

MASSACHUSETTS BOARD OF REGENTS OF HIGHER EDUCATION (UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER) AND MASSACHUSETTS ASSOCIATION OF SERVICE AND HEALTHCARE, SUP-2863, SUP-2865 (5/22/87). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

43.324 no solicitation
 65.2 concerted activities
 65.6 employer speech
 82.124 notices
 91.13 mootness
 92.51 appeals to full commission

Commissioners Participating:

Paul T. Edgar, Chairman
 Maria C. Walsh, Commissioner

Appearances:

Richard S. Ong, Esq.	- Representing the Massachusetts Board of Regents
Preston Ripley, Esq.	- Representing the Massachusetts Association of Services and Health Care

**Decision on Appeal of
 Hearing Officer's Decision**

On August 7, 1985, Hearing Officer Sherrie R. Talmadge issued a decision finding that the Massachusetts Board of Regents/University of Massachusetts Medical Center (Employer) had violated Section 10(a)(1) of the Law by repeated removal of Massachusetts Association of Service and Healthcare (MASH or Union) campaign leaflets, and by certain statements and actions of a supervisor. As a remedy, the Hearing Officer ordered a facility-wide posting of a cease and desist order.

The Employer filed a timely notice of appeal of the Hearing Officer's Decision pursuant to Commission Rules, 456 CMR 13.13 (formerly 402 CMR 13.13) and submitted a supplementary statement which has been considered. Based on the record as a whole, we affirm the hearing officer's decision.

Findings of Fact

Commission Rule 456 CMR 13.13 states, in part, that a party claiming that the Hearing Officer erred in making factual findings shall identify the findings challenged and direct the Commission to evidence supporting the party's proposed findings of fact. In Madley School Committee, 7 MLC 1632 (1980), the Commission stated that a party requesting either alternative or additional findings of fact must identify supporting evidence. The Employer points to no specific evidence in the record to support the factual contentions which are contrary to the Hearing Officer's findings. Based on the record, we find no error in the Hearing Officer's findings of



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

serial facts and adopt them with additional comments as set forth below. They are summarized as follows.

On June 28, 1984, MASH began a drive at the Medical Center to organize employees for the purposes of collective bargaining. On July 13, the Union sent a letter to the Chancellor/Dean of the Medical Center, stating that certain employees at the Medical Center, including Jane Dube, James E. Welsh (Welsh), and Dorothea Engquist (Engquist) had established a committee for the purposes of forming a labor union. A copy of the letter was posted on the Public Affairs bulletin board outside the cafeteria.

On Friday, July 20, 1984 during his break at 8:00 a.m., Welsh, a technician at the Operations Office/Physical Plant Dept., posted a leaflet entitled "M.A.S.H. FLASH" on a bulletin board which was centrally located in the Operations Office in the Physical Plant Department, a non-patient care area.¹ The leaflet specifically addressed the issues that MASH would emphasize if it were certified as the bargaining representative. At approximately 9:00 a.m., Ed Lemanski (Lemanski), supervisor at the Operations Office in the Physical Plant Department, removed the "M.A.S.H. FLASH" from the board. Engquist, a console operator in the Operations Office who sat at a desk located near the bulletin board, observed Lemanski leave the room with the leaflet. Engquist was the only person present when Lemanski removed the leaflet. She called Welsh and informed him that the leaflet had been removed. Welsh returned to the office at about 11:00 a.m. and posted a second copy of the same "M.A.S.H. FLASH."

Shortly thereafter, Lemanski returned to the office and took down the second "M.A.S.H. FLASH." Assuming that Engquist had posted the second copy of the leaflet to antagonize him, Lemanski walked to Engquist's desk, tore the leaflet into pieces in front of her, and threw the pieces into her garbage basket. At the same time, Lemanski stated to Engquist that, "No union activities will take place on the premises on any time."² Engquist, alarmed, called Welsh and informed him of what had occurred. Welsh returned to the Operations Office and observed that the leaflet had been removed from the bulletin board. There were no further postings in the Operations Office that day.

