In the Matter of COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE

and

MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case No. SUP-4514

65.62 threat of reprisal
65.91 request for representation at disciplinary interview
82.2 cease and resist orders
91.1 dismissal

May 31, 2000
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Michael Byrnes, Esq. *Representing Commonwealth of Massachusetts*

Joseph Fair, Esq. *Representing M.C.O.F.U.*

DECISION[1]

Statement of the Case

The Massachusetts Correction Officers Federated Union (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on November 4, 1998, alleging that the Commonwealth of Massachusetts (the Commonwealth) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 21, 1999. The complaint alleged that the Commonwealth had interfered with, restrained and coerced bargaining unit members in the exercise of their rights under Section 10 (a) (1) of the Law by: 1) making certain statements to bargaining unit members (Count I); and 2) preventing bargaining unit members from having a Union representative present at an investigation (Count II). The Commonwealth filed an answer on October 28, 1999.

On January 28, 2000, Cynthia A. Spahl, a duly-designated hearing officer of the Commission, conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Following the hearing, both parties filed post-hearing briefs. The Hearing Officer issued Recommended Findings of Fact on March 8, 2000. Neither party filed challenges to the Recommended Findings of Fact. Therefore, we adopt these findings in their entirety and summarize them as follows.

Stipulations

1. With respect to events that occurred prior to May 22, 1998, Officer Taft would testify in substantially similar fashion to Lieutenant Kerins.

2. Union exhibit #1 is a complete document and does not consist of any other pages.

Findings of Fact[2]

Gary Kerins (Kerins) worked as a correction officer chef[3] and Howard Taft (Taft) worked as a correction officer at the North Central Correctional Institution in Gardner. On May 1, 1998, Taft and Kerins were working in the kitchen and were responsible for a miscount of the inmates in that area. Kerins reported the miscount to Captain Palmieri (Palmieri) and Palmieri reported it to Deputy Superintendent Paul Verdini (Verdini). Verdini ordered Palmieri to provide him with incident reports regarding the miscount and to set up investigatory hearings. Palmieri instructed Kerins and Taft to file incident reports. Palmieri also instructed Kerins to verbally reprimand Taft about the miscount. Kerins and Taft followed Palmieri's instructions.

On May 7, 1998, Taft and Kerins received individual notices of an investigatory hearing from Palmieri regarding the failure to conduct a proper inmate count. The hearings were scheduled for May 8, 1998. The notices gave Taft and Kerins the opportunity to bring a Union representative to the investigatory hearings. Taft and Kerins attended the individual hearings on May 8 and answered Palmieri's questions concerning the May 1, 1998 inmate miscount. Officer Kenneth Sena (Sena) acted as Union representative for Taft and Kerins at the hearings. At the conclusion of the hearings, Palmieri indicated that he would submit a summary of the investigatory hearings to Superintendent Lynn Bissonnette (Bissonnette) for her disposition.

On May 22, 1998, Verdini telephoned Kerins while Kerins was at work. Verdini asked Kerins if Taft was on duty too. When Kerins answered affirmatively, Verdini asked Kerins to report to his office with Taft. Verdini did not indicate the reason for his request, and Kerins did not question him about it. Kerins related his conversation with Verdini to Taft. Because Kerins and Taft believed that Verdini wanted to investigate the May 1, 1998 inmate miscount further, Kerins telephoned to inquire who was on duty as steward that day. When Kerins learned that Union steward Daniel Dubrule (Dubrule) was on duty, he called Dubrule, explained that he and Taft had been ordered to report to Verdini's office and arranged to meet Dubrule.

Kerins, Taft, and Dubrule walked to Verdini's office. Once they arrived, Verdini asked them to take a seat and stated that he would be right with them. Director of Security Mark Nooth (Nooth) was also present.[4] Verdini asked Taft and Kerins why Dubrule was

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

2. The Commission's jurisdiction is uncontested.

3. This is a supervisory position.

4. Nooth previously had been in Verdini's office discussing unrelated matters. Verdini asked him to remain after Taft, Kerins, and Dubrule arrived. However, Taft, Kerins, and Dubrule did not know why Nooth was present.

there. Kerins and Dubrule said that Dubrule was there to provide Union representation for Kerins and Taft. Verdini became agitated and stated that Dubrule's presence was unnecessary because the purpose of the meeting was to issue sanctions and not to conduct an investigatory hearing. He told Taft and Kerins that, if Dubrule remained, he could re-open the investigatory hearing, and the matter could be sent downtown instead of remaining at the institutional level and could result in sanctions up to and including termination.[5] Kerins and Taft asked Dubrule to leave because they believed that his presence would result in further discipline. Dubrule asked them if they were sure about their decision. When Taft and Kerins nodded affirmatively, Dubrule left the room.

