

TOWN OF SHREWSBURY AND LOCAL 426, IBPO, MUP-2999 (12/22/78).

(60 Prohibited Practices by Employer)

- 63.7 discrimination - union activity and membership or non-membership
- 65.2 concerted activities

Commissioners participating:

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

Appearances:

Matthew R. McCann, Esq. - Counsel for the Town of Shrewsbury
Fernand J. Dupere, Esq. - Counsel for Local 426, International Brotherhood of Police Officers

DECISION

Statement of the Case

On February 21, 1978, Local 426, International Brotherhood of Police Officers (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Town of Shrewsbury (Town) had engaged in practices prohibited by Sections 10(a)(1) and (3) of General Laws Chapter 150E (the Law).

Pursuant to its authority under Section 11 of the Law, the Commission conducted an investigation of the case and on March 15, 1978 issued a Complaint of Prohibited Practice alleging that the Town violated Sections 10(a)(1) and (3) of the Law by discriminatorily transferring Officer Leo Mard to the night shift in the Police Department.

Pursuant to notice, a formal hearing was conducted on April 10, 1978 before James M. Litton, Hearing Officer. The parties were afforded full and fair opportunity to be heard, to examine and cross-examine witnesses and to present documentary evidence. Both sides have filed briefs.

On the basis of the entire record, we make the following Findings of Fact and issue the following Decision and Order.

Jurisdiction

1. The Town of Shrewsbury is a municipal corporation located in Worcester County in the Commonwealth of Massachusetts and is a public employer within the meaning of Section 1 of the Law.
2. Local 426, International Brotherhood of Police Officers is an employee organization within the meaning of Section 1 of the Law.



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Local 426, International Brotherhood of Police Officers is the exclusive representative for purposes of collective bargaining of certain employees of the Town of Shrewsbury, including its police officers.

Findings of Fact

Police Department of the Town of Shrewsbury operates 24 hours a day in three shifts. The day shift runs from 8:00 a.m. to 4:00 p.m.; the afternoon shift runs from 4:00 p.m. to midnight; and the night shift runs from midnight to 8:00 a.m. In addition, the Department runs a "swing" shift consisting of a single officer from 6:00 p.m. to 2:00 a.m. The night shift is known as the "graveyard" shift, and police officers are occasionally assigned to it for punishment duty.

J. Mard was hired by the Police Department in September 1973. Prior to that time, Mard worked a split shift (i.e., two night shifts followed by two day shifts). Thereafter, he worked days for approximately six months in late 1974. From then until January 1975 he worked the night shift. He then went to the Police Training Academy for several months, after which he returned to the evening shift from April 1975 until January 1978. On January 19, 1978¹ Mard was notified that, effective January 24, he would be assigned to the night shift.

Officer Mard has long been an active member of the Union. He held the position of steward from September 1975 to September 1976, and has been president of the Union since then. At the time of hearing in this case, Mard was a member of the Union's negotiating committee. He showed his interest in working conditions of Shrewsbury police officers in other ways as well. Prior to the filing of the charge in this case, Mard had complained to several union representatives, including the Police Chief, about four aspects of his employment, including what Mard alleged to be violations of the collective bargaining agreement between the Town and the Union (Agreement). Mard filed a grievance pursuant to the procedure outlined in the Agreement regarding the use of CETA employees for police dispatching work in violation of the Agreement. Without resorting to the contractual grievance procedure, he further complained that he was required to drive a cruiser piloted by Blitz (a German shepherd who was a member of the Police Department's canine corps), that special police officers were being assigned to unpaid details at a local retail establishment in violation of the Agreement, and that he was being required to ride in a cruiser with special police officers against his will.²

On January 19 the Chief learned that the midnight shift would soon be abolished. Officer Michniewicz had informed the Chief that he had

All dates hereinafter refer to the year 1978 unless specifically stated otherwise.

Mard filed the formal grievance on October 25, 1977. The record does not disclose the dates on which he made his other complaints.

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ured his back and would be absent for several weeks. In consultation with his Personnel Officer, Sgt. McGinley, the Chief decided to transfer Officer Mard from the evening shift to the night shift to replace Chniwicz. The Chief informed Mard of his transfer to the midnight shift January 21. When Mard reported to work at 4:00 p.m. he found a note in mail box from Chief Reynolds which stated as follows:

Starting Tuesday, 1/24/78, you are assigned to shift #18, on the 12-8 shift. Off on Sunday 1/22/78 and Monday 1/23/78. Report on 1/24/78 on the 12-8 shift.

d telephoned the Chief at his home that evening to discuss the shift change. The Chief, however, refused to discuss the matter during his duty hours.

