MASSACHUSETTS LABOR CASES

Commonwealth of Massachusetts
Department of Labor Relations

Administrative Law Decisions

VOLUME 45
2018-2019

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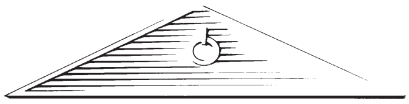

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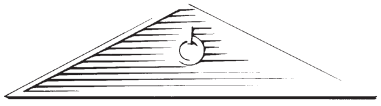

MASSACHUSETTS LABOR CASES

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Alphabetical Listing—Petitioner v. Respondent

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Cumulative Decisions Reported — July-October 2018

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After the City had repudiated a settlement agreement regarding the filling of a City Hall security position, the CERB affirmed a compliance decision of a Hearing Officer which ordered the City to pay the Superior Officers Federation more than $138,000 in back pay for stipends it had avoided paying by not honoring the settlement agreement. The CERB also affirmed the Hearing Officer's award of interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly. *City of Boston and Boston Police Superior Officers Federation*, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision), 45 MLC 78

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The CERB affirmed a Hearing Officer's decision that the City of Boston must pay the Boston Police Superior Officers Federation more than $138,000, plus statutory interest, to make the Federation whole for its failure to implement a 2005 settlement agreement requiring the City to fill a City Hall security position with a bargaining unit member. The CERB rejected the City's argument that the agreement was unenforceable due to its interference with the City's non-delegable rights and noted that a compliance hearing "does not provide a second chance to the party alleged to be in non-compliance to raise . . . arguments, that it failed to properly appeal, either to the CERB or to the Appeals Court." *City of Boston and Boston Police Superior Officers Federation*, MUP-06-4699 (October 30, 2018) (CERB Decision on Appeal of Hearing Officer's Compliance Decision), 45 MLC 78

Rejecting new evidence submitted for the first time on appeal, the CERB declined to overturn a Hearing Officer's decision on compliance that required that MassDOT post a notice at two locations where employees typically congregate. MassDOT had requested the record be reopened after the Hearing Officer's decision had issued and had submitted affidavits and other materials to show that the notice had in fact been posted at the two locations. *Massachusetts Department of Transportation and United Steelworkers, Local 5696*, SUP-14-3576 and SUP-14-3640, (August 21, 2018) (Decision on Appeal Hearing Officer's Compliance Decision), 45 MLC 5

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111.82 police

In conjunction with an increase in the work week for police officers, from 37.5 to 40 hours, a JLMC Panel issued an award requiring a .5% increase in each year of a three-year collective bargaining agreement between the Town of Chelmsford and the Fraternal Order of Police, Lodge 110. The Panel also increased the shift differential from $1.73 to $2.00 but allowed the Town's proposal that officers would no longer be compensated on an overtime basis for firearms training. *Town of Chelmsford and Fraternal Order of Police, Lodge 110*, JLM-16-5531 (September 11, 2018) (Interest Arbitration Award), 45 MLC 61

111.824 patrol officers

Arbitrator denied a grievance filed on behalf of a patrol officer who had been removed from Section 111F status by the City after it received a determination from a PERAC medical panel that he was not incapacitated as a result of a work-related injury. A subsequent panel reached the opposite decision and the Union had sought backpay and benefits for the approximately six-month period he had been removed from Section 111F status. *City of Lowell and Lowell Police Association*, ARB-18-6517 (August 23, 2018) (Arbitrator's Decision), 45 MLC 7

111.85 dispatchers

Town did not violate its contract with Union when it refused to provide a right of first refusal to full-time dispatchers before offering an unfilled shift to part-time, non-bargaining unit dispatchers. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLC 71

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Town did not have just cause to discharge a public works employee who forgot to leave his vehicle in park and caused damage to both the vehicle and private property. The Arbitrator ruled that the employee had committed a first offense under the contractual disciplinary procedure which required a written warning be imposed. The Town was not able to show that the employee had also been insubordinate when a police officer administered a breathalyzer test following the accident, a test which the employee ultimately passed. The Arbitrator further determined that the Town could not use an earlier incident where the employee had responded to an off-duty call for service while intoxicated to support its decision to terminate him. The earlier incident had not resulted in any disciplinary action, only a requirement that the employee complete a substance abuse program. *Town of Williamstown and IUE-CWA, Local 81256*, ARB-18-6474 (July 20, 2018) (Arbitrator's Decision), 45 MLC 1

113.1101 assignment of overtime

Contract provision governing assignment of overtime was neither clear nor unambiguous resulting in the Arbitrator reviewing parties' bargaining history to determine that the Town did not violate the contract when it first offered an open shift to a part-time non-unit employee rather than to a full-time dispatcher on an overtime basis. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLC 71

113.123 injury on duty leave

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113.22 past practices

Arbitrator found that there was no binding past practice or contractual requirement that prevented the City from relying on a determination from a PERAC medical panel to remove a police officer from Section 111F status. *City of Lowell and Lowell Police Association*, ARB-18-6517 (August 23, 2018) (Arbitrator's Decision), 45 MLC 7

113.24 bargaining history

After finding the parties' contract neither clear nor unambiguous, Arbitrator examined the bargaining history which established that the Union had insisted on a right of first refusal for full-time dispatchers to fill open shifts on an overtime basis and the Town had clearly rejected this proposal. This history, together with a reading of the parties' contract as a whole, provided the basis for the Arbitrator's decision to deny the Union's grievance protesting the Town's decision to offer an open shift to a part-time, non-unit dispatcher without first providing the opportunity a full-time dispatcher on an overtime basis. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLC 71

