

CITY OF FITCHBURG AND IBPO AND PAUL AIESI, FRANCIS QUINN, JOHN MURRAY,
MUP-2002, 2004, 2005, 2006 (9/23/75).

- (10 Definitions)
 - 17.2 probationary employee
- (60 Prohibited Practices by Employer)
 - 63.7 union activity and membership or non-membership
- (100 Impasse)
 - 107. picketing

Commissioners participating: Alexander Macmillan, Chairman; Madeline H. Miceli; Henry C. Alarie.

Appearances:

| | |
|---------------------------|---------------------------|
| Robert B. McCormack, Esq. | - For the Commission |
| Sanford A. Kowal, Esq. | - For the Public Employer |
| James G. Reardon, Esq. | - For the Petitioners |

DECISION AND ORDER

Statement of the Case

On July 2, 1974 the International Brotherhood of Police Officers (IBPO), filed a Complaint of Prohibited Practice with the Labor Relations Commission ("Commission") alleging that the City of Fitchburg (City) had violated G.L. Chapter 150E, Section 10(a)(3) and (1). MUP-2002. On July 5, 1975, additional complaints were filed on behalf of Francis E. Quinn, Paul A. Aiesi, and John J. Murray III, each alleging that they were discharged from their employment in the Fitchburg Police Department in violation of Section 10(a)(1) and (3) of the Law because of protected activity on behalf of the IBPO. MUP-2004, 2005, 2006. The Commission investigated the Complaints pursuant to its authority under section 11 of the Law. On August 19, 1974, the Commission consolidated the cases for hearing, and issued a Formal Complaint of Prohibited Practice, alleging violations of Sections 10(a)(1) and (3) of the Law in the discharge of the three individuals.

All parties were served with a copy of the Complaint and Notice of Hearing pursuant to the Rules and Regulations of the Commission. Pursuant to notice hearings were held in Boston on September 13, 1974, before Alexander Macmillan, Chairman; October 31 and November 1, 1974 before Robert B. McCormack, Hearing Officer; and on November 13, 1974, before Henry C. Alarie, Commissioner.¹ All parties were afforded full and fair opportunity to be

¹ Counsel for the City moved to dismiss MUP-2002 on the ground that it had been withdrawn at the informal conference. Motions to dismiss MUP-2004, 2005, and 2006 were also filed in the basis that the charges were not filed by the certified representative, and that no vote of the union authorized the charges to be filed. Both motions were denied by the hearing officer. I T. 7-8. We affirm both rulings.

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heard, to examine and cross-examine witnesses, and to introduce testimony.

Findings of Fact

Hedley Bray is Mayor of the City of Fitchburg, having assumed that office on January 7, 1974. He is the appointing authority with respect to the Fitchburg Police Department (1 T. 12). He is 68 years of age, and was born in Cornwall, England. He served as City Councilman on two occasions, and Mayor for two terms in prior years, but not immediately prior to his taking office on January 7, 1974. Mayor Bray is by occupation a farmer (1 T. 76 & 77).

When Mayor Bray was running for office, one of his campaign pledges was to "clean up" the City's police department.² In an effort to build a better department, Mayor Bray was instrumental in building a new police station (1 T. 79), obtaining five new automobiles, radio equipment for the cars, signs, and other incidental equipment for the Police Department. (1 T. 80; 3 T. 62).

The IBPO was the recognized bargaining agent for all full-time, permanent patrolmen, sergeants, and lieutenants in the Department. The most recent collective bargaining agreement had expired on December 31, 1973. Under that agreement, the work day was divided into three tours of duty, each of eight hours duration. The contract further provided that, so far as practicable, shift assignments would be made on the basis of seniority. Subsequent to the expiration of the contract, the city altered this practice, and adopted a policy of rotating shift assignments every three months. 1 T. 81. The change was extremely unpopular with the membership of the union.

Negotiations for a new collective bargaining agreement began in January, 1974. As of June 21, 1974 (the date that the three police officers were terminated) no agreement had been reached. At issue between the City and the Union were the rotating shift policy and wage proposals. (3 T. 25 & 26; 1 T. 81) Negotiations took place continuously from January through June of 1974 with an occasional break of a week or two. (3 T. 25-26). When negotiations started getting "heavy"³ and the parties were nearing impasse, there was bitterness on both sides, voice-raising and occasional angry outbursts (3 T. 26; 90).

At that point the Union began to consider picketing, or such other concerted actions as were legal, for the purpose of forcing the issues. There is testimony to indicate that in April, 1974 (3 T. 92-93) directly

²A federal study of the department prior to Mayor Bray's election had been critical. 3 T. 60.

³The description "heavy" is in the words of Mr. Theirbault, the Union president. (3 T. 88).

