

FRANKLIN INSTITUTE OF BOSTON AND LOCAL 254, SEIU, MUP-5398 (1/10/85).
 [Not previously reported.]

- 18. Employer
- 24. Parties
- 54.518 subcontracting
- 63.3 discrimination -- hiring, layoffs, promotion
- 63.7 discrimination -- union activity

Commissioners participating:

Paul T. Edgar, Chairman
 Gary D. Altman, Commissioner
 Maria C. Walsh, Commissioner

Appearances:

- Neil Jacobs, Esq. - Representing the Franklin Institute of Boston
- John Ryan III, Esq. - Representing Local 254, Service Employees International Union

DECISION

Statement of the Case

This case involves a charge by Local 254, Service Employees International Union (Union) that the Franklin Institute of Boston (Institute) violated Sections 3(a)(3) and (1) of Massachusetts General Laws, Chapter 150E (G.L. c.150E) by allegedly terminating three custodians, Robert Marsh, Robert Charpentier, and Peter Mack, in retaliation for their union activities.

The Union filed the instant charge with the Labor Relations Commission (Commission) On October 11, 1983. At that time, there were other cases pending before the Commission involving the same parties. The Union had filed, in September and October 1983, three representation cases on behalf of the custodians. Case No. CR-3634 alleged that the Institute was an employer as defined by Section 2 of Massachusetts General Laws, Chapter 150A (G.L. c.150A). Case No. MCR-3409 named the Institute as the employer pursuant to Section 1, G.L. c.150E, and Case No. CR-3413 named the City of Boston (City) as the employer. In addition to the above cases, the Union also filed Case No. UP-2492 alleging that the custodians were discharged discriminatorily in violation of G.L. c.150A.

By decision dated October 6, 1983, the National Labor Relations Board (NLRB) declined to assert jurisdiction over the Institute, concluding that the Institute was not an employer as defined by the jurisdiction of the NLRB pursuant to Section 2(2) of the National Labor Relations Act, 29 USC 152(2). The transcripts and exhibits from the NLRB hearing were received into evidence in the instant proceeding. As a preliminary matter, the Commission questioned whether the Institute was a private



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or public employer. On November 4, 1983, the Commission served notice upon the Supreme Judicial Court, the Office of the Attorney General, the Office of Employee Relations of the Commonwealth, the Office of Labor Relations of the City of Boston, the Institute and the Union, inviting the parties to submit statements of position concerning whether the Commission's jurisdiction was pursuant to G.L. c.150A or G.L. c.150E. All others were invited to inform the Commission if they had an interest in the matter. In response to the Commission's notice, the Institute submitted a copy of the brief that it had filed with the NLRB, which took the position that "it is an agent of the City of Boston and therefore is a political subdivision within the meaning of Section 2(2) of the National Labor Relations Act." The Union took the position that the Institute is subject to G.L. c.150E and cited, in support of its position, an Opinion of the Attorney General that the Institute is under public supervision and control, a District Court of Brighton decision, and the arguments of the Institute before the NLRB. The Supreme Judicial Court indicated that it "has no involvement with the operation of the Franklin Institute other than its statutory responsibility with respect to certain members of the corporation" and declined to file an appearance. Neither the Attorney General nor the City of Boston indicated an interest in the proceedings.

On December 1, 1983, the Commission dismissed the charges of prohibited practice filed pursuant to G.L. c.150A in Case No. UP-2492. For reasons to be discussed in detail *infra*, the Commission determined that the Institute, acting through its Board of Directors, is a public employer within the meaning of G.L. c.150E, Section 1, and therefore not an employer within the meaning of G.L. c.150A. Likewise, on February 16, 1984, the Commission dismissed the representation petition filed pursuant to G.L. c.150A in Case No. CR-3634. The two representation petitions filed pursuant to G.L. c.150E in Case No. MCR-3409, Franklin Institute of Boston, and Case No. MCR-3413, City of Boston, were held in abeyance pending the disposition of this matter.

On December 1, 1983, the Commission issued a Complaint of Prohibited Practice in the instant case, alleging violations of Sections 10(a)(3) and (1) of G.L. c.150E. On December 20, 1983 and January 6, 1984, a formal hearing was held before Diane M. Drapeau, a duly designated hearing officer of the Commission. The Institute and the Union had full opportunity to present testimonial and documentary evidence. Both parties filed post-hearing briefs which have been carefully considered.

On the basis of the evidence presented and for the reasons discussed below, we conclude that the Institute is an employer within the meaning of G.L. c.150E, Section 1, and that the Institute violated Section 10(a)(3) and (1) of G.L. c.150E.

Jurisdiction

Jurisdictional Facts

The Franklin Institute is a technical college offering one and two-year degree programs in science and engineering. The Institute is located at 41 Berkeley Street in Boston, Massachusetts. There are approximately 450 day students,



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00 evening students, 38 full-time faculty, and 12 to 15 clericals.

The Institute traces its existence to a codicil of the will of Benjamin Franklin, which in 1791 gave a legacy to the inhabitants of the then Town of Boston. The legacy, known as the Franklin Fund, was to accumulate for one hundred years, after which a portion of the fund was to be expended on public works of general utility to promote the convenience and comfort of the people of Boston. The balance was to be invested and allowed to accumulate for an additional one hundred years, after which time one part of the fund will be subject to disposition by the people of Boston and the remainder will be subject to disposition by the state government.

The Town of Boston, as trustee, held legal title to the Franklin Fund, but, by the terms of Franklin's will, the legacy was to be managed by a board of managers comprised of three ministers and the selectmen of the Town of Boston. In 1820, Boston became a city and no longer was governed by selectmen. Since Franklin's will made no provision for successors to the selectmen, the Supreme Judicial Court exercised its equity powers to rule that nine citizens of the City, including the mayor *ex officio*, should be appointed by the Court to serve with the three ministers as the board of managers. In 1904, Andrew Carnegie proposed a donation to match that portion of the Franklin Fund available after the first one hundred years in order to establish an apprentice training school. Carnegie specified that the City of Boston was to provide a site for the school. In 1905, the Massachusetts General Court passed an act entitled "An Act to Authorize the City of Boston to Maintain a Franklin Union and To Issue Bonds for the Purpose of Acquiring a Site Therefore" (Acts of 1905, Chapter 448, Section 1-3), which authorized the City of Boston to maintain an institute, pass ordinances for the maintenance and management of the institute and to issue bonds to pay for a site for the institute.

