MICHAEL J. CURLEY AND COMMISSIONERS OF HAMPDEN COUNTY AND THE SHERIFF OF HAMPDEN COUNTY, MUP-2439 (7/8/77).

(10 Definitions)
17. Employee
(20 Jurisdiction)
27.1 prohibited practice
(60 Prohibited Practices By Employer)
63.2 filing a charge or testifying

Commissioners participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner

Appearances:

Philip J. Dunn, Esq.	-	Counsel for the Commission
Thomas Donoghue, Esq.	-	Counsel for Michael J. Curley
William C. Flanagan, Esq.	-	Counsel for Sheriff Ashe
Savino J. Basile, Esq.	-	Counsel for Commissioners of Hampden County

DECISION AND ORDER

Statement of the Case

On February 4, 1976, Michael J. Curley filed a Complaint of Prohibited Practice with the Labor Relations Commission (the Commission), alleging that practices prohibited by G.L. c. 150E (the Law) §§10(a)(1), (2), (3) and (4) had been committed by Michael J. Ashe, Sheriff of Hampden County.

Pursuant to Section 11 of the Law, the Commission investigated the charge and on August 23, 1976 issued in its own name a Complaint of Prohibited Practice against the Commissioners of Hampden County and their designated representative for collective bargaining. Sheriff Ashe subsequently moved to intervene on his own behalf, which motion was allowed.

Pursuant to notice, a formal hearing was conducted at the offices of the Labor Relations Commission in Boston, on October 4, 1976. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties.

Findings of Fact

1. The Commissioners of Hampden County are public employers within the meaning of Section 1 of the Law.

2. The Sheriff of Hampden County, Michael J. Ashe, is a public employer or representative of a public employer within the meaning of Section 1 of the Law.[1]

[1]The Sheriff's status as Public Employer or its designated representative is unclear. Nevertheless, it is apparent on the record that he is one of the other or both. We need not resolve this issue in light of the recent enactment of Chapter 278 of the Acts of 1977. Under the law the "chief justice of the supreme judicial court" will be the Public Employer of court officers under section 1 of the Law.

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ichael J. Curley has been employed at the Hampden County Court House as -pool officer for the last three years. For the immediate five years to that, he served as a court officer at the same location. In November, he began organizing the jury-pool officers on behalf of the Teamsters, eurs, Warehousemen and Helpers, Building Materials, Heavy and Highway uction Employees, Local Union 404 (Teamsters) and obtained the signatures three jury-pool officers.

n November 21, 1975, the Teamsters filed a petition with the Commission No. MCR-2275) seeking representation of a unit of jury-pool officers. On y 27, 1976, a pre-investigation conference was held by the Commission in o. MCR-2275. At this conference, Michael j. Curley appeared on behalf petitioner. He was asked jurisdictional questions, and in answering aid that the Justices of the Superior Court, not Sheriff Ashe, were his According to Michael Curley, there was a heated exchange between Sheriff Michael Foley (Ashe's assistant) and Curley. The Sheriff and Mr. Foley ed Michael Curley's credibility and called him "a liar". Curley says n the course of this discussion that he "got hot", and that although he ot remember it, he probably called Sheriff Ashe and Mr. Foley "two fools".

heriff Ashe testified that on the day after the conference, he called Judy tino (who was temporarily assigned to jury-pool duty) and Michael Curley office and "outlined the plan for signing in and signing out in front of f them." Sheriff Ashe admitted that "there's no doubt that there was a tion between the day before [January 27, the date of the Commission's ence] and my action that took place the following day [imposing the new g-in-and-out policy on the jury-pool officers]." Curley objected to the tion of the new rule and requested that the rule be put in writing. gh Curley came to work that week, he refused to sign in and out. On Jan-0th, Ashe asked Curley to explain his actions, and unsatisfied with his se, suspended Curley for five days without pay for "insburodination".

urley denied that the Sheriff requested Farrentino to sign in, and testi-hat the reason he objected to signing in was because "I was the only one asked to do it." Neither the Commissioners of Hampden County nor the f called Farrentino as a witness. Counsel for the Sheriff stated at the g that he had records indicating that other jury-pool officers signed in t, but no such records were offered into evidence.

idney Cadry, a court officer who was acting as a jury-pool officer in y, 1976, testified that he saw Farrentino sign in. But when the Sheriff cted Cadry to sign in and out, he declined to do so because his union ent told him that it was a negotiable matter. He was neither suspended herwise disciplined for his refusal.

n February 2, 1976, Ashe sent Curley a letter confirming that he was sus-d for insubordination, and on February 4, 1976, Michael Curley filed the t complaint. A sign-in-and-out rule was made applicable to all court rs on September 13, 1976.

