
**COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF
ADMINISTRATION AND MCOFU, SUP-3557 (8/12/94). DECISION ON
APPEAL OF ADMINISTRATIVE LAW JUDGE'S DECISION.**

65.91 request for representation at disciplinary interview
92.51 appeals to full commission

Commissioners Participating:

William J. Dalton, Chairman
William G. Hayward, Jr., Commissioner
Claudia T. Centomini, Commissioner

Appearances:

Robert J. Schilling, Esq. - Representing the Commonwealth of
Massachusetts, Commissioner of
Administration

Matthew E. Dwyer, Esq. - Representing the Massachusetts
Correction Officers Federated Union

**DECISION ON APPEAL OF
ADMINISTRATIVE LAW JUDGE'S DECISION**

On December 29, 1992, Administrative Law Judge Robert B. McCormack, Esq. issued his decision in this matter, concluding that the Commonwealth of Massachusetts, Commissioner of Administration (Commonwealth) had violated Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by restricting the role of a Massachusetts Correction Officers Federated Union (Union) representative during an investigatory interview of a bargaining unit member, thus effectively denying the employee Union representation.¹

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The administrative law judge's decision is published at 19 MLC 1619 (1992).

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The Commonwealth filed a timely appeal on January 8, 1993, and a supplementary statement on January 25, 1993. The Union filed its supplementary statement on March 4, 1993. Neither party challenges or objects to any of the administrative law judge's findings of fact. After considering the record before us, we reverse the administrative law judge's conclusion that the Commonwealth violated the Law.

Findings of Fact²

We adopt the administrative law judge's findings of fact and summarize the facts as follows.³

The Union is the certified exclusive collective bargaining representative for all employees in statewide bargaining Unit 4, including Correction Officers (C.O.) Michael Phaneuf (Phaneuf) and Donna Robinson (Robinson) employed by the Department of Corrections (DOC) at the Southeastern Correctional Center at Bridgewater, Massachusetts. In July 1990, Captain Richard Daugirda (Daugirda), an agent of the Commonwealth, conducted an investigation of a June 9, 1990 incident involving Correction Officer Phaneuf. Since the Commonwealth's investigation focused on Phaneuf's alleged misconduct, as observed and reported, both orally and in writing, by Correction Officer Robinson, Daugirda interviewed Robinson on July 20, 1990. Had the Commonwealth discovered any inaccuracies or misrepresentations in Robinson's written report, it could be grounds for disciplinary action. Robinson's request for union representation during Daugirda's interview was granted.⁴

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Neither party contests the Commission's jurisdiction.

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The record on which the findings of fact are based consists of the Commission's November 14, 1991 Complaint of Prohibited Practice, the Commonwealth's answers to the Commission's Complaint and two documentary exhibits, a Memorandum from Captain Richard Daugirda to Superintendent Ronald Amaral, RE: Investigatory Hearing -- C.O. Michael Phaneuf and a September 12, 1990 letter from Superintendent Ronald Amaral to Michael Phaneuf.

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Daugirda's interview of Robinson consisted of eight questions surrounding the Paneuf incident.⁵ Union representative Poh was present during the entire interview.⁶

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In its answer to the Commission's November 14, 1991 Complaint of Prohibited Practice, the Commonwealth admitted that at the commencement of the interview, Jerel Poh, the Union representative present, asked Captain Daugirda, in Robinson's presence, if the interview could result in any discipline for Robinson. In response, Captain Daugirda stated that he could not guarantee that it would not.

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Employer Exhibit 1, Daugirda's Memorandum to Superintendent Ronald Amaral, contains the following script of Daugirda's questions and Robinson's responses:

- Q. Did you see C.O. Phaneuf sleeping on C-1?
A. I saw him lying on [the] bed stretched out. I did not see his eyes because he had sunglasses on.
- Q. Did he appear to be in pain?
A. He could have been but he didn't appear to be.
- Q. Was the cell door open?
A. Yes.
- Q. Did you report to Sgt. Magner what you saw?
A. I told Sgt. Magner to look into [the] cell.
- Q. Did you tell Lt. Hambly what you saw?
A. I told Lt. Hambly everything I wrote on my report. I told him I observed Phaneuf asleep in a cell on C-1 approximately noon time.
- Q. Your reported stated that he was sleeping and you now say lying in a bed?
A. I am not a doctor but he did appear to be sleeping.
- Q. Did you yell to Phaneuf or speak to him?
A. No.
- Q. When did you report it to Sgt. Magner?
A. A few minutes later.