113.38 timeliness

Noting that the agreement contained a "Stability of Agreement" provision stating that the failure of either party to insist upon performance of any of the terms of the agreement will not be considered a waiver or relinquishment of a right, the Arbitrator rejected Town's argument that a grievance concerning assignment of overtime was not timely filed and reached the merits of the dispute. The Town had assigned overtime to part-time, non-bargaining unit employees on three occasions prior to the incident giving rise to the grievance and had argued that the grievance was untimely where it had been filed more than 30 days after the incident first arose. *Town of Holden and RECCA, MCOP, Local 450*, ARB-17-5949 (October 5, 2018) (Arbitrator's Decision), 45 MLC 71

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TOPICAL INDEX OUTLINE — 2018-2019

In the Matter of STOUGHTON SCHOOL COMMITTEE

and

STOUGHTON TEACHERS ASSOCIATION

Case No. MUP-17-5762

65.23 wearing buttons

October 2, 2018
Kerry Bonner, Hearing Officer

Joseph A. Emerson, Jr., Esq.	*Representing the Stoughton School Committee*
Mark A. Hickernell, Esq.	*Representing the Stoughton Teachers Association*

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Stoughton School Committee (School Committee) violated Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by ordering bargaining unit members at Stoughton High School to remove buttons which stated "I Support Stoughton Teachers." Based on the record and for the reasons explained below, I conclude that the School Committee violated the Law as alleged.

STATEMENT OF THE CASE

On January 30, 2017, the Stoughton Teachers Association (Association) filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the School Committee had engaged in prohibited practices within the meaning of Section 10(a)(1) of the Law. On May 3, 2017, a DLR investigator issued a Complaint of Prohibited Practice (Complaint). On May 15, 2017, the School Committee filed an Answer to the Complaint. On May 8, 2018, the Association filed a Motion to Exclude the Testimony of Mark Schaefer and an Arbitration Decision (Motion). The School Committee filed an Opposition to the Motion, in which it advised that it no longer intended to call Mark Schaefer as a witness. On May 17, 2018, I issued my ruling allowing the School Committee's Motion to exclude an arbitration decision. I conducted a hearing on June 20, 2018. Following the hearing, the Association and School Committee each timely filed post-hearing briefs. On the entire record, including my observation of the demeanor of witnesses, I make the following findings.

STIPULATIONS OF FACT

1. The Association is an employee organization within the meaning of the Law.

2. The Town of Stoughton (Town) is an employer within the meaning of the Law.

3. The [School] Committee is the Town's representative for the purpose of collective bargaining with school employees.

4. The Association is the exclusive bargaining representative for certain employees employed by the [School] Committee, including teachers and professional employees of the Stoughton Public Schools.

5. On or about January 17, 2017, certain bargaining unit employees at Stoughton High School wore buttons to work which stated "I Support Stoughton Teachers."

6. On or about January 17, 2017, Stoughton High School Principal Juliette Miller (Miller) directed those employees wearing buttons referenced in paragraph 5, *supra*, to remove and not wear those buttons.

7. On or about January 19, 2017, Stoughton Public Schools Superintendent Marguerite Rizzi (Rizzi) held an emergency faculty meeting at the High School at which she reiterated the directive described in paragraph 6, *supra*.

8. At all relevant times, Miller and Rizzi acted as agents of the [School] Committee.

9. The employees wearing buttons referenced in paragraph 5, *supra*, complied with Miller's and Rizzi's directive.

FINDINGS OF FACT

On January 11, 2017, Rizzi disciplined three teachers at Stoughton High School, SM, JR, and HM,[1] in connection with complaints that they had bullied a student after an incident for which the student was disciplined.[2] The letter to SM states, in relevant part:

> This is a letter of reprimand which shall be placed in your personnel file for violating the Stoughton Public Schools' Employee Handbook. The Handbook provides that "As leaders and educators in the Stoughton Public Schools, we are committed to providing an educational climate that is conducive to student engagement and learning."
>
> The reason for this action is that an investigation into a bullying complaint that was filed against you revealed that while you did not engage in bullying toward the student, you engaged in a lengthy discussion about the student with the students in your English class and commented on the extent of the discipline he received from the administration. In doing so, you failed to provide an educational climate conducive to student engagement and learning. When the students discussed rumors regarding the student and the discipline imposed, the educational environment was disrupted and you should have intervened to stop the behavior, not join the disruptive behavior.

1. The parties agreed to use pseudonyms for these three teachers, and for the student at issue, who will be referred to as Student F.

2. Additional details regarding Student F's conduct, which involved the use of a swastika, is provided in statements read to the School Committee by Association leaders reprinted below.

> Therefore, I have concluded that you failed to perform the roles and responsibilities of a teacher as defined in the Handbook. This did not advance a culture of learning for anyone; rather, it was unprofessional and was disruptive to the educational process for the students in your class.
>
> It is well established that public school teachers hold a position of special public trust. They are responsible for more than teaching basic academic skills and the students must be able to rely on their teachers to exercise sound judgment and maintain appropriate boundaries, even when they themselves may be unable to do so. I have concluded that you failed to exercise sound judgment when you engaged in behavior, discussing the appropriateness of a student's discipline and conduct, with students.
>
> It is for these reasons that I am placing this letter of reprimand in your personnel file.

Rizzi also issued JR a written reprimand. The letter of reprimand is substantially similar as the letter to SM, with the disciplined conduct described as the following, in relevant part:

> Specifically, you failed to perform the roles and responsibilities of a teacher as defined in the Handbook when you pulled a student aside during class to make inquiry about the discipline that was imposed on another student. This did not advance a culture of learning for anyone; rather, it was unprofessional and was disruptive to the educational process for the students in your class. In addition, you had unnecessary communications with colleagues about a student and the consequences imposed for his discipline.