The board of managers was incorporated by St. 1908, c.569,¹ as the Franklin Foundation,² and under section two of the Act, as amended by St. 1953, c.77, section 3, the City of Boston is required to use the corporation as its exclusive agent in administering Franklin's gift. It is provided that the corporation, "in behalf of the city," shall have the sole care, custody and management of the school as an independent industrial school. A Board of Directors (Board) was established consisting of twelve (12) members, eight (8) of whom are appointed by the Supreme Judicial Court of Massachusetts. Any of these eight (8) Board members may be removed by the Court for cause. The other members of the Board are the Mayor of the City of Boston, *ex officio*, and the three ministers of the oldest Episcopalian, Presbyterian, and Congregational Churches of Boston, *ex officio*. This legislation

¹Chapter 569 of the Acts of 1908, although amended through the years by the Massachusetts General Court, has remained essentially the same since enactment.

²By vote of June 13, 1961, the Franklin Foundation changed the name of the school to the Franklin Institute of Boston, effective July 1, 1961.



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also provides that the Board shall control the expenditure of all monies appropriated by the City for the institution, and in incurring liabilities to be discharged from funds of the City, other than trust funds, shall be subject to all applicable statutes and ordinances in a manner similar to boards or officers of the City. The legislation also states that legal title to the property constituting the Institute is in the City. Finally, the legislation directs that the Foundation has custody, management and control of that part of the Franklin Fund which is accumulating for the second 100 years, but legal title remains with the City.

The Institute has a president who is appointed by the Board. Although the president has authority over the day-to-day operations of the Institute, the Board is ultimately responsible for the Institute's administration. Thus, for example, the Board approves all hiring and firing, sets and fixes compensation, and approves all wage increases and other expenditures. The Board determines the Institute's pension plan and determines all benefits to be provided to employees. The benefit package offered to the Institute's employees differs from that offered by the City to its employees. Nonetheless, at one time, the Institute offered to its employees the same Blue Cross/Blue Shield plan offered to employees of the City.

The Foundation does not pay any Federal, state or local taxes. The United States Treasury Department ruled, in 1943, that the Foundation was "an agency or instrumentality of the City of Boston, a political subdivision of the State of Massachusetts" and therefore exempt from Federal income tax.

On June 11, 1964, the Attorney General of Massachusetts issued a decision which concluded that

Title to the Franklin Institute of Boston is in the City [of Boston]. The management of the Institute is in the persons incorporated as the Franklin Foundation in their capacities as public agents under the authority of the act incorporating the Foundation and as trustees acting exclusively for the public and the City of Boston. The supervision and control of the Institute by the corporation is public supervision and control, and in the exercise of their public obligation the members of the corporation and their successors are responsible to the courts and to representatives of public authority ... [T]herefore...the Franklin Institute of Boston is clearly an institution of higher education under public supervision and control.³

The United States Treasury Department examined similar evidence in order to determine the Institute's Federal income tax status. The Internal Revenue Service ruled that the Institute is exempt from Federal income tax because "[the Institute is] an agency or instrumentality of the City of Boston, a political subdivision of

³Opinion of the Attorney General, pp. 6-7.



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the State of Massachusetts."⁴

In legal memoranda submitted both to a court of the Commonwealth⁵ and to the NLRB,⁶ the Institute maintained respectively that it "is not a private corporation," but rather an "instrumentality of the city to administer the Franklin Institute of Boston" and that the "supervision and control of the [Institute] is public supervision and control." The Regional Director of the NLRB for the First Region found the Institute to be a political subdivision within the meaning of Section 2(2) of the National Labor Relations Act.⁷ We take administrative notice of the fact that no request for review of that decision by the NLRB was filed by either the Institute or the Union.

Jurisdictional Conclusion

Based upon the origin and the degree of public control over the Institute, we conclude that the Institute is a "public employer" within the meaning of Section of G.L. c.150E.⁸

It is undisputed that the Franklin Institute of Boston is a corporation established by special act of the Massachusetts General Court to manage an independent industrial school. The twelve-member board of corporate directors includes eight appointees of the Supreme Judicial Court, the Mayor of Boston and three religious leaders. Funding for the Institute derives from the proceeds of a gift made by Benjamin Franklin to the City of Boston. The legislation specifies that the corporation shall be the exclusive agent of the City in administering Franklin's gift; and shall, on behalf of the City, have sole care, custody, management and control of the Institute. Further, the legislation requires that the corporation be subject to all applicable statutes and ordinances in the same manner as would be a board or officer of the City.

⁴ Letter from the U.S. Treasury Department to the Franklin Institute dated February 10, 1943.

⁵ Memorandum submitted by the Institute in Murphy v. Director of the Division of Employment Security, et al., Municipal Court of the Brighton District of the City of Boston (1973).

⁶ Employer's brief in the matter of Franklin Foundation et al. before the NLRB, Case No. 1-RC-17,991.

⁷ Decision and Order of the Regional Director of the NLRB for the First Region in the matter of Franklin Foundation et al., Case No. 1-RE-17,991.

⁸ Section 1 of G.L. c.150E defines "employer" or "public employer," in relevant part, as follows:

"Employer" or "public employer," the commonwealth acting through the commissioner of administration, or any county, city, town, district, or other political subdivision acting through its chief executive officer, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees, but excluding authorities created pursuant to chapter one hundred and sixty-one A and those authorities included under the provisions of chapter seven hundred and sixty of the acts of nineteen hundred and sixty-two. (Emphasis added).