On the following Monday, July 23, Welsh posted another copy of the same "M.A.S.H. FLASH" on the Operations Office bulletin board.³ The leaflet remained posted until

¹The bulletin board is located in an area used by Operations Office personnel and other Physical Plant personnel for their "coffee fund." The board is between the refrigerator and the coffee facility used by these employees.

²The Employer disputes this statement and alleges that Lemanski told Engquist that such conduct be done on her own time.

³The Hearing Officer specifically found that Welsh posted the first and second leaflets on July 20th during his break time, but made no specific finding with regard to when Welsh posted the July 23rd leaflet. The Employer contends that the

(continued)



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

July 30, 1984 while Lemanski was on vacation. He returned from vacation on July 30, 1984 to pick up his paycheck. When Lemanski noticed the leaflet, he removed it from the bulletin board in the presence of Engquist and Blair Norton, her co-worker. Without addressing either employee, Lemanski left the building and continued his vacation.

There is no Medical Center or department rule regulating either what may be posted on the Operations Office bulletin board or whether approval is necessary before posting a notice on the board.⁴ Half of the bulletin board is used for work related notices, and the remaining space is used for personal messages. The office is used by the fifteen employees who work for the Operations Department and approximately sixty additional employees from neighboring departments who use the office because a coffee facility and restroom are located in that area. All of the employees who use the office have access to the board as long as their messages do not interfere with Lemanski's posting of work-related notices. The employees have a history of posting and removing personal messages, such as thank-you cards, cartoons, personal notes and office lotteries when they are in the area, without prior approval from Lemanski. The board is generally in a state of confusion, and material often remains posted on the board for months. On occasion, Lemanski monitors the board and removes outdated or inappropriate material from the board (e.g., off-color jokes).⁵

Before MASH filed its charges Jane Dube, the president of MASH, sent a copy of the charges to Gary Hackenson, the Medical Center's employee relations representative. Under the direction of his supervisor, Edward Kelly, Jr., the Associate Vice President for Human Resources, Hackenson internally investigated the matter on July 31 by reviewing the bulletin board in question and questioning Lemanski about the incident. After the investigation, Hackenson, with the approval of Kelly, directed Lemanski to allow MASH to post its leaflets on the bulletin board in the Operations Office.

3 (continued)

Hearing Officer erred by failing to find that Welsh posted during his work time. The record discloses that the Employer did not know either when the leaflets were posted or by whom. Therefore, the timing of Welsh's conduct could not have been material to Lemanski's decision to remove the leaflet. Moreover, the record discloses that Welsh and other employees often took a few seconds to post personal items during worktime when they happen to pass the bulletin board with no interference from Lemanski.

⁴The Employer contends that the bulletin board at issue was subject to departmental rules. A thorough review of the testimony of all witnesses discloses extensive evidence to support the Hearing Officer's finding. Welsh and Engquist testified that they personally posted personal items as did others. They did not seek prior approval from Lemanski, nor were they ever advised to do so. They were neither aware of nor advised of any departmental policy either written or informal. This is corroborated by Lemanski himself who testified that "employees did not ask -- they just posted." Moreover, he specifically admitted never having advised his

(continued; 5, see page 1700)



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

On August 20, Kelly sent Dube a letter stating that he was in receipt of the prohibited practice charges filed in this case. Kelly further stated that the Medical Center recognized MASH's right to engage in organizational activity, and he disavowed the behavior of Lemanski, by asserting that he was not acting on behalf of the administration. He noted that the Medical Center was willing to take corrective action and to post a notice to the employees in the Physical Plant Department informing them of their rights. A copy of a sample posting was enclosed in the letter. Dube and Kelly exchanged a series of letters that left unresolved the language to be used on the posting and the number of postings to be placed throughout the Medical Center. Without reaching agreement on these issues, on September 13, 1984,⁶ Kelly posted a "Notice To Employees In The Operating Engineers Control Room" using the wording he had initially proposed. At the end of September 1984, MASH distributed a flyer throughout the Medical Center which included a reproduction of the "Notice To Employees In The Operating Engineers Control Room," with an introductory paragraph stating that the administration had to post this notice after MASH filed an unfair labor practice charge with the Commission.

