In the Matter of COMMONWEALTH OF MASSACHUSETTS/OFFICE OF THE ATTORNEY GENERAL

and

MASSACHUSETTS ORGANIZATION OF STATE ENGINEERS AND SCIENTISTS

Case No. SUP-4301

62.5 insubordination
62.7 tardiness
65.91 request for representation at disciplinary interview
91.1 dismissal

March 9, 2000[1]
Robert C. Dumont, Chairman
Mark A. Preble, Commissioner

Deborah Steenland, Esq.	*Representing the Commonwealth of Massachusetts*
Neil Osborne, Esq.	*Representing the Massachusetts Organization of State Engineers and Scientists*

DECISION[2]

Statement of the Case

In June 11, 1996, the Massachusetts Organization of State Engineers and Scientists (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Commonwealth of Massachusetts, Office of the Attorney General (the OAG) had engaged in prohibited practices within the meaning of M.G.L. c.150E (the Law). The Commission investigated the Union's charge and, on January 13, 1997, issued a complaint of prohibited practice alleging that the OAG had violated: 1) Section 10(a)(1) of the Law by continuing with an investigatory interview after a member of the bargaining unit had requested union representation; and 2) Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by suspending a member of the bargaining unit in retaliation for requesting union representation at an investigatory interview.[3] On September 18, 1998, Hearing Officer Mark A. Preble[4] conducted a hearing, at which both parties had an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties subsequently submitted post-hearing briefs. On July 20, 1999, the Hearing Officer issued his Recommended Findings of Fact (the findings). The OAG filed Objections to the findings on September 13, 1999. The Union filed no objections to the findings.

Findings of Fact[5]

The Commonwealth contested certain of the Hearing Officer's findings of fact. After reviewing the Commonwealth's objections and the record in this case, we adopt the Hearing Officer's findings of fact, except where noted, and summarize the relevant portions below.

The Union is the exclusive collective bargaining representative for all full-time and regular part-time non-managerial and non-confidential employees employed by the OAG in statewide unit 9, including certain employees employed in its Fair Labor and Business Practices Division.

At some point prior to July 1993, David Vieira (Vieira) was laid off from his employment at the Department of Labor and Industries. On July 1, 1993, certain functions of the Department of Labor and Industries, including the enforcement of the Commonwealth's wage and hours laws, were transferred to the OAG.[6] On November 3, 1993, Vieira was recalled and, because of the transfer of certain functions from the Department of Labor and Industries to the OAG, when Vieira returned from lay off, he was assigned to work as an Industrial Safety and Health Inspector in the Fair Labor and Business Practices Division of the OAG.

On October 30, 1995, Supervising Inspector Cecile Byrne (Byrne) issued a verbal warning to Vieira for improperly signing in and out in the Division's logbook. Specifically, Vieira had recorded a departure time of 4:45 P.M. on October 24, 1995 and an arrival time of 9:04 A.M. on October 26, 1995, when the normal business day in the Division was 8:45 A.M. to 5:00 P.M. Bureau Chief Stuart Rossman (Rossman) also directed then Chief Legal Counsel Anthony Penski (Penski) to conduct an investigation into allegations of insubordination during the incidents as well as two incidents that occurred during the fall of 1995: one involving a complaint by a shop owner over Vieira's conduct during a site visit and the other involving an encounter with Byrne after a check for unpaid wages had been returned for insufficient funds in a case on which Vieira had been working.

Penski completed his investigations and submitted reports to Rossman on October 31 and November 15 and 21, 1995, concluding that Vieira was insubordinate when leaving the office early and arriving late on October 24 and 26, 1995, when discussing the returned check with Byrne on November 5, 1995, and by failing to respond appropriately to the questions or directions posed or given to him by his Division Chief Brian Burke (Burke).[7] Penski

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1. Commissioner Helen A. Moreschi has recused herself from participating in this case.

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

3. The Commission dismissed that portion of the Union's charge alleging that OAG violated Section 10(a)(4) of the Law and the Union did not seek reconsideration of that determination pursuant to 456 CMR 15.03.

