COMMONWEALTH OF MASSACHUSETTS, COMMISSION OF ADMINISTRATION AND FINANCE AND ALLIANCE, AFSCME/SEIU, LOCAL 509, SUP-3319 (8/8/91). DECISION ON REVIEW OF A HEARING OFFICER'S DECISION.

65.91 request for representation at disciplinary interview
82. Remedial Orders
82.13 reinstatement
92.51 appeal to full commission

Commissioners participating:

Maria C. Walsh, Chairperson
Haidee A. Morris, Commissioner

Appearances:

Matthew D. Jones, Esq. - Representing the Alliance, AFSCME/SEIU, Local 509

Karen E. Spilka, Esq. - Representing the Commonwealth of Massachusetts

DECISION ON REVIEW OF A HEARING OFFICER'S DECISION

On November 16, 1989, Hearing Officer Tammy Brynie issued her decision in this matter.[1] Briefly, she found that the Commonwealth of Massachusetts, Department of Social Services violated Section 10(a)(1) of G.L. c.150E (the Law) when it failed to afford employee Alethia Rodgers her so-called "Weingarten rights" when it conducted an investigatory interview with her on September 19, 1988. Although Rodgers' employment was terminated on September 28, 1988, the hearing officer narrowly tailored her remedy, confining it to a cease and desist order and the posting of a notice to employees. She did not require Rodgers' reinstatement to her former position. The Alliance, AFSCME/SEIU, Local 509 (Union) represents Rodgers, and has appealed the narrowness of the remedial order.

The Challenged Findings

The hearing officer found that "the termination decision was based on Rodgers' lack of improved performance since being placed on the February 1988 work plan." 16 MLC 1373. The Union challenges this finding, and would have us find that she was terminated not only for her job performance but also for her conduct. Upon review of the evidence we find that Rodgers was not terminated for her conduct but for her job performance and her failure to meet written performance expectations in specifically identified areas of concern.

[1] The full text of the hearing officer's decision appears at 16 MLC 1366.

The hearing officer also found that Rodgers' "angry responses or outbursts ...did not affect or influence Boileau's decision to terminate Rodgers' employment." 16 MLC 1373. The Union would have us find that Rodgers' conduct at the September 19, 1988 meeting influenced and was directly and inextricably linked to the decision to terminate her.[2]

During her September performance review, Rodgers was criticized for, inter alia, inappropriate use of work time. It is undisputed that she then retorted "Scott (Liebert) watches every fart that I do." Even if we assume that Liebert was insulted by those words, and that they re-enforced his view that Rodgers' overall behavior and performance were unacceptable and that she should be terminated, we do not find that Rodgers' remarks led to her termination.[3] Notwithstanding the fact that Liebert could and did base his termination recommendation partly on Rodgers' remarks, Boileau made the actual decision to terminate and was free to accept or reject his view. Rodgers' remarks were made in Boileau's presence, so certainly she was aware of them. The hearing officer found specifically however that Boileau gave no particular significance to the "fart remark" and considered it a minor outburst resulting from Rodgers' understandable anger. The hearing officer's finding is clearly explained, based on demeanor evidence of credibility, and fully supported by the record. We find no cause to overrule the hearing officer's finding that Rodgers' angry response or outburst did not affect or influence Boileau's decision to terminate Rodgers' employment.

Lastly, the Union would have us additionally find that at the meetings where Union representative Pasqualino Colombaro was present, he acted as Rodgers' spokesperson and Rodgers did not make angry responses or outbursts. This additional finding is substantiated by the evidence of record.

Opinion

The Union amply proved that Rodgers was denied Weingarten[4] protection when

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2 Carol Boileau is the Chief Divisional Counsel of the Department of Social Services Region IV legal office where Rodgers worked as a Social Work Technician. Boileau made the ultimate decision to terminate Rodgers. Scott Liebert was Deputy Divisional Counsel, and was Rodgers' immediate supervisor.