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Prior rulings from the courts and state and federal agencies have found the Foundation to be an agent of the City. The Attorney General has opined that the Foundation acts as a public agent to carry out the terms of Franklin's will and that the Institute is publicly supervised and controlled. The Internal Revenue Service has ruled the Institute to be an agency or instrumentality of the City, a political subdivision of the Commonwealth. A Regional Director of the NLRB found the Institute to be a political subdivision within the meaning of the National Labor Relations Act. While we do not find these prior rulings to be in any way dispositive of the issue of the Institute's status under c.150E, we find that they reinforce our conclusion that the Institute is an "employer" within the meaning of G.L. c.150E.⁹

Based upon all the above factors, we conclude that the Institute is a "political subdivision" within the meaning of Section 1 of G.L. c.150E and hence is an "employer or public employer" as defined by that statute.¹⁰

Facts

The Termination of Marsh, Charpentier, and Mack

Until October 7, 1983,¹¹ the following employees performed custodial services for the Institute: Robert Marsh, Robert Charpentier, Peter Mack, George Pinieri, and their supervisor, Sam Bienes. Marsh, Charpentier and Mack are the subjects of the instant charge.

The general duties of the custodians and their supervisor (Bienes) were: painting, working on the boiler, general maintenance, carpentry work, replacing light bulbs, and electrical and plumbing work that did not require a license. The supervisor and three of the custodians worked from 6:00 a.m. to 3:00 p.m.; one of

⁹This case is distinguished from Trustees of Forbes Library, 6 MLC 1216 (1979), in which the Commission exerted jurisdiction over the Forbes Library pursuant to Section 2(2) of G.L. c.150A. In that case, the Commission accepted the admission of the library Trustees that the library was an "employer" within the meaning of G.L. c.150A. The Commission, however, noted that "[since] it [was] clear the Commission [had] jurisdiction under either G.L. c.150A or G.L. c.150E, we believe that the admission by the Trustees that they are the employer is sufficient to insure our ability to determine this case." *Id.* at n.1.

¹⁰Although the Institute expressed some confusion about whether the Commission's jurisdiction arose pursuant to G.L. c.150E or G.L. c.150A, we note that counsel for the Institute assured the Commission's hearing officer that the Institute did not deny the Commission's jurisdiction over the Institute.

¹¹Unless otherwise noted, all dates refer to calendar year 1983.



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he custodians worked from 8:00 a.m. to 5:00 p.m. Charpentier had been employed by the Institute for approximately two years and seven months. The record does not reveal the tenure of Marsh or Mack.

In May 1983, Richard D'Onofrio, vice-president and chief operating officer of the Institute, held a meeting to discuss Bienes's poor work performance as supervisor. Present at the meeting were Michael Mazzola, president of the Institute; James Boyd, assistant dean; Richard Beaton, dean of faculty; and Mr. Shapiro, dean of students. At this meeting, Boyd expressed his displeasure with Bienes's performance and reported that faculty members were complaining that the cleaning was not getting done. Bienes was criticized for having hired a licensed plumber and electrician to perform electrical and plumbing repairs that did not require a license. Participants in the meeting also expressed concern about Bienes's failure to supervise the other custodians. On many occasions, the custodians were reportedly seen taking extended coffee breaks and failing to perform certain duties.

D'Onofrio frequently interacted with Bienes and had observed that he was extremely disorganized. On numerous occasions, D'Onofrio had asked Bienes where the other custodians were and what they were doing. Bienes knew neither where the custodians were nor on what tasks they were working. Although D'Onofrio considered Bienes to be a very honest man, his opinion of Bienes as a supervisor was that he was "marginal at best." At the end of this May meeting, it was decided to replace Bienes as supervisor after the June 5 graduation.

At the reception following graduation on June 5, D'Onofrio, Mazzola and George Cooper, a member of the Board, further discussed Bienes's work performance. D'Onofrio reminded Mazzola that they should do something about replacing Bienes and do it quickly. D'Onofrio told Mazzola that D'Onofrio's neighbor, Frank Dicks, had an excellent record as a supervisor and that he should be considered seriously as a replacement for Bienes. Mazzola authorized D'Onofrio to speak with Dicks and to offer him between \$16,000 and \$18,000 for the supervisor's position.

On June 11, D'Onofrio and Dicks discussed the supervisory position. D'Onofrio offered Dicks \$17,000 for the position. Dicks said he would have to think about it and talk to his wife because it was less than his current salary.

After June 11, Dicks went out of town for a week. On June 12, Dicks wrote the following letter to D'Onofrio.¹²

¹²The record does not reveal the date when this letter was received at the Institute. The letter is handwritten and not on business stationery. It was sent to D'Onofrio at the Institute. D'Onofrio testified that the customary procedure at his office is for his secretary to slit open envelopes and to place them on his desk. Consistent with his usual practice, D'Onofrio threw the envelope away and saved the letter. It is not his custom, nor did he, note on the letter the date of its receipt.



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June 12/83

Dear Dick

I really appreciated your job offer Saturday an [sic] enjoyed our talk. But the salary of seventeen would not really be enough to get me to take that job on.

I'm too involved in the house'1 [sic] I'm remodeling and have several cleaning contracts that are much more lucrative.

If you would consider me on a cleaning contract which will include some maintenance I'll be only too happy to come in and discuss it with you.

I'm sorry your [sic] having so much trouble with your staff but your [sic] really asking a lot of anyone to come in and turn it around, keeping the same people that got you in that mess. So if you get a new super don't be to [sic] disappointed if he can't.

I've been doing this type of work for over twenty-five years. And wouldn't take that job under them conditions.

Thanks again for thinking of me. I'll stay in touch. I'm only home weekends now in working in Brant Rock during the week. You can get me at 834-4481 nights.