4. Since the time of the hearing, Hearing Officer Preble has been appointed as a Commissioner.

5. The Commission's jurisdiction in this matter is uncontested.

6. See, Chapter 110, §269 of the Acts of 1993.

7. [See next page.]

offered no conclusion in the matter involving the complaint by the shop owner. In the meantime, on November 8, 1995, Byrne had issued a written warning to Vieira for signing in at 9:00 A.M. and out at 5:00 P.M. on November 2, 1995.

In a memorandum to Director of Personnel Doris Donovan (Donovan) dated November 29, 1995, Rossman related the substance of Penski's investigations and proposed placing Vieira on probation for six (6) months. Donovan approved Rossman's proposal on December 14, 1995. However, after Rossman spoke with Donovan about implementing the probation, it was decided that the probation would be implemented after the Christmas holiday.

On December 8, 1995, Byrne issued a second written warning to Vieira, stating "[I]n spite of receiving your [earlier] warnings, you continuously leave the office before 5:00 without permission." Thereafter, on December 11 and 26, 1995, Byrne issued two (2) additional warnings to Vieira for arriving late or departing early.

On the morning of January 9, 1996, Penski asked Vieira to report to a meeting in Burke's office with Burke, Rossman, and Penski. Because he had never met with Burke, Rossman, and Penski before and because of the warnings he had recently received, Vieira believed the meeting could be disciplinary in nature and asked Penski about it.[8] When Penski responded that the meeting could be disciplinary in nature, Vieira asked Penski if he could have a few minutes. Penski agreed. Vieira attempted unsuccessfully to contact Union Shop Steward Richard Hartigan (Hartigan), who was out of the office. Thereafter, at approximately 10:45 A.M., Vieira reported to Burke's office. Burke, Rossman, and Penski were present. Vieira asked if the meeting would be disciplinary in nature and received an affirmative response.[9] Vieira indicated that he would not respond to questions without union representation. Rossman responded that Vieira would not be asked any questions and that he could just sit there and not say anything.

At Rossman's direction, Penski presented Vieira with an overview of the facts gathered as part of his investigations. Vieira asked for copies of Penski's reports and was told that the copies would be provided. Rossman told Vieira that he was being placed on probation for six months and that Vieira would receive a summary of the meeting. Vieira did not ask to leave the meeting, and Burke, Rossman, and Penski never indicated that he was free to leave. The meeting lasted between fifteen and twenty minutes. Before the end of the meeting, Vieira was informed that he had two weeks to return with his union representative if he or the union wished to ask questions or gather further information about his discipline.

In a January 11, 1996 memorandum addressed to Vieira, Rossman reiterated the basis upon which Vieira's probation had been imposed at the January 9, 1996 meeting and the offer to meet with Vieira and his steward before January 25, 1996. Rossman further indicated that the January 11, 1996 memorandum would not be placed in Vieira's personnel file until after the meeting with Vieira and his union representative, or if no meeting occurred, until after January 25, 1996.

On January 10, 1996, Rossman received a memorandum from Burke describing an alleged incident involving Vieira the previous day. Burke reported that he had observed Vieira leaving early and, after being told not to sign out before 5:00 P.M., entering "5:00 P.M." in the logbook. Burke further informed Rossman that, when Burke was speaking to Vieira regarding the sign-out issue, Vieira walked away from him and left the office.

On January 12 or 13, 1996, Rossman received another memorandum from Burke relating a similar incident that allegedly occurred on January 10, 1996. Therefore, Rossman asked Penski to investigate those allegations.

In a memorandum dated January 19, 1996, Penski informed Rossman that he had conducted the investigation as directed. Penski's investigation included presenting Vieira with the memoranda dated January 10 and 12, 1996, and directing him to review the documents and report to Penski's office later that morning. According to Penski's report, Vieira did not report as directed. Therefore, Penski concluded that Vieira did not dispute the allegations contained in the memoranda and added that Vieira's failure to report to Penski's office was "just another instance of [Vieira's] insubordination toward supervisory staff." On January 17, 1996, Byrne issued a fifth written warning to Vieira, outlining four (4) occasions on which he signed in late to work.

