TOWN OF WINCHESTER AND WINCHESTER FIREFIGHTERS LOCAL 1564, IAFF, MUP-7514 (12/22/92). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

53.51 press releases and publicity
65.2 concerted activity
65.6 employer speech
92.51 appeals to full commission

Commissioners Participating:

Jean Strauten Driscoll, Acting Chairperson[1]
William G. Hayward, Commissioner
William J. Dalton, Commissioner

Appearances:

Michael C. Lehane, Esq. - Representing the Town of Winchester

Howard B. Lenow, Esq. - Representing Winchester Firefighters, Local 1564, IAFF

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On September 10, 1990, Hearing Officer Anne M. DeSouza, Esq. issued her decision in this matter, concluding that the Town of Winchester (Town) violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by the public meeting statements of Selectmen Robert Deering and Thomas Schmitt criticizing the behavior of Winchester Firefighters Local 1564, IAFF (Union) President Kenneth Duffy for writing letters to the press on behalf of firefighters concerning reductions in the level of fire protection services.[2]

The Town filed a timely notice of appeal on September 25, 1990. On December 6, 1990, the Town filed a supplementary statement challenging the legal basis of the hearing officer's decision. The Union filed its supplementary statement on January 16, 1991. Neither party challenges or objects to any of the hearing officer's findings of fact. After considering the record before us, we reverse the hearing officer's conclusion that the Town violated the Law.

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[1] Acting chairperson Driscoll has been designated to act by Chairperson Walsh pursuant to the provisions of M.G.L. c.30, Section 6, with the approval of the Governor while Chairperson Walsh takes a temporary leave of absence.

[2] The full text of the decision appears at 17 MLC 1258.

Findings of Fact[3]

We adopt the hearing officer's findings of fact and summarize the relevant facts as follows.

The Union is the exclusive collective bargaining representative for fire fighters employed by the Town. In 1989, Kenneth Duffy had served as Union president for about five years, and was also Chairman of the Town's Insurance Advisory Committee, and Chairman of the Winchester Labor League, a coalition of the Town's unions which Duffy, in part, organized. Prior to serving as Union President, Duffy was the Union's Secretary/Treasurer for one year.

After approximately nineteen months of negotiations, the Town and the Union finalized a collective bargaining agreement in early June 1989. The agreement was executed on June 29, 1989. According to Duffy, for the first time in the Union's history of collective bargaining, the Union membership voted to picket and did so on about five occasions. The picketing was reported in the local press, often quoting Duffy as the Union's spokesperson.

At the end of 1988, the Town initiated discussion of a trust fund arrangement for administering the Town's insurance plans. Duffy was active in discussing the proposal with the Town Manager and with Selectman Schmitt, who in 1988 was the Board of Selectmen's representative to the Insurance Advisory Committee. According to Duffy, Schmitt was not pleased with Duffy's investigation of the implications of the Town's proposed changes.

Prior to and during 1989, Duffy was also prominent in protesting the Town's layoff of fire fighters. As part of this activity, Duffy sought and secured the Union's Executive Board approval of the text of a letter addressing the loss of manpower within the fire department. The text of the June 1989 letter that appeared in the Woburn Daily Times Chronicle is as follows:

> To the Editor:
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> An open letter to the taxpayers and voters of the City of Woburn:
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> I would like to thank the taxpayers, your fire chief, and your city's administration for using, or allow [sic] to be used, the full resources of the City of Woburn's fire department to underwrite, subsidize, and supply fire protection and ambulance service to the Town of Winchester.
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> Winchester is a "poor" town and cannot afford to maintain the

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[3] The Commission's jurisdiction is uncontested.

current level of fire protection. Therefore by "misusing and distorting" the intent of "Mutual Aid," we can reduce our fire protection and ambulance service. And the City of Woburn can cover "our" shortages in equipment and manpower, thereby saving us hundreds of thousands of dollars in our "free cash account."

