In the Matter of DUXBURY SCHOOL COMMITTEE

and

AFSCME, COUNCIL 93, AFL-CIO

Case No. MUP-1446

67.42	*reneging on prior agreements*
67.8	*unilateral change by employer*
91.1	*dismissal*

August 7, 1998
Robert C. Dumont, Chairman
Claudia T. Centomini, Commissioner
Helen A. Moreschi, Commissioner

Robert G. Fraiser, Esq. *Rebecca L. Bryant, Esq.*	*Representing the Duxbury School Committee*
Steven A. Torres, Esq.	*Representing AFSCME, Council 93, AFL-CIO*

DECISION[1]

Statement of the Case

On February 6, 1996, AFSCME, Council 93, AFL-CIO (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Duxbury School Committee (the School Committee) had violated Sections 10(a)(1), (3), (4), and (5) of M.G.L. c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 2, 1996 alleging that the Duxbury School Committee (the School Committee) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) unilaterally implementing surveillance of its employees; and 2) repudiating a term in the parties' collective bargaining agreement.[2] On October 2, 1996, the School Committee filed a copy of an arbitrator's decision and requested that the Commission dismiss the matter on the basis of that decision. On October 28, 1996, the Union filed an opposition to the School Committee's request, and on November 20, 1996, the School Committee filed a response. On January 2, 1997, we denied the School Committee's Motion to Dismiss. See, *Duxbury School Committee*, 23 MLC 165 (1997). On May 30, 1997, Mark A. Preble, a duly designated administrative law judge (ALJ) of the Commission, conducted a hearing at which both parties had an opportunity to be heard, to examine and cross-examine witnesses and to offer documentary evidence. At the outset of the hearing, the parties agreed to certain stipulations of fact. Both parties subsequently filed post-hearing briefs. On September 30, 1997, the ALJ issued his recommended findings of

1. Pursuant to 456 CMR 13.02 (1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The Commission dismissed those portions of the Union's charge alleging that the School Committee had violated Sections 10(a)(3) and (4) of the Law and the Union did not seek review of that decision pursuant to Section 15.03 of the Commission's Rules.

fact, to which both parties filed challenges. The School Committee also filed a response to the Union's challenges.

Findings of Fact[3]

Both the School Committee and the Union challenged portions of the ALJ's recommended findings of fact by arguing that additional findings should have been included. However, after reviewing those challenges and the record, we find that the additional findings are not relevant to our consideration of the allegations contained in the complaint. Therefore, we adopt the ALJ's findings of fact in their entirety and summarize the relevant portions below.

The Union represents a bargaining unit of custodians in the Duxbury School Department. In March 1995, Jack Rose (J. Rose), Michael Rose (M. Rose), James O'Neil (O'Neil), Colin Fencer (Fencer), Jesse Hawk (Hawk), William Cwikielnik (Cwikielnik), and Roy Green (Green)(collectively, the custodians) were assigned to the Duxbury Junior/Senior High School (the High School) and were members of the bargaining unit represented by the Union. Dr. Eileen Williams (Dr. Williams) is the superintendent of schools and Wayne Ogden (Ogden) is the principal of the High School.

The Union and the School Committee are parties to a collective bargaining agreement covering the period July 1, 1994 through June 30, 1997. Article IX of that agreement states, in part:

> Any complaints regarding an employee made to any member of the Committee or the Administration by any parent, student or other person as a result of which any action concerning the employee is contemplated will be called to the attention of the employee within two (2) working days.

The custodians were assigned regular shifts and required to record their arrival and departure times using an electronic time clock. On March 10, 1995, following an event at the High School, Ogden observed O'Neil and Fencer leaving the school at 10:30 P.M. On Monday, March 13, 1995, Ogden checked O'Neil's and Fencer's timecards and learned that both timecards had a recorded departure time of 11:02 P.M. for March 10, 1995.

Ogden subsequently discussed his observations with Dr. Williams. Specifically, Ogden sought Dr. Williams's approval to spend money to conduct a further investigation. Both Ogden and Dr. Williams considered Article IX and its applicability to the matter and decided that, because the information was based upon a personal observation by a member of the administration rather than by a complaint made to the administration, the provisions in Article IX did not apply. After a further discussion between Ogden, Dr. Williams, and Business Manager Mickey McGonagle (McGonagle), it was agreed that the School Department would conduct a broader investigation into the time clock issue.

Thereafter, the School Department retained Data Quest Investigations to conduct surveillance of the school parking lot near the exit door where the custodians parked. Surveillance by an investigator using a hand-held video camera and personal observation on April 6, 7, 27, and 28, 1995 revealed custodians leaving prior to the end of their shifts. A subsequent review of the employees' timecards revealed that the departure times recorded on the time cards did not accurately reflect the actual departure times. On May 1, 1995, Ogden had a conversation with Hawk, during which Hawk acknowledged that employees had left early and had their timecards punched by other employees.

