LLS REGIONAL TECHNICAL SCHOOL DISTRICT AND LOCAL 254, SEIU, MUP-4613 (9/10/82).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION

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ices:

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DECISION

Statement of the Case

1 October 13, 1981, the Service Employees International Union, Local 254, (Union or Local 254) filed a charge with the Labor Relations Commission sion) alleging that the Blue Hills Regional Technical School District (em- School District, or District) had engaged in prohibited practices within the of Sections 10(a)(2), (3) and (1) of G.L. c.150E (Law). The Commission con- an investigation and issued a Complaint of Prohibited Practice on November 30, The Commission's complaint alleged that the District had violated Section of the Law by providing the impetus for the creation of an employee organi- the Cafeteria Workers Association, and by selecting and retaining control representatives. The complaint further alleged that the District had vio- ections 10(a)(3) and (1) of the Law by discharging two employees because of involvement in union organizational efforts. Notice was given to all parties suant thereto an expedited hearing was held on December 18, 1981, and January , before Amy L. Davidson, a duly designated hearing officer of the Commis- All parties were given full and fair opportunity to be heard, to examine and camine witnesses, and to introduce evidence. Both parties filed timely

ne hearing officer held that the District violated Sections 10(a)(2) and (1)

of the Law by dominating and interfering with the formation and existence of the Cafeteria Workers Association, and dismissed the Union's charge of employer violation of Section 10(a)(3) of the Law. 8 MLC 2060 (1982).

Statement of the Facts

Serving the needs of seven towns in the Blue Hills area, the Blue Hills Regional Technical School District has one cafeteria which employs twelve cafeteria employees, one manager, and one director. Until the fall of 1980, employees at the cafeteria had no union representation. In the fall of 1980, the Superintendent Director of the School District decided that the cafeteria employees needed representation. He instructed Mary Lovely, then newly appointed as cafeteria director, to designate two employees who would be in charge of putting together a benefit package. Accordingly, Lovely selected Loula Bellazos, Mary Marinelli and Kathleen Cotter[1] to work on the employees' benefit package. Later in the fall, Lovely requested that only Bellazos and Marinelli submit a list of proposed benefits to her and the Superintendent Director. She did not make such a request of Cotter.

In April of 1981, Marinelli, along with Bellazos, who had just been promoted by Lovely to the position of Acting Cafeteria Manager, met with Brennan, Lovely and another School Committee member to discuss the proposed benefit list previously submitted to Lovely. These parties met about two or three times between April and June 1981, concerning the cafeteria workers' benefit package. The discussions resulted in a written benefit statement which was labelled as an agreement between the Cafeteria Workers Association and the Blue Hills Regional District School Committee. This benefit statement was distributed to cafeteria employees by Lovely and Bellazos in June 1981. Prior to that date, the cafeteria workers were not made aware of discussions concerning benefits between the employer and Bellazos and Marinelli.

In March 1981, Kathleen Cotter and Catherine Farrell, two cafeteria employees, began union organizational efforts and contacted a union about representing the twelve cafeteria employees. Cotter contacted Martin Joyce, who is the business agent of Local 254. Joyce agreed to come and speak to the employees about Local 254. In June 1981, Cotter invited some cafeteria employees to a meeting with Joyce to be held at her home. At that meeting, many cafeteria employees signed union authorization cards, and it was agreed then that the employees would keep the union a secret among themselves. Subsequently, Cotter and Farrell solicited signatures

[1] On page 3 of the hearing officer's decision, it is stated in the findings of fact: "Lovely initially chose three cafeteria workers, Loula Bellazos, Mary Marinelli and Catherine Farrell and instructed them to bring any 'gripes in the kitchen' to Lovely." (Emphasis supplied). The record, however, indicates that the three employees chosen were Loula Bellazos, Mary Marinelli and Kathleen Cotter. This is consistent with paragraph 2 of the School District notice of appeal and the hearing officer's later referral to this factual issue on page 15 of her decision when she states: "Initially, cafeteria manager Mary Lovely hand-picked Bellazos, Marinelli and Kotter to be the 'representatives' of the cafeteria workers."

on authorization cards from other cafeteria employees. There was testimony to the effect that at least one employee was approached about the Union during working hours. On June 22, 1981, Local 254 filed a representation petition with the Commission.

