

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

SUFFOLK COUNTY SHERIFF'S
DEPARTMENT

and

AFSCME, COUNCIL 93, AFL-CIO
Locals 419, 3643, 3967

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Case Nos. SUP-09-5493
SUP-09-5496

Date Issued:

February 14, 2012

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Ellen M. Caulo, Esq.

- Representing the Suffolk County Sheriff's
Department

Maureen Medeiros, Esq.

- Representing AFSCME, Council 93, AFL-CIO,
Locals 419, 3643, 3967

HEARING OFFICER'S DECISION

SUMMARY

The issue in these cases is whether the Suffolk County Sheriff's Department (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when, in December of 2008, it unilaterally changed the number of overtime hours it paid to employees who worked two successive shifts. I find that the Employer did not violate the Law as alleged.

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² The parties agreed that the transcript is the official record of the case.

³ I did not request reply briefs. Because the Employer submitted its reply brief after the agreed-upon deadline for briefs without requesting an extension, I have not considered or relied on the reply brief.

1 and in consideration of the parties' arguments, I make the following findings of fact and
2 render the following opinion.

3 ADMISSIONS OF FACT

- 4 1. The Employer is a public employer within the meaning of Section 1 of the
5 Law.
6
7 2. The Union is an employee organization within the meaning of Section 1 of the
8 Law.
9
10 3. The Union, through Local 419, is the collective bargaining representative for
11 certain employees employed by the Employer at the Suffolk County House of
12 Corrections, including Correction Officers working within the titles of CO-1,
13 CO-2, CO-3 and CO-4.
14
15 4. The Union, through Local 3967, is the collective bargaining representative for
16 all Jail Officers employed by the Employer at the Suffolk County House of
17 Corrections holding the title of Captain.
18
19 5. The Union, through Local 3643, is the collective bargaining representative for
20 all Jail Officers employed by the Employer at the Suffolk County Jail holding
21 the titles of Lieutenant and Captain.
22
23 6. Prior to December 2008, the Employer paid bargaining unit members referred
24 to in Paragraphs 3, 4 and 5 who worked two successive shifts for eight (8)
25 hours of overtime for the second shift even though, based on overlapping
26 schedules, the employees worked only an additional 7.5 hours on the second,
27 successive shift.⁴
28
29 7. On or about December 2008, the Employer began to pay those unit members
30 referred to in Paragraph 3, 4 and 5 only 7.5 hours of overtime for the second
31 shift when working two successive shifts.

32 STIPULATIONS OF FACT⁵
33

- 34 1. Local 419 employees employed at the House of Correction are assigned to
35 one of three shifts: 6:45 a.m. to 3:15 p.m., 2:45 p.m. to 11:15 p.m., and 10:45
36 p.m. to 7:15 a.m.
37

⁴ The Union disputes the accuracy of this fact.

⁵ The parties also stipulated to paragraphs 1 – 5 of the admissions of fact.

2. In November of 2008, Superintendent of Human Resources, Michael Harris, verbally informed the affected locals about an alleged "overpayment for successive shifts" and advised them that the Department intended to take corrective action during the December payroll periods.
3. On or about December 2008, the Employer began to pay those unit members referred to in paragraphs 3, 4, and 5 [of the admitted facts] 7.5 hours of overtime for the second shift commencing when the unit member completed their assigned regular 8-hour shift.
4. On December 28, Mr. Harris notified the Locals by letter of the Employer's intention to "correct the overpayment."
5. On December 28, 2008, the parties were in main table negotiations, bargaining for a successor agreement.
6. On January 12, 2009, Mr. Breslin sent a letter to Mr. Harris.
7. On January 15, 2009, Mr. Breslin received a letter from Superintendent Harris.
8. The parties reached the following additional stipulations regarding the staff arrival departure times:
 1. The Department operates cameras in the lobby and salleyport areas of the House of Correction that record the arrival and departure of staff.
 2. Two CDs containing video for the lobby and salleyport areas from 2:30 p.m. to 3:30 p.m. depict shift the arrival and departure of staff on the following dates: January 6, 7, 10, 11, 12, 13, 14, 17, 18, and 19, 2011.
 3. Another CD containing video for the lobby and salleyport areas from 10:30 p.m. to 11:30 p.m. depicts the arrival and departure of staff on the following dates: January 6, 7, 10, 11, 12, 13, 14, 17, 18, and 19, 2011.
 4. The video is a fair and accurate portrayal of the arrival and departure of staff on those dates and times.
 - a. On January 6, 2011the video indicates: ten (10) 419 members leaving the facility between 2:40-2:50 p.m.; sixty-eight (68) 419 members leaving the facility between 2:50-3:00 p.m.; fifty (50) 419 members leaving the facility between 3:00-3:10 p.m. and nineteen (19) 419 members leaving the facility between 3:10 and 3:20 p.m.
 - b. On January 6, 2011 the video indicates: twenty-six (26) 419 members leaving the facility between 10:40-10:50 p.m.; nineteen (19) 419 members

1 leaving the facility between 10:50 and 11:00 p.m.; twenty-seven (27) 419
2 members leaving the facility between 11:00-11:10 p.m. and one (1) 419
3 members leaving the facility between 11:10-11:20 p.m.
4

5 c. On January 7, 2011 the video indicates: fifteen (15) 419 members leaving
6 the facility between 2:40-2:50 p.m.; fifty-five (55) 419 members leaving the
7 facility between 2:50 and 3:00 p.m.; fifty (50) 419 members leaving the facility
8 between 3:00 and 3:10; and fourteen (14) 419 members leaving the facility
9 between 3:10 and 3:20 p.m.
10

