

In the Matter of BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION, LOCAL 66,
MFT/AFT/AFL-CIO

Case No. MUP-07D-5111

67.3 *furnishing information*
92.51 *appeals to full commission*

January 4, 2011

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

*Brendan M. Greene, Esq. Representing the Boston School
Committee*

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Teachers Union, Local 66, AFT
Massachusetts, AFT, AFL-CIO*

DECISION ON APPEAL OF HEARING OFFICER DECISION

Summary

At issue in this appeal is a Hearing Officer's decision that the Boston School Committee (School Committee) refused to bargain in good faith by not providing the Boston Teachers Union, Local 66, MFT/AFT/AFL-CIO (BTU or Union) with unredacted student statements that the Union had requested to prepare for two scheduled disciplinary proceedings - an investigatory meeting followed by a disciplinary hearing - convened to address a teacher's alleged misconduct.

The School Committee raises two arguments. First it argues that the Hearing Officer committed an error of law or exceeded her authority when, as characterized by the School Committee, the Hearing Officer ruled that the Union was entitled to the requested information *prior* to the investigatory meeting. Second, the School Committee contends that a provision of the parties' collective bargaining agreement required the Union to drop its pursuit of the prohibited practice charge at issue.

After reviewing the record and the parties' briefs, the Commonwealth Employment Relations Board (Board) affirms the Hearing Officer's conclusion that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by failing to provide the Union with unredacted student statements to represent the teacher in disciplinary proceedings. We find no error or any undue expansion of authority in the Hearing Officer's finding that the School Committee did not provide the Union with the names of the students who provided statements to school administrators prior to the teacher's disciplinary hearing.

As such, the Hearing Officer correctly found that the School Committee's overall failure to provide unredacted students statements in connection with the teacher's disciplinary proceedings violated the Law. As explained more fully below, we do not view the Hearing Officer's decision as squarely holding that the School Committee committed a separate and independent violation of the Law by failing to provide unredacted students statements *before* the investigatory meeting. Further, for the reasons explained below, the Board finds no merit to the School Committee's other argument.

Statement of the Case

The Union filed a charge on December 5, 2007 alleging that the School Committee had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of the Law by providing redacted student statements in response to September and October 2007 information requests. After an in-person investigation, a duly-designated Division Investigator issued a three-count complaint of prohibited practice on March 26, 2008.

After a one-day hearing on July 9, 2009, the Hearing Officer issued a decision on June 25, 2010, finding that the School Committee had refused to bargain in good faith by failing to provide the Union with unredacted student statements. The Hearing Officer found that the student statements were relevant and reasonably necessary to the Union's function as the exclusive bargaining representative of certain teachers employed by the School Committee and that the failure to provide unredacted statements violated Section 10(a)(5) and, derivatively Section 10(a)(1) of the Law. The Hearing Officer dismissed the two additional allegations in the Division's complaint alleging that, by this same conduct, the School Committee repudiated two provisions of the parties' collective bargaining agreement.¹ The Union did not appeal this aspect of the Hearing Officer's decision.

On July 7, 2010, the School Committee timely appealed the Hearing Officer's Decision and Order to the Board pursuant to 456 CMR 13.15 and filed a supplementary statement pursuant to 456 CMR 13.15(4). On July 15, 2010, the Union filed a response.

Statement of the Facts

The School Committee did not specifically challenge any of the Hearing Officer's factual findings. We therefore adopt the findings set forth in her decision and summarize the material facts relating to the issues on appeal. See *Massachusetts Board of Regents*, 13 MLC 1267 (1986).

On September 7, 2007, the School Committee placed a teacher on paid administrative leave pending its investigation of alleged misconduct that occurred on September 6, 2007. By letter dated September 14, 2007, the School Committee notified the teacher of an

investigatory meeting² to take place on September 21, 2007 regarding the alleged misconduct. By letter dated September 20, 2007, the Union requested that the School Committee provide information to prepare to represent the teacher at the investigatory meeting. The information the Union requested included: a) all statements prepared by or on behalf of any individuals with knowledge of the facts giving rise to the allegations against the teacher; and b) copies of all witness statements obtained or received by the School Committee relative to the teacher's alleged misconduct. The School Committee did not provide the Union with copies of any student statements prior to the investigatory meeting.