Mary Lovely testified that she had no knowledge of union organizational activities until June 25, 1981, when Brennan informed her that he had received notification in March that the union filed a petition with the Commission seeking to represent the cafeteria employees. Lovely further testified that she had no knowledge of Cotter's and Farrell's involvement in organizing the union.

There was testimony to the effect that Lovely questioned employees about the union. Catherine Trunfio, a cafeteria employee, testified that on July 1, 1981 she went into Lovely's office to pick up her check and she found both Lovely and Bellazos. According to Trunfio, Bellazos at that point indicated to her that a custodian told Bellazos that cafeteria employees had signed union cards. Trunfio further testified that Bellazos specifically asked her whether Cotter and Farrell were involved in the union organizational effort at the cafeteria. Trunfio said, however, that in responding to Bellazos she did not mention the name of Cotter nor that of Farrell.

Lovely testified that the decision to terminate Cotter and Farrell was made on June 22, 1981 when Lovely sent a letter to Brennan recommending their discharges due to "Federal and State changes in the program." However, on July 1, 1981, Bellazos sent a letter to all cafeteria employees, including Cotter and Farrell, stating that September 1, 1981 was the day agreed on to prepare the kitchen for the opening of the school year. The letter further stated that September 1, 1981 was a mandatory work day and that failure to report would result in dismissal.

On July 23, 1981, following a vote by the School Committee to eliminate three positions in the cafeteria staff, notices of termination of employment with the School District were sent to Cotter and Farrell, and it was stated that their terminations were due to cutbacks in federal funds. Lovely asserted that the reasons for choosing to terminate Cotter and Farrell rather than other employees were that she felt that Cotter was not as productive as other employees, and that neither Cotter nor Farrell perform key jobs in the kitchen. The evidence presented at the hearing shows that there has been no incidence of discipline in the case of Cotter during her six years of employment at the cafeteria. During Farrell's six years, there was only one incidence of discipline, which occurred on January 22, 1981, five months prior to Lovely's termination recommendation. On that occasion, Lovely gave a letter of reprimand to Farrell alleging that she had been tardy, that she had been leaving her work station to receive personal telephone calls, and that she had been working her lunch hour in order to be able to leave early.

On August 27, 1981, a month after Farrell's and Cotter's discharge, the School District placed an advertisement in the Canton Journal seeking part-time and substitutes because substitutes were not paid benefits, and, as a result, by employing them rather than full-time employees, the School District would save money. Neither Farrell nor Cotter was informed of the availability of part-time substitute work prior to the advertisement in the Canton Journal. Two part-time substitutes and

ur culinary students were hired in the fall of 1981 to perform the work previously rformed by Cotter and Farrell.

Position of the Parties

Both parties appeal the hearing officer's decision to the Commission. The hool District appeals the hearing officer's finding of employer violation of Sec- on 10(a)(2) of the Law on several grounds. First, it argues that the original arge filed by the union did not allege facts sufficient to establish employer mination or interference in the formation of the Cafeteria Workers Association. cond, the District seems to argue that, because Cotter was one of the employees itially designated by the Supervisor, Lovely, to represent the cafeteria workers negotiating a benefit package with the School District, she cannot now be a rty to a different cause of action against the employer. Furthermore, the School strict's argument on appeal seems to imply that because an election has been held d Local 254 had been designated as the union representing the cafeteria employees, e question of employer domination prohibited under Section 10(a)(2) is now moot.

On the other hand, the union's appeal seems to be based on its assumption that e hearing officer made factual determinations with respect to the reasons given by e School District for terminating Cotter and Farrell. The union therefore appears be challenging those factual determinations. In addition, the union seems to gue for the first time that the employer, by reducing its workforce in terminating tter and Farrell, and at the same time by increasing its workforce with the hiring part-time employees and culinary students, acted unilaterally and thereby vio- ted Section 10(a)(5) of the Law.

OPINION

A. Procedural Issues

The School District challenges the hearing officer's decision on the grounds at the original charge filed by Local 254 did not specifically allege employer mination or interference in the formation of the employee organization. Conse- ently, the District argues, the charge did not make out a violation of Section (a)(2) of the Law.