Lastly, the disciplinary letter to SM states, in relevant part:

> This is to inform you that in accordance with Massachusetts General Laws Chapter 71, Section 42D, it is my intention to suspend you for twenty (20) days. This suspension shall begin on January 25, 2017.
>
> The reasons for this action are that you violated the Stoughton Public Schools Employee Handbook, state law and the basic principles of teaching by engaging in bullying behavior toward a student, by acting unbecoming of a teacher, and by being untruthful during the investigation of a civilian complaint that you bullied a student. The specifics are as follows:
>
> 1. You engaged in bullying behavior toward a student in violation of the Bullying Prevention and Intervention Plan set forth in the Stoughton Public Schools' Employee Handbook and defined by state law. This is supported by the investigation into the bullying complaint.
>
> - Specifically, your repeated communication to students and to teachers targeted a student who had been disciplined for conduct about which you did not have direct knowledge nor did you have direct knowledge of the actual discipline imposed. As a result of your actions, the student did not want to attend school and was emotionally distraught to the level that Principal Miller and his mother expressed concern about his emotional well-being.
>
> - In addition, by contacting and reporting to the college to which he applied that this student had a disciplinary infraction and recklessly reporting inaccurate information, you unnecessarily targeted the student. You had the option of simply removing your recommendation from Naviance, but you chose to make direct contact for the purpose of interfering with the student's future without knowing any of the specifics of his discipline.
>
> - In addition, these actions amounted to bullying but they also are in violation of the Stoughton Public Schools' Employee Handbook and are blatantly contrary to the mission of the school. Specifically, you communicated unnecessarily with teachers and students about the student and contacted the college misrepresenting the facts relating to his discipline. The student learned of your communications and became upset and did not want to go to school. By acting contrary to the mission of the school, you exhibited behavior unbecoming of a teacher.
>
> For these reasons, I intend to suspend you for ten (10) days for bullying the student and ten (10) days for violating the Handbook by acting in a manner contrary to the mission of Stoughton High School and demonstrating conduct unbecoming of a teacher. You shall serve these 10 day suspensions concurrently. This conduct fundamentally disrupts the trust and nurturing relationships necessary to achieve any school's mission. It is critical that all students be treated fairly and civilly when they are in the hands of their educators. Your actions targeted the student and caused him to suffer emotionally. This behavior has no place in the educational process.
>
> I intend to suspend you for an additional ten (10) days for being intentionally untruthful during the investigation of this matter. The integrity and efficiency of an investigation is of paramount importance for Stoughton Public Schools to be accountable to itself and to the public it serves. By deliberately being untruthful when answering questions at your interview with the investigator, you shattered the integrity of the investigation.

On January 12, 2017, Melanie Ingrao (Ingrao), Association Grievance and Negotiation Chair, and Mollie O'Connell (O'Connell), a member of the Association's Grievance and Negotiation Committee, discussed what actions the Association could take in response to the disciplinary actions described above.[3] After considering various options, they decided to suggest that members wear buttons with the statement "I Support Stoughton Teachers."[4]

On January 13, 2017, the Association held a meeting at which approximately 50-60 high school teachers attended. O'Connell and Ingrao began the meeting by explaining the discipline that had been given to the three teachers referenced above. The unit members were asked about wearing the buttons as support, and the overwhelming response was in favor of wearing the buttons. At this meeting, the unit members discussed the fact that they felt the teachers were disciplined unfairly for conduct that every teacher has engaged in, specifically, discussing a student with other students and teachers. When unit members asked what they should say if students asked why they were wearing buttons, O'Connell and Ingrao advised them to simply say that the buttons are a message of support for their fellow teachers.

Following the meeting described above, the buttons were made and distributed, and high school teachers wore them to school

3. The Association also filed grievances in connection with the discipline.

4. Teachers had worn buttons with this message in the past during contract negotiations, which were also ongoing at this time. The message had also been displayed on signs that were posted on front lawns. The administration had never prohibited teachers from wearing such buttons. O'Connell and Ingrao also considered, and then decided against, including the statement, "I am an Upstander" on the buttons, as they felt it had a direct connection to a disciplined teacher who was teaching about upstanding during the Holocaust.

to act together for the purpose of collective bargaining or other mutual aid or protection;

and

to refrain from all of the above.

WE WILL NOT prohibit unit members from wearing "I Support Stoughton Teachers" buttons.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action to effectuate the purposes of the Law:

- Rescind the directive prohibiting teachers from wearing "I Support Stoughton Teachers" buttons.

[signed]
STOUGHTON SCHOOL COMMITTEE

DATE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

* * * * * *

In the Matter of the Arbitration Between: TOWN OF HOLDEN

and

RECCA, MCOP, Local 450

ARB-17-5949

111.85	***dispatchers***
113.1101	***assignment of overtime***
113.24	***bargaining history***
113.38	***timeliness***

October 5, 2018
Timothy Hatfield, Arbitrator

Daniel Fogarty, Esq.	*Representing RECCA, MCOP, Local 450*
Corey Higgins, Esq.	*Representing Town of Holden*

ARBITRATOR'S DECISION

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

INTRODUCTION

RECCA[1], MCOP, Local 450 (Union) filed a unilateral petition for Arbitration. Under the provisions of MGL Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Timothy Hatfield, Esq. to act as a single neutral arbitrator with the full power of the Department. The undersigned Arbitrator conducted a hearing at the Holden Police Station on December 20, 2017.

The parties filed briefs on March 20, 2017.

THE ISSUE

The Parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Did the Employer violate the collective bargaining agreement by the manner in which it filled unfilled shifts? If so, what shall be the remedy?

The City proposed:

Did the Town violate Article 18, Section 18.1 of the collective bargaining agreement between the Town of Holden and the Regional Emergency Communications Control Association, MCOP, Local 450 when it scheduled a part-time dispatcher for a shift on January 31, 2017 that became open in advance of the shift when the Town

1. The Union's official name has been referred to alternatively as the Regional Emergency Communications Control Association and the Regional Emergency Communications Center Association.

granted leave to a full-time dispatcher for that shift? If so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issues to be:

1. Is the grievance procedurally arbitrable?

2. If so, did the Town violate the collective bargaining agreement when it scheduled a part-time dispatcher for an open shift on February 3, 2017, without offering the shift to full-time dispatchers first?

3. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Agreement) contains the following pertinent provisions:

> **ARTICLE 1 RECOGNITION**
>
> The Town of Holden recognizes the Regional Emergency Communication Control Association, MCOP, Local 450 (the Union) as the exclusive bargaining representative for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment for all full-time dispatchers of the Town of Holden and part-time dispatchers of the Town of Holden who regularly work twenty-three (23) or more hours per week, and excluding all police officers, administrator of dispatching, clerical, managerial, confidential, and casual employees, and all other employees of the Town of Holden.
>
> **ARTICLE 2 MANAGEMENT RIGHTS (In Part)**
>
> 2.1 The Town will not be limited in any way in the exercise of the functions of management and will have retained and reserved unto itself the right to exercise, without bargaining with the Union, all powers, authority and prerogatives of management specified below:
>
> t. the mandatory requirement and assignment of overtime including recall to duty and holding employees over at the end of the employee's shift;
>
> u. the determination of which employees, if any, are to be called in for work at times other than their regularly scheduled hours; …
>
> **ARTICLE 5 GRIEVANCE PROCEDURE (In Part)**
>
> 5.1 A Grievance is defined as an actual dispute arising as a result of the application or interpretation of one or more express terms of this Agreement and the fringe benefits manual of the Town.
>
> 5.2 The parties understand that the grievance procedure is a procedure for the prompt resolution of disputes. Therefore, it is agreed that any grievance by either party shall be commenced within thirty (30) days of the time of the incident or event upon which the grievance is based, or within thirty (30) days of the time the grieving party knew, or should have known (through the exercise of reasonable diligence), of such occurrence. For this purpose, the knowledge of any employee aggrieved or the knowing of the Union steward shall be deemed knowledge of the Union. Whether this time limitation shall have been satisfied in any particular case may be a subject of a grievance and arbitration, but if such time limitation shall not be satisfied, or shall be found not to have been satisfied, then no relief through grievance or arbitration may be granted. …
>
> **ARTICLE 10 OVERTIME (In Part)**
>
> 10.2 Assignment of Overtime
>
> b. The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit. …
>
> **ARTICLE 18 ASSIGNMENT OF NON-BARGAINING UNIT PERSONNEL**
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> 18.1 The Town may assign part-time dispatchers who are not in the bargaining unit to perform dispatcher duties from time to time.
>
> 18.2 In the event of an emergency situation or due to operational necessity as determined by the Police chief or his designee, police officers, including supervisory personnel, and administrator of dispatching, may be assigned to perform dispatching duties.
>
> **ARTICLE 27 STABILITY OF AGREEMENT (In Part)**
>
> 27.2 The failure of the Town or the Union to insist on any one or more incidents, or upon performance of any of the terms or conditions of the Agreement, will not be considered as a waiver or relinquishment of the right of the Town or the Union to future performance of any such terms or conditions, and the obligations of the Town and the Union to such future performance will continue in full force and effect.

FACTS

The Town of Holden (Town) and the Union are parties to a first collective bargaining agreement that was in effect from August 19, 2016 to June 30, 2018. The Union's bargaining unit consists of all full-time dispatchers and part-time dispatchers who regularly work twenty-three or more hours per week. At the time of this arbitration there were no regular part-time dispatchers.

Prior to the negotiation of the first collective bargaining agreement, if a full-time dispatcher called out for a shift prior to the date of the shift, the Town offered the shift to part-time dispatchers before offering it to full-time dispatchers as an overtime opportunity.

During the negotiations for the first collective bargaining agreement, the Union submitted a proposal seeking to have open shifts offered to full-time dispatchers as an overtime opportunity prior to the shifts being offered to non-bargaining unit part-time dispatchers. The Town rejected this proposal stating that the right of first refusal would be very expensive, and cost the Town $93,000 in annual overtime which it was not budgeted for. The parties further discussed the meaning of an unfilled shift. The Town's position was that it had the right to fill a shift with a part-time dispatcher if it was open prior to the date of the shift and only had to offer it to a full-time dispatcher if the opening occurred on the same day. Once filled by a part-time dispatcher, it was no longer an open shift. The Union disputed that interpretation.

At the conclusion of bargaining, the parties agreed to the following relevant articles in the collective bargaining agreement:

> 10.2 Assignment of Overtime
>
> b. The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary over-

> time prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit. …
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> ARTICLE 18 ASSIGNMENT OF NON-BARGAINING UNIT PERSONNEL
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> 27.2 The failure of the Town or the Union to insist on any one or more incidents, or upon performance of any of the terms or conditions of the Agreement, will not be considered as a waiver or relinquishment of the right of the Town or the Union to future performance of any such terms or conditions, and the obligations of the Town and the Union to such future performance will continue in full force and effect.

The parties ratified and executed the first collective bargaining agreement in August 2016. Shortly after ratification, then Union President Sean McKiernan[2] (McKiernan) asked Chief Armstrong to clarify whether full-time dispatchers have the right of first refusal for open shifts. Chief Armstrong indicated that the Town would continue to follow the same procedure that it had followed prior to the adoption of the collective bargaining agreement.

Prior to September 30, 2016, Union Attorney Fogarty again raised the issue of the right of first refusal for full-time dispatchers. In a letter dated September 30, 2016, Town Attorney Moschos reiterated that full-time dispatchers did not have the right of first refusal to all shifts, and the Town would continue to fill shifts and offer overtime in the manner it had prior to the adoption of the collective bargaining agreement. The Union took no further action against the Town after either the Chief's response, or Attorney Moschos' response.

Max Jette (Jette) was elected Union President shortly after finishing his probationary period in January 2017. Jette was scheduled to work on February 3, 2017. On January 31, 2017, Jette put in for a holiday day off for the February 3, 2017 shift. The Town offered the shift to a part-time dispatcher and did not offer the shift to a full-time dispatcher as an overtime opportunity. As a result, on February 20, 2017, the Union filed a grievance over the Town's refusal to offer open shifts to full-time dispatchers in violation of the collective bargaining agreement. The grievance was denied by the Town at all steps of the grievance procedure and resulted in the instant arbitration.

