

In the Matter of UNITED AUTO WORKERS, LOCAL
2322/GEO and JAMES SHAW, as President of UNITED
AUTO WORKERS, LOCAL 2322/GEO

and

UNIVERSITY OF MASSACHUSETTS (AMHERST)

Case No. SI-265

91.1 Dismissal
108.2 withdrawal of services
108.22 sick out
108.5 sufficiency of charge
111.67 teachers

August 29, 2001

Helen A. Moreschi, Chairwoman

Mark A. Preble, Commissioner

Julie C. McCarthy, Esq. Representing the University of
Ariel D. Cudkowicz, Esq. Massachusetts
Mary T. Sullivan, Esq. Representing the United Auto
Workers, Local 2322/GEO

NOTICE TO PARTIES

On August 21, 2001, the University of Massachusetts, Amherst (Employer) filed a petition with the Labor Relations Commission (Commission) requesting the Commission to conduct a strike investigation pursuant to Section 9A(b) of Massachusetts General Laws, Chapter 150E (the Law). The petition alleged that the United Auto Workers, Local 2322/GEO (Union), James Shaw (Shaw), in his capacity as the Union President, and certain individuals¹ had violated Section 9A of the Law by engaging in and by inducing, encouraging, and condoning an illegal strike, work stoppage, slowdown and withholding of services. The petition specifically alleged that: 1) the final grades of students enrolled in approximately forty of the Employer's Division of Continuing Education's (Division) first-term Summer Session courses were delivered to the Division's Registrar approximately four hours after the noon deadline on July 18, 2001; 2) six graduate student instructors called in "sick" or informed the Division that they would not be holding class on August 16, 2001; 3) five of the six students did not hold class on August 16, 2001; and 4) on August 17, 2001, two graduate student instructors called in "sick" and neither instructor held class on that day.

1. The petition was captioned "University of Massachusetts, Amherst and United Auto Workers, Local 2322/GEO, et al." and was served on the Union as well as seven individuals referenced in Appendix "D" to the petition. However, the petition did not specifically identify those seven individuals as respondents. Therefore, prior to commencement of the strike investigation, the Commission's investigator advised the Employer that it could proceed against the Union and James Shaw in his official capacity as Union president, but not against the individuals. The Employer elected to go forward with the investigation and reserved its right to amend the petition at a later date.

2. The Commission's rules do not specify any particular method by which petitions for strike investigations must be served. However, we conclude that the Union and Shaw, in his capacity as Union president, received adequate notice of the investigation because the petition was left with Shaw's secretary at the Union's office. See generally *Tewksbury School Committee*, 12 MLC 1353 (1985)

The Commission conducted a strike investigation on August 23, 2001 at which time the parties had an opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the investigation, the Union moved to dismiss the petition on the ground that service was defective because a copy of the petition was served at the Union's offices, rather than being served on any individuals. The Commission denies the Union's motion.²

The Union also moved to consolidate the investigation with one or two other cases pending before the Commission involving the same Employer and Union or hold the matter in abeyance pending the outcome of those proceedings.³ The Commission denies the motion to consolidate and declines to hold the matter in abeyance pending the outcome of those separate proceedings.

During the investigation, the Union made a motion to dismiss the petition on the grounds of mootness, arguing that there is no ongoing labor dispute. After considering the information submitted by the parties at the investigation⁴ and the parties' arguments, we dismiss the petition for the reasons set forth below.⁵

Findings of Fact

The parties submitted several stipulations at the investigation, which we have considered along with the information proffered through witnesses and documents.

Stipulations

1. The University of Massachusetts (Amherst) is a public employer within the meaning of Section 1 of M.G.L. c.150E (the Law).
2. The United Auto Workers, Local 2322/GEO (Union) is an employee organization within the meaning of the Law.
3. The Union represents the teaching associates (TOs), teaching assistants (TAs), research assistants (RAs), project assistants (PAs), assistant residence directors (ARDs) and graduate interns receiving University paychecks, and fellows and trainees whose duties and responsibilities are substantially similar to those of TOs, TAs, RAs, PAs, ARDs or interns.
4. The graduate student instructors in the Division of Continuing Education (Division) are not represented by the Union with respect to their work in the Division⁶.
5. The Union filed a petition to represent the graduate student instructors in the University's Division as well as any other division

(Commission found delivery of a petition and notice of investigation to the union's office provided sufficient notice to the union).

3. One case was a representation proceeding, Commission docket nos. SCR-01-2241 and CAS-01-3481; the other a prohibited practice proceeding, Commission docket no. SUP-01-4840.

4. After the investigatory hearing was concluded, both parties forwarded documentary materials to the Commission for our consideration. The Union submitted a list of cases and the Employer submitted two newspaper articles. We decline to consider those materials.

5. Accordingly, we need not rule on the Union's motion to dismiss for mootness.

6. [See next page.]

instructors who were not represented by an existing unit as of March 17, 2000. That petition was amended on January 29, 2001 and is currently pending before the Labor Relations Commission (Commission).

6. The Division is a unit of the Office of University Outreach and assists the campus's academic units in offering credit courses and degree programs to members of the community, including University students.

7. There are two summer sessions in the Division. The first summer session began June 5, 2001 and ended July 14, 2001. The second session began July 17, 2001 and ends August 23, 2001.

8. James Shaw (Shaw) is the Union's president and is a graduate student instructor in the Division. Shaw did not teach any courses in the 2001 summer sessions.

9. The final grades of students enrolled in approximately forty of the Division's first-term summer session courses were handed into the Division's Registrar at approximately 4:45 p.m. on July 18, 2001.

10. The Union assisted the graduate student instructors in turning in grades at 4:45 p.m. on July 18, 2001.

11. The document marked as Employer exhibit 1 appeared on the Union's website on or about July 18, 2001.

12. The document marked as Employer exhibit 2 appeared on the Union's website on or about July 24, 2001.

13. The document marked as Employer exhibit 3 appeared on the Union's website on or about July 25, 2001.

14. Employer exhibits 4 and 5 are a compilation of articles that appeared on the Union's website as of August 21, 2001.

15. Each article that is listed by date in Employer exhibits 4 and 5 appeared on the Union's website on or about the date listed.

16. The Employer represents that approximately ninety-seven graduate student instructors and approximately fifty-five faculty members taught in the first summer session of the Division. The Employer further represents that approximately sixty-one graduate student instructors and approximately twenty-two faculty members taught in the second summer session of the Division.

17. The Employer represents that there were approximately sixty-three courses scheduled in the Division on Thursday, August 16, 2001.

18. The Employer represents that there were approximately twenty-two courses scheduled in the Division on Friday, August 17, 2001.

Other Findings of Fact

Graduate student instructors employed by the Employer work either for the University's regular day program, its Division of Continuing Education (Division), or both. Graduate student instructors who work for the Division (Division GSIs) are currently unrepresented for purposes of collective bargaining.⁸

During the Summer of 2001, the Union engaged in a number of events designed to encourage the University to voluntarily recognize the Union as the exclusive collective bargaining representative for Division GSIs. These activities included a series of rallies, demonstrations and/or protests on the University campus on a weekly basis, as well as a staged "sit-in" at the offices of the University President. The Union regularly provided previews and updates of its activities to its membership via its website. For example, on or about July 18, 2001 the Union posted on its website an article entitled "First Session Instructors to Embargo Grades," which provided in pertinent part as follows:

On Wednesday, July 18th, from 4-5pm, University of Massachusetts graduate students will be taking their first job-action against the University in an escalating campaign to win union recognition for Continuing Education instructors. The action will be a five-hour delay of first-term Summer Session grades. Scheduled to be due at noon, graduate instructors will turn them in at five, shortly before the office closes. . . . The delay is a response to the University's refusal to recognize graduate instructors in Continuing Education as University employees and members of the Graduate Employee Organization/United Auto Workers Local 2322 (GEO). . . .

The Alleged Strike on July 18, 2001

Every year, Division GSIs are provided with copies of the Division's Instructor Information Guide. The Guide contains a section entitled "Grades Due"⁹ that identifies the time of day and approximate date that summer session grades are required to be delivered to the Registrar's offices.¹⁰ At summer orientation sessions, the Registrar's staff notifies Division GSIs orally and in writing of the exact date and time their grades are due for each summer session.¹¹ The due dates for grades are also listed on the University's calendar. Grades for the first summer session were scheduled to be due at noon on July 18, 2001.¹²

On July 18, 2001, the Union set a table up outside an entrance to the University building that housed the Registrar's offices where Division GSIs were required to turn in their grades. Throughout the

6. For purposes of this proceeding we assume, without deciding, that graduate student instructors in the Division of Continuing Education are public employees within the meaning of the Law. The Employer specifically alleged this in its petition and the Union did not dispute that allegation.

