cause to believe a violation had occurred, issued a complaint and notice of hearing on May 8, 2003. The Commission assigned Hearing Officer Ann T. Moriarty, Esq. (Hearing Officer) to conduct the hearing.

The Commission's two-count complaint alleges that the City refused to bargain in good faith by: 1) failing to give the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to adopt a 28-day pay period under Section 207(k) of the Fair Labor Standards Act (FLSA), 29 U.S.C. s. 207(k), for the purposes of calculating overtime and the impacts of that decision in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law; and, 2) delaying providing relevant information regarding the City's decision to adopt a 28-day pay period that was reasonably necessary for the Union to execute its duties as the exclusive representative in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commission also dismissed other allegations that the City had violated the Law. The Union did not seek a review of the dismissal pursuant to Commission Rule 15.04(3), 456 CMR 15.04(3).

On May 14, 2003, the City filed an answer to the complaint with the Commission. On July 17, 2003, the City filed an unopposed Motion to Amend Answer (Motion) and an amended answer with the Commission. The Hearing Officer allowed the Motion on July 24, 2003 and conducted the evidentiary hearing on July 25, 2003. Both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The Commission received both parties' briefs on October 10, 2003.

The Hearing Officer issued recommended findings of fact on August 29, 2005. The City and the Union filed challenges to the recommended findings of fact on October 21, 2005. The Union filed an opposition to the City's challenges on November 14, 2005. The City did not file an opposition to the Union's challenges.

Findings of Fact[2]

The City and the Union 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.

The Union is the exclusive collective bargaining representative for a bargaining unit of uniformed police patrol officers employed by the City in its police department, excluding detectives. The City and the Union are parties to a collective bargaining agreement covering the period July 1, 1996 - June 30, 2002 (Agreement). The Agreement continued in effect at all times material to the issues in this case.

Article IX of the Agreement, in relevant part, provides as follows:

> ARTICLE IX
>
> HOURS OF WORK AND OVERTIME
>
> Section 1. Scheduled Tours of Duty or Work Shifts
>
> Except for those officers assigned to the drug control unit including drug control officers detailed to the districts, employees shall be scheduled to work on regular work shifts or tours of duty and each work shift or tour of duty shall have a regular starting time and quitting time. Work schedules shall be posted on all Department bulletin boards at all times and copies shall be given to the Association. ... The existing "Four and Two Work Schedule" shall remain in full force and effect[3]....
>
> Section 3. Overtime Service
>
> All assigned, authorized or approved service outside or out of turn of an employee's regular scheduled tour of duty (other than paying po-

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. Neither party contests the Commission's jurisdiction in this matter.

3. The Agreement does not contain a provision that expressly defines the length of a patrol officer's regular work shift or tour of duty. The Commission has modified this footnote in response to a request by the Union.

lice details), including service on an employee's scheduled day off, or during his vacation, and service performed prior to the scheduled starting time for his regular tour of duty, and service performed subsequent to the scheduled time for conclusion of his regular tour of duty, including the assigned, authorized or approved service of patrolmen-detectives or plainclothesmen, and including court time as set forth in Article X, entitled "Court Time", shall be deemed overtime service subject to the following rules: ....

Section 4. Method of Compensation for Overtime Service

A. An employee who performs overtime service in accordance with the provisions of this Agreement shall receive, in addition to his regular weekly compensation, time-and-one-half his straight-time hourly rate for each hour of overtime service. The straight-time hourly rate shall be computed as one fortieth of an employee's regular weekly compensation.

B. Employees shall not be required to accept compensatory time off in lieu of monetary compensation for overtime service.

C. Pay for overtime service shall be in addition to and not in lieu of holiday pay or vacation pay, and shall be remitted to employees as soon as practicable after the week in which such overtime service is performed.

The Agreement contains an education incentive plan that is found at Article XVII A, Section 1. In accordance with the terms of the Agreement, the City implemented the education incentive plan effective July 5, 2000, after the City's legislative body had accepted the provisions of M.G.L. c. 41, s. 108L (Quinn Bill). The Quinn Bill, a local option law, in part, provides:

Any city or town which accepts the provisions of this section and provides career incentive salary increases for police officers shall be reimbursed by the commonwealth for one half the cost of such payments upon certification by the board of higher education....

That any regular full-time police officer commencing such incentive pay program after September 1st 1976 shall be granted a base salary increase of ten per cent upon attaining an associate's degree in law enforcement or sixty points earned to a baccalaureate degree in law enforcement, and a twenty percent increase upon attaining a baccalaureate degree in law enforcement, and a twenty-five percent increase upon attaining a master's degree in law enforcement or for a degree in law.

Article XVII A, Section 1, Subsections 5 and 8 of the Agreement provide, in relevant part, as follows:

ARTICLE XVII A

EDUCATION INCENTIVE PLAN

TRANSITIONAL CAREER AWARDS PROGRAM

Section 1. Education Incentive Plan

5. Payments made pursuant to M.G.L. c. 41, s. 108L [the Quinn Bill] shall be included in base pay for purposes of pension retirement and overtime pay only as required by federal law, but not for the purposes of overtime pay paid under provisions of the parties' collective bargaining agreement, holiday pay, detail pay, leave pay, hazard pay, night differential pay or any other pay.

8. Quinn Bill payments shall be made on an annual basis on a date certain. The date certain shall be in late November or early December of each year.[4]

Article XVII, Compensation, Section 6, Night Shift Differential of the Agreement provides as follows:[5]

An employee who is regularly scheduled to work on a night shift (any shift or tour commencing at or after 4 P.M. and prior to 7:30 A.M.) shall receive, in addition to his regular weekly salary, a weekly night shift differential in the amount equal to nine percent (9%) of his base pay plus weekend differential. Night shift differential shall not be included in base pay for the purpose of computing overtime but shall be so included for the purpose of determining holiday pay, vacation pay, sick and injured leave pay, and pay for in-service training, and shall be considered as regular compensation for retirement and pension purposes to the extent permitted by law.

The City pays bargaining unit members on a weekly basis. Under the terms of the Agreement, the City pays patrol officers overtime compensation in accordance with Article IX, Section 4 and Article XVII A, Section 1, Subsection 5, for all overtime service defined in Article IX, Section 3.

