

In the Matter of CITY OF BOSTON/BOSTON PUBLIC LIBRARY

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO, LOCAL 1526

Case No. MUP-2081

52.63	<i>oral agreements</i>
52.65	<i>"meeting of the minds"</i>
54.31	<i>impact of management rights decision</i>
67.42	<i>reneging on prior agreements</i>
91.1	<i>dismissal</i>

May 31, 2000

Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Joseph Sarno, Esq. *Representing the City of Boston/
Boston Public Library*

Steven Torres, Esq. *Representing AFSCME, Council 93*

DECISION¹

Statement of the Case

On April 6, 1998, the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO, Local 1526 (the Union or AFSCME) filed a charge with the Labor Relations Commission (Commission) alleging that the City of Boston (City) had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and (a)(1) of Massachusetts General Laws Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the Union's charge and on January 4, 1999, issued its own Complaint of Prohibited Practice, alleging that the City had violated Section 10(a)(5) and derivatively, (a)(1) of the Law by repudiating the terms of an agreement to provide a smokers' lounge in the Boston Public Library (BPL). The City, on behalf of the BPL, filed an answer to the Commission's Complaint on or about March 31, 1999.

On June 29, 1999 and August 17, 1999, Susan Atwater, a duly-designated Commission hearing officer, conducted a hearing at which both parties had an opportunity to examine and cross-examine witnesses and to introduce documentary exhibits.

Both parties filed post-hearing briefs on or about December 24, 1999, and the Hearing Officer issued her Recommended Findings of Fact on April 13, 2000. Neither party filed any challenges to her Recommended Findings.

Findings of Fact²

Founded in 1848, the BPL is an administrative agency of the City, as well as a separately chartered state non-profit corporation. It is governed by a nine member Board of Trustees (the Trustees) and its employees are represented by three different unions, Local 1526 of AFSCME, Council 93, the Professional Staff Association (PSA) and a graphics union. When BPL President Bernard Margolis (Margolis) began working at the BPL in March 1997, employees were permitted to smoke in designated areas of the library, including the cafeteria, staff lounge, restrooms and other locations. Margolis was distressed by this practice. Consequently, in the early summer of 1997, he began to discuss the issue of smoking with the staff and the unions in an effort to create a non-smoking policy for the library. By letter dated July 29, 1997, AFSCME demanded to bargain over the impact of the proposed non-smoking policy. Margolis and the unions³ discussed issues like smoking cessation programs, discipline for policy violations, and equity between the twenty-nine library facilities. Margolis discussed the non-smoking policy with the unions at regularly scheduled monthly meetings and also at other meetings called periodically to focus solely on the policy.

On Monday, September 22, 1997, Margolis presented the non-smoking policy to the Trustees. The policy provided that after January 1, 1998, it would be considered a violation of library rules for any employee, library patron, library vendor, occupant or visitor to smoke in any BPL facility or vehicle. The Trustees approved the policy, and it became effective on October 1, 1997.⁴ However, the BPL and the Union continued their discussions about the policy after implementation. By November 1997, the parties had considered designating a room or a lounge inside the main library as a smoking area, and they began to look for a suitable location. The Union and the BPL toured many sites but focused their attention on three particular locations. At a meeting on December 3, 1997, Margolis, Carter, Union President Antonelli, (Antonelli) Union Staff Representative Stephen Dolan (Dolan) and Union Chief Steward Anthony Rosetti (Rosetti) discussed using the cafeteria as a smoker's lounge because they believed it was vented through the roof. After learning that it was not vented through the roof, the BPL and the Union eliminated the cafeteria as a possibility.

On December 8, 1997, AFSCME filed a charge of prohibited practice with the Commission alleging that the City unilaterally

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's jurisdiction in this matter is uncontested

3. Although Margolis discussed the smoking policy with all of the unions representing the library employees, there was no evidence in the record that any agreement to create a smoking room was contingent on the approval of all three unions.

4. Margolis believed that creating a smoking room in the library would constitute a retreat from the non-smoking policy that the Trustees approved. Although Margolis could have unilaterally modified the non-smoking policy, he preferred to bring any proposed revisions to the Trustees for their consideration and approval. There was no evidence that Margolis told BPL Labor Counsel Stephanie Carter (Carter) or any union representative that an agreement to create a smoker's lounge would require the Trustees' approval.

changed its smoking policy without bargaining to impact or resolution. The Commission docketed this charge as MUP-2007 and dismissed it on April 29, 1998.⁵ The BPL and the Union continued their discussions while the charge of prohibited practice was pending at the Commission.