On Monday, January 23, Mard, accompanied by his Union representative, Officer Bouvier, went to Chief Reynolds' office to discuss the impending transfer. When the Chief saw Bouvier he asked him to leave but immediately changed his mind and permitted him to stay. The Chief admonished the two men, however, that the meeting was not a grievance session. Mard then asked for some consideration regarding the announced shift change. The Chief responded that he had given Mard plenty of consideration in the past--by not seeking a commendation from Mard's employer when he first applied for a job with the police department, by cooperating with Mard when he sought a job with the Worcester Police Department, and by paying Mard to repeat an EMT course after he failed an earlier EMT examination. The Chief then said that Mard was "a chronic complainer". The Chief testified that he told Mard:

"You have complained about things in this police department that nobody else seems--that don't seem to bother anybody else... If you work on the 12-8 shift, you won't have to worry about the dog; you won't have to worry about the dispatcher; and you won't have to worry about the special police officers because they don't ride the 12-8 shift."

During this meeting the Chief questioned Mard about his motivation in filing a grievance regarding the use of civilians as police dispatchers. The Chief wanted to know why Mard had to "go all the way" with that complaint when it could have been settled informally.

Notwithstanding the January 23 meeting, Mard was reassigned. He started work on the 12-8 shift as of January 24, and he remains on the night shift.

Opinion

The Commission has consistently held that discriminatory treatment of employees because of their lawful participation in union or other protected activities is in violation of Chapter 150E, Sections 10(a)(1) and (3). Town of Westboro, 5 MLC 1116 (1978); Town of Wareham, 3 MLC 1334 (1976); Town of Halifax, 1MLC 1486 (1975). The burden of establishing such a violation by a preponderance of the evidence rests with the charging party.

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charging party establishes a prima facie case of unlawful discrimination, then the burden of proof shifts to the employer to provide an adequate non-discriminatory explanation of its conduct. Town of Wareham, supra. If the charging party establishes a prima facie case, and the employer fails to rebut it, the court will find the employer in violation of the Law.

The court will now examine the evidence of Officer Mard's union and other protected activity.

Town admits that Mard was a union activist. It further admits that at least two grievances have been filed pursuant to the grievance procedure under the agreement, one of these was filed by Mard. This grievance dealt with the Police Department's use of CETA employees as civilian dispatchers. It was ultimately resolved to Mard's satisfaction.

Mard's protected activity, however, is not limited to union activity and is also covered by the contractual grievance procedure. In addition Mard three times reported to Chief Reynolds or other department officials about terms and conditions of employment in the Police Department: that special police officers were being assigned to extra-paid details; that police officers were required to ride in cruisers with special police officers; and that he was required to ride in a police cruiser which smelled of a dog.

Mard's complaint regarding the use of special police officers on extra-paid details constitutes protected activity notwithstanding the fact that Mard did not initiate the complaint in concert with any other fellow employees. The National Labor Relations Board (Board) has on numerous occasions held that a complaint of discrimination against an employee who seeks to enforce a collective bargaining agreement is violative of the National Labor Relations Act, whether the employee acts in concert with others or as an individual. In Interborough Bus, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966), enforced 399 F.2d 495, 67-3 (CA2, 1967), the Board held that:

"...complaints made for such purposes are grievances within the framework of the contract that affect the rights of all employees in the unit, and thus constitute concerted activity which is protected by Section 7 of the Act." Interboro, supra at p. 1298.

The Board has consistently followed Interboro. In Cray-Burke Co., 708, 85 LRRM 1197 (1974), the Board found an employee to have been unjustly discharged for voicing complaints about overtime work not being paid on the basis of seniority as required by the collective bargaining agreement. The Board cited Interboro as controlling and held the employee's activity to be protected under the Act as it was taken in order to effect implementation of the contract. In Hughes Sheet Metal, 224 NLRB 835, 1144 (1976) the employer laid off an employee because of alleged lack of seniority. The employee was a union activist and a chronic complainer about employer deviations from contractual terms and conditions of employment as well as employer deviations from accepted trade practices. The Board found a violation of the federal act.