Fair Labor Standards Act, 29 U.S.C. secs. 201-219

Section 7(a) of the FLSA requires employers to pay overtime to non-exempt employees for all hours worked in excess of forty hours in any workweek. 29 U.S.C. sec. 207(a). The overtime rate is not less than one and one-half times an employee's regular rate of pay. 29 U.S.C. sec. 207(a). Section 7(k) of the FLSA is a partial overtime exemption applicable to public employees engaged in fire protection or law enforcement activities. 29 U.S.C. sec. 207(k). Section 7(k) (s.7(k)) of the FLSA provides:

(k)[6] No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if -

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974)[7] in tours of duty of employees engaged in such activities in work period of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of

4. In or about July of 2002, the City changed the Quinn Bill payments from an annual payment to a weekly payment. In an April 16, 2002 letter to the Union, the City stated that the change was "necessary to ensure compliance with state and/or federal wage laws and also to enable the City to comply with the Quinn overtime payment requirement under the collective bargaining agreement."

5. The Commission amends the findings to include this provision in the Agreement in response to the Union's request.

6. Effective January 1, 1978.

7. The results of the Secretary of Labor's study were published in the Federal Register on September 8, 1983. The Secretary determined hours standards for law enforcement employees at 171. 48 FR 40, 518.

consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. sec. 207(k).

U.S. Department of Labor (DOL) - 29 CFR Part 553

On January 16, 1987, the DOL issued the rules and regulations implementing the Fair Labor Standards Amendments of 1985 applicable to employees of state and local governments. The DOL Summary that accompanied the final text of the regulations states, in part, as follows:

29 CFR Part 553

Application of the Fair Labor Standards Act to Employees of State and Local Governments

Subpart C revises the prior existing regulations in 29 CFR Part 553, concerning State and local government fire protection and law enforcement personnel, to incorporate rule changes needed to reflect the 1985 Amendments. These existing regulations have been restructured and retitled as noted above. In addition, this Subpart includes the results of a study published in the Federal Register on September 8, 1983 (Vol. 48, No. 175), as required by section 6(c)(3) of the 1974 Amendments to the Act, which reflect the current maximum hours standards applicable to employees of public agencies who are engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) and who qualify for the partial overtime exemption under section 7(k) of the FLSA....

29 CFR 553.201 - Statutory provisions: section 7(k), in part, provides as follows:

(a) Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis. This section of the Act formerly permitted public agencies to pay overtime compensation to such employees in work periods of 28 consecutive days only after 216 hours of work. As further set forth in Sec. 553.230 of this part, the 216 hour standard has been replaced, pursuant to the study mandated by the statute, by 212 hours for fire protection employees and 171 hours for law enforcement employees. In the case of such employees who have a work period of at least 7 but less than 28 consecutive days, overtime compensation is required when the ratio of the number of hours worked to the number of days in the work period exceeds the ratio of 212 (or 171) hours to 28 days.

The DOL supplementary information that accompanied the final text of the rules and regulations contained a discussion by the DOL of the major comments it received to the proposed rules and regulations published in the federal register on April 18, 1986. 51 FR 13402. Below is the text of the DOL response to a comment from the International Association of Fire Fighters (IAFF).

Section 553.201 Statutory provisions: section 7(k).

The IAFF requested that the regulations be revised to require that a prior agreement between the employer and the employees, or their representative, should be required in order to utilize the section 7(k) exemption which provides a partial overtime pay exemption for firefighters and law enforcement personnel who are employed by public agencies on a work period basis. The IAFF recommended this change in order to make the requirements under section 7(k) consistent with the "prior agreement" provisions under section 7(o), which permits compensatory time off for public agency employees. The Department has not adopted this recommendation. The requirement that a prior agreement or understanding between the employer and employees be obtained in order to utilize the compensatory time provisions under section 7(o) is statutory. There is no such requirement in the FLSA with respect to 7(k).

29 CFR 553.230 - Maximum hours standards for work periods of 7 to 28 days —section 7(k), in part, provides as follows:

(a) For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28.

(b) For those employees engaged in law enforcement activities (including security personnel in correctional institutions) who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 171 as the number of days in the work period bears to 28.

(c) The ratio of 212 hours to 28 days for employees engaged in fire protection activities is 7.57 hours per day (rounded) and the ration of 171 hours to 28 days for employees engaged in law enforcement activities is 6.11 hours per day (rounded). Accordingly, overtime compensation (in premium pay or compensatory time) is required for all hours worked in excess of the following maximum hours standards (rounded to the nearest whole hour):

Maximum hours standards

Work period (days)	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

29 CFR 553.224 - "Work Period" Defined, provides as follows:

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day. Once the beginning and ending time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within the period. The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

29 CFR 553.231 - Compensatory time off, provides as follows:

(a) Law enforcement and fire protection employees who are subject to the section 7(k) exemption may receive compensatory time off in lieu of overtime pay for hours worked in excess of the maximum for their work period as set forth in Sec. 553.230. The rules for compensatory time off are set forth in Secs. 553.20 through 553.28 of this part.

(b) Section 7(k) permits public agencies to balance the hours of work over an entire work period for law enforcement and fire protection employees. For example, if a fire fighter's work period is 28 consecutive days, and he or she works 80 hours in each of the first two weeks, but only 52 hours in the third week, and does not work in the fourth week, no overtime compensation (in cash wages or compensatory time) would be required since the total hours worked do not exceed 212 for the work period. If the same firefighter had a work period of only 14 days, overtime compensation or compensatory time off would be due for 54 hours (160 minus 106 hours) in the first 14 day work period.

The City implemented the Quinn Bill career incentive pay in July of 2000. In accordance with the terms of the Agreement, the career incentive pay is not included in the bargaining unit members' base pay for the purposes of calculating their contractual overtime pay. After members of the Union's bargaining unit brought suit against the City under the FLSA for failing to include educational incentive pay and other stipends in a police officer's regular rate of pay for the purposes of calculating the FLSA overtime pay, certain City officials, including the City Auditor, (FLSA Committee) began to meet in late March of 2002 to review the FLSA requirements.[8] The City did not include a Union representative at these FLSA Committee meetings. The FLSA Committee considered the various work periods contained in the FLSA and decided to adopt a 28-day/171-hour work period under the FLSA.