In late December or early January 1998, the BPL and the Union identified Room 417A in the McKim building as a potential site for a smoker's lounge. On or about January 22, 1998, Margolis and Carter met with Antonelli and Rosetti and other Union representatives to discuss room 417A. They discussed issues like limiting the number of persons who could occupy the room at a given time, installing double doors to contain smoke in the room, furnishing the room with chairs and a table, and purchasing a microwave oven, "smoke-eaters" and smoke-eater filters. Either at that meeting, or at a subsequent time, Margolis asked Buildings Superintendent Joseph Sarro (Sarro) to purchase smoke-eaters and smoke-eater filters. Sarro received financial approval to purchase the equipment from Financial Officer Bruce Cole (Cole) and purchased the smoke-eaters and filters.⁶

Rosetti and Antonelli met again with Carter to discuss room 417A on January 30, 1998. Margolis was not present at this meeting. They discussed: 1) targeting March 1st as an implementation date, 2) limiting the occupancy to fifteen people at one time, and 3) holding the BPL harmless for grievances filed regarding the absence of smoking facilities at library branch offices with less than 200 people. The Union subsequently discussed room 417A with its executive board and its membership and decided that the room was too small and located in an undesirable area. In addition, the Union and the BPL learned that room 417A was under the control of a building contractor who was renovating certain areas of the McKim building. Consequently, it became apparent that room 417A was problematic for both parties and they began to search for an alternative site.

At this point, although Sarro and Rosetti believed that the BPL and the Union had an agreement to use room 417A as a smoker's room, Antonelli, Dolan and Margolis did not. Antonelli believed that the Union and the BPL had agreed to create a smokers lounge, but had not agreed to use room 417A because the Union did not like the room. Dolan believed that the agreement to create a smoker's lounge was contingent on finding a suitable room and that there would be no agreement if the parties could not find a suitable room. Margolis was willing to consider creating a smoking room but believed that he never agreed to do so.

At some point in mid-February, Margolis, Dolan and Antonelli walked around the BPL again to look for an acceptable room for the smoking lounge. The Union suggested a room referred to as the "old telephone room" or "the switchroom"⁷ and the parties

discussed using that room as the smoker's lounge. The telephone room was bigger than room 417A but the parties did not discuss increasing the number of people who could occupy the room and or purchasing additional furniture or smoke-eaters.⁸ Margolis told Antonelli that he would contact Carter and instruct her to contact the Union and complete the "paperwork".⁹ Dolan and Antonelli believed that Margolis agreed to use the switchroom as a smoker's room at this meeting. Margolis believed that he did not agree to create a smoker's room in the switchroom.

Subsequently, in late February or early March, Antonelli met with Carter and discussed the BPL's concerns for the switchroom. They discussed restricting the smoker's lounge to the main library and not creating one in the library's branch offices, and they also discussed the implementation date.

At some point prior to March 4, 1998, Margolis became aware that Boston Mayor Thomas Menino had proposed to ban smoking in all public buildings in the City. In addition, Margolis received feedback from members of the PSA who supported the concept of a smoke-free building. Consequently, Margolis began to consider whether to bring the issue of creating a smoking room to the attention of the Health and Safety Committee, a group comprised of members of management and all three unions, in order to allow the committee to consider alternative courses of action. By letter dated March 4, 1998, Carter asked the members of the Health and Safety Committee to consider whether the BPL should create a smoker's lounge in the library or whether the library buildings should remain smoke-free.

On March 16, 1998, the City of Boston promulgated a no-smoking policy that prohibited smoking in any City-owned or leased building, including buildings owned and/or used by agencies of the City. The BPL never created a smoker's lounge in any room in the library.

Opinion

The issue in this case is whether the City violated Sections 10(a)(5) and (a)(1) of the Law by repudiating an agreement it made with the Union to provide a smoker's lounge in the main branch of the BPL. To establish that the City repudiated the agreement, the Union must show that the City deliberately refused to abide by the agreement. See, *Boston School Committee*, 22 MLC 1365, 1375 (1996); *City of Quincy*, 17 MLC 1603, 1608 (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 terms of the agreement, the Commission will not find a repudiation because the parties did not achieve a meeting of the minds. *City of Everett*, 26 MLC 25 (1999). To achieve a meeting of the minds, parties must manifest an assent to the terms of the agreement.