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Poh was also the Union representative present during Daugirda's July 19, 1990 interview of Phaneuf. By letter dated September 12, 1990, Superintendent Ronald Amaral suspended Phaneuf for five (5) days.

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After Daugirda completed his questioning of Robinson, he then asked if she wished to add any information related to the Phaneuf incident. After meeting outside the interview room, Robinson and Poh returned and Robinson indicated that she wished Poh to speak on her behalf. Poh then started questioning Robinson about the Phaneuf incident, but Daugirda refused to permit Poh to question Robinson. Rather, Daugirda informed Poh that he could meet with Robinson outside the interview room, discuss any questions with her, and return to the interview to give a summation. Poh objected.⁷ After speaking with other DOC personnel, Poh returned to the interview, restated his objections to the procedure, and provided a summation of Robinson's role in the Phaneuf incident.⁸

Opinion

The issue on appeal is whether the Commonwealth interfered with, restrained or coerced Robinson in the exercise of her rights guaranteed by Section 2 of the Law⁹ by

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Daugirda's Memorandum to Superintendent Ronald Amaral, Employer Exhibit 1, summarizes this part of the interview as follows:

C.O. Robinson was offered to add any information related to this incident she wished. Caucus with C.O. Poh. She wished C.O. Poh to speak on her behalf. C.O. Poh began to interrogate C.O. Robinson. I explained to C.O. Poh that questioning Robinson would not be allowed. I told him he could leave and discuss any questions he had of her and re-enter the hearing and give a summation. C.O. Poh objected to this and I called a recess.

The record contains no information about the substance of the questions initiated by Union representative Poh.

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Daugirda's Memorandum to Superintendent Ronald Amaral, Employer Exhibit 1, summarizes Poh's statement as follows:

C.O. Poh in summation stated that C.O. Robinson did nothing to get C.O. Phaneuf's attention, then more weight should be placed on appeared to be sleeping than sleeping as the report states. He also stated that he felt C.O. Robinson had notified her supervisor and did everything correct. Except for the word sleep in the report it is accurate and factual.

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denying Union representative Poh the opportunity to question Robinson during the course of an interview, which Robinson reasonably believed would result in disciplinary action against her.¹⁰ The administrative law judge concluded that Robinson was not accorded her right to effective Union representation because Poh's role during the investigatory interview was restricted. On appeal, the Commonwealth asserts that the administrative law judge's conclusion is not supported by the evidence, nor is the result required by the application of federal precedent.

Our assessment of whether the Commonwealth violated the Law, requires us to examine the role of a union representative during the course of an investigatory interview and the extent to which a public employer may lawfully regulate that role. In Commonwealth of Massachusetts, 9 MLC 1567 (1983), the Commission referenced the limited nature of the union's function during investigatory interviews to support its conclusion that the Union's interest in participating in an investigatory interview is derivative of, and dependent on, the employee's proper assertion and exercise of his or her Section 2 rights. Commonwealth of Massachusetts, 9 MLC at 1571. Citing directly from the United States Supreme Court's ruling in NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the Commission stated:

The task of the union representative is to 'clarify the facts,' to 'elicit favorable facts,' and to otherwise assist an employee 'who may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating

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

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Although the administrative law judge, in his statement of the case, framed the issue somewhat differently, we believe this is the issue contemplated by the Commission in its November 14, 1991 Complaint of Prohibited Practice.