Sincerely yours,

/s/ Frank Dicks

Around the third week of June, D'Onofrio spoke to Mazzola again regarding the Bienes situation. Mazzola expressed his concern about the approximately 10% decline in the number of student applications for the Fall 1983 semester. At some point, D'Onofrio mentioned Dicks's letter and Dicks's suggestion of doing the cleaning on a contract basis. They briefly discussed the salaries of the custodians and Mazzola indicated to D'Onofrio that if he could do anything to save the Institute money, then he should explore the possibility of contract cleaning with Dicks.

During either the last week of June or the first week of July, D'Onofrio spoke with Dicks again. During this conversation Dicks asked D'Onofrio for a physical description of the Institute's buildings. D'Onofrio told Dicks that the Institute needed someone to do unlicensed electrical and plumbing work which he knew Dicks was qualified to do. D'Onofrio also told Dicks that he would prefer that the cleaning and maintenance be done in the evening rather than during the day.

D'Onofrio did not resume his conversations with Dicks until the end of July. At some point, D'Onofrio requested that Dicks provide him with a letter of recommendation. Dicks provided the following letter from a previous employer.



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TO WHOM IT MAY CONCERN:

March 15, 1982.

Frank Dicks has been the plant manager at the Walker Home and School for over 17 years. His responsibilities have included supervision of and participation in all those tasks necessary to the functioning of our physical plant. This has entailed regular maintenance of seven buildings, five vehicles, numerous appliances and equipment, and nine acres of grounds. He was also responsible for special remodeling and renovation projects.

Administratively, Mr. Dicks [sic] duties included hiring, project scheduling, upkeep of maintenance records, sub-contracting and compliance with state and local building regulations and inspection requirements. He supervised a crew of four people and coordinated all outside contracting jobs.

Mr. Dicks brought a wide variety of skills to his tasks and applied them with industry. He is competent in carpentry, plumbing, electrical work, painting and in the planning and execution of property renovation. He always showed concern for the feelings of others and strove to be responsible to their needs. Walker will not only miss his talents greatly, but his integrity and loyalty as well.

If you should have further questions please feel free to write or call me.

/s/ A.E. Trieschaman, Ph.D.
Executive Director

D'Onofrio claims that he spoke to Dicks in late July and told Dicks that the Institute was prepared to offer him a figure in the mid-fifty thousand or low sixty thousand dollar range for a cleaning and maintenance contract. Dicks was disappointed by this figure and stated it would cost him much more to do the work.

D'Onofrio claims to have made a notation in his scheduling book on or about July 29 to talk to MCM about contract cleaning possibilities.¹³ D'Onofrio and Mazzola, during the first week of August, discussed the fact that Dicks thought their figures for the cleaning were too low. Mazzola said he would do a cost analysis and get back to D'Onofrio.

Sometime during the week of August 14, Mazzola told D'Onofrio that he had included that the Institute's actual costs for custodial services were somewhere around \$84,000 for the 1983-84 year and that his estimate excluded any cost-of-living wage increase. D'Onofrio estimated that the figure would approximate \$89,000

¹³"MCM" stands for Michael C. Mazzola, president of the Institute.



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for the following year. Mazzola suggested that they offer Dicks \$72,000. By this time, D'Onofrio and Mazzola anticipated a 7% decline in student enrollment for the fall 1983 semester.

D'Onofrio claims to have spoken with Dicks at his home during the week of August 14 and offered him \$72,000. Dicks responded that he now thought they were serious, and he wanted to come in and look at the buildings. An appointment was scheduled for Dicks to come to tour the Institute on September 6, 1983.

Dicks's testimony recounts a slightly different version. According to Dicks, sometime during the first two weeks of August, D'Onofrio said that he had calculated the actual cost to the Institute of the custodial department. Dicks claimed that it was also during the first two weeks of August that D'Onofrio offered Dicks a cleaning and maintenance contract in either the high sixty thousand or low seventy thousand dollar range. Dicks claims to have immediately gone into the Institute, during either the first or second week of August. Dicks testified that he met with no one but instead roamed, unaccompanied, through some of the buildings for about ten minutes. Dicks claims that he then asked D'Onofrio to set up a meeting to discuss a contract.

On August 18, Charpentier, on behalf of Mack and Marsh, contacted "Al" Buffum, the Union's business agent, to ask the Union to represent the custodians. Charpentier, Mack and Marsh had discussed joining a union in order to improve their working conditions. They felt that Bienes was not doing his job well and wanted a better definition of their responsibilities. The custodians were not aware that management had discussed the possibility of either replacing Bienes or subcontracting the custodial services. We note, however, that Charpentier had, at some unspecified time, told Bienes that all the custodians desired a wage raise. Bienes later told Charpentier that he had told Mazzola of Charpentier's desire for a raise.

Shortly after August 18, Buffum came to the Institute and met with Charpentier, Mack and Marsh on their lunch hour at a coffee shop across the street from the Institute. After this meeting, the three custodians discussed the possibility of joining the Union, and they decided to call Buffum and tell him they wanted to join.

On August 24, Buffum met with Charpentier, Mack and Marsh, who signed Union cards and paid \$10 for membership dues. On August 25, Buffum sent the following letter to Mazzola.

Dear Mr. Mazzola:

Please be advised that this Local Union represents a majority of the custodians employed at the Franklin Institute of Boston.

Therefore, the writer requests that we meet for the purpose of entering into a Collective Bargaining Agreement.



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The writer suggests that we meet, if you are available Wednesday, August 31, 1983, at 10:00 a.m. at your office.

Please advise.

Very truly yours,

/s/ E.W. Buffum
Business Agent

Mazzola admits receipt of this letter on August 26. On or about August 25, Buffum also filed representation petitions at the NLRB and at the Commission.¹⁴ Mazzola recalled having received a call from an NLRB attorney on or about August 26 and 29 concerning the petition filed with the NLRB. D'Onofrio recalled having received the NLRB petition on August 29, but denied any prior knowledge of union activity by the custodians.

Sometime in late August or early September, the custodians received the following undated notice from Mazzola.

TO ALL CUSTODIANS

I have received a letter from an outside union claiming to represent you for the purpose of bargaining over wages and working conditions. At the same time, the Union has filed a petition with the National Labor Relations Board.