Opinion

Curley alleges that he was unlawfully suspended in retaliation for his organizational activities and for giving testimony at the Commission. The Commissioners and Sheriff of Hampden County in turn contend that since Curley orks as a jury-pool officer, he is an employee of the judicial branch, and herefore is not a public employee entitled to the protections of the Law. assachusetts Probation Association v. Commissioner of Administration, 76 Mass. dv. Sh. 1814, 322 N.E.2d 684 (1976).

Although it would be necessary to find that Curley is an employee under ection 2 of the Law to find a violation of Section 10(a)(3), such a finding is ot necessary for the Section 10(a)(4) and (1) allegation. The National Labor elations Board (the Board) has consistently held, with approval of the federal ourts, that an employer violates Section 8(a)(1) of the National Labor Relaions Act (the Act)[2] by discharging a supervisor (not an employee under Section of the Act) for testifying under the Act in a way adverse to the employer's nterests. The Board's rationale is that an employer thereby interferes with, estrains and coerces non-supervisory employees. The effect of discharging omeone who is not an employee under the statutory definition is to cause those ho are employees to fear that the employer would take the same action against hem if they testified in a proceeding to enforce their protected rights. herefore, the Board has held that since discrimination against non-employees ho testify under the Act infringes on the rights of employees, such discrimnation is violative of §8(a)(1) of the Act. Fuqua Homes, Inc., 219 NLRB No. 52, 90 LRRM 1157, (1975); Supplementing 211 NLRB 399, 87 LRRM 1141 (1974); LRB v. Better Monkey Grip Co., 243 F.2d 836, 40 LRRM 2027 (5th Cir. 1957), ert. denied, 355 U.S. 864, 41 LRRM 2007 (1957); NLRB v. Schill Steel Products, nc., 480 F.2d 586, 83 LRRM 2386, 2392 (5th Cir. 1973).

The Respondent's contention that Curley technically is not an employee evinces undue preoccupation with the statutory definition, rather than with he underlying purposes and intent of the Act as a whole". NLRB v. Talladega otton Factory, Inc., 213 F.2d 309, 34 LRRM 2196, 2201 (5th Cir. 1954). It is ear that the purposes of the Law are served by preventing intimidation of ndividuals who present information to the Commission, whether or not they are mployees as defined in Section 1.[3]

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[2] U.S.C., §141 et. seq.

[3] In a recent case under the National Labor Relations Act, the Supreme ourt said that the language of Section 8(a)(4) should be interpreted broadly. LRB v. Scrivener, 405 U.S. 117, 79 LRRM 2587 (1972). The necessity for a broad nterpretation of Section 8(a)(4) was first pointed out by Judge Bazelon who oted that this type of construction was needed "to prevent the Board's channels f information from being dried up by employer intimidation of prospective comlainants and witnesses." John Hancock Mutual Insurance Co., 191 F.2d 483, 28 LRM 2236, 2237 (DC Cir. 1951).

In recognition of the above principles, the Board recently found an em-
ır to have violated Section 8 (a)(4) of the Act, when the employer refused
-hire a supervisor because he had filed charges with the Board. Although
ın "employee" as defined in Section 2 of the Act, the Board concluded that
upervisor was an "employee" entitled to the protections of Section 8(a)
General Services, Inc., 229 NLRB No. 134, 95 LRRM 1174 (1977). We agree
the reasoning of the Board, and conclude that the purposes of Section 10
) can only be properly served if the protections of that section reach
ersons involved in an employment relationship with an employer or
yer's representative subject to our jurisdiction. Therefore, we may
ss the substance of the Section 10(a)(4) and Section 10(a)(1) allegations
ut deciding whether Curley is an employee within the meaning of Section 1
ıe Law.

