

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

COMMONWEALTH OF MASSACHUSETTS

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 509

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Case No. SUP-12-1829

Date Issued:

April 2, 2014

Hearing Officer:

Timothy Hatfield, Esq.

Appearances:

Andrew Levrault, Esq. - Representing the Commonwealth of
Massachusetts

Tod Cochran, Esq. - Representing the Service Employees
International Union, Local 509

HEARING OFFICER DECISION

SUMMARY

1 The Complaint of Prohibited Practice in this case alleges that the
2 Commonwealth of Massachusetts (Commonwealth) violated Section 10(a)(1) of
3 M.G.L. c. 150E (the Law) by interfering with, restraining, and coercing employees
4 in the free exercise of their rights under Section 2 of the Law when it suspended
5 Peter MacNeill (MacNeill) for three days because of his conduct prior to and
6 during a grievance hearing. I find that the Commonwealth violated the Law in the
7 manner alleged.

Statement of the Case

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9
10 On May 3, 2012, the Union filed a charge of prohibited practice with the
11 Department of Labor Relations (DLR), alleging that the Commonwealth had

1 engaged in prohibited practices within the meaning of Section 10(a)(1) of the
2 Law. On September 17, 2012, following an investigation, the DLR issued a one-
3 count Complaint of prohibited practice. The Commonwealth filed an Answer to
4 the Complaint on or about September 28, 2012. The Complaint alleges that the
5 Commonwealth violated Section 10(a)(1) of the Law by unlawfully interfering with
6 and restraining employees' exercise of rights under Section 2 of the Law when the
7 Commonwealth suspended MacNeill because of statements he made at a
8 grievance hearing.

9 I conducted a hearing on November 1, 2013, at which both parties had the
10 opportunity to be heard, to examine witnesses and to introduce evidence. The
11 parties filed post-hearing briefs on or about December 9, 2013.¹ Based on the
12 record, which includes witness testimony, my observation of the witnesses'
13 demeanor, stipulations of fact, and documentary exhibits, and in consideration of
14 the parties' arguments, I make the following findings of fact and render the
15 following opinion.

16 Stipulations of Fact

17 1. The Commonwealth is a public employer within the meaning of Section
18 1 of the Law.

¹ The Commonwealth filed a Motion to Strike simultaneously with its post-hearing brief to strike testimony by Darrel Cole (Cole) regarding hearsay statements from Sara Welch (Welch) that bargaining unit members were not filing grievances after MacNeill's discipline. The Union filed an Opposition to the Motion to Strike on December 16, 2013. During the hearing, I sustained the Commonwealth's objection on the basis of hearsay, with the exception of Cole's testimony regarding his personal knowledge relating to the number of grievances filed. Therefore, consistent with my rulings during the hearing, I allow in part and deny in part the Commonwealth's Motion to Strike.

- 1 2. The Union is an employee organization within the meaning of Section
2 1 of the Law.
- 3
- 4 3. The Union is the exclusive bargaining representative for certain
5 employees in statewide bargaining Unit 8, including Substance Abuse
6 Coordinators employed by the Employer at the Department of Children
7 and Families (DCF).
- 8
- 9 4. At all relevant times, the Commonwealth and the Union were parties to
10 a collective bargaining agreement (CBA), which by its terms expired on
11 December 31, 2011. This agreement was extended by a Memorandum
12 of Understanding through December 31, 2013. Article 23A of this
13 agreement outlines the procedure to be followed by the parties for
14 grieving disputes under the CBA, including the grievance of disciplinary
15 actions.
- 16
- 17 5. MacNeill is a Substance Abuse Coordinator with DCF and a member
18 of the bargaining unit described in paragraph 3, above. MacNeill has
19 been employed with DCF since June 1, 2007.
- 20
- 21 6. Kristin Simone (Simone) has been the Northern Region Mental Health
22 Specialist with DCF. Simone has been employed with DCF for the
23 past four and one half (4 ½) years. Simone has been MacNeill's direct
24 supervisor since approximately 2010.
- 25
- 26 7. Pamela Fitzpatrick (Fitzpatrick) is a Labor Relations Specialist with the
27 Executive Office of Health and Human Services, and works
28 predominantly with DCF. Fitzpatrick has held this position for the past
29 seventeen (17) years.
- 30
- 31 8. Darrel Cole (Cole) is a Field Representative for the Union and has held
32 this position for 20 years.
- 33
- 34 9. On or around October 17, 2011, DCF issued MacNeill a one-day
35 suspension for unprofessional conduct.
- 36
- 37 10. The Union grieved the one-day suspension referenced in the
38 preceding paragraph and a hearing for the grievance was scheduled
39 for February 28, 2012.
- 40
- 41 11. Fitzpatrick was designated as the hearing officer for the hearing
42 referenced in paragraph 10.
- 43