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after a formal negotiation session had adjourned, the president of the Union had a conversation with the labor relations attorney who was retained by the City. Raymond LeBlanc (the City Manpower Director and its negotiator) and the Chief of Police were present. The Union president told the three men that picketing or other concerted action was being considered. The labor relations attorney for the City allegedly stated to the Union president that he had among his ranks "some vulnerable police officers and probationary officers and not to rile the Mayor to any exotic extent" (3 T. 88). The attorney also remarked that he "would love to be a city manager in the City, he could straighten things out" (3 T. 89). Further testimony indicates that later in May of 1974 (3 T. 92-93) the labor relations attorney for the City and the Union president had a similar conversation where in the attorney allegedly said "you got some provisional and probationary officers you got to watch out for" (3 T. 89). The Union president testified that he told the attorney to "go to Hell" (3 T. 92). The Union president did tell Aiesi, Murray and Quinn of the conversations sometime prior to July, 1974. (3 T. 94-95). The attorney assumed the witness stand and denied the threats, claiming he "never said those words" 3 T. 119-120; 126. However he does admit that they had a conversation during the time of the impasse concerning the advisability of a picket line and what its effect would be on Mayor Bray's attitude. He admits that he said that if the police went on a picket line, it would likely harden Mayor Bray's mind in salary and shifts (3 T. 91).

At all times relevant to these cases there were only three probationary police officers on the police force of the City, and those officers were Aiesi, Murray and Quinn (1 T. 60; 4 T. 19-20). In addition, there were seven or eight provisional officers (4 T. 31, 38).

On or about May 28, 1974 the Union set up picket lines in front of City Hall, and picketing was conducted on a daily basis until approximately July 8, 1974 (3 T. 84 & 85). Tensions mounted during the picketing. A quantity of red paint appeared on the concrete sidewalk near City Hall (1 T. 82). Telephone calls were made to the Mayor, and the air was let out of his automobile tires. (1 T. 37). Pieces of heavy construction equipment mysteriously appeared in the yards of both the Mayor and Chief of Police, having been left there by unknown persons with the motors running. (4 T. 53). At least three police officers followed the Mayor as he went from place to place in the City (1 T. 77 & 78), and a automobile "horn-honking" campaign was started around City Hall. (4 T. 54 & 55). Some of the pickets carried signs bearing the legend "Blow your horn to support the local police." (4 T. 54; 2 T. 23). Other signs were carried which read to the effect of "Put the ass back on the farm." (4 T. 53 & 54).

Officers Aiesi, Murray and Quinn participated with other police officers in picketing City Hall. Commencing May 28, 1974 Aiesi picketed between two and three times a week. Usually he did so thrice weekly, and carried signs supporting the Union (3 T. 104 & 105). Murray participated five or six times (4 T. 16) and on June 10, 1974 took a photograph of Mayor Bray conversing with



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certain other officers who were picketing (4 T. 14; Petitioner's Exh. 20). Quinn picketed ten times and worked as a "runner"⁴ twice (4 T. 43).

Mayor Bray often had occasion to cross the picket lines on his way to his office in City Hall. When he did so, he and the picketers frequently engaged in heated debate. Cursing, name-calling, and other "picket line rhetoric" was enthusiastically practiced by both sides. Picketers would call the Mayor a "stupid God damned farmer" (4 T. 15-16), and would cry "here comes the stupid farmer" (4 T. 17). The Mayor at one point told them they "could picket until next winter, and he (would) put sand out for them" (3 T. 86-87). The picketers would call him a "buffoon" and told him to "get back on the farm" (3 T. 86-87; 3 T. 114). In retaliation the Mayor replied (at various times) "You S.O.B., I don't have to put up with any of your bull shit" (3 T. 86-87); "no union is going to tell me how to run my city" (3 T. 86-87); "none of you bastards are going to tell me how to run my city" (4 T. 14); "Don't interfere with my city and you better watch your steps, lad" (4 T. 14); "I'll do things when I want to the way I want to" (4 T. 15-16); "you bastards, I'm going to get even with you" (4 T. 17).

In another instance the Mayor was accosted with the remark "I hear you're having landscaping done?" (an obvious reference to the heavy construction equipment left in his yard). The Mayor expressed anger and asked what the men knew about it. An officer made some remark to which the Mayor responded, "I'll take care of you, you bastards; no union tells me how to run my city. This is my city" (4 T. 53). On June 10, 1974, eleven days before the discharges, the Mayor drove by the picket line, honked his horn, and said "I'll get even with you bastards" (1 T. 16).

Quinn, Murray and Aiesi were present upon the picket line when much of the foregoing was taking place. (3 T. 87; 3 T. 110; 3 T. 112-115; 4 T. 13; 4 T. 54). Although claiming they did not engage in the name-calling, they actively participated in the picketing. At another time Quinn was in the process of coloring a sign which read "Put the ass back on the farm" when the Mayor passed through the picket line. The Mayor again expressed anger and said "Lad, you're looking for trouble", and "Lad, I have a good memory" (4 T. 53-54). At the same time Aiesi was lettering another sign, which read "blow your horn to support the local police". That sign referred to the horn blowing campaign urging the drivers of passing cars to blow their horns in support of the policemen's efforts (4 T. 54-55).

