BROCKTON EDUCATION ASSOCIATION AND BROCKTON SCHOOL COMMITTEE, MUPL-2740, AND BROCKTON EDUCATION ASSOCIATION AND MARIO DIMARZO, MUPL-2777, AND BROCKTON EDUCATION ASSOCIATION AND THOMAS CIBOTTI, MUPL-2778 (1/7/86).

75.91 censure
82.1 affirmative action
91.13 mootness
92.38 interference with witnesses/hearings

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner
Maria C. Walsh, Commissioner

Appearances:

Mark G. Kaplan, Esq.	- Representing the Brockton Education Association
Edward F. Lenox, Jr., Esq.	- Representing the Brockton School Committee
James M. Burke, Esq.	- Representing Mario DiMarzo and Thomas Cibotti

DECISION

Statement of the Case

On April 4, 1984, the Brockton School Committee (School Committee) filed a charge alleging that the Brockton Education Association (BEA) violated Section 10(b)(1) of G.L. c.150E (the Law) by censuring three bargaining unit members for voluntarily testifying on behalf of the School Committee at a hearing before the Labor Relations Commission (Commission). On August 3, 1984, Mario DiMarzo and Thomas Cibotti, two of the three who had testified, filed similar charges.

The Commission issued a complaint in the School Committee's case on August 9 and in DiMarzo's and Cibotti's cases on October 24. The three cases were consolidated for hearing.

Hearing Officer Diane M. Drapeau conducted a formal hearing on the consolidated cases on November 9, 1984. All parties filed timely briefs.

Findings of Fact

At all times relevant to this case, the BEA represented over nine hundred teachers and administrators in the Brockton public schools. All but six or seven bargaining unit members belonged to the BEA. Individual charging parties Mario

DiMarzo and Thomas Cibotti belonged to the administrators' unit and were BEA members.[1]

As of the hearing date, the parties' most recent collective bargaining agreement had expired on August 31, 1983. Negotiations for a successor had begun in February 1983, but no contract had been executed.

By September 1983 negotiations had grown tense. Marge Donovan, president of the BEA from 1982 to June 1984, described them as "the most difficult...ever under the most difficult conditions within the teaching staff of the Brockton public schools." The city had cut the School Committee's budget substantially; 225 teachers had been laid off. During the spring of 1983 there were widespread public demonstrations concerning the budget cuts. As many as 1800 teachers, students and citizens attended one School Committee meeting. A public meeting with the mayor on the subject of the budget cuts was large enough to be held in the high school's football stadium.

In June 1983, the parties entered mediation. One of the major issues on the table was the scheduling of teachers' lunch periods (referred to by all parties as "lunch mods"). In the past, most faculty had had approximately thirty minutes for lunch, but some had had only eighteen. The BEA proposed a thirty-minute lunch for all faculty. This proposal generated considerable heat in the already volatile negotiations.

On August 11, 1983, the BEA filed a charge under Section 10(a)(5) of the Law, alleging, inter alia, a unilateral change in the time available to employees for lunch. On November 18, 1983 the Commission issued a complaint on the charge, docketed as MUP-5339, alleging in essence that before September 1, 1983, teachers had been able to schedule their eighteen-minute lunch mods next to other unscheduled mods so that they had thirty-six minutes for lunch, and that in September the School Committee changed the schedule so that teachers could no longer dovetail their mods.

The Commission held five days of formal hearings on MUP-5339 on December 7 and 16, 1983; January 12 and 18, 1984; and March 1, 1984. Negotiations remained antagonistic during the hearings. November had seen a mayoral election in Brockton; the School Committee budget and the status of negotiations were campaign issues. Donovan testified that on January 18, 1984 negotiations were still difficult and she was concerned about them.

On January 18, Cibotti, DiMarzo and a third administrator, Ward Grant (the latter not a party to this case), testified on behalf of the School Committee. None had been subpoenaed. Their testimony bore on the issue of whether the BEA had received notice of the School Committee's intention to alter the lunch mods prior to

[1] Cibotti had been a member since 1962, although he had withdrawn from membership from 1971 to 1977. DiMarzo had been a member since the beginning of his employment.