The Notice reads as follows:

**NOTICE TO EMPLOYEES IN THE PHYSICAL PLANT,
OPERATING ENGINEER STATION**

Employees are guaranteed specific rights under the state law. One such right is the "right of self-organization and the right to form, join, or assist any employee organization..." in a non-disruptive manner. Such rights would include the employees utilizing the employee bulletin board in the Physical Plant area consistent with established policy, procedure and practice.

⁴ (continued)

employees of any policy, he merely removed material that was inappropriate or outdated. This is further supported by the testimony of Gary Hackanson, the Center's employee relations representative.

⁵The Employer asserts that Lemanski monitored the board frequently. The record supports the conclusion that Lemanski monitored the bulletin board on occasion. However, whether Lemanski monitored the board "on occasion" or "regularly" is not material to the issue of whether the employees had access to the board. The hearing officer's findings that, at the least, Operation Office employees had access to the board for personal use is not in dispute on appeal. Therefore, an alleged error regarding the frequency of Lemanski's monitoring would not materially affect the finding that these employees had personal access to the bulletin board. Moreover, the removal of the MASH FLASH was not part of Lemanski's regular monitoring. He admitted he specifically removed the leaflet because he believed his employees had no right to post union material during working hours.

⁶The date of the Commission's investigation of this case.



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

The University Medical Center's Administration recognizes and acknowledges such rights and encourages employees to so utilize the bulletin board consistent with established policy and practice. Although employees' notices may have been inappropriately removed from the employee bulletin board in the recent past, such action was not authorized, condoned or otherwise sanctioned by the Administration. Corrective action has been taken by the Administration and such activity shall not occur again.

Opinion

Section 2 of the Law guarantees employees the right to self-organization and the right to form, join or assist any employee organization for the purpose of bargaining collectively. An Employer violates 10(a)(1) of the Law when it engages in conduct which may reasonably be said to interfere with the employees in the free exercise of their Section 2 rights. City of Boston, 8 MLC 1281, 1284 (1981). Employees have the legal right to organize a union at their place of employment and to distribute Union literature. Employees also have a right to observe and read such material. Clinton Services Corporation d/b/a Great Expectations, Inc., 9 MLC 1494 (1982).

In this case, the distribution of Union literature was through a posting on the Employer's bulletin board. The Employer contends that Welsh posted the literature during work time, and that his conduct therefore is unprotected. The record discloses no evidence that the Employer had promulgated any neutral rules by which to legitimately regulate employee posting of literature on the bulletin board. It had been the practice for employees to post personal items on the bulletin board whenever they had a few seconds to accomplish the task. There is no evidence that employees were restricted to posting personal literature only during non-work time. Moreover, Lemanski did not remove the literature because it was posted during work time. He knew neither by whom nor when it had been posted. His decision to remove the literature was based solely on the content of the leaflet. A rule which is enforced only against union material demonstrates the lack of any truly legitimate purpose for the rules. Pay'n Save v. NLRB, 641 F.2d 697, 106 LRRM 3041 (CA 9th, 1981); Baptist Memorial Hospital, 225 NLRB 525, 93 LRRM 1290 (1976), Dighton School Committee, 8 MLC 1303, 1305 (1981). Therefore, it is Lemanski's removal of the MASH literature which violates Section 10(a)(1) of the Law, not the timing of the posting.

The Employer also contends that the MASH literature was improperly posted on an Employer bulletin board. The record in the instant case more than supports the fact that, at least as to employees in the Operations Department, there was a practice of using the bulletin board for personal notes and notices which included thank-you and birthday cards, cartoons, a lottery and perhaps personal ads, and notes from an employee on one shift to an employee on another shift.