11 d. On January 7, 2011 the video indicates: twenty-six (26) 419 members
12 leaving the facility between 10:40-10:50 p.m.; thirty-six (36) 419 members
13 leaving the facility between 10:50 and 11:00 p.m.; fourteen (14) 419 members
14 leaving the facility between 11:00-11:10 p.m.; and zero (0) 419 members
15 leaving the facility between 11:10-11:20 p.m.
16

17 e. On January 10, 2011 the video indicates: twenty-three (23) 419 members
18 leaving the facility between 2:40-2:50 p.m.; eighty-eight (88) 419 members
19 leaving the facility between 2:50 and 3:00 p.m.; eighteen (18) 419 members
20 leaving the facility between 3:00 and 3:10; and three (3) 419 members leaving
21 the facility between 3:10 and 3:20 p.m.
22

23 f. On January 10, 2011 the video indicates: twenty-eight (28) 419 members
24 leaving the facility between 10:40-10:50 p.m.; thirty-eight (38) 419 members
25 leaving the facility between 10:50 and 11:00 p.m.; six (6) 419 members
26 leaving the facility between 11:00-11:10 p.m.; and two (2) 419 members
27 leaving the facility between 11:10-11:20 p.m.
28

29 g. On January 11, 2011 the video indicates: twenty-one (21) 419 members
30 leaving the facility between 2:40-2:50 p.m.; eighty (80) 419 members leaving
31 the facility between 2:50 and 3:00 p.m.; twenty-eight (28) 419 members
32 leaving the facility between 3:00 and 3:10; and eleven (11) 419 members
33 leaving the facility between 3:10 and 3:20 p.m.
34

35 h. On January 11, 2011 the video indicates: twenty-five (25) 419 members
36 leaving the facility between 10:40-10:50 p.m.; thirty-six (36) 419 members
37 leaving the facility between 10:50 and 11:00 p.m.; six (6) 419 members
38 leaving the facility between 11:00-11:10 p.m.; and two (2) 419 members
39 leaving the facility between 11:10-11:20 p.m.
40

41 i. On January 12, 2011 the video indicates: eighteen (18) 419 members
42 leaving the facility between 2:40-2:50 p.m.; forty-four (44) 419 members
43 leaving the facility between 2:50 and 3:00 p.m.; fourteen (14) 419 members
44 leaving the facility between 3:00 and 3:10; and two (2) 419 members leaving
45 the facility between 3:10 and 3:20 p.m.
46

1 j. On January 12, 2011 the video indicates: seventeen (17) 419 members
2 leaving the facility between 10:40-10:50 p.m.; twenty-three (23) 419 members
3 leaving the facility between 10:50 and 11:00 p.m.; twelve (12) 419 members
4 leaving the facility between 11:00-11:10 p.m. and four (4) 419 members
5 leaving the facility between 11:10-11:20 p.m.
6

7 k. On January 13, 2011 the video indicates: twelve (12) 419 members
8 leaving the facility between 2:40-2:50 p.m.; seventy (70) 419 members
9 leaving the facility between 2:50 and 3:00 p.m.; thirty-eight (38) 419 members
10 leaving the facility between 3:00 and 3:10; and eleven (11) 419 members
11 leaving the facility between 3:10 and 3:20 p.m.
12

13 l. On January 13, 2011 the video indicates: thirty-one (31) 419 members
14 leaving the facility between 10:40-10:50 p.m.; thirty-two (32) 419 members
15 leaving the facility between 10:50 and 11:00 p.m.; twelve (12) 419 members
16 leaving the facility between 11:00-11:10 p.m.; and zero (0) 419 members
17 leaving the facility between 11:10-11:20 p.m.
18

19 m. On January 14, 2011 the video indicates: twenty-four (24) 419 members
20 leaving the facility between 2:40-2:50 p.m.; seventy-four (74) 419 members
21 leaving the facility between 2:50 and 3:00 p.m.; twenty (20) 419 members
22 leaving the facility between 3:00 and 3:10; and seven (7) 419 members
23 leaving the facility between 3:10 and 3:20 p.m.
24

25 n. On January 14, 2011 the video indicates: forty-one (41) 419 members
26 leaving the facility between 10:40-10:50 p.m.; thirty-eight (38) 419 members
27 leaving the facility between 10:50 and 11:00 p.m.; two (2) 419 members
28 leaving the facility between 11:00-11:10 p.m. and two (2) 419 members
29 leaving the facility between 11:10-11:20 p.m.
30

31 o. On January 17, 2011 the video indicates: eleven (11) 419 members
32 leaving the facility between 2:40-2:50 p.m.; fifty (50) 419 members leaving the
33 facility between 2:50 and 3:00 p.m.; twenty-one (21) 419 members leaving the
34 facility between 3:00 and 3:10; and four (4) 419 members leaving the facility
35 between 3:10 and 3:20 p.m.
36

37 p. On January 17, 2011 the video indicates: twenty-five (25) 419 members
38 leaving the facility between 10:40-10:50 p.m.; thirty-five (35) 419 members
39 leaving the facility between 10:50 and 11:00 p.m.; ten (10) 419 members
40 leaving the facility between 11:00-11:10 p.m.; and three (3) 419 members
41 leaving the facility between 11:10-11:20 p.m.
42

43 q. On January 18, 2011 the video indicates: twenty-nine (29) 419 members
44 leaving the facility between 2:40-2:50 p.m.; eighty-four (84) 419 members
45 leaving the facility between 2:50 and 3:00 p.m.; eighteen (18) 419 members

1 leaving the facility between 3:00 and 3:10; and five (5) 419 members leaving
2 the facility between 3:10 and 3:20 p.m.