September 1983. Cibotti testified that during the school year September 1982 to June 1983, he had held monthly faculty meetings, and that at some of them the participants had discussed the School Committee's plans to shorten the school day from fourteen to sixteen mods; as a consequence, lunch might be served in four sittings rather than seven. The new schedule was discussed in terms of its "theoretical" or "possible" implementation in September 1983, or possibly September 1984. BEA building representatives attended all of the meetings. Cibotti further testified that the mod changes had been discussed at six housemasters' meetings from December 1982 through April 1983, the minutes of which had been posted in the faculty lounge of his house.[2] DiMarzo's and Grant's testimony was similar. Neither DiMarzo nor Cibotti saw themselves as partisans. They agreed to testify on behalf of the School Committee because they felt that they could provide useful information to the Commission.[3]

Among those present at the January 18, 1984 hearing were Donovan; Grace O'Meara, chairperson of the BEA's negotiating team; and Brockton High School Principal Robert F. Reagan. During a break in the testimony, when Cibotti, DiMarzo, Grant and Reagan were gathered in the corridor, Donovan spoke to them. The significant aspects of this conversation are not in dispute. Donovan, surprised to see DiMarzo and Cibotti appear as witnesses for the School Committee, asked them whether they had been subpoenaed. They replied that they had not. Donovan then remarked, "Well, at least you could have come under subpoena." Cibotti responded: "I think I'm coming here only to testify as to what some facts were that School Committee attorney Lenox asked me to testify, and if there's anything that you want to ask me while I'm here that could shed light to the Hearing Officer as to what the issues might be, I'd be more than glad to."

On February 6, 1984, Donovan chaired a meeting of the BEA's Representative Council at Brockton High School.[4] Forty-six of the approximately fifty building

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[2]Brockton High School is divided into four academic houses, each presided over by a housemaster. Cibotti and DiMarzo are both housemasters.

[3]The BEA introduced evidence tending to show that both administrators must have intended to testify against the BEA's interests because both were unusually well qualified to understand the adversarial process and their roles in it. Cibotti was chairman of the Walpole School Committee and had been on the School Committee for five years. In that capacity he had bargained with AFSCME. DiMarzo had been a member of the bar since 1964 and worked part-time as a practicing attorney. In light of our ultimate disposition of this case, it is immaterial whether the two understood themselves to be acting adversely to the BEA's interests by testifying.

[4]The Representative Council is the BEA's governing body. It is composed of representatives from each house in a ratio of one representative to twenty-five bargaining unit members.

representatives attended, as well as four of the five officers. According to the minutes of this meeting, Donovan reported to the representatives that "the School Committee had brought in three BEA members to testify on its behalf against the BEA at the unfair labor practice hearing before the Commission." Later in the meeting, Grace O'Meara, in the course of her usual progress report on the conduct of negotiations, said, again according to the minutes,

> that three members of our own union didn't let the BEA know that they were going to testify against the BEA. Our members have a responsibility to cooperate with the BEA. Formal notice is hereby given to all BEA members not to voluntarily testify against the association's positions...
>
> The names of those working against our issues will be published in the future.

BEA Representative George McSherry then moved to send letters of censure to the three BEA members who had testified, without naming them. The motion passed. Another representative asked whether the BEA by-laws contained a provision to censure members. The chairman of the Professional Rights and Responsibilities Committee responded that "there was a past practice of censure." The motion and discussion were reflected in the minutes.

It is undisputed that no one identified DiMarzo and Cibotti by name at the February 6 meeting, although there is also no question that Donovan and O'Meara knew who they were. As one building representative at the meeting apparently noticed, there is no provision for censuring members in the BEA by-laws.

Nonetheless, the BEA disseminated notice of the censure vote via two publications. First, as was customary, the minutes were distributed to all schools within two or three weeks of the meeting and posted on faculty bulletin boards. Second, the February 1984 edition of the BEA's monthly newsletter, authored by Donovan, referred to the vote in a column that read, in pertinent part:

> The BEA has charged the Brockton School Committee with an unfair labor practice for unilaterally implementing a new BHS lunch schedule while refusing to negotiate the BEA proposal on the bargaining table that would provide a thirty-minute duty free lunch for everybody.
>
> The fact that some of our members have willingly gone to the State Labor Relations Commission to testify in behalf of the School Committee resulted in the Representative Council unanimously voting to censure them.

