
TOWN OF SOUTHBOROUGH AND KAREN TERRY, MUP-8521 (8/29/94).
DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

54.25 work shifts
54.4114 non-renewal
65.211 concerted activities -- "mutual aid or protection"
92.51 appeals to full commission
92.52 credibility determination on appeal

Commissioners Participating:

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

Appearances:

Amy L. Davidson, Esq. - Representing Karen Terry
Frederick A. Busconi, Esq. - Representing the Town of Southborough

**DECISION ON APPEAL OF
HEARING OFFICER'S DECISION**

Statement of the Case

On September 8, 1992, Robert B. McCormack, a duly designated hearing officer of the Labor Relations Commission (Commission), issued his decision in this case.¹ The hearing officer determined that the Town of Southborough (Town) violated Sections 10(a)(3) and (1) of M.G.L. c.150E (the Law) by not reappointing Karen Terry (Terry) because she had engaged in lawful, concerted activities on behalf of herself and other part-time dispatchers.

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The full text of the hearing officer's decision appears at 19 MLC 1318 (1992).

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The Town filed a timely notice of appeal, and both parties filed supplementary statements, which we have duly considered. We reverse the hearing officer's conclusion that the Town violated the Law for the reasons set forth below.

Findings of Fact²

We adopt the hearing officer's findings of fact with one modification as noted below and summarize the relevant facts as follows.

The Town hired Terry as part-time dispatcher in September 1983. She was subsequently appointed as a reserve police officer and served in both capacities until June 11, 1991 when the Board of Selectmen did not reappoint her.³

Terry testified that she met with some other part-time dispatchers "several times" to discuss perceived problems in the workplace. Terry could not identify the exact dates that these meetings took place but at least one meeting occurred in July of 1987.⁴

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The Town has made objections to the Hearing Officer's findings of fact. We have addressed in seriatim those objections to specific findings of fact made by the Hearing Officer.

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The town has argued that there is substantial evidence to justify overruling the hearing officer's credibility determinations, particularly with respect to Terry's testimony concerning what her motivations were when she made her complaints. We are not persuaded by the Town's argument and uphold the hearing officer's credibility determinations. See Town of Clinton, 12 MLC 1361, 1365 (1985).

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The Town objects to the Hearing Officer's finding that Terry met "several times" with fellow dispatchers, arguing that the evidence was insufficient to demonstrate that any meeting was held other than the one meeting in July 1987. We disagree. We find sufficient evidence to show that Terry discussed working conditions on more than one occasion with her fellow dispatchers.

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The perceived problems include: 1. Lack of any rules and regulations for dispatchers; 2. Insufficient training and the lack of a training manual to which the dispatchers might refer for guidance; 3. Lack of a standardized procedure concerning complaints made by police officers against dispatchers; 4. A desire that positions on the 4:00 p.m. to 12:00 a.m. shift be given to part-time dispatchers rather than full-time ones; 5. Inability of the dispatchers to enter data into the computer; and 6. Certain "out of control of behavior" on behalf of certain individuals.

On July 21, 1987, Terry sent two letters to Police Chief William Colleary (Chief Colleary) that alluded to some of the problems in the workplace which are described above. She later met with Chief Colleary to discuss these matters.⁵

In August 1987, Chief Colleary changed the shift schedule in a manner that reduced the number of shifts available to other part-time dispatchers. Terry complained to Chief Colleary about the change in schedules. Chief Colleary responded that he was "in charge of the schedules."

On or about November 4, 1988, Terry met with Chief Colleary and Janice Conlin (Conlin), an administrative assistant to the Board of Selectmen, and informed Conlin of her complaint concerning schedule changes. She then sent a letter dated November 7, 1988 to Conlin in which she reiterated her complaint.

On or about November 15, 1988, Terry met with the Board of Selectmen (Board) and complained about the changes in scheduling made by the Chief to the Board. At the Board's request, Terry put her complaints in writing in a letter dated November 21, 1988. That letter provided, in part:

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The Town objects to the Hearing Officer's failure to find that the problems involving the shift schedule and the use of the computer were resolved. We need not reach this issue because the focus of our inquiry is whether the Town chose not to reappoint Terry because she had participated in concerted protected activity, not whether the Town addressed the problems raised by Terry.

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Many of the inconsistencies in the rules do not even affect me directly, but they add to the fact that there is a lack of proper management. It affects me indirectly in that the morale is so bad that it fosters a difficult working environment. Having worked at the police department for five years, I have seen many ups and downs. However, I have never seen the attitudes of the officers as bad as they are now, and justifiably so. Some officers get medals, some officers get days off, and some officers get nothing, all for similar acts of good police work. Because of these inconsistencies, there is a definite affect on the quality of police work being performed.

...All these procedures I have had to take have taken up a great deal of my time, and has been a source of great frustration. I chose to pursue this further because I feel there is a need for the Administrators of the Town of Southborough to realize that there are serious problems with the police department.