3
4 r. On January 18, 2011 the video indicates: twenty-five (25) 419 members
5 leaving the facility between 10:40-10:50 p.m.; thirty-two (32) 419 members
6 leaving the facility between 10:50 and 11:00 p.m.; twelve (12) 419 members
7 leaving the facility between 11:00-11:10 p.m.; and six (6) 419 members
8 leaving the facility between 11:10-11:20 p.m.

9
10 s. On January 19, 2011 the video indicates: twenty-one (21) 419 members
11 leaving the facility between 2:40-2:50 p.m.; eighty-one (81) 419 members
12 leaving the facility between 2:50 and 3:00 p.m.; thirty-six (36) 419 members
13 leaving the facility between 3:00 and 3:10; and eleven (11) 419 members
14 leaving the facility between 3:10 and 3:20 p.m.

15
16 t. On January 19, 2011 the video indicates: thirty-one (31) 419 members
17 leaving the facility between 10:40-10:50 p.m.; twenty-six (26) 419 members
18 leaving the facility between 10:50 and 11:00 p.m.; thirteen (15) 419 members
19 leaving the facility between 11:00-11:10 p.m. and two (2) 419 members
20 leaving the facility between 11:10-11:20 p.m.

21
22 9. On April 1, 2007, Officer Salvetti worked a regular shift and was hired for
23 overtime. During both shifts, he took a lunch break.

24
25 10. Sheriff Andrea Cabral took over the Suffolk County Sheriff position on
26 November 30, 2002.

27
28 11. The language of Article X, Section 1 in the collective bargaining agreements
29 for Locals 3967 and 3643 regarding hours of work have not changed in the
30 2009 – 2012 collective bargaining agreements.

31
32 FINDINGS OF FACT⁶

33 BACKGROUND

34 Andrea Cabral (Cabral) is the Suffolk County Sheriff. The Suffolk County
35 Sheriff's Department operates the Jail and the HOC and employs the captains,
36 lieutenants, and correction officers in Locals 3967, 3643 and 419 (collectively referred to
37 as custody officers). The Jail, which is located at 200 Nashua Street in Boston, houses

⁶ Neither party contests the DLR's jurisdiction in this matter.

1 approximately 750 inmates and employs approximately 30 captains and lieutenants
2 represented by the Union in Local 3643. The Union does not represent the correction
3 officers at the Jail.⁷

4 The HOC houses approximately 1,450 inmates. It employs approximately 535
5 correction officers represented by the Union in Local 419 and approximately 15 captains
6 in Local 3967. Captains can function as the individual in charge of a particular building,
7 or as the commander of a shift. There is only one shift commander per shift.

8 Prior to 1991, the Boston Penal Commission operated the HOC, and the facility
9 was located on Deer Island. In 1991, the Deer Island House of Correction closed,
10 moved to its current location in a high rise facility in Boston's South Bay, and became
11 part of the Suffolk County Sheriff's Department.

12 The HOC captains were not represented by any union at the time that they
13 transferred to the South Bay facility. The Union subsequently petitioned to represent
14 the HOC captains, and the former Labor Relations Commission certified Local 3967 as
15 their exclusive collective bargaining representative in December of 1993.

16 **THE COLLECTIVE BARGAINING AGREEMENTS**

17 **Locals 3643 and 3967**

18 Locals 3643 and 3967 negotiated joint collective bargaining agreements until
19 2008. They negotiated separate agreements covering the period July 1, 2009 to June
20 30, 2012. The language of Article X, Sections 1 and 2 in the former joint contracts and
21 the current separate contracts is the same, and provides as follows:

⁷ JOEASC (Jail Officers and Employees Association of Suffolk County) represents the correction officers at the Jail.

1 Article X: Hours of Work and Overtime

2 Section 1. The regular workweek shall consist of five (5) eight-hour days
3 between any Wednesday and the following Tuesday, inclusive. The
4 parties agree that the definition and/or composition of the workweek shall
5 be a subject of continuing negotiations.
6

7 Section 2. A. All authorized overtime service in excess of the regular
8 workday or the regular workweek, or on the sixth and seventh consecutive
9 days of service during any workweek, shall be compensated on a time-
10 and-one-half basis, except that a seventh consecutive day shall be
11 compensated at double time.
12

13 Local 419⁸

14 Article X: Hours of Work and Overtime

15 Section 1. The regular workweek shall consist of 5 (five) eight-hour days
16 between any Saturday and the following Friday, inclusive. It shall consist
17 of eight (8) hours of work and one-half (1/2) hour of unpaid meal break in
18 the course of an 8.5 hour shift....
19

20 Section 2. All authorized overtime service in excess of the regular
21 workday or the regular workweek, or on the sixth and seventh days of
22 service, shall be compensated on a time-and-one-half-basis, except that
23 service on the seventh day of a workweek on a continuous operation only
24 shall be compensated at double-time....
25

26 **REGULAR WORK HOURS AND MEAL BREAKS**

27 **Jail Captains**

28 Since at least 1991, the Jail captains have worked the following overlapping
29 shifts: 6:45 a.m. to 3:15 p.m., 2:45 p.m. to 11:15 p.m., and 10:45 p.m. to 7:15 a.m. The
30 Jail captains' work shifts are 8½ hours in duration, and their shifts include a ½ hour
31 unpaid meal break during which captains can eat in the cafeteria or go outside for a
32 walk. The Employer considers the Jail captains to be on duty during their meal breaks.