Negotiations for a Successor Agreement and the Information Request

On or about April 1, 2002, the Union sent the City a letter requesting to begin negotiations for a successor collective bargaining agreement as soon as possible and further requesting that the City provide the Union with dates in April of 2002 to start the negotiations. The Union renewed this request by letter dated April 9, 2002.

On or about April 9, 2002, the City sent the following notice to the Union:

RE: FLSA - Adoption of 28 day/171 hour Overtime Exemption

Be advised that pursuant to federal law, the Boston Police Department intends to adopt the 28 day, 171 hour overtime exemption effective July 6, 2002. If you have any questions and/or wish to sit down over this issue, please contact me immediately. Thank you for your attention to this matter.

The City's April 9, 2002 letter is the first notice the Union had that the City intended to adopt the 28-day/171-hour overtime exemption. Prior to July 6, 2002, the City did not use any work period, as that term is defined in the FLSA and the DOL's applicable regulations, to track and calculate FLSA overtime pay for bargaining unit members.

The Union's April 16, 2002 response to the City's FLSA notice, in relevant part, is as follows:

Re: FLSA Adoption of 28 day/171 Hour Overtime Exemption

This is in regards to your April 9, 2002 letter to Tom Nee on the above named matter. As you know, the Union is awaiting dates from you to begin bargaining for a successor collective bargaining agreement. Since the City and the Union are about to embark upon successor negotiations, if the City wishes to implement changes, as you have stated in your letter, it must present such proposals at the upcoming contract negotiations. See *Town of Brookline* 20 MLC 1570, 1595 (1994). Meanwhile the City must refrain from implementing any changes until the negotiating process has concluded.

The City's April 16, 2002 response to the Union, in relevant part, is as follows:

As to the Boston Police Department's adoption of the 28 day, 171 hour overtime exemption effective July 6, 2002, such decision is clearly not bargainable. Should you wish to sit down over the impacts of the decision on your membership, do not hesitate to contact me. The Department has no interest in waiting for maintable negotiations to address such issues.

By letter dated April 18, 2002 to the City, the Union stated, in part, that, "as explained in its April 16, 2002 letter... the Union will bargain over the City's proposal to implement a 28-day, 171-hour work period as part of contract negotiations, which we continue to hope will commence soon." The Union also requested that the City provide it with certain information in order for the Union to prepare for bargaining on the FLSA issue in its April 18, 2002 letter to the City. Specifically, the Union requested the following information:

1. Please provide any documents that relate to or were referenced with regards to the decision to propose the adoption of a 28 day, 171 hour work period, including, but not limited to, notes of any meetings at which the adoption of a 28 day, 171 hour work period was discussed, any studies commissioned by or prepared by the City that influenced the decision to propose the adoption of a 28 day, 171 hour work period, any descriptions of alleged benefits to be gained by the City through the adoption of a 28 day, 171 hour work period, and any and all other documents regarding or relating to the adoption of a 28 day, 171 hour work period.

2. Please provide any documents that relate to or reference how the City intends to implement a 28 day, 171 hour work period.

8. The Commission has modified these findings as requested by the Union.

3. Please describe how the City intends to implement a 28 day, 171 hour work period.

4. Please describe for what purpose the City proposes to adopt a 28 day, 171 hour work period.

5. Please provide any documents in the City's possession that reference or relate to a 28 day, 171 hour work period and/or 29 U.S.C. sec. 207(k).

6. Please describe how the City intends to track hours worked for police patrol officers under a 28 day, 171 hour work period. In your answer, please describe what systems the City will utilize for this purpose and provide any documents relating to said systems; state whether said systems are now in place or will be implemented, and if the latter, describe any plans for said implementation and provide any documents relating to said implementation.

7. Please provide any documents that relate to the costs and/or cost savings to be realized by the City by the adoption of a 28 day, 171 hour work period.

8. If the City does not possess any documents in response to request #7 above, then please provide the rationale for the proposal to adopt a 28 day, 171 hour work period.

9. Please list any and all meetings held by employees and/or representatives of the City at which the adoption of a 28 day, 171 hour work period was discussed. For each meeting, list all persons in attendance and indicate their position, state the location of the meeting, and provide any documents prepared as a result of said meeting.

Implementation of Section 7(k) of the FLSA, 29 U.S.C. sec. 207(k)

The City's Police Commissioner issued Special Order 02-020 (Special Order) on June 28, 2002. The Special Order, in part, provides as follows:

SUBJECT: PAYROLL PROCEDURES

Beginning with the first payroll of Fiscal Year 2003 (commencing 29 June), the department will be introducing a number of practices that are required in order to timely and accurately track employees' time. The principle components are the requirement of an accurate count of actual hours worked (as distinct from hours paid) and the introduction of a twenty-eight day cycle as the basis for counting actual hours worked.

By letter dated July 2, 2002, the Union notified the City that it had filed the instant charge of prohibited practice. Further, referencing its April 16, 2002 letter to the City, the Union again demanded to bargain about the City's proposal to implement a 28-day, 171-hour pay period during the negotiations for a successor collective bargaining agreement.

The City responded to the Union's July 2, 2002 letter on July 10, 2002, in part, as follows:

As to the Boston Police Department's adoption of the 28 day, 171 hour overtime exemption, the City offered to bargain but you declined. The Department rejected your proposal to address it at maintable negotiations, and the BPPA never responded.

By letter dated July 19, 2002, the Union responded to the City's July 10, 2002 letter, in part, as follows:

... the Union did not decline to bargain over the City's proposal to adopt a 28 day 171 hour overtime exemption. My [Union's counsel] letter dated April 16, 2002 stated that the Union was ready to bargain concerning the issue during the bargaining agreement. The *Town of Brookline* case fully supports our position that bargaining at the main table is appropriate and proper in this case. I [Union counsel] also have been trying since April 1, 2002 to start the successor bargaining process. The City has however repeatedly delayed the process. On May 7, 2002 I [Union counsel] explained that both the FLSA and the Quinn Bill issues could be discussed at the main table immediately and proposed 7 dates in May (copy enclosed). The Union didn't fail to respond, we [the Union] clearly stated our position and offered numerous opportunities to meet.

