

TOWN OF BILLERICA AND LOCAL 1495, IAFF, MUP-4000, MUP-4122 (3/19/82). Decision on Appeal of Hearing Officer's Decision.

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Commissioners participating:

Phillips Axten, Chairman
 Joan G. Dolan, Commissioner
 Gary D. Altman, Commissioner

Appearances:

Edward Owens, Esq. - Representing Town of Billerica
 William Lafferty, Esq. - Representing Local 1495, International Association of Fire Fighters

DECISION ON APPEAL
 OF HEARING OFFICER'S DECISION

Statement of the Case

On August 3, 1981 Jean Strauten Driscoll (with Alan Shapiro) issued her decision in these consolidated cases pursuant to the expedited hearing procedures established by Section 11 of General Laws Chapter 150E (the Law).¹ The hearing officer found that the Town of Billerica (Town) had violated Sections 10(a)(5) and (1) of the Law by unilaterally implementing changes in its procedures for filling shift absences without fulfilling its obligation to first bargain with Local 1495, International Association of Fire Fighters (Association) regarding the impact of these changes on safety conditions, workload, and opportunities for overtime of employees represented by the Association.

The Town filed a notice of appeal of the hearing officer's decision pursuant to Commission Rules, 402 CMR 13.13. As elaborated below, we affirm the hearing officer's decision in part, although the reasoning and scope of our holding differ from hers, and we reverse her decision in part.

¹For the full text of the hearing officer's decision, see 8 MLC 1237 (H.O. 1981).



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Findings of Fact

The parties have not challenged the hearing officer's findings of fact, and we therefore adopt them in their entirety. See Commission Rules, 402 CMR 13.13. We summarize the facts as follows.

The Town and the Association are parties to a collective bargaining agreement whose effective dates are July 1, 1980 through June 30, 1983. This agreement contains the following relevant provisions:

ARTICLE IV
SECTION 3: ASSIGNMENT OF OVERTIME

In the assignment of overtime, the Chief or his designee shall assign from the seniority list.

ARTICLE IV
SECTION 4: MANNING

A. The parties do hereby recognize that adequate manning coverage is the necessary prerequisite to the safety and welfare of the citizens and property of the Town of Billerica. The parties do further recognize that the Selectmen were elected to attain such goals of safety and welfare and in turn, that the Selectmen hired the Chief of the Fire Department to determine the manning levels necessary to these goals.

B. Therefore, the parties do agree that it is the sole responsibility of the Chief and the Selectmen to establish minimum manning levels.

ARTICLE XV
SECTION 3

The listing of the following specific rights of management in this ARTICLE is not intended to be a waiver of any of the rights of the Town or the Chief not listed herein. Such inherent management rights shall remain with the Town or the Chief subject to the provisions of this Agreement.

The Employer shall have the exclusive right, subject to the provisions of the Agreement and consistent with applicable laws and regulations.

- A. To direct employees of the Employer in the performance of their duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Fire Department and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;



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- D. To determine the methods, means and personnel by which such operations are to be conducted;
- E. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature;
- F. To establish or continue policies, practices, and procedures for the conduct of Town business and, from time to time, to change or abolish policies, practices, or procedures subject to the provisions of the agreement;
- G. To prescribe and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with the requirement of the Town.

On September 9, 1980, Fire Chief Harry Martell, Jr. issued the following order:

To All Captains:

Captains in charge in central station will not fill odd hours for any reason.

Men will not be called to fill in for sick, injury, vacation after 8:00 a.m. or 6:00 p.m.

Per Order
Harry Martell, Jr.
Fire Chief

The term "odd hours" refers to the filling of absences from shifts which have already commenced when the absence occurs. Prior to the Fire Chief's September 9, 1980 order such "odd hours" were filled from an "odd hours" list by the Captain in charge.²

On the day after Chief Martell issued his order the Association, through its President Norman Hall, made a demand to bargain regarding the change in the Town's policy for filling "odd hours." The Chief indicated that he was unwilling to bargain regarding this change in policy, since he regarded the matter to be a prerogative of management.