⁸ The parties made no substantive changes to Article X, Sections 1 and 2 between the 1999-2000 and 2005-2008 collective bargaining agreements.

House of Correction: Local 419

When the HOC was located on Deer Island, custody officers worked shifts that began and ended on the hour. When the HOC moved to the new South Bay facility in 1991, the Employer changed the starting and ending time for shifts so the shifts overlapped. The Employer changed the shift structure to promote safe and efficient HOC operations and to correspond to the overlapping shift schedule at the Jail. The new HOC shift structure was as follows, and the employees described it with the following abbreviated numbers:

- 6:45 a.m. to 3:15 p.m., a/k/a/ 7 to 3
- 2:45 p.m. to 11:15 p.m., a/k/a 3 to 11
- 10:45 p.m. to 7:15 a.m., a/k/a 11 to 7

In January of 1992, Local 419 filed a charge of prohibited practice over the change in work hours. Local 419 and the Employer litigated the issue and resolved it in July of 1995. Their settlement agreement confirmed and documented the new overlapping hours of work and stated that each shift "shall include a one-half hour unpaid meal break." Since then, Local 419's unit members have worked the 8½ overlapping shifts described above. These 8½ hour shifts consist of 8 paid hours and a ½ hour unpaid meal break.

House of Correction: Local 3967

After the former LRC certified Local 3967 as the HOC captains' bargaining representative in 1993, Local 3967 filed a grievance over the new overlapping shift work hours. In the subsequent arbitration, Local 3967 and the Employer stipulated that the captains worked shifts that started fifteen minutes before the hour and ended fifteen

1 minutes after the hour (i.e. "6:45 a.m. to 3:15 p.m.") with a ½ hour unpaid lunch break
2 during the shift. The arbitrator denied the grievance in January of 1999.

3 In March of 1999, Local 3967 filed complaints with the Regional Director of the
4 United States Department of Labor and the Massachusetts Office of the Attorney
5 General stating that the Employer had failed to provide the HOC captains with a duty-
6 free lunch period. In the complaint, the Union acknowledged that the shift schedule
7 spanned 8½ hours and included a ½ hour unpaid meal break, but argued that the
8 captains' duties and continual "on call" status prevented them from enjoying a duty-free
9 lunch break.⁹

10 In 1999, the HOC shift commanders changed their shift start and ending times so
11 that they started their shifts one hour before the shift start time for the correction
12 officers.¹⁰ The change in the HOC shift commanders' reporting time enabled the
13 incoming shift commanders to review the roster of employees for the upcoming shift
14 before the correction officers' shift started and assess potential vacancies and overtime
15 needs.¹¹ The earlier start time did not change the length of the HOC shift commanders'
16 work day because they also ended their shifts earlier. There is no evidence that the
17 change in the starting and ending times for HOC shift commanders changed the

⁹ There is no evidence of a response from the Regional Director or the Attorney General.

¹⁰ In 1999, captains who were not shift commanders had the same start time and overlapping schedules as the correction officers. These captains continued their regular start time until 2010, when they began to report for duty at the same earlier time that the shift commanders did.

¹¹ This practice differs between the Jail and the HOC. At the Jail, the outgoing shift commander assesses vacancies and overtime needs for the next shift and calls in custody officers to work overtime. Consequently, the incoming shift commander does not need to report for duty earlier than the correction officers under his/her command.

1 overlapping shift schedules that they had been working since 1991, and they continued
2 to work overlapping shifts.¹²

3 The meal break practice for HOC captains varies. Sometimes, captains eat at
4 their desks while continuing to respond to the radio and address work issues. Captains
5 also eat meals in the facility cafeteria. Captains may also leave the secure perimeter to
6 buy a meal at the canteen truck in front of the facility or to work out in the exercise room
7 in Building 2. Captains can also leave the facility grounds to run errands at nearby
8 businesses.¹³ The Employer is aware that captains leave the facility during their shifts,
9 and there is no evidence that the Employer disciplined any captain for doing so prior to

¹² There is no evidence that prior to the 2008 change at issue here, the HOC shift commanders changed the overlapping shifts that they had been working since 1991. This finding conflicts with the Union's argument that the HOC shift commanders do not work overlapping shift schedules. However, the Union's argument relies on events and circumstances that occurred after 2008. The Union presented no evidence that the HOC shift commanders' shift schedules did not overlap in 2008, or explain why the HOC commanders would work fewer hours at that time than the captains who were not shift commanders. There is also no evidence that when Harris notified Breslin in 2008 that the overpayment was based on the captains' overlapping shift hours, Breslin told Harris that the HOC shift captains' hours did not overlap. See infra, page 19.

Because the focus of the complaint is the change that occurred in 2008, I need not make findings on the Employer's current practices at the HOC - which appear to allow HOC shift commanders to work more flexible hours - or any change in the hours of work that was announced at a captains meeting in 2010.

¹³Captains who leave the facility during a shift advise a superior officer of their departure.

1 December of 2008.¹⁴ However, the Employer considers captains to be on duty during
2 the entire time they are inside the facility.

