CITY OF LAWRENCE AND LAWRENCE PATROLMEN'S ASSOCIATION, MUP-6086 (9/13/88). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

65.2 concerted activities
65.3 interrogation, polling
65.6 employer speech
92.51 appeals to full commission

Commissioners participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Arthur Caron, Esq. - Representing the City of Lawrence

David C. Jenkins, Esq. - Representing the Lawrence Patrolman's Association

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

On April 13, 1987, Hearing Officer Robert B. McCormack issued a decision in the above-captioned matter[1] holding that the City of Lawrence (Employer), by certain actions and statements of its agent Police Chief Joseph Tylus, interfered with, coerced and restrained employees in the exercise of their rights guaranteed under the Law, in violation of Section 10(a)(1) of the Law. Pertinent to this appeal, he found that the decision of certain members of the Lawrence Patrolman's Association (Association) to conduct a vote of no-confidence in Chief Tylus and the letter which accompanied the mail ballot vote both constituted protected, concerted activity under the Law.

The Employer filed a timely notice of appeal pursuant to Commission Rules, 456 CMR 13.13(2) and filed a supplementary statement requesting reversal of the Hearing Officer's decision. The Association also filed a supplementary statement. For the reasons set forth below, we affirm the Hearing Officer's decision as modified.

Findings of Fact

We have reviewed the record in this case and, to the extent that the Employer does not challenge the hearing officer's factual findings, we adopt those findings, except where noted. Whitman-Hanson Regional School Committee, 9 MLC 1615 (1983). We summarize the facts as follows.

[1]The full text of the Hearing Officer's decision is found at 13 MLC 1614 (H.O. 1987).

In late September 1986, the Association held a special evening meeting to discuss complaints about Chief Tylus and conflicts between Tylus and the Association. The meeting was attended by the four members of the Association's Executive Board[2] and approximately 16 Association members. The Executive Board members proposed that a vote of no-confidence in Chief Tylus be conducted. After some discussion about the timing of the no-confidence vote in relation to an upcoming mayoral primary election, a decision was reached to proceed with the vote.[3]

Immediately thereafter, the Executive Board members took preparatory measures to conduct the vote. Ballots and envelopes were printed and addressed, a post office box was rented, and a letter was written to accompany the ballot. The letter, signed by Association President Smith, read in full:

> Lawrence Patrolman's Association
> 90 Lowell St.
> Lawrence, Mass.
>
> Dear Member,
>
> It has been brought to our attention that many members feel initmidated by having to cast a vote of confidence or no-confidence in the Chief at the police station. Therefore, in an effort to maintain absolute anonymity, we are mailing a ballot to each and every member of the Officials' and Patrolmans' Unions along with a self-addressed stamped envelope for its return. This way, NO ONE will see you cast your vote. We hope this will ease your fears.
>
> The Executive Board of the Lawrence Patrolman's Association, for your benefit, wishes to say that we are disgusted with the low morale which is present in our police department today. We feel that the Chief, more than anyone else, is responsible for the existance [sic] of this situation. We urge you to vote your hearts and minds. Here is a list of reasons why we voted for this ballot at our last union meeting.
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> 1. The Chief's attitude toward his men.

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[2]President Raymond Smith, Secretary Charles Carroll, Steward Donald Foley, and Steward Justin Hart.

[3]The City argues on appeal that, absent a finding that the membership actually authorized the no-confidence vote, the hearing officer could not correctly find that the decision to conduct the vote was protected activity. The question regarding authorization arises from the contrary testimony of two witnesses that the members voted to delay any vote until after the mayoral primary election. We conclude, below, that membership approval is not a prerequisite to establish that the employees engaged in protected, concerted activity when they decided to conduct the vote. Therefore, we need not resolve the factual question of whether the membership authorized the vote.

2. The Chief's constant lying and being caught at it. This reflects badly upon us all.

3. The Chief's failure to honor our contracts by his unilateral interpretations of them.

4. The Chief's attitude toward unionism -- especially towards Union officials. This is exemplified by his actions toward Capt. Aliano and Patrolman Foley.

5. The Chief's union busting tactics. He fails to negotaite differences. Instead, he forces us to fight for everything which depletes our treasury.

6. The Chief's absence in time of need. He was nowhere to be found during layoff hearings, disciplinary hearings and especially when the Mass. Criminal Justice Training Council report was issued.

7. The Chief's attitude toward men injured in the line of duty. He carries them sick instead of ILD, all but calls them liars and often jokes about their injuries.