A stationary video camera was subsequently installed for surveillance of the parking lot where custodians park their cars. The surveillance camera was in place between May 24 and June 23, 1995. The School Committee did not notify or bargain with the Union over the installation of the video surveillance of the custodian's parking area. A review of the surveillance conducted during the May through June, 1995 period revealed numerous discrepancies between each of the custodian's actual departure time recorded on video tape and the time recorded for the same date on the corresponding employee's time card.

In August 1995, the School Committee conducted investigatory interviews with each of the custodians. The custodians were given prior notice of the investigatory interviews and were permitted to have union representation/legal counsel present if the individual employees so elected. All of the custodians, with the exception of Hawk, chose to have both a Union representative and an attorney at the investigatory interview.

As a result of the investigation, Ogden recommended the dismissal of all of the seven custodians. In nearly identical letters dated August 31, 1995, Dr. Williams notified J. Rose, M. Rose, O'Neil, Fencer and Cwikielnik that they had been dismissed, effective September 5, 1995. Dr. Williams did not dismiss Hawk, but rather suspended him for ten (10) days, because the School Committee concluded that he had cooperated with the investigation and told the truth when interviewed. In a letter dated August 31, 1995, Dr. Williams informed Hawk of his suspension. Because Green had previously informed Dr. Williams that he had planned to retire, Dr. Williams took no action concerning Ogden's recommendation and allowed Green to retire.

The Union filed a grievance over the dismissal of J. Rose, M. Rose, O'Neil, Fencer and Cwikielnik and that grievance proceeded to arbitration before Arbitrator Arnold Zack on the following stipulated issue:

> Is the grievance substantively arbitrable? If so, did the Employer violate the parties' Collective Bargaining Agreement by terminating M. Rose, W. Cwikielnik, R. Green, J. Rose, J. O'Neil, and or C. Fencer without just cause? If so, what shall be the remedy?[4]

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3. The Commission's jurisdiction in this matter in uncontested.

4. At the arbitration hearing, the Union also proposed that the parties stipulate to an additional issue concerning whether the employer violated the collective bargaining agreement by conducting undercover monitoring, video observation and investigation of custodians without notifying them. After a brief exchange, the arbitrator stated that the termination issue was broad enough to cover the additional charge and the Union withdrew its proposal.

On September 9, 1996, Arbitrator Zack issued his award, denying the grievance and sustaining the dismissal of J. Rose, M. Rose, O'Neil, Fencer and Cwikielnik.

Opinion

A. Unilateral Change

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it changes a condition of employment involving a mandatory subject of bargaining without giving the union representing its employees notice and an opportunity to bargain to resolution or impasse. *See, School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557 (1983); *Town of Arlington*, 21 MLC 1125 (1994). However, an employer does not violate the Law when, without bargaining, it unilaterally alters procedural mechanisms for enforcing existing work rules, provided that the employer's action does not change underlying conditions of employment. *Board of Trustees, University of Massachusetts*, 7 MLC 1577 (1980). *See also, Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327, 92 LRRM 1576 (1976)(Unilateral installation of time clocks held permissible where merely a more efficient and dependable means of enforcing pre-existing workplace rules). Here, it is undisputed that the custodians had always been required to work their regular shift and record their arrival and departure times by punching a time clock. After learning that certain custodians had been leaving work early and falsifying their time cards, the School Committee began to record the custodians' departure times using video surveillance. Because the use of the surveillance was limited to recording the custodians' departure times and was in response to a specific concern about the accuracy of the existing method of timekeeping, we find that the School Committee's use of video surveillance in this case was merely a more efficient and dependable means of enforcing existing work rules and did not affect an underlying term or condition of employment. Accordingly, we find that the School Committee did not violate Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by unilaterally implementing video surveillance to record the custodians' departure times.

2. Repudiation

To establish that the School Committee repudiated a term in the parties' collective bargaining agreement, the Union must show that the School Committee deliberately refused to abide by an agreement with the Union. *See, South Shore Regional School district Committee*, 22 MLC 1414, 1425 (1995); *City of Quincy*, 17 MLC 1603 (1991). If the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the provision at issue there can be no repudiation. *City of Quincy*, 17 MLC at 1608. Here, the parties hold differing good faith interpretations of the applicability of Article IX to the matter concerning the custidians' falsifying their timecards. Although the Union interprets the provision to have triggered an obligation to bring the matter to attention of the custodians either following Ogden's observation on March 13, 1995 or Hawk's conversation with Ogden on May 1, 1995, the School Committee did not consider Ogden to be within the class of "other persons" and did not consider the conversation between Ogden and Hawk to be a "complaint" within the meaning of Article IX. Moreover, Dr. Williams and Ogden discussed the applicability of Article IX to the matter and decided that, because the information was based upon Ogden's personal observation, the obligation in Article IX did not apply. Therefore, we are unable to conclude that the School Committee deliberately refused to abide by an agreement with the Union. Accordingly, we find that the School Committee did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating a term in the parties' collective bargaining agreement.

Conclusion

For the reasons set forth above, we dismiss the complaint of prohibited practice.

SO ORDERED.

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