CITY OF BOSTON AND LOCAL 285, SEIU, MUP-2345 (6/9/77)

(60 Prohibited Practices By Employer)
62.6 Discharge-misconduct
63.2 Discrimination-filing a charge or testifying
(90 Commission Practice and Procedure)
91.6 deferral to prior arbitration award

Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner

Appearances:

Richard F. Meyer, Esq. - Counsel for the City of Boston
Joseph G. Sandulli, Esq. - Counsel for Local 285, Service Employees International Union, AFL-CIO

DECISION AND ORDER

Statement of the Case

On September 23, 1975, Local 285, Service Employees International Union, AFL-CIO (Local 285) filed a Complaint of Prohibited Practice with the Labor Relations Commission (Commission) alleging that the City of Boston (City) had engaged in certain practices prohibited by Section 10 of Chapter 150E of the General Laws (the Law).

The Commission, pursuant to the power vested in it by Section 11 of the Law, investigated the aforesaid Complaint. On January 26, 1976, the Commission issued its own Complaint of Prohibited Practice, alleging that the City had violated Sections 10(a)(1) and (4) of the Law by discharging an employee in retaliation for his having given testimony before the Commission in Commission Case No. MUP-2135.

Copies of the Complaint were served on all parties pursuant to the rules and regulations of the Commission. A timely answer was filed by the City placing at issue all the material allegations of the Complaint. Pursuant to notice, a formal hearing was held at the offices of the Commission in Boston on April 1, 1976. Both parties were represented at that hearing, at which time a joint stipulation was entered. The parties agreed that the official record in the present case would consist of the transcript of and the exhibits submitted in an arbitration hearing relating to the same discharge. The parties further stipulated that the arbitrator's award would be submitted to the Commission upon receipt by the parties. It was also agreed that the Commission would take administrative notice of the transcript of the hearing in Case No. MUP-2135. The formal hearing was then officially closed with the understanding that it would be reconvened if the Commission found the record as submitted inadequate.

The record as so stipulated was submitted to the Commission, along with briefs from both parties. Having reviewed all of the evidence submitted, and having carefully considered the briefs, the Commission makes the following Findings of Fact, Opinion and Order.

City of Boston and Local 285, SEIU, 4 MLC 1033

Findings of Fact

1. The City of Boston is a municipal corporation situated in the County of Suffolk, and is a "public employer" within the meaning of section 1 of the Law.

2. Local 285, Service Employees International Union, AFL-CIO, is an "employee organization" within the meaning of Section 1 of the Law.

3. Local 285 is the exclusive representative for the purposes of collective bargaining of certain employees of the City of Boston, including Jehu Eaves.

Jehu Eaves, the employee whose discharge gave rise to the present complaint, was employed by the City as Supervisor of Patient Transportation at Boston City Hospital from March 1971 through June 1975. Eaves' immediate supervisor was William Schuler, Assistant Deputy Commission - Area Administrator. In October of 1974 Schuler discovered certain discrepancies in the records kept by Eaves in his capacity as Supervisor. The errors all related to irregularities involving the hours worked by, and payments made to, two of Eaves' sons, who were employed in his department. Schuler considered the matter a sensitive one for two reasons: one, Eaves is black; secondly, Eaves' brother was a former member of the Board of Trustees of the Hospital. Because of the sensitive nature of the case, Schuler brought the matter to the attention of his immediate supervisor, James R. Shedno, Assistant Director of the Hospital.

Toward the end of October, 1974, Schuler and Shedno met with the Executive Director of the Hospital, Francis Guiney, and the Director of Personnel, Wallace Kountze. As a result of that meeting, Guiney asked Kountze to speak to Eaves to get his response to the charges, and to discuss possible transfer or resignation. At that meeting Kountze also asked Schuler to prepare a written summary of the discrepancies that had been discovered.

Later in October, Schuler and Donald B. Vincola, who was then Senior Personnel Officer in the Employee Relations Office, met with Eaves and discussed the charges. After that meeting, Kountze asked Vincola for his recommendation. Vincola stated that the evidence appeared to be overwhelming and recommended that a hearing be held, since Eaves had not offered a satisfactory explanation.