POSITIONS OF THE PARTIES

Procedural Arbitrability

THE EMPLOYER

The Union's Step I grievance was not properly grieved pursuant to Section 5.2 of the parties' collective bargaining agreement. Under this section, a grievance must be filed within thirty days of the time the grieving party knew, or should have known (through the exercise of reasonable diligence) of the occurrence of the incident or event upon which the grievance is based.

In the instant case, the Union did not submit its grievance until February 20, 2017, when it filed the grievance with Chief Armstrong. The grievance alleges that the Town violated the collective bargaining agreement when it assigned a shift to a part-time employee outside the bargaining unit after the shift was called out on January 31, 2017. The subject of the Union's grievance was initially raised by the Union in September 2016. The Town, through Attorney Moschos, specifically informed the Union that its claim that full-time dispatchers have the right of first refusal to shift vacancies was not accurate and that the Town would continue to follow the past practice and the contract. The Union therefore, knew or should have known (through the exercise of reasonable diligence) in September 2016, that the Town disputed the Union's claim and intended to continue to assign overtime based on the contract and past practice. The Union therefore had thirty days from September 30, 2016 to file a grievance and failed to do so.

The collective bargaining agreement states that the arbitrator has no power to add to, subtract from, or modify the agreement. Only by disregarding the time lines set out in the agreement could the arbitrator rule on the merits. Therefore, according to the contract language, the arbitrator is foreclosed from adjudicating the merits of the Union's grievance. As the Union has failed to comply with the express requirements of Section 5.2 of the collective bargaining agreement, the grievance is not procedurally arbitrable.

THE UNION

Shortly after settling the parties' first collective bargaining agreement, McKiernan, the Union President at the time, approached Chief Armstrong to clarify whether full-time dispatchers should be offered the opportunity to work unfilled shifts before the Town offered those shifts to employees outside the bargaining unit. Chief Armstrong claimed that he was entitled to continue using part-time employees to fill in for full-time dispatchers. Subsequently, Attorney Moschos sent a letter to the Union alleging that Union members were not entitled to the right of first refusal over non-unit part-time dispatchers where there was an advance request for time off. The Union did not file a grievance at this time.

In January 2017, Jette was elected Union president shortly after completing his probationary period. At this time, the Union focused its concern that the Chief was violating the collective bargaining agreement by offering shifts to part-time employees outside the bargaining unit before offering the shifts to unit members as voluntary overtime. Jette raised the issue with Chief Armstrong, but the Chief persisted and offered a February 3, 2017 shift to a part-time employee without offering the shift to unit members as voluntary overtime. In light of the Chief's actions, the Union filed a grievance over the issue and then properly processed the grievance at each step of the grievance procedure.

The Union's grievance is procedurally arbitrable, as it was filed and processed in a timely manner. The precipitating incident occurred at the earliest on January 31, 2017, when the Chief hired

2. McKiernan has since been promoted to Patrol Officer and is no longer a member of the bargaining unit.

an employee outside the bargaining unit to work on February 3, 2017. The Union filed its grievance within thirty days of the incident, and properly processed the grievance at each step. The Town's contention that the Union is prevented from challenging a violation of the collective bargaining agreement because it should have known the Chief would violate the collective bargaining agreement months before the incident at issue is not supported by the facts, the collective bargaining agreement, or the law.

The Town's argument misappropriates an aspect of the grievance procedure intended to toll the deadline to file a grievance in the event that a grievant could not have reasonably known that a violation occurred. Nothing in the collective bargaining agreement suggests that the Union, members of the bargaining unit, or even future members of the bargaining unit will be precluded from asserting their rights should they fail to bring a grievance during one narrow window of time after the Town indicates that a difference of opinion related to the collective bargaining agreement exists. If the Town truly intended for the grievance procedure to include such uncommon requirements, it was responsible for drafting clear, unequivocal language to that effect and placing the Union on notice during bargaining. Yet, the plain language of the collective bargaining agreement does not support its position, and the record does not include any evidence that the Town previously asserted that the grievance procedure would operate as it now suggests.

Finally, Article 27 of the collective bargaining agreement explicitly considers and rejects the Town position. The parties agreed to include a provision protecting both parties' right to future performance of the terms of the collective bargaining agreement, even if either party previously failed to enforce those terms. This language specifically protects the Union's right to enforce the terms of the collective bargaining agreement going forward, even if it did not challenge similar actions in the past. Neither party waives its right to enforcement merely by failing to insist at any one time on the performance of its term. As a result, the Union's grievance is procedurally arbitrable.

Arguments on the Merits of the Case

THE UNION

The Town violated the collective bargaining agreement by offering a non-unit part-time dispatcher the opportunity to work the evening shift on February 3, 2017, before offering unit members the opportunity to work the shift. The collective bargaining agreement unequivocally requires the Town to offer unfilled shifts to unit members before offering the shift to employees outside the bargaining unit. Even if the collective bargaining agreement is susceptible to multiple, reasonable interpretations, it must be interpreted against the Town because it drafted the provisions at issue. Moreover, the Town's position is not supported by a legitimate past practice, or relevant bargaining history.

The Town violated the Plain Meaning of the Collective Bargaining Agreement

When interpreting a collective bargaining agreement, an arbitrator must first determine whether the meaning of the provision at issue can be determined by considering the plain meaning of the language within the context of the agreement as a whole. Where the agreement is clear and unambiguous, the arbitrator should not look beyond it to other evidence. Article 10.2 states that:

> The Town shall offer unit members the opportunity to work an unfilled shift, which the Town intends to fill, as voluntary overtime prior to offering that unfilled shift to an employee outside the bargaining unit. The provision of initial voluntary overtime opportunity shall not apply to part-time employees who are not in the bargaining unit.

