'N OF CLINTON AND RICHARD J. HART, MUP-5659 (11/9/85). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

63.21 discrimination - filing a grievance
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missioners participating:

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

earances:

James A. Gibbons, Esq. - Representing the Town of Clinton

Dennis Brown, Esq. - Representing Richard J. Hart

DECISION ON APPEAL
OF HEARING OFFICER'S DECISION

Statement of the Case

On March 15, 1985, Hearing Officer Sherrie Talmadge issued her decision holding t the Town of Clinton (Town) had violated G.L. c.150E, Sections 10(a)(1) and (3) refusing to appoint Richard J. Hart (Hart) to the position of Deputy Fire Chief ause he had filed a grievance pursuant to the collective bargaining agreement ether with other members of the fire department. The Town filed a timely notice appeal. On May 28, 1985 it filed a supplementary statement challenging the legal is of the hearing officer's decision and certain of her factual findings. Hart ponded on June 18, 1985.

Facts

The Town's fire department consists of twenty-one permanent fire fighters, luding eighteen fire fighters, two captains, and the deputy chief; twenty-five 1 fire fighters; and Chief Thomas Moore. Moore has been chief for thirty years. is the appointing authority for the purposes of Civil Service law, G.L. c.31, tion 1 et sec. The National Association of Government Employees (NAGE), Local 125, represents the twenty-one permanent fire fighters. The Town and NAGE are ties to a collective bargaining agreement containing a grievance procedure cul- ating in binding arbitration.

The Clinton Fire Department has had no permanent deputy fire chief since tember 13, 1978, when the last incumbent retired. A number of fire fighters have en the Civil Service examination for the position, but until January 1984 none passed. Therefore, in accordance with G.L. c.31, Sections 12, 13 and 14, Moore

series of provisional appointments to the position, the most recent being cNamara. McNamara had been promoted from fire fighter to fire captain on er 23, 1980. Moore provisionally appointed him deputy chief on August 1, 1981.

Hart initially worked as a call fire fighter for the Clinton Fire Department. ame a permanent, full-time fire fighter on July 15, 1979. Moore promoted him e captain on September 1, 1983. During 1982, Hart was president of the NAGE In addition to his experience with the Clinton Fire Department, Hart has college credits in fire science, three hundred credit hours with the Massachu- Fire Academy, and is qualified as a level one instructor at the latter institu- Furthermore, he has been a call fire fighter with the Town of Lancaster Fire ment since 1972. From August 1980 through March 1982, Hart was captain of the ter Ambulance Department, and in that capacity he supervised employees and d budgetary problems. Hart resigned this position to prepare for the 1983 Service examination for the position of deputy fire chief in Clinton. Hart ne examination on March 19, 1983.

On December 7, 1983, Hart and nineteen other bargaining unit members filed a ice under Article IX, Section 2 of the collective bargaining agreement. That provides that the employer will reimburse fire fighters for a certain propor- f their work clothing on presentation of an itemized bill to the chief. At oint, Moore had issued an order requiring bargaining unit members to show him tual items purchased in order to be reimbursed. McNamara was the only bargain- it member who did not sign the grievance.

On January 10, 1984, Hart received notice that he had passed the examination outy chief. He was the only candidate to pass.

Around the end of February 1984, Hart learned from the Department of Personnel istration (DPA) that Moore had not requested the list of the eligible candi- for the position of deputy fire chief. Hart was concerned, for Moore had pre- told him that he had requested the list from DPA. In late February or early Hart went to Moore's office to tell him that DPA had not yet received the tion.

The conversation between Moore and Hart took place in an upstairs room of e station. Hart told Moore that DPA had not received the requisition. The declared, "I'm not going to appoint somebody who is against me. I'll ask for l-damned list when I'm good and ready." Moore showed Hart the December 7, ievance and, pointing to Hart's name, asked "You signed this didn't you?" plied that he had.[1]

[1] We differ from the hearing officer on some particulars of this conversation. nd that during the conversation, Moore told Hart that he had sent his requi- to DPA. The record indicates that while Moore did tell this to Hart, it was me before the conversation. She also found that Moore exhibited the Civil list to Hart during this conversation. According to the record, Moore dis- the grievance, but not the list.

