CITY OF BOSTON AND BOSTON POLICE SUPERIOR OFFICERS FEDERATION, MUP-3994 (2/25/82). Decision on Appeal of Hearing Officer's Decision.

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Commissioners participating:

Phillips Axten, Chairman
Gary D. Altman, Commissioner

Appearances:

Eric J. Nadworny - Counsel for the City of Boston

Gerald Alch - Counsel for the Boston Police Superior Officers Federation

DECISION ON APPEAL
OF HEARING OFFICER'S DECISION

Statement of the Case

On September 4, 1981, Hearing Officer Sharon Henderson Ellis issued a decision in which she found that the City of Boston (City) violated Sections 10(a)(3) and (1) of General Laws Chapter 150E (the Law) by transferring Sergeant Daniel J. Harrington, a member of the Boston Police Superior Officers Federation (Federation) from District 4 to District 15 in retaliation for testimony before a City Council meeting and participation in back pay litigation against the City.[1]

On September 21, 1981, the City filed a Notice of Appeal of the hearing officer's decision. On December 4, 1981, the City filed a supplementary statement. No supplementary statement was filed by the Federation.

For the reasons set forth below, we affirm the hearing officer.

Opinion

Disputed Factual Findings

The City challenges certain of the hearing officer's findings of fact. We discuss those challenges in the order presented by the City.

[1]The hearing officer's decision is reported at 8 MLC 1318 (1981).

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ıe hearing officer found that in the months preceding a July 18, 1980 City meeting, the City was planning a reorganization of the police department mplemented in October, 1980. The City contends that prior to and as of , no date had been set for implementation of the reorganization, and that ord provides no basis for such a finding. The City is correct that, ıh the reorganization took place on October 22, 1980, there is no evidence ıat date was set as of the July City Council meeting.

ırrington appeared at the July 18 Council meeting on behalf of the Federa- The hearing officer found that Harrington's stated purpose in attending the was to get answers regarding the effect of the reorganization on members Federation. The City argues that the record indicates that the purpose of ting was not to discuss the reorganization, but to discuss the police de- ıt's existing budget. At best, the City says, this finding represents only e of mind" of the Federation which was never communicated to the City.

ırrington's testimony indicates that prior to the meeting, Federation offi- ıd met on several occasions with representatives of the police department, ng Commissioner Joseph M. Jordan, regarding the effect of the reorganiza- Federation members. No clear answers came from these meetings, Harrington Then, he testified, the Federation was subpoenaed by the Council's Committee ic Safety to testify as to how the Federation felt about the reorganization. ıbpoena" to which Harrington referred was in fact a letter to Harrington bert L. O'Neil, Chair of the Committee on Public Safety, asking Harrington luce all records, books or documents in his possession relative to the 1980-81 requests of the police department and the 1979-80 budget of the department elated to the then-existing deficit. O'Neil's letter made no reference to posed reorganization. On cross-examination, Harrington said that the pur- the Council meeting was to discuss the police budget. Harrington's actual ny at the Council meeting, and the documents he produced there, related the issue of civilian influence over the police department, including the of civilians being assigned to fill positions previously held by superior s. The matter of civilian influence was relevant to the budget issue, ton testified, because the civilians were being funded through the police Thus, the City's contention regarding this aspect of the record is also

ıe hearing officer further found that the City settled with the Federation ıbstantial back pay award, "allegedly one of the largest ever made in the The City asserts that this characterization is unsupported by the record, whimsical and prejudicial.

affirm this finding. Harrington testified that he was told by an attorney nting the Non-Payment of Wage Division of the Department of Labor and ies that this settlement was the largest that office had handled. The esented no evidence to the contrary.[2]

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[2] We note that this evidence is hearsay. We further note that we do not rely ıs the basis for our holding.

The City challenges the hearing officer's finding that Sergeant Flynn in District 15 was a street supervisor, and argues instead that he was a community service officer. The evidence indicates that Flynn was a street supervisor who performed the extra, uncompensated duty of community service officer. We affirm this finding.

The City correctly notes that the hearing officer omitted the fact that one week after Harrington's transfer into District 15, Sergeant Flynn was promoted out of that district, leaving Harrington as the only street supervisor in District 15.

The City contends that the hearing officer does not support with names her finding that within one week of Harrington's transfer out of District 4, the complement of superior officers there was reduced by four. In fact, she does. She lists three sergeants, one of whom was Harrington, and one lieutenant.

The hearing officer found that District 4 was the busiest station and consequently the most heavily staffed. The City correctly asserts that the record does not support her finding that District 4 is the most heavily staffed. It is, according to the record, the busiest.