Rossman reviewed Penski's report and, in light of the report and the warning that Burke had given Vieira during the January 9, 1996 meeting, recommended that Vieira be suspended without pay for three (3) days. That recommendation was approved and, in a memorandum dated January 19, 1996, Rossman informed Vieira he was being suspended.[10]

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7. The Commonwealth contested the Hearing Officer's failure to include certain findings. The Commonwealth argues that the Hearing Officer erroneously failed to include certain conduct for which Vieira was disciplined in his findings of fact. Specifically, the Commonwealth claims that the Hearing officer failed to include in his findings of fact that (1) Vieira's failure to respond to the questions or directions posed or given to him by Burke and (2) his act of walking away from Burke and leaving the office while Burke was attempting to address him regarding the procedures for signing out of the office were both factors leading to the decision to suspend Vieira on the basis of insubordination. After a thorough review of the record, the Commission has determined that the additional findings requested by the Commonwealth are, in fact, supported by the record in this matter. Therefore, the findings have been incorporated below.

8. Neither Burke, Rossman, nor Penski was Vieira's immediate supervisor.

9. The responses ranged from "could be" to "yes," and, although there is some dispute over to whom each response should be attributed, we find it unnecessary for us to make such a specific finding. The complaint alleges that the OAG continued an investigatory interview after Vieira had requested union representation. The threshold inquiry is, therefore, whether Vieira reasonably believed that the meeting could result in discipline. *See*, *Commonwealth of Massachusetts*, 4 MLC 1415, 1418 (1977). Accordingly, it is sufficient for us to find that the response to Vieira's question concerning whether the meeting was disciplinary in nature was affirmative.

10. Although the memoranda refers to January 22, 23, and 24, 1996 as the days on which Vieira was to serve his suspension, Rossman later agreed with the Union to stay the suspension until a meeting on January 22, 1996. Following that meeting, Vieira served his suspension.

Discussion

In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview, the Commission has been guided by the general principles enunciated in *NLRB* v. *Weingarten*, 420 U.S. 251 (1975); *Commonwealth of Massachusetts*, 4 MLC 1415, 1418 (1977); *Commonwealth of Massachusetts*, 22 MLC 1741, 1747 (1996). The right to union representation attaches when an employee reasonably believes an investigatory meeting will result in disciplinary action, and after the employee has made a valid request for Union representation. *Id.*

Therefore, a public employer that denies an employee the right to union representation at an investigatory interview the employee reasonably believes will result in discipline interferes with the employee's Section 2 rights, in violation of Section 10(a)(1) of the Law. *Commonwealth of Massachusetts*, 9 MLC 1567, 1569 (1983).

A meeting is investigatory in nature when the employer's purpose is to investigate the conduct of an employee and the interview is convened to elicit information from the employee or to support a further decision to impose discipline. *See*, *Baton Rouge Water Works*, 103 LRRM 1056, 1058 (1979); *Commonwealth of Massachusetts*, 8 MLC 1287, 1289 (1981). The statutory entitlement to Union representation is not triggered merely by a meeting with the employer or its agents. Further, no right to representation attaches when the sole purpose of a meeting is to inform an employee of, or to impose, previously determined discipline and no investigation is involved. *See*, *e.g.*, *Certified Grocers of California*, 591 F.2d 312, 100 LRRM 3029 (9th Cir. 1979); *Baton Rouge Water Works*, 103 LRRM at 1058; *Commonwealth of Massachusetts*, 8 MLC at 1289.

The first issue in this case is whether the OAG violated Vieira's right to union representation by proceeding with the January 9, 1999 meeting after he indicated that he would not respond to questions without a union representative. Tested by the above standards, Vieira's right to representation was not violated because the January 9, 1999 meeting was not investigatory in nature. On the contrary, an investigation had already been completed and the decision to place Vieira on probation already made when the meeting took place. Therefore, the sole purpose of the meeting was simply to inform him of the reasons for his discipline.

