

COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND AFSCME, COUNCIL 93, AFL-CIO, SUP-2443 (8/20/81). Decision on Appeal of Hearing Officer's Decision.

- (60 Prohibited Practices by Employer)
  - 65.91 request for representation at disciplinary interview
- (80 Commission Decisions and Remedial Orders)
  - 82.11 back pay
  - 82.13 reinstatement
- (90 Commission Practice and Procedure)
  - 92.51 appeals to full commission

**Commissioners participating:**

Phillips Axten, Chairman  
 Joan G. Dolan, Commissioner  
 Gary D. Altman, Commissioner

**Appearances:**

- |                          |   |
|--------------------------|---|
| Jerome T. McManus, Esq.  | - Counsel for the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO |
| Valerie J. Semensi, Esq. | - Counsel for the Commonwealth of Massachusetts, Commissioner of Administration                     |

**DECISION ON APPEAL  
 OF HEARING OFFICER'S DECISION**

Statement of the Case

On March 25, 1981 Hearing Officer Robert M. Schwartz issued his decision in this matter pursuant to the expedited hearing procedures established by Section 11 of General Laws Chapter 150E (the Law).<sup>1</sup> The hearing officer concluded that the Commonwealth of Massachusetts (Commonwealth) had violated Section 10(a)(1) of the Law by denying an employee union representation.

The Commonwealth filed a timely notice of appeal of the hearing officer's decision pursuant to Commission Rules, 402 CMR 13.13. The Commonwealth submitted a supplementary statement on April 24, 1981. As elaborated below, we affirm the hearing officer's determination that the Commonwealth violated Section 10(a)(1) of the Law.

Findings of Fact

The parties have not challenged the hearing officer's findings of fact, and we therefore adopt them in their entirety. See Commission Rules 402 CMR 13.13. We summarize the facts as follows.

In April, 1980 John Bourgois was promoted from the position of Mental Health

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<sup>1</sup>For the full text of the hearing officer's decision, see 7 MLC 1963.



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Attendant (MHA) I to the position of MHA IV. He was also transferred from the Northampton State Hospital to the Springfield area office. Before beginning his new duties, Bourgois was required to attend a one-week training program. From the start, the training session did not go well for Bourgois. On May 12, 1980, the first day of classes, Bourgois' supervisor, Louise Flynn, called him into an office and asked him about some of the answers he was giving in class. One of the instructors told Bourgois that he was not taking the training "seriously." Flynn called Frank Robinson, an assistant Area Director, to complain that Bourgois was becoming a "detractor" from the program. The next day Robinson came to the training program and called Bourgois into a meeting. Flynn was also present. Robinson informed Bourgois that he wanted to discuss Bourgois' behavior during the training, and that the discussion would be taped and placed in Bourgois' record. Bourgois demanded that a Union representative be present at the meeting. Robinson replied that the meeting was not disciplinary in nature, that a Union representative would not be present, but that the meeting would not be recorded. Although the testimony of Robinson and Bourgois differed on this latter point, the hearing officer credited Bourgois' testimony that he was assured by Robinson that the discussion would not be placed on his record. Based upon these assurances, Bourgois agreed to participate in the discussion without union representation.

On the following day, May 14, 1980, following a mid-morning break in the training program, Bourgois received a letter from Robinson summarizing the discussion that had taken place on the previous day and concluding with the statement: "This memo will be placed in your personnel file." Bourgois was upset by the letter since it had been his understanding that no reference to the previous day's meeting would be placed in his personnel file. He did not join in the remaining portion of the morning session of the training program.

During the lunch break, Louise Flynn telephoned Robinson to inform him that Bourgois had not participated in part of the training program that morning. Robinson instructed Flynn to order Bourgois' reassignment to the Springfield area office and out of the training program.

Later that afternoon, Bourgois received a letter from Flynn which stated:

As per our conversation on 5/13/80 regarding your participation and performance in the training program being conducted for the service coordination program staff, you are directed not to attend the remaining training sessions this week. You are hereby reassigned to the 736 State Street facility...This reassignment is being implemented because of your failure to participate constructively in the training being provided and, specifically, your failure to participate appropriately during the training conducted on the morning of May 14.