The building representatives distributed the newsletter to the teachers.

Word of the censure vote had spread through the grapevine before these documents appeared. Cibotti himself was approached a few days after the meeting by

three teachers who had not been at the meeting but who knew that Cibotti had been censured.[5]

Joseph O'Sullivan, a BEA member who had attanded the February 6 meeting and who eventually succeeded Donovan as president in June 1984, clearly played a part in this grapevine.[6] O'Sullivan had realized who the subjects of the censure vote were at the meeting, and before the minutes were posted he discussed the censure with other BEA members, some of whom had not previously known who the subjects were. After the minutes were posted, others asked O'Sullivan who they were, and he told them.

On March 5, 1984 another Representative Council meeting took place. According to the minutes, O'Meara "clarified her report that in the future members who voluntarily testified against the BEA will have their names published." There was no evidence on the nature of the "clarification." One representative moved to rescind the February 6 vote to censure; this motion was defeated. Finally, in answer to a question from a representative, Donovan stated that she had not sent the letters of censure because she was waiting for a legal opinion from counsel to the Massachusetts Teachers Association (MTA). The minutes of the meeting were distributed and posted in the usual way.

A third Representative Council meeting took place on June 4, 1984. At this meeting, Donovan passed the gavel to O'Sullivan, who had won the union presidency. Before she stood down, Donovan read a letter from MTA attorney Brian Riley, dated May 17, 1984, recommending that the BEA enact a by-law specifying the grounds for union discipline. Donovan then recommended that the Representative Council rescind its February 8 vote to censure because she was not certain that the existing BEA by-laws conferred the authority to censure members. Accordingly, a motion to rescind was introduced, passed, and duly recorded in the minutes. The minutes were eventually posted in the schools.

The next edition of the BEA newsletter came out in September 1984 and carried the following item:

> At its meeting of June 4, 1984, the Representative Council voted to rescind the earlier motion that it approved in February to censure three members of the Association who voluntarily testified in behalf of the School Committee against the Association in a proceeding at the Labor Relations Commission. In fact, the letters of censure which it had been voted to send to these members were never actually sent.

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[5]Cibotti first heard of the censure from DiMarzo, soon after the meeting. DiMarzo heard of it from Grant. At some point the three administrators asked Donovan "point blank" if they were the subjects of the censure. Seh replied that they were.

[6]O'Sullivan held no union office before June 1984.

The BEA never named DiMarzo, Cibotti or Grant at any meeting or in any publication. It did not fine or suspend them from membership, or affect their job status in any way. The BEA sent them no letters of censure or formal notification of the censure vote.

Discussion

A. DiMarzo's and Cibotti's Cases

The Commission has been consistently vigilant to deter conduct that interferes with employees' free access to Commission processes. Michael J. Curley, 4 MLC 1124, 1126 (1977); City of Boston, 4 MLC 1033, 1037 (1977); Town of Wareham, 3 MLC 1334, 1344 (1976). Indeed, we value open access to the Commission so highly that in Michael J. Curley we extended protection even to persons who are not employees within the meaning of the Law. "The effect of discharging someone who is not an employee under the statutory definition is to cause those who are employees to fear that the employer would take the same action against them if they testified in a proceeding to enforce their protected rights." 4 MLC at 1126.

Hitherto, all of our cases in this area have involved employer retaliation against employees who filed charges or gave testimony. They have thus arisen under Section 10(a)(4) of the Law, which forbids a public employer to "[d]ischarge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information under this chapter." Section 10(b) contains no cognate proscription against employee organizations.

