CITY OF PEABODY AND PEABODY POLICE BENEVOLENT ASSOCIATION, MUP-4750, 4767 (11/17/82). AMENDED DECISION.

(50 Duty to Bargain)
54.2 hours
54.23 overtime
54.68 paid lunch
(60 Prohibited Practices by Employer)
67.8 unilateral changes by employers
67.82 implementing changes after impasse

Commissioners participating:

Paul T. Edgar, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Robert L. Wise, Esq. - Representing the Peabody Police Benevolent Association

Daniel B. Kulak, Esq. - Representing the City of Peabody

AMENDED DECISION

Statement of the Case

On February 16, 1982, the Peabody Police Benevolent Association (Union or Association) filed with the Labor Relations Commission (Commission) charges of prohibited practice alleging that the City of Peabody (Employer or City) violated Sections 10(a)(5) and (1) of G.L. c.150E (the Law).

Pursuant to its authority under Section 11 of the Law, the Commission investigated the Union's charge and on April 8, 1982 issued a complaint of prohibited practice alleging that the Employer had violated Sections 10(a)(5) and (1) of the Law by unilaterally changing the wages and the lunch schedule of the officers on the police force. On June 18, 1982, a formal hearing was held before John Cochran, a duly designated hearing officer of the Commission.[1] All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed timely briefs which have been fully considered.

Findings of Fact

Police officers on the City of Peabody force work on two different schedules. Some officers work four days and are off duty for the following two days. Others work on a regular five-day per week schedule. Officers who work from 8:15 a.m. to 5:15 p.m. are considered to work day hours. The collective bargaining agreement between the City and the Association, which expired in 1980, provided that officers who

[1] Neither party contests the jurisdiction of the Commission.

worked day hours ("day men") were entitled to a one-hour lunch period every day.

Prior to 1970, lunch hours for "day men" were between 12:00 p.m. and 2:00 p.m. In negotiations in 1970, representatives of the Association made proposals to the City concerning the compensation of officers at overtime rate for working a half-hour of their lunch break. As a result of those negotiations, the City began, in 1970, the practice of permitting "day men" to work twenty minutes of their lunch hour, at the overtime rate. By computing these twenty minutes at time and one-half, every officer who worked the day shift was automatically credited an additional half an hour pay for that day.[2] After the implementation of this practice in 1970, the new lunch schedule for police officers was between 12:00 p.m. and 1:30 p.m., replacing the previous schedule which ran between 12:00 p.m. and 2:00 p.m.

Under this practice, each police officer who worked the day shift was guaranteed an extra half-hour pay every day. In late 1978 or early 1979, however, the Association's bargaining committee entered into negotiations with the City and, as a result of negotiations between the parties, the method of computing the daily half-hour of overtime was modified. Under the modification, all officers who worked three days during the week were guaranteed two hours overtime. At time and one-half, these two hours were the equivalent of three hours of compensation. Officers who did not work three full days were compensated for an extra half-hour pay for every day they actually worked. This practice remained in effect from 1979 until February, 1982.

Sometime in 1981, the parties began negotiations for a successor to the agreement which expired June 30, 1982. In the course of these negotiations, the City proposed the elimination of the lunch overtime. Specifically, in November 1981, the City submitted to the Union a proposal which would have eliminated the lunch overtime practice. After bargaining about the issue, the City withdrew this proposal. No further negotiations took place until February of 1982.

On January 31, 1982, the membership of the Association met to vote. The package was rejected by the Union membership. Following this membership meeting, representatives of the City and the Association met on February 3, 1982. At that meeting, the City informed the Association representatives of its intention to eliminate the lunch overtime practice effective the following week. The Association protested such action by the Employer and requested that the Employer schedule further negotiation sessions to discuss the issue. The City's reply was that it would "get back to" the Union representative. The Union next heard from the City on February 5, 1982, when the Chief of Police issued the following order:

> "Effective 7 February 1982, Officers assigned to Second Watch will hereafter take one hour for lunch.
>
> Per Order:
>
> _____
> Chief of Police

[2]This half-hour of overtime was also applicable to other day personnel in the bargaining unit, including superior officers and deskmen.