Raymond LeBlanc is Manpower Director of the City (1 T. 76), and is its labor negotiator. (3 T. 25). His position requires him to be at his office at City Hall five days a week, and he was there at the time the picketing was taking place in May and June of 1974. Picketing was generally occurring when he arrived for work and when he left. He saw the picket line almost every day (3 T. 23-24; 3 T. 64). He was also aware of the horn-honking campaign going on with regard to cars passing City Hall (3 T. 23). Quinn and Aiesi were on the picket line on some occasions when LeBlanc engaged in

⁴"Runner" as used in this context is one who runs errands for those actively picketing, brings them coffee, etc.



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conversation with some of the picketers (4 T. 70-71). The window of LeBlanc's office is on the second floor of City Hall, and looked down upon the picket line at a distance of about twenty feet. He could see the line any time he looked out of his window. A man on the picket line could look up at the window and recognize a person looking out. LeBlanc was often seen looking out of his window by the picketers. On occasion someone would say "there's Ray LeBlanc looking out". Others would look up and he'd be gone (3 T. 40; 4 T. 20). Quinn, Murray and Aiesi were all present and picketing on several occasions when LeBlanc was seen looking out his window (3 T. 89-90; 4 T. 69). LeBlanc knows all three men personally, and has known them since they first started work under the Emergency Employment Act program (3 T. 50).⁵ During the time of the picketing, LeBlanc admitted that he talked to the Mayor "All of the time" about it. (3 T. 24-25).

Francis R. Roddy is the Chief of the Fitchburg Police Department. Four or five days before the men received their termination notices, he was observed seated in his unmarked car with a Sergeant Pelletier near the picket line at City Hall. They sat in the car about twenty minutes. They would look at an individual and the Chief would appear to jot something down. Pelletier was seen pointing at individuals. A cruiser would go by beeping its horn and the Chief would write. (4 T. 21; 4 T. 72).

On the 15th or 16th of June, 1974 a patrolman by the name of Arthur J. DeTomasso received a call from one Sergeant Tossis, who was the officer in charge of the first relief. Sergeant Tossis told Officer DeTomasso to get Quinn off the picket line. Officer DeTomasso communicated the message to Quinn (3 T. 6 through 8). Quinn subsequently had a conversation with Aiesi as the latter arrived at the picket line to perform picket duty. Quinn told Aiesi he had heard that if any probationary or provisional officer were to picket they would be fired. Quinn indicated to Aiesi that he had heard that the word came from Sergeant Tossis, and that is was "straight from Mr. LeBlanc's office" (3 T. 106; 108-109). At that point Aiesi got into his car and left. (3 T. 109).

Five or six days later, on June 21, 1974, Mayor Bray wrote a letter to the Chief of Police, the body of which is quoted below:

Dear Chief Roddy:

Please be advised that effective June 30, 1974 the employment of the following police officers are terminated.

Paul A. Aiesi
John J. Murray
Francis E. Quinn

⁵All three dischargees commenced work as police officers in Fitchburg in 1971.



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These men, in my judgment, do not fulfill the qualifications for appointment as permanent police officers for the City of Fitchburg.

Very truly yours,
s/Hedley Bray
Hedley Bray
Mayor

(Petitioner's Exhibit 8)

Chief Roddy was summonsed to LeBlanc's office to pick up the letter, which he did the same day (3 T. 27; 2 T. 6 through 8). Roddy returned to the police station, and after reading the letter he researched the Civil Service laws relative to dismissals. He then telephoned LeBlanc and informed him that they would have to be more specific as to the reasons for termination (2 T. 9-11; 3 T. 28). Roddy then prepared three more specific notices of termination, (one for each man) and brought them to LeBlanc's office (3 T. 31; 3 T. 37). The letter of the Mayor to Chief Roddy was attached to each one (3 T. 33). LeBlanc took the letters out to Mayor Bray's farm, and the Mayor signed them (3 T. 35 & 38). Le Blanc then turned the letters over to the Chief of Police (2 T. 25) and the Chief informed each officer of his termination (3 T. 26).

The letter of termination for each police officer is quoted below:

EXHIBIT 4

June 21, 1974

Officer Francis Quinn
917 Ashby State Road
Fitchburg, Mass.

Officer Quinn:

As indicated in my letter of June 21, 1974 to Chief Francis R. Roddy (copy attached) your services will be terminated as of June 30, 1974.

Due to your adverse conduct on or about the 2nd week of November, 1973 which resulted in an Official Reprimand on December 10, 1973 for conduct unbecoming an officer, Rule 15, Section 16 (I).

This adverse conduct being that Officer Quinn, while in the performance of his duty, did stop a female operator and that Officer Quinn did subsequently arrange a nocturnal meeting with this female person and did so meet with her in the early morning hours thus acting in such a way that could lead to discredit to himself and to the department which he serves.