This money can be saved for more important things like the continued growth in management, and the redoing of our playing fields and other worthwhile beautification projects. Remember Winchester has an "image" to project to the outside world. Again, I thank you for your tax dollars to support Winchester, "The Poor Town."

As of July 1, 1989, Winchester will drop one fire engine (out of service), four firefighter positions (three men will be laid off), the elimination of the "call firefighters force," and a major reduction in Fire Department overtime, and the reduction of "on duty firefighters" to handle emergency calls. And you, the people of Woburn will help make up the difference for Winchester!

Ken Duffy, President, Winchester Firefighters

P.S. As good neighbors that you are, could you let us know when your rubbish pick-up days are and on what streets? It would save Winchester a lot more if we could leave our garbage and rubbish on your streets for your pick-up. Thanks.

The Union's similar open letter to residents of three or four other surrounding communities was also published in local newspapers.

During a regular meeting of the Board of Selectmen on or about June 26, 1989, Selectman Robert Deering made the following statement:[4]

I just have one last thing which I gave much thought to whether I would even discuss it tonight or not, and I've chosen to discuss it. I've always been very supportive of Town employees, and I'm not going to be any different tonight, but I was confronted with something over the weekend which I found distressful. You know, normally, when we, there is a problem with something in the town, it's handled behind the scenes. It's usually on a small scale basis, and usually involves one individual. But I think this reflects on the whole town and I found it

[4] The text of the statements of two members of the Board of Selectmen are reprinted as they appeared in the Hearing Officer's Decision. A videotape of the Selectmen's remarks, that was entered into evidence by the Union was reviewed by all participating Commissioners.

in bad taste and I'd just like to, if you'll bear with me, I'd like to read it.

As you all know, there's been much discussion in the newspapers concerning the reduction in Town services, and namely in the fire department. I think it, we all find that hard to take and terrible to deal with. But the president of the firefighters' union has taken it upon himself to write letters to the editor to all the newspapers in the surrounding communities and, if you bear with me, I'd just like to read it to you.

This is written to the Arlington Advocate, [Selectman Deering here reads aloud a letter addressed to the citizens and taxpayers of the Town of Arlington which states verbatim the words of the Woburn letter set out above.] I think we may all have our differences, but I think we've always dealt with them in a professional way in character with the Town, and I found this to be.... I'm sure it's not representative of the fire department itself, it may be of the Union administration. But I believe this has been sent to the, a similar article with a change of the town, to Lexington, Woburn, Arlington and, I assume, Medford.

I just found that this type of strategy is not working on this particular selectman. And I think if you're trying to solicit public support, for a worthwhile cause, because I think every one of us on the Board here, if we were going to support anything, we're supporting public safety. And I think, you know, I'm very appreciative of the hard work the firefighters do, and I compliment them. And, as I said, I don't think this is a reflection on them. I think it's more the Union more than the town employees. But I do not think it should be written to other towns. I think there's a process. We had a ballot question that got defeated. We went to Town Meeting and got defeated. We may not all agree with it but I think there's a process and a proper way of addressing these issues and I don't believe articles such as this serve the process well. And that's all I can say.

After a few unrelated comments, the Chairman of the Board of Selectmen, Thomas Schmitt, made the following statements:

And last is an agreement with Mr. Deering on the issue he raised with respect to the letters. We are sensitive to the situation on the mutual aid pacts. We have been in contact with the communities that participate in our mutual aid agreements to let them know precisely what we're doing and to be sensitive to their concerns and, we hope, them to ours. Having just worked very hard on behalf of the Town to work out a collective bargaining agreement with that particular group and, you might say, making a fairly major commitment to try to bring

> that to resolution, I'm not very pleased at all by that behavior. And I agree with Selectman Deering that I think it is unprofessional and not very reflective of the quality employees we have in this town. So I would agree with his observation and second it.

The Selectmen's meetings are carried on the local cable television station. Televisions are in all Town fire stations, and fire fighters will view the Board of Selectmen's meeting if the agenda includes budget discussions and/or fire department related items. According to Duffy's testimony he did not attend nor personally view the televised meeting at the time it occurred, but viewed a videotape.

