

TOWN OF WESTBORO AND RICHARD HORNE, MUP-2867 (6/30/78)

(60 Prohibited Practices by Employer)
62.5 Insubordination
63.7 discrimination: union activity

Commissioners participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner; Joan G. Dolan, Commissioner

Appearances:

Arnold W. Olsson, Esq.

- Representing Richard Horne

Robert J. Gallagher, Esq.

- Representing the Town of Westboro

DECISION**Statement of the Case**

On September 20, 1977 Richard Horne, an individual, filed with the Massachusetts Labor Relations Commission (Commission) a charge of prohibited practice alleging that the Town of Westboro, Department of Public Works (Employer) had engaged in prohibited practices within the meaning of Section 10(a)(1) of General Laws Chapter 150E (the Law).

Pursuant to its authority under Section 11 of the Law, the Commission investigated Horne's charge and on December 5, 1977 issued its own Complaint of Prohibited Practice. In substance, the Commission's Complaint alleged that the Employer had discharged Horne because of his concerted protected activity on behalf of employees in violation of Section 10(a)(1) of the Law.

Pursuant to notice, a Formal Hearing was held before the Commission in Boston on January 31, 1978 before Hearing Officer Robert B. McCormack. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties. After having heard and/or read all of the evidence adduced at the hearing, we hereby make the following findings of fact and render the following opinion.

Findings of Fact

The Town of Westboro is a municipal corporation in the County of Worcester in the Commonwealth of Massachusetts and is a public employer within the meaning of Section 1 of the Law.

The Board of Selectmen is the chief executive officer of the Town within the meaning of Section 1 of the Law.

Joseph Farrell is the Manager of the Westboro Department of Public Works and is an agent of the employer.

Richard Horne is a public employee within the meaning of Section 1 of the Law.



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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 of Massachusetts gives all employees these rights:

To engage in self-organization;

To form, join and assist employee organizations;

To bargain collectively through a representative of their own choosing;

To engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion;

To sign or file an affidavit, petition or complaint or give any information or testimony to the Labor Relations Commission, or to choose to be represented by an employee organization;

To refrain from any or all such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in Section 12 of the Law.

WE WILL NOT DO ANYTHING WHICH INTERFERES WITH THESE RIGHTS. MORE SPECIFICALLY,

WE WILL NOT by discharge or any other like or related means, discriminate against any of our employees because they are active on behalf of any employee organization.

WE WILL offer Richard Horne full and immediate reinstatement to his former or substantially equivalent position of employment with us, without loss of seniority or other rights, privileges and benefits, and will pay him all monies lost as a result of his termination.

All our employees are reminded that they are free to exercise all of the above rights, or to refrain therefrom, freely and without interference by us.

Town of Westboro

by:
Chairman, Personnel Board



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4. Notify the Commission, in writing within ten (10) days of the service of this decision and order, of the steps taken to comply therewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

James S. Cooper, Chairman
Garry J. Wooters, Commissioner
Joan G. Dolan, Commissioner

Horne vigorously availed himself of the opportunity thus afforded. It is clear that he was acting on behalf of employees, and was protesting what he perceived to be unsafe working conditions. While we do not place our imprimatur upon Horne's choice of expression, "we cannot find [Horne's remarks]...to be egregious or out of context in a labor struggle." *NLRB v. Cement Transport Inc.*, 490 F.2d 1024, 85 LRRM 2292 (6th Cir. 1974). The "remark furnished the excuse, rather than the reason for the...retaliatory action." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965). Farrell admitted failure to keep his composure, and his action in joining the verbal affray and following Horne to the door exacerbated an already tense situation and led to the minor encounter there.⁹ In sum, when we balance Horne's imprudence against his otherwise lawful action in representing employees, we conclude that we must give greater weight to the latter. A preponderance of the evidence demonstrates Horne's discharge was motivated by his insistence upon his right to engage in lawful concerted activities for the purpose of collective bargaining and other mutual aid or protection and was therefore a violation of G.L. Chapter 150E, Section 10(a)(1).

Order

WHEREFORE, on the basis of the foregoing, it is hereby ORDERED pursuant to G.L. Chapter 150E, Section 11, that the Town of Westboro shall take the following affirmative action which the Commission finds will effectuate the policies of the Law:

1. Offer Richard Horne immediate and full reinstatement to his former position without prejudice to his seniority rights or other rights and privileges, and make him whole for any loss of earnings he may have suffered as a result of his termination, by paying to him a sum equal to that which he would normally have earned from September 16, 1974 to the date of the employer's offer of reinstatement, less net earnings during such period, with the back pay computed on a quarterly basis plus interest at the rate of 7% per annum.
2. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records, time cards, personnel records and reports, and all other records necessary to determine the amount of back pay due under the terms of this order.
3. Post the attached notice in a conspicuous place in the several divisions of the Department of Public Works for thirty (30) days commencing not later than ten days after receipt of this decision.