Commission Rule 402 CMR 15.02(3) provides in relevant parts that:

> "A charge made under this chaper shall contain the following:
>
> ...(3) An enumeration of the subdivision of the law claimed to have been violated and a clear and concise statement of all relevant facts which cause the charging party to believe that the law has been violated."

mmonwealth of Massachusetts, 8 MLC 1453 (H.O. 1981) SUP-2536, presented a similar estion. In that case, the employer argued that the union's charge should have en dismissed because it did not include sufficient facts to constitute a violation the Law and that, under such circumstances, the Commission should not have issued

a complaint. That decision held that the proper time to raise such a defense was prior to or at the investigation stage of the proceedings. To raise the issue at the post complaint stage was, therefore, untimely. (Id. at 1456).

In this case, the original charge brought by the union contained the correct subsection enumeration of 10(a)(2), as required by Commission Rule 402 CMR 15.02(3), even though the specific facts were not spelled out. On the basis of the charge filed by the union, the Commission proceeded to investigate the matter and subsequently issued a complaint. In the complaint, specific facts sufficient to establish a 10(a)(2) violation were alleged (See Commission Complaint of Prohibited Practice, MUP-4613, 11/30/81 at p.3). A hearing on the matter was subsequently held. The School District had the opportunity to raise the issue of lack of specificity of the charge at the investigation proceedings, and it failed to do so. It also failed to bring it up at the subsequent hearing. Therefore, since the School District did not raise this question prior to this appeal to the Commission, it is barred from raising it at this stage of the proceeding. Cf. Town of Wayland, 7 MLC 2082, 2085 (4/29/81); Malden Education Association, 7 MLC 1184 (1980).

Assuming, however, that the School District had timely raised the issue of lack of sufficiency of the union's charge to make out a violation of Section 10(a)(2), the Commission could still find a Section 10(a)(2) violation under a theory similar to that elucidated in our recent decision in Town of Randolph, 8 MLC 2044 (1982). In that case, following a rule adopted by the National Labor Relations Board (NLRB),[2] we held that where illegal conduct relates to the general subject matter of the Commission's complaint and the facts alleged have been fully litigated, a violation may be found, even though the specific subsection of the Law alleged to have been violated was not cited.[3] Randolph and the cases cited therein stand for the proposition that the determining factor in deciding whether a violation not alleged in a Commission complaint exists is whether the party charged with such a violation had fair notice of the conduct at issue and an opportunity to present a defense. Randolph, 8 MLC at 2050; see also Town of Wayland and IAFF, Local 1978,

In this case, there is no question that the School District had knowledge of the conduct being objected to. Even though the union's initial charge did not spell out all the facts supporting a 10(a)(2) violation, it did nonetheless specifically allege a 10(a)(2) violation where it states:

> "The above-named Employer/Employee organization has engaged in or is engaging in a prohibited practice within the meaning of Chapter 150E, Sections 10(a)(2), (3) and (1) as that term is used in the Act." (See Union's Charge, Case No. MUP-4613).

In the course of the Commission investigation, facts forming the basis of a 10(a)(2) violation were brought forth by the union, and the School District neither objected at that time nor contradicted these facts. Following the investigation, the Commission found probable cause for a 10(a)(2) violation and issued a complaint which contained detailed factual allegations sufficient for a 10(a)(2) violation. (See Commission's complaint, p. 3-4). In the subsequent hearing in which all the facts alleged in the complaint were litigated by the parties, the School District had a fair opportunity to present a defense. It is, therefore, fair to conclude that the employer in this case had ample notice of the objectionable conduct and was given a fair opportunity at this hearing to defend itself. Consequently, it cannot at this stage avoid an unfavorable finding by the hearing officer by seeking to nullify the proceedings on a mere technicality.

B. Domination

The School District further challenges the finding of a 10(a)(2) violation on the basis of the fact that charging party Cotter was also one of the employees initially designated by supervisor Lovely to represent the cafeteria employees in the negotiation of a package with the School District. The argument implies that since Cotter did in fact participate in the early stages of the "bargaining" between the Cafeteria Workers Association and the employer, she cannot now be a party to a different cause of action against the employer. A review of the elements necessary to establish a 10(a)(2) violation will reveal that there is no merit to this argument.

As mentioned in the hearing officer's decision, the Commission has rarely had occasion to rule on a violation of G.L. c.150E, sec. 10(a)(2).[4] However, the NLRB has on various occasions considered employer domination cases arising under sec. 8(a)(2)[5] of the National Labor Relations Act (Act or NLRA), the statutory counterpart of G.L. c.150E, sec. 10(a)(2). It is appropriate, therefore, to turn to these decisions for guidance.