The hearing officer found that Federation President O'Neil was sent to District 15 six times over a three-month period. The City contends that the period was six months. O'Neil's uncontroverted testimony was, as the hearing officer found, three months.

Conclusions of Law

Section 10(a)(3) of the Law prohibits an employer from discriminating against an employee in retaliation for the employee's exercise of rights under Section 2 of the Law. To establish such a violation, a charging party must show by a preponderance of the evidence that the employee was engaged in protected activity, that the employer knew of this activity, and that the employer took some adverse action against the employee with the motive of penalizing or discouraging the protected activity. Commonwealth of Massachusetts, 6 MLC 2041 (1980); Town of Somerset, 3 MLC 1618 (1977). The charging party must demonstrate that the adverse action would not have occurred but for the employee's protected activity. Trustees of Forbes Libaray v. Labor Relations Commission, _____ Mass. _____, Mass. Adv. Sh. (1981) 2183, 2185. If the adverse action would have occurred even in the the absence of protected conduct, the complaint must be dismissed. Id., Mass. Adv. Sh. (1981) at 2186. "Proof of a prima facie case shifts to the employer the responsibility to come forward with evidence; the employer must state a lawful reason for its decision and produce supporting facts indicating that this reason was actually a motive in the decision." If this burden is met, "the presumption of discrimination is dispelled." Id., at 2190. The ultimate burden of persuasion remains with the charging party.

The hearing officer determined that the Federation established a prima facie showing of discrimination. Both Harrington's testimony before the City Council and his participation in back pay litigation against the City were protected activities, she reasoned, and she found sufficient evidence to conclude that the

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transfer of Harrington was in retaliation for those activities. She then to the City for evidence of a non-discriminatory motive for the transfer. ınd, however, that although the City alleged as its motive an actue staffing ıe in District 15, the City provided no evidence of a shortage. Absent ıidence from the City, she concluded, the Federation had met its burden of ıion. The City challenges this conclusion on several grounds.

rst, the City argues that the hearing officer erred in ruling that Harring- ıarticipation in the Council meeting was protected. It asserts that the ıe indicates that Harrington's concern during the meeting was not, as the ı officer found, the proposed reorganization. Rather, his concern was civil- ıfluence within the police department, and, more specifically, the effect of ıfluence on the authority of the police commissioner. Such is not a legiti- ıncern of the Federation, argues the City, so Harrington's testimony on that was not protected. In so arguing, the City distinguishes "civilianization" term was used in City of Boston, 6 MLC 1117 (1979) from the topic of ın influence which was addressed by Harrington.

disagree. Although the City is correct that Harrington's testimony at the ı did not involve the effect of the proposed reorganization on Federation , we find, nevertheless, that his testimony regarding civilians within the ıent was protected. In part, at least, Harrington's testimony related to ıns replacing superior officers in the performance of certain duties. In Boston, supra, civilian personnel replaced uniformed officers performing ıl duties. The Commission held that if such "civilianization" resulted in ıtial detriment to bargaining unit employees, it was mandatorily bargainable. here was no showing of substantial detriment. However, in another case ng Harrington, we made clear that "what is bargainable and what is protected y are not necessarily coextensive. Employees are generally protected in ning about job conditions which they perceive as affecting their working ons, irrespective of the employer's bargaining obligation. Thus, even if ton's true concern was civilian control, he would still have a protected o complain to management..." City of Boston, 8 MLC 1199, 1202 (1981).[3]

e City next challenges the hearing officer's conclusion that the transfer ington was motivated by the back pay settlement reached the day before the r. It argues that there was no "large back pay settlement" on that date, t, even if there was, no other complainant in the back pay suit suffered erse personnel action. Also, the City argues that there was no evidence mmissioner Jordan knew of the settlement.

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he City also asserts that Harrington's testimony is unprotected because the o which it related was stale. We disagree that the issue was stale. The of the Council meeting was to discuss the police budget for fiscal years and 1980-81. Although some of the examples Harrington cited of civilians ng within the department occurred prior to those years, others took place those years. All were offered to illustrate the Federation's concern over tinuing funding of civilians through the police budget.

The evidence is clear that there was a substantial back pay settlement on September 4. The initial back pay complaint was instigated by Harrington. Harrington enlisted other officers to join him in signing the complaint. Harrington was the named plaintiff in the suit. Even though no evidence exists of other individuals being treated adversely, the hearing officer could properly infer that the City was motivated to penalize Harrington, the organizer of the suit. We also conclude that the hearing officer could properly infer Commissioner Jordan's knowledge of the litigation. The evidence indicates that Jordan is actively involved in the affairs of the department. For example, he personally issues personnel orders, including the one at issue herein, Harrington's transfer.

