

In the Matter of BRISTOL COUNTY SHERIFF'S
DEPARTMENT

and

MASSACHUSETTS CORRECTIONS OFFICERS
FEDERATED UNION

Case No. MUP-03-3900

65.22 filing a grievance

January 3, 2007

Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

Robert M. Novack, Esq. Representing County of Bristol
Bruce A. Assad, Esq. Representing Bristol County
Sheriff's Department
Douglas I. Louison, Esq. Representing Massachusetts
Regina M. Ryan, Esq. Correction Officers Federated
Union

DECISION¹

Statement of the Case

The Massachusetts Correction Officers Federated Union (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on September 17, 2003, alleging that the Bristol County Sheriff's Department (Employer or Sheriff) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (3), and (5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a three-count complaint of prohibited practice on March 9, 2005. Count I of the complaint alleges that the Sheriff violated Section 10(a)(1) of the Law by suspending Union steward Sandra Nuno (Nuno) for calling a supervisor a liar during a grievance hearing. Counts II and III of the complaint allege that the Sheriff unlawfully transferred certain types of bargaining unit work to non-bargaining unit personnel in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commission dismissed the allegation that the Sheriff had violated Section 10(a)(3) of the Law. The Union did not seek reconsideration of the dismissed count pursuant to Commission Rule 456 CMR 15.04(3). The Employer filed its answer to the complaint on or about March 15, 2005.

On September 29 and September 30, 2005, Marjorie F. Wittner, Esq., a duly designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.² On the second day of hearing, the Union withdrew Count II of the complaint. By letter dated October 5, 2006, the Union confirmed that it was also withdrawing Count III of the complaint. The Union filed its post-hearing brief on January 6, 2006.³ The Employer did not file a post-hearing brief.

The Hearing Officer issued Recommended Findings of Fact on October 12, 2006 and Amended Recommended Findings of Fact on October 13, 2006. Neither party filed challenges to the Amended Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

Findings of Fact⁴

Background

The Union is the exclusive collective bargaining representative for a bargaining unit of correction officers and lieutenants employed by the Employer, including correction officers employed at its Ash Street facility (Ash St.). The Union and the Employer are parties to a collective bargaining agreement (Agreement) that is effective by its terms from July 1, 1997 to June 30, 2000.

Nuno began working for the Employer as a correction officer in 1993. She transferred to Ash St. in 1995 and remained there until August 12, 2004, when she voluntarily resigned. Nuno became a shop steward in 2001 and was elected chief shop steward at Ash St. in March or April of 2003.

The Step 2 Grievance Hearing and Subsequent Suspension

Sometime after becoming chief steward, but before June 10, 2003, Nuno received a written warning for being insubordinate in an incident involving Lieutenant Dennis Costa (Lieutenant Costa), Captain Jane Salvail (Captain Salvail), and Major Robert J. Silvia (Major Silvia).⁵ Nuno filed a grievance over the warning.⁶ On June 10, 2003, the Sheriff, through his designee, Attorney Lorraine J. Rousseau (Rousseau), held a Step 2 hearing to determine the merits of the grievance. Nuno, Union business representative Paul Reynolds (Reynolds), Lieutenant Costa, Captain Salvail,⁷ and Major Silvia attended the hearing, which was held around a conference table in one of the facility's conference rooms.⁸

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

2. On the first day of hearing, the Sheriff objected to any Commissioner who had participated in the issuing of the complaint to render a final decision in this matter. However, the Sheriff's objection is groundless. Section 11 of the Law grants the Commission the authority to issue complaints upon a probable cause finding and to render decisions based on those complaints. That statute does not prohibit a commissioner from voting to issue a complaint and to render a decision in the same case. Moreover, "[i]t is well settled that the combination of investigative and judicial functions within the same agency does not violate due process. . . . Furthermore, the mere issuance of the complaint by the commission does not indicate a prejudgment of the merits of the case." *School Committee of Stoughton v. Labor Relations Commission*, 4 Mass. App. Ct. 262, 272-273 (1976).

3. The Union briefed Count I only.

4. The Commission's jurisdiction is uncontested.

5. The record does not indicate the exact date that Nuno received this warning.

6. Nuno testified that, although she was personally involved in this matter, she filed this grievance on behalf of the Union in her capacity as chief steward. The actual grievance was not introduced into evidence.

7. Captain Salvail was not present at the outset of the hearing. At Nuno's request, she was summoned and spoke at some point after the hearing had begun.

8. The conference table was about eight feet long and four to five feet wide.

At the outset of the hearing, Rousseau told all present to observe the rules of conduct and to behave in a professional and respectful manner. She then called upon the Union to present its case. Nuno spoke first, conveying, in an emotional manner, her version of the incident that led to her written warning.⁹ Her presentation lasted five to ten minutes. Reynolds, who was acting as Nuno's representative at the hearing, also spoke.¹⁰ When the Union finished its presentation, Lieutenant Costa relayed his version of events.¹¹

When Lieutenant Costa was done, Rousseau asked Major Silvia if he had any information to add. He said that he did. Approximately two minutes into his presentation, Nuno put her head in her hands and, without looking at Major Silvia, exclaimed in an audible, but not elevated, tone of exasperation and disbelief, "Liar," or "Oh my God, what a liar." Major Silvia asked Nuno whether she had just called him a liar. Nuno responded, "Yes, you're lying," or "Yes, you're a liar," or words to that effect.¹² Major Silvia then stood up as if to leave (all parties had been seated around the table until this point) and, with his voice slightly raised, stated words to the effect of "This is over," or "I don't need to take this." Rousseau reminded Major Silvia that she was presiding over the hearing, and that she would determine when the hearing was finished. She admonished everyone to calm down, act professionally, and refocus on the matter at hand. Major Silvia sat down and the hearing resumed, with all sides having the opportunity to present further evidence.

After the hearing had concluded, at approximately 9:00 a.m., Major Silvia asked everyone except Nuno, Reynolds and Rousseau to leave the conference room. Once they had gone, Major Silvia informed Nuno that he was relieving her of her duties for disrespect to a commanding officer. He ordered Nuno to punch out with pay pending an investigation. Nuno left the conference room in tears. Major Silvia proceeded to inform Superintendents Romeo Payant (Superintendent Payant) and Peter Peroncello (Superintendent Peroncello) what had transpired at the hearing and prepared an incident report.¹³ Later that morning, Superintendent Peroncello directed Rousseau to write an incident report, which she completed that same day.¹⁴

After leaving the premises, Nuno visited her physician, who provided her with a note excusing her from work. She gave the note to someone at the Sheriff's offices at about 11:00 a.m. At around 2:30 p.m. on June 10th, Nuno received a call from a captain indicating that she could come back to work tomorrow, "no questions asked."

Nuno did not return to work on June 11, 2003. At about 1:00 p.m. that day, she received a telephone call from a captain in the Internal Affairs Department (IAD) who told her she needed to go into work to get some paperwork. Nuno did not go into work. During an off-premises meeting the following day, Nuno received the following notice of suspension from the Sheriff dated June 11, 2003:¹⁵

Dear Officer Nuno:

On June 10, 2003, you along with Major Robert J. Sylvia [sic], Attorney Lorraine Rousseau, Lieutenant Dennis Costa and Union Representative Paul Reynolds attended a Step II Hearing. During said hearing, Major Sylvia was in the process of making a statement when you interrupted him and called him "a liar." Your conduct was both disrespectful and insubordinate.

In light of the potential volatile and dangerous environment of the workplace and keeping in mind the best interest of the Sheriff's Office and that the health and safety of the employees and inmates must be kept paramount, it is my decision that you be suspended without pay for a period of ten (10) days commencing on June 21, 2003.

The Sheriff has imposed ten-day suspensions for insubordination on at least nine or ten other correction officers. However, those cases did not involve insubordination occurring during the course of a grievance hearing.

Opinion

A public employer violates Section 10(a)(1) of the Law when it engages in conduct that tends to interfere with, restrain, or coerce employees in the exercise of their rights under Section 2 of the Law. *Quincy School Committee*, 27 MLC 83, 91 (2000); *Town of Athol*, 25 MLC 208, 212 (1999); *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989). The focus of a Section 10(a)(1) analysis is the effect of the employer's conduct on reasonable employees exercising their Section 2 rights. *Town of Winchester*, 19 MLC 1591, 1596 (1992). The Commission does not analyze either the motivation behind the conduct, *Town of Chelmsford*, 8 MLC 1913, 1916 (1982), *aff'd sub nom.*, *Town of Chelmsford v. Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983), or whether the coercion succeeded or failed. *Groton-Dunstable Regional School Committee*, 15 MLC at 1555-1556. The Commission considers the objective impact that

9. Nuno testified that she was quite emotional during her presentation. Rousseau observed that Nuno was visibly nervous during her presentation, and that her level of emotion increased as the hearing continued.

10. Nuno testified that, because she was the Ash St. chief shop steward, she had no one else to represent her at the hearing other than Reynolds.

11. Nuno testified that during her testimony, she was interrupted by what she characterized as "little things," like conversations, bickering and whispering. However, Nuno could not recall specifically what she had heard. Both Major Silvia and Rousseau were unable to recall any interruptions during Nuno's testimony. Because Nuno could not recall what was said, and because, by her own description, the noises were "little things," the Hearing Officer found that, if there were interruptions, they were relatively minor.