On October 24, 2007, the School Committee notified the teacher that a disciplinary hearing would be held November 7, 2007.³ On October 25, 2007, in order to prepare for the disciplinary hearing, the Union reiterated its request for information concerning the September 6, 2007 incident of alleged misconduct. On November 7, 2007, the School Committee provided the Union with ten student statements, but redacted the students' names.⁴ The Union offered the redacted statements into evidence at the disciplinary hearing and at a subsequent arbitration hearing over the teacher's termination.

Collective Bargaining Agreement

The Union and the School Committee are parties to a collective bargaining agreement (Agreement) that was in effect by its terms from September 1, 2007 through August 31, 2010. Article X, Section E, Part 4 of the Agreement states:

Arbitration Award Application

The Committee agrees that it will apply to all substantially similar situations the decision of an arbitrator sustaining a grievance and the Union agrees that it will not bring or continue, and that it will not represent any employee in any grievance which is substantially similar to a grievance denied by the decision of the arbitrator.

The Hearing Officer's Decision

Applying the Board's⁵ traditional standard to determine whether information requested by a union is relevant, the Hearing Officer found that the unredacted student statements, secured on September 6, 2007, from ten students about their first day of school in the teacher's classroom, were relevant and reasonably necessary for the Union to prepare to represent the teacher in the disciplinary proceedings, including the investigatory meeting and the disciplinary hearing.

In addition to the traditional cease and desist and posting order, the Hearing Officer ordered the School Committee to provide the Union with the unredacted students' statements if the Union has an

1. On July 7, 2010, the Hearing Officer issued an Errata correcting two typographical errors.

2. The decision contains few details about the investigatory meeting other than that it is a step in the School Committee's disciplinary policy and procedures, it was held sometime between September 21 and October 23, 2007, it was attended by both Union and School Committee counsel, and the teacher participated in the discussion and denied all the allegations against her.

3. The disciplinary hearing was later rescheduled to December 11, 2007 and January 18, 2008.

4. The principal originally obtained the students' statements as part of a writing assignment about how they spent their first day of school.

5. References in this decision to the Board include the former Labor Relations Commission.

ongoing practical need for those statements to represent the member in the teacher's disciplinary proceedings.

Opinion

Hearing Officer Allegedly Exceeded Authority

On appeal, the School Committee contends that, by issuing a decision that addressed the Union's September 20, 2007 information request, the Hearing Officer unilaterally and without notice expanded the scope of the proceedings and deprived the School Committee of an opportunity to respond to this new allegation.⁶ The School Committee requests the Board to rescind the portion of the Hearing Officer's decision that address the Union's information request made *prior* to the teacher's investigatory meeting.

In support of this argument, the School Committee notes that Count I of the Division's complaint alleged that the School Committee violated the Law when it redacted student names from statements supplied to the Union prior to a disciplinary hearing on December 11, 2007 and January 18, 2008. The School Committee thus claims that the issue of when the Union was entitled to the unredacted student statements was not an issue before the Hearing Officer, particularly where the Union's charge does not allege that the School Committee violated the Law by not providing the unredacted statements prior to the investigatory meeting.

We disagree that the Hearing Officer exceeded the scope of her authority by addressing the Union's first information request. In Count I, paragraph 10 of the Complaint, the Division found probable cause that the School Committee failed to bargain in good faith when, as set forth in paragraph 8, it provided the Union with redacted student statements on November 7, 2007. As described in paragraphs 6, 7 and 8, the redacted statements were provided in response to the Union's two identical information requests made on September 20 and October 25, 2007. Paragraphs 6 and 7 also reflect that the Union made its first request after the School Committee notified the teacher, on September 14, about the investigatory meeting.⁷ As both the complaint and the charge clearly address the Union's first information request, we do not find that the Hearing Officer exceeded her authority by referencing the earlier request for information.

Hearing Officer Allegedly Made Material Error of Law

In a similar vein, the School Committee contends that the Hearing Officer made a material error of law in finding that the Union was entitled to information prior to the investigatory meeting. The

School Committee contends it is well-established within the employee discipline process that an investigation provides the employee with an opportunity to respond to misconduct allegations, and that its obligation to respond to information requests extends only to the subsequent disciplinary hearing, which is an adversarial proceeding. In support of this argument, the School Committee attached to its appeal a 2009 arbitration award, which the School Committee describes as holding that the School Committee is not required to provide the Union with information prior to an investigatory meeting.⁸ The School Committee further argues that the Union was obligated to discontinue processing this matter in light of the 2009 arbitration award and Article X, E.4 of the Agreement.