Nonetheless, we conclude that Section 10(b)(1), which prohibits employee organizations from interfering, restraining or coercing employees "in the exercise of any right guaranteed under this chapter," embraces union discrimination against employees who appear before the Commission. Section 2 guarantees to employees the right to engage in lawful, concerted activities for the purpose of "mutual aid or protection."[8] Pursuit of charges before the Commission and the submission of documentary or testimonial evidence assist the Commission to administer the Law and

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[7]The legislative history does not explain this asymmetry, which persisted from G.L. c.149, the precedessor to G.L. c.150E, through all six 1973 drafts of G.L. c.150E. However, this legislative silence does not permit the inference that the legislature intended to allow employee organizations to take retaliatory actions forbidden to employers. Cf. Sheet Metal Workers' International Association, Local 355 v. NLRB, 716 F.2d 1249, 1258 n.6, 114 LRRM 2569, 2575-76 (9th Cir. 1983) (court finds it of little significance that legislature deleted provisions similar to Section 8(a)(4) from Section 8(b) of the National Labor Relations Act).

[8]Section 2 provides:

> Employees shall have the right of self-organization and the right to form, join or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing

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therefore constitute a form of "mutual aid or protection" among all employees protected by the Law. G.L. c.150E sanctions the collective bargaining rights of public employees in the Commonwealth and regulates both public employers and unions. Unless all employees are free from interference and restraint when they participate in the Commission's processes by filing charges or giving evidence, the Law cannot be adequately enforced. In the absence of adequate enforcement, the rights of all employees are infringed. As a consequence, we conclude that an employee engages in concerted activity for the purpose of mutual aid or protection within the meaning of Section 2 when she or he assists the Commission to enforce the Law by filing a charge or by giving documentary or testimonial evidence. Therefore, an employee's right to give testimony supporting or rebutting a charge, including, as in this case, testimony at the request of the employer in a case initiated by a union, is protected by Section 2 of the Law. As the Supreme Court observed when considering whether Section 7 of the National Labor Relations Act[9] provided protection to employees who testified or filed charges with the National Labor Relations Board against unions, the policy of unimpeded access to the agency is "important to the functioning of the Act as an organic whole." NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418, 424, 68 LRRM 2257, 2259 (1968). See also Sheet Metal Workers' International Association, Local 355, supra.[10]

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8 (continued)

> on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all such activities...

[9]Section 7 of the National Labor Relations Act, 29 U.S.C. 158, provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[10]We also note that the National Labor Relations Board has interpreted Section 7 of the National Labor Relations Act to prohibit union restraint or coercion of employee testimony before the NLRB. The NLRB emphasizes the Section 7 guarantee to employees of the right to assist or refrain from assisting a labor organization through testimony at NLRB proceedings to which the union is a party. The NLRB has concluded that "it is no less an infringement of that statutory right for a union to discipline or threaten to discipline an employee for testifying on behalf of an employer than it is for an employer to retaliate against an employee for testifying on behalf of a union." Freight Drivers and Helpers Local 557 (Liberty Transfer Co.),

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In reaching this conclusion, we have considered the BEA's forceful argument that its action in this case constituted a legitimate exercise of its right to regulate its internal affairs, and hence was permissible under Section 10(b)(1). It likens its conduct to that at issue in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449 (1967), where the Court held permissible union-imposed fines on members who had crossed the union's picket line during a lawful strike.

In Allen and Robinson, 8 MLC 1518, 1521 n.6 (1981), the Commission concluded that the "intent and reasoning" of the proviso to Section 8(b)(1)(A) of the National Labor Relations Act were equally applicable to G.L. c.150E. Section 8(b)(1)(A), under which Allis-Chalmers was decided, preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." We observed that "[t]here is nothing in c.150E to suggest that the Commission should, as a regular matter, become involved in overseeing purely internal union affairs." Id. However, we also recognize an established exception to this principle. A union's freedom to manage its internal affairs and to discipline its members must give way before certain overriding public interests. See NLRB v. Marine & Shipbuilding Workers, supra; Local 138, International Union of Operating Engineers (Charles S. Skura), 148 NLRB 679, 57 LRRM 1009 (1964). When a union rule or disciplinary action conflicts with a policy implicit in the Law, we will weigh the union's interest in its rule or action against the extent to which it may violate the policy of the Law. Allen and Robinson, 8 MLC 1518, 1522.[11]