The City responded to the Union's April 18, 2002 request for information by letter dated October 10, 2002. In its October 10, 2002 response, the City informed the Union that it would continue to pay the contractual overtime and "any additional FLSA overtime where the FLSA entitlement (less any appropriate offsets) exceeds contractual premium earnings." The City also informed the Union that its "rationale for adopting section 207(k) is to save money by bringing FLSA overtime pay closer to contractual overtime pay than would otherwise be the case had the City not adopted section 207(k)." Further, the City requested "that the Union reconsider its decision not to meet with the City to discuss this important topic. This office [the City's Office of Labor Relations] remains available to meet."

The Union responded to the City's October 10, 2002 letter on the same date. The Union acknowledged its receipt of the City's letter and stated, in part, as follows:

In the last sentence of your letter you claim that the Union has refused to meet on this issue. As you should know, that is an erroneous statement. In a letter dated April 16, 2002 the Union made clear that it was prepared to bargain concerning FLSA issues in the bargaining for a successor contract. In my April 18, 2002 letter I reiterated that the "Union will bargain over the City's proposal to implement a 28 day, 171 hour work period as part of contract negotiations...." It was the City which chose to unilaterally implement a 28 day pay period without bargaining. This left the Union with no choice but to file a charge of prohibited practice. If the City wants to bargain about these issues then it must rescind special order 02-020 and place these issues on the main table for bargaining. The Union will then gladly bargain concerning this topic as it has always said it would.

FLSA Overtime Payments

The Police Commissioner issued Commissioner's Memorandum 03-016 (Memorandum) on April 23, 2003. The Memorandum notified employees, including bargaining unit members, that the paychecks issued April 25, 2003 would be the first to include the Fair Labor Standards Act Premium Payments for the 28-day work period ending April 4, 2003. The Memorandum also informed the employees that the City was in the process of calculating the retroactive payments for the current or prior fiscal years based on the 28 day cycles. Further, the Memorandum, in part, states:

Contractual overtime payments are and will continue to be made as they have been in the past. However, since the FLSA Premium Payment is calculated based on actual hours worked, not all income received or hours paid are figured into the calculations (e.g. vacation days). As a result, officers who meet the 171 hour threshold based on hours paid may not reach that figure when only hours actually worked are counted. Alternatively, officers may reach the 171 hour threshold but not receive FLSA Premium Payment because the con-

tractual overtime paid was higher than the Premium Payment due under the FLSA.

The Police Commissioner attached a FLSA Fact Sheet (Fact Sheet) to the Memorandum. The Fact Sheet, in part, provides:

· The FLSA work period for Law Enforcement personnel is 28 days with an overtime threshold of 171 hours of actual work.

· FLSA Premium Pay will only be calculated when Actual Hours Worked is OVER 171 hours.

· Hours not worked (vacation, sick, personal, injured, non-worked court time, etc.) are not included in the calculation.

· Only eligible earnings are counted [(Actual hours worked *Contractual Hourly Rate) + Quinn + Shift + Specialist Pay].

· FLSA hourly rate is Eligible Earnings divided by Actual Hours Worked.

· FLSA premium rate is defined as the extra portion added to the regular rate when paying overtime. The premium rate is one-half the FLSA hourly rate.

· FLSA Premium Pay is Hours Actually Worked over 171 multiplied by the premium rate.

· Contractual Overtime payments are evaluated against the FLSA Premium Pay requirements to determine if an FLSA Premium Payment will be issued.

· FLSA Premium Payments will only be paid when the FLSA Premium Pay is GREATER than Contractual Premium (Overtime) Pay.

· Every 28 days the City will review paychecks to ensure that it has met the legal requirements for FLSA Premium Pay.

· FLSA Premium Payments will generally be issued two weeks after the end of each 28 day work period. Work period end dates for 2003 are April 4, May 2, May 20, June 27, July 25, August 22, September 19, October 17, November 14, and December 12.

The City Auditor met with the Union on May 1, 2003 and explained the methodology that the City had adopted to calculate FLSA overtime pay. The City employed that methodology using a 28-day/171-hour work period to calculate bargaining unit members' FLSA overtime pay for the 28-day period ending April 4, 2003 and continuing. The April 25, 2003 paychecks included the FLSA overtime payments for the 28-day period ending April 4, 2003. About twenty-two bargaining unit members received FLSA overtime pay for the 28-day/171-hour work period ending April 4, 2003.

Generally, bargaining unit members receive less FLSA overtime pay, if any, under a 28-day/171-hour work period than under four distinct 7-day/40-hour work periods. For example, applying the City's methodology to the 28-day timeframe ending April 4, 2003, one identified bargaining unit member did not receive any FLSA overtime pay using the 28-day/171-hour work period, because his contractual overtime pay exceeded the amount of the FLSA premium pay in that one work period. In contrast, applying the same methodology to the same time frame, but using four distinct 7-day/40-hour work periods, the same unit member is entitled to $32.06 in FLSA overtime pay in the third work period and $25.24 in FLSA overtime pay in the fourth work period, because his FLSA overtime pay exceeded his contractual overtime pay in those two work periods, but not in the first and second work periods.