3 **REPORTING FOR DUTY**

4 When a custody officer comes on duty for a new shift, he/she (the incoming
5 officer) attends roll call. Shift commanders hold roll call for approximately fifteen
6 minutes at the beginning of the shift to take attendance and brief the incoming officers
7 on important issues. After roll call, the incoming officer goes to their post, takes the
8 keys and the radio, and relieves the officer who has been working the previous shift
9 (outgoing officer). Once "properly" relieved by the incoming officer, the outgoing officer
10 leaves their post to change clothes and collect their personal belongings. Frequently,
11 the outgoing officer leaves their post a few minutes prior to the end of the scheduled
12 shift. After the incoming officers relieve the outgoing officers and the inmate count is
13 verified, outgoing officers can leave the facility. Due to the overlapping shift schedules,
14 outgoing officers frequently leave the facility approximately 15 minutes before the
15 scheduled end of their shift. The Employer pays the officers through the scheduled end
16 of their shift.

¹⁴ In August of 2010, Assistant Deputy Superintendent David Agnew (Agnew) "counseled" Captain John Sullivan (Sullivan) for leaving the facility during his shift. This incident does not persuade me that the Employer prohibited captains from leaving the premises during their shift during the time period at issue. This incident post dates the relevant time period, and Sullivan's testimony suggested that restrictions on leaving the facility during a shift are more recent. Further, credible testimony demonstrated that other captains have left the facility during their shifts and have not been disciplined as a result.

OVERTIME STAFFING

Shift commanders set up their shifts right before the start of the next shift.¹⁵ When they set up their shifts, the shift commanders generally know which employees will be working on the upcoming shift, but they are never completely sure until roll call. Once the shift commander learns which employees are absent and which posts are vacant for the upcoming shift, the shift commander assesses the public safety needs and financial concerns of the institution and then calls in or retains employees to work overtime to ensure that the shift is staffed safely. The decision to call employees in on overtime can be made right before or after roll call, depending on when the shift commander learns which employees are absent and which posts the shift commander chooses to fill.

Custody officers can volunteer for overtime work, or the shift commander can mandate overtime work. The overtime assignment may span an entire shift, or it may only require a certain number of hours. A shift commander may assign a custody officer to work overtime on a specific post, or may move the officer from one post or location to another, depending on the needs of the institution. A shift commander can reduce the number of overtime posts to fill by "collapsing" posts and redeploying officers to different posts or locations.

Custody officers who have just completed a shift may volunteer or be required to stay and work another shift immediately following the first shift (a successive shift) on an

¹⁵ As previously noted, the incoming shift commander assesses the shift and hires overtime for the HOC. At the Jail, the outgoing shift commander performs this function.

1 overtime basis. The shift commander generally¹⁶ notifies the officer of the overtime
2 opportunity (or mandate) at the conclusion of the officer's first shift. The outgoing officer
3 remains at his post until he is properly relieved, then he reports to the new post. In
4 most cases where a custody officer works a successive shift, he does not attend roll call
5 for the second shift because he cannot leave the inmates unattended and must wait to
6 be relieved from his first post. As a result, the time that a custody officer begins his
7 successive shift varies depending on when he is relieved from his first shift. However,
8 he is paid through the end of the first shift, even if he leaves it early and starts a
9 successive shift.

10 Meal breaks for custody officers working a successive shift on an overtime basis
11 are handled the same way meal breaks are handled for custody officers working a
12 regular shift. HOC correction officers receive a meal break when they work a successor
13 shift on an overtime basis.¹⁷ There is no evidence that the captains' meal break
14 practices are any different on a successive overtime shift than they are on a regular
15 straight time shift.

¹⁶ On one occasion, a shift commander called an officer during the officer's commute home and told him to return to the institution to work a successive shift.

¹⁷ Various Union witnesses suggested that correction officers do not receive a meal break when they work a successive overtime shift. I do not credit this testimony. The parties stipulated that on April 1, 2007, Officer Troy Salvetti (Salvetti) worked a regular shift and a successive overtime shift, and he took a lunch break on both shifts. Sullivan and Salvetti both testified that correction officers receive a meal break on successive overtime shifts unless an institutional issue arises that precludes custody officers from taking a meal break. I credit Sullivan's institutional knowledge of correction officers' meal break procedures because as a shift commander, he oversees correction officers' meal breaks.

DISCOVERING THE OVERPAYMENT

The Employer had been paying custody officers 8 hours of overtime pay for a full successive shift since the mid-1990's.¹⁸ In the fall of 2008, Director of Personnel Administration William Sweeney (Sweeney) was analyzing employee payroll information in connection with a Fair Labor Standards Act (FLSA) lawsuit that certain custody officers had filed. As part of the FLSA litigation settlement process, Sweeney worked with auditors at PriceWaterhouseCoopers (PWC) to ensure that the Employer accurately captured the amount of overtime that each employee worked and the pay that should be factored into their overtime rate.

In the course of his discussions with the PWC auditors, Sweeney discovered that custody officers working successive shifts were being paid twice for the thirty minute period that spanned two overlapping shifts. Specifically, Sweeney found that an officer working a regular straight-pay 6:45 a.m. to 3:15 p.m. shift and then a successive 2:45 p.m. to 11:15 p.m. overtime shift, had been receiving 17 hours of pay when the officer was only physically present at the facility for 16½ hours. Also, that officer had been receiving thirty minutes of straight time for the time period between 2:45 p.m. to 3:15 p.m., and thirty minutes of overtime for the same time period. According to Sweeney's calculations, after deducting a ½ hour unpaid meal break for each shift, officers working a successive overtime shift should receive 7.5 hours of overtime pay rather than 8 hours. Sweeney believed that paying a custody officer twice for the same time period

¹⁸ The entity issuing employee paychecks changed over time. Prior to January of 2010, Sheriff's Department employees provided payroll information to the City of Boston, and the City of Boston cut payroll checks to the Sheriff's Department employees. In or about January of 2010, legislation shifted this responsibility to the Commonwealth of Massachusetts.