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218 NLRB 1117, 1120, 89 LRRM 1734 (1975). See also Union Nacionale de Trabajadores (Macal Container Corporation), 219 NLRB 429, 89 LRRM 1747 (1975), enf'd sub nom. NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 94 LRRM 2201 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1976). We agree that the right guaranteed in G.L. c.150E, Section 2 to assist or refrain from assisting a labor organization may be interpreted similarly to protect employees who testify before the Commission from retaliation by their union when their testimony is adverse to the union. Nonetheless, we conclude that the guarantee to employees of the right to engage in concerted activity for the purpose of mutual aid or protection is sufficiently broad that it encompasses the right to participate as a witness in a Commission proceeding regardless of the identity of the respondent. Thus, Section 2 of G.L. c.150E protects the employee witness from union restraint and coercion without regard to the nature of the employee's testimony or its impact on the union.

[11] In both Allen and Robinson and a later case on the subject, Johnston and McNulty, 8 MLC 1993 (1982), aff'd sub nom. Boston Police Patrolmen's Assoc. v. Labor Relations Commission, 16 Mass. App. Ct. 953 (1983), we applied this test and held that the union's actions transgressed important policies embedded in the Law. In Allen and Robinson, the interest at stake was the prohibiting against strikes in Section 9A(a); in Johnston and McNulty, it was the Commission's mandate to determine appropriate bargaining units.

The BEA acknowledges that the Commission favors unimpeded access to our processes, but insists that in this case its actions did not encroach upon that policy. First, the BEA concedes that the Law would preclude it from disciplining DiMarzo and Cibotti if they themselves had directly opposed the union in a Commission proceeding, but it contends that the two administrators lost the Law's protection when they became involved "in a dispute that was strictly between the School Committee and the Association and in which they did not have a direct interest." Brief of the BEA at 25. As our foregoing discussion suggests, we cannot accept this argument. Our concern is with "prevent[ing] intimidation of individuals who present information to the Commission." Michael J. Curley, 4 MLC at 1126 (emphasis added). This encompasses disinterested witnesses as well as actual parties to the case.

Second, the BEA argues that it voted to censure DiMarzo and Cibotti not merely because they testified on behalf of the School Committee, but because they did so voluntarily, against a background of bitter and proteacted contract negotiations. In the BEA's view, the precipitating factor was not the testimony but the administrators' "willing participation in the School Committee's effort to drive a public wedge into the Association's otherwise united stance." Brief of the BEA at 26.

Even if we accept this characterization of DiMarzo's and Cibotti's motivation -- although the record provides no reason to do so -- it does not change the fact that the forum in which their activities took place was a Commission proceeding. Their vehicle was testimony. Furthermore, we see no basis to deny the same protection to voluntary employee testimony that we accord to subpoenaed testimony. See NLRB v. Scrivener, 405 U.S. 117, 124, 79 LRRM 2587, 2590 (1972). The voluntary witness has as much to contribute to the Commission's efforts to effectuate the Law as the subpoenaed witness.

We turn to the BEA's remaining defenses. First, in the BEA's view, only union acts that result in tangible detriment to their subjects, such as fines, expulsion from membership, and removal from union office, rise to the level of "restraint and coercion" within the meaning of 10(b)(1). Second, the BEA argues that by rescinding its vote to censure on June 4, and by publicizing the recission exactly as it had publicized the original vote, the BEA nullified its original action.

A review of the BEA's actions reveals none that cause palpable harm to DiMarzo and Cibotti. At the February 4 Representative Council meeting, Donovan announced that three BEA members had testified on behalf of the School Committee. At the same meeting, Grace O'Meara, chairperson of the Negotiations Team, made statements in the course of her report to the Representative Council to the effect that all BEA members had a responsibility to cooperate with the BEA and that no BEA member should voluntarily testify against the BEA. A representative then moved to censure, or to send letters of censure to, the "three administrators who had testified on behalf of the [School Committee]." The body unanimously approved the motion.

Two or three weeks later, the BEA posted the minutes of the meeting on faculty bulletin boards in all schools. The minutes contained summaries of Donovan's and O'Meara's statements and a record of the vote to censure, but did not name the administrators.