Bourgois was subsequently demoted to his previously held MHA I position.

#### Opinion

The Commonwealth's arguments on appeal are three-fold. First, the Commonwealth



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alleges that the hearing officer would have concluded that the May 13, 1980 meeting was held in compliance with the Law had he considered the Commonwealth's post-hearing brief in formulating his decision.<sup>2</sup> Second, the Commonwealth argues that the hearing officer exceeded his authority in ordering that the ten percent (10%) interest added to the back pay order be computed quarterly. Finally, the Commonwealth argues that the hearing officer improperly ordered the posting of a "Notice to Employees" for sixty (60) days rather than for the thirty (30) days most commonly ordered by the Commission.

We conclude that the hearing officer's failure to consider the Commonwealth's post-hearing brief has resulted in no prejudice whatsoever. The Commission has considered the brief in deciding the case on appeal. In addition, it is our responsibility to engage in a de novo review of all the legal issues raised in this case. Hadley School Committee, 7 MLC 1632, 1634 (1980). Furthermore, as noted above, the Commonwealth on appeal has not challenged the facts as found by the hearing officer.<sup>3</sup>

In assessing whether it was a violation of the Law for the employer to deny Bourgois' request to have a Union representative present at the May 13 meeting, we generally apply the principles set forth in NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975) and Commission decisions decided thereunder.<sup>4</sup> Under Weingarten an employee's right to union representation on request is limited to situations in which the employee reasonably believes that the interview with the employer will result in discipline. The test is whether a reasonable person in the employee's situation would have believed that adverse action would follow. Amoco Chemical Corp., 237 NLRB 69, 99 LRRM 1017 (1978).

The right to have a union representative present does not attach unless the meeting is investigatory in nature. Thus, where a meeting is not held to elicit information from an employee or to support a further decision to discipline an employee but is merely convened so that the employer can deliver a warning, Weingarten protections do not apply. Baton Rouge Water Works, 103 LRRM 1056 (1980); NLRB v. Certified Grocers of Calif., 587 F. 2d 449, 100 LRRM 3029 (9th Cir. 1978).

Applying these criteria to the instant case, we conclude that the employer should have granted Bourgois' request to have a Union representative present.

<sup>2</sup>The Commonwealth submitted a timely post-hearing brief, which was apparently misfiled, and was not considered by the hearing officer in reaching his decision.

<sup>3</sup>We deem the Commonwealth's assertion that the May 13, 1980 meeting complied with the Law to be a legal conclusion. In any event, the statement does not address "specific evidence warranting either a contrary finding on a material issue or an additional material finding not made by the hearing officer." Hadley School Committee, supra.

<sup>4</sup>Commonwealth of Massachusetts, 4 MLC 1415 (1977); Commonwealth of Massachusetts, 5 MLC 1653 (H.O. 1979).



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Bourgois had been previously warned about his behavior at training sessions. He was called to a meeting with his supervisor, at which a higher-level supervisor from another location was present. He was told that the session would be tape-recorded, and that the tape would be placed in his record. These facts support a conclusion that Bourgois was reasonable in his belief that the meeting was scheduled to investigate possible disciplinary action. Additionally, the presence of the tape recorder and the statement that the results of the interview would be placed on Bourgois' record indicate that the purpose of the meeting was to gather information about Bourgois' attitude toward the training program.

The Commonwealth asserts that by consenting to proceed with the May 13 meeting despite the denial of his request to have a union representative present, Bourgois waived his right to protest that denial. According to the facts as found by the hearing officer, however, he did so only after Robinson assured him that the meeting was not disciplinary, that it would not be tape-recorded, and that a record of the discussion would not be placed in his record.

We will not find a waiver of an employee's Weingarten rights where such waiver was obtained through false assurances that no adverse consequences would result from the hearing.

#### The Remedy

For the foregoing reasons we affirm the hearing officer's ruling that the Commonwealth violated Section 10(a)(1) of the Law. Based upon all of the facts, we conclude that such violation is directly linked to the Commonwealth's subsequent decisions to place a letter in Bourgois' personnel file, transfer him back to the Springfield office, and demote him to an MHA I level position.