On February 11, 1982, the Association met again with the City and requested that the City reinstate the lunch hour overtime. The City refused. Sometime in Febraury, 1982, after the termination of the lunch practice, the Association petitioned the Joint Labor-Management Committee to intervene in the negotiations between the parties.

After February 5, 1982, the date on which the termination of the lunch practice became effective, the Chief of Police also ordered officers working during the day shift to take their lunch hour between 11:00 a.m. and 2:00 p.m. Specifically, officers in patrol cars were ordered to take their lunch break in the following manner: two men were to go between 11:00 a.m. and 12:00 p.m.; two others between 12:00 p.m. and 1:00 p.m.; and two others between 1:00 p.m. and 2:00 p.m. The practice since 1970 was that officers take their lunch between 12:00 p.m. and 1:30 p.m. The Union protested the City's change of assignment of lunch periods at both the February 3 and February 11, 1982 meetings. During the prior negotiations that culminated in the package voted on by the membership on January 31, 1982, there was no discussion of changing the officers' lunch time practice. The Association learned for the first time that the City intended to change the lunch periods on February 3, 1982.

Opinion

1. The Law on Unilateral Action

Under the Law, it is a violation of Sections 10(a)(5) and (1) for an employer to unilaterally change wages, hours, standards of productivity and performance, or any other terms and conditions of employment of its employees without providing to the exclusive representative of those employees an opportunity to bargain prior to the implementation of such change. Town of Randolph, 8 MLC 2044, 2051 (1982); Brookline School Committee and Brookline School Custodians Association, 7 MLC 1185, 1186 (1980). To establish a violation, an actual change in the existing conditions of employment must have occurred. A mere change in the procedure for administering a condition of employment where the actual condition remains intact does not amount to a unilateral change. See, City of Boston, 5 MLC 1317 (H.O. 1978), aff'd. 5 MLC 1783; City of Worcester, 4 MLC 1317 (H.O. 1977), aff'd. 4 MLC 1697; City of Boston, 8 MLC 1007 (1981). In addition, the change must impact on a mandatory subject of bargaining. See, Town of Danvers, 3 MLC 1559 (1977); Town of Billerica, 8 MLC 1957 (1982).

In cases where the parties have reached an impasse in negotiations, a unilateral change by the employer on an issue under negotiations will not be deemed to be a violation, provided that the change is consistent with the position previously adopted by the employer and communicated to the union. Blue Hills Regional School District Committee, 3 MLC 1613 (1977); City of Boston, 3 MLC 1450 (1977); Hanson School Committee, 5 MLC 1613 (1971).

Having stated these principles, we consider the allegations of the instant complaint.

2. Employer's Elimination of Lunch Overtime

It is undisputed that between 1970 and late 1978 or early 1979, the Employer

permitted police officers working during the day shift to work twenty minutes of their lunch hours, for which it compensated the officers at overtime rates. In late 1978 or early 1979, the parties agreed to modify this practice so that officers who worked three days in a given week would receive three extra hours of compensation, and officers who did not work three days in a given week would still receive compensation for twenty minutes of their lunch hour computed at time and one-half, which equalled thirty minutes of compensation.

The parties began negotaitions for a successor agreement for the fiscal year 1982 sometime in 1981. During these negotiations, the Employer proposed to the Union, inter alia, the elimination of the most recent lunch overtime practice. It later withdrew this particular proposal from its package. After a package was agreed upon, the Union membership held a ratification meeting. In January 1982, it rejected the Employer's package. Following the membership vote, the parties met on February 3, 1982. At this meeting, the Employer told the Association that the lunch overtime practice would be terminated starting the following week. In spite of the Union's demand to bargain over the issue, the Employer issued the order on February 5, 1982 terminating the lunch overtime practice. It is clear from these facts that, on February 3, 1982, the Union was faced with a fait accompli. See City of Everett, 2 MLC 1471, 1477 (1976). The Employer nevertheless argues that it did not violate the law because the change in overtime compensation is not a mandatory subject of bargaining. The Employer relies on Town of Danvers, 3 MLC 1559 (1977) and Town of Billerica, 8 MLC 1957.