⁹See *Betts Baking Co., Inc. v. NLRB*, 380 F.2d 199, 65 LRRM 2568 (10th Cir. 1967) wherein the NLRB held that the discharge of any employee on the ground that he used profanity was discriminatory even though his employer admittedly acted rashly out of personal dislike for the employee. There the employee was an active and known union adherent...and the profanity was such a minor act of misconduct that it would not ordinarily have resulted in a discharge unless the employer had been determined to find some way of ridding himself of union supporters.

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for facilitating resolution of internal personnel matters; or for promoting industrial harmony generally. In the instant case, however, two factors are plainly evident. First, when faced with the spectre of a unionized department, the employer immediately acted to give the employees an alternative course of action. Second, after forming the grievance committee, the employer's agent, Farrell, firmly controlled and dominated it. He indicated when and where meetings would be held, and acted as a chairman in conducting them. While the committee members were invited to express their concerns and views, and solicit the views of other employees, it is clear that Farrell imposed a limit on how far they might go in doing so.⁶

Horne's visibility in support of organizing the employees is particularly strong and needs no reiteration here. Likewise, the timing of his discharge is suspect, inasmuch as he was terminated immediately after vigorously protesting working conditions.

We now consider the reasons in advance by the employer to justify the discharge. As the employer's brief suggests, there is a need to maintain an appropriate image of and respect for supervisors and their authority. We have little doubt that verbal abuse of supervisors is one form of insubordination, especially where it takes place in front of virtually all of the employees.⁷ However, it is likely that Horne's choice of expression, particularly when uttered under conditions of exasperation and seeming futility, is rather common parlance in town barns. In view of this and of Horne's otherwise good record, the offense would appear not to merit so severe a penalty. Of greater concern is whether, in addition to the perceived insult, the discharge was further motivated by a desire to limit the rights of employees who desired to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁸ Here it was the employer who instituted the grievance committee.

⁶See, for example, *Great Lakes Screw Corp.*, 164 NLRB 149, 65 LRRM 1236, enf. den. on other grounds 70 LRRM 2769 (7th Cir. 1969) wherein the NLRB held that an employer dominated an employee advisory committee that had no offices, funds or equipment and which conducted its operation at the employer's expense. The Employer set the time for meetings of the committee, and conducted the meetings and the elections for employee representatives to the committee. In this case several pro-union employees were discharged. One had sworn at a supervisor.

⁷Horne was officially discharged for reason of "insubordination".

⁸G.L.c. 160 E, section 2, provides in pertinent part, that: "employees shall have the right of self-organization and the right to form, join or assist any employee organization for the purpose of collective bargaining through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion."

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party,⁵ and may be satisfied by circumstantial evidence and the reasonable inference that may be drawn therefrom. Town of Wareham, supra; Town of Dennis, supra; Town of Sharon, 2 MLC 1205 (1975). Once the complaining party has established prima facie the existence of an unlawful discrimination-typically by the presence of diverse circumstantial evidence-then the burden of proof shifts to the employer to provide an adequate non-discriminatory explanation for its conduct, "since proof of motivation is most accessible to him." Town of Wareham, supra; Town of Dennis, supra; Town of Sharon, supra. Conversely, failure by the complaining party to establish a prima facie case avoids the necessity for Commission inquiry into the adequacy of the employer's non-discriminatory explanation. Town of Wareham, supra; Town of Dennis, supra; Blasingame Well Service, 174 NLRB 1126, 1130 (1969).

If an employee establishes a prima facie case, and the employer fails to rebut that case by a preponderance of the evidence, the Commission will find the employer in violation of the Law. Where an employer has been found to violate individual rights guaranteed by G.L.c. 150E, ss. 10(a)(1) and (3) by demoting, suspending or terminating the employment of individuals for engaging in protected concerted activity, it is the responsibility of the Labor Relations Commission to remedy that violation by ordering affirmative relief, including reinstatement with back pay. Town of Wareham, supra; Town of Dennis, supra; Town of Tewksbury, 2 MLC 1158 (1975); Crimson Cafe, Inc., d/b/a Cronin's Restaurant, UP-2201 (1973); St. Elizabeth's Hospital v. Labor Relations Commission, 321 N.E.2d 837 (1974); Town of Townsend v. Labor Relations Commission, 319 N.E.2d 916.