1 was unlawful, and that continuing to do so would violate the public trust and his
2 responsibilities as the custodian of public money.

3 **COMMUNICATION WITH THE LOCAL UNIONS**

4 In the summer of 2008, Sweeney conveyed his concerns to Superintendent of
5 Human Resources Michael Harris (Harris). Harris and Senior Legal Advisor for Human
6 Resources Charles Abate, Jr. (Abate) then researched the issue to see if the Employer
7 had any contractual obligation to justify continuing the practice. Harris contacted
8 Sullivan, Thomas Flynn (Flynn) and Al Moscone (Moscone), the presidents of Locals
9 3643, 3967, and 419 in November to explain the issue and give them an opportunity to
10 present information to justify continuing the 8 hour overtime payment. Harris told those
11 Local presidents that the Employer would change the payment practice if he found no
12 justification to continue it. Harris also told Union Staff Representative James Breslin
13 (Breslin) about the overpayment for the overlap on successor shifts. On or about
14 December 1, 2008, the Employer changed the prior practice by paying the custody
15 officers 7.5 hours instead of 8 hours of overtime when they worked a successive shift.

16 On or about December 23, 2008, Harris sent letters to Sullivan, Flynn, and
17 Moscone stating in pertinent part as follows:

18 I write with regard to recent conversations pertaining to the matter of
19 overtime pay on those days when individuals are compensated for 2
20 successive shifts. When I first spoke with you about this in November I
21 indicated that the Department had identified a 30-minute overpayment in
22 the compensation calculation and intended to correct this error during the
23 December payroll periods.

24
25 You have clearly voiced your opposition to the Department's actions and
26 subsequently informed me of [the Union's] opinion that the Department is
27 obligated to bargain on this matter. Although the Department does not
28 agree with your position, we are willing, in good faith, to meet with you and
29 provide you with an opportunity to explain your position and present any

1 viable information for our consideration. For your convenience, I suggest
2 either of the dates listed below. Please confirm your interest and
3 availability.
4

5 By letter dated January 12, 2009, Breslin responded to Harris's December 23,
6 2008 letter. Breslin's January 12 letter provides in pertinent part that:

7 Re: AFSCME, Local 419, Local 3643 & Local 3967
8

9 This letter serves to memorialize the position of the Department (sic) with
10 regards to the recent change in overtime calculation for Officers who work
11 successive shifts.
12

13 In your letters to individual AFSCME Presidents dated December 23,
14 2008, you stated that the Department did not believe it had an obligation
15 to bargain this change. At main-table negotiations (Local 3643 & Local
16 3967) on January 6, 2009, I asked to discuss this important issue prior to
17 the commencement of our scheduled bargaining session.¹⁹
18

19 During our discussion on January 6th you reaffirmed your position that the
20 Department did not agree that this issue required bargaining. Also,
21 Personnel Director William Sweeney stated that this change was
22 implemented on December 1, 2008.
23

24 Clearly, the Union's position is that a change in overtime
25 procedures/payment required bargaining. Further, by denying the Union's
26 request for "status quo" regarding this matter, which I requested during our
27 discussion and implementing this change while main-table negotiations
28 are in progress, constitutes (sic) a unilateral change in working conditions.
29

30 Please contact me if there is a need to discuss the above, or you disagree
31 with the position of the Sheriff's Department as I have outlined above.
32

33 Harris responded to Breslin's January 12, 2009 letter with a letter dated January
34 15, 2009. Harris's January 15 letter provides in pertinent part as follows:

35 I write with regard to your January 12, 200[9] correspondence relative to
36 overtime calculations for successive shifts. Your summation of events is
37 in need of some clarification.

¹⁹ The contracts for Locals 419, 3967 and 3643 had expired on June 30, 2008. Local 419 had signed a ground rules agreement in May of 2008, but did not hold a bargaining session until 2009. The Employer had been negotiating successor contracts with Locals 3967 and 3643 during the time period in which the overpayment issue arose.

1
2 During our scheduled January 6, 2009 meeting with Locals 3643 and 3947
3 you did suggest that this topic required "main-table" discussion and I re-
4 iterated to you the Department's position that this was simply a matter of
5 over-payment and not a subject of bargaining. I also called your attention
6 to the December 23, 2008 letter sent to each of the AFSCME locals and
7 copied to you.

8
9 In this letter, I indicated to each of your locals, that the Department,
10 despite its rightful position regarding the overpayment, was willing, in good
11 faith, to meet and provide the locals with an opportunity to present any
12 viable information for our consideration. At the January 6th meeting you
13 informed me that the AFSCME locals were not going to prejudice their
14 position on this subject unless the Department was willing to (a.) engage
15 in "main-table discussions" and (b.) grant "status-quo". Although the
16 Department, without obligation, was willing and prepared to discuss this
17 matter (despite our disagreement as to the actual bargaining status of this
18 issue), the AFSCME locals, through you, declined the opportunity
19 extended by the Department to offer viable information for consideration.
20

21 Neither Breslin nor any of the Local presidents provided any new information to
22 Harris regarding the overtime payment practice at issue. There is no evidence that
23 Breslin or Sullivan told Harris that the shifts for the HOC shift commanders did not
24 overlap. The Employer declined to return to the prior payment practice or bargain the
25 matter on the main negotiating table, and consequently, the Union declined to meet to
26 discuss the issue. Locals 419, 3643 and 3967 filed these charges of prohibited practice
27 on May 20, 2009.

