**CITY OF FITCHBURG AND FITCHBURG FIRE FIGHTERS, LOCAL 3128, IAFF, AFL-CIO, MUP-9843 (11/28/95).**

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|---|---|
| 65.22 | filing a grievance |
| 65.62 | threat of reprisal |
| 82.2 | cease and desist orders |
| 82.21 | posting orders |

nissioners Participating:

Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

arances:

Gregory Angelini, Esq. - Representing the City of Fitchburg

Bryan C. Decker, Esq. - Representing the International Association of Fire Fighters

DECISION[1]

Statement of the Case

This matter is before the Labor Relations Commission (Commission) as a result of a e filed on May 12, 1994 by the Fitchburg Fire Fighters, Local 3128, International iation of Fire Fighters, AFL-CIO (Union) alleging that the City of Fitchburg (City) ed in a prohibited practice within the meaning of Section 10(a)(1) of M.G.L. c. 150E aw) by issuing statements through a grievance response designed to interfere with, in and coerce bargaining unit members in the exercise of their rights guaranteed under w.

1 Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in the Commission shall issue a decision in the first instance.

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Following an investigation, the Commission issued its own Complaint of Prohibited ctice on February 2, 1995. The Commission alleged that the City had violated Section a)(1) of the Law by issuing a grievance response that would tend to interfere with, restrain l coerce the grievants in the exercise of their rights guaranteed under the Law.

On May 25, 1995, Administrative Law Judge Stephanie Carey conducted an dentiary hearing during which the parties had an opportunity to be heard, to examine and ss-examine witnesses, and to introduce evidence. Both parties submitted post-hearing efs on or about July 17, 1995. Pursuant to 456 CMR 13.02(2), the administrative law judge ıed recommended findings of fact on August 14, 1995. On September 25, 1995, the City d challenges to those recommended findings of fact. The Commission has reviewed the ord and adopts the administrative law judge's findings of fact.[2]

Findings of Fact[3]

Prior to March 1994, Chief Malcolm Lillie, Sr. (Lillie) had served as fire chief of the

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2 Commission Rule and Regulation 13.02(2) requires that a party challenging the ommended factual findings "...must identify the specific recommended findings alleged to erroneous and must clearly identify all record evidence that supports a contrary factual ding." The city does not allege any error in the issued Recommended Findings. Rather, the y requests supplemental factual findings or challenges the administrative law judge's ıracterization of certain record evidence. For example, the City requested a finding that the y past practice on compensation for EMT training occurred during the years of 1953 to 83 at which time there was no contract language on the subject and therefore, there was no ıctice or experience under the relevant contract language until the present dispute arose. e City further objects to the characterization of Lillie's response as a factual recitation of ıployees' obligations without stating Lillie's reasoning and his interpretation of the contract. e city also objects to the administrative law judge's failure to make a finding on the issue of ıether grievances were routinely placed in the mailboxes of the grievants. We do not ısider the City's challenges to be material to our determination, and we decline to adopt ım.

3 (See page 1288)

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f Fitchburg for four years. Lillie rose through the ranks of the fire department holding sitions of lieutenant, captain, and deputy chief prior to becoming chief. As fire chief, was involved in contract negotiations as a member of the City's bargaining team and had istered approximately twenty grievances, many of which were initiated by Union nce chairman, Gary Vaillancourt (Vaillancourt). Lillie and Vaillancourt have been inted for twenty years and Vaillancourt credits Lillie with being instrumental in his on to join the Fitchburg Fire Department. Vaillancourt has been employed by the City re fighter for twenty years and has held the rank of lieutenant for the past sixteen years. currently secretary-treasurer of the Union, but he has previously been a Union steward, as completed eight years as chairman of the grievance committee. In his capacity as nce chairman, Vaillancourt was responsible for filing and processing all grievances. g Lillie's four years as chief, Vaillancourt had filed several grievances many of which nated in arbitration, but he had filed no prohibited practice charges with the Labor ons Commission during Lillie's tenure.

During the mid-1980s, the City ceased operating an ambulance service, and Lillie tuted the City-operated ambulance service during his tenure as fire chief. As a result of newed ambulance service, the most recent collective bargaining agreement, effective 1994, included a new provision requiring fire fighters to become certified as Emergency al Technicians (EMT). Specifically, the contract provided:

ARTICLE XII

EDUCATION

(j) An attempt is being made by the City to hire only EMTs as firefighters but if this cannot be done in every case, all new firefighters will be obligated to become an EMT during his/her probationary period as a condition of employment and at the City's expense.