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factors.' 420 U.S. at 259, 88 LRRM at 2693. The employer need not bargain with the union representative at an investigatory interview; neither may the union representative interfere with legitimate employer prerogatives by virtue of its participation. 420 U.S. at 258, 259, 88 LRRM at 2693. Commonwealth of Massachusetts, 9 MLC at 1571.

To this framework, we add the Supreme Court's admonition that the "employer is free to insist that he is only interested at that time, in hearing the employee's own account of the matter under investigation;" and, the union representative's presence "need not transform the interview into an adversary contest." NLRB v. Weingarten, Inc., 420 U.S. at 260, 263, 88 LRRM at 2692, 2693.

Faced with similar issues, the National Labor Relations Board (Board), interpreting the principles enunciated by the Supreme Court in Weingarten, seeks to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role of a union representative present in an interview. New Jersey Bell Telephone Co., 308 NLRB 277, 279, 141 LRRM 1017, 1020 (1992) (Union representative, by advising an employee to answer questions only once, and by persistently interrupting and objecting to the employer's questioning, exceeded the permissible bounds of Weingarten.), citing, southwestern Bell Telephone Co., 251 NLRB 612, 613, 105 LRRM 1246, 1247 (1980), enf. denied, 667 F.2d 470, 109 LRRM 2602 (5th Cir. 1982) (Contrary to the Board, the Court held that the employer's insistence that the union representative not interfere with its questioning of the employee was permissible under Weingarten.); Texaco, Inc., 251 NLRB 633, 634, 105 LRRM 1239, 1243 (1980), enfd. 659 F.2d 124, 108 LRRM 2850 (9th Cir. 1981). (Employer, by refusing to permit the union representative to speak during the course of an investigatory interview did not afford the employee the representation to which he was entitled.)

As we recognized in Commonwealth of Massachusetts, 9 MLC 1567 (1983), in cases that require an examination of the role of an employee's union representative during the course of an investigatory interview, we will balance the right of the employer to investigate alleged employee misconduct and the right of an employee to the assistance of a union representative. Ultimately, the issue to be determined is whether the employer's conduct unlawfully interfered with, restrained or coerced the employee in the exercise of his or her rights guaranteed under Section 2 of the Law.

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Turning now to the facts of this case, it is undisputed that the Commonwealth granted Robinson's request to have a Union representative present during the course of Daugirda's interview. It is also undisputed that, after Daugirda completed his questioning of Robinson, he offered Robinson the opportunity to meet with Union representative Poh and to provide further information. The narrow issue on appeal is whether by denying Poh the opportunity to question Robinson directly, the Commonwealth effectively denied Robinson the right to union assistance to which she was entitled.

Based on our review of the record, we decline to find that Daugirda's objection to Poh's direct questioning of Robinson effectively silenced or precluded Poh from assisting Robinson during the investigatory interview. Rather, we find that, by offering Robinson the opportunity to meet privately with Union representative Poh and to add any further information she desired, Daugirda provided Robinson with the assistance of her Union representative, an adequate opportunity to clarify disputed facts and to provide any further favorable facts as they related to Robinson's conduct.¹¹ In the totality of the circumstances, the Commonwealth's prohibition of the Union representative's direct questioning of Robinson, whom the Union was present to represent, is insufficient for us to conclude that the Commonwealth interfered with, restrained or coerced Robinson in the exercise of her rights guaranteed under the Law because the Commonwealth permitted Robinson an opportunity to have Poh fully and fairly represent her.¹²

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It is Robinson's statutory right to the assistance of a Union representative that is at issue here. Poh's presence during the investigatory interview was a result of Robinson's request, and his function was to assist her in clarifying her role in reporting the alleged misconduct of correction officer Phaneuf.

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Our decisions should not be viewed as forever precluding a Union representative from utilizing a question and answer format as a technique to assist a bargaining unit member during an investigatory interview. In each case presented for decision, the Commission will continue to carefully examine the facts in determining the respective rights and obligations of employees, employee organizations and employers.

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CONCLUSION

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, CHAIRMAN

WILLIAM HAYWARD, JR.,
COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER