GREATER NEW BEDFORD INFANT TODDLER CENTER AND DISTRICT 65, UNITED AUTO WORKERS, AFL-CIO, UP-2493 (4/17/87). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

62.5 insubordination
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Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Phillip Rivard-Raposa, Esq. - Representing the Greater New Bedford Infant Toddler Center

John F. McMahon, Esq. - Representing District 65, United Auto Workers

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

On August 8, 1985, Hearing Officer Amy L. Davidson issued her decision in the above-captioned matter.[1] She concluded that the Greater New Bedford Infant/Toddler Center (Center or Employer) had violated Section 4(3) of General Laws Chapter 150A (the Law) by terminating Yvonne Houtman (Houtman) and reprimanding employees Patricia Cook (Cook) and Patricia L'Abbe (L'Abbe) in retaliation for their union activities. The Hearing Officer also concluded that the Employer had violated Section 4(1) of the Law by making certain statements which would reasonably tend to interfere with the free exercise of rights existing under Section 2 of the Law.

The Employer filed a timely notice of appeal and a supplementary statement challenging many of the Hearing Officer's findings of fact. The charging party, District 65 of the United Auto Workers, AFL-CIO, filed no supplementary statement. After careful consideration of the Employer's supplementary statement and of relevant portions of the record, we affirm the Hearing Officer's decision for the reasons set forth below.

[1] The full text of the Hearing Officer's decision is found at 12 MLC 1131 (H.O. 1985).

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FACTS[2]

The facts in this case are complex, requiring 23 pages in the reported text of the Hearing Officer's decision. After a thorough review of the record below, we have decided to adopt the Hearing Officer's findings of fact, except where noted, and therefore we shall not reiterate the Hearing Officer's copious factual findings. In the discussion below, we have provided only the factual background necessary to an understanding of the decision. Further reference may be made to the facts set out in the report of the Hearing Officer's decision. See 12 MLC at 1132-1154.

DISCUSSION

The Commission's Regulations state that the findings of fact made by a hearing officer will constitute the record on review unless one of the parties in its supplementary statement directs the Commission to specific evidence warranting either a contrary finding on a material issue or an additional material finding not made by the hearing officer. 456 (formerly 402) CMR 13.13(5); Hadley School Committee, 7 MLC 1632, 1634 (1980). The Employer concedes that the Hearing Officer correctly stated and applied the Law, but the Employer asserts that her findings were the product of "an arbitrary and capricious selection of testimonial support." Insofar as specific credibility-based findings are placed into question, we are mindful of our settled principle that we "will not overrule a hearing officer's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect." Bellingham Teachers Association, 9 MLC 1535, 1543 (1982).

Before turning to the particulars of the arguments raised on appeal, we note that the gist of the Employer's general protest appears to be that the Hearing Officer largely credited the witnesses produced by the Union while discrediting opposing testimony offered by the Employer's witnesses. The Hearing Officer's general belief that the Union's witnesses were telling the truth, and that the Employer's witnesses in certain material respects were not, naturally translated into many credibility resolutions in favor of the Union. Nonetheless, as the National Labor Relations Board and the courts have long recognized, there in nothing inherently arbitrary in crediting all the witnesses on one side and discrediting all

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[2]Neither party disputes the Commission's jurisdiction to hear this matter under G.L. c. 150A, Section 4. By letter dated July 27, 1983, the Regional Director for the National Labor Relations Board declined to assert jurisdiction over the Center, concluding that it did not derive "the minimum amount of gross revenues that the Board requires before it will assert jurisdiction over day care centers. Salt & Pepper Nursery School & Kindergarten No. 2, 222 NLRB 1295 (1976) and Rebecca Blaylock Nursery School, Inc., 260 NLRB 1428 (1982)." The Employer specifically admitted in its Answer to the allegations in the Complaint that it is an employer within the meaning of Section 2 of the Law.

those on the other. See, e.g., Conair Corp. v. NLRB, 721 F.2d 1355, ____, 114 LRRM 3169, 3177 (D.C. Cir. 1983); NLRB v. Berger Transfer and Storage Co., 678 F.2d 679 ____, 110 LRRM 2865, 2868 (7th Cir. 1982). If the reasons for the hearing officer's determinations are clearly stated and the evidence does not require a contrary finding, we will not disturb the hearing officer's credibility resolutions.