The employer's motivation is essentially a question of fact. The factual determination is to be made on the basis of all of the evidence-direct and circumstantial-including such factors as evidence of anti-union bias, triviality of reasons, visibility of the alleged discriminatee in support of the union or in his participation in other protected activity, employer attitude, timing, and inconsistent or shifting reasons advanced by the employer to justify its actions. Town of Wareham, supra; Mt. Wachusett Community College, 1 MLC 1496 (1975), and supporting cases cited therein. Ordinarily, when some form of discriminatory action has been taken by an employer, several if not all of the above factors and circumstances are present. See for example, Mt. Wachusett Community College, supra; St. Elizabeth's Hospital v. Labor Relations Commission, supra.

We now examine the evidence in the case sub judice in light of the above criteria. Initially, we examine evidence relating to anti-union bias and employer attitude.

The remarks of the Chairman of the Personnel Board and Farrell's remarks to Horne clearly evince the employer's preference to avoid, if possible, realization of the employees' threat to "go union." Further, the employer's subsequent action in creating a grievance committee is further evidence of a desire to avoid the necessity of dealing with a full-fledged employee organization. We must note that it is not unlawful for an employer to form an internal "grievance committee" for the purposes of fostering better communication between employees and management;

Article 15.07 of the Commission's Rules and Regulations provides, in pertinent part: "The charging party shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."



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Jone about it.³ Farrell again explained that he was "opening up a program where during the months of September, October, and early November...all of the trucks (would) go through the garage to prepare (them) for the winter months, so they would be in top condition for snow plowing." This answer was not satisfactory to Horne who wanted to know exactly what was going to be done and when. Farrell attempted to refer some of Horne's questions to the department's mechanic. Specifically, he asked the mechanic whether there was anything wrong with the truck. The mechanic would not admit that the truck was unsafe, but allowed that something was wrong with it. Horne interrupted to ask what the defect was. At this point Farrell ordered Horne to "shut up" and let the mechanic answer.⁴ Horne grumbled a bit, but remained silent while the mechanic answered Farrell's question. Farrell then inquired of Horne whether the mechanic's answer was satisfactory. Horne then exclaimed in an exasperated manner "don't ask me any more questions. You just told me to shut up." Horne then threw up his hands and started for the door, proclaiming (to Farrell) "I'm disgusted. You don't know what the hell is going on. You are not around". He then called Farrell an "asshole", and Farrell retaliated by verbally applying the identical epithet to Horne. At this point the two men were addressing each other in loud tones as both were moving toward the door. Horne exclaimed, "do you want my job? Fine, you can have my job. I'm not on the clock. You have no right to fire me." Farrell replied that he was firing him then and there for insubordination and told him to get out. As they met face to face at the door, Horne pointed his finger at Farrell and the latter raised his hand. There was brief and minor contact of a pushing and shoving nature which was quickly broken up by the employees present. Horne then left, and Farrell resumed the meeting without further interruption.

Horne's deportment prior to September 16, 1977 had never been complained of, and he was never the subject of disciplinary action.

Opinion

The Commission has consistently held that discriminatory treatment of employees motivated by their lawful participation in union or other protected concerted activities, violates Chapter 150E, Sections 10(a)(1) and (3) of the General Laws. Town of Wareham, 3 MLC 1334 (1976); Town of Dennis, 3 MLC 1014 (1976); Ronald J. Murphy, 1 MLC 1271 (1975). The burden of establishing a violation of Chapter 150E by a preponderance of the evidence rests with the complaining

³One of the trucks would develop a front end "shimmy" when it attained the speed of 30 mph. As previously alluded to, the front end loader had a brake problem. Earlier in the summer Horne had been operating it on Ward's Corner at a road rebuilding project. The brake peddle stuck to the floor and the air tank emptied, causing the vehicle to roll back. Arnold, the Assistant Manager, was present when it occurred. Another time the brakes jammed when Horne was "pushing out the dump" and a mechanic was summoned to fix them.

⁴Horne admitted interrupting Farrell's questioning of the mechanic, but denies that he did so repeatedly. Farrell testified that Horne interrupted "two or three times or more." The evidence is not significantly divergent and we credit Farrell's version.

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Thereafter Horne processed two grievances for the employees. One grievance involved Tommy Moynihan, who had been docked a day's pay for calling in sick. The record is silent as to the nature of the second grievance.

Farrell called a second meeting of the grievance committee on September 12, 1977. At that meeting Farrell spoke of the need for limiting overtime so that funds which were presumably earmarked for that purpose would be available during the winter. He also expressed his concern that sick leave was being abused. They again discussed clothing allowances, stand-by duty pay, Blue Cross-Blue Shield, and a cost of living pay increase. Horne raised complaints concerning the condition of equipment, in particular the trucks and a front end loader. Horne was the principal operator of the front end loader, and wanted its brakes repaired. There was further discussion of putting first-aid boxes in the trucks. Farrell replied that the equipment would be serviced and "taken care of" so that it would be in good repair for winter snow removal operations. The parties agreed to meet again in early October, and that in the meantime Farrell would "research" some of the benefits the employees wanted. As he was leaving the meeting, Horne asked Farrell if the grievance committee might meet as a group with the employees on a one to one basis or catch them in the morning or at noon time.