Section 10(a)(4) of the Law states that:

> It shall be a prohibited practice for a public employer or its designated representative to discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by an employee organization.

, the issue in this case is whether Michael Curley was disciplined because
ave information or testified before the Commission in the representation
eeding on January 27, 1976. The Charging Party has the burden of proving
preponderance of the evidence:[4] 1) that he gave information or testimony
r the Law; 2) that the Employer or its designated representative had know-
e that the Employee gave information or testimony; and 3) that the Employer
ts designated representative discharged or otherwise discriminated against
Employee because the Employee gave this information or testimony.

It is undisputed that Curley gave information to the Commission. Curley
ared before the Commission on January 27, 1976, in Case No. MCR-2275. He
information to the Commission that was relevant to the Commission's deter-
tion of an appropriate unit among the jury-pool officers in the Hampden
ty Court House. Sheriff Ashe was present at the January 27, 1976 confer-
and therefore had direct knowledge that Michael Curley presented informa-
to the Commission. The crucial issue is whether Sheriff Ashe suspended
ey because he gave this information.

It is first necessary to determine whether Sheriff Ashe in any way discrim-
ed against Curley. The imposition of the new sign-in-and-out rule on the
following Curley's testimony could be a form of "discrimination" depending
he Employer's motive. If the rule was imposed in part because Curley testi-
, then there is a violation of the Law, but if the timing of the new rule

[4]MLRC Rules, Art. III, §9.

was a mere coincidence and the Employer was seeking greater accountability from all employees, then the imposition of the new rule would not violate Sections 10(a)(4) or (1).

When Michael Curley refused to sign in and out, he was suspended from work for five days without pay because of his "insubordination." With the suspension, as with the initial imposition of the new rule, it must be determined whether the Employer was motivated by Curley's appearance before the Commission. An employer's action will be seen as discriminatory if it is motivated in whole or in part by an employee's protected activity. Town of Halifax, 1 MLC 1486 (1975); Town of Sharon, 2 MLC 1205, 1208 (1975); Ronald J. Murphy, 1 MLC 1271, 1274 (1975).

Factors to be considered in determining an employer's motive are: timing, visibility of the discriminatee's protected activity, an employer's general bias or hostility toward the union, differential treatment of the employee who is active in the union, and staleness of the charges. Town of Halifax, 1 MLC 1486 (1975).

The timing of the new sign-in-and-out rule weighs heavily against Sheriff Ashe. Although the Sheriff claims that he had been concerned about accountability for some time, it does not seem coincidental that he formulated and imposed the rule on the day after Curley appeared before the Commission and gave information adverse to the Sheriff. In fact, the Sheriff admitted that "there's no doubt that there was a connection between the day before and my action that took place the following day." Sheriff Ashe's hostility toward the Teamsters is reflected in his well-publicized view that he was opposed to the idea of a union when the organizational drive began.

Even if the timing of the new rule could be dismissed as a mere coincidence, the Commission must look to how the rule was applied. The facts show that when Curley refused to sign in or out that he was suspended, but when Sidney Cadrey refused to sign in or out he was not disciplined. This discriminatory enforcement of the new rule against the most active union adherent raises serious questions about the Employer's motivation in formulating, imposing, and enforcing the new rule requiring jury-pool officers to sign in and out. These combined factors compel us to find that the new rule was imposed and enforced in retaliation for Michael Curley's testifying before the Commission on January 27, 1977. Thus, the employee has satisfied its initial burden of proving a prima facie case of a Section 10(a)(1) violation.