There is no question that the elimination of the lunch practice in this case reduces the wages of the officers. The essential issue is whether the reduction of overtime is a mandatory subject of bargaining. In Town of Billerica, supra, the Commission had to decide whether overtime opportunities were a consequence of the Employer's right to staff the enterprise, a permissive subject, or whether overtime opportunities were guaranteed wage items, a mandatory subject. In Billerica, the loss of overtime was a necessary by-product of the Employer's permissible discretion to determine the staffing needs of the department. See, Town of Danvers, supra. Furthermore, because there was no past practice in the Billerica Fire Department which guarnateed a particular amount of overtime pay to the employees, the action of the Employer in reducing the availability of overtime opportunities did not change the terms and conditions of employment of the employees in question.

Unlike Billerica, this matter is not a minimum manning case, but is rather a wage issue. Wages are, of course, a mandatory subject of bargaining under the Law.[3]

[3]Assuming, however, that the practice here can be characterized as overimte, the outcome would still be the same. In Billerica, the rationale for holding that overtime opportunities were a permissive subject of bargaining was that the employees in that case had no assurance that a certain amount of overtime would be made available to them. The overtime was unscheduled. Therefore, we concluded in that case that the decision to assign overtime was a decision within the discretion of the employer and therefore permissive.

This case is the opposite of the situation in Billerica. Here, the prior

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Here, the prior practice had been that police officers who worked during the day shift received overtime pay when they worked twenty minutes of their lunch period or three hours' extra pay if the officers worked three days in a given week. The payment of overtime had nothing to do with staffing levels. The past practice sanctioned by the Employer was that the officers simply received that extra compensation solely because they worked the regularly scheduled day shift.

The Employer next argues that at the Febraury 3, 1982 meeting the parties had reached an impasse, since soon after that meeting the Association requested the intervention of the Joint-Labor Management Committee in the negotiations. Accordingly, the Employer contends, it bargained to impasse prior to implementing the elimination of the lunch practice. See, Commonwealth of Massachusetts and MOSES, 8 MLC 1978 (1982). We disagree. The parties had not reached an impasse in their negotiations. In November 1981, they began negotiations for the fiscal year 1982 contract. During these negotiations, the Employer submitted proposals containing provisions regarding the elimination of the lunch hour overtime, but it later withdrew these provisions from its package. In January 1982, the Union membership voted on the Employer's entire package. Following the membership vote, the next meeting between the parties was on February 3, 1982. On that date, the Employer informed the Union that the practice would be terminated, effective the following week. On February 5, 1982, the order terminating the practice was issued. The parties met again to further negotiate on February 11, 1982. On the basis of these facts, no impasse had been reached by the parties on February 5, 1982, the date the change became effective. There is absolutely no evidence on the record to demonstrate that further negotiations would have been fruitless. Indeed, the evidence shows that there were hardly any negotiations at all. The fact that the Union later petitioned the Joint-Labor Management Committee to intervene does not mean that an impasse had been reached on February 5, 1982. See, MOSES, supra at 8 MLC 1983.

Moreover, even if the parties had reached a genuine impasse here, the Employer under the Law would not have had a right to implement the change. The change as implemented by the Employer was not consistent with its bargaining position most recently communicated to the Union. The Employer eliminated the lunch overtime practice when it had previously led the Union to believe that such practice would continue. See, Blue Hills Regional School District Committee, 3 MLC 1613 (1977).