A day or two later, on the 13th or 14th of September, 1977, Horne telephoned Farrell. Horne indicated that he had talked to some employees and they had questions. He reiterated his request to have the grievance committee meet with the employees as a group. Farrell said he would post notice of such a meeting, and he did so. He scheduled the meeting at the town garage on September 16, 1977 at 3:00 p.m.

On the morning of September 16, Horne punched in to work as usual, but requested unpaid time off to attend a funeral. He indicated that he should be back at 1:00 p.m. Permission was granted. At 2:45 p.m., in dress clothes, he arrived at the town garage for the scheduled meeting at 3:00. Twenty-two or twenty-three employees were present. Upon arriving, he spoke with Hyland, a grievance committee member, and learned that Farrell was coming to the meeting. Horne responded "what the hell is he doing here? This is a meeting of the grievance committee and the employees." However, everyone waited until 3:15 p.m. when Farrell arrived. Farrell walked in and personally opened the meeting. In his opening comments he complimented the employees for their efforts in performing various projects which had been undertaken during the summer. He discussed "the work we would be attempting to do in trying to improve the Blue Cross-Blue Shield and clothing allowances." There was further mention of stand-by duty and sick leave. Horne questioned Farrell on the sick leave issue. One or two other employees also participated in the discussion. Eventually Farrell finished what he wanted to say about the subjects described above, and asked if there were any questions from the employees at large. At this point Horne again raised the issue of the condition of the equipment. He brought up many of the things that the grievance committee had discussed with Farrell on September 12th, and wanted to know when the equipment was going to be taken care of, and what was going to be



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The Westboro Department of Public Works consists of four divisions, namely the Highway, Cemetery, and Water Departments, and the Sewerage Treatment Plant. Joseph Farrell is the Manager and general supervisor of the Department of Public Works and John Arnold is Assistant Manager. Approximately twenty-five to thirty persons are employed in the four divisions.

In the spring of 1977 Horne and a few other employees attended a meeting of the Town Personnel Board and aired various complaints which they had concerning their conditions of employment.¹ They told the Board that they "wanted to have certain things....taken care of;" and that they "were going to go union if things weren't taken care of." Roscoe S. Horton, Chairman of the Personnel Board, cautioned the man not to "threaten us with a union" or words to that effect, and suggested that the complaints might be resolved through voluntary discussion by all concerned. The Manager of the Department of Public Works and his assistant did not attend that meeting, and the Personnel Board recommended that they all meet again, within a week, with the Manager and his assistant present. Horne and the employees with him assented to that procedure.

A second meeting of the Personnel Board was held the following week with the Manager, Farrell, present. Approximately twenty-four D.P.W. employees attended. The members of the Board, Farrell, Horne, and other employees engaged in an open discussion concerning various topics including clothing allowances, pay raises, Blue Cross-Blue Shield benefits, and miscellaneous working conditions in the Town Garage, which is an old building. Either during that meeting or shortly thereafter, Farrell suggested the formation of a grievance committee consisting of one employee from each of the four divisions of the Department. He asked Horne to "get together with his employees and.... submit to (me) a list of people who would represent the various divisions." Horne later presented Farrell a list of four names, including himself, Eugene Hyland, Douglas Minardi, and Donald Landroche. Farrell posted the names upon bulletin boards in the several divisions, and indicated, that if he heard no dissent from the employees, he would assume that they were satisfied with the procedure and the persons named as representatives.

No one expressed dissatisfaction, and Farrell scheduled a meeting with the four representatives on the evening of June 28, 1977. They discussed clothing allowances, a percentage pay increase, Blue Cross-Blue Shield, and morale in the department. Farrell suggested that many of the requests would require action at the Town Meeting which would be held in March, 1978, and that "we would set up our goals along this line." Either at this meeting, or at another time, Farrell remarked to the grievance committee that a union "wouldn't be a very proper thing to have. The dues and so forth would cost you." He suggested that the men "try something else."²

¹The Westboro Selectmen have delegated certain duties which arise from employer-employee relations to the Personnel Board.

²Two witnesses testified to Farrell's remark. The date is uncertain, but it was before Horne was discharged. One witness testified that it was at a "meeting at the Highway garage." Transcript pg. 34. The other testified it "was a meeting at the Community building which was after the meeting of the Personnel Board...." Transcript pg. 48-49.

