CITY OF BOSTON AND BOSTON POLICE PATROLMEN'S ASSOCIATION, MUP-2878 (5/23/79). Decision on Appeal of Hearing Officer's Decision.

(60 Prohibited Practices by Employer)
62.5 discipline--insurbordination
63.7 union activity and membership or non-membership
(90 Commission Practice and Procedure
92.51 appeals to full Commission

Commissioners participating:

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

Appearances:

Paul T. Edgar, Esq. - Representing the City of Boston

Frank J. McGee, Esq. - Representing the Boston Police Patrolmen's Association

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On September 18th, 1978, Hearing Officer Judith A. Wong issued her decision in the above matter under the Expedited Hearing procedure authorized by Section 11 of G.L. c.150E, 5 MLC 1265 (1978). She concluded that the City of Boston (City) had not violated sections 10(a)(1) and (3) of the Law by imposing sixty hours of punishment duty on officer Frederick C. Nolan. An appeal was timely filed by the Boston Police Patrolmen's Association (Association). The Association and the City subsequently filed supplementary statements on October 13, 1978, and October 18, 1978, respectively.

Opinion

This dispute arose out of a conflict over distribution of paid details in District 14 of the Boston Police Department (District 14). The facts as found by the Hearing Officer may be summarized as follows.

Since 1974, police officer Frederick C. Nolan has served as Association day shift representative for District 14. Prior to the events which gave rise to this case, there had been a history of grievances over administration of paid detail assignments in District 14. Nolan participated in most, if not all, of these grievances. On May 19, 1977 Nolan phoned District 14 headquarters to inquire about the availablity of paid details for the following evening. When he was told that another officer with less total paid detail time had been assigned the detail Nolan wanted, he became upset. An argument ensued, in the course of which Nolan made several remarks which his superiors considered improper. See 5 MLC 1266-7.

Nolan's commanding officer brought charges against him for violations of Department rules on police conduct. After a hearing on the charges before Police Commissioner Jordan, Nolan received 60 hours of punishment duty. The Association's charge before the Commission alleged that Nolan was punished in

retaliation for engaging in protected activity. The rationale for the charge was that, as shift representative, it was Nolan's duty to ensure equitable distribution of paid details. For his pains, the Association contended, he was punished in violation of sections 10(a)(3) and (1) of the Law.

The Hearing Officer ruled that the fact that it was Nolan's own detail assignment which led to his telephone tirade did not place the conversation outside the scope of protected activity. She went on to find, however, that his remarks went beyond the leeway the Law affords union activity. Finally, she found that the Association did not prove its case that the City's action was unlawfully motivated.

On appeal, the Association urges us to find reversible error in the Hearing Officer's conclusion that the City was not illegally motivated when it disciplined Nolan. Inferentially, the Association also raises for review the finding that Nolan's remarks were "beyond the pale" of protection.

The fact that speech takes place within the context of protected activities does not preclude an inquiry into the nature of the statements made. Instead, a balance must be struck in each case between the rights of employees to engage in concerted activities and the rights of employers not to be subjected to egregious, insubordinate, or profane remarks which disrupt the employer's business or demean workers or supervisors. Harwich School Committee, 2 MLC 1095 (1975).

One type of case is the situation where injudicious remarks are the understandable culmination of employer provocation and/or hard-fought grievance processing or vigorous employee advocacy of other types. In certain of these cases, we have found intemperate speech to be, on balance, within the leeway the Law affords employees engaged in protected activities. Discharge or discipline for such remarks has, in this context, been held to be pretextual upon proof that the employee speech provided an excuse masking a real motivation to discourage protected activity. See, for example, Town of Westboro and Richard Horne, 5 MLC 1116 (1978) where the employer expressed anti-union statements and created and dominated the grievance committee; employee's remarks were made after supervisor provocation during a dispute over working conditions in a "shop talk" context. The Nolan case before us on review does not fit into this category of cases.

Without argument or citation, the Association contends that Nolan's speech was protected. We agree with the Hearing Officer's finding that it was not. In addition to the fact that Nolan's conduct was specifically prohibited by a Department rule, his speech occurred during an informal telephone conversation with fellow officers and a superior who were not responsible for grievance processing. On balance, profane and personally abusive remarks to individuals not in a position to redress an employee's complaint will rarely be found to be protected speech.

Additionally, the facts do not support a theory that Nolan's punishment duty was illegally motivated. The Association argues on appeal that we must find that the City's real motivation for the discipline was Nolan's union activity, not the impropriety of his remarks. It asks us to look at Nolan's visibility, timing of the adverse action, and comparative treatment of other officers for similar offenses.

There is no dispute that Nolan was a highly visible union official, and the Hearing Officer so found. Nor is there, apparently, any dispute over the fact

that Nolan had previously protested vigorously through the grievance procedure what he felt to be contract violations related to the paid detail assignments in District 14. Nothing in the record indicates that the City ever took any action adverse to Nolan in connection with these or any other grievances until the profane language incident which gave rise to this case. The record is similarly devoid of any evidence that Nolan's conduct was within the bounds of normal police behavior, that conduct such as his had been tolerated in others in the past, or that the severity of discipline inflicted on Nolan was inconsistent with comparable cases. Thus, the Association's assertions as to disparate treatment of Nolan are not supported by the record. Additionally, the fact that the officer was never disciplined until the admitted telephone outburst mitigates against an inference of illegal motivation in this case.

The Association claims, however, that the timing of the filing of charges against Nolan is indicative of discriminatory motivation. The Hearing Officer was correct in her conclusion that the delay in bringing charges and holding a disciplinary hearing did not show improper motivation on the part of the City. In the usual case where delay in the bringing of charges is seen as evidence of improper motivation, the delay occurs between the time of the event giving rise to the charges and the time of the concerted activity. The inference in such a situation is that the employer would not have brought charges had the employee abstained from engaging in concerted activity but resurrected the charges as a pretext for adverse action. In the present case, where the event giving rise to the disciplinary action and the employee's concerted acitvity were simultaneous, no such inference is justified. In any event the delay was caused by the fact that there was no counsel for the Police Deparment during the summer of 1977.

We therefore find that the Hearing Officer's decision was without error and affirm it in its entirety. This complaint is hereby DISMISSED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

JAMES S. COOPER, Chairman
GARRY J. WOOTERS, Commissioner
JOAN G. DOLAN, Commissioner