MASSACHUSETTS BOARD OF REGENTS OF HIGHER EDUCATION, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER AND MASSACHUSETTS ASSOCIATION OF SERVICE AND HEALTHCARE, SUP-2901 (12/21/87). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

65.2 concerted activities
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92.33 rules of evidence
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Commissioners Participating:[1]

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

Appearances:

Richard Ong, Esq. - Representing the Massachusetts Board of Regents of Higher Education

Preston Ripley - Representing the Massachusetts Association of Service and Healthcare

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

On September 11, 1985, Hearing Officer Diane Drapeau issued her decision holding that two statements made by Edward Lemanski (Lemanski), an agent of the Massachusetts Board of Regents, University of Massachusetts Medical Center (Employer), had violated G.L. c.150E, Section 10(a)(1). The Employer filed a timely notice of appeal and on November 15, 1985, a supplementary statement challenging certain of the hearing officer's findings of fact. The charging party, Massachusetts Association of Service and Healthcare (MASH), filed no supplementary statement.

FACTS

Because the Employer has contested certain of the hearing officer's findings of fact, we have reviewed the entire record. We affirm the hearing officer's findings of fact, with the modifications noted below.

The following facts are not in dispute. Dorothea Engquist is a console operator at University of Massachusetts Medical Center. She is responsible for monitoring the physical plant systems, such as air conditioning, fire alarms and computers.

[1]Commissioner Elizabeth K. Boyer did not participate in the consideration or decision of this case.

In the summer of 1984, MASH began organizing service and healthcare employees at the Medical Center. Engquist joined MASH and actively supported the union. She sought signatures on authorization cards, talked to employees about the union, posted union literature (known as MASH Flashes) and wore a MASH button.

Engquist and her supervisor, Edward Lemanski, have worked together for approximately six years. During that time they have had several disagreements regarding her work schedule. Engquist has filed grievances over some of these disagreements, through an Employer-sponsored grievance procedure. The Employer ruled in Engquist's favor on at least one of these grievances. Several times, Lemanski has suggested that Engquist seek employment elsewhere.

The Employer challenges the hearing officer's factual findings concerning a November 13, 1984, conversation during which Lemanski allegedly uttered unlawful statements. Engquist and Lemanski testified to different versions of this conversation, and based upon the demeanor of the two witnesses the hearing officer credited Engquist. The hearing officer noted that Engquist "testified in a forthright manner and her answers to questions appeared less contrived than [Lemanski's]." As we explain infra, we have affirmed the hearing officer's decision to credit Engquist's version of the conversation. However, based on our review of the evidence, we modify the hearing officer's findings as to what Engquist's testimony was.

On November 13, 1984, Engquist entered Lemanski's office, which was across from her work station. Engquist began talking to Lemanski about her schedule, and Lemanski immediately became irritated. He said "Look at my desk, look at my desk. I've got to take care of these things. I'm going to make up a memo, it's going to go up, so that your MASH Flashes can't stay up on the board more than two days. I have the authority to take them down." Lemanski then said that Ray Jolie's (another console operator) "political things" and outside work were interfering with his job, and that Engquist "wouldn't have stress if [she] weren't MASH-involved." Lemanski then said, "If the stress is too much for you, find a job elsewhere." Lemanski spoke loudly and made gestures. Engquist told Lemanski he could not take MASH flashes off the bulletin board and that "we've got a case already going with the Labor Board that's not even final and here you are making other recommendations." She denied that her feelings of stress were related to her union activities and declared that they resulted solely from her schedule.[2]

[2]The facts which we have found modify slightly the hearing officer's findings regarding Engquist's testimony. The hearing found that on November 13, Engquist entered Lemanski's office to discuss her scheduling conflicts. When she started to discuss scheduling, Lemanski said loudly, "Look at my desk, look at my desk. I've got to take care of these things. I have to make up a memo so that it's going to go up and your MASH Flash can't stay up more than two days. I've got all the authority to take them down. Ray Jolie...his work outside and his political things are interfering with work and you wouldn't have stress if you weren't MASH involved. If you can't handle the rotating schedule, find a job elsewhere." The hearing officer found that Engquist then left Lemanski's office.