1 designated hearing officer for the grievance hearing. Cole represented MacNeill
2 in the hearing. Simone also attended the hearing to testify for DCF.

3 The parties held the hearing in a conference room in the Lawrence Office.
4 Prior to the start of the hearing, MacNeill and Cole met in the conference room to
5 discuss the grievance and potential settlement. Cole left the room to make a
6 settlement offer to DCF. Cole returned to the room with Raymond Pillage
7 (Pillage), the DCF Regional Director, and the three men had a brief cordial
8 conversation. When Pillage left, Cole informed MacNeill that DCF had rejected
9 the Union's settlement offer.

10 A few minutes later, the hearing began. Cole, MacNeill and Fitzpatrick sat
11 around the conference table, and Simone entered and sat down shortly after.³
12 Fitzpatrick took attendance and then began the hearing by introducing the parties
13 and talking about the hearing process. During the recitation of Fitzpatrick's
14 opening, MacNeill stated that he "wanted to be treated with respect" during the
15 grievance hearing. Fitzpatrick responded that "no one said anything yet."
16 MacNeill repeated he wanted to be treated with respect during the hearing.⁴ At

³ Fitzpatrick sat at the head of the table, with Simone to her left and Cole to her right. MacNeill sat on the other side of Cole. MacNeill was positioned approximately five to eight feet away from Fitzpatrick and four feet away from Simone, who sat diagonally across the table from him.

⁴ Simone and Fitzgerald testified that MacNeill repeatedly stated "I want a fair shake," but MacNeill denied stating that and insisted that he only stated that he "wanted to be treated with respect" and that he wanted to have a "fair hearing." However, the slight difference in terminology used is not dispositive to the reasoning here.

1 this time, Cole and MacNeill both testified at the November 1, 2013 unfair labor
2 practice hearing that he did not raise his voice. Simone and Fitzpatrick testified
3 that McNeill was loud and looked visibly upset. They further stated that he had
4 his hands on the table, as if he was bracing himself, and that he was red-faced.⁵
5 Conversely, Cole and MacNeill stated he had his hands both resting on the table
6 in a relaxed manner and that he was speaking in a measured tone.

7 Fitzpatrick attempted to gain control of the hearing. In a firm voice, she
8 asked him to quiet down, and assured him he would have a chance to speak.
9 Fitzpatrick told MacNeill that she was the hearing officer and she was “running
10 the show.” She informed MacNeill it was her hearing and that she would let him
11 know when he was allowed to talk. MacNeill continued to state that he “wanted
12 to be treated as equals.”

13 Shortly thereafter, Fitzpatrick continued introducing the hearing, and
14 stated that it was a step 2 grievance hearing. MacNeill interjected that he
15 believed they were there for a step 3 rather than a step 2 hearing. At this point,

⁵ Simone further testified that MacNeill was shouting and aggressive, and that she felt threatened by MacNeill’s behavior. However, when asked on direct examination how loud MacNeill was yelling, she responded that when she feels threatened “the room gets smaller” and “voices get louder,” and so “to [her]” he was loud. Further, when asked during re-direct whether she felt intimidated by MacNeill she stated that the “past and present are very mixed up in my mind right now, so I feel at this moment, yes.” Given Simone’s demeanor while testifying and her difficulty recalling and separating the February 28, 2012 hearing from prior and subsequent events with MacNeill, I do not credit Simone’s testimony.

1 MacNeill and Fitzpatrick tried to speak over one another.⁶ Eventually, Fitzpatrick
2 told Cole that the hearing could be “waived” to step 3. Cole confirmed to
3 MacNeill that they could waive step 2 and continue to step 3. MacNeill agreed.
4 Because they agreed to no longer hold the step 2 hearing as originally
5 scheduled, Fitzpatrick began gathering her belongings and stood to leave the
6 room. As she was about to leave, MacNeill told Fitzpatrick that he “wanted to go
7 on the record” about his concerns with having Simone as his supervisor while he
8 was challenging his grievance. Fitzpatrick stated the hearing was over, and that
9 nothing else was on the record.