Mard's individual complaint about the use of special police officers on extra-paid details was aimed at enforcement of Article X of the Agreement,

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as such is protected activity. Certainly, his filing a formal grievance is protected union activity. Town of Halifax, supra.

We find that Mard's complaint about special police officers riding in cruisers with regular police officers and his complaint about riding in a cruiser which smelled of the police dog were also protected activity. Although these complaints were not directed at compelling compliance with the Agreement, they were focused on terms and conditions of employment which had an impact on the bargaining unit as a whole. All Shrewsbury police officers who rode with special police officers incurred the same effect from their assignment as did Mard. Similarly, all Shrewsbury police officers who were assigned to the cruiser which smelled of the police dog suffered the same odor as did Mard. We find such individual complaints on generally applicable terms and conditions of employment to be protected activity.

That Mard's employer knew of his complaints and resented them is definitively established in the record. Calling the officer a "chronic complainer," Chief Reynolds testified to his conversation with Mard shortly after the transfer order was given. Reynolds stated that during the discussion on January 23 he specifically mentioned the areas about which Mard complained. Thus, the Chief's knowledge of the complaints cannot be doubted, nor can his motivation for the transfer. Chief Reynolds testified that he said to Mard during this same January 23 conversation that the transfer to the 12-8 shift would remove him from situations which had caused his complaints. The shift to which Mard was transferred was known as the "graveyard" shift among the officers and was used as a punishment duty assignment.

We find that the Union has proved a prima facie case of unlawful assignment by showing that Mard was known by the public employer to be a union activist, that he had made complaints about working conditions which constituted protected activity, and that these complaints were the reason for his transfer by his employer.

We now examine the reasons advanced by the Town in justification of Mard's reassignment.

In its brief the Town takes the position that it has the power to assign Mard to the midnight shift to replace Michniewicz as a matter of common law. We do not question the broad statutory power granted to a Chief of Police to manage his department. However, the inherent power to assign must be accommodated with G.L. c.150E; that is, a police officer may not be reassigned in retaliation for his protected activity. In this case the Chief had the authority to replace Michniewicz with an officer from another shift, as long as Michniewicz' replacement was not discriminatorily chosen because of his protected activity.

Although the Town claims that it need give no reason for transferring Mard to the midnight shift, it chose to offer various reasons at various times. When Mard received a notice in his mailbox on January 21 that his shift would be changed, no reason was given. When Chief Reynolds met with Mard two days later the reason given for his transfer was his chronic complaining. At the hearing before the Commission in April the Police Chief claimed for the first time that Mard's tendency to return to the



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tation too frequently during his tour of duty was a factor in his to reassign him to the midnight shift. Additionally, although Mard r been reprimanded, the Town in its brief claimed that Mard was ed because he was not a good employee. We view such shifting reasons reassignment of Mard to be an indication of improper motivation by . Mt. Wachusett Community College, 1 MLC 1496 (1976).

onic complaining is the reason admittedly most relied on by the Town ng chosen Mard for assignment to the midnight shift. We have, found Mard's complaints to be protected activity, and, accordingly, that the real reason for Mard's reassignment was his protected activity nsisted of filing a formal grievance under the Agreement, complaining mpliance with the Agreement, and complaining about working conditions d an impact on the bargaining unit as a whole. Therefore, we find ransfer to the midnight shift to be violative of G.L. c.150E, 10(a)(1) and (3).

REFORE, on the basis of the foregoing, it is hereby ORDERED pursuant c.150E, Section 11, that hte Town of Shrewsbury shall take the g affirmative action which the Commission finds will effectuate the f the Law:

Offer Leo Mard immediate and full reinstatement to his former position on the evening shift (4 p.m. to midnight) in the Shrewsbury Police Department.

Post the attached notice in a conspicuous place in thirty (30) days commencing not later than ten (10) days after receipt of this decision.

Notify the Commission in writing, within ten (10) days of the service of this decision and order of the steps taken to comply therewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JAMES S. COOPER, CHAIRMAN
GARRY J. WOOTERS, COMMISSIONER
JOAN G. DOLAN, COMMISSIONER

ies are advised of their right, pursuant to G.L. c.30A, section 14 to icial review of this Decision and Order.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION

WILL NOT interfere with, restrain or coerce any employees in the : of their rights guaranteed under G.L. c.150E.

WILL offer Leo Mard immediate and full reinstatement to his former on the evening shift (4 p.m. to midnight) in the Shrewsbury Police nt.

Chief Reynolds, Shrewsbury Police Department