The record reflects that Penski ordered Vieira to attend a meeting with Penski, Burke and Rossman and that Vieira, concerned that the meeting could be disciplinary in nature because of warnings he had previously received, inquired as to the nature of the meeting. Penski acknowledged that the meeting could be disciplinary in nature and agreed to Vieira's request to have a few minutes. Thereafter, Vieira attempted to contact his Union steward to no avail. Vieira arrived at the meeting without Union representation and indicated that, because he lacked Union representation, he would answer no questions. Rossman responded that Vieira would be asked no questions and would not be required to say anything. What followed was a presentation by Penski of the facts gathered as part of his investigation of Vieira. At the end of the presentation of facts, Vieira was informed that, based on those facts, the decision had been made to place Vieira on probation for six months. Vieira was further advised that he could return within two weeks with Union representation if he or the Union wished to ask any questions or gather further information related to his discipline. Thus, the purpose of the January 9, 1996 meeting was to advise Vieira that a decision had been made to place him on probation for six months and to inform him of the facts upon which the decision had been made. The meeting was not designed to elicit responses from Vieira or to gather specific information about his conduct.[11] We find that the January 9, 1996 meeting was not investigatory in nature and that the OAG did not violate Section 10(a)(1) of the Law by proceeding with that meeting.[12]

Next, we must consider whether the OAG retaliated against Vieira by suspending him for three (3) days because he had requested a union representative at the January 9, 1996 meeting. Section 10(a)(3) prohibits retaliation by an employer against an employee for engaging in activities protected under the Law. *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 565 (1981). As a threshold matter, a charging party must establish a prima facie case demonstrating that: 1) the employee was engaged in activity protected under Section 2 of the Law; 2) the employer was aware of this protected activity; 3) the employer took an adverse action against the employee; and 4) that action would not have been taken but for the protected activity. See also *City of Haverhill*, 8 MLC 1690, 1693 (1982); *City of Attleboro*, 20 MLC 1037, 1050 (1993). The charging party has the burden of establishing a violation by a preponderance of the evidence. If the charging party establishes a prima facie case, the burden shifts to the employer to articulate legitimate, non-discriminatory reasons for its action. *Town of Belmont*, 25 MLC 95 (1998). Proof of discriminatory motive may be made by means of circumstantial evidence and the reasonable inferences drawn therefrom. *Town of Northborough*, 22 MLC 1527 (1996). There are several factors that may suggest unlawful employer motive including: 1) timing of the alleged discriminatory act, *Town of Somerset*, 15 MLC 1523, 1529 (1989); 2) triviality of reasons given by employer, *Commonwealth of Massachusetts*, 14 MLC 1743, 1748 (1988); 3) an employer's deviation from past practices, *Everett Housing Authority*, 13 MLC

11. The Union argues that, even if the employer did not directly ask Vieira any questions to gather information, it could have nonetheless gathered information from Vieira based on his non-verbal responses to management's accusations and by the nature of Vieira's own questions of management. However, because we have found that the January 9, 1996 meeting was not investigatory in nature and held for the purpose of informing Vieira of a decision that had already been made to place him on probation for six months and the reasons therefor, what, if anything, management could or could not have gleaned from Vieira's non-verbal responses or questions is immaterial.

12. Because a meeting or interview must be investigatory in nature in order for the right to union representation to attach, and because we have found that the January 9, 1999 meeting was not investigatory in nature, it is unnecessary to reach the question of whether a reasonable person in Vieira's position would have reasonably believed that the meeting would result in discipline or whether he made a valid request for representation. *Commonwealth of Massachusetts*, 8 MLC at 1289; *Amoco Chemical Corp.*, 237 NLRB 69, 99 LRRM 1017, 1018-1019 (1978).

1001, 1007 (1986); or 4) expressions of animus or hostility towards a union or the protected activity, *Town of Andover*, 17 MLC 1475, 1483 (1991).