Parties' Dealings - June 2003

In a letter to the Union dated June 11, 2003, the City, as relevant, notified the Union that the City remained open to meeting with the Union separately from the main table contract negotiations for the purpose of bargaining the impact(s) of implementing section 7(k) of the FLSA - the 28-day/171-hour work period. In another letter dated June 12, 2003, the City stated its "continuing invitation to impact bargain the matter of the City's adoption of 29 USC 207(k) for tracking and paying FLSA overtime" separate from the main table contract negotiations. By letter dated June 13, 2003, the Union declined the City's offer to impact bargain the change unless the City first restored the *status quo ante.*

Federal Court Proceeding

On March 19, 2001, members of the Union's bargaining unit filed a complaint in federal court (Court) alleging, in part, that the City had failed to pay overtime for hours worked over forty hours in a workweek under the FLSA, and that the City had underpaid the overtime compensation due under the FLSA.[9] The parties stipulated to certain facts, including: "for purposes of the FLSA only that as of the dates at issue in the Amended Complaint the City of Boston has not effectively adopted a partial public safety exemption as set forth in 29 U.S.C., sec. 207(k)." The Court issued its decision on March 31, 2003. *O'Hara* v. *Menino*, 253 F. Supp. 2d 147 (D. Mass. 2003).[10]

The Court issued a decision regarding damages on April 8, 2004.[11] *O'Hara* v. *Menino*, 312 F.Supp. 2d 99 (D. Mass. 2004). The Court concluded that the City was not entitled to the partial exemption under s. 7(k) of the FLSA, "because it had not effectively adopted a qualifying work period during the time at issue, nor was one as a matter of fact in place." In footnote 7 of the decision, the Court stated that "[a]lthough not pertinent in the current context, the City did affirmatively adopt a qualifying work plan on July 6, 2002." *Id.* at 106, n.7. The Court also concluded that the damages award should be calculated on a forty-hour workweek, not on the basis of the forty-three hour workweek in s. 7(k) of the FLSA for the period prior to July 6, 2002.[12]

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9. The Union is not a party to the federal court action, but it has encouraged bargaining unit members to join in the action.

10. The Commission takes administrative notice of this Court decision.

11. The parties entered into the record the complaint filed with the Court on March 19, 2001 (JX 22) and the stipulation filed with the Court on May 14, 2002 (JX 23). The Union provided the Commission with a copy of the Court's April 8, 2004 decision on April 23, 2004. The Commission takes administrative notice of the decision and states the Court's conclusion in the facts.

12. The Commission has modified the findings as requested by the City.

Opinion

Count I - Unilateral Change

The issue here is whether the City refused to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to give the Union prior notice and an opportunity to bargain to resolution or impasse about its decision to adopt a 28-day work period and the impacts of that decision. The City asserts several defenses to its conduct. First, the City argues that its decision to implement a 28-day work period is not a mandatory subject of bargaining, because the FLSA preempts any bargaining obligation under the Law. The Union disagrees.

Federal Preemption

Congress has the power to preempt state law under the supremacy clause of the United States Constitution. Art. VI, cl. 2. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000), *citing*, *Gibbons* v. *Ogden*, 22 U.S. 1 (1824) further citations omitted. Under the federal preemption principles, a state law can be preempted in either of two general ways:

> "If Congress evidences an intent to occupy a given field, any state law in that field is preempted.... If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law,...or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (Citations omitted) *Commonwealth Electric Co.* v. *Department of Public Utilities*, 397 Mass. 361, 375 (1986), *cert. denied*, 481 U.S. 1036 (1987), *quoting*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

The City bears the burden of demonstrating with hard evidence of conflict that the FLSA preempts the Law. *Commonwealth Electric Co.* v. *Department of Public Utilities*, 397 Mass. at 376. Preemption "is not favored, and State laws should be upheld unless a conflict with Federal law is clear." *Id.* at 375, *quoting*, *Attorney Gen.* v. *Travelers Ins. Co.*, 385 Mass. 598, 602 (1982), *vacated* 463 U.S. 1221 (1993), *reaffirmed*, 391 Mass. 730 (1984), *aff'd sub nom. Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985).

The FLSA does not contain a provision that overrides or displaces state enacted public employee collective bargaining laws.[13] Further, the provisions of the Law do not conflict with the provisions of the FLSA. Public employers may comply fully with both the Law and the FLSA during their dealings with unions about wages and hours. Therefore, if the City's preemption argument is to prevail, the evidence must demonstrate that the Law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress in passing the FLSA. To decide this issue, the FLSA is examined as a whole, identifying its purpose and intended effects. *Crosby* v. *National Foreign Trade Council*, 530 U.S. at 373.

Congress enacted the FLSA in 1938 to correct and, as rapidly as practicable, eliminate substandard working conditions throughout the United States. *See*, 29 U.S.C. s. 202. The FLSA establishes minimum living standards for covered workers, including a minimum wage, a maximum workweek, and standards for overtime compensation. 29 U.S.C. s. 201 et. seq. The 1974 amendments to the FLSA extended the minimum wage and overtime provisions to an increased number of public employees, including the members of the Union's bargaining unit. *See*, 29 U.S.C. s. 203(d). Due to successful constitutional challenges to the 1966 and the 1974 amendments, the City was not required to implement the FLSA until after the Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Our review of the purposes and policies of the FLSA and the Law convinces us that the Law does not stand as an obstacle to the accomplishment of the full objectives of Congress in passing the FLSA, including the 1974 amendments. The Law gives public employees, including the members of the Union's bargaining unit, the right to organize and to bargain collectively with their employer through a representative of their choice over wages, hours, and other terms and conditions of employment. The Commission's enforcement of the statutory bargaining obligation focuses on the parties' reciprocal responsibilities to bargain in good faith over mandatory subjects to resolution or impasse, not on the substantive outcome. *See*, *Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority, et. al.*, 12 MLC 1531, 1544 (1986) (ERISA does not preempt the bargaining obligation under M.G.L. c. 150A). The Law requires that "the parties enter into discussions with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences." *Commonwealth of Massachusetts*, 8 MLC 1499, 1510 (1981) further citations omitted. The Law does not require either party to agree to a proposal or to make a concession.

Finally, we decline to infer from the absence of language in s. 7(k) imposing a bargaining obligation that Congress intended to displace the authority of the Commission to enforce the provisions of the Law. The fact that other sections of the FLSA, s. 3(o), s.7(b)(1), s. 7(b)(2), and s. 7(f), enacted prior to the 1974 amendments, and s. 7(o) enacted in 1985, contain language referencing collective bargaining does not require a different outcome. The Commission has jurisdiction to decide the issue presented in Count I of its complaint of prohibited practice and its authority to act here is not preempted by the FLSA.