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There is cause to find that Officer Quinn was in neglect of duty, Rule 15, Section 16 (c) in that he failed to report his activities to his superior officer either by formal or informal reports.

Very truly yours,
s/Hedley Bray
Hedley Bray
Mayor

EXHIBIT 7

June 21, 1974

Officer Paul Aiesi
11 Railroad St.
Fitchburg, Mass.

Officer Aiesi:

As indicated in my letter of June 12, 1974 to Chief Francis R. Roddy (copy attached) your services will be terminated as of June 30, 1974.

On December 7, 1973 you were given Punishment Duty for the following reasons:

1. That on or about 0500 hours on the 1st of December 1973 while on duty in unit 1301, you parked the unit and fell asleep, stating that you put your head back because you were tired and blacked out.
2. That on or about 0201 hours on the 1st of December 1973 while on duty in unit 1301, you were warned by the street supervisor, Sgt. Hamel regarding your slow response time on a missing girl complaint, as it took six (6) radio transmissions to reach you, and you were not on any other assignment.
3. That on or about 0530 hours you reported that your radio transmitter would not work, and that you tried to push the wire back. An inspection of this unit by the Street Supervisor, Sgt. Hamel, indicated that the thumb screw holding this cable was loosened, which could be construed that the equipment was tampered with.
4. That you were previously given a warning regarding your conduct as a police officer in an incident in Ashby.



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In addition to the above specifications, your conduct was unbecoming an officer, you were doing other acts contrary to good order and discipline and were in neglect of duty, in violation of Rule 15 section (c), (1) and (s) of the Rules and Regulations of the Police Department of the City of Fitchburg.

Very truly yours,
s/Hedley Bray
Hedley Bray
Mayor

EXHIBIT 6

June 21, 1974

Officer John J. Murray, III
36 Highland Ave.
Fitchburg, Mass.

Officer Murray:

As indicated in my letter of June 21, 1974 to Chief Francis R. Roddy (copy attached) your services will be terminated as of June 30, 1974.

Due to the lack of stability in your personal life the indications are that you would not be able to perform the duties of a permanent Police Officer.

Very truly yours,
s/Hedley Bray
Hedley Bray
Mayor

After reading his notice of termination, Murray asked the Chief "Why? I haven't done anything wrong." The Chief responded "I had nothing to do with it, its the Mayor's doing." Murray asked "Have I been a good police officer?" The Chief responded "yes, you have. I have nothing to do with it, but I couldn't say anything."

Murray then complained to the Civil Service Commission about the inadequacy of the reason contained in his letter of termination. (4 T. 5). He was later summoned to the office of Raymond LeBlanc, and a conversation ensued in that regard. (3 T. 39; 4 T. 9-10). LeBlanc informed Murray that there was not enough information in the July 21st letter of termination, but that the City could come up with more information if required, and that if they were to do so, it might hurt Murray's chances of reemployment. Murray denied involvement in extra-marital activity, and, in substance, challenged them to do so. (3 T. 39; 4 T. 9-10). Whereupon, on July 10, 1974, the Mayor sent Murray the following additional notice of termination:



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EXHIBIT 5

July 10, 1974

Officer John Murray, III
36 Highland Ave.
Fitchburg, Mass.

Officer Murray:

You are hereby notified that you are terminated effective
July 12, 1974 for the following reasons:

1. Failure to pass the most recent Civil Service examination taken by you for appointment of the Fitchburg Police Department.
2. Instability in your personal life, effecting your judgment and capacity to perform your duties as a Police Officer.
3. Involvement in extra-marital relations during the period of your appointment to the Department, as reported to the Department and the City by your wife and others and admitted by you to the Chief of Police and to the Personnel Director of the City of Fitchburg on various occasions during this period.
4. Conduct unbecoming a Police Officer in violation of the Rules and Regulations of the Fitchburg Police Department in regard to the items indicated above.
5. Having admitted the events in Paragraph 3, as described, this officer later denied such events occurred.

s/Hedley Bray
Hedley Bray
Mayor

Mayor Bray did not terminate any other city employees during his current term. I T. 18. In his previous administrations he had never terminated any member of the police department. I T. 63. Membership of the police department included seven or eight provisional police officers during the times relevant to these consolidated cases. None of the provisional officers participated in the picketing. Although encouraged to picket by the union president the provisional employees stated they were afraid they would be fired. 4 T. 31, 39-40. No provisional officers were terminated. With the exception of Aiesi-Quinn, and Murray all employees who participated in the picketing enjoyed

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civil service protection, and could only be fired for "cause". G.L. c.31, sec. 45.