The City contends that the Septebmer 5 transfer was too removed in time from the July 18 Council meeting for the meeting to serve as a basis for retaliation. Again, we disagree. The hearing officer found that the transfer was motivated by both Harrington's participation in the meeting and his participation in the wage dispute. The meeting was only a month and a half prior to settlement of the wage dispute and Harrington's transfer. It is reasonable to infer that the wage dispute, which resulted in substantial liability for the City, was the straw that broke the camel's back, a back already strained by Harrington's earlier testimony before the Council. These two actions, occurring in such proximity to each other, together may have led the City to retaliate against Harrington.

The City also asserts that the hearing officer erred in relying on Harrington's union activism during 1977 and 1978 as a ground for the City's motivation to retaliate against Harrington. We note that this earlier union activism was the subject of a previous decision in which we found that the City discriminatorily transferred Harrington. City of Boston, supra. That decision was issued on July 1, 1981, just a few weeks prior to the City Council meeting and just two months prior to Harrington's transfer. Thus, at the time of the events involved in this case, Harrington's earlier union activism, as well as subsequent litigation based on that activism, had assumed a renewed freshness. Under these circumstances, it was proper for the hearing officer to rely in part on Harrington's prior protected activity.

The final contention[4] raised by the City is that the hearing officer's reference to a personnel shortage in District 4 following Harrington's transfer to District 15 is irrelevant: first, because Harrington was already working in District 15 on the day he learned of his transfer; and second, because only a week after his transfer, Harrington was the only street supervisor working in District 15. We do not see these factors as rendering the hearing officer's finding irrelevant. With respect to the first, Harrington was in District 15 on that day only to cover for another officer who was on vacation. The evidence does not indicate that he was there because of any permanent shortage in District 15. With respect to the second, the evidence indicates that there was only one street supervisor

[4]The City also argues on appeal that Harrington's transfer had no effect on his union activity. The hearing officer made no finding with respect to this point. The point is immaterial, and we therefore decline to discuss it. See, Commission Rules, 402 CMR 13.13(7).

:rict 15 prior to Harrington's transfer. Thus, since Harrington was now the supervisor, the other street supervisor became available for other assign-

aving reviewed the City's challenges, we find no reason to disturb the hear-ficer's conclusion. The evidence presented by the Federation of protected ty, employer knowledge, and adverse action was sufficient to shift the bur- the City to state a reason for its action and present supporting facts. The n turn alleged that Harrington's transfer was motivated not by his protected ty, but by a staffing shortage. However, it failed to put into evidence which would substantiate the existence of such a shortage. Significantly, ty called no witnesses, and the documents it introduced as exhibits did not to the issue of staffing shortages. Such evidence, if it exists, should have asily obtainable by the City. The hearing officer was correct in drawing an e inference against the City for its failure to produce such facts. For all reasons, on the basis of the record before us, we conclude that the charging nas proved by a preponderance of the evidence that the City violated Sections 3) and (1) of the Law by its transfer of Harrington. See, City of Quincy, 1527 (1981).

ORDER

)RE, IT IS HEREBY ORDERED that:

. The City shall cease and desist from:

   a. Discriminating against Harrington in the location of his work assignments;

   b. Interfering with, restraining, and coercing Harrington in the exercise of his guaranteed rights under the Law.

. The City shall immediately offer Harrington the choice of remaining in his current assignment or returning to District 4.

. The City shall post the enclosed Notice to Employees in conspicuous places where employees represented by the Federation generally congregate, including all District stations, and shall display said Notice for a period of thirty (30) days.

. The City shall notify the Commission within ten (10) days of the steps taken to comply herewith.

ERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman

GARY D. ALTMAN, Commissioner

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

The Labor Relations Commission, an agency of the Commonwealth, has determined that our action in transferring Police Sergeant Daniel Harrington on September 5, 1980 constitutes a violation of Sections 10(a)(3) and (1) of General Laws Chapter 150E (the Public Employees Collective Bargaining Law).

WE WILL cease and desist from discriminating against Sergeant Harrington in the location of his work assignments.

WE WILL cease and desist from interfering with, restraining, and coercing Sergeant Harrington in the exercise of his guaranteed rights under the Law.

WE WILL immediately offer Sergeant Harrington the choice of remaining in his current work location or returning to District 4.

CITY OF BOSTON

JOSEPH JORDAN,
POLICE COMMISSIONER