

TOWN OF WAYLAND AND IBPD, MUP-2294 (3/29/79). Decision on Appeal of Hearing Officer's Decision.

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Commissioners participating:

James S. Cooper, Chairman  
Garry J. Wooters, Commissioner  
Joan G. Dolan, Commissioner

Appearances:

C. Peter R. Gossels	- Counsel for the Town of Wayland
Robert J. Canavan	- Counsel for the International Brotherhood of Police Officers

DECISION ON APPEAL  
OF HEARING OFFICER'S DECISION

On May 16, 1977, Hearing Officer Stuart Kaufman issued his decision in the above-entitled matter in which he found that the Town of Wayland (Town or Employer) had committed certain prohibited practices in violation of Sections 10(a)(1) and (5) of General Laws Chapter 150E (the Law).<sup>1</sup>

The Town filed a timely Notice of Appeal pursuant to Commission Rules and Regulations then in effect, Art. III, sec.28<sup>2</sup> and sec.11 of the Law and filed a supplementary statement raising objections to the factual findings and legal conclusions made by the Hearing Officer.

Findings of Fact

The findings of fact are set forth fully in the Decision of the hearing officer. 3 MLC 1724 (1977). Except as modified or supplemented herein, the Commission adopts the hearing officer's findings of fact. We summarize those facts as follows:

In September, 1971 the Wayland Police Chief briefly adopted a system of

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<sup>1</sup>For the full text of the Hearing Officer's Decision, see 3 MLC 1724 (1977).

<sup>2</sup>Effective May 15, 1978: 402 CMR 13.13.



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performance evaluation. Although each of the members of the police department was evaluated during that year, there is no evidence that departmental decisions were based on the evaluations, and when the chief left the department the system was abandoned.

The concept of performance evaluations did not appear again in the Wayland Police Department until a successor chief discussed the idea at two meetings during the winter of 1974-1975. On November 7, 1974, Chief Blake held a staff meeting and distributed a sample performance sheet and asked for comments. The sheet was identical to those used in the 1971 evaluation of police officers. On January 8, 1975, Chief Blake held a second staff meeting. At this meeting he decided to implement a quarterly evaluation system based on criteria similar to those of the 1971 system. He did, however, make two changes. He decided to eliminate evaluations of supervisors by patrolmen and to eliminate a plan for bi-annual evaluations of all patrolmen.

The results of neither of these meetings were publicized either to the department as a whole or to the collective bargaining representative of the employees, the International Brotherhood of Police Officers (Union). The Union had received no advance notice of the meetings, and there was no representative of the Union at either meeting.

Collective bargaining for a successor agreement between the Town and the Union commenced in February, 1975. Between February and June 1975, there were approximately 24 negotiating sessions; neither side raised the issue of performance evaluations. The parties executed a successor agreement on June 13, 1975.

The written performance evaluations were put into use beginning some time in June, 1975. It was also during June that the Union first received complaints about the evaluation system, for it was then that its members were asked to sign their individual evaluations. Thereupon the Union filed the charge in this case.

Opinion

The Town's Supplementary Statement raises several exceptions to the hearing officer's Findings of Fact and Conclusions of Law. All objections have been fully considered and are treated as follows.

Denial of Motion to Re-Open the Record

The threshold objection of the Town is the hearing officer's denial of its Motion to Re-Open the Record. The motion was filed seven weeks after the close of the hearing. The intent of the Town was to offer evidence relating to the credibility of a Union witness. This evidence, however, was not new evidence. It was merely a document which was in possession of the Town throughout the hearing and which for some unexplained reason was not then produced or offered into evidence. The Town in its Supplementary Statement offers no authority requiring either an administrative agency or a court to reopen its record to deal with such evidence. For newly-discovered evidence to be included in the record it must be "evidence in existence of which a party was excusably ignorant, discovered after trial. In addition, facts implying reasonable diligence must be provided by the movant." NLRB v. Decker and Sons, 569 F.2d 357, 97 LRRM 3179



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(5th Cir. 1978). The Town offered no excuse for its failure to produce the evidence at hearing. Further, the evidence is merely impeaching, and it is well settled that such newly-discovered evidence does not afford a basis for a new trial. NLRB v. Sunrise Lumber and Trim Corp., 241 F.2d 620, 39 LARM 2441 (2nd Cir. 1957), cert. denied 355 U.S. 818 (1957). Moreover, to allow a motion of this nature would open to question the finality of Commission evidentiary hearings. City of Everett, 2 MLC 4171 (1976).