DISCUSSION

The Employer contests the hearing officer's decision to credit Engquist, rather than Lemanski. The Commission has held that it will not overrule a hearing officer's credibility determination unless the clear preponderance of the relevant evidence indicates that the determination is incorrect. Boston School Committee, 10 MLC 1501, 1511 (1984); Bellingham Teachers Association, 9 MLC 1536, 1543 (1982). The Employer has not identified any record evidence that refutes the hearing officer's decision to credit Engquist. Rather, it notes that Engquist testified that employees in the surrounding officer overheard the November 13 conversation and argues that MASH's failure to produce these corroborating witnesses should have caused the hearing officer to draw the inference that the witnesses, if produced, could not swear to the truth of Engquist's testimony.

In Bellingham Teachers Association, 9 MLC 1536 (1982), the Commission considered the so-called "adverse inference rule," which Bellingham stated as follows: "'When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.'" Id. at 1548, quoting from Auto Workers v. NLRB, 459 F.2d 1329, 79 LRRM 2332, 2336 (D.C. Cir. 1982). The opinion in Auto Workers explained, "[A]ll other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it...Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it." 79 LRRM at 2337. The court further noted that the "rule" is not inflexible, but "is a matter of discretion for the fact finder." Id. at 2338.

In Bellingham Teachers Association, supra, the Commission drew an adverse inference from a party's failure to produce a witness. At issue in Bellingham was whether the vote of a three-member union executive board not to take a grievance to arbitration resulted from lawful or unlawful motives. The third member's motivation was critical, but the Union did not produce her as a witness. The Commission concluded, "That evidence was available to the Association, and its failure to call [the board member] as a witness means that this issue must be resolved against it." 9 MLC at 1548.

Here, the hearing officer was not required to draw an adverse inference from MASH's failure to produce a corroborating witness. First, the rule requires that a party have relevant evidence within his control that he would be expected to produce. This record does not establish that there existed any identifiable witness who actually had overheard the conversation. Engquist only speculated that someone must have overheard the conversation because employees in her office commonly eavesdropped and because an employee in her office had told her that "they heard voices." Second, the cited cases concern situations where a party failed to produce evidence crucial to establishing a vital element of its case. The rule assumes that in such compelling circumstances, a party would withhold such evidence only if it were damning. The rule is less applicable where a party does not produce corroborating testimony, for this may be simply a matter of litigation strategy. "[I]n a situation where a party has good reason to believe he will prevail without

introduction of all his evidence, it would be unreasonable to draw any inference from a failure to produce some of it." Auto Workers, 79 LRRM at 2342-43. Here, Engquist's testimony alone could suffice to establish the violation.

Finally, our review of the record indicates that evidence independent of demeanor tends to support the hearing officer's decision to credit Engquist. Lemanski's testimony was evasive.[3] He admitted that the posting of MASH flashes was a subject of the November 13 conversation but testified that he had told Engquist only that he was writing down an unwritten policy that had always been in effect in response to an "incident" involving the MASH postings. If we are to believe Lemanski, he did not say what the policy was but simply left the matter vague. This is improbable. Furthermore, Lemanski's assertion that he was only writing down a pre-existing policy is not itself credible, unless Lemanski was referring to a "policy" of which no one else was aware. As the hearing officer noted, the Employer adduced no evidence of any pre-existing policy. Lemanski's own testimony that he was writing down the policy "because of the incident of the postings for MASH" which "would not have occurred" had the policy been written suggests that Lemanski was instead formulating a new policy in response to union activities.

The hearing officer concluded that Lemanski's reference to MASH activities as the cause of Engquist's "stress," coupled with a suggestion that she look for work elsewhere, and his statement concerning the MASH postings, violated Section 10(a)(1) of the Law. For the reasons stated herein, we affirm this conclusion.