12. Counsel did not question Nuno regarding this exchange, and Reynolds could not recall whether it had occurred. Thus, in making this finding, the Hearing Officer relied entirely on Rousseau and Major Silvia's consistent testimony, which is corroborated by an incident report that Rousseau prepared on the day of the grievance hearing.

13. Major Silvia's incident report was not introduced into evidence.

14. As described in footnote 12, above, this report corroborates Major Silvia and Rousseau's testimony regarding the exchange between Major Silvia and Nuno after Nuno uttered the word, "Liar." The final sentence of Rousseau's report states: "Officer Nuno was visibly nervous and emotional during the hearing and was disrespectful and insubordinate to Major Silvia." At some point after preparing this report, Rousseau issued a separate Step 2 hearing decision, which was not introduced into evidence.

15. There is no evidence that Internal Affairs had interviewed Nuno or had asked her to write a report before the Sheriff imposed the 10-day suspension.

the employer's conduct would have on a reasonable employee under the circumstances. *Quincy School Committee*, 27 MLC at 91. The subjective impact of the employer's conduct is not determinative. *City of Fitchburg*, 22 MLC 1286, 1292 (1995).

It is undisputed that Nuno was engaged in concerted activity protected under Section 2 of the Law when she filed a grievance over receiving a written warning and processed that grievance through Step 2 of the grievance process. *See, Bristol County Sheriff's Department*, 32 MLC 111, 116 (2005) (filing and processing grievances constitute concerted, protected activities). We turn to examine whether Nuno's conduct lost its protected status when she called Major Silvia a liar.

Activity protected by Section 2 of the Law can lose its protected status if it is unlawful, violent, in breach of contract in certain circumstances, disruptive or indefensibly disloyal to the employer. *Town of Bolton*, 32 MLC 13, 18 (2005). Similarly, conduct that is physically intimidating, egregious or disruptive of the employer's business is beyond the pale of protection. *City of Boston*, 7 MLC 1216, 1226 (1980), *citing, Harwich School Committee*, 2 MLC 1095, 1100 (1975). When intemperate statements are made within the context of protected activity, the Commission balances the rights of employees to engage in concerted activities, and the rights of employers not to be subjected to egregious, insubordinate, or profane remarks that disrupt the employer's business or demean workers or supervisors. *City of Boston*, 6 MLC 1096, 1097 (1979).

Here, Nuno impulsively called Major Silvia a liar during an emotional grievance hearing in response to a perceived inaccuracy in Major Silvia's testimony. Under these circumstances, we find that Nuno's statement, on balance, fell within the protection of Section 2 of the Law. *Contrast, Plymouth Police Brotherhood v. Labor Relations Commission*, 417 Mass. 436, 441 (1994) (union president's e-mail to unit members calling town's negotiating team members "pigs, cheats, liars" was unprotected, because he had made those remarks "with time to reflect" rather than "during the heat of a dispute, at a collective bargaining session, or during a grievance procedure"). Thus, the remaining issue for our consideration is whether the Employer's conduct violated Section 10(a)(1) of the Law.

We are troubled that Nuno's suspension directly resulted from the comment that she had made while engaging in concerted, protected activity at the grievance hearing. The Commission previously found that discipline arising out of an employee's decision to attend his grievance hearing rather than a department training program would chill reasonable employees from exercising their right to attend grievance hearings. *City of Boston*, 26 MLC 80, 83 (2000). Likewise, we are persuaded in this case that reasonable employees would be chilled from filing and processing grievances, if they were apprehensive about receiving discipline for lawful remarks made during grievance hearings. Therefore, we find by a preponderance of the record evidence that the Employer's conduct interfered with, restrained, and coerced employees in the exercise of their Section 2 rights.

Conclusion

Based upon the record before us, we conclude that the Employer violated Section 10(a)(1) of the Law.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Employer shall:

1. Cease and desist from:

a. Disciplining employees for lawful remarks made during grievance hearings that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

b. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 2 of the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

a. Refrain from disciplining employees for lawful remarks made during grievance hearings that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

b. Revoke Nuno's June 11, 2003 suspension and remove any reference to it from her personnel file.

c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter signed copies of the attached Notice to Employees.

d. Notify the Commission within ten (10) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission (Commission) has held that the Bristol County Sheriff's Department (Employer) violated Section 10(a)(1) of M.G.L. c. 150E (the Law) by interfering with, restraining, and coercing employees in the free exercise of their rights guaranteed under Section 2 of the Law by disciplining a bargaining unit employee, Sandra Nuno (Nuno), for making a lawful comment about the testimony of a superior officer during a grievance hearing.