The personnel records of the three men encompass the period from October and November of 1971 up to the time of discharge.⁶ In general, the records disclose (in the case of Aiesi and Murray) a typical progression from an inexperienced "rookie" officer to a more seasoned policeman. Quinn's record was similar, but showed outstanding performance upon several occasions. On February 22, 1972 former Mayor Carleton E. Blackwell sent a letter of appreciation to Chief Roddy which was placed in Quinn's personnel records. On March 3, 1972 Chief Roddy gave him a written letter of commendation for solving breaks in a jewelry store and a sporting goods store. On May 14, 1973 he again received an official commendation from Mayor Blackwell for guiding several occupants of a house fire to safety at his own personal peril. He later received a commendation from the Massachusetts House of Representatives for bravery displayed at that fire.

Also in the files are the 1974 evaluation reports of the three men by Sergeants Hamel and Gaetz, who directly supervised the officers. Aiesi's letter of termination (heretofore set forth as Petitioner's Exhibit 7) is copied almost verbatim from a letter to him from Chief Roddy, dated December 7, 1973, which imposed 40 hours of punishment duty upon him for the infractions stated. Aiesi's conduct as a police officer since that punishment, as reflected in his sergeants' evaluation reports, is outstanding. Both sergeants unequivocally recommend him for appointment to the permanent position of patrolman. An evaluation of Aiesi by Lieutenant Richard L. Lambert, dated February 10, 1974, indicates his attitude is "improving", and describes him generally as a good police officer.

Murray's personnel file contains 1974 evaluations from Sergeants Hamel, Gaetz and Pelletier, and from Lieutenant Lambert. The reports of the four superior officers in regard to Murray are consistent. All describe him as a generally "good" police officer, although they note a few instances where improvement was warranted. Sgt. Gaetz recommended him for permanent appointment. Sgt. Hamel indicated in an evaluation report that "if he continues as he has demonstrated this past month, I would have no reservations in recommending him permanently for the job." Sgt. Pelletier describes him as a generally good police officer, and he indicates an awareness of Murray's domestic problems. Pelletier concludes that "This officer is still young and with a bit of maturity I think he deserves a chance and can be an asset to the department." Lt. Lambert's evaluation shows Murray's performance to be generally "good" or

⁶ Murray first became a police officer in Fitchburg in October, 1971, and Aiesi and Quinn joined the force in November, 1971. Their personnel records were accepted into evidence. Each record is approximately an inch thick.



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"improving", while noting a "carefree attitude" and that he could benefit from training relative to the General Laws.

On August 30, 1973⁷ Quinn was one of two officers selected from a group of 15 volunteers to receive assignment as a police dog handler. A local philanthropist had given two canines to the City Police Department at a cost of approximately \$1400 each. (4 T. 50-51). Quinn was given a course in dog handling, kept the dog with him at home when he was off duty (4 T. 74), and, it appears, most of the time while he was on duty. A general order was issued by the department which indicated that dog handlers were not to handle motor vehicle accidents, due to danger involved in having the dog present. (4 T. 51). In their 1974 evaluations of Quinn, Lt. Lambert and Sgts. Gaetz and pelletier express concern that he may have slipped somewhat in his performance due to his having special assignment as a dog handler, and indicate that his specialized assignment might have an adverse effect upon his development as a well-rounded police officer. Nevertheless, all three of the sergeants and Lt. Lambert rate Quinn as a fair to good police officer.

Captain Bernard J. Keenan, who supervised the training of the three men testified regarding the performance of the three officers that he "found them as rookie police officers doing their job." There were times when he noted things they could improve upon, but "They did their job."

The City predicates Aiesi's discharge upon his activities during a single day. On December 1, 1973, with the permission of the department, he had worked two eight hour shifts within a 24 hour period. It was during the second shift that his response time was slow and he became "tired and blacked out." He was given a written reprimand along with 40 hours punishment duty. The incident was not mentioned again until the letter of termination on June 21, 1974.

Likewise, Quinn's transgression consisted of stopping a female motorist in November, 1973 and engaging in a nocturnal meeting with her thereafter.⁸ After full investigation by his superiors he was given an Official Reprimand. There is no suggestion that he was considered for discharge at that time.

The "lack of stability" in Murray's personal life stems from the fact that he separated from his wife in July of 1973 (4 T. 9). Murray's wife visited Chief Roddy and complained that "he had been running around with another woman." The Chief had a talk with Murray, and counseled him to go

⁷ The date is reflected in Quinn's personnel records.

⁸ There is evidence sufficient to give the benefit of the doubt to Quinn, who may have been acting within his line of duty, if lengthy testimony is to be credited. However, we will not substitute our judgment for his superiors who saw fit to give him an official reprimand.



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back to his family. Murray did so, but again left his wife (1 T. 98-99). Murray denied telling anyone that he was having "an affair" with another woman (4 T. 11), or that he was "having extra-marital relations" (4 T. 12 & 13). At the time of the hearings before the Labor Relations Commission, Murray was still separated from his wife, and she had filed for divorce (4 T. 24). When Chief Roddy was questioned concerning the incidence of divorce among his police officers, he responded that he "wouldn't be surprised" if he were told that the divorce rate was as high as 70 percent. (1 T. 99).