7. See footnote 3, *supra*.

8. See footnotes 3 and 7, *supra*.

9. The 2000/2001 Guide's "Grades Due" section provides: "Grades will be due at 12 Noon approximately . . . one week after the end of each Winter/Summer session. Please return grade rosters to the Division of Continuing Education, Records and Registration Office by the deadline so the students will receive their grade on the grade reports sent out by Records and Registration."

10. In addition, an April 3, 2000 memorandum attached to the Guide provides, in pertinent part: "The deadline for submitting final grades for the Spring 2000 semester is May 23, 2000 12:00 noon. Adherence to these policies by all faculty members and graduate assistants will help to minimize student grievances and other avoidable problems. Thank you for your cooperation."

11. Registrar Cynthia Boissonneault (Boissonneault) advised Division GSIs at the orientation to their summer teaching sessions that student grade rosters were due at her office at 12:00 noon on July 18, 2001.

12. Grades for the second summer session were scheduled to be due at noon on August 28, 2001.

day, representatives of the Union collected grades from Division GSIs and held the grades in manila envelopes until 4:45 p.m. as part of the Union's campaign for recognition. At about 4:45 p.m., approximately forty to sixty individuals, some of whom were GSIs, marched up to the Registrar's offices carrying Union signs and chanting Union slogans. One by one, those individuals handed approximately forty-two manila envelopes to the Registrar that afternoon while the Union's vice president, Leslie Edwards (Edwards), stood by.¹³ As a result, the Registrar could not begin processing those grades until the next day. There were 125 sets of grades due at noon on July 18, 2001. In addition to the forty-two delayed sets of grades, another twelve sets were turned in after 12:00 p.m. Prior to July 18, 2001, there is no evidence that the Employer had ever disciplined Division GSIs who had turned their grades in late.¹⁴

The Alleged Sick-out on August 16 and 17, 2001

On August 16, 2001, five Division GSIs called in sick¹⁵ and did not hold class¹⁶. On August 17, 2001, two Division GSIs called in sick and did not hold class.¹⁷ According to the manager of the Division's Academic Programs & Instructional Services (APIS) office, instructors call in sick and cancel class no more than once or twice a year. One of the Division's two APIS receptionists recalled three instances in the previous two and one-half years where GSIs called in sick and at least one occasion where a Division GSI canceled class for a different reason.

All of the Division GSIs who called in sick over the two day period informed the Division that they had telephoned their students to let them know their classes were being canceled. Prior to this two day period, no Division GSI who called in sick had ever informed the Division they had called their students to let them know class would be canceled.

In the days prior to August 16, 2001, Shaw had two or three conversations with Union Vice President Leslie Edwards regarding the subject of a sick-out. Edwards told Shaw words to the effect of, "We are thinking of having a sick-out. What do you think?" Shaw replied that in his opinion it was a "bad idea." Shaw also knew that Edwards had been talking to GSIs about the possibility of a sick-out, and Shaw believed that those discussions were related to the Union's fight for recognition of Division GSIs. Shaw took no steps to discourage a sick-out other than telling Edwards he thought it was a bad idea.

No evidence was presented that the Union posted on its website or elsewhere a request that Division GSIs call in sick. Nor has the Union posted a request that Division GSIs call in sick or otherwise cancel class in the future. There is also no evidence that the Union is planning to sponsor another grade embargo. In fact, Shaw testified under oath that the Union would "never do it [sponsor a grade embargo] again".

Discussion

Section 9A(a) of the Law prohibits public employees and employee organizations from engaging in, inducing, encouraging, or condoning any strike, work stoppage, slowdown, or withholding of services. Section 1 of the Law defines a strike as a public employee's refusal, in concerted action with others, to report for duty, or his willful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment. Under Section 9A(b) of the Law, a public employer may petition the Commission to investigate alleged violations of Section 9A(a).