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[3]Our review of the record reveals that Lemanski's testimony was as follows. When Engquist came into his office on November 13, Lemanski said that if Engquist had a better way to schedule the operators he was willing to listen, as long as the other operators would go along with it. He asked how Engquist could say that it was the schedule that was causing all of the operators to be sick. Ray Jolie, he pointed out, was running a business during the daytime, was involved in politics, and was involved in the union; Phyllis Gage (another console operator) was a diabetic, had arthritis, and was working the shift she had asked for. How, Lemanski inquired, could these employees claim it was only the job that was making them sick? Lemanski then said, according to his testimony, "You're working the hours assigned, you're involved with the union, you have other problems at home--how can you say it's just the hours that are causing your depression?" He then suggested that if the hours were making Engquist sick she should look for other employment in the Medical Center. Lemanski denied having said that he would remove MASH Flashes from the bulletin board after two days. Rather, he testified that he told Engquist that he was attempting to write down a policy (related, one can infer from the record, to postings) that he had been following all along, but that had not previously been in writing. Lemanski testified that he felt it necessary to reduce the policy to writing at this point "because of the incident of the postings for MASH...I suggested [to Engquist] if I had my procedures on paper that incident would not have occurred." Lemanski did not testify as to what the "incident" was or what the policy was that he was writing down. Lemanski conceded that he could have been angry during the conversation.

An employer violates Section 10(a)(1) of the Law if it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law. Town of Mashpee, 11 MLC 1252, 1270 (1984). The pertinent inquiry is the effect that the employer's conduct would tend to have upon "reasonable employees." Id.; Town of Chelsmford, 8 MLC 1913, 1917 (1982), aff'd 15 Mass. App. Ct. 1107 (1983).

On November 13, 1984, Lemanski said to Engquist, "I'm going to make up a memo, it's going to go up, so that your MASH Flashes can't stay up on the board more than two days. I have the authority to take them down." In a prior case involving the same parties, the same supervisor, and the same bulletin board, we found:

> 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. 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).

Massachusetts Board of Regents of Higher Education, 13 MLC 1697, 1699 (1987). We further found in the prior case that around July 31, 1984, the Employer had directed Lemanski to allow MASH to post its leaflets on the bulletin board. Thus, we now conclude that Lemanski's November 13, 1984 statement was an unlawful announcement of his intent to promulgate a restrictive policy aimed at union communication. See Id. at 1701; see generally Commonwealth of Massachusetts, 9 MLC 1842, 1847-48 (1983).

We also conclude that Lemanski's comment that Engquist "wouldn't have stress if [she] weren't MASH-involved," followed by his suggestion that she find a job elsewhere if the stress was too much for her, violated Section 10(a)(1) of the Law. "A threat need not be explicit if the language used can reasonably be construed as threatening." Southern Worcester County Regional Vocational School District v. Labor Relations Commission, 377 Mass. 897, 905 (1979) (citations omitted).

Lemanski's "stress" statements were sufficiently ambiguous that they could have had a coercive effect on a reasonable employee. Such an employee could have interpreted the statement to signify that if the employee continued her union activities, it

would become necessary for her to seek work elsewhere.[4]

CONCLUSION

For the reasons stated herein, the employer's statements recited above violated Section 10(a)(1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that:

1. The Massachusetts Board of Regents, University of Massachusetts Medical Center, shall cease and desist from restraining, coercing and interfering with employees in the exercise of rights guaranteed under the Law.

2. The Massachusetts Board of Regents, University of Massachusetts Medical Center, shall take the following affirmative action which will effectuate the purposes of the Law:

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

   b. 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

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[4]The Employer contends that in order for MASH to establish a violation of Section 10(a)(1), it was necessary to show that Lemanski's comment actually intimidated Engquist. No such showing is required. "[A]ctual coercive effect need not occur in order to establish a Section 10(a)(1) violation." Bristol County House of Correction, 6 MLC 1582, 1584 (1979). It need only be shown that the employer's conduct may have been threatening to "a reasonable employee." Town of Chelmsford, supra.

[NOTICE TO EMPLOYEES OMITTED]