The Employer argues that the Hearing Officer arbitrarily selected portions of the testimony from which to make her credibility resolutions. Our review of the record and of the Hearing Officer's decision does not support the Employer's contention. In resolving each factual dispute presented, the Hearing Officer referred to the relevant evidence and explained her reasons for resolving the conflict as she did. Her factual determinations were not based on crediting or discrediting any witness because of that witness's identification with either party, but rather were based on cited factors such as the witness's consistency, demeanor, lack of bias, and the corroboration of other witnesses. Indeed, the Hearing Officer rejected portions of the testimony of Union witnesses which she deemed unreliable, and, as a result, dismissed a portion of the Complaint. See 12 MLC at 1155, n. 41.[3]

Certain findings resulted from the failure of the Employer to refute Union witness testimony. For example, employee Yvonne Houtman testified for the Union about a conversation she had with Smith in which Smith made certain negative remarks about unionization at the Cneter. See, 12 MLC at 1139-1140. Although Smith generally denied making any anti-union comments, she did not specifically confirm or deny that the conversation with Houtman occurred. Therefore, the Hearing Officer credited Houtman's testimony about this particular incident. The Hearing Officer's decision to credit Houtman was justified by the adverse inference arising from Smith's silence on the matter. The Hearing Officer did not act arbitrarily by accepting Houtman's unchallenged testimony.[4]

The Employer maintains that the Hearing Officer erroneously attributed to Smith certain anti-union sentiments expressed by her daughter Gail, who was not involved in the management of the Center. We understand this argument to suggest that,

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[3]The hearing Officer also properly declined to resolve disputes that were not germane to the disposition of the case.

[4]We note that the Employer also asserts that the Hearing Officer incorrectly concluded that the testimony of former employee Lydia Rodrigues was generally more credible than that of Mrs. Smith because, inter alia, Rodrigues had "no self-interest in the outcome of the case." The Employer asserts that, inasmuch as Rodrigues had openly engaged in union activities, she cannot accurately be characterized as disinterested in a case involving her union and her employer. We note, however, that Rodrigues was not a discriminatee, had no financial interest in the outcome of the case, and indeed was no longer employed at the Center at the time of the hearing. If she had any distorting biases the record does not reflect them. There is no basis for concluding that the Hearing Officer erred in regarding her as "not self-interested" and in crediting her testimony accordingly.

without Gail's animus, there was insufficient evidence to sustain a finding that Smith had anti-union animus. The record yields sufficient evidence of Smith's expressed displeasure with, and hostility toward, the employees' unionization efforts to support the Hearing Officer's finding. Specifically, the Hearing Officer found that Smith made anti-union statements on June 15 to Patricia Cook and on July 17 to Yvonne Houtman. See, 12 MLC at 1133 and 1139-40, respectively. Additional findings made by the Hearing Officer with respect to Gail's anti-union animus appear to have been treated solely as a factor for assessing Gail's credibility as a witness. We find no support for the proposition that the Hearing Officer relied upon evidence about Gail either in fashioning her findings concerning Smith or in reaching her legal conclusions.

The Employer next argues that the Hearing Officer's findings misconstrue labor-management dynamics at the Center by regarding certain employees as having been deferential towards Smith on occasions when they were in fact confrontational or provocative. We have carefully reviewed the record and are satisfied that it supports the Hearing Officer's credibility determinations and that the Hearing Officer's findings concerning labor-management relations at the Center are accurate.

The Employer also argues that the Hearing Officer ignored alleged inconsistencies in the testimony of Union witnesses. As an example, the Employer asserts that there is a discrepancy between the Union's claim that Smith made anti-union remarks when shown a poster announcing a Union organizational meeting and the testimony of the Union's witnesses that Smith allowed the flyer to be posted. See 12 MLC at 1133. But these facts are not necessarily discrepant. The fact that Smith permitted the posting does not belie her possession of anti-union animus and, standing alone, is insufficient to overturn the Hearing Officer's credibility resolutions and findings concerning her unlawful remarks.

As a second example, the Employer notes that the Hearing Officer found that Smith made a threatening comment at a meeting with employees on June 27. See 12 MLC at 1138. The Employer complains that this finding cannot be harmonized with the admission of three Union witnesses that Smith did not repeat the remark the next day at a make-up meeting for absent employees. See 12 MLC at 1139. However, the fact that Smith did not repeat the remark does not directly rebut the evidence that she made it in the first place. Moreover, the Hearing Officer noted that the statement arose at the June 27 meeting in response to an employee-initiated comment concerning unions. The fact that no employees raised the issue at the second meeting does not alter what was said the day before.