Exceptions

1. The Town excepts to the following fact finding by the hearing officer: "...Chief [McGrath] did not use the [1971] evaluations for any particular purpose and merely filed them away." We have reviewed the entire record and find no direct evidence that the evaluations made by Chief McGrath in 1971 were used for any particular purpose. Furthermore, Chief Blake testified at the hearing that he did not know the purpose of the evaluations made by his predecessor. Moreover, there is record testimony by Patrolman Glinvisian, an eight-year veteran of the police department, that there was no system of determining how an officer was performing his job for promotional purposes. We therefore affirm the finding of the hearing officer that Chief McGrath's evaluations were not used.

2. The hearing officer found that a secretary took notes at the staff meeting on November 7, 1974, transcribed them, and filed them in a drawer. The Town challenges the finding that the transcribed notes were placed in "the Chief's drawer." We have reviewed the record and find that the notes were filed in the administrative section of the Chief's file under the heading "Staff Meetings." We fail to see any meaningful distinction between "the Chief's drawer" and a section of the Chief's file. It is clear from the record that the notes, whether kept in a file or a drawer, were not used for any purpose.

3. The hearing officer found that at the departmental staff meeting on November 7, 1974 "no patrolman...[was] present or notified of the subject matter of the meeting." The hearing officer further found that at the second departmental staff meeting "there were no union patrolmen present." We find that the hearing officer erred in each of these findings. The record is clear that there was at least one patrolman at the November 7, 1974 meeting and that many of the officers present at both meetings were members of the Union. We further find, however, that the errors are harmless. Neither the patrolman nor the other Union members were agents of the Union. Notice to them of the subject matters discussed at the meetings cannot be imputed to the Union. See City of Cambridge, 5 MLC 1291, 1292 (1978).

4. The hearing officer found that during the period of June and July 1975 Union members were aware of some "scuttlebutt" or "rumor" regarding the implementation of an evaluation system. The Town claims that the finding, while true is misleading. It claims that because a Union witness had signed his evaluation on June 8, 1975, the Union had actual knowledge of the evaluation system--hard evidence that such a system had been instituted rather than mere "rumor" or "scuttlebutt". The record, however, contains no evidence of any evaluation having been signed on June 8, 1975: We, therefore, affirm the finding of the hearing officer.



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### Statute of Limitations

The Town excepts to the hearing officer's finding that the Union's charge is not barred by the six-month statute of limitations established by Article III, Section 2 of the Rules and Regulations of the Commission.<sup>2</sup>

The charge in this case was filed on July 11, 1975. For the charge to be barred by the Commission's six-month rule, the Town must show that the Union acquired or should have acquired knowledge of the implementation of the evaluation system prior to January 11, 1975. See, NLRB v. Allied Products Corp., 548 F.2d 644, 94 LRRM 2433 (1977). The Town, however, has failed to meet its burden of proof. As we stated above, knowledge of the evaluation system cannot be imputed to the Union from the knowledge of some of its members. Although the Town states that Chief Blake informed the President of the Union of his evaluation plans "early in 1975" we find no such evidence in the record.

Accordingly, we affirm the finding of the hearing officer that the charge in this case is not time-barred.

### Evaluation Procedures

The hearing officer found that the Town had committed a prohibited practice by failing to negotiate with the Union regarding a performance evaluation system intended to be used for such purposes as granting promotions and rewards for good performance. We agree.

The Commission has held that the institution of written evaluation procedures which merely measure the same performance criteria which have been measured in the past does not violate the Law. City of Worcester, 4 MLC 1697 (1978) citing Wabash Transformer Corp., 215 NLRB 546, 88 LRRM 1511 (1974); Town of Arlington, 4 MLC 1946 (1978); Rust Craft Broadcasting, Inc., 225 NLRB 65, 92 LRRM 1576, 1577 (1976). See also City of Leominster, 3 MLC 1579 (H.O., 1977), in which a hearing officer found that the institution without bargaining of time clocks which more accurately measure previously established hours of attendance did not violate the Law.