Whether the City may unilaterally select and implement a work period without first bargaining to resolution or impasse with the Union is an issue separate from whether the FLSA preempts the Law. Having concluded that the FLSA does not preempt the Law, we next decide whether the City refused to bargain in good faith over its decision to adopt a 28-day work period and the impacts of that decision.

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13. Section 218(a) of the FLSA, 29 U.S.C. s. 218(a), establishes that the wage and hour provisions of the FLSA are a floor and "the FLSA does not preempt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute." *Goodrow* v. *Lane Bryant, Inc.*, 432 Mass. 152, 170-171 (2000), *quoting*, *Cosme Nieves* v. *Deshler*, 786 F.2d 445, 452 (1st. Cir. 1986), *cert. denied*, 479 U.S. 824 (1986).

Section 10(a)(5) and (1) - Alleged Unilateral Change-Refusal to Bargain

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 572 (1983). A public employer's duty to bargain includes working conditions established through custom and practice as well as those governed by the provisions of a collective bargaining agreement. *City of Newton*, 27 MLC 74, 81 (2000); *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1699 (1983).

To establish a violation, the Union must show that: 1) the City altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and, 3) the City established the change without giving the Union prior notice and an opportunity to bargain. *See, e.g., Town of Harwich*, 32 MLC 27, 30-32 (2005) (unilateral change in the criteria for receiving injured-on-duty benefits); *Commonwealth of Massachusetts*, 27 MLC 1, 4 (2000) (unilateral change in the criteria for assessing supervisory performance); *City of Boston*, 26 MLC 177, 181 (2000) (unilateral implementation of compulsory training for police officers before returning to work after an extended absence).

Wages are a mandatory subject of bargaining under Section 6 of the Law. Here, the length of the work period the City uses to calculate FLSA overtime pay, either the 7-day/40-hour work week under s. 7(a) or a work period under s. 7(k), impacts directly on the amount of overtime pay a police patrol officer receives. Generally, the longer the work period, the more likely it is that overtime liability is decreased for the benefit of the employer. *O'Brien* v. *Town of Agawam*, 350 F. 3d 279, 291 (1st Cir. 2003). Conversely, the shorter the work period, the more likely it is that overtime payment is increased for the benefit of the employees. Therefore, we conclude that the length of the work period used to calculate FLSA overtime pay constitutes a mandatory subject of bargaining.[14] *See, City of Peabody*, 9 MLC 1447, 1450-1451 (1982) (lunch hour overtime compensation is a wage issue).

The City argues that it acted permissibly, within the specific and narrow authorization of s.7(k) of the FLSA, when it adopted the 28-day work period. In the City's view, the purpose of the law enforcement exemption would be undermined if the employer's freedom to act was compromised by the collective bargaining process. We disagree. Although the City correctly states that s. 7(k) of the FLSA does not require an individual employee's agreement[15] or impose a bargaining obligation that must be satisfied before the City adopts a 28-day work period, the absence of an express bargaining obligation in s. 7(k) does not preclude good faith negotiations over the length of the work period, nor does it provide the City with a safe harbor from the bargaining obligations under the Law. Where the legislative body has enacted an economic benefit that places certain aspects of the program within the discretion and control of the employer, the Law requires the employer to bargain with its employees' exclusive representative to resolution or impasse over the non-mandated aspects of the benefit prior to implementation. *Commonwealth of Massachusetts*, 24 MLC 113 (1997) (the Law required the employer to bargain over the amount of money to be paid to employees who elected to participate in the health insurance buy-out program). The imposition of a bargaining obligation on the length of the work period, a subject that is amenable to good faith negotiations, is in harmony, and not in conflict with, the purposes and objectives of Congress in passing the FLSA.[16]

Because the work period is a mandatory subject of bargaining, the Law required the City to give the Union notice and an opportunity to bargain to resolution or impasse prior to implementing the 28-day work period effective on or about July 6, 2002.[17] The City argues that the Union waived its right to bargain by inaction, because it provided the Union with notice of its decision to adopt a 28-day work period and repeatedly offered the Union the opportunity to bargain over the impacts of its decision separate from successor contract negotiations. The City asserts that the Union unlawfully insisted on bargaining over the decision to adopt a 28-day work period and unlawfully conditioned that the bargaining occur as part of the successor contract negotiations.

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14. The City's argument that its decision to implement an FLSA overtime tracking system is a non-mandatory subject because it relates only to future, unscheduled, and speculative overtime is misplaced. First, the issue presented here is not the City's compliance with the FLSA, but rather whether the City violated the Law by implementing a particular work period without first satisfying its statutory bargaining obligation. Second, the issue raises the amount of overtime paid to bargaining unit members, not the opportunity to work on an overtime basis.

15. *O'Brien* v. *Town of Agawam*, 350 F. 3d at 291, citing, *Barefield* v. *Village of Winnetka*, 81 F.3d. 704, 710 (7th Cir. 1996).

16. The City argues that the DOL statement in response to a union's request that it incorporate a bargaining obligation into its rules implementing the s. 7(k) exemption further supports the absence of a bargaining obligation and precludes a Commission decision that imposes this process. We disagree. The DOL's decision not to incorporate a bargaining obligation in its rules demonstrates the administrative agency's exercise of its rule-making authority, acting only within the scope of the Congress's directive.

17. The City argues that its adoption of the 28-day work period effective on or about July 6, 2002 was administrative only, and that the City did not implement its decision until April of 2003 when it paid the patrol officers. If the City offers this argument to assert that the Union's charge is premature, the record evidence demonstrates that the April 2003 payment was the first in a series of payments using the 28-day work period, including retroactive payments for both the current and prior fiscal years. Further, the findings include information that the Police Commissioner issued a special order on June 28, 2002 regarding the introduction of a twenty-eight day cycle as the basis for counting actual hours worked. The findings also include a specific statement by the federal court that the City adopted the 28-day work period effective July 6, 2002. The Union's charge alleging that the City violated the Law by refusing to bargain over its decision to adopt a 28-day work period is timely filed. *See*, 456 CMR 15.03; *Town of Lenox*, 29 MLC 51, 52 (2002) (six-month period of limitations for filing a charge alleging an unlawful increase in prescription drug co-payments began to run on the date the union received actual notice of the employer's announcement of the upcoming changes, not the subsequent effective date of the increase).