Murray had taken the civil service examination for police officer and was on the civil service list when he was appointed to the police department in 1971. (4 T. 2) Sometime in September of 1972 the civil service list for police officers was frozen by Judge Wyzanski of the U.S. District Court. (4 T. 3) In 1972 Murray took a second civil service examination for the purpose of getting on a new civil service list if the Court ruled that the earlier list was invalid. Murray did fail the second examination. However, the first civil service list was subsequently reactivated. Murray spoke to Chief Roddy concerning whether his failing the second examination would have any bearing upon his subsequent appointment. The Chief responded "None whatsoever" because he was on the first list (4 T. 7).

CONCLUSIONS AND OPINION

Officers Aiesi, Quinn and Murray claim that their discharge from the Fitchburg Police Department was a result of their participation in the picketing of City Hall, and other protected, concerted activity on behalf of the IBPO. The City contends that each was terminated for legitimate cause, as stated in the letters of termination. The task of the Commission is to determine on the basis of the record and the fair inferences to be drawn therefrom⁹ the "real" or "true" motivation of the employer. If the three officers would have been retained but for their activity on behalf of the union the law is violated by the discharge, though legitimate reasons for termination may have existed.¹⁰ If, on the other hand, the employer's action was unrelated to the

⁹"[T]he Employer's motive is essentially a question of fact, to be determined by the Commission on all the evidence -- direct and circumstantial -- including such circumstantial factors as 'coincidence of union activity and discharge'". Town of Halifax, MUP-2059, 1 MLC 1486 (6/30/75) and cases cited therein.

¹⁰City of Boston (Ronald J. Murphy), MUP-728, 1 MLC 1271 (2/18/75); Town of Halifax, *supra*.
Mount Wachusett Community College, SUP-53, 1 MLC 1496 (6/30/75); Saint Elizabeth's Hospital v. Labor Relations Commission, Mass. App., 321 N.E. 2d 837, 88 LRRM 2422, 1 MLC 1248 (1/16/75) *en'g* UP-2222 (8/17/73); cf. NLRB v. Symons Manufacturing Company, 328 F.2d 835, (7th Cir. 1964); Norge Division, Borg-Warner Corp. 155 NLRB 1087 (1965); Erie Sugar Co., 205 NLRB No. 45, 87 LRRM 1162 (1974); NLRB v. Princeton Inn Co., 424 F.2d 264, 73 LRRM 3002 (3rd Cir. 1970).



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protected activity of the individuals we will not substitute our judgement for that of the employer in the determination of whether discharge was warranted for the transgressions of the three officers.¹¹

Other issues in the case are insubstantial. To the extent that the Employer contends that a probationary employee may be discharged for any reason (TR I, p.2), including retaliation for having engaged in protected activity, we reject the argument out of hand. The definition of "employee" in the Law is broad and all encompassing.¹² Save for "managerial" and "confidential" employees, all individuals with whom the Commonwealth stands in the relationship of employer¹³ are within the ambit of the act.¹⁴ Thus, the Commission has applied the provisions of the law to non-classified employees,¹⁵ non-tenured teachers,¹⁶ part time employees,¹⁷ summer employees,¹⁸ employees hired under the provisions of the Emergency Employment Act¹⁹ and others. The

¹¹Middlesex County Engineering Department, MUP-472 (1973); Watuppa Oil Co., CR-3466, UP-2260, 2 MLC (7/18/75).

¹²"'Employee' or 'public employee', any person employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer, and other managerial and confidential employees, and members of the militia or national guard and employees of the Commission." G.L. Ch. 150E, sec. 1.

¹³As opposed to, for example, independent contractors.

¹⁴The language of the Supreme Judicial Court in dealing with the predecessor statutory provisions is instructive. "All municipal employees are embraced in the 1965 code 'whether or not in the classified service of the municipal employer' except elected officials and certain others." Town of Dedham v. Labor Relations Commission, ___ Mass. ___, 312 N.E. 2d 548, 554 (1974).

¹⁵Id.; Town of Townsend, MUP-298 (10/6/72).

¹⁶Mount Wachusett Community College, supra.

¹⁷Stoughton School Committee, MUP-276 (7/10/72) (denied enforcement on other grounds).

¹⁸City of Gloucester, MCR-2000, 1 MLC 1170 (10/11/74).

¹⁹Town of Halifax, supra.



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charging party in City of Boston (Ronald J. Murphy), supra was a probationary employee, as were the discriminatees in St. Elizabeth's Hospital, supra. As probationary employees are clearly within the definition of "public employee", they fall within the protection of sections 10(a)(1) and (3) of the Law.