On October 29, 1974 Schuler wrote up a summary of the evidence against Eaves and submitted it to Kountze who met with Eaves to discuss the matter. Kountze asked Eaves for a written response to the charges. On November 1, 1974, Eaves submitted to Kountze a written explanation of the discrepancies.

On November 4, 1974 Schuler wrote a memo to Kountze indicating that he had decided to initiate a hearing for disciplinary action. Schuler contacted Guiney in November requesting another meeting to discuss the case. Kountze cancelled three scheduled meetings. For a time, no action was taken concerning the case, in part because the administration was occupied preparing for an accreditation inspection to take place the second week in December.

In January, Schuler discovered what he believed to be additional record manipulations by Eaves, involving one of his sons who had been late for work repeatedly but had nevertheless been paid in full.

On February 4 or 5 Schuler discussed these new irregulatities with Eaves. He indicated to Eaves the seriousness of the matter and stated that these new alleged violations would be added to the charges.

In February, Shedno called another meeting of the four administrators who had met the previous November. At the time, Shedno was impatient because of what he regarded as "foot-dragging" by Kountze. Guiney agreed that it was too late for corrective action, and made a decision at that meeting to hold a disciplinary hearing. While arrangements for a hearing were being made, Kountze was given time to talk to Eaves again to attempt a voluntary resolu- of the matter.

During the months of February and March, Schuler spent time going through documents to put together evidence relative to the case. Basically, however, he was waiting for an indication from Kountze that it was time to proceed with the case, since Kountze's authorization was needed in order to prepare formal charges. On April 8, Schuler wrote a memo to Kountze reiterating the allegations and requesting a hearing, hoping that the memo would "get the ball rolling". Schuler sent a copy of this April 8 memo to Vincola and later placed several telephone calls to Vincola asking whether the case was ready to go to hearing. Vincola relayed these inquiries to Kountze, who gave his approval to write up formal charges in late April or early May.

In the meantime, on April 18, the Commission held the first day of a hearing in Case No. MUP-2135. That case involved the discharge of an employee named Rotman, who had been employed in Eaves' department. The Complaint in the Rotman case alleged that the City had discharged Rotman due to his participation in a campaign critical of safety conditions in the hospital. The City maintained that Rotman was discharged for excessive absenteeism. This reason was found by the Commission to be pretextual, based upon attendance records of various employees in Rotman's department, and upon testimony including that of Eaves who testified that he did not think the reason given by the City was the actual reason for Rotman's discharge.

According to Eaves, on the afternoon of April 18, the day Eaves testified, Schuler reprimanded Eaves for taking a position adverse to the interests of the administration and reminded him that his own case was still pending. Portions of Schuler's testimony concerning the timing and substance of that conversation are set forth below:

Q Now, did you have a conversation with Mr. Eaves about the Rotman case?

A I think we might have discussed it, yes. We probably discussed it. I can't give you specific verbatim.

Q And about when was that, Mr. Schuler?

A Right about the time -- around the time of the hearing. I can't even give you the dates of the hearing. So, I doubt I can give you a verbatim time.

* * *

Q Now, what was the substance of the conversation you had with Mr. Eaves?

A You know I can't give you a verbatim recall. I am not even sure -- this is a year ago. In fact, I am not even sure that it wasn't the same time shortly after the office was broken into. We discussed everything. I don't know. I can't give you an answer on that right now. I don't know. I don't think it was, you know, I just don't recall it. I'm sorry. I don't think it's a big thing.

Q So, as I understand your testimony, all you recall is that you had a conversation with him about the hearing but you do not recall what the substance of that conversation was?

A To be honest with you, I don't. I can't give you a verbatim.

Q I didn't ask you for a verbatim.

A Or even a general recollection of it.

* * *

Q Mr. Schuler, is it possible that you said to Mr. Eaves, "You have no right going against the Administration about the Rotman case?"

A I have -- I don't think I said that. I could have. I don't know. I can't give you a verbatim one way or another.

Some time between the end of the work day on April 18 and the beginning of the work day on April 22, a break-in occurred in Schuler's office. His desk drawer was pried open and a folder containing all the documentation relative to Eaves' case was discovered missing. Nothing else was taken from the office. The break-in was reported to the Hospital's Security Department and to the Boston Police Department. A fingerprint investigation yeilded negative results. This incident acted as a catalyst, prompting Kountze to issue instructions to Vincola to prepare formal charges and proceed to a hearing. This authorization was given within two weeks of the break-in.

In a letter to Eaves dated May 12, Vincola indicated he was contemplating action against him "including termination, suspension without pay, transfer from office of employment or lowering in rank or compensation..." The letter included specific reasons for this contemplated action, making reference to the October and January incidents. The letter stated that an informal hearing would be held on May 15 to determine whether just cause existed for such contemplated action.

At the Union's request, the hearing was postponed to May 20. The hearing officer was a hospital administrator who had had no previous involvement

with the case. Schuler presented the case against Eaves, introducing evidence on each of the charges of altered records. He also introduced evidence of the break-in, although Eaves was not specifically accused of any involvement in the incident.

On June 4, the hearing officer sent Eaves a letter indicating his decision that Eaves was guilty of the charges and was to be terminated effective June 23, 1975. On June 12, a grievance was filed on behalf of Eaves, protesting his discharge as a violation of Sections 1 and 2 of Article VI of the collective bargaining agreement in effect between the parties.[1] On September 11 the City Grievance Committee denied Eaves' grievance and the matter was subsequently submitted to arbitration pursuant to the collective bargaining agreement. Arbitration hearings were held on March 15 and March 29, 1976. On July 23, 1976, the Arbitrator issued his decision in which he denied Eaves' grievance. The Arbitrator concluded: "I cannot find on the basis of the record that the City's action was arbitrary, capricious or unreasonable, and it is only on the basis of that standard that I may review the action." (Emphasis added.)

Opinion

At the outset, we note that this case is inappropriate for deferral to the decision of the arbitrator, inasmuch as the underlying claim of retaliation for having given testimony before the Commission is one that the Commission ought to, and will, hear and decide independently. This procedure is necessary in order to assure the effectiveness of the Commission's administration of the public sector collective bargaining law. The Commission has a strong interest in affording protection to those who testify before the agency. What is basically involved is whether there may have been an attempt to hinder access to the Commission's procedures and remedies. Since this involves possible interference with the Commission's own processes, the matter is particularly appropriate for the Commission itself to handle.

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[1] The relevant portions of the collective bargaining agreement read as follows:

ARTICLE VI.
Discipline and Discharge

SECTION 1. The discipline and discharge of an employee whose office or position is classified under Civil Service law and rules shall not be a subject of grievance or arbitration hereunder, except as specifically provided otherwise in Section 2 of this Article. The Union shall have the right to represent any such employee at any Civil Service proceeding.

SECTION 2. Any dispute as to whether the City acted arbitrarily, capriciously or unreasonably with respect to the discharge or other discipline of an employee serving under a provisional appointment to a permanent position, with more than six months of continuous active provisional service, shall be a subject of grievance and arbitration hereunder. .....

This is the approach that the National Labor Relations Board (the Board) has taken when considering similar charges under the comparable Section 8(a)(4) of the National Labor Relations Act (the Act).[2] E.g., Diversified Industries and Coopers International Union, 208 NLRB 233, 85 LRRM 1394 (1974). The Board has recently reaffirmed its position that such charges of retaliation are solely within the jurisdiction of the Board, and may not be deferred:

> The prohibition expressed in Section 8 (a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes. In our view the duty to preserve the Board's processes from abuse is a function of this Board and may not be delegated to the parties or to an arbitrator. Filmation Associates and Loudenslanger, 227 NLRB No. 237, 94 LRRM 1470, at 1471 (1977).

The courts, in reviewing decision of the NLRB, have noted the crucial importance of Section 8 (a)(4) in affording full protection to those who may be placed in jeopardy because they have initiated or assisted in proceedings under the Act. The effect of discrimination against persons who have given testimony is to tend to dry up sources of information that are essential to the agency's proper functioning, and to restrain employees in the exercise of their protected rights. NLRB v. Electro Motive Mfg., 389 F.2d 61, 67 LRRM 2513 (4th Cir. 1968); Oil City Brass Works v. NLRB, 357 F.2d 466, 61 LRRM 2318 (5th Cir. 1966); Pederson v. NLRB, 234 F.2d 417, 38 LRRM 2227 (2nd Cir. 1956); John Hancock v. NLRB, 191 F.2d 483, 28 LRRM 2236 (D.C. Cir. 1951).

For the above-stated reasons, we conclude that the Commission has sole jurisdiction over complaints alleging violations of Section 10 (a)(4).

The standard to be applied in this case is the same as that utilized in any case where an unlawful, discriminatory discharge is alleged. In a case involving a discharge for participation in union activities, the Commission set forth the following standard:

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[2]The relevant sections read as follows:
G.L. c. 150E, Section 10(a)(4): It shall be a prohibited practice for a public employer or its designated representative to ... discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by an employee organization.

29 U.S.C. §158(a)(4): It shall be an unfair labor practice for an employer ... to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

Inasmuch as the present case involves alleged discrimination for having given testimony before the Commission, which is clearly protected activity under both of the above versions, we need not consider the relevance of the differences between the two statutes, although we note that c. 150E appears on its face to offer broader protection.

> While pro-union activities will not insulate an employee from discharge for "cause", it is well settled that the existence of "cause" for the employer's action does not justify it where substantial evidence shows that anti-union consideration were involved. Ronald J. Murphy, 1 MLC 1271 (1975).

Similarly, in a case involving a violation of Section 10(a)(4), the Commission stated:

> Where at least part of the reason for an action is retaliation because of protected activity, it is not a defense that a legitimate reason for the action also exists. Town of Wareham 3 MLC 1334, at 1346.

The burden is on the complaining party to establish by a preponderance of the evidence that a violation has been committed. This burden may be met by circumstantial evidence and the reasonable inferences that may be drawn therefrom. Once a prima facie case of discrimination has been established, the burden shifts to the respondent to provide an adequate non-discriminatory explanation for its conduct. Town of Wareham, supra; Town of Dennis, 3 MLC 1014 (1976); City of Boston, 3 MLC 1101 (1976).

Thus, our initial inquiry in the present case is whether Eaves has presented sufficient evidence to establish a prima facie case of unlawful discrimination. Ordinarily, such evidence is purely circumstantial, since an employer rarely states directly its unlawful motive. However, in the present case there was testimony by Eaves that Schuler had told him, after he had testified before the Commission in the Rotman case, that Eaves had no right to go against the administration in the Rotman case. Schuler's own testimony basically corroborates this statement, since he stated that he "could have" made such a statement. Eaves further testified that Schuler reminded him, in the same conversation, that Eaves' own disciplinary case was still pending. This testimony is basically unrebutted.

Schuler's testimony about the conversation is replete with comments concerning his inability to remember details, or even generalities, concerning the verbal exchange. Since Schuler was able to remember clearly the details of conversations that took place as much as six months prior to the one concerning Eaves' role in the Rotman case, we regard his testimony concerning the latter conversation as evasive. We infer from that evasiveness that Schuler said something during that conversation which he did not want to reveal. Since Schuler admitted the conversation occurred, admitted that he could have said at least part of what Eaves attributes to him, and otherwise has an uncharacteristically poor memory of the conversation, we credit Eaves' account of content and timing of the conversation concerning his testimony in the Rotman case and the pendency of his own case. We view Schuler's statements, as related by Eaves, as indicative of a desire to punish Eaves for his participation in the Rotman hearing, and of a willingness to utilize the charges pending against Eaves as a means of accomplishing that end. We find this conduct to constitute an interference, restraint and coercion of Eaves' right to testify before this Commission. As such, his comments to Eaves constitute a violation of Section 10(a)(1) of the Law.