28 OPINION

29 A public employer violates Sections 10(a)(5) and (a)(1) of the Law when it
30 unilaterally alters a condition of employment involving a mandatory subject of bargaining
31 without first bargaining with the union to resolution or impasse. School Committee of
32 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The employer's
33 obligation to bargain before changing conditions of employment extends to working

1 conditions established through past practice, as well as those specified in a collective
2 bargaining agreement. Town of Wilmington, 9 MLC 1694, 1699 (1983). To establish a
3 violation, a union must demonstrate by a preponderance of evidence that there was a
4 pre-existing practice, that the employer unilaterally changed that practice, and that the
5 change impacted a mandatory subject of bargaining. Boston School Committee, 3 MLC
6 1603, 1605 (1977).

7 The Union and the Employer agree that since the mid-1990's, the Employer had
8 paid employees in all three bargaining units for 8 hours of overtime when the employees
9 worked a full successive shift. They also agree that the Employer changed that practice
10 in December of 2008, when it began to pay employees working a full successive shift
11 for 7.5 rather than 8 hours of overtime pay. There is no dispute that the Employer did
12 not bargain with the Union to impasse or resolution over this change. Thus, the pivotal
13 issue in this case is whether the Employer was obligated to bargain over the decision to
14 reduce the number of overtime hours paid to employees working a full successive shift
15 or the impact of that decision.

16 The Employer argues that it was not obligated to bargain over the change
17 because the prior practice was an erroneous and unlawful overpayment to employees
18 and compensated employees for unscheduled overtime, a non-mandatory subject of
19 bargaining. The Union does not contend that its employees should be paid twice for the
20 same work. Rather, the Union argues that there was no mistake and no overpayment:
21 bargaining unit members are entitled to 8 hours pay on a successive shift because they
22 actually work 8 hours. The Union further argues that a so-called "mistake" that
23 continues for many years becomes an established practice that requires bargaining,

1 and the fact that the wages compensate employees for an overtime shift is
2 inconsequential. Alternatively, it argues that here, as in City of Peabody, 9 MLC 1447
3 (1982), the overtime wages are a mandatory subject of bargaining. I address these
4 arguments sequentially.

5 To assess whether the Employer had been mistakenly overpaying employees, I
6 must determine whether the employees actually worked for 8 or 7.5 hours on a
7 successive overtime shift. The Union argues that employees worked 8 hours because
8 they started the successive shift late - after they were properly relieved from their first
9 shift - and they did not receive a meal break on the successive shift. For example, an
10 employee who worked a regular 6:45 a.m. to 3:15 p.m. shift and a successive 2:45 p.m.
11 to 11:15 p.m. shift started the second shift at 3:15 p.m. and ended it at 11:15 p.m.
12 without taking a meal break. Thus, the Union maintains that there is no overlap, and the
13 employee should receive 8 hours of pay for 8 hours actually worked on the successive
14 shift. In this example, the Employer contends that the employee started the second
15 successive shift at 2:45 p.m. – which caused the unlawful overlapping payment – and
16 did receive an unpaid meal break. Thus, the Employer asserts that the employee
17 should receive 8 hours of overtime payment from 3:15 p.m. to 11:15 p.m. less ½ hour
18 for an unpaid meal break, for a total of 7.5 hours.

19 Contrary to the Union's contention, I have found that all custody officers received
20 a meal break on the full successive shift. I have also found that the Employer's payroll
21 practice prior to December of 2008 paid custody officers twice for the overlapping period
22 between the two shifts (in the example; 2:45 p.m. to 3:15 p.m.) regardless of the time
23 that they actually started working the second shift. Thus, even if a custody officer

1 started his successive shift at 3:15 p.m. (after being properly relieved by the incoming
2 officer), the Employer had been paying him since 2:45 p.m. In short, I am persuaded
3 that the Employer had been paying employees twice for the same 30-minute period of
4 time, and that it reduced the number of hours that it paid employees on a successive
5 overtime shift to correct this erroneous overpayment.

6 The Law does not require the Employer to bargain over its decision to conform its
7 payment practices to the dictates of the Commonwealth's Finance Law. See generally,
8 Secretary of Administration and Finance v. Commonwealth Employment Relations
9 Board, 74 Mass. App. Ct. 91 (2009) (employer had no discretion regarding its obligation
10 to follow the tax laws, thus parties agreed that employer had no duty to bargain over the
11 decision to apply reporting and withholding requirements mandated by Federal and
12 State income tax laws); City of Springfield, 12 MLC 1021 (1985) (city not required to
13 bargain about decision to confirm its method of calculating retirement benefits to the
14 requirements of M.G.L. c. 32, a statute not listed in Section 7(d) of the Law).
15 Consequently, the Employer was not obligated to bargain over the decision to stop
16 paying employees twice for the same time period.

17 The fact that the Employer overpaid its employees for an extended time period
18 does not alter this conclusion. Citing City of Boston, 22 MLC 1755 (1996), aff'd sub
19 nom. City of Boston vs. Labor Relations Commission, 48 Mass. App. Ct. 169 (1999), the
20 Union argues that this mistake became an established practice, which the Employer
21 could only alter through bargaining. In the circumstances of this case, I disagree and
22 find that City of Boston does not require this result.

1 In City of Boston, the employer had a long-term practice of paying a weekly wage
2 differential to captains who commanded a specific district as well as those who
3 commanded a special unit. The collective bargaining agreement required the
4 differential for district commanders, but did not expressly require the differential for
5 special unit commanders. The city unilaterally discontinued the wage differential to the
6 special unit commanders, the union challenged the action, and the hearing officer held
7 that the city's action violated the Law. In his decision, the hearing officer questioned
8 whether the differential payment to the special unit commanders was a mistake, while
9 noting that neither party made that claim. On appeal, the Commonwealth Employment
10 Relations Board's (CERB) decision did not address the origin or continuation of the
11 practice for special unit commanders. Thus, neither the hearing officer's speculative
12 dicta nor the holding in City of Boston stands for the proposition that the correction of
13 the Employer's long-term mistake in this case requires decisional bargaining.

14 My inquiry does not end here. Although the Employer's decision to correct the
15 overpayment was excepted from the statutory bargaining obligation, I must still assess
16 whether the Employer was required to bargain over the impacts of that decision on
17 mandatory subjects of bargaining prior to implementation. City of Boston, 30 MLC 23,
18 29 (2003). The only identified impact of this decision was a reduction in the number of
19 overtime hours that the Employer paid to custody officers working a full successive shift.

20 In West Bridgewater Police Association v. Labor Relations Commission, 18
21 Mass. App. Ct. 550 (1984), the Appeals Court held that unscheduled overtime is not a
22 condition of employment and affirmed the CERB's determination that the town was not
23 required to bargain over the impact of a managerial decision where the only impact was

1 a reduction in the employees' ability to perform unscheduled overtime. The West
2 Bridgewater overtime stemmed from the town's practice of assigning police officers to
3 attend court arraignments, and the town reduced overtime opportunities when it decided
4 to assign all arraignments to one member of the bargaining unit. In its decision, the
5 CERB likened the arraignment overtime to the overtime at issue in Town of Billerica, 8
6 MLC 1957 (1982), which was scheduled on an ad hoc basis, and contrasted it with the
7 overtime at issue in City of Peabody, supra, where the employer eliminated a twelve-
8 year practice of regularly paying police officers extra compensation at an overtime rate
9 when they worked twenty minutes of their lunch period. Town of West Bridgewater, 10
10 MLC 1040, 1046 (1983). The CERB has continued the distinction between
11 unscheduled and scheduled overtime, holding in City of Boston, 32 MLC 4, 13 (2005)
12 that the city did not need to bargain over the unscheduled overtime lost by virtue of the
13 city's decision to transfer riot control work to non-unit detectives.

14 The Employer argues that the erroneous reporting of overtime hours at issue
15 concerns unscheduled overtime, thus bargaining was not required. Conversely, the
16 Union focuses on the changed wages, arguing that the wages' overtime origin does not
17 affect the Employer's bargaining obligation. Alternatively, the Union contends that this
18 case is comparable to City of Peabody, supra, where the CERB found that the regular
19 payment of overtime to employees was a guaranteed wage item.

20 The change at issue in this case reduced the amount of overtime paid to custody
21 officers working a successive shift, and I find that these overtime hours were
22 unscheduled rather than scheduled. Overtime on a successive shift stems from a shift
23 commander's decision to fill a post once he or she learns that the post will be vacant on

1 a certain shift. Shift commanders learn which posts will be vacant just prior to the shift,
2 and they decide which posts to fill based on the public safety needs and financial
3 concerns of the Jail or HOC. Shift commanders have the discretion to determine how
4 and where to employ staff and by collapsing and shifting posts, can reduce the number
5 of officers employed on an overtime shift and vary the amount of overtime assigned.
6 Consequently, the overtime at issue here is comparable to the overtime at issue in
7 Town of Billerica because it is assigned on an ad hoc basis and is dependent on
8 discretionary staffing levels. Like the overtime at issue in Town of West Bridgewater, it
9 is a by-product of the Employer's staffing patterns.

10 The Union's contrary reasoning is unpersuasive. Asserting that the reduction in
11 hours only affects wages ignores the heart of the issue: reducing the number of
12 overtime hours that the Employer paid an employee who worked a full successive
13 overtime shift. The rate of pay did not change, only the employee's entitlement to
14 overtime pay during a time that he or she was already receiving straight time pay.

15 Finally, the Union's alternative argument is not meritorious. The Union argues
16 that City of Peabody is comparable to this case because both situations involved
17 changes in overtime wages without a reduction in the number of hours worked.
18 However, the Union points to no evidence demonstrating that the overtime at issue here
19 was regularly scheduled like the lunch period overtime payment was in City of Peabody.
20 Nor does the Union dispute that shift commanders assign overtime on an ad hoc basis
21 and have the discretion to limit or eliminate the number of overtime hours assigned.
22 Accordingly, because the Employer's decision to stop paying employees twice for the

1 same 30 minute time period only impacted unscheduled overtime, the Employer did not
2 unlawfully fail to bargain over the impact of that decision.

3 CONCLUSION

4 Based on the record and for the reasons explained above,²⁰ I conclude that the
5 Employer did not violate the Law. The complaints are dismissed.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

²⁰ I have not addressed the Employer's argument that Union refused its invitation to "be heard" because I have dismissed this case on other grounds.