Nor do we entertain any serious doubt that the picketing of City Hall, which the officers claim resulted in their discharge, constitutes protected activity within the meaning of the Law. Section 2 of the Law, modeled after Section 7 of the Labor Management Relations Act,²⁰ describes the basic rights of employees:

Employees shall have the right to self-organization and the right to form, join and 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.

Peaceful picketing in support of bargaining demands has long been considered lawful concerted activity under the LMRA and similar statutes, and, in certain circumstances may be constitutionally protected.²¹ Unless carried on in an unlawful manner, or for some unlawful end, such activity is protected by Chapter 150E. The picketing at Fitchburg City Hall was in support of the bargaining position of the union, an undeniably "lawful" end. In spite of certain instances of clearly improper tactics²² the picketing,

²⁰29 U.S.C. sec. 141-67, 171-97.

²¹Case law and commentary in this area are abundant. For an excellent general discussion of economic picketing, consumer picketing, and recognition picketing, see Morris, "The Developing Labor Law" (1970). For collected materials on the unique problems of picketing in connection with public employee labor disputes see Smith, Edwards, and Clark, "Labor Relations Law in the Public Sector" (1974) at 691-95.

²²In characterizing the picketing and related activities as "protected" by section 2 of the Law we indicate no approval of other activity, clearly related to the labor dispute between the Mayor and the police union. Thus, we entertain no doubt that the Mayor accurately described events such as letting the air out of tires, surveillance, and the threatening placement of earthmoving equipment near the Mayor's property. We are further persuaded that such actions were intended to coerce the City into accepting the position of the union. However, on the face of this record we may not attribute these actions to any of the three officers discharged. Nor can we conclude that the union as an organization condoned or sponsored such activities. If such a relationship were demonstrated, we might well have concluded that the activity was not protected. See note 23, *infra*. Crown Central Petroleum v. NLRB, 430 F.2d 724 (5th Cir. 1970).



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while strident and occasionally coarse, "retained its protected character."²³

We conclude from the foregoing that, if the reason for the discharge of Aiesi, Quinn, and Murray was their participation in this protected activity, the discharges are illegal. The overwhelming weight of the evidence in this case supports this conclusion.

That the employer had knowledge of the participation of the three probationary employees in the picketing is patent. The mayor and the personnel director had to cross the picket lines daily. All three discharges were frequently on the lines. The mayor himself addressed Quinn and Aiesi on more than one occasion, indicating that he had a long memory and would not forget their participation. The Chief of Police was also observed surveying the picket line, and taking notes.

We also note the demonstrated animus of the mayor toward the union. Angered by both the picketing and other activity he considered related to the labor dispute he frequently expressed hostility toward the union. "[N]o union is going to tell me how to run my city." "Don't interfere with my city and you better watch your step lads." "I'll do things when I want to the way I want to." "[Y]ou bastards, I'm going to get even with you." Such clear threats of retaliation lead to the clear inference that the discharges of Quinn, Aiesi, and Murray were because of the participation in the labor dispute, not for the reasons stated.²⁴

²³Harwich School Committee, MUP-720, 2 MLC (8/26/75). Cf. Capitol Rubber and Specialty Co., 82 LRRM 1321, 201 NLRB No. 95 (1973) (where one striker who had engaged in name calling and had followed a non-striker was ordered reinstated; another, who engaged in obstruction and threats of violence lost his right to reinstatement). As the Board stated in Longview Furniture Co., 110 NLRB 301, 304, 35 LRRM 1254 (1954):

Although the Board does not condone the use of abusive and intemperate language, it is common knowledge in a strike where vital economic issues are at stake, striking employees resent those who cross the picket line and will express their sentiments in language not altogether suited to the pleasantries of the drawing room or even to courtesies of parliamentary disportation. Thus, we believe that to suggest that employees in the heat of picket line animosity must trim their expression of disapproval to some point short of the utterances here in question, would be to ignore the industrial realities of speech in a workday world and to impose a serious stricture on the exercise of their rights under the Act.

²⁴The charging party offered testimony, which, if believed, indicates that the labor relations counsel for the City twice indicated to the Union president that he had some "vulnerable" people. We need not resolve the dispute at this point as we are satisfied that additional evidence of animus would be surplusage.



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In this context of resentment toward the union and hostility, circumstantial evidence leads inexorably to the conclusion that the discharges were retaliatory. Quinn, Aiesi, and Murray were the only probationary employees in the Police Department. None of the "vulnerable" employees who did not participate for fear of losing their jobs (the provisional officers) were fired. All of the probationary employees were fired. The conclusion to be drawn from these facts is clear. The Mayor was angered by the activity of the union. He threatened to retaliate against the union, and did in fact retaliate against the most vulnerable members of the union.

