In the Matter of TOWN OF PLYMOUTH

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO

Case No. MUP-05-4523

54.23	***overtime***
54.31	***impact of management rights decisions***
54.7	***permissive subjects***
67.8	***unilateral change by employer***
91.1	***dismissal***
91.8	***standard of proof***

April 26, 2007
John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Mark Sylvia, Esq.	*Representing the Town of Plymouth*
James J. Dever, Esq.	*Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO*

ORDER OF DISMISSAL

The Labor Relations Commission (Commission) has decided to dismiss the above-referenced matter. On September 7, 2005, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO (Union) filed a charge of prohibited practice with the Commission, alleging that the Town of Plymouth (Town) had unilaterally changed the practice of providing regularly-scheduled overtime to a bargaining unit member without giving the Union prior notice and an opportunity to bargain in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c.150E (the Law).

The Union is the exclusive bargaining representative for certain Town employees, including the heavy motor equipment operators (HMEO) in the solid waste division of the Town's Department of Public Works (DPW). Cara A. Winslow (Winslow) is the Union's representative, and Melissa Arrighi (Arrighi) is the Assistant Town Manager. The Union and the Town are parties to a collective bargaining agreement (Agreement).

On or about July 7, 2005, the Town posted an opening for a HMEO to work Sunday through Thursday. By letter dated July 14, 2005, Winslow notified the Town that the posted HMEO position had "the potential to eliminate the clear and unambiguous practice of regularly scheduled overtime for at least one (1) employee." Winslow demanded that the Town immediately "cease and desist" from implementing the new position and requested that the Town contact the Union to arrange for a date and time to discuss the issue.

In a July 22, 2005 response, the Town, through Arrighi, stated that its decision to add a position to the DPW was permitted under the

management rights clause of the Agreement. The Town also stated that, because the only impact of filling a new HMEO position was a reduction in unscheduled overtime, the Town did not need to negotiate with the Union over this issue.

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 that involves a mandatory subject of bargaining without first giving 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 (1983). Decisions about the nature and level of services a public employer provides lie within the exclusive prerogative of management and are not mandatory subjects of bargaining. *Commonwealth of Massachusetts*, 25 MLC 201, 205 (1999), *citing*, *Town of Dennis*, 12 MLC 1027 (1985); *Town of Danvers*, 3 MLC 1559 (1977).

The Town's decision to increase its staffing level of HMEOs, who are in the Union's bargaining unit, is a level of services decision that lies outside the scope of mandatory negotiations. *See*, *Boston School Committee*, 10 MLC 1410, 1420 (1984) (decisions to abolish or to create positions lie within the managerial prerogative of the employer). Although the Town's staffing decision does not constitute a mandatory subject of bargaining, the Law requires the Town to negotiate with the Union over the impacts of that decision on employees' terms and conditions of employment. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 564.

On the Commission's charge form, the Union alleges that the Town failed to bargain the HMEO's work schedule. However, the Union does not pursue this alleged violation in its written submission by providing evidence that the work schedule deviates from a well-established prior practice or from the provisions of the parties' Agreement. Moreover, the Union's July 14, 2005 letter to the Town does not assert that the work schedule constitutes a unilateral change in a mandatory subject of bargaining. Rather, as evidenced by its July 14, 2005 letter and its written submission, the Union alleges that the Town violated the Law, because it refused to bargain about the impacts of the decision to hire a HMEO to work Sunday through Thursday on the loss of regularly-scheduled overtime to a bargaining unit member. The Union identifies no other impacts of this decision on bargaining unit members' wages, hours, and other terms and conditions of employment.

The Commission has decided that not all overtime opportunities are a mandatory subject of bargaining. *Compare*, *City of Peabody*, 9 MLC 1447, 1450-1451 (1982) (the reduction in wages caused by the elimination of a practice of regularly paying police officers extra compensation at an overtime rate when they worked twenty minutes of their lunch period constituted a mandatory subject of bargaining) *with Town of Billerica*, 8 MLC 1957, 1962-1963 (1982) (the reduction in overtime opportunities resulting from decisions to stop filling odd hours and to reduce staffing levels did not constitute a mandatory subject of bargaining). A public employer has no obligation to bargain over the impact of a core managerial decision if the only identifiable impact is a reduction in the employees' ability to perform unscheduled overtime and no other terms and conditions of employment are affected. *City of Boston*, 32 MLC 4, 12-13 (2005), *citing*, *Town of West Bridgewater*, 10 MLC 1040, 1044 (1983), *aff'd sub nom.*, *West Bridgewater Police Association* v. *Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984) (overtime opportunities are not the equivalent of a wage item where the work previously performed by employees on an overtime basis is a byproduct of the employer's staffing patterns and not regularly scheduled). Therefore, to establish that the Town changed a practice regarding a loss of overtime opportunities, the information must contain a description of the overtime allegedly impacted by the Town's decision to hire a HMEO to work Sunday through Thursday.

Here, the Union's evidence that the Town's conduct allegedly violated the Law consists solely of a statement that a practice existed regarding regularly-scheduled overtime. This statement, standing alone, without any specificity concerning the circumstances surrounding the availability of the overtime, the nature of the overtime work assignments, whether the overtime was regularly scheduled, and the length of time the alleged practice had been followed by the Town, among other things, fails to establish that the Town's refusal to bargain with the Union over the impacts of its decision to hire a HMEO to work Sunday through Thursday violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. Accordingly, the Commission declines to issue a complaint and dismisses the charge of prohibited practice.

SO ORDERED.

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