Despite the Commonwealth's argument that Bourgois' transfer and demotion were occasioned by his failure to fully participate in the training program on May 14, 1980, rather than by the interview which took place the previous day, we conclude that the various disciplinary actions taken by the Commonwealth are inextricably linked to the interview at which Bourgois' request for union representation was denied. The letter informing Bourgois of his transfer out of the training program began with the words "as per our conversation on May 13, 1980 regarding your participation and performance in the training program." Robinson testified that the "bottom line" regarding his expectations of Bourgois, discussed during the May 13 interview was the basis for his decision to transfer Bourgois on May 14. Finally, Bourgois was transferred and demoted because of concerns the employer had regarding his attitude, which was the very subject discussed at the meeting on May 13. Because we find that the disciplinary action taken against Bourgois was linked to the interview at which his request for a union representative was denied, the appropriate remedy is to return Bourgois to the status he enjoyed prior to the Commonwealth's violation of the Law. We therefore order that he be reinstated to the MHA IV level position, after which, of course, he may be required to satisfactorily complete any necessary training for that position. He is also entitled to back pay for losses suffered as a result of his wrongful demotion. Additionally, we deem it appropriate that the Commonwealth expunge from Bourgois' personnel record all notations of his transfer and demotion and all related documents.



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The Commonwealth raises objections to only two aspects of the hearing officer's remedial order. First, the Commonwealth challenges the hearing officer's computation of interest due Bourgois on the back pay he lost by virtue of his demotion. More specifically, it argues that the quarterly compounding of interest goes beyond the level of interest allowed under General Laws, Chapter 231, Section 6C.<sup>5</sup> That statute, however, sets the rate of interest to be added to damages in contract actions by the clerk of courts if no rate is set by the contract. It is not controlling in this case. Moreover, the Commission has regularly ordered the interest added to back pay orders to be compounded quarterly.

Finally, the Commonwealth opposes the hearing officer's order that it post a notice to employees for sixty (60) days rather than thirty (30) days. Although the Commission customarily orders a thirty-day posting, the hearing officer's action was unquestionably within his discretion.

ORDER

WHEREFORE, IT IS HEREBY ORDERED:

1. The Commonwealth of Massachusetts shall cease and desist from restraining, coercing, and intimidating employees in the exercise of rights protected by Section 2 of the Law;

In order to effectuate the purposes of the Law, IT IS HEREBY FURTHER ORDERED that the Commonwealth of Massachusetts shall take the following affirmative action:

1. Immediately reinstate John Bourgois to his former position as MHA IV and make him whole for any loss of wages or other benefits which he has suffered as a result of his wrongful demotion, together with interest on any sums owing computed at ten percent (10%) and compounded quarterly from the date of demotion;
2. Expunge from John Bourgois' personnel records all notations of his transfer and demotion and all related documents;
3. Post in conspicuous places where employees of the Department of Mental Health of the Commonwealth of Massachusetts usually congregate, and leave same posted for a period of not less than sixty (60) consecutive days, the attached Notice to Employees;
4. Notify the Commission within ten (10) days of receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
LABOR RELATIONS COMMISSION  
PHILLIPS AXTEN, Chairman  
JOAN G. DOLAN, Commissioner  
GARY D. ALTMAN, Commissioner

<sup>5</sup>The Commonwealth does not contest the award of back pay itself.



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

After a hearing at the Massachusetts Labor Relations Commission at which all parties were given an opportunity to be heard, the Commonwealth of Massachusetts has been found in violation of Section 10(a)(1) of the Law by the denial of union representation to John Bourgois leading to his demotion and transfer from MHA IV to MHA I.

WE WILL NOT, in any like manner, restrain, coerce, or intimidate employees in the exercise of rights guaranteed by Section 2 of the Massachusetts General Laws Chapter 150E.

WE WILL reinstate John Bourgois to his former position as MHA IV and make him whole for any rights, benefits, privileges, and monies lost by him as a result of the demotion from MHA IV to MHA I.

COMMONWEALTH OF MASSACHUSETTS

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FRANK ROBINSON  
ASSISTANT AREA DIRECTOR  
DEPARTMENT OF MENTAL HEALTH