5. The Commission did not find probable cause to believe that the City had violated the Law because the City's decision to eliminate smoking in the workplace had stemmed from its interest in promoting a healthy environment for its employees and the public.

6. There is no evidence that any agreement was contingent on ascertaining or approving the costs of constructing a smoking room.

7. The parties referred to this room as the switchroom because it contained a panel of electrical equipment. It was located on the ground floor of the McKim Building.

8. The proper amount of smoke-eating equipment depends on the size of the room and a bigger room requires more smoke-eating equipment.

9. Neither Dolan nor Antonelli heard Margolis ask Carter to reduce an agreement to writing.

Commonwealth of Massachusetts, 26 MLC ___ (2000)(slip. op. issued May 10, 2000); *City of Everett*, 26 MLC at 28 (1999). On the record before us, we conclude that the parties did not have a mutual understanding or agreement to create a smoker's lounge in the switchroom.

Although there is evidence that the parties had extensive discussions concerning the smoking lounge, the evidence is insufficient to establish that the BPL representatives manifested an assent to create a smoker's lounge in the switchroom. The evidence demonstrates that Margolis was willing to consider constructing a smoking lounge, and he and the Union representatives toured the library extensively in an effort to find an acceptable room. The library purchased smoke-eating equipment to use in a smoker's lounge, and the parties discussed whether to use a room identified as the "switchroom." At one point during the discussions about the switchroom, Margolis told the Union representatives that he would tell Carter the complete the "paperwork." The Union representatives believed that Margolis agreed to construct a smoking lounge in the switchroom, and testified that the parties agreed to use the switchroom as a smoking lounge. However, Margolis denied making an agreement, and there is no evidence of the specific words Margolis used that caused the Union representatives to believe that he agreed to it. Therefore the Union has not met its burden of proving by a preponderance of the credible evidence that the City agreed to provide a smoker's lounge in the switchroom. Absent evidence of the statements Margolis made that caused the Union to believe that he agreed to provide a smoker's lounge in the switchroom, the Union witnesses' belief that he made an agreement and their supporting conclusory testimony do not demonstrate a meeting of the minds. *See generally, City of Marlborough*, 9 MLC 1708, 1711 (1983)(insufficient evidence of a meeting of the minds where union witnesses never specifically stated that employer representatives agreed to the union's position; also, evidence of union's expressed position and belief that the matter was settled did not establish existence of an agreement.) Although the Library acted consistent with the existence of an agreement when it purchased smoke-eating equipment, the purchase alone does not establish an agreement because Sarro bought the equipment before the parties identified the switchroom as a potential site for a smoker's lounge.

Second, the three Union witnesses held differing views of the alleged agreement. Rosetti believed that the parties agreed to use room 417A as a smoker's lounge, but Antonelli and Dolan did not. Antonelli believed that the parties had agreed to create a smoker's lounge but not in room 417A. Dolan believed that the agreement to create a smoker's lounge was contingent on finding a suitable room and that there would be no agreement if the parties could not find a suitable room. The fact that the Union representatives held three different views suggests a level of confusion or misunderstanding that belies a meeting of the minds.

Third, the parties' written communications fail to demonstrate that the Library representatives agreed to create a smoker's lounge in the switchroom. Although there are contemporaneous notes documenting the discussions surrounding the potential use of Room 417A as a smoker's lounge, the Union did not introduce any

written evidence of any discussion or agreement to use the switchroom as a smoker's lounge.

Finally, we consider whether Margolis's statement to the Union representatives that he would contact Carter and instruct her to contact the Union and complete the "paperwork," establishes the existence of an agreement. Although this statement may suggest an intent to create an agreement, the statement alone is too vague and general to sustain the Union's burden of proof. *See generally, Watertown School Committee*, 9 MLC 1301, 1305 (1982) (School Committee's one misleading statement did not establish that there was a meeting of the minds.)

Conclusion

After considering the record evidence, we conclude that the Union has not established that the parties agreed to provide a smoker's lounge in the Boston Public Library. Consequently, we find that the City did not violate Sections 10(a)(5) and (a)(1) of the Law by repudiating an agreement and the complaint of prohibited practice is dismissed.

SO ORDERED.

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