These conclusions are strengthened by other evidence in the record. The decision to terminate the employees was made first by the Mayor, who directed the police chief to fire them. Neither the Chief, nor any other official in the department recommended the termination of any of the officers.²⁵ The Chief informed the personnel director that specific reasons would have to be given to justify the termination. These reasons were then supplied, well after the decision to terminate had been made. It is apparent from this sequence that the reasons given to the three officers were not the reason for their termination, but were merely an attempt to justify a decision already made. Cf. Town of Halifax, supra at 14-15, 1 MLC at 1492. Whether or not the after-supplied reasons would have justified discharge, the law is violated since the "real" reason was retaliation for union activity.²⁶

The timing of the termination decision also supports the inference of unlawful motivation. Each of the officers had been on the department for approximately two and one half years at the time of their termination. The incident for which Quinn was allegedly fired occurred in November of 1973, a full seven months prior to the decision to discharge him. Aiesi's "offense" preceded his termination by six months. The only significant intervening event was the vigorous participation in protected activity. The decisions to terminate closely followed the protected activity. The only rational conclusion which may be drawn is that it was the union activity, not the resurrected offense of the prior year, which motivated the Mayor's decision. See, Town of Townsend, supra; Mount Wachusett Community College, supra. (6/30/73). In Town of Halifax, supra the Commission noted:

The direct evidence of a discriminatory motivation is strongly supported by circumstantial evidence, including the timing of the termination -- i.e., coincident with [the] filing of the... grievance and several months after the events upon which the termination was allegedly predicated. Indeed the stateness of the charges alone ... warrants the inference that previously condoned "transgressions" were resurrected by the Employer as a vehicle for ridding itself of a vocal union activist.

²⁵The decisions to terminate were "the Mayor's doing" according to Chief Roddy. "I had nothing to do with it."

²⁶See note 10, supra.



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To the persuasive evidence already discussed we add the fact that the reasons advanced by the City to support the discharge simply fail to persuade. The records of the officers in question appear to be more than adequate to justify their retention. In several years of service Quinn and Aiesi had but one black mark. Murrays "offenses" did not even relate to his on duty conduct. Against these defects are the generally favorable (and in some cases outstanding) recommendations of superior officers. We are not persuaded that these offenses, in context, are such as would normally justify termination of employees with considerable honorable service behind them. While it is not the function of the Commission to substitute its judgment for that of the employer, we will draw the inference, when warranted by the facts, that the explanation for a minor offense resulting in a draconian penalty is that the true motivation was other than that stated. See Mount Wachusett Community College, supra; Burbank Hospital, UP-2178 (1972).

The determination of the motivation of the employer is a question of fact which must be resolved on the basis of the record as a whole. Ronald J. Murphy, supra. In making such judgments the Commission will draw reasonable inferences from the facts. The record in the instant case demonstrates knowledge of protected activity, animus towards the union, threats toward the discharged employees, and compelling circumstantial evidence that the employer was motivated by a desire to undermine the union. We unanimously conclude that the termination of Officers Aiesi, Quinn, and Murray are in violation of Section 10(a)(1) and (3) of the Law, and that it is the responsibility of the Commission to make these employees whole for their losses. Town of Townsend, supra; Saint Elizabeth Hospital v. Labor Relations Commission, Mass., 321 N.E. 2d 837, 88 LRRM 2422, 1 MLC 1248 (1/16/75), aff'g UP-2222 (8/17/73). Mount Wachusett Community College, supra.

ORDER

Based upon the foregoing findings of fact and our conclusions drawn therefrom, we hereby order:

1. That the City of Fitchburg, through its Mayor or his duly authorized representatives, immediately offer Paul A. Aiesi, Francis E. Quinn and John J. Murray, III full reinstatement to their former positions in the Police Department, without prejudice to any rights and privileges formerly enjoyed by them.
2. That the City of Fitchburg, through its Mayor or his duly authorized representative, make whole the said Paul A. Aiesi, Francis E. Quinn and John J. Murray, III, by payment to them of a sum of money equal to that which they would have earned as wages from the date of their termination to their date of reinstatement, plus interest at the rate of 6 per annum, less their net earnings during said period.
3. The City of Fitchburg, through its Mayor or his duly authorized representative, shall preserve, and upon request, make available to the Massachusetts Labor Relations Commission or its agents for



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examination and copying, all records necessary for the determination of the amount of back pay due under this order.

4. The City of Fitchburg, through its Mayor or his duly authorized representative, shall immediately post upon the premises of the Fitchburg Police Department, in a place where policemen usually pass or congregate, a full copy of this decision and order, and leave the same posted for a period of thirty days.
5. The City of Fitchburg, through its Mayor or his duly authorized representative, shall notify the Commission in writing, within 14 days from receipt of this decision and order, what steps it has taken to comply therewith.

ALFONSO M. D'APUZZO
Executive Secretary

ALEXANDER MACMILLAN, Chairman

MADLINE H. MICELI, Commissioner

HENRY C. ALARIE, Commissioner

You are hereby advised of your right to appeal this Decision and order under the provisions of General Laws Chapter 30A, Section 14 or Chapter 150A, Section 6(f) as amended.