In this case, the Employer urges the Commission to find that the Division GSIs were required to turn in their student grade rosters by 12:00 noon on July 18, 2001 as a condition of their employment, and that the collective conduct delaying grade filing constituted an illegal strike. In support of its argument, the Employer notes that the Division's 2000/2001 Division Instructor Information Guide (Guide) provided that grades were due at 12:00 p.m. approximately one week after the end of the first summer session, and the University's calendar listed the deadline for first summer session grades as 12:00 noon on July 18, 2001. In addition, Boissonneault advised Division GSIs at the orientation to their summer teaching sessions that student grade rosters were due at her office at 12:00 noon on July 18, 2001. Furthermore, the University's calendar as well as an April 3, 2000 memorandum attached to the Guide established other 12:00 noon grade deadlines.

The Union acknowledged in information posted on its website that the grades were due at 12:00 noon on July 18, 2001, but argues that because Division GSIs have turned student grades in late in the past, without adverse disciplinary consequences, that the 12:00 noon deadline was not a requirement. The Union further argues that the language of the Guide and its attachments indicated that the dates and time of day were not absolute requirements.

In *Lenox Education Association*, 7 MLC 1761, 1775 (1980), *aff'd sub nom. Lenox Education Association v. Labor Relations Commission*, 393 Mass. 284 (1984) the Commission concluded that "duties of employment", the abstinence in whole or in part from which constitutes a strike, include duties specifically mentioned in an existing or recently expired collective bargaining agreement, personnel policies in effect for more than one year, and those practices not unique to individual employees which are intrinsic to

13. The Union's website characterized the event as a "grade embargo."

14. Prior to July 18, 2001, the Registrar never sought to discipline Division GSIs who had turned their grades in late. In addition, the Union president had personally turned grades in late and knew of others who had done so without penalty.

15. One of the five called to cancel class without saying she was sick.

16. Another instructor had told his students the night before that he might be sick the next day but he did meet with his students on August 16, 2001.

17. No evidence was presented regarding whether any of the seven absences were legitimately due to illness.

the position or which have been performed by employees as a group on a consistent basis over a sustained period of time. Although the Guide states that "[g]rades will be due at 12 Noon approximately . . . one week after the end of each Winter/Summer session," Division GSIs have previously turned grades in after the noon deadline, and the Employer has not disciplined them for any delay. Furthermore, twelve other instructors turned in grades after 12:00 noon on July 18, 2001 for reasons apparently unrelated to the grade "embargo." Therefore, because Division GSIs were not required to turn in their grades at 12:00 noon that day, the five hour delay was not a strike, slowdown or withholding of services within the meaning of Section 9A. Because we conclude the five hour delay in submitting grades was not a strike, the Union accordingly did not engage in, induce, encourage or condone a strike.

We next consider whether the alleged "sick out" on August 16 and 17, 2001 constituted a strike, work stoppage, slowdown, or withholding of services and whether the Union induced, encouraged, or condoned the activity. The Commission can infer the existence of a strike from, *inter alia*, absenteeism of an abnormally high rate, similarity of employee excuses for absence, and timing of absenteeism coincident to expressed frustration with labor relations. *City of Medford*, 14 MLC 1217, 1220 (1987); *Shrewsbury School Committee*, 26 MLC 103, 104 (2000). In this case, approximately seven Division GSIs called in sick on two consecutive days during a period of escalating Union protests for recognition, and during a time frame in which Union officers had been discussing a sick-out among instructors. Each instructor who called in sick stated that they had telephoned their students and advised them that they would not be holding class. The Employer argues that we should infer from these facts that the Union induced, encouraged or condoned a strike

We need not decide here whether the calling in sick of seven instructors on August 16 and 17 constituted a strike under Section 9A of the Law because we do not find that the Union induced, encouraged or condoned five instructors on August 16 and two instructors on August 17 to participate in a sick-out. In contrast to the grade embargo, the Union did not advocate on its website that instructors call in sick, and the Union president had informed at least one other Union official that he thought that the idea of a sick-out was a "bad" idea.

Conclusion

For all of the above reasons, we find that the Union did not engage in, induce, encourage or condone a strike, work stoppage, slowdown, or withholding of services within the meaning of the Law and we therefore dismiss the petition.¹⁸

* * * * *

18. Accordingly, we need not address the Union's motion that Section 9A(a) is inapplicable to Division GSIs because the Employer argued in Case No. SCR-01-2241 and CAS-01-3481 that Division GSIs are not entitled to collective bargaining rights.