CITY OF LOWELL

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES/INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 382

Case No. MUP-2423

65.6 employer speech
91.1 dismissal

July 31, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

David J. Fenton, Esq.	*Representing the City of Lowell*
Richard K. Sullivan, Esq.	*Representing the National Association of Government Employees/International Brotherhood of Police Officers, Local 382*

DECISION

Statement of the Case

On June 1, 1999, the National Association of Government Employees/International Brotherhood of Police Officers, Local 382 (the Union) filed a Charge of Prohibited Practice with the Labor Relations Commission (the Commission) alleging that the City of Lowell (the City) had violated Sections 10(a)(1) and (2) of Chapter 150E of Massachusetts General Laws (the Law). On May 3, 2000, following an investigation, the Commission issued a Complaint of Prohibited Practice alleging that the had City violated Section 10(a)(1) of the Law by interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed under the Law.[1] On August 8, 2000, Commissioner Mark A. Preble, a duly designated hearing officer of the Commission, conducted a hearing at which the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the outset of the hearing, the parties offered certain stipulations of fact and two joint exhibits, which the hearing officer incorporated into his recommended findings of fact. Both parties filed post-hearing briefs. On October 6, 2000, the hearing officer issued recommended findings of fact pursuant to 456 CMR 13.02(2). Neither party challenged the hearing officer's recommended findings.

Findings of Fact[2]

Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

The City, acting through its City Manager, is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive collective bargaining representative of all regular police officers below the rank of sergeant.[3]

The City and the Union are parties to a collective bargaining agreement that was in effect at all relevant times. Article XVIII of that agreement, entitled Nondiscrimination, states:

> The Employer and the Union agree that neither the Employer nor the Union nor any representatives thereof, will discriminate in any way against employees covered by this Agreement on account of membership or non-membership in the Union, or for adherence to the provisions of this Agreement.

The collective bargaining agreement also contains a grievance procedure.

In October 1998, several officers in the Lowell Police Department (the Department), including Gerald Flynn (Flynn), Scott Fuller (Fuller), John Leary (Leary), Jose Rivera (Rivera), Daniel Otero (D. Otero), Angel Otero (A. Otero), Edward McMahon (McMahon), and Vanessa Dixon (Dixon) were together on a bus trip to Boston. At that time, Flynn was the Union president and Fuller was the Union vice president. An incident occurred during that trip that prompted Dixon to exit the bus prior to leaving Boston.

Although she did not file a formal written complaint in accordance with the City's Sexual Harassment Policy, Dixon alleged that several members of the Police Department had engaged in sexually harassing conduct.[4] In response to Dixon's allegations, Superintendent Edward F. Davis III (Davis) changed the accused officers' shifts to reduce their contact with Dixon and ordered the accused officers not to contact Dixon. The Department also conducted an investigation that included interviews with officers and a departmental hearing before the appointing authority.

The incident and ensuing investigation caused severe tension in the Department. Subsequent allegations of corruption further compounded the tension. At one point, the Union filed complaints with both the Federal Bureau of Investigation and the local District Attorney's office.[5] The Union also spoke out on a local talk radio program against what it believed to be racism within the Department.

In April 1999, the Department disciplined seven (7) of the police officers who were on the trip with Dixon for, in part, allegedly en-

1. The Commission dismissed that portion of the Union's charge alleging that the City had violated Section 10(a)(2) of the Law. The Union did not seek review of that dismissal pursuant to 456 CMR 15.04(3).

2. The Commission's jurisdiction is uncontested.

3. The position of police chauffeur is also included in the bargaining unit. However, the parties stipulated that no bargaining unit member presently fills that position.

4. Dixon also filed a complaint with the Massachusetts Commission Against Discrimination.

5. Following an investigation, the Department was cleared of any wrongdoing.

gaging in sexually harassing conduct. Although the record is unclear concerning the exact discipline of each officer, Flynn was suspended for thirty (30) days beginning in April 1999.[6]

Shortly after Flynn began serving his suspension, Davis sent a letter to the homes of all employees of the Department, including the superior officers and the civilian employees who are not in the bargaining unit represented by the Union, but excluding Flynn, Fuller, Leary, Rivera, D. Otero, A. Otero, and McMahon. Davis wrote the letter in part because he was concerned about reports that he had heard concerning the actions allegedly taken by certain members of the Union leadership and was generally concerned that the Department was becoming polarized as officers took sides in the dispute. For example, Davis had heard that Flynn had had a conversation with a deputy superintendent, during which Flynn had allegedly stated that, if the Department did not cease its investigation, he would bring the Department down. Davis had also heard of an incident at a local nightclub during which a witness who gave information during the investigation was allegedly referred to as a "rat" and then punched.

Davis's letter stated:[7]

> The men and women of the Lowell Police Department have worked incredibly hard during the past five years. You are responsible for dramatic decreases in crime and a remarkable improvement in the quality of life in Lowell not seen in decades. You have made this department an organization of which to be proud. There is abundant evidence of your commitment, professionalism, and success. We have done much work together and have more to do. Juvenile violence, domestic violence and continually improving community relationships are our priorities now. However, in order to successfully continue our work on those challenges, we must, as a group move beyond the recent ordeal that has left one of us, and therefore all of us, injured.
>
> I have remained silent on the current controversy within our police department in recent months, which has been at times difficult, especially when I see the integrity of our organization publicly challenged. I have been effectively gagged by a section of a general order, much quoted by the suspended officers, that prohibits me from discussing this case until a finding of guilt has rendered. This has now happened and I wish to share with this department some of my thoughts on this matter.
>
> The victimization of a member of our department on that bus is unconscionable. Vanessa was set upon by several fellow officers, threatened, verbally abused and ultimately forced to flee. She was deserted by these officers and found herself in danger. Because these officers abandoned her, a stranger further victimized her. Police officers everywhere, no matter their allegiance, political bent or personal prejudice *never* let another officer get hurt. Police officers have died defending one of their own. The reprehensible actions on that bus were not restricted to one of our own either. The victimization of a female officer, an elderly female bus driver and a citizen invited onto a bus full of police officers is not what we stand for. The officers' conduct that early morning was a betrayal of one of our finest.
>
> The betrayal, however, did not end in Boston.
>
> When other officers became aware of the incident they appropriately reported it to superior officers, and a Professional Standards investigation was launched. Several officers on that trip opted not to cooperate in our investigation. Lying to a superior officer in an internal investigation must be dealt with severely to ensure the integrity of this organization. Because of the people involved, the patrolmen's union further victimized Vanessa by deserting her yet again. She was offered no counsel or support from her own union, a union that she had performed much volunteer work for in the past. Never have any of the men on that bus accepted any responsibility, apologized to Vanessa or displayed any courage in light of the circumstances. In fact, Vanessa has been subjected to further insults and threatening comments.
>
> Early in this investigation, the union leadership sent this administration a clear and defiant message: "Back off this investigation or we will bring this department down." Their campaign of mudslinging in recent weeks supports their threat, but they will not succeed. Several of the officers in question have launched a concerted and aggressive campaign to besmirch the reputations of officers within their own ranks and in the command staff of this department. The bombastic and threatening statements being made by these officers are spiteful and rooted in revenge. Bullying tactics do not work on police officers. These officers should amend their repertoire, it is boring.
>
> The sum total of this behavior has resulted in a workplace that is offensive to Vanessa and other officers, especially females. I refuse to allow that to happen. I have an incredible amount of respect for working police officers and for the members of the Lowell Police Department. There is no higher calling. Each of you risks your life for the citizens of this city. I am proud of your continued work and commitment to excellence, in spite of the recent tumultuous climate.
>
> Many of you have expressed disdain for the pathetic tactics of a few vocal members of this organization. I agree with you, and simply ask that you continue the exceptional work you have been doing for this city. Make no mistake about it, you have played a critical role in our city's rebirth. I appreciate your hard work, and I respect you for it. I know that you and I have a deep respect for this institution and this city. If you did not, you would not risk your life for it. We may not always agree with one another, but we are all proud to be members of the Lowell Police Department.
>
> Members of this department throughout time would not want their wives, girlfriends, sisters, mothers, or daughters - or for that matter, any loved one - to be treated in the manner Vanessa has been treated. I challenge you to offer her your support and encouragement.
>
> Vanessa needs your assistance. Be there for her. [Emphasis in original]

The only other time that Davis had mailed letters directly to the homes of Department employees was when he was first appointed.

Opinion

It is well-settled that an employer violates Section 10(a)(1) of the Law if it engages in conduct that would reasonably tend to interfere with employees in the free exercise of rights under Section 2 of the Law. *Town of Chelmsford*, 8 MLC 1913 (1982), *aff'd sub*

6. The Civil Service Commission subsequently reversed that discipline.

7. Although the hearing officer included excerpts from the letter in his recommended findings, we include the entire text, because it is relevant to the context in which the alleged unlawful statements were made.

nom. *Town of Chelmsford* v. *Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983); *Commonwealth of Massachusetts*, 28 MLC 250 (2002), *citing Quincy School Committee*, 27 MLC 83, 91 (2000). Even without a direct threat of adverse consequences, the Commission has found a violation when an employer makes disparaging remarks toward a union or the exercise of protected activities. *See*, *Groton-Dunstable Regional School Committee*, 19 MLC 1194, 1197 (1992), *citing Groton-Dunstable Regional School Committee*, 15 MLC 1551 1557 (1989). To determine whether an employer's conduct violates the Law, the Commission does not consider the employer's motivation, *see*, *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989), or whether the employer's conduct actually impacted the employee or employees involved, *see*, *Town of Tewksbury*, 19 MLC 1808 (1993). Rather, the inquiry focuses on the objective impact that the employer's conduct would have on a reasonable employee. *See*, *Town of Winchester*, 19 MLC 1591, 1596 (1992).

However, when analyzing the impact of the employer's conduct on reasonable employees, the Commission considers the impact on a reasonable employee under the circumstances. For example, in *City of Fitchburg*, 22 MLC 1286 (1995), two probationary employees became unwitting participants in a grievance concerning compensation for certain training which they had attended. The employer denied the grievance, stating, in part:

> I feel very strongly that if they truly wanted to be Fitchburg Firefighters that they certainly should expend some time and effort on their own towards this goal.
>
> If they are not interested, there are a lot of other candidates on the Civil Service list that are …

Id. at 1290, n.5. In concluding that the employer unlawfully interfered with, restrained and coerced the employees in the exercise of their rights guaranteed under the Law, the Commission stated:

> Those same words used in the course of every day conversation would arguably not be the same source of great concern. However, in the context of a grievance, filed on behalf of two unwilling probationary employees, they assume a more threatening essence. We view the effect, not merely from the perspective of the reasonable employee, but from the perspective of the reasonable probationary employee lacking Civil Service protection.

Id. at 1293. Here, the Union argues that Davis's letter threatens and intimidates unit members from participating in Union activity because it asserts that Flynn, Fuller, and the Union do not represent the members' interests. However, for the reasons set forth below, we find that, in the context of the tension then on-going in the Lowell Police Department, Davis's letter, when considered as a whole, would not tend to interfere with a reasonable employee in that situation.

First, much of Davis's letter concerns the alleged bus incident and Davis's views of the officers allegedly involved. However, Davis's criticism goes more to their actions as police officers than it does as Union officials. For example, Davis states "Police officers everywhere, no matter their allegiance, political bent or personal prejudice *never* let another officer get hurt. Police officers have died defending one of their own." (emphasis in original)

Second, Davis comments negatively about the statement reportedly made by Flynn that, if the Department did not cease its investigation, he would bring the department down, and to unfounded allegations made by the Union to federal and state authorities and on local radio of corruption and racism within the department. However, although a union has the right to take a position contrary to the employer's and to make that position public, *see*, *e.g*., *City of Lawrence*, 125 MLC 1162 (1988)(union that conducted no confidence vote in police chief and tallied vote in presence of media engaged in activities protected under Section 2 of the Law), that right must be balanced against the employer's right to manage the enterprise free from "egregious, insubordinate, or profane remarks which disrupt the employer's business or demean workers or supervisors." *Plymouth Police Brotherhood* v. *Labor Relations Commission*, 417 Mass. 436 (1994), *citing*, *City of Boston*, 6 MLC 1096, 1097 (1979). Here, we find that Flynn's reported threat to "bring the department down," and the Union's unfounded allegations made to federal and state authorities and local radio of corruption and racism within the department were not aimed at furthering a legitimate union interest, but rather were aimed at undermining Davis and his attempts to investigate the bus incident.

The Union cites *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (1989) and *Town of Plainville*, 20 MLC 1217 (H.O. 1993) as examples of where the Commission has found an employer's criticism of a union to violate Section 10(a)(1) of the Law. However, those cases are distinguishable. [8] In *Groton-Dunstable*, a grievant, who was also a union official, advanced a grievance to the superintendent's level and contacted the superintendent to suggest a meeting "prior to October 8." On October 9, the grievant advanced the grievance to the school committee, noting that "since [the superintendent] has failed to meet with me within the five (5) school days after receipt of the written grievance at Level 2, I am proceeding to Level 3 of the procedure." Thereafter, unaware of the grievant's action, the superintendent attended a previously scheduled meeting with union officials, including the grievant, at which all parties had agreed that communications between the union and the employer should be better. Following the meeting, the superintendent learned that the grievance had been advanced to level 3 and criticized the grievant, stating, in part: "You have not even followed the contract procedures which you supposedly support and that seems at best hypocritical and at worse callous in your disregard for other union officers." In *Town of Plainville*, 20 MLC 1217 (H.O. 1993) members of the local Fire Department affiliated with the Professional Firefighters of Massachusetts and the International Association of Firefighters. Following the affiliation, the fire chief made several derogatory remarks about the union, including: "I'm in charge here, not the f———- union"; "[t]he union