WE WILL NOT discipline employees for lawful remarks made during grievance hearings that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL refrain from disciplining employees for lawful remarks made during grievance hearings that would tend to interfere with,

restrain, or coerce employees in the exercise of their rights guaranteed under Section 2 of the Law.

WE WILL revoke Nuno's suspension and remove any reference to it from her personnel file.

[signed]

For the Bristol County Sheriff's Department

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In the Matter of MASSACHUSETTS TURNPIKE
AUTHORITY

and

UNITED STEELWORKERS OF AMERICA

Case Nos. UP-05-2676 and UP-05-2677

17.8	<i>definition - casual employee</i>
67.16	<i>other defenses</i>
67.18	<i>inappropriate unit</i>
67.66	<i>altering bargaining unit</i>
67.73	<i>refusal to bargain during term of contract</i>

January 5, 2007

John F. Jesensky, Chairman
Hugh L. Reilly, Commissioner
Paul T. O'Neill, Commissioner

D. M. Moschos, Esq. and Sharon Siegel, Esq. *Representing Massachusetts Turnpike Authority*

Richard Peirce, Esq. James Musgrave, Esq. *Representing United Steelworkers of America*

DECISION'

Statement of the Case

The United Steelworkers of America (Union) filed charges with the Labor Relations Commission (Commission) on July 14, 2005 and July 22, 2005, alleging that the Massachusetts Turnpike Authority (Employer or MTA) had engaged in prohibited practices within the meaning of Sections 4(1) and 4(5) of the Massachusetts General Laws, Chapter 150A (the Law).

The Commission investigated the Union's charges, issued two complaints of prohibited practice on October 28, 2005 and consolidated the cases. The complaints allege that the Employer violated Sections 4(5) and, derivatively, 4(1) of the Law by: 1) refusing to bargain over certain employees in the bargaining unit that the Commission had certified in Case No. CR-04-3729 (UP-05-2676, Count I); 2) unreasonably delaying negotiations for an initial collective bargaining agreement (UP-05-2676, Count II); and 3) withdrawing recognition from the Union as the exclusive representative for the assistant manager of toll collection position (UP-05-2677). On October 28, 2005, the Commission also issued an interim bargaining order directing the Employer to bargain over the certified unit during the pendency of the prohibited practice case, UP-05-2676.²

The Employer filed answers to the Commission's complaints on or about November 9, 2005.

The parties subsequently agreed to waive their right to an evidentiary hearing and filed joint stipulations of fact and briefs on or about January 20, 2006.³ Susan L. Atwater, Esq., a duly designated Commission hearing officer (Hearing Officer), issued recommended findings of fact on October 13, 2005. The Employer filed challenges to the recommended findings of fact on October 26, 2006.

Stipulations of Fact in UP-05-2676 & UP-05-2677

1. The Massachusetts Turnpike Authority is an employer within the meaning of Chapter 760 of the Acts of 1962 and within the meaning of Sections 4, 4A, 4B, 5, 6, 6A, 6B, 6C, 7 and 8 of Chapter 150A. The MTA contends that it is not an employer within the meaning of Section 2 of Massachusetts General Laws Chapter 150A.

2. The United Steelworkers of America is a labor organization within the meaning of Chapter 760 of the Acts of 1962 and within the meaning of Sections 4, 4A, 4B, 5, 6, 6A, 6B, 6C, 7 and 8 of Chapter 150A.

3. On or about March 23, 2005, the Commission certified the Union as the exclusive collective bargaining representative for the following MTA employees:

All full-time and regular part-time employees employed by the [MTA] in the positions listed in Parts I(A), I(B), II(A), and II(B) of Attachment A [to the Commission's Certification of Representatives in Case No. CR-04-3729]⁴ including the Project associate general counsels, and excluding the assistant manager of toll audit, deputy director of highway maintenance, supervisor of field operations, supervisor of toll equipment program, permit administrator, training administrator, CA/T, MTA associate general counsels, all

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

2. The Employer filed a motion for reconsideration of the interim bargaining order on November 15, 2005. On December 21, 2005, the Commission affirmed the order. The Employer petitioned the Worcester Superior Court for a stay of the interim bargaining order on March 10, 2006. The Commission filed a motion to dismiss the Employer's complaint on or about April 12, 2005. On June 21, 2006, the Court granted the Commission's motion to dismiss the Employer's complaint.

3. Additionally, the Employer filed a motion for oral argument on January 20, 2006; the Union filed a motion to strike portions of the Employer's brief on January 27, 2006; and the Employer filed a cross-motion to strike portions of the Union's brief on February 2, 2006. The Commission denies all these motions.

4. Attachment A is also attached to this decision.