There is only one reasonable interpretation of this provision. The first sentence provides unit members the opportunity to work voluntary overtime before the Town offers an unfilled shift to an employee outside the bargaining unit, and the second sentence clarifies that voluntary overtime will not be provided to non-unit part-time employees.

In this case, Jette was scheduled to work from 3:00 p.m. to 11:00 p.m. on February 3, 2017. On January 31, 2017, Jette scheduled a holiday day off for the February 3, 2017 shift. As soon as Jette took the shift off, the shift was unfilled. No one was assigned to work that shift. It is also clear from the record that the Town intended, and in fact did fill the shift. As a result, a non-unit part-time dispatcher accepted the shift before any unit member had a chance to accept the work. The Town's actions constitute a blatant violation of the collective bargaining agreement.

The Town argues that the February 3, 2017 shift was not an unfilled shift, within the meaning of the collective bargaining agreement, because Jette scheduled his leave of absence in advance and then the shift was filled by a part-time dispatcher. Attorney Moschos testified that "if a full-time dispatcher asks in advance to have a day off, the chief will first schedule a part-time dispatcher; so the shift becomes filled, it's not unfilled." The circularity of Attorney Moschos' logic exposes the unreasonable nature of the Town's interpretation of the collective bargaining agreement. The Chief cannot fill a shift with a part-time employee unless the shift was unfilled in the first place. Understanding that the shift was unfilled, and the Town intended to fill it, the Town had an obligation to first schedule a unit member, rather than a part-time dispatcher.

If the Town wanted the term "unfilled shift" to carry a special meaning, it should have clarified that meaning in the collective bargaining agreement. However, nothing in the collective bargaining agreement indicates that a shift is only unfilled at some point in time. Moreover, nothing in the collective bargaining agreement contemplates some other type of shift, besides either filled or unfilled. The only reasonable conclusion is that a shift is unfilled when no one is scheduled to work the shift. This occurs any time the employee originally assigned to work the shift takes paid or unpaid leave.

The Town may also argue that Article 10 is limited by Article 18. However, there is no dispute that part-time dispatchers outside the bargaining unit have performed, and may continue to perform bargaining unit work at times. Article 10 specifically addresses when the Town may assign non-unit personnel to work in dispatch, absent exigent circumstances. Article 18 does not limit the benefits provided to bargaining unit members in Article 10, and it cannot be read to be in conflict with the right of first refusal. Instead a proper reading of Article 10 and Article 18 together shows that the Town is allowed to hire non bargaining unit personnel to perform bargaining unit work from time to time, after it has given bargaining unit members the opportunity to work voluntary overtime.

Leo J. Peloquin, Esq,
Noris, Murray and Peloquin, P.C.

PROMOTION

In *Town of Blackstone and Blackstone Police Union, Local 442, AFL-CIO*, 44 MLC 138 (February 23, 2018), Hearing Officer Margaret M. Sullivan found that the Town of Blackstone (Town) violated Section 10(a)(3) of the Law by discriminating against former Union president Maxwell Hurwitz (Hurwitz) for engaging in concerted, protected activities, which included objecting to a proposed consent form for a background check for promotional candidates.

Hurwitz was an active Union president who spoke out at Town Meeting on matters that pertained to unit members' terms and conditions of employment, including the installation of GPS devices in police cruisers. He also negotiated with the Town over issues concerning compensatory leave, the impacts of Narcan requirements on unit members, and in six instances, to reduce or remove discipline that a unit member previously incurred. Further, Hurwitz was involved in concerted, protected activity in the months prior to the Employer's decision to bypass him for promotion. He represented the Union in successor contract negotiations with the Town. Beginning in January 2016, Hurwitz also attended the four to six meetings in which the Employer and the Union successfully negotiated over the two-part promotional process to fill the three vacancies for sergeant. Additionally, Hurwitz met with the Police Chief to protest the April 27, 2016 consent, which the Chief proposed that unit members execute as part of the promotional process for the sergeant position. Hurwitz characterized the April 27, 2016 consent as too threatening and too invasive and informed the Chief that he had advised his unit members not to execute it. The Chief was not happy with Hurwitz' rebellious side. Thereafter, the Town posted the three promotional opportunities for sergeant and used an assessment center and a hiring panel to evaluate the candidates. Although Hurwitz ranked third of the six candidates after the promotional process, the Town bypassed him in favor of a candidate who was ranked fourth.

The Hearing Officer rejected all but two of the Town's cited reasons for the bypass as not being legitimate reasons. The two legitimate reasons that the Town provided were that Hurwitz had less seniority than the fourth-ranked candidate and that the Town recently had received documents with derogatory information about Hurwitz from a prior employer. However, the Hearing Officer concluded that despite Hurwitz's seniority date, the Town would have promoted him but for his concerted, protected activity because it had promoted another candidate who had nearly the same seniority date as Hurwitz. Also, the Hearing Officer found that the Town could not have relied upon the information from Hurwitz's prior employer as the reasons for his bypass because it decided not to promote him more than a week before it received the documents relating to his prior employment.

EMPLOYER BARGAINING OBLIGATIONS

To bargain in good faith is to allow discussion on all proposals, to listen to each other's arguments, and to show a willingness to consider compromise. In *Newton School Committee and Newton Public Schools Custodians Association*, 44 MLC 178 (March 14, 2018), Hearing Officer Kerry Bonner found that the Newton School Committee (School Committee) failed to bargain in good faith with the Union when it preconditioned its willingness to bargain on the Union's acceptance of its outsourcing proposal. The Hearing Officer further held that the School Committee engaged in surface bargaining when it failed to make any counterproposals, and that it failed to timely comply with an information request. However, the School Committee did not engage in bad faith bargaining or retaliated against Union activity when it made the outsourcing proposal.