On December 4, 1980, Chief Martell issued a second order:

²The "odd hours" list was similar to the overtime list, but was kept separately.



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Positions will not be filled on each group down to sixteen men.

When an officer is out sick note the senior man, he will be paid for working out of grade (sic).

In the event the Captain at the Central Station is out, the other on-duty captain will report to the Central Station and take charge.

Harry Martell, Jr.
Fire Chief

The established practice regarding minimum manning had previously been to maintain a shift complement of seventeen or eighteen fire fighters.

The Association, through Hall, protested this change in the Town's minimum manning policy immediately upon becoming aware of it, which was either a few days before the Chief's December 4, 1980 order or a few days thereafter.³

The effect of the Chief's September 9 and December 4, 1980 memoranda has been a drop in the shift complement at various times to fifteen or sixteen fire fighters. As a result less overtime has been assigned. In addition, the orders have at certain times resulted in a drop in the number of fire fighters available to work on a piece of equipment responding to alarms. There have been instances in which two rather than three fire fighters have manned a pumper truck. As a result, one fire fighter has had to enter a burning structure alone while the other operated the pump. Previously, when three firefighters were on the pumper truck, two would assist each other in putting on air masks and entering the building together while the third would operate the pump.

Opinion

To satisfy its burden in this case, the Association must show that, without prior notice and opportunity to bargain, the Town took action affecting terms of employment. The record establishes that the Town altered its prior practice regarding "odd hours" and reduced its manning levels per shift. We also find that the Town implemented these changes without first providing the Association notice and an opportunity to bargain. The Association received no prior notice of the order concerning odd hours. With respect to the minimum manning order, the Association received either no prior notice, or a two-day notice of this change, depending on whose interpretation of the facts we accept. Even assuming arguendo that the Town provided a two-day notice to the Association before implementing its December 4, 1980 order, we believe that this was inadequate notice and opportunity to bargain.

³For the reasons set forth infra, we agree with the hearing officer that resolution of the factual dispute regarding the precise date upon which the Association made a demand to bargain is unnecessary.



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The Association suggests two ways in which the orders issued by the Fire Chief affected terms of employment. The Association contends that the orders have affected the number of fire fighters per piece of apparatus, and thus the workload and safety of fire fighters, and that the orders have significantly decreased the amount of available overtime in the Department. We will discuss these areas of alleged impact in turn.

1) Minimum Manning Per Piece of Apparatus. Commission decisions have articulated distinctions between minimum manning per shift and minimum manning per piece of equipment. In Town of Danvers, 3 MLC 1559 (1977), we held that minimum manning per shift is a permissive subject of bargaining. The Union bargaining proposal at issue in Danvers involved minimum coverage per shift and mandatory call-back (overtime) to fill shift vacancies. In our decision, we discussed the minimum manning and overtime requirement as a single entity, finding that the subject of coverage per shift was permissive. Danvers, 3 MLC 1559 at 1573. We went on to distinguish those aspects of the minimum manning issue which relate to workload and safety. The Commission stated:

"We recognize that the workload and risk of injury of each firefighter increase as team complement at a fire is reduced or whenever substitution of a specific firefighter is made. Workload and safety, in turn, fall within the language of Section 6 of the Law: 'wages, hours, standards of productivity and performance and any other terms and conditions of employment.' However, we find that the number of firefighters on duty has no direct impact on workload and safety. We find that a decision regarding shift coverage in a fire department has far greater impact on the level of delivery of a public service than on workload and safety of firefighters. Thus, we find it to be a permissive subject of bargaining. Nothing in this opinion should prevent firefighters from bargaining with their employers regarding such subjects as safety and workload." 3 MLC 1574.