Todd Reese (Reese) was appointed to the Fire Department in December 1993 and Peter ıdito (Gradito) was appointed on February 14, 1994. Pursuant to their Civil Service tionary status, both were informed that they would have to become certified as EMT's

3 (From page 1287)
The Commission's jurisdiction in this matter is uncontested.

hin twelve months. In March 1994, Reese and Gradito were pursuing EMT training as uired by the contractual provisions and were the only two probationary employees enrolled EMT training at that time. They had completed several weeks of their training program and s undisputed that their performance to date had been exemplary. The EMT training gram was a fifteen-week course, arranged and scheduled by Frederick L. Buck (Buck), puty Chief in charge of training. The training consisted of four-hour sessions held two hts per week commencing in February 1994. On some occasions, training classes ncided with scheduled on-duty time for which Reese and Gradito were relieved of duty, laced on an overtime basis if necessary and required to return to duty after class with no s of pay. On other occasions, however, they attended training classes while off-duty and eived no compensation. Traditionally, EMT trainees had been compensated for attending ining classes during off-duty hours at the rate of one and one-half times the rate of pay and ieved of duty for those classes scheduled during on-duty hours. Reese and Gradito, wever, received no compensation for classes they attended during off-duty hours. Reese proached Vaillancourt, who coincidentally was also his uncle, about compensation for ining. Vaillancourt subsequently contacted Gradito and asked if he were receiving npensation for training classes during off-duty hours, and learned that he was not. illancourt believed that the City was contractually required to pay probationary employees off-duty time spent in training. As a result, Vaillancourt and Union president William ladini approached Chief Lillie on March 6 or 7 about compensation for Reese and Gradito. ief Lillie, citing a lack of funds, declined to pay Reese and Gradito for training classes ended during off-duty hours, pursuant to his interpretation of the contract. The Union bsequently filed a grievance on March 9, 1994, seeking to make Reese and Gradito whole the allegedly lost compensation.[4] Although Reese disclaims any prior knowledge of the evance, Gradito was informed by Vaillancourt that such a grievance would be filed. adito, fearing repercussions, informed Vaillancourt that he did not want his name on the evance. Vaillancourt assured both that any action taken would be on behalf of Local 3128 d would have no impact on their jobs. Gradito also spoke to Lillie about the grievance. adito informed Lillie that he wanted nothing to do with the grievance, that he was happy th his position on the fire department and was not looking for money or overtime. Lillie

4 The parties stipulated that the underlying grievance was submitted to arbitration. On ly 14, 1995, an Arbitrator's Award issued.

red Gradito that the grievance was not personal and was merely "union business." The nce was denied by Chief Lillie on March 16, 1994.[5] Lillie characterizes the response as ıal recitation of the obligations incumbent upon probationary employees to become ; and a summary of his interpretation of Article XII, Section J of the collective ning agreement.

On March 16, both Reese and Gradito received notification that the grievance had been . Because Vaillancourt was assigned to an outlying station and failed to pick up his ıat day, he received the response subsequent to Reese and Gradito.[6] Reese contacted

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5
The grievance response provided in part:

ssing the City's expense, the City is allowing Reese and Gradito time off when they are ıled to work to attend the EMT classes and the City is also paying for the course. Keep ıd that this course allows the firefighters eight (8) credits toward their Fire Science iates Degree. They will be compensated annually at the rate of $160 for the rest of their in the Fire Department. A number of firefighters have paid $800 for this same ...at Mt. Wachusett Community College and had to arrange for their own time off when 'ere scheduled to work.

ve the "City's expense" as addressed in Article 12, Section J of the Union contract has 'ery fairly addressed by allowing the firefighters time off to attend the course when they ıeduled to work and by paying in full for the complete course, books and the state exam.

in mind that it is a condition of the new firefighters' employment to satisfactorily ete the EMT course that they are attending and that the City is paying for and allowing ime off to attend.

very strongly that if they truly wanted to be Fitchburg Firefighters that they certainly l expend some time and effort on their own towards this goal.

' are not interested, there are a lot of other candidates on the Civil Service list that are...

6
There was some disputed testimony about whether Lillie had a past practice of g named parties to a grievance a copy of the grievance response. The Union intimated
(continued)

illancourt at home and read the grievance response to him. He then scheduled a meeting h Vaillancourt for the following day at central station. At that meeting, Reese expressed concerns about the grievance response. Reese was particularly concerned with the last two ıtences and how the last two sentences might affect his job status. He also asked illancourt to withdraw the grievance. Gradito also approached Vaillancourt voicing ıcerns about the effect of the grievance on his job security, expressing a desire to have hing to do with the grievance and asking that his name be removed from the grievance. th Reese and Gradito voiced particular concerns about the last two sentences in the evance response. Reese asked Vaillancourt to withdraw the grievance. At some point, adito also approached Buck about his concerns related to the grievance, the effect on his tus in the fire department and the possible loss of his job. Gradito was reassured by Buck l told not to worry about the letter.

At no time during the events of March 1994 did Reese or Gradito threaten to stop ending training classes or otherwise fail to cooperate in fulfilling their EMT requirements.[7] ey have since completed EMT certification requirements and are currently permanent fire hters with the Fitchburg Fire Department.

OPINION

An employer violates Section 10(a)(1) of the Law if it engages in conduct that tends to train, coerce, or interfere with employees in the free exercise of their rights under Section 2 the Law. Town of Winchester, 19 MLC 1591, 1595 (1992). Section 2 rights include "the ht to form, join or assist any employee organization...and to engage in lawful, concerted ivities for the purpose of collective bargaining or other mutual aid or protection..." Filing a

6 (continued)
ıt this was a deviation from past practice and an effort to further intimidate Reese and adito. We do not reach the issue of whether that conduct constitutes intimidating behavior it is not relevant to our ultimate decision in this matter.