Duffy testified that, after the June 26, 1989 Board of Selectmen's meeting, fellow fire fighters approached him to express their concern about a possible increase in the loss of manpower as well as a concern of retaliation to individual members who stand by him. Duffy also testified that he felt personally threatened by the statements of Deering and Schmitt, and that it was, in his opinion, an effort to stop him from engaging in that kind of activity.

Opinion

The issue on appeal is whether the public statements of Selectman Deering and Selectman Schmitt interfered with, restrained or coerced employees in the exercise of their rights guaranteed by the Law.[5] The Union bears the burden of proof by a preponderance of the evidence. 456 CMR 15.07.

A public employer will be found culpable under the Law if it engages in conduct that may reasonably be said tends to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Section 2 of the Law. Bristol County House of Correction and Jail, 6 MLC 1582, 1584 (1979), citing Illinois Tool Works, 153 F.2d 811, 17 LRRM 841, 843 (1946).[6] To establish a

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5 Section 2 of G.L. c.150E provides in part that: Employees shall have the right of 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. Section 10(a)(1) of G.L. c.150E provides that: It shall be a prohibited practice for a public employer or its designated representative to interfere with, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter.

6 This decision interpreted the National Labor Relations Act prior to the enactment of the Taft-Hartley Amendments of 1947 that included section 8(c) of the N.L.R.A. 29 U.S.C. 158(c)

Section 10(a)(1) violation, a finding of improper motivation is not generally required. Bristol County House of Correction and Jail, supra at 1583. Groton Dunstable Regional School Committee, 15 MLC 1551, 1555 (1989) (Groton-Dunstable I). Instead, the Primary focus of the inquiry is the effect of the employer's conduct on a reasonable employee. Massachusetts Board of Regents, 14 MLC 1397, 1401 (1987) citing Town of Chelmsford, 8 MLC 1913, 1916 (1982), aff'd 15 Mass. App. Ct. 1107 (1983). However, "an employer's conduct need not actually coerce or restrain employees in the exercise of their rights in order to interfere with their rights, and to constitute a violation of the Law." Groton-Dunstable I, 15 MLC at 1556. The legal test is an objective one, and the subjective impact of the employer's conduct on one or more employees is not therefore determinative.

On appeal, the Town has not challenged the hearing officer's conclusion that Duffy was engaged in protected concerted activity when he drafted and distributed the open letter to residents of surrounding communities critical of the Town's action in reducing the level of fire protection services. Town of Winchester, 17 MLC 1258, 1262-63 (1990). The conclusion is in accord with Commission case precedent, which supports the right of union officials to publicly protest working conditions. See e.g., City of Haverhill, 8 MLC 1690, 1694 (1981); City of Holyoke, 9 MLC 1876, 1879 (1983).

Although we adopt the hearing officer's conclusion that Duffy's activity is statutorily protected, we reverse her determination that the statements of Selectmen Deering and Schmitt unlawfully criticized Duffy's activity and thus interfered with, restrained and coerced employees in violation of Section 10(a)(1) of the Law. Rather, based on the record, including a review of a videotape of the selectmen's statements, which permitted us to observe the tone and demeanor of both selectmen, we find that the selectmen's comments did not rise to the level of a violation of the Law.[7]

Unlike the criticism directed toward a union vice-president in Groton-Dunstable I, 15 MLC 1553-1554, the statements of Deering and Schmitt[8] were restricted

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[7] In this case, we personally viewed the videotape of the Selectmen's remarks that the hearing officer determined criticized the protected concerted activity. Through the availability of this evidence, introduced into the record by the Union, we are in the same position as the hearing officer to make certain findings.