In determining whether an 8(a)(2) violation exists, the Board decides, as a threshold question, whether an organization alleged to have been dominated by an employer qualifies as a labor organization within the meaning of the statutory

[4] See City of Worcester, 1 MLC 1265 (1975) and Town of Natick, 2 MLC 1149 (H.O. 1975).

[5] Under sec. 8(a)(2) of the NLRA it is unlawful for an employer "to dominate or (continued)

definition found in Section 2(5)[6] of the Act. Clapper's Mfg., Inc. v. United Brotherhood of Carpenters & Joiners of America, 196 NLRB 324, 333 (1970); NLRB v. Ampex Corp., 77 LRRM 2072, 442 F.2d 82, cert. den., 78 LRRM 2704, 404 U.S. 939 (1971). The Board has held that an organization is deemed to be a labor organization within the meaning of sec. 2(5) of the Act where its function is to deal with the employer on subjects concerning wages, conditions of work, grievances, hours of employment, etc. Clapper's Mfg., Inc., supra at 334; NLRB v. Cabot Carbon Co., Inc., 360 U.S. 203, 210-214 (1959); Jansen Electronics Mfg., Inc., 153 NLRB 1555, 1558 (1965); Holland Mfg. Co., 129 NLRB 776, 784 (1960), enf'd 292 F.2d 870 C.A. 3).

Once it is established that an organization is a labor organization within the meaning of sec. 2(5) of the Act, the Board then examines the employer conduct alleged to be violative of Section 8(a)(2) to determine whether such conduct amounts to prohibited employer domination. Employer domination has been found in cases where the employer initiates or provides the impetus for the formation of an organization, dictates its form and structure, or selects its representatives. Clapper, supra at 334; Holland Mfg. Co., supra at 785.

The facts in this case indicate that Bellazos and Marinelli discussed with management issues concerning wages, benefits, and conditions of employment. As a result of these discussions, Bellazos and Marinelli entered into what was called by the School District a "collective bargaining agreement" with the employer on behalf of the "Cafeteria Workers Association." G.L. c.150E, sec. 1 defines "employee organization" as "any lawful association, organization, federation, council, or labor union, the membership of which includes public employees, and assists its members to improve their wages, hours, and conditions of employment." In light of this definition of employee organization and under the Board's decision in Clapper's Mfg. Inc., supra, Bellazos and Marinelli's activity in negotiating with the School District concerning terms and conditions of employment on behalf of the "Cafeteria Workers Association," renders the Association a labor organization within the meaning of G.L. c.150E, sec. 1.

Having determined that the "Cafeteria Workers Association" is a labor organization, we must consider whether the employer's conduct amounted to prohibited domination within the meaning of c.150E, sec. 10(a)(2) which provides that it is unlawful for a public employer to "dominate, interfere, or assist in the formation, existence, or administration of any employee organization." The evidence in this case clearly establishes that the idea of forming an association for the employees was introduced by the employer, when, in the fall of 1980, the District's Superintendent Director Charles Brennan decided that the cafeteria workers needed some

5 (continued)
interfere with the formation or administration of any labor organization or contribute financial or other support to it... ."

[6]Sec. 2(5) of the NLRA defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

representation. To further its desire to create an employee organization, the employer took the initiative of selecting representatives for the association when the Director of the cafeteria, Lovely, hand-picked Bellazos, Marinelli and Cotter to work on a benefit package for the employees. Not only did the employer hand-pick the representatives of the association, but it retained control over these individuals by exercising the power of removing them from participation in the negotiation as representatives of the employees. The extent of such employer continuing control is evidenced by Lovely's subsequent removal of Cotter as a representative of the association.

Therefore, it is fair to conclude that the employer, by initiating the creation of the Cafeteria Workers Association, dictating its structure, selecting its representatives, dominated and interfered in the formation of the organization to such an extent as to violate G.L. c.150E, sec. 10(a)(2). Under the statutes and case law, a violation of 10(a)(2) or sec. 8(a)(2) of the Act occurs when an organization alleged to have been dominated by an employer is found to be a labor organization within the meaning of the statutory definition, and the employer's interference with its formation and existence is found to be extensive enough to constitute domination under the Law. Therefore, once the union presented sufficient evidence to establish that a labor organization existed and that the employer dominated such an organization, it made its case against the School District. The fact that Cotter, one of the representatives originally selected by the employer, is a party in a different charge against the employer is totally irrelevant.