Our reasoning in Town of Danvers was refined in light of the factual variations presented in a subsequent case. In City of Newton, the Union's proposals again called for minimum manning and its inevitable corollary, overtime to fill vacancies. City of Newton, 2 MLC 1192, 1194 (H.O. 1975). In affirming our hearing officer's decision, we held that the number of firefighters on a piece of equipment when it is responding to an alarm is mandatorily bargainable to the extent that such coverage raises questions of safety and workload. We contrasted the situation where a proposal involved a minimum number of firefighters on duty on a shift per piece of equipment while that apparatus awaits an alarm. Noting that the latter proposal would be tantamount to minimum manning per shift, which we had found in Danvers to be permissive, we held this latter type of proposal to be permissive. City of Newton, 2 MLC 1282, 1283 (1977).

When Danvers and Newton are read together, the cases must be seen as standing for the proposition that what is mandatorily bargainable about any type of minimum manning proposal is the safety and workload aspect at the time a piece of apparatus is responding to an alarm. With our precedent in mind, we turn to the facts of the present case.



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The Chief's September 9 and December 4, 1980 orders called for reductions in manning levels per shift and, as such, did not require prior bargaining. The matter does not end here, however. The evidence demonstrates that the Fire Chief's orders have periodically resulted in a reduction in the number of fire fighters on a piece of apparatus when it responded to a fire. This implicated the safety and workload of fire fighters in that at times trucks responded to alarms without an officer present and at other times fire fighters were put in the position of entering a burning structure alone while fellow fire fighters operated the pump. As noted above, in City of Newton, supra, the Commission held that the number of fire fighters assigned to apparatus responding to an alarm is a term of employment requiring bargaining insofar as it affects the workload and safety of fire personnel. Since the Town refused the Association's timely demand to bargain over the matter, it violated Sections 10(a)(5) and (1) of the Law unless the Town prevails on its affirmative defense waiver. See infra.

2) Overtime Opportunities. The Association also asserts that the Town's actions gave rise to a bargaining obligation regarding a reduction in available opportunities for overtime, since opportunities for overtime constitute a mandatory subject of bargaining. The hearing officer concurred in this view and ordered the Town to make employees whole for lost overtime pay resulting from the Town's unilateral action. We reverse this aspect of the hearing officer's decision.

The loss of available overtime is inevitable whenever a municipal employer reduces the minimum number of personnel assigned to a shift. The former inextricably follows from the latter, and the latter, as emphasized above, is a matter over which the employer may legally exercise its discretion free of any obligation to bargain with the employees' representatives.

Moreover, in order to prevail on a unilateral change theory, the Association must establish that the Town's action in fact constituted a change in a pre-existing condition of employment. Town of North Andover, 1 MLC 1103 (1974). The past practice in the Billerica Fire Department has been to assign overtime according to the staffing needs of the Department. Pursuant to the provisions of Article IV, Section 3 of the parties' contract, seniority has been the method used in determining which fire fighters would be assigned to overtime that becomes available. However, the amount of available overtime has been to a large extent dictated by a factor within the sole prerogative of management -- minimum manning levels per shift. Neither the provisions of the collective bargaining agreement nor the past practice in the Department guaranteed a particular amount of overtime to fire fighters. No overtime has been regularly scheduled. Instead, overtime was assigned on an ad hoc basis. Fire fighters may in the past have been able to anticipate that overtime hours would be made available to them during a particular week or month, but this expectation has always been and continues to be contingent upon the retention by management of previously established minimum manning levels.