The fact that employees had personal access to the bulletin board is further corroborated by employee relations representative Hackenson. Hackenson determined



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

that employees did use the board for some personal postings. Moreover, Lemanski testified that employees never asked permission for posting personal items, they just posted them. In addition, Lemanski admitted that he removed the leaflet because of his mistaken belief that Union postings were not appropriate.⁷

The testimony clearly supports the finding that employees of the Operations Office had personal access to the bulletin board in question. Therefore, the use of that bulletin board for Union postings is protected activity under Section 2 of the Law. See Clinton Services Corporation, 9 MLC at 1498 (1982) and See also Southern Worcester Regional Vocational School, 2 MLC 1488, 1503-1505 (1976).

The Employer further contends that Lemanski's statement to Engquist was proper since it was merely a recitation of the Law. However, Engquist had a protected right of access to MASH literature as an Operations Office employee. Lemanski's restriction of Engquist's access to Union literature by the removal of the MASH FLASH constitutes a violation of the Law.

In addition, Lemanski issued an oral warning to Engquist on the mistaken belief that she had improperly posted the Union material. An employee who is criticized for alleged misconduct in the course of protected activity, but who in fact is innocent, suffers a violation of 10(a)(1) of the Law despite the Employer's motive or mistake of fact. Whitman-Hanson Regional School Committee, 9 MLC 1615, 1618 (1982). Therefore, Lemanski's remarks and actions toward Engquist were coercive as well as violative of her right of access to Union material.

Finally, the Employer argues that Lemanski's actions did not have a coercive effect on the employees. The test is whether the employer engaged in conduct which may reasonably be said to interfere with the employee's rights under the Law. Bristol County House of Correction, 6 MLC 1582, 1584 (1979), Southern Worcester Reg. Voc. School, 377 Mass. 897 (1979), Town of Chelmsford, 8 MLC 1913, 1916 (1982). It is not necessary to demonstrate that the Employer's conduct actually did have such effect. Bristol County House of Correction, *supra*.

Lemanski's removal of the postings directly interfered with Welsh's right to self-organize and to form an employee organization by discriminatorily denying him the ability to communicate with fellow employees through use of the bulletin board. The conduct also interferes with the rights of other employees to join an employee organization by restricting their access to the information contained in the leaflet. Therefore, Lemanski's removal of the Union literature interfered with Welsh's,

⁷This departed from Lemanski's practice of only removing outdated and offensive material. In general, he only removed inappropriate or outdated material when he monitored the board. However, he admitted removing the MASH FLASH because he did not believe Union business should be allowed during the work day. In addition, he asserted that it was his bulletin board, and that he had authority to decide what should or should not be posted.



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

Engquist's and other employees' Section 2 rights. Moreover; Lemanski's actions and statement to Engquist may reasonably be said to inhibit an employee from engaging in protected activity such as posting union literature on the bulletin board. Lemanski's comments and actions, given the fact that he was a supervisor, would reasonably tend to interfere with Engquist's and other employees' willingness to participate in any organizational activities protected by Section 2 of the Law.

Having found a 10(a)(1) violation, the hearing officer ordered a facility wide posting. On appeal the Employer asserts that it acted immediately to remedy the situation in the affected area and its action was sufficient under the Law. The Employer further argues that if the Commission affirms the hearing officer's decision, only a posting in the Operations Area is necessary.

The Commission has statutory responsibility to determine whether a prohibited practice has been committed, even where the offending parties' actions have ceased. Massachusetts Board of Regents, 10 MLC 1196 (1983). As the Commission has stated, "Respondent, . . . has a heavy burden [to demonstrate that a case is moot because of corrective action] and must show that there is no reasonable expectation that the wrong will not be repeated," City of Boston, 7 MLC 1707, 1709 (1980) (citation omitted). There is no evidence in the record that the Employer in this case has met this burden. Moreover, these incidents occurred at the very beginning of a heated organizational campaign, and there was every possibility such action would occur again.