The School District further implies that because an election has been held and Local 254 has been selected as the union representing the cafeteria workers, the employer domination issue is therefore now moot. The facts indicate that the employer interference in the formation and existence of the association began to occur in the fall of 1980, when the District Superintendent Director Brennan decided that the cafeteria employees needed some representation and instructed Lovely to designate individual employees to represent these workers. The interference continued into June, 1981, when the benefit package was distributed to employees. Activities on the part of employees seeking representation from Local 254 did not start until March, 1981, when Cotter and Farrell contacted Business Agent Martin Joyce of Local 254 about union representation of cafeteria workers. Union authorization cards were signed by the employees during June, 1981. An election was held on March 4, 1982 and Local 254 was certified as the exclusive bargaining representative of the cafeteria employees on March 12, 1982. Therefore, during the period between the fall of 1980 and June, 1981, when the cafeteria employees' sole union representation was by the "Cafeteria Workers Association," the School District, by interfering with the formation and existence of the Association, violated sec. 10(a)(2) of the Law. The later election of another union to represent the employees does not change the fact that the employer violated 10(a)(2) by dominating the association during the period preceding the election of Loqal 254.

C. The Discharges

The union challenges the hearing officer's conclusion that employer violation of G.L. c.150E, sec. 10(a)(3) was not established. The Complaint of Prohibited Practice alleges facts which, if proved, would have constituted a violation of

Section 10(a)(3). These facts aver that the employer discriminated against Cotter and Farrell by discharging them because of their participation in union organizing efforts. As articulated in the hearing officer's opinion, to establish a prima facie violation of sec. 10(a)(3), the union must show that: 1) the employee was engaged in concerted activity, protected under the Law; 2) that the employer had knowledge of this activity; and 3) that the employer, with the motive of penalizing the protected activity, took adverse action against the employee. Town of Randolph, 8 MLC 2044, 2052, 2053; Commonwealth of Mass., 6 MLC 2041, 2046 (1982); William S. Carroll, Inc., 5 MLC 1568 (1978); Town of Somerset, 3 MLC 1618, 1621 (1977). Furthermore, under the recent Supreme Judicial Court decision of Southern Worcester Co. Regional Vocational School District v. Labor Relations Commission, 1982 Mass. Adv. Sh. 414, 386 Mass. 414, reaffirming the decision of Trustees of Forbes Library v. Labor Relations Commission, 1981 Mass. Adv. Sh. 2183, 2185-2186, a violation of sec. 10(a)(3) can exist only where it can be shown "that the employee would not have been discharged but for his protected activity... ." Id at p. 418. The Court is therefore reaffirming the "but for" test as the standard for determining whether the discharge of an employee by an employer is discriminatory in violation of Section 10(a)(3).

Employer knowledge, one of the elements necessary to make out a violation of G.L. c.150E sec. 10(a)(3), may be proved by direct or circumstantial evidence. William S. Carroll, Inc., 5 MLC 1562, 1569 (1978). In cases where the workplace qualifies as a small plant,[7] employer knowledge may be proved by invoking the small plant doctrine. This doctrine provides a basis for inferring employer knowledge in circumstances where inpermissible motivation has been established, but knowledge cannot be proved directly. NLRB v. Abbott Worsted Mills, Inc., 127 F.2d 438, 10 LRRM 590 (1942); NLRB v. Joseph Antell, Inc., 358 F.2d 880, 62 LRRM 2014 (1966); Lexington Taxi Corporation, 4 MLC 1677, 1684 (1978). However, the smallness of the plant alone does not justify the invocation of the doctrine. The employee's protected, concerted activity would have had to have taken place on the work premises in such a manner and at such times that the employer would have had to have noticed them. Coral Gables Convalescent Home, 234 NLRB No. 180, 97 LRRM 1435, 1436 (1978); NLRB v. Antell, Inc., 358 F.2d 880, 62 LRRM 2014, 2016 (1st Cir, 1966); Lexington Taxi Corporation, 4 MLC 1677, 1684 (1978); see also, Friendly Market, Inc., 224 NLRB 967, 969, 92 LRRM 1584 (1976); Hadley Mfg. Co., 108 NLRB 1641, 1650, 34 LRRM 1246, 1248 (1954).