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3 (continued)
practice has been that police officers working during the day shift were automatically compensated for thirty minutes for every day worked or three hours for working three days in a given week. Unlike Billerica, under the practice in this case, the Employer exercised no discretion with regard to staffing needs. Under the circumstances, the overtime here is scheduled overtime, the continued existence of which is a condition of employment within the meaning of the Law. See, Town of Billerica, supra at 8 MLC 1963. We conclude, therefore, that the elimination of the lunchtime payment practice would be a mandatory subject of bargaining even if we were to adopt the parties' characterization of this practice as "overtime."

3. Change in Employee's Lunch Period

With regard to the change in the officers' lunch schedule from 12:00 p.m. through 1:30 p.m. to 11:00 a.m. through 2:00 p.m., the Employer states that it has not changed the lunch schedule, but merely added an additional hour and a half to the pre-existing period. Such an addition, it argues, is appropraite since, under the contract, each officer is entitled to an hour for lunch. The evidence presented at the hearing showed that since 1970 police officers had been accustomed to take their lunch between 12:00 p.m. and 1:30 p.m. Now, the Chief of Police not only requires that day men take their lunch between 11:00 a.m. and 2:00 p.m., but also decides when the officers on patrol must eat their lunch. Specifically, lunch is assigned in the following manner: two men go between eleven and twelve, two others between twelve and one, and two others between one and two. Other officers in the department were ordered to do the same thing. The Union argues that this change amounted to a unilateral change by the Employer, and since scheduling of lunch hour is a mandatory subject of bargaining, the Employer violated Section 10(a)(5) of the Law.

In Medford School Committee, 1 MLC 1280 (1975), the Commission decided whether issues relating to employees' hours of work and days of rest were mandatory subjects of bargaining. In that case, the Union made a set of proposals which dealt with the specific hours the employees would work and the specific days the employees would be off-duty. The Employer maintained that these subjects were not negotiable. The Commission, relying on cases such as Amalgamated Meatcutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965), held that particular hours of the day and particular days of the week during which employees are required to work were subjects within the realm of wages, hours, and other terms and conditions of employment, that must be negotiated between an employer and a union. Id., at 1252. Similarly, in City of Everett, 2 MLC 1471 (1976), the Commission held that change in the hours of floor patrols by firemen was a mandatory subject of bargaining.

By changing the officers' lunch period from 12:00 p.m. through 1:30 p.m. to 11:00 a.m. through 2:00 p.m. and ordering when the officers can now eat their lunch, the Employer has changed the past practice. Specifically, by changing the beginning of the lunch period from 12:00 p.m. to 11:00 a.m. and ordering that two officers eat lunch during the first hour of the lunch period, the City has necessarily required that at least these two officers take their lunch an hour earlier. Such a practice substantially impacts on the officers' terms and conditions of employment within the meaning of the Law. We conclude, therefore, that the change in the officers' lunch period is a mandatory subject of bargaining and that the Employer here violated Sections 10(a)(5) and (1) of the Law by implementing this change without first offering the Union an opportunity to bargain.

ORDER

On the basis of the foregoing IT IS HEREBY ORDERED that the City of Peabody shall:

1. Cease and desist from:

a. Refusing to bargain collectively in good faith with the exclusive representative of the Peabody police officers, the Peabody Police Benevolent Association;

b. In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 2 of the Law.

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

a. Reinstate the previous practice of lunch hour overtime compensation and the previous practice of scheduling day officers' lunch assignments;

b. Upon demand, negotiate in good faith with the Peabody Police Benevolent Association before changing the lunch schedule and the lunch hour extra compensation;

c. Make whole all police officers who lost wages as a result of the elimination of the lunch payment from February 3, 1982 to this date;

d. Post in conspicuous places where the police officers usually congregate, and leave posted for a period of thirty (30) consecutive days, the attached Notice to Employees.

e. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEATLH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

[Notice to Employees omitted]