Soon after, DPA instructed Hart to appear for an interview with Moore for the sition of deputy fire chief. The interview took place on March 29, 1984 and was tremely short. Referring to a Civil Service form, the Chief said, "You sign the cking thing and I'll do what I have to do."

On April 2, 1984, Moore wrote the following letter to an official at DPA:

> Dear Mr. McLaughlin:
>
> I find that the recent eligible list for Deputy Fire Chief that I have received from your office with just one name thereon is inadequate for me to appoint from. I request that Clinton be included in the next scheduled test for Deputy Fire Chief.
>
> At the present time John M. McNamara is serving provisionally in the position of Deputy Fire Chief and I request that this provisional employment in this position be continued until an adequate list is established.
>
> Very truly yours,
> Thomas F. Moore, Chief
> Clinton Fire Department

DPA rejected Moore's request and instructed him that the list of one was adeate. On April 9, 1984, Moore responded in the following letter:

> Dear Mr. McLaughlin:
>
> I received your communication of April 4, 1984 to my request to continue the provisional promotion of John M. McNamara as Deputy Fire Chief until an adequate eligible list is established.
>
> Mr. Richard J. Hart was the only name on the most recent eligible list and I have interviewed him as required by Civil Service regulation. My un-willingness [sic] to promote him at this time is in no way a condemnation of Mr. Hart. I appointed Mr. Hart to the position of permanent Fire Captain only last September 1, 1982 and I do not feel he has served in that position long enough to gain the experience I feel is necessary to warrant another promotion at this time.
>
> Mr. John M. McNamara became a permanent Fire Captain on 11/23/80 and was provisionally promoted to Deputy Chief on 8/1/81. At the time he was the only permanent officer, other than myself, on this department. He has done an outstanding job as acting Deputy Chief as well as when he acts in my behalf when I am not available.
>
> I, therefore, feel that it is in the best interest of the Town of Clinton to continue the provisional promotion of Mr. McNamara until Mr. Hart gains more experience or until an adequate list can be established.
>
> Very truly yours, Thomas F. Moore,
> Chief, Clinton Fire Department

On June 6, DPA sent a letter to Moore instructing him to appoint from the ıg list or give an acceptable reason why he would not. It further informed at McNamara could no longer retain his provisional appointment. In August McNamara relinquished the position of deputy chief, and it has been vacant then.

In addition to Hart's inexperience, Moore testified that he hesitated to t Hart because he was immature, had a short temper, and was known to show up rk after he had been drinking. In support of these contentions, Moore related ı July 1983, Hart had shown up at a fire while off duty. He began ordering ighters into the burning building. Moore noticed that Hart had been drinking, d him off the scene, and told him never to return in that condition.

Moore had never criticized Hart's performance and relations between them had been amiable until March 1984. Moore testified that he had not told DPA the July 1984 incident or about his other concerns because he believed that ıg so he would permanently disqualify Hart from promotion, and he did not wish so.

Discussion

The Commission applies a three-step analysis to Section 10(a)(3) discrimination Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 ; Boston City Hospital, 11 MLC 1065 (1984). To establish a prima facie case, arging party must produce evidence to support each of the four elements of the ion: 1) that the employee engaged in activity protected by Section 2 of the) that the employer knew of this activity, 3) that the employer took some against the employee, 4) that the adverse action was motivated by the em- 's desire to penalize or discourage the protected activity. Id. at 1071.

Once the charging party has established its prima facie case, the employer ɔut it by stating a lawful reason for its decision and producing evidence ıis reason actually motivated the adverse action. Id. If an employer meets tandard, the case becomes one of "mixed motives" and the third step of the is comes into play. The Commission will consider the admixture of motives ld that the adverse action is unlawful if the employer would not have taken it ɔr" the employee's protected activity. Forbes Library; Boston City Hospital, at 1071.