However, Schuler's comments to Eaves cannot be utilized to infer a discriminatory motive in the subsequent discharge, for several reasons. First, there is no evidence on the record that Kountze, who had the responsibility for authorizing the holding of a hearing, had any knowledge of Eaves' testimony in the Rotman case. Nor is there any indication of such knowledge on the part of the hospital administrator who acted as hearing officer. Even if either of these individuals had possessed such knowledge, we could not infer therefrom that they were motivated by that knowledge to take the actions they took, given all the circumstances of this case.

Secondly, we note that Schuler had been persistent in his effort to discipline Eaves for the record manipulations for several months, and had attempted as late as April 8, when he wrote a memo to Kountze, to accomplish that purpose. Schuler did not take any new steps based upon his unlawful motive, other than to pursue his long-standing goal of obtaining a hearing on the previous allegations. This is not a case where an employer, motivated by unlawful reasons, resurrected dormant charges against an employee. On the contrary, the charges were being actively pressed by Schuler all along. We find no evidence on the record to indicate that Schuler's later unlawful motive played any part in Kountze's decision to authorize a hearing, or in the hearing officer's decision to discharge Eaves.

However, there is another factor in this case from which we might draw the inference that Eaves' testimony was the basis of the decision to proceed to a hearing. The timing of the hearing, scheduled within weeks of Eaves' testimony, after a delay of many months, is certainly suspicious on its face. However, we are convinced by the record as a whole that the catalyst in this case was the break-in, and not Eaves' testimony.

We base this conclusion on several facts. First, Eaves' testimony was not crucial in the Rotman case, in the sense that it merely corroborated other extensive evidence indicating that Rotman's discharge was not for absenteeism.[3] Therefore, even if Kountze knew of Eaves' testimony, we find it unlikely that this inconsequential act of Eaves' would have altered Kountze's attitude, which had always been one of great reluctance to proceed.

Furthermore, the employer offered a more logical explanation for the timing of the decision to hold a hearing, that reason being the suspicion that Eaves was involved in the disappearance of the evidence regarding Eaves' alteration of records. We find that such a belief on the part of the employer was justified under the circumstances, although we certainly make no finding that Eaves actually had any involvement in the break-in. It is also reasonable that Kountze, who had previously been somewhat sympathetic to Eaves, would change his mind based upon the serious implications of the break-in.

Nor do we view this case as an instance of an employer countenancing past misconduct and then utilizing that misconduct to justify taking disciplinary action against an employee for other, unlawful reasons. If such were the

[3]We do not mean to imply that a finding of a 10(a)(4) violation must rest on a finding that the testimony given affected the outcome of the hearing. Rather, the test is whether the testimony was adverse to the employer. Carter Lumber and Laborers International, Local 83, 207 NLRB 391, 84 LRRM 1475 (1973).

case, we might reach a different conclusion, as the Board has done in numerous cases where an employer had tolerated faults until the employee engaged in protected activity. E.g., Western Exterminator and Carpenters Union, 223 NLRB No. 181, 92 LRRM 1161 (1976); Marriott Corp. and Local 481, 224 NLRB No. 26, 92 LRRM 1316 (1976); United States Cold Storage and Arroyo, 208 NLRB 423, 85 LRRM 1313 (1974); D. D. Thomas and Teamsters Local 171, 79 NLRB 982, 22 LRRM 1467 (1948). In contrast to those Board precedents, the present case is one where the employer was attempting to deal with the prior misconduct, holding numerous meetings to discuss the matter both internally and with Eaves. A decision had been made, prior to Eaves' testimony, to proceed with a disciplinary hearing unless a voluntary resolution was achieved.

The Union points to the long delay between the decision to hold a hearing and the actual authorization to proceed as evidence of the fact that the administration did not really consider the offenses serious. We decline to draw this inference, for two reasons. First, we do regard the offense of record manipulation as a serious one, involving indiscretions on the part of a supervisor which border on actual theft and do not feel that an employer would treat lightly such wrongdoing on the part of its supervisory personnel in whom trust must be placed.