8. Although we find that Town of Plainville is distinguishable, we note that "[u]nappealed hearing officer decisions are final and binding on the parties to the case in which the decision issues, but do not constitute precedent for subsequent decisions and do not necessarily reflect the Commission's view of the Law." *Town of Ludlow*, 17 MLC 1191, 1196, n.11 (1990).

is a waste of time and if the union trie[s] screwing with [me] and filing all sorts of grievances, you will find a lot more work having to be done around this fire station"; and in reference to the affiliation with the Professional Firefighters of Massachusetts, "I don't know why they call themselves professional firefighters, I don't consider them professional." After the union president commented that there were not many tools in the toolbox, the fire chief responded, "Maybe your buddies in the union were stealing them." Finally, in response to the union president's inquiry about certain vacation time that was owed to a firefighter who has just resigned, the fire chief stated, "Tom is no longer with the department. If he has any further questions about vacation time, he is to see me. Not the f——— union."

In both *Groton-Dunstable* and in *Town of Plainville*, there was an initial determination that the employees involved were engaged in protected concerted activity. *See*, *Groton Dunstable*, 15 MLC at 1555 ("When [the grievant] moved his grievance through the contractual grievance procedure, he was engaged in protected activity."); *Town of Plainville*, 20 MLC at 1225 (hearing officer considered the activities criticized by the chief and found that each was protected under Section 2 of the Law). Here, most of Davis's letter refers to matters that are outside or beyond the protections of Section 2 of the Law. To be sure, there are troublesome aspects of Davis's letter, including his remarks that the Union had "victimized" and "abandoned" Dixon and offered her "no counsel or support." However, the prohibition against making statements that would tend to interfere with employees in the exercise of their rights under the Law does not impose a broad "gag rule," that prohibits employers from publicly expressing their opinion about matters of public concern. *See*, *Town of Winchester*, 19 MLC 1591, 1597 (1992). The ultimate test remains whether the employer's statements would tend to chill a reasonable employee's right to engage in activity protected by Section 2 of the Law. *Id*. at 1557-8.

We do not suggest that an employer may generally criticize a union's choice of which of two competing interests to represent. However, here, even if the Union had chosen to represent the interests of the officers whom Dixon had accused over Dixon, that choice was inextricably intertwined with other conduct both during and after the bus incident that was beyond the protection of Section 2 of the Law. Therefore, in the context we find that Davis's letter would not tend to interfere with a reasonable employee in the exercise of rights guaranteed under Section 2 of the Law.

Conclusion

For the reasons set forth above, we find conclude that the City did not violate Section 10(a)(1) of the Law. Accordingly, the complaint is dismissed.

SO ORDERED.

* * * * * * *

PLYMOUTH COUNTY SHERIFF'S DEPARTMENT

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

and

MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case Nos. CAS-3413, CAS-3462, and CAS-3463

34.2	***community of interest***
34.7	***geographic location – place of employment***
34.8	***similarity of work (interchangeability)***
34.91	***accretion***
35.41	***clericals***
35.51	***para-professionals - technical***

August 1, 2002
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

Michael P. Sheridan, Esq. *Steven Walsh, Esq.*	*Representing the Plymouth County Sheriff's Department*
Joseph Burke *Christopher Murphy*	*Representing the National Association of Government Employees*
Paul M. Facklam, Jr., Esq.	*Representing the Massachusetts Correction Officers Federated Union*

DECISION[1]

Statement of the Case

On July 20, 1999, the National Association of Government Employees (NAGE) filed a petition with the Labor Relations Commission (the Commission) seeking to accrete the positions of medical records coordinator, accreditation specialist, volunteer/intern services coordinator, discharge planning coordinator, sales and service worker (greenhouse), human resources specialist, telephone systems administrator, and photo lab technician at the Plymouth County Sheriff's Department (the Sheriff's Department) into its existing bargaining unit. On September 17, 1999, the Massachusetts Correction Officers Federated Union (MCOFU) filed a motion to intervene regarding the issue of the proper unit placement of two of the disputed titles: the telephone systems administrator and the photo lab technician. Neither NAGE nor the Sheriff's Department opposed MCOFU's motion to intervene. The Commission allowed the motion to intervene on January 4, 2000. On that same date, NAGE amended its petition to include the position of reintegration manager.

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.