On December 18, 2014, the School Committee and Union entered into negotiations for a successor contract to the 2011-2014 CBA and participated in between eight and eleven bargaining sessions. On July 23, 2015, the School Committee proposed that the parties delete Article XXIX, Work Jurisdiction, from the 2011-2014 CBA, which gave custodians exclusive right in their work, and to substitute for it language allowing the School Committee to outsource the work of all custodial positions in its discretion. Outsourcing the work would have added up to $3 million in savings. Accordingly, the School Committee sent its outsourcing proposal to the Union. It met with the Union several times to bargain over the outsourcing proposal, each submitting various proposals and/or counterproposals. At the start of the negotiations, the School Committee made it clear that it was not willing to proceed on any other issues until the outsourcing proposal was resolved. The Union also advanced multiple proposals to address the outsourcing issue, however the School Committee rejected "all" of them or "to be discussed later". When the School Committee did respond, it responded to the Union's counterproposals, and, even then, it rejected all of the Union's concerns.

The Hearing Officer found that the School Committee failed to bargain in good faith by conditioning its willingness to make economic proposals on the Union's acceptance of an outsourcing proposal. While the School Committee was not required to compromise or concede its position on outsourcing, it was obligated, at minimum, to discuss other economic proposals before it resolved the outsourcing issue. The Hearing Officer also found that the School Committee engaged in bad faith during negotiations by failing to make wage proposals and rejecting or setting

aside the majority of the Union's proposals without making any counterproposals.

The Hearing Officer, however, did not find that the School Committee's proposal to outsource the entire bargaining unit was part of its bad faith conduct as the School Committee continued to show a willingness to revise and discuss the proposal. The Hearing Officer rejected the Union's argument that the School Committee engaged in retaliation by making an outsourcing proposal in response to its filing of grievances because the outsourcing proposals were not "adverse actions". But even if they were, the School Committee met its burden of persuasion by showing that it would have pursued the outsourcing proposal even if the Union had not filed the grievances because of the monetary savings the outsourcing would provide.

Additionally, the Union had requested information from the School Committee regarding the revenue that the school obtained from renting its facilities which was relevant to the making of its proposals. The School Committee took three months to respond to this information request. The Hearing Officer found that the School Committee unreasonably delayed furnishing the requested information when it took three months to respond to this request, did so only after this action was brought by the Union, and admitted that the request "fell through the cracks."

DISCIPLINE

In City of Methuen and New England Benevolent Association, Local 117, 44 MLC 203, (March 23, 2018), Arbitrator James Sunkenberg found that the City had just cause to discipline Police Dispatcher Sherri Ventrillo (Ventrillo) for incompetently handling a dispatch situation when she failed to contact the victim and advise him that police response would be delayed. The Arbitrator, however, found the five-day suspension to be excessive and reduced it to a two-day suspension.

On June 5, 2016, Ventrillo received a call from a victim caller (caller) who reported almost getting into a physical confrontation with an erratic driver. The caller dialed 911 and reported this incident. Accordingly, Officer Velazquez received this information from Ventrillo. Velazquez was additionally told that the victim was out in front of the Market Basket that the erratic driver had left the parking lot traveling in an unknown direction. However, Ventrillo never informed the Commanding Officer that the call for service was more substantial than just an erratic operator. Not long after this conversation, Velazquez was redirected to report to another call which caused a delay in police response. At no time did the Dispatcher attempt to notify the victim or the commanding officer that response would be delayed. Eventually, an officer did arrive late at the scene, but was unable to locate the caller. Following an investigation of this incident, the City issued Ventrillo a Notice of Discipline listing four alleged violations of the Police Department's Rules and Regulations and imposed a five-day unpaid suspension. The Union grieved the suspension where the City dismissed two of the four initial allegations against Ventrillo in Step 2 but affirmed the five-day suspension.

Upon hearing the Union's challenge, the Arbitrator upheld the City's finding of just cause to discipline the dispatcher for violating Section 8.2.n of the Operations Manual, and, derivatively, Rule 5, which require the reporting of any delay of response time to victims. Based on the dispatcher's testimony that she would have called the victim back if she knew that Officer Velazquez did not initially make contact with the victim, it was clear that she understood her obligations under Rule 5.1. However, the Arbitrator did not credit her lack of knowledge because Officer Velazquez was redirected only "seconds" after she spoke with him and she was aware of that. However, the Arbitrator found no violation of Chapter 7 of the Department's Rules and Regulations under Section 8.2n because Chapter 7 dealt with emergency calls and Section 8.2.n was silent as to whether it applied to non-emergency callers when delay in police response arises before any contact with the caller is made. Because the violation here did not implicate the public or the officer's safety, the five-day suspension was excessive in relation to the single less serious offense and was reduced to a two-day suspension.

PAST PRACTICE

In *Worcester and National Association of Government Employees, Local 495*, 44 MLC 215 (April 6, 2018), Hearing Officer Margaret M. Sullivan found that the City of Worcester did not violate 10(a)(5) of the Law by hiring a new employee to work in the Department of Public Works (DPW) Reservoir Division as a motor equipment repairman (MER) without first offering the position to MERs already employed in the DPW.

MERs are mechanics, who work at the DPW's central garage or at a satellite garages in other divisions, including Water, Sewer and Reservoir. The DPW uses several methods to fill job openings for its Motor Equipment Repairman (MER) position, which include the use of Civil Service lists, newspaper advertisements and internal postings. Notices of MER openings are also posted within the DPW to determine whether current employees are interested. Employees may express interest in openings by signing their names to the notices, but the notices explicitly state that there are no guarantees that individuals will be appointed to the positions.

The parties disagreed as to whether the DPW permits MERs to transfer to open positions in other divisions within the DPW based upon their seniority but agreed that the DPW does not permit other employees to transfer between divisions based upon their seniority. The City alleges that, based on past practice, employees are prohibited from transferring between divisions based on their seniority. In contrast, the Union argued that there was a past practice that MERs would have the opportunity to exercise their seniority by moving to another garage or to a preferred work shift when there was an opening. None of the rules prohibiting transfers based on seniority were recorded in writing anywhere.