Additionally, the Employer's posting was done unilaterally on the date of the Commission's investigation. Nowhere in the posting does the Employer concede that it violated the Law when it removed the Union postings, nor does it address the oral warnings given to Engquist.⁸ Indeed, the Employer has contended throughout the proceedings in this case that the actions by Lemanski were appropriate and not in violation of the Law. Although the particular incident at issue may have been temporarily resolved by allowing the Union to post its MASH FLASH, there is a broader issue of the Employer's responsibilities under G.L. c.150E. Massachusetts Board of Regents, supra. Therefore, the hearing officer was correct in determining that a Commission adjudication was proper and that the voluntary posting by the Employer, while laudable, did not remedy the violation in this case.

The hearing officer's order for a facility-wide posting is also appropriate in this case. The restraining effect of coercive conduct is rarely limited to the employees directly involved, especially during a pre-election campaign when such conduct is likely to receive prompt and wide circulation. Therefore, the number of

⁸ In its posting, the Employer modified the employees' Section 2 rights by stating that such rights must be "consistent with established policy, procedure and practice." The record shows there is no policy or procedure. Moreover, the Employer characterizes Lemanski's actions as possibly inappropriate, but fails to concede that the actions were violative of the Law.



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

employees directly involved cannot be determinative of the probable effect of illegal conduct. Intercontinental Mfg. Co. Inc., 167 NLRB 769, 770 (1967). As the Supreme Court stated in NLRB v. Donnelly Garment Company, 330 U.S. 219 (1964), "Since the impact of specific conduct upon the employee directly involved [in threats and coercion] is so inexactly ascertainable, the possibility of measuring the precise impact upon others not identified would appear futile." 330 U.S. at 231. Similarly, in the instant case, even though the incidents and comments directly involved only a small number of employees, we believe it unlikely that news of such events remains only with the immediate audience during the course of an organizational campaign. In addition, the record indicates that employees from neighboring departments had regular access to the Operations Department office. Accordingly, we affirm the appropriateness of the Hearing Officer's order to post the Commission's notice throughout the Medical Center.

Conclusion

Accordingly, for the reasons discussed above, we affirm the findings and conclusion that the Employer violated Section 10(a)(1) of the Law. We therefore order the Board of Regents to take the action specified below to remedy its violation of Section 10(a)(1).

Order

WHEREFORE, IT IS HEREBY ORDERED that:

1. The Board of Regents of Higher Education shall cease and desist from interfering with, restraining, and coercing James Walsh and Dorothea Engquist, or any other employee, in the exercise of her or his rights protected under the Law.
2. The Board of Regents of Higher Education shall post the attached Notice to Employees at the University of Massachusetts Medical Center in conspicuous locations, including the Physical Plant Department, where notices to employees are usually posted, and leave the same posted for thirty (30) days.
3. The Board of Regents of Higher Education shall 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



Massachusetts Board of Regents of Higher Education (University of Massachusetts Medical Center) and MASH, 13 MLC 1697

**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 Board of Regents of Higher Education has violated Section 10(a)(1) of General Laws, Chapter 150E (the Public Employee Collective Bargaining Law), by removing MASH campaign leaflets posted by James Welsh from the Operations Office bulletin board at the University of Massachusetts Medical Center, and by certain remarks made to Dorothea Engquist while she was engaged in certain organizing activity for the Massachusetts Association of Service and Health Care.

Section 2 of General Laws, Chapter 150E gives public employees the following rights:

- to engage in self-organization;
- to 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;
- to refrain from any or all of the above.

WE WILL NOT restrain, coerce, or intimidate James Welsh or Dorothea Engquist or any other employee in the exercise of her or his rights guaranteed under Section 2 of G.L. Chapter 150E.

Our employees are free to exercise their rights of self-organization, and to form, join or assist any employee organization, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

BY _____

Massachusetts Board of Regents
UMASS Medical Center