We do not believe that you desire to be represented by this outside group. You are entitled to decide this matter by secret ballot. Accordingly, we replied to the union letter by stating that the matter should be resolved under the procedure of the National Labor Relations Board.

In a small institution such as ours, we do not believe that it is in your best interest to be represented by strangers.

I will keep you advised of all future developments.

/s/ Michael C. Mazzola
President

Mazzola admitted that he did not want his employees to unionize.

On August 24 or 25, Mazzola received a phone call from a person named Marie D'Assignol, who claimed to represent Louis Paris of United Industrial Cleaning. D'Assignol had called Mazzola in late May or early June to inquire about whether the Institute could use the services of any outside cleaning contractor. Mazzola had

¹⁴The Commission docketed petition number CR-3634 on September 1.



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told her to call him later in the summer, when he might need a "night service" from an outside contractor. At Mazzola's request, Paris subsequently called and scheduled an appointment with Mazzola for September 2.

On September 2, Mazzola, D'Onofrio and Bienes met with Paris at the Institute. Mazzola told Paris that he was interested in getting an idea of the cost of contract cleaning and of the type of services which would be provided. Paris asked what kind of services Mazzola wanted and had Bienes explain his routine and schedule. Bienes described in detail the type of work he and his staff did. All of them then toured the facilities. Paris explained that it would be very difficult to calculate the cost unless he knew the square footage of the Institute. Mazzola said he did not have the figures, but he could get them within a few days. At some point, Mazzola also asked Paris whether his company was unionized. Paris affirmed that his company was unionized.¹⁵ Mazzola never asked Dicks if his employees were unionized. Mazzola knew they were not.

On September 6, Dicks visited the Institute. D'Onofrio brought Dicks to Mazzola's office to introduce them. D'Onofrio then took Dicks on a tour of the building, and, about halfway through the tour, D'Onofrio turned Dicks over to Minieri because D'Onofrio had another appointment.

Sometime between September 2 and 15, Mazzola supplied to Paris his calculation of the Institute's square footage. On September 15, Paris submitted the following written proposal:

Dear Sir:

In reference to the general cleaning and maintenance¹⁶ of your facility at 41 Berkeley Street, Boston, Massachusetts, we herewith submit our tentative price for the services as outlined by you.

Our price tentatively shall be \$5,765.00 per month.

Please feel free to call upon us to further discuss this proposal.

Sincerely,

/s/ Louis S. Paris, President

No one from the Institute discussed this proposal further with Paris.

¹⁵ Mazzola says that he asked Paris about unionization in order to determine what the Institute's costs would be should the custodians unionize. Mazzola learned that Paris's unionized employees earned less than the Institute's custodians.

¹⁶ Mazzola testified that Paris's bid covered only cleaning services. Mazzola based this statement on some telephone conversation which he claims to have had with Paris prior to receipt of the written bid. In addition, a Paris representative offered to recommend a painting contractor to the Institute.



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On September 15, the NLRB conducted a hearing concerning the Union's representation petition.

On September 22, Dicks visited the Institute again, with his wife, and met with Mazzola, D'Onofrio, the Institute's business manager (Mr. Young), and the Institute's accountant (Mr. Galvin). Dicks stated that the buildings were in terrible shape and that a lot of work needed to be done. Dicks opined that the staff was not doing its work and was not being supervised. He then proposed to do the cleaning and maintenance during the next year for \$82,000. Mazzola said the Institute could not afford that price, so Dicks counterproposed a price of \$78,000. Mazzola agreed to this price, and Dicks agreed to draft a contract for Mazzola's review and signature.

On September 26, Dicks give D'Onofrio a draft of the contract on stationery bearing the following heading:

SDS CONSTRUCTION, INC.¹⁷
984 West Street
Mansfield, Mass. 02048
(617) 339-7728

Mazzola and D'Onofrio reviewed the contract and proposed some modifications, such as a certification of liability insurance and a clause regarding supervision. The following agreement was prepared, signed, and dated on October 4:

CONTRACT TO SUPPLY JANITORIAL AND MAINTENANCE SERVICE TO THE
FRANKLIN INSTITUTE OF BOSTON BY SDS CONSTRUCTION, INC.

- (1) SDS will supply two (2) people to cover day hours Monday through Friday. One of these people shall be fully qualified to do maintenance beside janitorial duties and has a good background in such work.
- (2) SDS will supply two (2) qualified people to clean buildings at night (Monday through Friday). (This is what the school is sorely lacking now.)
- (3) SDS will shovel major walkways to clear them of snow.
- (4) SDS will paint walls and maintain grounds of the campus when required.
- (5) SDS will provide annual stripping and waxing of floors of all campus buildings.

¹⁷Dicks testified that the real name of his company might be SDS Construction Co. He also acknowledged that the stationery probably was not printed until sometime after August 25.



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(6) SDS will supply people for other events such as board meetings, open hours, etc., subject to salary reimbursement if such events fall on days or hours when not normally staffed such as weekends or holidays.

(7) All supplies will be provided by the Franklin Institute such as cleaning materials and tools, paints or any equipment needed to fulfill our duties in either janitorial or maintenance of the school.

(8) Supervision of all maintenance and janitorial work done will be supplied by SDS.

(9) SDS will provide help for purchasing and supplies so that they are both cost efficient and good quality (I believe we can make a substantial savings to the school in this regard by purchasing from the companies we use now).

(10) SDS will make every effort to correct the conditions of the Institute as fast as possible by having one extra person for the first month who will rotate between the day and night shifts.

(11) Receiving of goods will be done by the day people.

(12) Moving of books and papers for the start of each semester will be done by our staff during semester layoffs.

(13) SDS will supply the workman's compensation certificate to cover our own employees.

(14) SDS will carry Liability and Casualty Insurance in the amount of \$100,000 minimum and will provide certification of such insurance.

(15) Thirty (30) days notice in writing by either party will be required to terminate this contract.