Although I can only speak for myself, my concerns have been expressed by others in the department. It is my hope that a complete and confidential investigation be conducted in order to address and resolve the problems within the police department.

Not long after the meeting, the Chief posted "new procedures for dispatch shifts." Under the new procedures, overtime would be "open to full-time personnel by seniority first" and would then be made available to "part-time dispatchers by seniority, on a fair and equitable basis."

The National Association of Government Employees began representing full-time dispatchers for purposes of collective bargaining in 1989. Its contract with the Town provided that full-time dispatchers receive preference in performing all "open-shifts." In 1991, full-time dispatchers began to take advantage of this provision and, thus, Terry and other part-time dispatchers, who remained unrepresented, had their hours reduced.⁶

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The Town objects to the Hearing Officer's finding that the full-time dispatchers

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Terry questioned Chief Colleary about the reduction in the hours of part-time dispatchers and Chief Colleary told her to read the full-time dispatchers' contract. Upon his suggestion, Terry read the contract but differed with Chief Colleary on the meaning of the contractual provision pertaining to "open-shifts" and called Conlin about it in April of 1991. Conlin advised Terry to address her complaint in writing to Chief Colleary. In a letter dated May 10, 1991, Terry wrote as follows:

Dear Chief Colleary,

In the past, I have questioned you regarding the full-timers taking several open shifts, and your reply was that it is in their contract. After reading their contract, I see nothing in it that would prevent the four scheduled open shifts per week, to be called "part-time shifts" and thus be filled by part-time dispatchers. I contacted Janice Conlin with my concerns, and was told the procedure to follow would be to put my request in writing to you, and then to obtain a written response from you. If we could not come to some agreement the next step would be for me to send a letter to both the Personnel Board and the Board of Selectmen.

My reasons for requesting these shifts to be designated part-time shifts are several. My first reason is that when I was hired almost eight years ago, the shifts that were open due to the schedule were called part-time shifts and thus were filled accordingly. Secondly, in these tough financial times, it is ludicrous to allow a minimum of four overtimes (sic) a week, then part-timers are available. This is certainly a costly and unnecessary expenditure to the Town. Thirdly, safety is certainly an issue both from the standpoint of the full-timers working so many hours that they are unable to be at their peak performance, to the part-timer who may only work once every couple of months and lacks the experience.

6 (continued)

came to be represented in 1991. We agree that the Hearing Officer erred and change the findings of fact to reflect that the full-time dispatchers' first collective bargaining agreement came into effect in 1989. However, this change is not material to the Commission's decision because it is not determinative as to whether Terry engaged in lawful, concerted, protected activity.

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I hope that you will consider my request, and I will appreciate receiving your timely written response.

Thank you for your consideration.

Chief Colleary did not respond to the letter immediately because he was out of the office on vacation.

On June 11, 1991, Terry heard from another employee that she might not be recommended for her annual reappointment. She immediately telephoned Chief Colleary and inquired about her reappointment and he informed her that what she had heard was true. Terry attempted to persuade Chief Colleary to change his mind. In response, Chief Colleary essentially told Terry that she had not been happy in the department and he wanted a harmonious relationship with his employees. The conversation ended with Chief Colleary agreeing to reconsider his decision to not reappoint Terry to another term. On the evening of June 11, 1991, however, the Board of Selectmen voted not to reappoint Terry as a reserve officer and part-time dispatcher.⁷

Opinion

The issue presented in this case is whether the Town violated Sections 10(a)(3) and (1) of the Law by not reappointing Terry because she had engaged in lawful, concerted, protected activity. For the reasons set out below, we conclude that the Town did not violate the Law when it did not reappoint Terry.

The elements of a Section 10(a)(3) violation are: (1) that the employee engaged in

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At an undisclosed time (but well before the decision on Terry's reappointment), Chief Colleary discovered that 227 phone calls had been made from the police station to Terry's home over a four and one-half (4-1/2) month period. However, it is undisputed that the calls were made by another police officer who admitted his indiscretion. Terry did not instigate these calls and was never criticized for them. The phone call episode was not a factor in her non-reappointment.

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activity protected by Section 2 of the Law; (2) that the employer knew of this activity; (3) that the employer took adverse action against the employee; (4) that the employer's motive in taking this action was to penalize or discourage the protected activity. Town of Clinton, 12 MLC 1361, 1364 (1985); Boston City Hospital, 11 MLC 1065, 1071 (1984); City of Boston (Police Department), 18 MLC 1872, 1874 (1982). The charging party must produce evidence to support each of these elements to establish a *prima facie* case.

