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TOWN OF AVON AND IBPO, MUP-3191 (7/12/79). Decision on Appeal of Hearing Officer's Decision.

- (50 Duty to Bargain)
  - 54.3 management rights
  - 54.641 disability leave
- (60 Prohibited Practices by Employer)
  - 67.15 union waiver of bargaining rights
  - 67.8 unilateral change
- (90 Commission Practice and Procedure)
  - 92.51 appeals to full commission

Commissioners participating:

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

Appearances:

John H. Flood, Esq. - Counsel for the Town of Avon  
 Robert L. Canavan, Esq. - Counsel for the International Brotherhood of Police Officers

DECISION ON APPEAL  
 OF HEARING OFFICER'S DECISION

Statement of the Case

On March 16, 1979, Hearing Officer Judith A. Wong issued her decision in this case, dismissing the complaint of the Labor Relations Commission (Commission) against the Town of Avon (Town or Employer).<sup>1</sup> The Commission's complaint alleged in essence that the Town unilaterally established two new rules: that disability leave for police officers would be contingent upon examination by a Town-selected physician; and that disability leave requests would have to be reviewed by the Board of Selectmen as well as the chief of police.

A request for review of the hearing officer's decision was filed by the International Brotherhood of Police Officers (Union). On March 30, 1979, the hearing officer submitted her statement of the case to the Commission. The Union and Employer filed supplementary statements on April 12, 1979 and April 25, 1979 respectively.

Findings of Fact

Neither party disputes the hearing officer's findings of fact. We therefore accept these findings and limit our review to issues of law. City of Medford, 3 MLC 1584 (1977). The facts relevant to our determination can be briefly summarized.

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<sup>1</sup> See Town of Avon, 5 MLC 1717 (H.O., 1979).

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The past practice regarding requests for disability leave was for police officers to fill out an accident form and submit it to the chief. A form to be filled out by a physician of the police officer's choice was also used, but it is not clear that it was required in every case. An officer was not required to submit to a disability leave, nor did an officer have to seek approval by the Board of Selectmen prior to taking leave.

On May 11, 1978, the Board of Selectmen notified the chief of police by letter that:

Effective forthwith, any police officer applying to the Chief of Police for a disability leave may be required at the option of the Board of Selectmen, to be examined by a physician of the Town's choice at the Town's expense prior to approval of such leave....

On July 17, 1978, the Board of Selectmen notified the chief of police that, effective immediately:

Any member of the Avon Police Department making a claim to the police chief for disability leave shall also have this claim reviewed by the Avon Board of Selectmen.

The Board of Selectmen promulgated these two directives without affording the IBPO an opportunity to bargain.

In June, 1978, Officer Manuel Ribeiro injured himself while on duty and was out of work one day. When he applied for disability leave the Town instructed him to see a physician whom it designated. The Town set up an appointment for him in July, 1978 and Ribeiro was examined by the physician. Based on this examination, Ribeiro was denied disability leave for the day he was out and was charged for a sick day instead.

The IBPO first requested bargaining regarding the May 11 and July 17 directives on August 14, 1978.

### Opinion

To establish an unlawful unilateral change in violation of Section 10(a)(5) of the Law, the Union has the burden of proving some pre-existing condition of employment, unilaterally altered by the Town, involving a mandatory subject of bargaining. Boston School Committee, 3 MLC 1603 (1977). The hearing officer concluded that the rule requiring police officers requesting disability leave to submit to an examination by a Town-designated physician rather than a physician of the employee's choice involved a non-mandatory subject of bargaining. The hearing officer therefore dismissed that portion of the complaint without considering whether the other elements of a unilateral change case were proven, or whether the Town had established any affirmative defenses.

In disagreement with the hearing officer, we conclude that a mandatory subject of bargaining is presented in the question of whether an employee claiming disability leave may be required to submit to an examination by a



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physician designated by the employer, rather than the employee. The difference between a physician selected by the employer rather than the employee may have a substantial impact on whether disability leave will result. Conflicting medical opinions are routine in industrial accident claims. Physicians acting in good faith will often disagree on whether a particular condition is sufficiently serious to preclude work, and/or whether that condition is job-related. The question of whether the employee or the employer will select the examining physician is therefore of substantial importance in determining how liberally or restrictively the disability leave provisions of a collective bargaining agreement will be construed.

Because we find this issue to be a mandatory subject of bargaining, we must determine whether the Union has otherwise proven that the Town violated Section 10(a)(5). We conclude that the Union established a prima facie case of unilateral change. The Town did unilaterally announce the new policy concerning examination by a Town-designated physician.

Once the Union was on notice that this change was contemplated, however, it was bound to make a prompt and effective demand for bargaining. Boston School Committee, 4 MLC 1912 (1978). The Town advised the chief on May 11 that the Board of Selectmen might require an examination by a Town-designated physician before approving disability leave for police officers. The president of the Union testified that a copy of this notice was sent to him and was received on or about May 11, 1978. The Union did not request bargaining until August 14, 1978.

We conclude that, by delaying for over three months before demanding bargaining, the Union failed to act in a timely manner and thereby acquiesced in the new disability leave examination procedure. The Union was not entitled to sit back, once it was aware of the Town's intention to institute the examinations by a Town-selected physician, and wait until the policy was implemented before it demanded bargaining. By its inaction, the Union waived any objection that it had to the change in disability policy. Boston School Committee, 4 MLC 1912 (1978).

We affirm the hearing officer in her conclusion that the Town had no obligation to bargain with the Union concerning its decision to have requests for disability reviewed by the Board of Selectmen, rather than by the chief of police.

ORDER

In accordance with the above, we hereby DISMISS the complaint against the Town of Avon.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION

JAMES S. COOPER, Chairman  
GARRY J. WOOTERS, Commissioner  
JOAN G. DOLAN, Commissioner