3 Indeed, the hearing officer found as much in her decision. 16 MLC 1373.

4 In NLRB v. Weingarten, 420 U.S. 251 (1975) the Supreme Court held that the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., gives employees the right to be accompanied by a union representative at an investigatory interview by the employer which the employee reasonably believes may result in discipline. The Commission found that G.L. c.150E similarly guaranteed an employee a right to union (continued)

the Commonwealth conducted the September 19, 1988, investigatory interview without affording her Union representation.[5]

This being so, the burden of proof shifted to the Commonwealth to show that the flawed interview played no part in Rodgers' subsequent termination. Should it be found that the disciplinary action taken against Rodgers was linked to information obtained at the interview at which her request for a Union representative was denied, the appropriate remedy would be to return Rodgers to the status she enjoyed prior to the Commonwealth's violation of the Law. Commonwealth of Massachusetts and AFSCME, Council 93, 8 MLC 1287, 1290 (1981).

For reasons explained above, we have declined to find that Boileau's decision to terminate Rodgers was influenced by Rodgers' outburst during the interview. Thus, unlike the facts of the Commonwealth of Massachusetts case, supra, no nexus has been shown between the denial of union representation at the interview and the decision to terminate Rodgers. Contrary to the Union's arguments, the validity of Rodgers' termination must be judged by the "but for" test.[6] When that test is applied to Rodgers, we conclude that she has failed to meet her burden of proving that "but for" her conduct or information obtained at the interview she would not have been terminated. Rather, the evidence amply supports the hearing officer's conclusion that Rodgers was discharged because of her failure to meet performance expectations. Had there been no unlawful investigatory interview, she still would have been terminated.

We have noted that Rodgers made no outbursts when Union representative Colombaro was with her during earlier interviews, but even if we assume, arguendo, that Rodgers' remarks would have been more temperate had she been accompanied by her union representative, we would affirm the remedy ordered by the hearing officer. Since we have found that Rodgers' remarks were not a factor in Boileau's decision to terminate her, assumptions about how Rodgers might have acted had she been afforded representation at the interview are irrelevant to either our consideration of the results of the case or our consideration of the remedy.

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4 (continued)
representation at an investigatory interview conducted by the employer which the employee reasonably believes may result in discipline. Commonwealth of Massachusetts, 4 MLC 1415 (1977).

5 The hearing officer's analysis on this point is appropriate and need not be repeated here, see 16 MLC 1376-77.

6 See, for example, Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565-66 (1981); Town of Clinton, 12 MLC 1361, 1364 (1985); Boston City Hospital, 11 MLC 1065, 1071 (1984).

Therefore, for the reasons expressed above, we affirm the hearing officer's decision.

Order

Accordingly, it is hereby ordered that the Commonwealth of Massachusetts, Department of Social Services shall:

1. Cease and desist from interfering with the rights of its employees to request Union representation at investigatory interviews with the Employer at which the employee reasonably believes that the investigatory interview may result in disciplinary action against him or her.

2. Cease and desist in any like manner from interfering with, restraining and coercing its employees in the exercise of their rights under the Law.

3. Take the following affirmative action which will effectuate the policies of the Law:

   a) Sign and post the attached Notice to Employees in all places where employees usually congregate and where notices to employees are usually posted, and leave it posted for a period of thirty (30) consecutive days; and

   b) Notify the Commission, in writing, within thirty (30) days of receipt of this Decision of the steps taken to comply with this order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON

HAIDEE A. MORRIS, COMMISSIONER

Commonwealth of Massachusetts, Commission of Administration and Finance and Alliance, AFSCME/SEIU, Local 509, 18 MLC 1018

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

After a hearing, the Massachusetts Labor Relations Commission has ruled that the Commonwealth of Massachusetts, Department of Social Services, committed a prohibited practice in violation of Massachusetts General Laws, Chapter 150E, Section 10(a)(1) by not affording union representation to an employee at an investigatory interview which the employee reasonably believed could result in discipline.

Chapter 150E of the General Laws 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;
- To refrain from all of the above.

WE WILL honor our employees' requests for union representation during investigatory interviews which may result in disciplinary action.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their right guaranteed under Chapter 150E.

Chief Divisional Counsel
Region IV
Department of Social Services