Section 2 of the Law requires that Terry demonstrate that she engaged in "concerted" activity for the activity to be protected. The Commission has, however, adopted the so-called "Interboro" doctrine which further defines what constitutes "concerted" activity. Town of Halifax, 1 MLC 1486 (1975); Town of West Springfield, 8 MLC 1041, 1047 (1981). The "Interboro" doctrine provides that an individual grievance under a collective bargaining agreement is concerted, protected activity although only one individual may be affected by the grievance. Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966), *enfd.*, 399 F.2d 495, 67 LRRM 2083 (2nd. Cir. 1967).

The Charging Party contends that the principles of the "Interboro" doctrine apply to the instant case. The Charging Party argues that Terry's activities were protected by Section 2 of the Law because Terry's complaints to Chief Colleary concerned matters for the benefit of all part-time dispatchers.⁸ We disagree. This case can be distinguished from those cases involving the "Interboro" doctrine. The "Interboro" doctrine recognizes that the filing of a grievance by a single employee under a collective bargaining agreement is concerted, protected activity because the individual is, in essence, seeking to enforce the provisions of the collective bargaining agreement which, in turn, affect the rights of all employees covered by the collective bargaining agreement. Terry was not in a union nor is there

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The Charging party states in its supplementary statement that "...Terry, Chief Colleary and the Board of Selectmen reached an agreement concerning the distribution of overtime shifts" in 1988. Although Chief Colleary implemented new procedures for dispatch shifts not long after Terry met with the Board of Selectmen, neither the H.O.'s finding of facts nor the hearing record suggests that an agreement with respect to the distribution of overtime shifts occurred between the parties. Therefore, we shall not consider this assertion as part of the record.

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evidence to suggest she was attempting to enforce a collective bargaining agreement or was raising concerns about working conditions covered by a collective bargaining agreement. Therefore, Terry's activities would not be covered under the "Interboro" doctrine.

Rather, we find the National Labor Relations Board's decision in Meyers Industries, 268 NLRB 493, 115 LRRM 1025 (1984) to be illustrative here. In Meyers Industries, the Board held that the employer did not violate Section 8(a)(1) of the National Labor Relations Act when it discharged the charging party because the Charging Party had acted alone when he refused to drive the truck and contacted local authorities about the conditions of the truck. 268 NLRB at 498, 115 LRRM at 1030. In reaching that conclusion, the Board reasoned that an employee must be engaged in an activity with other employees or the employee must be acting on their authority in order for the employee's activity to be concerted. 268 NLRB at 497, 115 LRRM at 1029.

Our analysis then turns to whether Terry acted alone when she raised concerns to Chief Colleary and the Board of Selectmen or, in the alternative, Terry acted with other employees or on their authority.

As previously stated, the charging party has the burden of proving each element of a Section 10(a)(3) violation. Therefore, whether an employee is engaged in concerted activity is a factual question. It is the charging party's burden to produce evidence that the employees had designated the employee to act on their behalf, not solely for the employee's own benefit.

Although the findings of fact recognize that Terry had an undisclosed number of meetings with fellow part-time dispatchers in 1987 to discuss problems in the police department, this evidence alone is insufficient to reach the conclusion that Terry's letters and discussions with Chief Colleary, Conlin and the Board of Selectmen were on behalf of the other part-time dispatchers. Other than the general testimony about the subjects discussed at the meetings, there is no evidence in the record about any specifics of these meetings, nor is there any evidence in the record showing that, as a result of these meetings, the part-time dispatchers designated Terry to represent their concerns to Chief Colleary or even knew that she would ever communicate any concerns on their behalf.

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Further, Terry's letters never suggest that she had been designated in any manner by the other part-time dispatchers to bring these problems to the Chief's attention or the Board of Selectmen. On the contrary, in Terry's November 21, 1988 letter to the Board, Terry says that she can only speak for herself although others have expressed the same concerns. The other letters she wrote suggest the same.

The Charging Party argues that the nature of Terry's complaints demonstrate that Terry did not act only on her own behalf. Although her requests for items like a training manual may have affected other part-time dispatchers, this evidence is not sufficient to show that Terry acted in concert with other part-time dispatchers. In order for the Commission to conclude otherwise, Terry should have presented testimony from either Terry or other part-time dispatchers who attended these meetings demonstrating that they requested or authorized Terry to act on their behalf. Absent that evidence we are unable to find that Terry's complaints to Chief Colleary and Conlin were anything more than individual complaints that failed to satisfy the element of concerted activity in Section 2 of the Law.

We conclude that the Charging Party has failed to provide sufficient evidence to show that Terry had engaged in lawful, concerted protected activity under Section 2 of the Law. Because the Charging Party has failed to provide sufficient evidence to support the first element of a prima facie case of discrimination, it is unnecessary to proceed further in our review.

Conclusion

Accordingly, for the reasons articulated above, we find that the Town did not violate Section 10(a)(3) and derivatively 10(a)(1) of the Law. The Complaint is therefore DISMISSED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

WILLIAM J. DALTON, CHAIRMAN

WILLIAM HAYWARD, JR., COMMISSIONER

CLAUDIA T. CENTOMINI, COMMISSIONER