[8] Because we reverse the hearing officer on other grounds, we need not address the Town's argument that the statements of two members of a five member Board of Selectmen are only the protected expressions of individual opinions and do not represent an official action or statement of the Board; and, absent a Board endorsement, the Town need not disclaim the view of its individual Board members. But see, Town of Chelmsford, 8 MLC 1913, 1916 (1982), aff'd 15 Mass. App. Ct. 1107 (1983) (Using agency principles, the Commission rejected an argument that a (continued)

for the most part to expressions of their opinion and, although critical of the method Duffy selected to publicize the reduction in the Town's services, were not expressions of anger, either in tone or language. Nor did they demean Duffy or the Union for their positions. In Groton-Dunstable I, the Commission found that a school superintendent had "label[ed]" the union vice-president a "hypocrite" and "accused him of having a 'callous disregard'" for other union officers by advancing a grievance to another step in the grievance procedure. Id. In a subsequent case, the Commission concluded that employer statements that a grievant was "act[ing] like a little boy...a cry baby," and was "taking money out of the budget for [his] grievance [and it] could be spent for kids in the district," "ridiculed and belittled" the grievant's protected activity. Groton-Dunstable Regional School Committee, 19 MLC 1194, 1195-1197 (1992) (Groton-Dunstable II).

Although there are troublesome aspects of Deering's statement, particularly his references to the Union's role in communicating the reduction in town services through the news media,[9] we are unwilling to interpret the Law as imposing a broad "gag rule" on public employers that would effectively prohibit public comment on a public issue. Furthermore, Duffy's letter to local newspapers, although an expression of protected, concerted activity was sarcastic in tone. Deering's oral response was delivered in a tone of remorse or regret and expressed his opinion that the letter was in bad taste. A public employer risks violating the Law when it criticizes the method selected by a union official to arouse public sentiment about an issue affecting employees' wages, hours or terms and conditions of employment.[10] In the present case, however, we conclude that a reasonable employee's

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8 (continued)
supervisor's statement that the filing of grievances would result in layoffs was his opinion and not made on behalf of the employer).

9 The hearing officer determined that Deering and Schmitt "disparaged" the Union to employees when they criticized the behavior of "the Union" and not "the employees" and based her finding of a violation on these specific remarks. We conclude, however, that when viewed in context, Deering and Schmitt's comments concerning the Union's role were a minor portion of their statements and did not taint their entire statements. Thus, the comments as a whole did not reasonably interfere with, restrain or coerce employees' protected concerted activity. To subject each phrase to a litmus test of permissibility without considering the context and tone of the statements does not effectuate the purposes of the Law.

10 Because we find no violation, we need not address the Town's argument that the hearing officer failed to consider the Selectmen's statements in light of the employer's right of free speech guaranteed by the First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights. Specifically, the Town contends that for the Law to be constitutionally permissible, we must interpret M.G.L. c.150E to include the equivalent of 29 U.S.C. Section 158(c) that provides:

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rights to engage in protected activity were not chilled. Duffy's testimony that he felt personally threatened "to some degree," that he was interfered with because of the selectmen's comments and that some members of the union made comments to him that they were fearful that they had "gone too far" and that there was going to be some kind of retaliation, does not satisfy the objective test to determine the effect of the selectmen's comments on a reasonable employee. Duffy's subjective feelings are not the yardstick against which the employer's conduct must be measured. To the extent that his subjective feelings or his testimony concerning the statements of unnamed other employees should be accorded some weight in a determination of whether the "reasonable employee" would have been interfered with, coerced or restrained, we conclude that, as a matter of law, they fail to establish that a reasonable employee would have been deterred from engaging in future protected, concerted activity.

Conclusion

Accordingly, for the reasons discussed, we conclude that the Town did not violate Section 10(a)(1) of the Law, and the case is dismissed.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JEAN STRAUTEN DRISCOLL
ACTING CHAIRPERSON

WILLIAM G. HAYWARD, JR., COMMISSIONER

WILLIAM J. DALTON, COMMISSIONER

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The expression of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

But see, Town of Rockland, 16 MLC 1001, 1007 fn. 13 citing In the Matter of Bonin, 375 Mass. 680, 709 (1978) for the proposition that "judges and other public servants must suffer limits on constitutional rights of speech and association as are appropriate to the exercise of their official duties or sanctions."