Hart established his prima facie case. The first three elements were not in ə. As to the fourth, the law requires the charging party to produce evidence is protected activity played "some role" in causing the adverse action. Town v, 11 MLC 1312, 1318 (1984); Boston City Hospital, 11 MLC at 1071. If Hart's ı of his conversation with Moore is to be credited, there was ample evidence t this burden.

The hearing officer credited Hart's version because fire fighter Peter ell corroborated it. O'Connell testified that he was in a hallway about fif- r twenty feet from Moore's office during the conversation and that he heard

re say, "I'm not going to hire anyone who is against me. You've signed a griev-e before." Moore's testimony was uncorroborated.

The Commission will not overrule a hearing officer's credibility determina-ns unless the clear preponderance of the relevant evidence indicates that the erminations were incorrect. City of Marlboro, 9 MLC 1708 (1983); Town of Brain-e, 8 MLC 1193 (1981). The Town attacks O'Connell's credibility for two reasons. st, the Town points out that while Moore testified that the meeting occurred at .m. and Hart testified that it occurred "later in the day," O'Connell recalled t he overheard Moore's words shortly after 9 a.m. This reflects no more on onnell's credibility than it does on Moore's or Hart's. It only indicates a flict in the evidence as to when the conversation occurred. Second, the City ues that O'Connell's testimony relative to Moore's own alleged -- and totally ubstantiated -- drunkenness at a fire indicates O'Connell's bias and lack of dibility. Our review of the record reveals that O'Connell, even under prodding counsel for Hart, was creditably reluctant to testify to this alleged incident. recognized that his testimony was based only on rumor, and it is clear that he wered counsel's questions only because he had to. His testimony thus does not onstrate bias or otherwise reflect adversely on his credibility. We find no or in the hearing officer's decision to credit O'Connell and Hart.[2]

Moreover, Moore's exclamation, "I'm not going to hire anyone who's against is not crucial to the violation here. Even the Town's evidence relative to the versation indicates that Hart's protected activity played a role in Moore's deci-n not to promote him. There is no dispute that Moore raised the subject of the evance in the midst of an apparently unrelated discussion of Hart's application be deputy chief. According to the Town, Moore asked Hart why he felt Moore was ng about the grievance and then said that if Hart was going to be his assistant, y would have to work together. Thereafter, Hart did not get the promotion hough he alone passed the examination. Even if the hearing officer had not dited Hart, the Town's evidence demonstrates that the grievance influenced re's feelings about Hart's fitness for the position. See Town of Burlington, LC 1139 (1982), aff'd, 17 Mass. App. Ct. 402 (1984).

The Town next contends that the hearing officer misallocated the burden of of and improperly required the Town to persuade her that its proffered reasons e the predominant motives for Moore's refusal to promote Hart. However, the

[2]Having correctly found all of these facts, the hearing officer devoted ecessary attention to the circumstantial factors indicating Moore's anti-union mus. It is often necessary to resort to circumstantial evidence because dis-minatory motivation is "seldom susceptibel to direct proof." Forbes Library, Mass. at 563; see also Southern Worcester County Regional Vocational School Dis-ct v. Labor Relations Commission, 386 Mass. 414, 421 (1982). But this case pre-ts no such problem. The circumstantial factors that the hearing officer identi-d only bolster the effect of those statements by showing that Moore meant what said.

ails to appreciate the magnitude of an employer's obligation to rebut the Facie case.