In February the BEA distributed its monthly newsletter to the bargaining unit, containing the news that the Representative Council had voted to censure "some of our members who have willingly gone to the State Labor Relations Commission to testify in behalf of the School Committee." The posted minutes of the March 5 meeting stated that O'Meara had "clarified her report that in the future members who voluntarily testify against the BEA will have their names published" and that the Council had defeated a motion to rescind the censure.

At a meeting on June 4, the Council rescinded its vote to censure based on Donovan's recommendation. The minutes relating to this vote were posted. The BEA's September newsletter announced that the Representative Council had rescinded its February motion to censure "three members of the Association who voluntarily testified in behalf of the School Committee against the Association," and that the letters of censure "were never actually sent."

The actions alleged to be coercive here consist of the vote to censure and its publication, coupled with Grace O'Meara's general injunction against voluntarily testifying against the BEA; and the dissemination of an ambiguous statement suggesting that in the future the BEA would publish the names of members who voluntarily testified on behalf of the employer.[12] The BEA did not fine DiMarzo and Cibotti, expel them from membership, or disqualify them from any benefit that the Union might offer. But actions far less drastic than these have been held to coerce employees. In City of Boston, 4 MLC 1033, the Commission held that an employer's criticism of an employee for testifying against the employer at an unfair labor practice hearing, coupled with a veiled threat that his testimony might adversely affect his own pending grievance, was a 10(a)(1) violation. There is no apparent reason for us to apply a different standard to a union.[13] In this case, the BEA sent a message to DiMarzo, Cibotti and other bargaining unit members that "something" negative might happen to them if they voluntarily testified on the employer's behalf. They might receive letters of censure, a penalty of unknown effect. Their names might be published. Under duly amended by-laws, they might

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[12] It is not material to our assessment of the coercive effects of the BEA's actions that no BEA representative ever named DiMarzo or Cibotti. The union identified them clearly enough that any astute teacher could, and did, easily realize who they were. Moreover, the "censured" teachers knew that the BEA had voted to censure them. The coercion occurred when the BEA threatened to, and did, vote for censure.

[13] The Board has found 8(b)(1)(A) violation where a union merely threatened an employee with reprisals for testifying on an employer's behalf. International Union of Electrical, Radio and Machine Workers, Local 745 (Wayne A. Martin), 268 NLRB 308, 114 LRRM 1269 (1983); Macal Container Corporation, supra.

suffer some other punishment. The very obscurity of the threat could cause employees to think twice before offering testimony to the Commission.

While it is possible for a union to remedy its own coercive acts by effective rescission, the BEA's rescission vote here was insufficient to do so and hence did not render this case moot. In City of Boston, 7 MLC 1707 (1980), the Commission indicated that a party's spontaneous efforts to make amends for unlawful conduct would not necessarily lead to a conclusion that no further remedial action was warranted or that the case was moot. "The Commission has the statutory responsibility to determine whether a prohibited practice 'has been committed.' G.L. c.150E, Section 11. This language evidences a legislative intent to adjudicate unfair labor practices even where the offending party's actions have ceased." 7 MLC at 1708. We are reluctant to consider a case moot where there is a possibility that the challenged conduct will recur in substantially the same form. For example, where a respondent rescinds its original action, but fails to acknowledge openly that the action violated the Law, there is no assurance that the violation will not recur at a later date. Id.; Massachusetts State College Association (SUPL-2278), 12 MLC ____, sl. op. at 9 (1985); Board of Regents, 10 MLC 1196 (1983). See also United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1989 (Amy Vega), 249 NLRB 922, 104 LRRM 1264 (1980); Local 100, Transport Workers Union of America (Miguel Simms), 230 NLRB 536, 96 LRRM 1447 (1977), enf'd. sub nom. Simms v. NLRB, 99 LRRM 2633 (2d Cir. 1978).

The vote to censure was widely published among bargaining unit members. It affected not only the charging parties, but could well have had a chilling effect on other bargaining unit members' willingness to invoke or participate in Commission processes. Under these circumstances, only a clear, written repudiation of its conduct by the BEA, posted in the schools, coupled with expungement from BEA records of all references to the censure, would have remedied the harm. The BEA's efforts at rescission did not rise to this level. Donovan recommended rescission not because the vote to censure violated G.L. c.150E, but because the BEA by-laws did not clearly authorize intraunion discipline. The posted minutes of the June 4 meeting would have indicated as much to the careful reader. Indeed, the minutes suggest that a censure vote similar to that of February 6 might be appropriate "in the future" under amended by-laws. The September newsletter simply announced the rescission of the vote to censure, and incidentally republished the BEA's original unlawful conduct. The BEA did nothing to assure the charging parties or other bargaining unit members that G.L. c.150E protected their right to testify before the Commission and that the BEA would in the future refrain from violating that right.