The Sheriff contends that his actions were justified in view of Curley calling the Sheriff and Foley "fools" when Curley appeared before the Commission. Flagrant conduct of an employee, even though occurring in the course of protected activity, may justify disciplinary action. But the Commission has held that an impropriety in the context of protected activity does not necessarily place an employee beyond the protection of the Act, provided that the employee does not physically intimidate or disrupt the employer's business. Thus, an employee who used abusive language in presenting a grievance did not lose the protection of the Act, because the context was a heated discussion in the presentation of a grievance. Harwich School Committee, 2 MLC 1095 (1975). Thus, the Commission recognizes that the employee's right to engage in concerted activity permits some leeway for impulsive behavior.

mployee activity passes beyond the area of protection when it is either: ul, City of Fitchburg, 2 MLC 1123 (1975), Southern Steamship Co. v. NLRB, S. 31, 10 LRRM 544 (1942); violent or physically intimidating, Harwich Committee, 2 MLC 1095 (1975), NLRB v. Fansteel Metallurgical Corp., 306 40, 4 LRRM 515 (1939); in breach of a contract or disruptive of the em- 's business, Harwich School Committee, 2 MLC 1095 (1975), NLRB v. Sands o., 306 U.S. 332 (1932); or indefensibly disloyal, City of Boston, 3 MLC 1976), NLRB v. Local Union No. 1229, IBEW, 346 U.S. 404, 33 LRRM 2183 . As Curley's statement was neither unlawful, violent, in breach of a ict, nor indefensibly disloyal, it was not facially beyond the protection :tion 10(a)(4).

'here may be further situations other than those outlined above where the ee's conduct is so personally repugnant and humiliating that it passes be- he protection of the Law, but the present case does not fit that cate- Curley's statement was made in the context of the charged atmosphere of nuary 27 hearing, and in response to an attack upon his credibility and y by his employer. The evidence shows that during the hearing, either f Ashe or Michael Foley (Ashe's assistant) called Curley a liar. In the ge that followed, Curley referred to Ashe and Foley as "two fools". l in the context in which it arose, we do not find Curley's statement to een indefensibly disloyal. The Employer, by calling Curley a liar, had d an atmosphere of tension that provoked Curley into calling his Employer . Harwich School Committee, 2 MLC 1095 (1975); Town of Wareham, 3 MLC (1976); Webster Clothes, Inc., d/b/a Webster Men's Wear, 222 NLRB No. 195, M 1432 (1976).

In finding a §10(a)(1) violation deriving from §10(a)(4), we affirm this ssion's statement made under c.150A:

> We deem few rights more sacred under the Law than the right of employees to file charges with the Commission or give testimony under the Law without fear of employer reprisal. Bay State Harness Racing and Breeding Assn., Inc., 3 MLC 1269 (1976).

ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Sheriff mpden County shall:

1. Cease and desist from:

   a. Discriminating against Michael J. Curley because he gave information to the Commission under the Law.

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

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

a. Remove from Michael J. Curley's personnel file any record of the suspension that was in effect from on or about January 30, 1976 to on or about February 6, 1976.

b. Make Michael J. Curley whole for any loss of pay that resulted from this suspension, with interest at the rate of six percent (6%) per annum.

c. Restore to Michael J. Curley all rights, privileges and benefits that he lost as a consequence of this suspension, including seniority rights.

d. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records, time cards, personnel records and reports and all other records necessary to determine the amount of back pay due under the terms of this order.

e. Post the attached Notice in a conspicuous place in the Hampden County Court House for thirty (30) days commencing no later than ten (10) days after receipt of this Decision and Order.

f. Notify the Commission, in writing, within ten (10) days of this Decision and Order, of the steps taken to comply therewith.

James S. Cooper, Chairman
Garry J. Wooters, Commissioner

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

The Massachusetts Labor Relations Commission, in a Decision dated ound that the Sheriff of Hampden County committed a prohibited practice in violation of Section 10(a)(4) and (1) of the General Laws, Chapter 150E.

Chapter 150E of the General Laws gives public employees the following ights:

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

WE WILL NOT by suspension or any other like or related means, discriminate gainst any employee or other person because he or she has signed or filed an ffidavit, petition, or complaint or given any information or testimony under his Chapter, or because he or she has informed, joined, or chosen to be represented by an employee organization.

(cont'd.)

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WE WILL NOT do anything that interferes, restrains, or coerces employees
neir exercise of their rights under Chapter 150E.

WE WILL make Michael J. Curley whole with interest for any loss he may
suffered as a result of the discrimination against him because he gave in-
ation to the Commission under Chapter 150E.

SHERIFF OF HAMPDEN COUNTY.