In this case the 1975 evaluation procedures measured the same criteria which were previously measured pursuant to the 1971 evaluation,<sup>3</sup> and the forms

<sup>2</sup>Subsequent to the filing of the charge in this case Art. III, Section 2 of the Rules and Regulations of the Commission was superseded by MLRC Rules, 402 CMR 15.03. The Commission's six-month statute of limitations was not altered.

<sup>3</sup>Observance of Work Hours  
Attendance  
Grooming and Dress  
Compliance with Rules  
Safety Practices  
Public Contacts  
Suspect Contacts  
Employee Contacts  
Knowledge of Work

Quality of Work  
Volume of Acceptable Work  
Meeting Deadlines  
Accepts Responsibility  
Accepts Direction  
Accepts Change  
Effectiveness Under Stress  
Appearance of Work Station  
Operation and Care of Equipment

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used in the 1975 evaluation were virtually identical to those used in 1971. Therefore, the institution of the 1975 evaluation procedures does not violate the Law.

Notwithstanding the identity between the 1971 and 1975 evaluation criteria, the purpose of the 1975 evaluations is new. Chief Blake testified that the 1975 evaluations were to be used for promotions and assignments and the record is clear that the 1971 evaluations were not used for promotional and assignment purposes. Thus, the use to be made of the 1975 evaluations set new procedures for promotions and work assignments. The extent to which promotions and new work assignments are available and the criteria upon which they shall be based critically affect an employee's conditions of employment and, accordingly, are mandatory subjects of bargaining. See Town of Danvers, 3 MLC 1559 (1976); Old Line Life Ins. Co., 96 NLRB 499, 28 LRRM 1539 (1951); City of Albany, 7 PERB 3132 (1974). Accordingly, the use of the performance evaluations without bargaining over that use with the Union violated Sections 10(a)(1) and (5) of the Law.

#### Conclusion

We affirm the Hearing Officer's Findings of Fact as modified above and affirm his conclusion of law. We find that the Town of Wayland has engaged in practices prohibited by Sections 10(a)(1) and (5) of the Law.

#### ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of Wayland shall:

1. Cease and desist from:
  - a. Failing and refusing to bargain collectively in good faith with the Union, as required by Section 6 of the Law.
  - b. Utilizing the results of any performance evaluations implemented pursuant to directives of the Chief of the Wayland Police Department in 1975 as the basis for any decision affecting the assignment, promotion, or reward of any member of the Wayland Police Department represented by the Union.
2. Take the following affirmative action which will effectuate the policies of the Law:
  - a. Upon request, immediately commence bargaining with the Union over the purposes to which performance evaluations shall be applied.

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3(continued)  
Work Judgments  
Planning and Organizing  
Job Skill Level

Work Coordination  
Initiative



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- b. Post immediately in conspicuous places in its police department building where police officers usually congregate or where notices are usually posted, including Town Hall, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.
- c. Notify the Commission, in writing, within ten (10) days of service of this Decision, of the steps taken to comply with this Order.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

JAMES S. COOPER, CHAIRMAN  
GARRY J. WOOTERS, COMMISSIONER  
JOAN G. DOLAN, COMMISSIONER

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

WE WILL NOT refuse to bargain collectively in good faith with the International Brotherhood of Police Officers, as required by Section 6 of Mass. G.L. c.150E.

WE WILL NOT utilize the results of any performance evaluations implemented pursuant to directives of the Chief of the Wayland Police Department in 1975 as the basis for the assignment, promotion or reward of any member of the Wayland Police Department represented by the International Brotherhood of Police Officers.

WE WILL, upon request, immediately commence bargaining with the International Brotherhood of Police Officers over the purposes for which performance evaluations shall be applied.

By: \_\_\_\_\_  
CHAIRMAN, BOARD OF SELECTMEN