It is undisputed that Vieira requested union representation on January 9, 1996. Accordingly, there is no question that Vieira was engaged in protected activity and because Vieira's request for union representation was made to the employer, there is also no question that the employer was aware of Vieira's activity. Further, it is undisputed that, on January 19, 1996, Vieira was suspended for three (3) days without pay and that suspensions without pay constitute adverse action.

Therefore, the focus of our inquiry is whether the employer properly suspended Vieira notwithstanding the protections afforded an employee in exercising his right to union representation. The decision of the National Labor Relations Board (Board) in *General Electric Co*., 240 NLRB 66 (1979) is instructive on this point. In *General Electric Co*., the Board found that the employer did not violate the law by suspending an employee for insubordination where the employee believed that the prospective meeting was investigatory in nature and the employee disobeyed a direct order to remain on the plant floor. There, the Board found that the employee was disciplined for insubordination, not for asserting his *Weingarten* rights. Likewise, *in Commonwealth of Massachusetts / Commissioner of Administration and Finance*, 22 MLC 1748 (1996), the Commission found that the employer did not violate the Law by suspending an employee for insubordination where the employee refused to meet with the employer without union representation notwithstanding repeated assurances from her employer that no disciplinary action would result from their meeting. Similarly, here, the evidence reveals that Vieira was disciplined for insubordination and not for asserting his *Weingarten* rights. The events that transpired immediately prior to and following the January 9, 1996 meeting at which Vieira requested union representation bear upon our analysis.

To determine whether the employer has demonstrated that it had lawful reasons for suspending Vieira, we must examine its reasons. As its basis for the decision to suspend Vieira for three (3) days, the employer points to Vieira's conduct in the wake of Vieira's January 9, 1996 meeting with his superiors. The findings of fact reveal that Vieira not only engaged in further acts of insubordination, but four separate and well-documented acts of insubordination between the date of that meeting and January 19, 1996. At the January 9, 1996 meeting, in addition to being informed about the basis of the discipline he was being given, Vieira was warned that further acts of insubordination would not be tolerated. Accordingly, when Vieira engaged in further acts of insubordination following the January 9, 1996 meeting, he did so at his own peril.

The record here further undermines any notion that the employer's act of suspending Vieira was based on a desire to discourage him from engaging union representation. Prior to the January 9, 1996 meeting, Vieira requested time to contact his union representative. Even though the meeting was not investigatory and no right to union representation attached, Vieira was granted the time to obtain representation, although he was ultimately unsuccessful in doing so. In addition, before the meeting concluded, Vieira was informed that he could return with union representation to discuss his discipline. Following the meeting, Vieira was sent a letter dated January 11, 1996, memorializing the offer to return with union representation. The employer further accommodated Vieira by providing him with over two weeks within which to do so. Far from revealing conduct that would tend to discourage Vieira from seeking union representation, the countervailing evidence demonstrates the employer's affirmative invitation to Vieira to do just that, before, during and after the January 9 meeting. By contrast to the Union's claim that Vieira was suspended because he exercised his Weingarten rights, the evidence pertaining to his subsequent acts of insubordination coupled with the employer's manifest willingness to meet with him and his union representative belie any notion that the suspension was anything but lawful.

Because the Union has failed to establish any evidence of unlawful motivation on the employer's part here, it has fallen short of establishing a prima facie case of retaliation under Section 10(a)(3) of the Law. Therefore, we find that Vieira's subsequent discipline was not based on unlawful motives and dismiss Count II of the Complaint.

Conclusion

Accordingly, the Commission concludes that the OAG did not violate Section 10(a)(1) of the Law by proceeding with the January 9, 1999 meeting after Vieira indicated that he would answer no questions absent union representation because the meeting was not investigatory but rather designed only to inform Vieira of previously determined discipline. Further, having found that the OAG's decision to impose further discipline against Vieira subsequent to his request for union representation was not motivated by a desire to discourage the protected activity, the Commission dismisses the Complaint in its entirety.

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