Finally, the Employer asserts that the testimony of two witnesses for the Center was largely ignored by the Hearing Officer. The first of these witnesses, Toni Pires, the Center's bookkeeper, testified that she, not Smith, was responsible for the disputed error in Yvonne Houtman's vacation check, contrary to Houtman's accusation. The Employer insists that, since the accusation was the precipitating factor in Smith's decision to fire Houtman, the Hearing Officer should have explicitly considered the possibility that Smith's action was no more than "the legitimate

frustration of a person who is being unfairly accused." We observe, however, that Pires's testimony does not warrant either additional or different findings since it is not inconsistent with the Hearing Officer's findings and legal analysis. The testimony bolsters Smith's assertion that she was motivated by the frustration of being unjustly accused when she fired Houtman. Nonetheless, without specifically referencing Pires's testimony, the Hearing Officer did consider that the quarrel between Houtman and Smith concerning Houtman's paycheck could have supplied a lawful motivation for Smith's action. Accordingly, the Hearing Officer correctly applied a "mixed motive" analysis to determine whether Smith would have fired Houtman "but for" her union activities. See, Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981). Thus, although the Hearing Officer failed to discuss Pires's testimony, she fully considered Smith's assertion that Houtman was discharged for the reasons recited in the Hearing Officer's opinion at 12 MLC 1163-1164. The Hearing Officer concludes that the alleged "insubordination" of Houtman on October 6, concerning the vacation paycheck, did not cause Smith to terminate Houtman. In reaching this conclusion the Hearing Officer considered several factors including the following: the disparity between Smith's discipline of another employee in a prior instance of insubordination and her treatment of Houtman; the fact that Smith's attitude toward Houtman had changed since Smith had discovered that Houtman was involved in the union drive; and the timing of the discharge. The Hearing Officer concluded that Houtman's accusation that Smith was "playing games" with her paycheck would not have precipitated her discharge, "but for" Houtman's union activity. Thus, implicit in the Hearing Officer's analysis is acceptance of Smith's assertion that Houtman was "insubordinate." Pires's testimony merely bolsters Smith's contention that she was not "playing games" but does not refute the evidence upon which the Hearing Officer relied when she concluded that other factors demonstrated that the discharge would not have occurred "but for" Houtman's union activity. Additionally, we note that it is not necessary for the Hearing Officer to explicitly consider every possible factual finding suggested by the evidence before rendering a decision. An omission is significant only insofar as it may indicate that the fact finder failed to consider material evidence. In this instance the Hearing Officer's failure to explicitly note that Pires's testimony bolstered Smith's assertion that she had not "play[ed] games" with Houtman's vacation paycheck was not material.

The Employer also contends that the testimony of Dorothy Alfonso, a teacher at the Center, was largely ignored without explanation. However, a review of the decision and the record indicates that the Hearing Officer did credit Alfonso in all material respects. Testimony that was either immaterial or uncontested was appropriately omitted from the decision. The Hearing Officer's findings are not inconsistent with Alfonso's testimony, and there is no basis for believing that her testimony was not duly considered.

Thus, having reviewed the challenged credibility determinations and findings of fact, we find that they are supported by the record and that the Hearing Officer's conclusions are supported by the facts. We conclude that the Employer violated Sections 4(3) and (1) of the Law by disciplining employees in retaliation for their concerted protected activities. The decision of the Hearing Officer is hereby AFFIRMED.

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ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Greater New Bedford Infant Toddler Center shall:

1. Cease and desist from:

   a. Interfering with, restraining, and coercing its employees in the exercise of any right guaranteed under the Law.

   b. Discriminating in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any labor organization.

2. Expunge from its records the August 30, 1983 reprimand addressed to Patricia Cook, together with any and all copies of any references to the same.

3. Immediately offer Yvonne Houtman reinstatement to her former position and make her whole for any loss of benefits and wages she suffered as a result of the Center's decision to discharge her, plus interest on any sums owing, at the rate specified in M.G.L. c.231, Section 6B, with quarterly computation, from the date of discharge.

4. Post in the Center, where notices to employees are usually posted, the attached Notice to Employees, and leave the same posted for a period of not less than thirty (30) consecutive days.

5. 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

PAUL T. EDGAR, CHAIRMAN
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

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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 Greater New Bedford Infant Toddler Center (Center) violated Section 4(1) of Massachusetts General Laws, Chapter 150A (the Law) by making certain statements regarding the possible negative consequences which might result if employees unionize and by threatening to retaliate against employees who continued efforts to unionize.

The Commission further determined that the Center violated Section 4(3) and (1) of the Law by reprimanding Patricia L'Abbe, and Patricia Cook, and by discharging Yvonne Houtman from her position as cook at the Center because of each employee's concerted protected activities. The Commission has ordered the Center to post this Notice and abide by what it says.

Massachusetts General Laws, Chapter 150A, gives public employees the following rights:

To engage in self-organization;
to form, join or assist any Union;
to bargain collectively through representatives of their own choosing;
to act together for the purpose of collective bargaining or other mutual aid or protection;

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

WE WILL NOT discriminate against employees to encourage or discourage membership in any labor organization.

WE WILL EXPUNGE from our records the August 30, 1983 reprimand of Patricia Cook, together with any and all copies of and references to the same.

WE WILL REINSTATE YVONNE HOUTMAN to her position as cook for the Center, complete with all benefits to which she would otherwise have been entitled, and make her whole for any monetary loss she has incurred.

_____
Director