(16) My signature on this contract represents that SDS will fulfill all terms and conditions of this agreement for the annual sum of \$78,000 to be paid every two weeks at the rate of \$3,000 per pay period.

(17) This contract will take effect beginning on Monday, October 10, 1983, with the first payment for service to be received by SDS on Friday, October 21, 1983, and every other Friday thereafter.

(18) Access to buildings for the performance of our duties will require that SDS be given all the necessary keys.

/s/ SDS CONSTRUCTION, INC. Frank E. Dicks, President
 FRANKLIN INSTITUTE OF BOSTON /s/ Michael C. Mazzola, President
 THE FRANKLIN FOUNDATION /s/ C.W. Anderson, President
 Date: October 4, 1983



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On October 6, the NLRB Regional Director issued his decision concerning the representation petition and sent the decision to the parties by certified mail. There is a dispute regarding when the Union and the Institute received the decision. According to Buffum, he received the decision at approximately 9:30 a.m. on Friday, October 7. As discussed below, the Institute maintains that it received notice of the decision on October 11.

In the morning of October 7, when the custodians went to pick up their paychecks, Mazzola handed each one a letter, of which the following is representative:

October 7, 1983

Mr. Robert L. Charpentier
[address omitted]

Dear Mr. Charpentier:

Due to the fact that the cleaning and maintenance at the Institute will henceforth be done by an independent contractor, your employment at Franklin Institute of Boston is hereby terminated effective immediately.

Two weeks' pay in lieu of notice plus accrued vacation pay is tendered herewith.

/s/ Michael C. Mazzola
President

Upon receipt of this letter, Charpentier telephoned Buffum to tell him of the termination. Buffum asked Charpentier, Mack and Marsh to come over to his office and, after they arrived, he attempted to call Mazzola, but was unable to reach him. On October 7, Buffum filed charges with both the NLRB and the Commission alleging that the custodians had been discriminatorily discharged.

The Institute submitted in evidence the NLRB's affidavit of service showing that the return receipts from the Union and from George Foley, the Institute's attorney, were dated October 11. No receipt was returned from Mazzola. Mazzola explained that he received the decision on October 11, but for some reason the return receipt was not mailed. The green postal receipt card still is attached to the envelope in which the decision was mailed to the Institute. According to Mazzola, his secretary wrote the date of 10/11/83 on the envelope.

On October 11, the custodians began picketing the Institute and were still picketing at the time of the hearing.

At the time of the hearing, the Institute was staffed in the following manner pursuant to the SDS Construction Company contract. There are two shifts: the morning shift (6 a.m. to 2:30 p.m.) is staffed by John and Beatrice Holland and the evening shift (8:30 p.m. to 12 p.m.) is staffed by Dicks's daughter and Darlene



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McDonald. Dicks comes in two days per week to paint, plaster, and fix toilets. Occasionally, when he needs additional help, his wife and son-in-law also come in.

Opinion

The Termination of Marsh, Charpentier and Mack

To establish a violation of Section 10(a)(3) of G.L. c.150E, the Union must show by a preponderance of the evidence that Marsh, Charpentier and Mack participated in protected activity, that the Institute knew of this activity, and that the Institute, in taking adverse action against the employees, was improperly motivated by a desire to penalize or discourage protected activity. City of Boston, Department of Health and Hospitals, 11 MLC 1065, 1071 (1984); Clinton Services Corporation d/b/a Great Expectations, 9 MLC 1494, 1497 (1982); City of Boston (Police Department), 8 MLC 1872, 1874 (1982); City of Boston, 7 MLC 1216, 1223 (1980); Cf. So. Worcester County Reg. Voc. School District v. LRC, 386 Mass. 414, 418-19 (1982). A charging party must produce evidence to support a finding of each of the above-referenced elements to establish a prima facie case. Town of West Springfield, 8 MLC 1041 (1981).¹⁸ To prove unlawful motivation, the Union must demonstrate that the termination would not have occurred but for the participation in protected activity. Southern Worcester County Reg. Voc. School District v. Labor Relations Commission, 386 Mass. 414 (1982).

Marsh, Charpentier, and Mack were involved in protected activity when they sought Union representation. It is undisputed that the Institute had knowledge of their desire to join the Union by August 26, when Mazzola received Buffon's letter requesting bargaining.¹⁹ In addition, we note that Charpentier was engaged in protected, concerted activity when he told Bienes of his and his colleagues' desire for a pay raise. Mazzola did not deny that Bienes had told him of Charpentier's desire for higher pay.

¹⁸The Employer contends that Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565, fn. 4 (1981) requires that the employee prove that she or he has a good work record as part of a prima facie case. The Court did not establish such a requirement, rather it suggested that a good work record may be an element of a prima facie case.

¹⁹Since the Institute knew by August 26 that the custodians desired Union representation, the actual date of the receipt of the NLRB decision is unnecessary to substantiate knowledge of protected activity. In fact, had the Institute known before it terminated the custodians that the NLRB would dismiss the representation petition, the Institute might have had less reason to terminate the employees so abruptly. Of course the Institute was aware that dismissal by the NLRB of the Union's petition did not end the custodian's union aspirations because a petition was pending at the Commission.



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The record contains substantial evidence from which unlawful motivation may be inferred. See *Republic Aviation v. NLRB*, 324 U.S. 793, 16 MLRR 620 (1945). The discharges occurred soon after the Employer acquired knowledge of the custodians' protected activity. Prior to August 26, the custodians were given no indication that they might be terminated, or that an outside contractor might be used. After August 26, the Institute was aware of the custodians' desire to be represented by the Union. On September 15, a hearing was held at the NLRB to determine jurisdiction and the scope of the bargaining unit. On October 7, the custodians were terminated. Just six weeks passed between the time the Institute became aware of the custodians' desire for union representation and the date of their termination.