10 **Three-day Suspension Issued**

11 On March 14, 2012, DCF issued MacNeill a three-day suspension for his
12 behavior on February 28, 2012 immediately before and during the step 2 hearing.
13 The DCF cited the following reasons for the suspension in its suspension letter:

14 On February 28, 2012 you reported to a Step II grievance conference at
15 which you were the grievant. Present at this meeting were you, SEIU
16 Local 509 Field Representative Darrel Cole, Labor Relations Specialist

⁶ Cole, MacNeill, Simone and Fitzpatrick all agreed that MacNeill and Fitzpatrick were trying to speak over one another. Fitzpatrick and Simone testified that MacNeill was shouting while Fitzpatrick was speaking in a firm voice to regain control of the hearing and to tell MacNeill to stop speaking. Conversely, Cole and MacNeill testified that Fitzpatrick was yelling and disrespectful and that MacNeill never raised his voice higher than that of Fitzpatrick's. Cole further testified that in his experience in working with Fitzpatrick over the past several years of working with one another, his perception of Fitzpatrick is that she is even-keeled, but during the grievance hearing she acted “on the unprofessional side.” I credit MacNeill and Cole's testimony that MacNeill never raised his voice higher than that of Fitzpatrick, as it corroborates all witness' testimony that they were both trying to speak over one another because MacNeill wanted to be heard and Fitzpatrick wanted him to stop speaking. I do not find it credible, however, that MacNeill was shouting while Fitzpatrick never raised her voice.

1 Pam Fitzpatrick and me. Ms. Fitzpatrick was the designated hearing
2 officer in this matter.

3
4 Just after all participants were assembled for the conference, and before
5 the hearing officer had an opportunity to begin the proceedings, you, in a
6 loud tone of voice insisted that you be treated with respect and demanded
7 that you "...get a fair shake". The hearing officer asked you to stop
8 speaking to allow her to begin the conference. Despite her repeated
9 requests, you continued to interrupt and speak over the hearing officer.
10 After several requests from the hearing officer and assurances that you
11 would be given ample opportunity to speak, you allowed her to proceed
12 with opening the conference. However, during her opening, you again
13 yelled at her and challenged her about at which step the grievance had
14 been filed. The conference did not proceed after you and your union
15 representative agreed to waive the grievance to step III.

16
17 On March 9, 2012, I met with you, along with Regional Administrative
18 Manager David Foley about your behavior. Also present at this meeting
19 were SEIU Local 509 Director of Field Services Shanna Weston and
20 Union Steward Linda Hollins. You rejected the Department's opinion that
21 the conference had not yet started and indicated that your statements and
22 actions at the conference were union protected activities. Ms. Weston
23 added that because the February 28 meeting was for the purpose of a
24 grievance conference that you should not be disciplined or spoken to
25 about your behavior in the context of that meeting.

26
27 The hearing officer had clearly not begun the grievance conference before
28 you had begun to challenge her. Your demeanor was aggressive and
29 intimidating towards her shortly after I entered the room. Whether or not
30 the grievance conference had begun is not an acceptable excuse for your
31 behavior. You are expected to comport yourself in a professional and
32 respectful manner with others in any and all forums.

33

34 **MacNeill's Coworkers**

35 MacNeill then told a few of his coworkers about the suspension. Cole

36 Around this time, DCF had denied a number of bargaining unit members'

37 promotions. The bargaining unit members did not file grievances over the

1 denials. Cole thought that the unit members' failure to challenge the denials was
2 unusual.⁷

3 OPINION

4 **Section 10(a)(1)**

5 A public employer violates Section 10(a)(1) of the Law when it engages in
6 conduct that may reasonably be said to tend to interfere with, restrain, or coerce
7 employees in the exercise of their rights under Section 2 of the Law. Quincy
8 School Committee, 27 MLC 83, 91 (2000). Pursuant to Section 2 of the Law, an
9 employee has the right to "engage in lawful, concerted activities for the purpose
10 of collective bargaining or other mutual aid or protection, free from interference,
11 restraint, or coercion." Filing and processing grievances constitutes concerted,
12 protected activity under Section 2. See Id.