8. The Chief's inability to motivate those under his command in a positive manner.

Please return your ballot within two days of its receipt. DO NOT put your name or any other identifying marks on it. There is no need to do so. Just place it in the return envelope and drop it into a mail box. Results will not be made known until after the primary elections. This is a rare chance for our union members to show some badly-needed solidarity. please [sic] vote.

The ballot and the letter were mailed on October 4 or 5 to members of the Association as well as to members of the Superior Officer's Association. On October 6, significant portions of the letter appeared in the Sunday edition of the Lawrence Eagle Tribune. Each of the witnesses for the Association consistently denied that he had provided a copy of the letter to the press, and the record contains no evidence indicating who supplied the document to the newspaper.

On October 6, Chief Tylus and Smith met in Tylus's office. At that time Tylus expressed his displeasure with Smith's letter, and demanded to know who authorized it. Smith replied that it was the work of the Executive Board. Tylus then stated that Smith was in trouble and could be fired. He further suggested that Smith and the Executive Board members should resign from the Association. Smith immediately refused to resign, but indicated that he would speak with the others about Tylus's suggestion. Tylus then commented that he regarded the letter as libelous, and further expressed his disappointment in Smith for signing it.

Shortly thereafter, piqued by the letter and the impending no-confidence vote, Tylus ordered an administrative inquiry into the factual circumstances

concerning the letter. Executive Board members Smith, Foley and Hart were ordered to attend a hearing and warned that sanctions might be applied based upon their answers. The inquiry was conducted on October 11 by a superior officer assigned by Tylus. Smith, Foley, and Hart attended and were represented by counsel. Each was questioned about the drafting of the letter, the specific incidents underlying the complaints against Tylus expressed in the letter, the special meeting in late September, and the membership decision to conduct the no-confidence vote. Upon advice of counsel, all three refused to answer any questions.

On October 18, the Executive Board members counted the ballots in the presence of local news media. No disciplinary action was ever taken against the Executive Board members.

Opinion

The hearing officer found that the decision to conduct the no-confidence vote and the letter signed by Smith were protected, concerted activities safeguarded by the Law, and that, consequently, the administrative inquiry ordered by Tylus, as well as certain remarks made by Tylus, interfered with, restrained, and coerced employees in the exercise of their rights, in violation of Section 10(a)(1).

Section 2 of G.L. c.150E provides in part that:

> Employees shall have...the right to form, join, or assist any employee organization, for the purpose of bargaining collectively through representatives of their own choosing...and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection...

An employer violates Section 10(a)(1) of the Law by taking adverse action against an employee for engagement in protected concerted activity so long as the employee's own conduct does not remove her or him from the Law's protection. City of Holyoke, 9 MLC 1454, 1461 (H.O. 1982), aff'd 9 MLC 1661 (1983).

The charging party has the burden of demonstrating that the concerted activity with which the employer allegedly interfered was protected under Section 2 of the Law. As a general matter, the Commission has allowed employees broad latitude to engage in concerted action to pressure an employer about collective bargaining concerns. See Southeastern Regional School District Committee, 7 MLC 1801 (1981). In this instance, we entertain no doubt that the employee members of the Executive Board engaged in protected activity when they discussed the no-confidence vote with other employees at the union meeting in late September. This activity was directly connected with the Union's labor disputes with Chief Tylus. Issues of contract compliance, management's attitude toward employee union activities, employee morale, and the treatment of employees injured in the line of duty are all subjects which relate directly to the terms and conditions of employment of the officers. The protected nature of the subject matter is not disturbed by the means through which the employees chose to communicate. The

use of a letter to fellow workers is one acceptable method by which employees could share their thoughts and concerns. In essence, it is no different than the prototypical situation in which one employee talks with other employees about workplace matters of mutual concern.

Similarly, the employees' conduct of the mail-ballot vote in October was protected by the Law. Conducting a poll to ascertain employee disgruntlement with a supervisor is protected activity so long as it is clearly directed at improving terms and conditions of employment. See, Whitman-Hanson Regional School Committee, 10 MLC 1276, 1279 (H.O. 1983), rev'd on other grounds, 10 MLC 1606 (1984) (circulating opinion poll about superintendent in order to counter assertions by superintendent about union is protected activity). Here, the letter that accompanied the mail ballot was, on balance, clearly related to working conditions at the police station.[4] The letter refers generally to the Union's concerns with Tylus's impairment of the integrity of the collective bargaining agreement and to the perceived threat to the Union's existence. It also refers to specific working conditions such as injured leave status. Although the letter as a whole constitutes a sharply worded protest, the protective reach of the Law embraces even sharply critical protests which are directly tied to collective bargaining matters or to employees' mutual aid or protection. See, Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320, 93 LRRM 2739 (7th Cir. 1976), aff'g 221 NLRB 309 (1975).