Second, we credit the reasons for the delay offered by the employer. It is certainly reasonable that the hospital would wish to save from embarrassment Eaves' brother who had served the hospital in the capacity of a trustee. It is also logical that the hospital might exercise extra caution in disciplining a black employee, although we decline to comment on either the legality or the wisdom of affording minority employees the type of special treatment given to Eaves.

It may be argued that even if Eaves had been involved in the break-in, such wrongdoing was provoked by Schuler's unlawful threat of reprisal against Eaves for having testified at the Commission. Ordinarily, an employer cannot unlawfully threaten or otherwise discriminate against an employee, and then discipline the employee when he or she responds with what would otherwise be unprotected activity. In other words, an employer may not provoke an employee to commit an indiscretion and then utilize that misconduct to justify disciplinary action. E.g., Boston University v. NLRB, ___F.2d___, 94 LRRM 2500 (1st Cir. 1977). Although we agree with this principle in general, we decline to extend the doctrine to cover the type of extreme misconduct involved in the instant case. The rationale for the doctrine is that employer is responsible for the foreseeable consequences of its acts. Thus, when an employer unlawfully threatenes an employee who is exercising his or her rights, the employer may expect that the employee will react with justifiable indignation and even anger. Thus, the employer may not provoke an employee into acts of insubordination such as cursing, walking off the job temporarily, or engaging in nonserious treats of assault. Boston University v. NLRB, supra.

In the present case, we find that the behavior relied upon as a catalyst, even if it could be attributed to Eaves, would not be excused by the unlawful threat of reprisal expressed by Schuler, inasmuch as the behavior is beyond the pale of protected activity. We reach this conclusion based both on the extreme nature of the activity assumed by the hospital to be attributable to

Eaves, as well as on the fact that the activity took place at a time remote from the threat and thus cannot as easily be regarded as impulsive and therefore excusable.

For all of the above reasons, we find that Eaves' discharge was not unlawfully motivated in whole or in part, and was therefore not a violation of the Law.

Order

Wherefore, on the basis of the foregoing, IT IS HEREBY ORDERED, pursuant to Chapter 150E, Section 11 of the General Laws, that the portion of the complaint against the City of Boston which alleges a violation of Section 10(a)(3) of the Law ought to be and hereby is DISMISSED.

In order to remedy the violation of Section 10(a)(1) of the Law, the City of Boston and the Department of Health and Hospitals shall:

1. Cease and desist from:

   (a) Discriminating or threatening to discriminate against any of its employees because they have signed or filed an affidavit, petition, or complaint or given any information or testimony under G.L. Chapter 150E;

   (b) In any like or realted manner interfering with, restraining or coercing its employees in the exercise of their protected rights under the Law.

2. Take the following affirmative action which it is found will effectuate the policies of the Law:

   (a) Post in conspicuous places at Boston City Hospital and maintain for a period of sixty (60) days thereafter, copies of the attached Notice to Employees;

   (b) Notify the Commission in writing within ten (10) days of service of this Decision and Order of the steps taken to comply therewith.

SO ORDERED.

James S. Cooper, Chairman
Garry J. Wooters, Commissioner

City of Boston and Local 285, SEIU, 4 MLC 1033

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

Chapter 150E of the General Laws gives to public employees the following rights:

To engage in self organization

To form, join, or assist any union

To bargain collectively through representatives of their own choosing

To act together for the purpose of collective bargaining or for the purpose of other mutual aid or protection

To refrain from all of the above

WE WILL NOT do anything that interferes, restrains or coerces employees in their exercise of their rights. More specifically,

WE WILL NOT discriminate or threaten to discriminate against employees who have signed or filed an affidavit, petition, or complaint or given any information or testimony before the Labor Relations Commission.

CITY OF BOSTON,
DEPARTMENT OF HEALTH AND HOSPITALS

By: _____
David L. Rosenbloom, Commissioner

_____
William Schuler, Assistant Deputy Commissioner-Area Administrator