⁷ I allow, in part, the Commonwealth's Motion to Strike Cole and MacNeill's hearsay testimony that Sara Welch (Welch), a Union steward who was not a witness at the present hearing, stated that members in the Lawrence Office were afraid to file grievances regarding their promotion as a result of MacNeill's suspension, as I sustained the Commonwealth's objection to a portion of this line of questioning during the hearing. Accordingly, Cole's testimony recounting Welch's understanding about members filing grievances is stricken from the record, and I do not consider it for the purposes of this decision. However, I deny the Commonwealth's Motion to Strike Cole's testimony that typically members filed grievances regarding a promotional bypass, but after six members were denied a promotion, after MacNeills' suspension, the six members did not file grievances. Regardless, I do not rely on this testimony since MacNeill works in the Metro Regional Office, rather than the Lawrence Office where the six members were involved. Further, Cole works out of the Union's Watertown Office and does not file all grievances himself. In addition, the evidence does not establish that Cole had any direct knowledge that members failed to file grievances because of MacNeill's discipline. Moreover, the focus of a Section 10(a)(1) allegation inquiry lies in the chilling effect on a reasonable person, not the actual or subjective impact on some employees.

1 However, activity protected by Section 2 of the Law can lose its protected
2 status if it is unlawful, violent, disruptive or indefensibly disloyal to the employer.
3 Bristol County Sheriff's Department, 31 MLC 6, 18 (2004). Similarly, conduct that
4 is physically intimidating, egregious, or disruptive of the employer's business is
5 beyond the pale of protection. See City of Boston, 6 MLC 1096 (1979). In order
6 for conduct to be intimidating, an employee need not necessarily use profanity,
7 physical gestures or explicit threats, as long as the ominous implication of the
8 message is expressed. Town of Bolton, 32 MLC 13, 18 (2005).

9 When intemperate statements are made within the context of protected
10 activity, the Commonwealth Employment Relations Board (Board) balances the
11 rights of the employees to engage in concerted activities, and the rights of the
12 employers not to be subjected to egregious, insubordinate, or profane remarks
13 that disrupt the employer's business or demean workers or supervisors. Bristol
14 County Sheriff's Department, 31 MLC at 18. However, if an employer provokes
15 an employee into acting in an intemperate manner while that employee is
16 presenting a grievance, the employee's conduct remains within the ambit of
17 protected activity. Newton School Committee, 6 MLC 1701 (1980).

18 The focus of a Section 10(a)(1) inquiry is on the effect of the employer's
19 conduct on a reasonable employee. Town of Winchester, 19 MLC 1591, 1596
20 (1992). The Board does not analyze the motivation behind the conduct, Id.;
21 Town of Chelmsford, 8 MLC 1913, 1916 (1982), aff'd sub nom. Town of
22 Chelmsford v. Labor Relations Commission, 15 Mass. App. Ct. 1107 (1983), or

1 whether the coercion succeeded or failed. Groton-Dunstable Regional School
2 Committee, 15 MLC 1551, 1556 (1989). The Board has previously found that
3 issuing discipline for concerted, protected conduct during a grievance hearing
4 chills reasonable employees in the exercise of their rights to engage in grievance
5 proceedings. See Bristol County, 31 MLC at 18; City of Boston, 26 MLC 80, 83
6 (2000).

7 **Protected Activity**

8 Participation in a grievance hearing is indisputably within the realm of
9 protected activity. See Quincy School Committee, 27 MLC at 91. However, the
10 Commonwealth argues that MacNeill's statements were largely made prior to the
11 grievance hearing and thus, were outside the realm of conduct protected by
12 Section 2. I disagree. By attending the grievance hearing, MacNeill was already
13 engaged in processing his grievance, which is covered by Section 2 of the Law.
14 See Id. Fitzpatrick began the opening to the grievance hearing before MacNeill
15 made any remarks about the process and which step of the grievance process
16 they were in. Their subsequent agreement to waive the hearing to step 3 does
17 not change the fact that MacNeill was participating in a grievance hearing when
18 he made the statements that prompted the suspension.