The facts of cases in which the small plant doctrine has been invoked (Coral Gables Convalescent Home, supra; Byrds Manufacturing Corp., 140 NLRB 147, 161 (1962); NLRB v. Sutherland Lumber Co., 452 F.2d 67, 78 LRRM 2772 (1971) generally show that either much protected, concerted activity occurred on the employer's premises or that a supervisor's knowledge of union activity was imputed to the employer. See Byrds Manufacturing Corp., supra at 161; American Sanitary Products Co. v. NLRB,

[7] A plant of eleven employees is deemed to be a "small plant" for purposes of the "small plant doctrine." Famet, Inc. v. NLRB, 85 LRRM 2223, 2224 (9th Cir. 1973). A plant of thirteen employees has also been held to be a "small plant." Wiese Plow Welding Co. Inc., 123 NLRB 616, 43 LRRM 1495, 1496 (1959).

382 F.2d 53, 65 LRRM 3122 (10th Cir. 1967); NLRB v. Mid-States Sportswear, Inc., 412 F.2d 537, 71 LRRM 2370 (5th Cir. 1969).

For instance, in Famet, Inc. v. NLRB, supra, in which employer discrimination was found, the employee in question distributed union authorization cards at his place of work to all his co-workers, except one. Id. at 2224. In Byrds Manufacturing Co., supra, even though much of the union activity occurred off the work site, there was much talk about the union at the plant. Moreover, there was evidence that one lower-level supervisor had direct knowledge of the involvement in union activity of some of the fired employees and such knowledge was imputed to the employer. Id, at p. 152.

On the other hand, in several cases where there was no clear evidence on which employer knowledge could be based, the circuit courts have reversed the Board when it found knowledge. See NLRB v. Antell, supra, (62 LRRM at 2016); NLRB v. Meinholdt Manufacturing, Inc., 451 F.2d 737, 78 LRRM 2892, 2895 (10th Cir. 1971). In NLRB v. Antell, supra, the Court held that, where union activities are carried on outside the work premises during off-hours, it is unreasonable to assume that the employer had an opportunity to observe the activity in question. The small plant doctrine is therefore not applicable because the application of the doctrine would result in placing an unfair burden on operators of small enterprises, Id. 62 LRRM at 2016. In Meinholdt Mfg., Inc., supra, the Court held that the substantial evidence rule is not satisfied by evidence which merely creates a suspicion, where there is equally enough evidence to support inconsistent inferences. See also Bill's Coal Co. v. NLRB, 493, F.2d, 85 MLRR 2742, 2746 (10th Cir. 1974) in which it was held that while there was some evidence of discriminatory layoff and of anti-union animus on the part of the employer, the record did not substantially support a finding of discriminatory discharge.

In the instant case, the hearing officer concluded that both Cotter and Farrell were engaged in concerted, protected activity, since they both served as the principal contacts between the union and the employees. The first necessary element of a Section 10(a)(3) violation is therefore met. However, because the element of knowledge was not proved, the hearing officer declined to examine the third element of a Section 10(a)(3) violation, namely employer motivation in discharging these employees. (See Blue Hills Regional School District, 8 MLC 2060 at 2071, H.O. 4/26/82). In this case, the evidence on the issue of employer motivation in terminating these two employees was introduced. While it would have been more desirable that the hearing officer examine the employer's reasons for discharge and reach a conclusion on the issue of impermissible motivation, such a finding would not have made a difference in this case, since knowledge was not proved. A Section 10(a)(3) violation cannot be found where employer knowledge is not shown. Brooks v. NLRB, 538 F.2d 260, 92 LRRM 3420 (9th Cir. 1976); NLRB v. Electro Mart, 523 F.2d 410, 423, 90 LRRM 2678 (9th Cir. 1976). The record does support an inference of anti-union animus on the part of the employer, simply on the basis of the School District's earlier interference with the formation of the "Cafeteria Workers Association," and on Bellazos' interrogation of Trunfio and others with respect to their knowledge of union activity as well as their own involvement in such activity. Assuming arguendo that on the basis of the employer's anti-union animus and other findings of fact on the record, an inference could be made that the reasons given by

the employer for terminating Cotter and Farrell were pretextual, employer knowledge of these two individuals' involvement in union activity would still have to be established. In this case, since there is no direct evidence of employer knowledge, knowledge might be proved by invoking the small plant doctrine in this cafeteria with 12 employees. Famet Inc. v. NLRB, supra.