Further evidence of the Institute's opposition to the unionization of its custodians appears in the "notice" sent by Mazzola to all custodians in late August or early September. Mazzola told the custodians that the Institute did not think it in the employees' best interest to be represented by "strangers." Mazzola also testified that he did not want the employees to join a union. Thus, the Union has established that the employees engaged in protected activity, that the Institute was aware of, and opposed to, their unionization and that, without prior warning, the employees were terminated soon after the Institute learned of their desire to unionize.

We next turn to the Institute's purported lawful reasons for terminating the custodians. The Institute contends that the decision to terminate the custodians was made well before the Institute learned of their desire to unionize and was motivated by two legitimate reasons: 1) poor work performance by the custodians; and 2) cost savings from contracting out custodial services. After careful consideration of the entire record, we find that the Institute did not decide to subcontract until after it learned of the custodians' desire to unionize and that the purported reasons for subcontracting were pretextual. We conclude that the real reason for terminating Marsh, Charpentier and Mack was to avoid unionization.

There is no evidence that any custodian was ever reprimanded by D'Onofrio or Mazzola for poor work performance. Nor is there any evidence that either D'Onofrio or Mazzola ever asked Bienes to reprimand the custodians for poor work performance. D'Onofrio apparently was satisfied with the job that Mack was doing, but claims that Marsh performed marginally and Charpentier performed poorly. D'Onofrio admitted that he had never spoken directly to the employees about their performance. D'Onofrio had seen the employees taking long coffee breaks while he enjoyed a cup of coffee with his father before he began his workday. D'Onofrio had told Bienes to talk to the employees about this. Bienes later assured him that he had. The record does not reflect whether Bienes was told to tell the employees to curtail their breaks or whether they did so.

From May through July, D'Onofrio, Mazzola, Board members, and other Institute officials, were primarily concerned with Bienes's poor performance as a supervisor. Nonetheless, the Institute retained Bienes throughout the summer and into the start of the fall semester. In September 1983, the Institute decided to subcontract all



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custodial services, rather than merely replace Bienes.

Although D'Onofrio and Mazzola contend that they were actively considering the option of contracting out the custodial services during July and early August, the testimony of the Institute's witnesses lead us to conclude that the Institute had not decided to contract out the custodial services until late in September 1983, after Mazzola and D'Onofrio learned of the custodians' union activity. The evidence demonstrates that it was not until after receipt of the Union's notice that the custodians were unionizing that the Institute even received a bid for contract cleaning and maintenance. Thus, no decision to contract out the maintenance and cleaning could have been made until after September 15, at the earliest. The Institute has offered no explanation for its delay from late May when it made the decision to remove Bienes as supervisor until its efforts in very late August and early September to solicit an outside cleaning contractor. The record supports the inference that the Institute gained the motivation to act quickly once it had received the Union's August 25 demand for recognition and bargaining.

Other facts support our conclusion that Mazzola did not decide to subcontract the custodians' work until after he had learned of the custodians' desire to unionize. When Paris's representative telephoned Mazzola on August 24 or 25, 1983, Mazzola did not tell Paris that the Institute already had a cleaning contractor. Instead, Mazzola invited Paris to schedule an appointment to discuss a cleaning contract and tour the facility. In addition, Mazzola admitted that he did not raise the suggestion of subcontracting custodial work with Mr. Anderson, president of the Franklin Foundation, until mid or late August "when the negotiations started to get serious."²⁰

Mazzola's notice to the custodians, advising them of the Union's representation claim and pending NLRB petition, was sent sometime between August 26 and early September. In that letter, Mazzola advises the custodians that the Institute did not believe it to be in their best interest to be "represented by strangers." Had Mazzola already made the decision to subcontract custodial services, and to terminate the custodians, he would have had no reason to send this notice. Instead, we find that the facts support the inference that the Institute's interest in subcontracting its custodial services to "strangers" was picqued by receipt of information indicating that the custodians sought unionization. We conclude that the decision to subcontract the custodial work was not made until September, after the Institute admits having knowledge of the custodians' Union activity. Moreover, no decision to subcontract could have been made before receipt of at least one bid. The first bid was submitted by Paris on or about September 15, 1983.

We also note that the entire bidding process described by D'Onofrio, Mazzola

²⁰ Since the Board of Managers of the Foundation must approve all hiring and firing and all expenditures, Mazzola had to secure the Foundation Board's approval prior to subcontracting any services.



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and Dicks is curious, at best. Rather than solicit a bid from Dicks, Mazzola and D'Onofrio claim that they calculated the Institute's costs and then selected a number that was \$12,000 to \$17,000 lower as the price that they requested Dicks to bid. There is no evidence that they offered the same price to Paris. To the contrary, Paris submitted his own bid of approximately \$69,000, and probably, would have been surprised to learn that the Institute was "offering" \$72,000. The fact that D'Onofrio, Mazzola and Dicks all agree that all of their discussions occurred prior to August 18, the date that the custodians first phoned the Union, seems more than coincidental and less than convincing. Their versions of events of early August reveal some discrepancies. For example, D'Onofrio and Mazzola recall that they did not even contact Dicks concerning the \$72,000 offer until after the time that Dicks claims to have not only received a different offer but also to have secured the facility by himself. Similarly, we note that Mazzola and D'Onofrio were unable to provide Paris with square foot measurements at the time Paris toured the facility in September, but claim to have prepared and supplied the same measures to Dicks in July or August. Had the measurements really been supplied to Dicks in July or August, Mazzola would not have needed more time in September to prepare them for Paris. Equally significant is Mazzola's admission that he questioned whether Paris's employees were unionized. Mazzola explained, "I was trying to get an idea of what the Union wages would be; if we had to get involved in the Union, we was just trying to see what type of costs would be involved." Had Mazzola already made the decision to contract out the Institute's custodial services, he need not have worried about the costs that might be involved "if [the Institute] had to get involved in the Union."