If a public employer asserts the affirmative defense of waiver by inaction, it bears the burden of proving by a preponderance of the evidence that a union had: 1) actual knowledge or notice of the impending change; 2) a reasonable opportunity to negotiate prior to the employer's implementation of the change; and, 3) unreasonably or inexplicably failed to demand to bargain. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 578; *City of Cambridge*, 23 MLC 28, 37-38 (1996), *aff'd sub nom., Cambridge Police Superior Officers Association & another* v. *Labor Relations Commission*, 47 Mass. App. Ct. 1108 (1999).

Here, the record establishes that the City notified the Union by letter dated April 9, 2002 that it intended to implement a 28-day work period effective July 6, 2002. The Union promptly demanded to bargain with the City over this proposal during the negotiations over a successor to the Agreement that would expire on June 30, 2002. In response, the City refused to bargain over its decision to adopt a 28-day work period and limited any negotiations with the Union to the impacts of that decision separate from the successor contract negotiations. Because the length of the work period constitutes a mandatory subject of bargaining, the Law required the City to bargain to resolution or impasse over its decision to adopt a 28-day work period, not just the impacts of that decision. Further, the record demonstrates that, by letter dated April 1, 2002, the Union had requested that the City begin negotiations over a successor agreement that would expire in less than three months, and that the Union renewed this demand on April 9, 2002. Therefore, the Union did not waive its right to bargain by insisting that bargaining occur during the upcoming negotiations for a successor contract. *See, Town of South Hadley*, 27 MLC 161, 163 (2001) (union did not waive its right to bargain by insisting on bargaining during impending successor negotiations) and cases cited.

Faced with the Union's demand to bargain over the City's proposal to implement a 28-day work period as part of imminent successor contract negotiations, the Law required the City to withhold implementation absent resolution, impasse, or exigent circumstances that required the immediate implementation of the proposed changes. *Town of South Hadley*, 27 MLC at 164, *citing, New Bedford School Committee*, 8 MLC 1472 (1981), *citing, City of Boston School Committee*, 4 MLC 1912 (1978). It is clear that the parties did not engage in good faith negotiations that either resolved the issue or ended in impasse. Nor does the evidence support a finding that circumstances outside the City's control mandated the implementation of the 28-day work period effective July 6, 2002. Indeed, the City had over a decade to evaluate whether or not to adopt a 28-day work period and to notify and bargain upon demand with the Union to resolution or impasse about its decision and the impacts of its decision. *See, Town of Plymouth*, 26 MLC 220, 223-224 (2000) (implementation of a drug testing policy does not fall within the narrow exception to the rule prohibiting unilateral changes where the employer implemented the policy over eleven months after the deadline under the federal rule).

The City next asserts that the Quinn Bill language in the Agreement stating that the educational incentive plan payments shall be included in a patrol officer's base pay for "overtime pay only as required by federal law" proves that the parties acknowledged that the FLSA gives the City the right to unilaterally determine the work period. A waiver of statutorily protected rights must be "shown clearly, unmistakably, and unequivocally." *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569. To prevail in this defense, the evidence must demonstrate that the parties consciously explored and considered the length of a work period and the Union knowingly and unequivocally yielded that right. *Town of Andover*, 28 MLC 264, 270 (2002); *Springfield School Committee*, 20 MLC 1077, 1082 (1993), *citing, Melrose School Committee*, 3 MLC 1299 (1976); *Town of Marblehead*, 12 MLC 1667, 1670 (1986).

To determine the existence of waiver, the Commission examines the contractual language. *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988), *citing, Town of Marblehead*, 12 MLC at 1670. If the language clearly, unequivocally, and specifically permits the City to implement a work period, no further inquiry is necessary. *Boston School Committee*, 27 MLC 121, 123 (2001), *citing, City of Worcester*, 16 MLC 1327, 1333 (1989). If the language is ambiguous, the Commission reviews the parties' bargaining history to determine their intent. *Central Berkshire Regional School Committee*, 31 MLC 191, 202 (2005).

Here, the plain language of the Agreement referenced by the City does not demonstrate that the parties considered the application of the FLSA law enforcement exemption, and the Union unequivocally waived its right to bargain over the City's decision to implement a 28-day work period and the impacts of that decision on employees' wages, hours, and other terms and conditions of employment. No further inquiry is necessary.[18]

Based on the record and for the reasons stated above, the City adopted a 28-day work period to calculate FLSA overtime pay for bargaining unit members effective on or about July 6, 2002 without first bargaining with the Union to resolution or impasse in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Count II - Failure to Timely Provide Requested Information

Count II of the Commission's complaint alleges that the City failed to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by delaying providing the Union with requested information that was relevant and reasonably necessary for it to perform its duties as the employees' exclusive collective bargaining representative.

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. *Bristol County Sheriff's Office*, 28 MLC 113, 120-122

18. Even if the language is ambiguous, the record does not contain any evidence of bargaining history to resolve the ambiguity. Further, the record does not contain any information about the parties' dealings, if any, over the implementation of the FLSA overtime requirements prior to the events giving rise to this case.

(2001), *aff'd sub nom. Sheriff of Bristol County* v. *Labor Relations Commission*, 62 Mass. App. Ct. 665 (2004); *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1149 (1981). The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration. *Id.*, *Sheriff's Office of Middlesex County*, 30 MLC 91, 96 (2003), *citing*, *Boston School Committee*, 24 MLC 8, 11 (1998) (additional citations omitted).

The Commission's standard in determining whether the information requested by a union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1141. Information about terms and conditions of employment is presumptively relevant and necessary for a union to perform its statutory duties. *City of Lynn*, 27 MLC 60 (2000), *citing*, *Higher Education Coordinating Council*, 23 MLC 266, 268 (1997).