For the small plant doctrine to operate, however, the union activities would have had to have been carried on in a manner which made it likely that the employer had an opportunity to observe them. Here, the record indicates that all union organizational activities occurred off the work premises of the school district. Except for one isolated incident in which an employee was approached by Cotter during working hours to sign an authorization card, no union activity occurred on the premises. There is no evidence in the record that anyone from management observed Cotter soliciting from this employee an authorization card signature on behalf of the union. Even though there is evidence that the employer may have known at some point that there was union activity among the cafeteria employees, the record does not support a finding that the employer knew prior to their discharge that Cotter and Farrell were in fact the union organizers.

We conclude, therefore, that the small plant doctrine cannot be applied in this case since all significant protected, concerted activity took place off the cafeteria premises. It simply was not proved either that the employer could have observed these activities or that any supervisor had knowledge which could be imputed to the employer. Because employer knowledge was not shown in this case, we hold that a Section 10(a)(3) violation was not established. The hearing officer's conclusion in this regard is hereby affirmed.

D. Unilateral Change

In paragraph 4 of its notice of appeal, the union seems to argue for the first time that the reduction in force by the School tistrict amounts to a unilateral change in the contract by the employer, a practice prohibited under G.L. c.150E, sec. 10(a)(5). Under Rule 402 CMR 13.13(6), the evidence to be reviewed on appeal to the Commission is limited to evidence presented to the hearing officer. In addition, facts which were not made part of the record may not be presented on appeal. Town of Wayland, 7 MLC 2082, 2085 (4/29/81); Malden Education Assn., 7 MLC 1184, 1185 (1980); City of Taunton, MCR-3149, 7 MLC 1960, 1961 (3/24/81). In this case, no evidence was introduced by the union at the hearing on the issue of unilateral change. Consequently, the School District did not have the opportunity to cross-examine witnesses and present evidence to defend itself against a charge of employer unilateral change. Therefore, this issue is untimely raised at this stage of the proceedings.

Finally, the union has no standing to raise a Section 10(a)(5) violation, since it was not certified or recognized as representing the cafeteria employees during June, July and August 1981, when the employer allegedly made the unilateral change.

ORDER

On the basis of the foregoing, IT IS HEREBY ORDERED that the Blue Hills Regional School District shall:

1. Cease and desist from:

   a. Dominating and interfering with the administration of the Cafeteria Workers Association or with the formation or administration of any other employee organization of its employees;

   b. Recognizing or in any manner dealing with the Cafeteria Workers Association or Loula Bellazos and Mary Marinelli as representatives of any employees for the purpose of dealing with the District concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment;

   c. In any other 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 which will effectuate the purposes of the Law:

   a. Withdraw all recognition from the Cafeteria Workers Association or Loula Bellazos and Mary Marinelli as representatives of any of its employees for the purpose of dealing with the District concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment and completely disestablish the Cafeteria Workers Association as such representative;

   b. Post in conspicuous places where the Blue Hills Regional School District cafeteria employees usually congregate, and leave posted for a period of thirty (30) consecutive days, the attached Notice to Employees;

   c. Notify the Commission within thirty (30) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JOAN G. DOLAN, Commissioner

GARY D. ALTMAN, Commissioner

Blue Hills Regional Technical School District and Local 254, SEIU, 9 MLC 1271

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

After a hearing at the Massachusetts Labor Relations Commission at which all parties were given an opportunity to be heard, the Blue Hills Regional School District has been found in violation of Sections 10(a)(2) and (1) of Massachusetts General Laws Chapter 150E (the Public Employee Collective Bargaining Law) by dominating and interfering with the formation, existence and administration of the Cafeteria Workers Association.

WE WILL NOT dominate or interfere with the administration of the Cafeteria Workers Association or any other employee organization of our employees.

WE WILL NOT recognize or in any manner deal with the Cafeteria Workers Association or Loula Bellazos and Mary Marinelli as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form employee organizations, to join or assist Local 254, Service Employees International Union, AFL-CIO, or any other employee organization to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities.

WE WILL withdraw all recognition from the Cafeteria Workers Association or Loula Bellazos and Mary Marinelli as a representative of any of our employees for the purpose of dealing with the District concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment.

All our employees are free to become or remain or to refrain from becoming or remaining members in good standing of Local 254, Service Employees Internatinal Union.

BLUE HILLS REGIONAL SCHOOL DISTRICT
CHARLES BRENNAN, SUPERINTENDENT

MARY LOVELY, CAFETERIA DIRECTOR