The Institute contends that the decision to subcontract the cleaning and maintenance services was motivated by a desire to save money. The facts, however, refute this contention. When Mazzola calculated the Institute's actual cost of custodial services, he told D'Onofrio that the cost was approximately \$84,000 during the 1983-84 school year and would increase to approximately \$89,000 during the 1984-85 school year. Paris subsequently submitted the lowest contract bid, proposing to perform the work for about \$69,000 per year. Dicks's bid contained a price of \$82,000, which was negotiated down to \$78,000. The Institute defends its failure to choose the lowest bidder by claiming that Paris's bid excluded maintenance. Mazzola formed this opinion from telephone conversations with Paris before receipt of the written bid. The plain language of the written bid, however, specifies that the proposed price covers both cleaning and maintenance. Yet no one from the Institute bothered even to telephone Paris to request clarification of the written bid and its reference to maintenance. As a result, the Institute spent one thousand dollars more to contract with Dicks, after failing to inquire about the details of Paris's bid. By its own conduct, the Institute has demonstrated that cost-saving was not its principal motivation when it subcontracted with Dicks.

Moreover, we note that Dicks acknowledges that his business stationery was probably not printed until sometime after August 25. The additional fact that the name of the company is incorrectly printed on the stationery leads us to conclude that the negotiations and the contract with Dicks were accomplished with haste. That the Institute has offered no explanation for the delay between its early June decision to remove Bienes as a supervisor and its September decision to subcontract



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the custodial service. The facts described above support the inference that the Institute gained the motivation to act once it had received the Union's August 25 demand for recognition and bargaining.

For all the above reasons, we conclude that the final decision to contract out the custodial services occurred only after the Institute had knowledge that Marsh, Charpentier, and Mack desired to join the Union and, would not have occurred but for their participation in that protected activity. Thus, these individuals were terminated in retaliation for their protected activity, in violation of Sections 10(a)(3) and (1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Section 11 of the Law, that the Institute shall:

1. Cease and desist from:
 - a. Restraining, coercing, and intimidating its employees in the exercise of their rights guaranteed by Section 2 of the Law;
 - b. Discriminating against Robert Marsh, Robert Charpentier, and Peter Mack because they engaged in activity protected by Section 2 of the Law;
2. Immediately offer Robert Marsh, Robert Charpentier, and Peter Mack, reinstatement to their former positions and make them whole for any loss of wages or other benefits which they may have suffered as a result of their wrongful discharges, plus interest on any sums owing, at the rate specified in M.G.L. c.231, Section 6B, with quarterly compounding, from the date of discharge.
3. Preserve, and upon request, make available to the Commission all records, documents, and information necessary to determine the amounts owed under the preceding paragraph of this Order.
4. Post in conspicuous places in all of the Institute's buildings, the attached Notice to Employees, and leave the same posted for a period of thirty (30) consecutive days.
5. Notify the Commission within thirty (30) days of receipt of the Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
GARY D. ALTMAN, Commissioner
MARIA C. WALSH, Commissioner



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

After a hearing at which all parties had the opportunity to present evidence and to be fully heard, the Labor Relations Commission has found that we violated the Law by terminating custodians Robert Marsh, Robert Charpentier and Peter Mack. The Commission has ordered us to post this Notice and to abide by what it says.

Chapter 150E of the General Laws gives all employees the right:

- To engage in self-organization;
- to form, join or assist employee organizations;
- to bargain collectively through representatives of their own choosing;
- to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT do anything that interferes with these rights.

More specifically,

WE WILL NOT discriminate in regard to hiring, tenure, promotion, or any other term or condition of employment in order to discourage employees from engaging in lawful concerted activities to improve their wages, hours or working conditions.

WE WILL offer Robert Marsh, Robert Charpentier and Peter Mack reinstatement to their former positions and will make them whole for any rights, benefits, privileges, and monies lost by them as a result of their discriminatory discharge.

FRANKLIN INSTITUTE OF BOSTON

By: _____
 MICHAEL C. MAZZOLA
 President



TOWN OF ABINGTON V. LOCAL 393, IBPO AND FRANCIS J. CURRAN, PRESIDENT, ET AL.,
SI-178 (7/4/85; 7/9/85).

108. Strikes
108.22 sick out
108.4 setting requirements under Chapter 150E
108.51 notice of investigation

Commissioners participating:

Gary D. Altman, Commissioner
Maria C. Walsh, Commissioner

Appearances:

Paul J. Hodnett, Esq. - Representing Local 393, International
Brotherhood of Police Officers
Robert Canavan, Esq. - Representing Town of Abington

SUPPLEMENTAL INTERIM ORDER

On July 3, 1985, the Town of Abington (Town) filed a petition with the Labor Relations Commission (Commission) under G.L. c.150E, Section 9A(b) alleging that Local 393 of the International Brotherhood of Police Officers (the Union) and certain of its officers and the employees whom it represents were engaging in or about to engage in a strike, work stoppage, slowdown or withholding of services. The Commission scheduled an investigation into the allegations of the petition for 9 a.m. on Thursday, July 4, 1985. Notice of the scheduled date, time and place of the investigation, along with a copy of the petition was delivered to the Union, and to Francis J. Curran, Richard J. Carney III, Kevin M. Force and Richard L. Tower, its officers, and to the following employees: Kevin K. Smith, George H. Cook, Paul B. Connolly, Richard L. Franey, Nicholas Marzocca and Robert G. O'Keefe, Jr. Service was made in hand upon all named individuals except Tower, Cook, Marzocca and O'Keefe whose copies were left under their doors. None of the named individuals appeared at the investigation on July 4, 1985.

The Commission issued an Interim Order on July 4, 1985, a copy of which is attached hereto. By agreement of the parties the Commission recessed the investigation of individual culpability until Monday, July 9, 1985. Notice of the date, time and place of the continued investigation was delivered to the Union on July 4, 1985 and to the individually named employees on July 5, 1985.

Also on July 5, 1985, representatives of the Town and of the Union informed the Commission of the steps taken to comply with the terms of the Interim Order.¹ The Town and the Union confirmed that all employees had returned to work on July 4, 1985.

¹The Union had held a meeting of employees prior to 10 a.m. on July 5, 1985 to read the Interim Order to all employees.