After Dubrule departed,[6] Verdini handed Taft and Kerins letters of reprimand signed by Bissonnette and dated May 20, 1998.[7] Verdini next spent ten to fifteen minutes discussing institutional operations and the importance of inmate counts and hearing the officers' version of events. Kerins asked Verdini to make notations on the letters of reprimand indicating that they would be removed from his and Taft's personnel files after six months if there were no further incidents. Verdini agreed. At this point, the meeting concluded and Taft and Kerins left Verdini's office.

Opinion

Independent 10 (a) (1) Allegation

A public employer violates Section 10 (a) (1) of the Law if it engages in conduct that tends to restrain, coerce, or interfere with employees in the free exercise of their rights under Section 2 of the Law. *City of Fitchburg*, 22 MLC 1286 (1995). A finding of illegal motivation is not generally required in a Section 10 (a) (1) case. *Town of Winchester*, 19 MLC 1591, 1596 (1992). Rather, the focus of the Commission's inquiry is the effect of the employer's conduct on a reasonable employee. *City of Boston*, 20 MLC 1154, 1161 (1994).

Here, it is undisputed that Taft and Kerins engaged in concerted, protected activity by requesting union representation at the May 22, 1998 meeting. *City of Peabody*, 25 MLC 191, 193 (1999). However, the Commonwealth argues that Verdini's statements did not interfere, restrain, or coerce Taft and Kerins in the exercise of that right. The Commonwealth points out that, after Dubrule left, Taft and Kerins discussed inmate counts with Verdini and shook his hand before leaving. The Commonwealth concludes that, under the totality of the circumstances, Verdini's statements were not chilling. However, the Commission has held that statements threatening future discipline tend to chill a reasonable employee from exercising the right to request union representation and, therefore, violate Section 10 (a) (1) of the Law. *Id.* Here, Verdini stated that he could re-open the investigatory hearing and the matter could be sent downtown and could result in sanctions up to and including termination, if Dubrule remained at the meeting. Because Verdini's statements threatened future discipline if Dubrule remained, those statements interfered with, restrained, and coerced Taft and Kerins in the exercise of their right to request union representation. Accordingly, the Commonwealth violated Section 10 (a) (1) of the Law.

Weingarten Allegation

In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview in violation of Section 10 (a) (1) of the Law, the Commission has been guided by the general principles enunciated in *NLRB* v. *Weingarten*, 420 U.S. 251 (1975). *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 discipline and the employee makes a valid request for Union representation. *Id.* 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. *City of Peabody*, 25 MLC at 193. The right 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. *Commonwealth of Massachusetts*, slip op. Case No. SUP-4301 (March 9, 2000); *Commonwealth of Massachusetts*, 8 MLC 1281, 1289 (1981).

Here, the Union argues that the May 22, 1998 meeting was investigatory in nature. The Union asserts that Verdini's statements that he could re-open the investigatory hearing and send the matter downtown resulting in sanctions up to and including termination indicate that a final determination regarding discipline had not been made and that the investigation was still open. However, Bissonnette signed and dated the officers' letters of discipline on May 20, 1998, two days prior to the meeting in question. Further, Verdini told Taft and Kerins shortly after they entered his office that the purpose of the meeting was to issue sanctions and not to conduct an investigatory hearing. Once the meeting commenced, Verdini did not interrogate Taft and Kerins about the inmate miscount. Because the record reflects that the sole purpose of the May 22, 1998 meeting was to impose previously determined discipline and that no investigation was involved, the meeting was not investigatory in nature. Therefore, the Commonwealth did not

5. Taft and Kerins testified that Verdini stated, if Dubrule remained in the room, the matter could be sent downtown instead of remaining at the institutional level and could result in sanctions up to and including termination. However, Verdini testified that he told Taft and Kerins: a) this could have been a serious matter that went downtown; and b) the sanctions would stay within the institution and not go to personnel. The hearing officer credited the testimony of Taft and Kerins on this point because it was the first time that they had been disciplined and, therefore, it is more likely that they would accurately recall Verdini's statements. Also, Taft and Kerins corroborated each other's testimony, whereas Verdini's testimony was uncorroborated.

6. Dubrule stood outside of Verdini's office for ten to fifteen minutes. He then knocked on the door and asked Taft and Kerins if they needed him. When they indicated that they did not need him, Dubrule left Verdini's office, returned to his post, and made notes about the incident.

7. Neither Kerins nor Taft had any prior discipline on record.

violate Taft and Kerins's Weingarten rights under Section 10 (a) (1) of the Law.

Conclusion

Based on the record before us, we conclude that the Commonwealth violated Section 10 (a) (1) of the Law by engaging in conduct that may reasonably be said to interfere with employees in the free exercise of rights guaranteed under Section 2 of the Law. We dismiss the portion of the complaint alleging that the Commonwealth violated Section 10 (a) (1) of the Law by preventing bargaining unit members from having a union representative present at an investigation.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

   a. Making statements that would tend to interfere with, restrain, or coerce Taft and Kerins from participating in concerted protected activity.

   b. In any similar manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

   a. Refrain from making statements that would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Law.

   b. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the Notice to Employees.

   c. Notify the Commission within ten (10) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

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