In its supplementary statement, the Employer argues that the failure of the Executive Board to secure proper authorization for the membership vote places its subsequent activities beyond the protective shield of the Law. Whether the letter was duly authorized is immaterial to our inquiry into the protected status of the action of the Executive Board members. The protection to be accorded to this conduct is determined by what the Law authorizes rather than by what the union membership authorizes.

The Employer also argues that the employees here exceeded the bounds of the Law by including members of another bargaining unit in the no-confidence vote. The Employer maintains that the effort to include superior officers in the concerted activity amounted to a disloyal attempt to undermine the Chief's authority. The Commission has previously found that activities designed to involve or persuade non-parties for the purpose of favorably resolving a dispute or a grievance are concerted and protected. See, e.g., City of Holyoke, 9 MLC 1876 (1983) (union

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[4] We note that certain statements in the letter do not immediately appear to be related to working conditions. As the Commission has previously observed, concerted activity unrelated to working conditions or to mutual aid or protection may not enjoy protection under the Law. See, City of Worcester, 7 MLC 2059 (1981) New Perspectives School, Inc., 6 MLC 1504 (1979). Nevertheless, the employer has offered no evidence indicating that the Chief's adverse responses were directed exclusively to those limited portions of the letter. Thus, we need not decide whether every statement in the letter is "protected" within the meaning of Section 2.

sends letter to police detail users); Southeastern Regional School District Committee, supra (union seeks support of parents of school children). Although "concerted activity can lose its protected status if it is unlawful, violent, in breach of contract in certain circumstances, disruptive, or indefensibly disloyal to the employer," City of Haverhill, 8 MLC 1690, 1694 (1981),[5] we do not believe that the employees' conduct here can be so characterized. The effort to enlist the support of an interested union as part of a plan to pressure the City concerning the employees' disputes with the Chief over working conditions is within the latitude of protected activity, and the Employer does not point to specific employee conduct in seeking outside support which would render the activity unprotected.

The Employer asserts that the release of the letter to the press in these circumstances amounted to disloyal disparagement of the Employer. Since the Employer has not shown that the Executive Board members were responsible for publicizing the vote in this manner, we decline to decide whether intentional dissemination to third parties of the information contained in the letter would result in the loss of protection under the Law.

Finally, we note in passing that we see no merit in the Employer's defense that Tylus cannot have interfered with employees in the exercise of their rights because he lacked the authority to punish them for their activities. We reiterate that the standard used in Section 10(a)(1) cases is whether the employer or its agent engaged in conduct whith "may reasonably be said to tend to interfere with" the free exercise of employee rights under Section 2 of the Law. Southern Worcester County Regional Vocational School District v. Labor Relations Commission, 377 Mass. 897 (1979). In applying this standard, the fact that Tylus did not have authority to sanction employees is immaterial. See, Town of Chelmsford, 8 MLC 1913, 1916-17 (1982). As Chief of Police, Tylus is the agent of the Employer in charge of running the Police Department, and it is reasonable to presume that employees regarded him as speaking and acting for the Employer. We believe that both his comments to Smith on October 6 and the administrative inquiry which he conducted on October 11 may reasonably be said to have had a chilling effect upon employees in the exercise of their rights under the Law.

Order

WHEREFORE, IT IS HEREBY ORDERED that the City of Lawrence, through its Police Chief Joseph Tylus, shall:

1. Cease and desist from interfering with, restraining, or coercing its employees in the exercise of any right guaranteed under the Law.

2. Sign and post the attached Notice to Employees, and leave the same posted for a period of not less than thirty (30) consecutive days.

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[5] See, City of Boston, 7 MLC 1216 (1980). See also, NLRB v. Electrical Workers (IBEW), Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (1953); Dreis & Krump Mfg. Co. v. NLRB, supra.

The Notice shall be posted in the police station where notices to employees are usually posted.

3. 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

MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, 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 City of Lawrence (City), acting through its agent, Police Chief Joseph Tylus, violated Section 10(a)(1) of the Massachusetts General Laws, Chapter 150E (the Law) by interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed under the Law.

Section 2 of M.G.L. c.150E provides in relevant part as follows:

> Employees shall have the right to 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 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.

The City of Lawrence hereby assures its employees that it will not interfere with, restrain, or coerce them in the exercise of any of their aforesaid rights. More specifically, the City will not threaten to take any disciplinary action against, or interrogate, any employees because of their participation in a "vote of no confidence" which occurred in October, 1986, or because of their preparation and delivery of a letter to members of the police department on October 4 or 5, 1986.

_____
Chief of Police
City of Lawrence