19 Second, the Commonwealth argues that MacNeill's behavior lost its
20 protected status because it exceeded the permissible bounds of protected
21 activity. The evidence demonstrated that MacNeill made statements at the start
22 of the grievance hearing requesting a fair hearing process, after which both

1 Fitzpatrick and MacNeill exchanged words, both raising their voices as high as
2 the other. While Fitzpatrick and MacNeill's exchange may have created tension,
3 there is no evidence indicating that MacNeill's words or actions were threatening
4 or intimidating. Despite variations in testimony regarding how MacNeill was
5 sitting, it is clear that he remained seated with his hands on the table throughout
6 the hearing. He did not ball his fists, raise his hands, or perform any other
7 gestures that could be reasonably construed as intimidating. Although MacNeill
8 made what can be construed as impulsive comments to clarify the hearing
9 process and his rights, he did not make any threatening remarks or use any
10 profane language to suggest that he intended to scare or intimidate Fitzpatrick or
11 Simone. Therefore, his conduct did not lose its protected status.

12 **Interference with Protected Rights**

13 The Commonwealth does not deny that it disciplined MacNeill as a result
14 of his conduct at the grievance hearing. The appropriate inquiry lies in whether
15 the Commonwealth's conduct in disciplining MacNeill for statements made during
16 the course of a grievance proceeding would chill a reasonable employee in the
17 exercise of their protected rights. The Board has clearly established that issuing
18 discipline for concerted, protected conduct during a grievance hearing chills
19 reasonable employees in the exercise of their rights to engage in grievance
20 proceedings. See Bristol County, 31 MLC at 18; City of Boston, 26 MLC 80, 83
21 (2000). Therefore, I find that the Commonwealth unlawfully interfered and

1 restrained MacNeill in the exercise of his protected rights in violation of Section
2 10(a)(1) of the Law.

3 CONCLUSION

4 Based on the record and for the reasons stated above, I conclude that the
5 Commonwealth independently violated Section 10(a)(1) of the Law by issuing
6 MacNeill a three day suspension for his conduct at a step 2 grievance hearing.

7
8 REMEDY

9 The traditional remedy in a Section 10(a)(1) case is limited to a cease and
10 desist order and a posting. Salem School Committee, 35 MLC 199, 219 (2009).
11 The Union requested that the DLR rescind MacNeill's discipline. However, I find
12 no reason to depart from the traditional remedy afforded to 10(a)(1) violations.
13 That remedy is appropriate here. The notice that I've ordered the Commonwealth
14 to post clarifies that issuing MacNeill a three-day suspension for his conduct at a
15 step 2 grievance hearing was unlawful.

16 ORDER

17 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that
18 the Commonwealth of Massachusetts shall:

- 19 1. Cease and desist from:
- 20 a. Interfering with, restraining, and coercing MacNeill in the
21 exercise of his rights protected under the Law; and
- 22 h. In any like or similar manner, interfering with, restraining, or
23 coercing any employees in the exercise of their rights
24 guaranteed under the Law.
25

- 1 2. Take the following affirmative action that will effectuate the
2 purposes of the Law:
3
4 a. Post immediately in all conspicuous places where members
5 of the Union usually congregate and where notices to these
6 employees are usually posted, including but not limited to
7 the Commonwealth's internal e-mail system, and maintain
8 for a period of thirty (30) consecutive days thereafter, signed
9 copies of the attached Notice to Employees; and,
10 h. Notify the Department within ten (10) days of receipt of this
11 Decision and Order of the steps taken to comply with it.

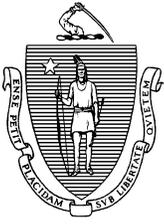
SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

TIMOTHY HATFIELD, ESQ., HEARING OFFICER

APPEAL RIGHTS

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



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Department of Labor Relations has determined that the Commonwealth of Massachusetts violated Massachusetts General Laws, Chapter 150E (the Law) by:

- interfering with, restraining and coercing Peter MacNeill in the exercise of his protected rights by issuing him a three-day suspension for his conduct during a grievance hearing.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- to engage in self-organization; to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection; and
- to refrain from all of the above.

The Commonwealth assures its employees that:

WE WILL NOT interfere with, restrain or coerce Peter MacNeill or any employee in the exercise of their rights guaranteed under the Law.

For the Commonwealth of Massachusetts

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, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132)