The Board agrees that the Hearing Officer's decision can broadly be read as ruling that the Union was, upon request, entitled to the unredacted student statements to represent the teacher at all disciplinary proceedings, including the investigatory meeting. However, the parties' briefs do not address, as a separate or independent violation of the Law, the School Committee's failure to provide any student statements in advance of the investigatory meeting. Rather, as to Count I, both briefs focus mainly on the School Committee's failure to provide unredacted statements prior to the disciplinary hearing.⁹ Notably, the Hearing Officer did not address whether the School Committee's failure to provide any statements before the investigatory meeting was an independent violation of the Law. Nor did the Hearing Officer discuss the distinction between the two types of disciplinary proceedings raised by the School Committee for the first time on appeal. Rather, the Hearing Officer held that the Union was entitled to unredacted student statements in connection with disciplinary proceedings generally, and that the School Committee violated the Law when it provided only redacted student statements to the Union prior the teacher's two-day disciplinary hearing. Viewed in this manner, we find no error.

We also reject the School Committee's argument that the Union was obliged to discontinue processing this case in light of the post-hearing arbitration award and Article X, E.4 of the Agreement. This case involves the School Committee's obligation to provide information to the Union under the Law, not whether the Union violated the Agreement by continuing to pursue its charge of prohibited practice.

6. The School Committee's Supplementary Statement references the "Union's September 14, 2007 information request." We believe this is an inadvertent error and the correct date is September 20.

7. The complaint also describes the School Committee's October 24, 2007 letter as an investigatory meeting notice, but the Hearing Officer's findings, upon which we rely, describe that letter as a notice of disciplinary hearing.

8. The arbitration award was not part of the hearing record. We therefore do not consider it on appeal. *Joseph R. Anderson and others v. Commonwealth Employment Relations Board*, 73 Mass. App. Ct. 908, 909 n.7 (2009) (adopting with approval Board's policy of not considering information raised for the first time on appeal).

9. For example, Section IIA of the Union's brief is titled, "By refusing to provide unredacted copies of witness statements prior to a disciplinary hearing, the School Committee plainly violated the good faith requirement imposed by [the Law]." In Section IIB, the Union argues generally that its information request was relevant and reasonably necessary, but the body of the ensuing paragraph discusses this only in terms of disciplinary hearings, as does the remainder of the brief. Not once does the Union argue that the failure to provide the information before the investigatory meeting violated the Law. The School Committee's brief similarly addresses why it was justified in providing redacted student statements before the hearing and makes no separate mention of its obligation to respond to the Union's first information request.

Conclusion

For the foregoing reasons, the Board affirms the Hearing Officer’s Decision and Order.

Order

WHEREFORE, IT IS HEREBY ORDERED that the School Committee shall:

1.Cease and desist from:

a) Failing and refusing to bargain in good faith with the Union by not providing information that is relevant and reasonably necessary to the Union in its role as the exclusive bargaining agent.

b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 2 of the Law.

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

a) If the Union has an ongoing practical need for the unredacted students’ statements to represent a bargaining unit member in the disciplinary proceedings that the School Committee initiated on September 7, 2007 concerning the alleged misconduct that occurred on September 6, 2007, provide the Union with the unredacted students’ statements.

b) Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, including electronically, if the School Committee customarily communicates with bargaining unit members via intranet or email, and display for a period of thirty consecutive days thereafter, signed copies of the attached Notice to Employees.

c) Notify the Division within ten days of receipt of this Decision and Order of the steps taken to comply with it.

SO ORDERED.

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH
EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS

The Commonwealth Employment Relations Board (Board) has issued a decision finding that the Boston School Committee (School Committee) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by not

providing the Boston Teachers Union, Local 66, AFT Massachusetts, AFT, AFL-CIO (Union) with information that is relevant and reasonably necessary to the Union in its role as the employees’ exclusive bargaining agent. The Board posts this Notice to Employees in compliance with the Hearing Officer’s order.

Chapter 150E gives public employees the following rights:

- To form, join or assist a union;
- To participate in proceedings at the Division of Labor Relations;
- To act together with other employees for the purposes of collective bargaining or other mutual aid or protection;
- To choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith by refusing to provide the Union with information that is relevant and reasonably necessary to the Union in its role as the employees’ exclusive bargaining representative.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 2 of Chapter 150E.

[signed]
For the Boston School Committee

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE
DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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