Upon review of the evidence, the Hearing Officer held that the Union failed to establish by a preponderance of the evidence that there was a binding past practice of transferring MERs by seniority. The Union presented no evidence that the City used seniority to fill the positions at any time for the past ten years. As such, the Hearing Officer found that an established past practice of not using seniority to fill the positions existed. The Hearing Officer also noted that that even if there was a past practice of hiring by seniority as the Union claimed, there was evidence that that the

City deviated from that practice seven to nine years ago by hiring others who were not current MERs employees working in the DPW. As a result, she concluded that the purported practice of offering current MERs an open position before hiring a new employee no longer remained a consistent practice that occurred each time there was an opening.

TRANSFER OF DUTIES

In *City of Boston and American Federation of State, County and Municipal Employees, AFL-CIO, Council 93*, 44 MLC 227, (May 9, 2018), Hearing Officer Will Evans found that the City of Boston had violated its bargaining obligation by transferring animal quarantining duties to non-bargaining unit members without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment.

Prior to 2000, the City had a contract with the Animal Rescue League of Boston to perform animal quarantines. After the contract ended, the Employer created two AFSCME bargaining unit positions as Dog/Animal Control Officers to perform animal quarantines within City limits. Although the Animal Rescue League of Boston continued to perform animal quarantines within its privately-owned shelter, it ceased going out into the field to handle animal quarantines after 2000. Additionally, the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) also performed animal quarantines, but solely within their privately-owned shelter in Boston. Both the Animal Rescue League and MSPCA are non-bargaining unit members and are not City employees.

The Hearing Officer found that since 2000, animal quarantining duties were given exclusively to bargaining unit members. The Hearing Officer found that after 2000, non-bargaining unit members no longer performed animal quarantines on City-owned property. Consequently, this practice established a departure from having shelters performing animal quarantines on City-owned property. The Hearing Officer further noted that the fact that shelters currently perform animal quarantines on their own private property was irrelevant as to the question of whether the work was shared with City employees. And, even assuming arguendo that the work was shared, there was no evidence presented showing that the Union was aware of this practice. But, even if the Union was aware of the shared work, the Hearing Officer nonetheless found that there was "calculated displacement" of bargaining unit work as a result of the transfer of those duties to non-bargaining unit members. Bargaining unit member quarantine duties witnessed a significant drop, which, on its own, was enough to prove that the unilateral transfer of duties violated the Law.

The Hearing Officer rejected the City's argument that the duties of animal quarantines were statutorily non-delegable duties and that to bargain over such effort to ensure this work is done would put public safety at risk and leave many quarantines undone. First, the statute cited by the City did not grant any explicit authority regarding the appointment or assignment of inspectors. Second, while the City emphasized it as a public safety issue, it presented no evidence of any critical safety interest that would outweigh the public interest in collective bargaining. There was no evidence that bargaining with the Union regarding a change in duties would interfere with the City's ability to manage animal inspectors or to deal with the backlog of animal quarantines. To the contrary, the Hearing Officer found that the City had assigned fewer animal quarantine duties than it had in the past years which contradicted its public safety concern. Finally, the Hearing Officer also found that transferring quarantine duties to non-bargaining unit members resulted in a substantial and permeant effect of eroding bargaining unit members' animal quarantine duties.

CONTRACT REPUDIATION

Documenting negotiation discussions and placing them in writing can be crucial when disputing an oral agreement. In *City of Boston and Boston Public Library Professional Staff*, 44 MLC 238 (May 29, 2018), the Hearing Officer found that the City did not violate the parties' oral agreement regarding sick leave when it deducted 7.5 days from bargaining unit members' sick leave balances in March 2016.

The parties began negotiations for a successor CBA in 2010. When they were unable to reach an agreement, the parties submitted their dispute to fact-finding with Arbitrator Gary Altman. On September 4, 2013, the City provided its last best offer to Altman, which granted members sick leave at the rate of one and a quarter (1.25) days for each month of service. The CBA previously provided that on each January 1 and each July 1 employees within the bargaining unit would receive 7.5 days of sick leave for use during the six-month period, this resulted in a total of 15 days of sick leave per year. The main dispute here is that the parties disagree as to whether they discussed during prior negotiations on what to do with the 7.5 days that the members were previously receiving.

On December 23, 2014, the Library Weekly was sent out with an excerpt reminding unit members that in addition to beginning to accrue sick leave at the rate of 1.25 day per month, they would receive 7.5 sick days on January 1, 2015 for the sick time earned from July 1, 2014 - December 31, 2014. However, it appeared that the 7.5 sick leave accrual language in the Library Weekly was an error and the City immediately identified and clarified the error. On March 4, 2016, the City sent a letter to all members of the PSA bargaining unit announcing its intention to remove some sick leave from each member's bank and it did so soon after. The Union brought this action, claiming that the City removal of the 7.5 day sick leave accrual was a breach of an oral agreement it made during previous bargaining sessions.

Upon review of the evidentiary record, the Hearing Officer examined the Union's last best offer which stated that, "The PSA is willing to modify this existing language so that sick leave accrues at the rate of one and a quarter (1.25) days for each month of actual service or paid time." The Hearing Officer indicated that there was no additional language conditioning the Union's acceptance of the City's proposal on an additional one-time award of 7.5 days at the beginning of the year. In addition, the Union offered no bargaining notes to bolster its position, or an explanation as to why Union members did not have any notes reflecting this agreement or even reflecting discussions about the topic of a one-time award of 7.5 days. On the other hand, the City was able to provide detailed notes of the meetings, all reflecting no discussions about the award

of 7.5 sick days. While the Union argued that the City's agreement is indicated through its post in the Library Weekly newspaper that members would receive the 7.5 sick day, this argument had little merit because the City identified and clarified this error. Lastly, the Hearing Officer also found that the Union had waived its right to bargaining over the sick leave by having refused to bargain with the City over the course of several months. ■