7 There was also no suggestion that the Union encouraged Reese and Gradito to spend their training efforts or indicated to Lillie that Reese and Gradito would cease training nding overtime compensation.

ınce is, without question, the kind of lawful concerted activity contemplated by the Law. Groton-Dunstable Regional School Committee, 15 MLC 1551, 1555 (1989). Any ›yer conduct that would tend to interfere with that activity violates Section 10(a)(1).

The pertinent inquiry into a violation of Section 10(a)(1) is the effect that the ›yer's conduct would tend to have upon reasonable employees. Massachusetts Board of its, 14 MLC 1397, 1401 (1987). The expression of employer anger, criticism or ridicule ed to an employee's protected activity constitutes interference, restraint and coercion of ›yees; however, that conduct need not actually coerce or restrain employees in the ise of their rights to constitute a violation. See Groton-Dunstable., supra at 1556-57. To ish a violation of Section 10(a)(1), a finding of improper motivation is not generally ed. Town of Winchester, supra at 1596. Because the test of interference, restraint and ion under Section 10(a)(1) does not turn on the employer's motive or whether the ion succeeded or failed but rather the effect on reasonable employees, we must analyze ıer the conduct in this case may reasonably tend to interfere with the rights of these ›yees under Section 2 of the Law.

The language of the grievance response was critical of the fire fighters' grievance. ›ver, the response communicated to the fire fighters the threat of adverse consequences--ıg other candidates on the Civil Service list--for exercising their protected rights. The ırgues that the response was merely a factual recitation of Chief Lillie's interpretation of obationers' obligations pursuant to the contract. The summary of relevant sections of the tive bargaining agreement and Civil Service provisions contained in the grievance ıse was innocuous and did not violate the Law. However, because the Chief added "[i]f ıre not interested, there are a lot of other candidates on the Civil Service list that are," the ıse assumed chilling overtones. Those words were coercive in nature, not necessarily by ı but certainly in effect. Despite Chief Lillie's assertedly benign intentions, his perate concluding remarks would tend to chill the grievance activity of a reasonable ›yee.

In this case, there were two probationary fire fighters, who unwillingly found ielves the subject of a grievance.[8] After all efforts to withdraw from that grievance

8 (see page 1293)

ed, they received a response that conveyed a threatened loss of job security. Those same rds used in the course of every day conversation would arguably not be the source of great icern. However, in the context of a grievance, filed on behalf of two unwilling bationary employees, they assume a more threatening essence. We view the effect, not rely from the perspective of the reasonable employee, but from the perspective of the sonable probationary employee lacking Civil Service protections. We conclude that this evance response would have a chilling effect on employees in the exercise of their rights to sue grievances as guaranteed by Section 2 of the Law. Therefore, on the facts of this case, ief Lillie's comments connecting the filing of the grievance with the employer's pursuit of er Civil Service candidates constitutes an impermissible threat in violation of Section a)(1) of the Law. See Town of Chelmsford, 8 MLC 1913, 1917 (1982).

## CONCLUSION

On the basis of the evidence, we conclude that, by the conduct of its agent, the City of chburg interfered with, restrained and coerced its employees in the exercise of their rights aranteed under the Law, in violation of Section 10(a)(1) of the Law.

## ORDER

HEREFORE, based upon the foregoing, IT IS HEREBY ORDERED, pursuant to Section of Chapter 150E of the General Laws, that the City of Fitchburg shall:

1. Cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed under Section 2 of the Law;

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8 (From page 1292)

The city contends that at least part of the alarm and surprise of Reese and Gradito was ributable to the failure of the Union to apprise them that a grievance had been filed on their half. Although Gradito testified that he was informed of the grievance, Reese disclaims any or knowledge that a grievance had been filed. Although we agree that their positions as willing, and in Reese's case unknowing, participants in a grievance might be some cause for nsternation, that in no way dissipates the coerciveness of the response.

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2. Post immediately in all conspicuous places where employees usually congregate and where notices to employees are customarily posted, and leave posted for not less than thirty (30) consecutive days, the attached Notice to Employees; and

3. Notify the Commission in writing within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

RDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

ROBERT C. DUMONT, CHAIRMAN

WILLIAM J. DALTON, COMMISSIONER

CLAUDIA T. CENTOMINI, 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, the Commission has determined that the City of Fitchburg violated ction 10(a)(1) of M.G.L. Chapter 150E by the conduct of its agent, Malcolm Lillie, in uing a grievance that was critical of the employees in their pursuit of the grievance and that eatened possible consequences of filing and pursuing that grievance.

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

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

The City of Fitchburg hereby assures its employees that it will not in any way restrain, erce or interfere with employees in the exercise of these rights.

CITY OF FITCHBURG

By:_____
Chief, Fitchburg Fire Department