Furthermore, the BEA did nothing to remedy the effect that Grace O'Meara's statements, as ambiguously recorded in the March 5 minutes, may have had. The statement that "[t]he chairman of the Negotiations Team clarified her report that in the future members who voluntarily testified against the BEA will have their names published" could well have left bargaining unit members with the impression that the BEA would hold them up to opprobrium were they ever to testify against the union.

In sum, the BEA's actions here interfered with DiMarzo's and Cibotti's

protected right to give testimony voluntarily in a Commission proceeding. The BEA's "rescission" of the censure vote was inadequate to redress the coercive effect. Finally, the BEA's conduct was not a legitimate exercise of its right to manage its internal affairs. For these reasons, the BEA's actions against DiMarzo and Cibotti violated Section 10(b)(1).

The School Committee's Case

Section 10(b)(1) of the Law protects employers, as well as employees, against a union's interference, restraint or coercion in the exercise of protected rights. Here, the School Committee alleges that the BEA, by its conduct toward DiMarzo and Cibotti, interfered with the School Committee's right to defend against the BEA's prohibited practice charge. It identifies the right to defend against such charges as a "right guaranteed" under the Law in Section 11 and enforceable against a union through Section 10(b)(1).

We recognize that Section 11 guarantees parties to a case "the right to appear in person or otherwise defend against [a] complaint." However, we believe that the Commission's Regulations, 402 CMR 13.10, which assure the respondent's ability to compel the attendance of witnesses by subpoena satisfies this right. The Commission's Regulations ensure the employer's access to relevant evidence in the great majority of cases; indeed, the Commission will deny requests for subpoenas only if the request is submitted in improper form or "is overbroad, oppressive, or otherwise legally defective." 402 CMR 13.10(3). Thus while a party may compel the attendance of witnesses by proper subpoena, the Section 11 right to defend against a complaint does not guarantee the voluntary cooperation of witnesses to any party. Therefore, while the BEA's actions interfered with DiMarzo's and Cibotti's right to give voluntary testimony to the Commission, it did not violate the Law with respect to the employer, because the Law does not assure the School Committee the voluntary testimony of these two employees.

Conclusion

The Brockton Education Association violated Section 10(b)(1) of G.L. c.150E by moving to censure the individual charging parties Mario DiMarzo and Thomas Cibotti for voluntarily testifying on behalf of the School Committee at a hearing before the Commission. Accordingly, the Commission issues an Order, below, in cases MUPL-2777 and MUPL-2778. However, the BEA did not by that action interfere with the School Committee's Section 11 right to defend against complaints of prohibited practice, and therefore committed no violation of Section 10(b)(1) as against the School Committee. The Complaint in Case No. MUPL-2740 is therefore DISMISSED.

Order

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED in cases MUPL-2777 and MUPL-2778 that the Brockton Education Association shall:

1. Cease and desist from restraining, coercing and interfering with employees in the exercise of rights guaranteed by the Law;

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

   a. Post immediately in conspicuous places where employees are likely to congregate, and leave posted for a period of not less than thirty (30) days, the attached Notice to Employees.

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER
MARIA C. WALSH, COMMISSIONER

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

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has determined that the Brockton Education Association violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by moving to censure three employees for voluntarily testifying on behalf of the Brockton School Committee at a hearing before the Labor Relations Commission on January 18, 1984. The Commission has ordered the Brockton Education Association to post this Notice and abide by what it says.

Massachusetts General Laws, Chapter 150E give public employees the right to seek access to and give testimony voluntarily before the Labor Relations Commission as witnesses to any case.

WE WILL NOT do anything that interferes with, restrains or coerces employees in the exercise of this right.

By: _____
President
Brockton Education Association