It is insufficient for an employer simply to state lawful reasons for its actions. It must "state a lawful reason for its decision and produce sup- facts indicating that this reason was actually a motive in the decision." Library, 384 Mass. at 563 (emphasis added); see also Boston City Hospital, at 1072; City of Woburn, 9 MLC 1417, 1422 n.5 (1982). "The decision-maker nd it more than 'plausible' that legitimate reasons motivated the employer's on. Those reasons must actually have been a motive in the decision in order case of dual motive." Boston City Hospital, 11 MLC at 1072. The Town three reasons for Moore's action: Hart's alleged lack of experience, refer- in Moore's April 9, 1984 letter to DPA; Hart's alleged immaturity and short- temper; and Hart's alleged occasional tendency to show up for work drunk. , as the hearing officer concluded, it did not support those reasons with e that they actually motivated Moore. Hart had been a fire fighter in Clinton e years. The Town failed to demonstrate how this level of experience was ate. Indeed, the record shows that Hart's experience was similar to that of preferred candidate, McNamara. Nor did the Town support its other reasons idence. It failed to show that the July 1983 incident actually caused Moore the adverse action. There was no evidence that the 1983 incident was on mind in the early part of 1984; indeed, he never mentioned it to Hart or else after July 1983. Nor did the incident disturb Moore sufficiently to pre- m from promoting Hart in September 1983. It was therefore unlikely that it ed him in March 1983.[3] Thus, we agree that Hart's purported immaturity, emper and drinking were pretexts and not actual motives.

If, as here, all of an employer's proffered reasons are found to be pretex- he charging party prevails. While the Town is correct that the ultimate bur- persuasion remains with the charging party in a 10(a)(3) case, the employer et its own intermediate burden to produce evidence and dispel the presumption rimination fostered by the prima facie case. Forbes Library, 384 Mass. at e also Boston City Hospital, 11 MLC at 1072. The Town did not do so here.

The Town finally argues that the hearing officer's order to offer Hart the n of deputy fire chief exceeded her remedial authority. According to the he hearing officer was at most empowered to direct a further proper consider- f candidates for promotion. However, Commission precedent amply supports ring officer's remedy. City of Malden, 5 MLC 1752 (1979), enforced Civ. 1995 (Middlesex) (August 14, 1981); see also Town of Stoneham, 8 MLC 1275 Town of Randolph, 8 MLC 2044 (1982) is distinguishable, because there the ion could not determine which of the three candidates would have received ointment had the employer followed lawful procedures. Here, it is clear rt, as the only candidate on the list, would have received the appointment.[4] efore affirm the hearing officer's remedial order.

[3]Possibly Moore considered the requirements of the deputy chief job to be nt than those of the captain's job. However, Boston City Hospital forecloses

(continued; [4], see page 1367)

CONCLUSION

The Town violated Sections 10(a)(1) and (3) of the Law by refusing to promote re fighter Richard J. Hart to the position of deputy fire chief in retaliation for s having filed a grievance. The decision of the hearing officer is affirmed.

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Town of inton shall:

1. Cease and desist from:

   a. Discriminating in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization;

   b. Interfering with, restraining and coercing any employee in the exercise of any right guaranteed under the Law;

   c. Discriminating against Richard J. Hart in regard to any term or condition of employment.

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

   a. Offer Richard J. Hart the position of deputy fire chief in the Clinton Fire Department, which position he shall be deemed in terms of seniority, benefits and all rights and privileges to have held as of April 2, 1984;

   b. Make Richard J. Hart whole for loss of earnings, if any, suffered as a result of the discriminatory denial of his promotion to deputy fire chief. He shall be paid a sum equal to the difference between what he would have earned as deputy fire chief and his salary as fire captain for the period from April 2, 1984 to the date of compliance with this order. Any amount due under the terms of this

3 (continued)
ich speculation about an employer's motives. It must be "more than 'plausible' that :gitimate reasons motivated the employer's decision." 11 MLC at 1072.

4 (from page 1366)
An appointing authority need not appoint from a list containing less than ree eligible persons. G.L. c.31, Section 7. However, DPA has already rejected ore's attempt to avoid appointing Hart under that section because Moore was unable produce "sound and sufficient reasons" for refusing to promote Hart.

order shall bear interest at the rate specified in M.G.L. c.231, section 6B, to be computed quarterly;

c. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records, and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order;

d. Post in the usual posting places at the Clinton Fire Department, and maintain for a period of thirty (30) days thereafter, a copy of the attached Notice to Employees;

e. Notify the Commission in writing within ten (10) days of the receipt of this 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