By issuing two orders, one of which abolished the practice of filling "odd hours" and the other of which altered minimum manning levels in the Department, the Town has unquestionably reduced the number of overtime hours available to fire fighters represented by the Association, but it has not changed the terms and conditions of employment of these fire fighters within the scope of Section 10(a)(5)



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of the Law. Fire fighters have never enjoyed any guarantee that a certain amount of overtime would be made available, nor have they received assurances that the overtime needs of the Town would remain unchanged. On such a fact pattern, the overtime at issue here can be characterized as unscheduled overtime, the continued existence of which is not a condition of employment within the meaning of the Law. See also City of Hartford and Local 760, IAFF, AFL-CIO, Connecticut State Board of Labor Relations, Case No. MPP-5145, Decision No. 1850, January 16, 1980. ("The reduction or elimination of unscheduled overtime for purely economic reasons may be effected unilaterally if it involves no breach or repudiation of contract unless it has substantial impact on the working conditions of employees beyond the deprivation of such overtime pay.")

Finally, we turn to the Town's defense that the Association waived its right to bargain any issues relating to minimum manning. The defense turns on the contractual management rights clause and a manning provision reading: "Therefore, the parties do agree that it is the sole responsibility of the Chief and the Selectmen to establish minimum manning levels." In light of our conclusion in the Overtime Opportunities discussion above, we need not determine whether the contract was a waiver of bargaining on overtime issues. Since the only potential violation in this case involves the safety and workload issues when an apparatus is responding to an alarm, we must decide whether the contractual language is a waiver of the Association's right to bargain over these mandatory subjects.

We find that the language is not a waiver. Waiver is an affirmative defense which has not been proved in this case. All that is in the record is the contractual language, which is far from clear given the realities of fire department minimum manning issues. We have no bargaining history and no other explication of what the language means. It may merely track the law of Danvers, supra, and Newton, supra. If that is the case, the Town has the authority to set manning levels but must bargain safety and workload issues arising in connection with the decrease in manning levels. There is nothing in this record indicating that the Association waived safety and workload bargaining when it agreed that the Chief and the Selectmen could "establish minimum manning levels." Alternatively, the provision may relate to overtime, in which case, again, it does not deal with safety and workload issues. In summary, without clarification in the record on the meaning and application of the contract language we cannot find a waiver in this case.

Conclusion

We hold that the Town of Billerica violated Sections 10(a)(5) and (1) of the Law insofar as its unilateral actions affected the workload and safety of fire fighters assigned to a piece of apparatus responding to an alarm.

ORDER

WHEREFORE, based upon the foregoing, we order that the Town of Billerica shall:



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1. Cease and desist from:
 - a. Refusing to negotiate in good faith by unilaterally reducing the minimum number of fire fighters per piece of fire fighting apparatus without giving the Association prior notice and an opportunity to negotiate safety and workload issues arising when a piece of apparatus responds to an alarm;
 - b. In any like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights under G.L. Chapter 150E.
2. Take the following affirmative action which we find will effectuate the policies of the Law:
 - a. Restore the prior practice regarding the number of fire fighters assigned to a piece of apparatus responding to an alarm;
 - b. Prior to changing the minimum manning levles per piece of fire fighting apparatus provide the Association with reasonable notice and an opportunity to bargain over safety and workload issues;
 - c. Post signed copies of the attached Notice to Employees in conspicuous places where employees represented by the Association usually congregate, or where notices are usually posted, and leave the copies posted for a period of thirty (30) days thereafter;
 - d. Notify the Commission in writing within ten (10) days of the service of this decision and order, of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman

JOAN G. DOLAN, Commissioner

GARY D. ALTMAN, Commissioner

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

The Massachusetts Labor Relations Commission has issued a decision finding that the Town of Billerica has violated Sections 10(a)(5) and (1) of General Laws Chapter 150E by failing to bargain over the safety and workload issues involved in



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decisions to change the "odd hours" and minimum shift manning policies on the number of fire fighters assigned to a piece of apparatus when it responds to an alarm.

In compliance with the Commission's order, WE WILL reinstitute the past practice regarding minimum manning per piece of fire fighting apparatus prior to changing the number of fire fighters per piece of apparatus responding to an alarm. WE WILL provide the Association with reasonable notice and an opportunity to bargain over the matter.

CHIEF,
BILLERICA FIRE DEPARTMENT