As the exclusive collective bargaining representative of patrol officers, the Union has a duty to negotiate in good faith with the City over wages, hours, and other terms and conditions of employment. The record establishes that, by letter dated April 18, 2002, the Union requested information about the City's adoption of the 28-day work period to prepare for bargaining on this subject. Generally, a union has a right to information that may explain a public employer's proposals and to assist it in formulating reasoned counterproposals. *Boston School Committee*, 25 MLC 181, 186 (1999) (additional citations omitted). The City does not dispute, and we find, that the requested information is relevant and reasonably necessary for the Union to prepare for bargaining with the City about its decision to adopt a 28-day work period. It is also undisputed that the City provided the Union with the requested information on October 10, 2002. Therefore, the only issue before us is whether the City failed to timely provide the Union with the requested information in violation of the Law.

It is well settled that a public employer may not unreasonably delay furnishing requested information that is relevant and reasonably necessary to the union's function as the employees' exclusive representative. *Boston School Committee*, 25 MLC at 188. The record demonstrates that the City did not provide the Union with the requested information until October 10, 2002, just short of six months after the Union had made the request and after the Union had filed the instant charge. The City argues that the timing of its response was due to various circumstances, but the record fails to identify any circumstances that would excuse the passage of time between the request and the date the City provided the Union with the information. Further, the City argues that there is no evidence that the Union was actually prejudiced in the performance of its duties and responsibilities through the timing of the City's response. However, the legal standard does not require a showing of actual prejudice. Rather, the appropriate inquiry is whether the Union's role as the patrol officer's exclusive representative was diminished by the City's delay in furnishing the requested information. *Board of Higher Education*, 26 MLC 91, 93 (2000); *Massachusetts State Lottery Commission*, 22 MLC 1468, 1472 (1996).

Stated simply, the City notified the Union that it intended to implement a 28-day work period and offered to bargain with the Union about the impacts of this decision. The Union requested bargaining over the decision and requested information about the City's decision. All these exchanges took place in April of 2002. The City did not provide the requested information for six months. We decline to excuse the City's delay in providing the Union with the requested information. The fact that the Union's need for the information may not have been immediate during those six months to formulate bargaining proposals is due in substantial part to the City's refusal to bargain over its decision to adopt a 28-day work period. Further, the Union had the right to the information to explain the City's decision to the members of its bargaining unit and to answer their questions about a subject matter that would impact directly on their overtime pay. Finally, the fact that the City has continued to provide the Union with information about its implementation of the 28-day work period since the fall of 2002 does not excuse its failure to timely provide the Union with a response to its April of 2002 request for information.

Conclusion

Based on this record and for the reasons stated above, we conclude that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by adopting a 28-day work period to calculate overtime pay under the FLSA without first bargaining with the Union to resolution or impasse over alternatives to its decision to adopt a 28-day work period and the impacts of that decision on employees' terms and conditions of employment. Further, we conclude that the City refused to bargain in good faith by failing to provide in a timely manner the requested information that was relevant and reasonably necessary for the Union to perform its duties as the employees' exclusive representative in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City of Boston shall:

1. Cease and desist from:

a) Failing and refusing to bargain collectively in good faith with the Union about its decision to adopt a 28-day work period and the impacts of that decision;

a) Refusing to bargain collectively in good faith with the Union by failing to provide in a timely manner information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative; and

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

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

a) Upon request of the Union, bargain collectively in good faith to resolution or impasse over the length of the work period used to calculate overtime pay under the FLSA.

b) Make whole affected employees for the economic losses they may have suffered as a result of the City's decision to adopt a 28-day work period by paying the employees the amount of overtime they would have received under the practice in effect immediately prior to the City's adoption of the 28-day work period on or about July 6, 2002, less any amounts the employees received under the 28-day work period, plus interest on any sums owed pursuant to M.G.L. c. 321, s. 6I, compounded quarterly from the date the City adopted the 28-day work period until one of the following occurs:

1) Resolution of bargaining by the parties;

2) Failure of the Union to request bargaining within fifteen days of the receipt of this decision;

3) Failure of the Union to bargain collectively in good faith; or,

4) Good faith impasse between the parties.

c) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate and where notices to these employees are usually posted, and maintain for a period of thirty consecutive days thereafter, signed copies of the attached Notice to Employees; and,

d) Notify the Commission in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply with it.

SO ORDERED.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Labor Relations Commission has issued a decision finding that the City of Boston (City) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by: 1) adopting a 28-day work period to calculate overtime pay under the FLSA without first bargaining with the Boston Police Patrolmen's Association to resolution or impasse over its decision to adopt a 28-day work period and the impacts of that decision on employees' terms and conditions of employment; and, 2) failing to provide in a timely manner certain requested information that was relevant and reasonably necessary for the Boston Police Patrolmen's Association to perform its duties as the police patrol officers' exclusive collective bargaining representative.

The City of Boston posts this Notice to Employees in compliance with the Labor Relations Commission's Order.

WE WILL NOT refuse to bargain collectively in good faith with the Boston Police Patrolmen's Association about the decision to adopt a 28-day work period and the impacts of that decision.

WE WILL NOT refuse to bargain collectively in good faith with the Boston Police Patrolmen's Association by failing to provide in a timely manner information that is relevant and reasonably necessary for the Boston Police Patrolmen's Association to perform its duties as the police patrol officers' exclusive collective bargaining representative.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under Chapter 150E.

WE WILL, upon request by the Boston Police Patrolmen's Association, bargain collectively in good faith to resolution or impasse over the length of the work period used to calculate overtime pay under the FLSA.

WE WILL make whole affected employees for the economic losses they may have suffered as a result of the decision to adopt a 28-day work period by paying the employees the amount of overtime they would have received under the practice in effect immediately prior to the adoption of the 28-day work period on or about July 6, 2002, less any amounts the employees received under the 28-day work period, plus interest on any sums owed pursuant to M.G.L. c. 321, s. 6I, compounded quarterly from the date the City adopted the 28-day work period until one of the following occurs:

1) Resolution of bargaining by the parties;

2) Failure of the Union to request bargaining within fifteen days of the receipt of the Labor Relations Commission's decision on this issue;

3) Failure of the Union to bargain collectively in good faith; or,

4) Good faith impasse between the parties.

[signed]
City of Boston

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Labor Relations Commission, 399 Washington St., 4th Floor, Boston, MA 02108-5213 (Telephone: (617) 727-3505).

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