TOWN OF CHELMSFORD AND LOCAL 877, INTERNATIONAL UNION OF OPERATING ENGINEERS, MUP-4620 (3/12/82).

(60 Prohibited Practices by Employer)
61.1 standard of proof
65.61 promise of benefit
65.62 threat of reprisal

Commissioners Participating:

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

Appearances:

Martin Ames, Esq. - Representing the Town of Chelmsford

Michael Gormley - Representing the International Union of Operating Engineers

DECISION

Statement of the Case

The issue in this case is whether the Town of Chelmsford restrained, coerced, or interfered with employees in the exercise of their rights under General Laws Chapter 150E (the Law) by making statements regarding possible negative repercussions that could result from the filing of grievances or unfair labor practice charges.

On October 20, 1981, Local 877 International Union of Operating Engineers (Union) filed a charge with the Commission alleging that the Town of Chelmsford (Town) had violated Sections 10(a)(1), (2) and (3) of the Law. Following an investigation, the Commission issued its own complaint of prohibited practice alleging a violation of Section 10(a)(1). The Commission dismissed the Union's charge regarding alleged violations of Sections 10(a)(2) and (3) of the Law.

Pursuant to notice, a formal hearing took place on December 14, 1981 before Sarah P. Garraty, a duly designated hearing officer. The parties had opportunity to be heard and to examine and cross-examine witnesses. Following the hearing, the parties submitted briefs which we have considered together with the rest of the record.[1]

For the reasons set forth below, we find that by its conduct the Town has violated Section 10(a)(1) of the Law.

[1] Neither party contests the Commission's jurisdiction over this action.

Town of Chelmsford and Local 877, International Union of Operating Engineers, 8 MLC 1913

Findings of Fact

The Union represents the employees in the Highway Department of the Town. Currently, there are approximately twenty employees in the bargaining unit. This represents a decline from approximately fifty-four employees in 1980 and approximately thirty-four as of July, 1981.[2]

On or about August 20, 1981[3] Harold E. Gray, Superintendent of the Highway Department, had a conversation with Union steward Frederick Dillon. During the preceding months Dillon had on several occasions informed Gray that changes contemplated by Gray would violate the collective bargaining agreement between the Town and the Union and would result in the filing of grievances. During the August 20 conversation Gray stated to Dillon that, in his opinion, if grievances were filed additional layoffs would result since the money to pay for the grievances would have to be raised through layoffs. As Dillon testified without rebuttal, Gray stated "if this nonsense continues, there will be more layoffs," or words to that effect. Gray additionally told Dillon that "the Union might win a few battles, but it would lose the war."

Approximately five days later, on or about August 25, Gray met near the time clock in the Highway Department garage with all the bargaining unit members who were at work that day. At this meeting Gray informed bargaining unit members that if they continued doing the jobs they were told to do, whether or not these tasks were in their job descriptions, they would have a good Thanksgiving and a good Christmas, without layoffs.[4]

In late October, the Union filed a grievance regarding winter work hours. The Town had scheduled winter work hours from 7:00 a.m. - 3:30 p.m., while the Union maintained that work hours should be from 8:00 a.m. to 4:30 p.m. On the day on which this grievance was filed, Gray called a meeting of Highway Department employees. This meeting took place during working hours, and attendance was mandatory. Gray complimented employees on their excellent work in completing a drainage job. He stated that, in appreciation for this work, he would like to give half of the men a Friday afternoon off with pay in one week, and the other half of the men the afternoon off in the following week. This offer was made contingent upon the retention of the 7:00 a.m. - 3:30 p.m. winter work hours.[5] Immeidately

[2] In 1980 a reduction in force occurred because a town dump was closed and responsibility for garbage collection was assumed by a private contractor. A second round of layoffs, on or about July 1, 1981, was the result of budget reductions necessitated by Proposition 2-1/2.

[3] Unless otherwise indicated all dates referred to are in 1981.

[4] Gray testified that his purpose in making this comment was to reassure employees, rather than to intimidate them.

[5] Dillon and Paul Higson, a member of the Union's grievance committee, both testified that the offer of a paid Friday afternoon off was made contingent upon (continued)

following this meeting the grievance regarding winter work hours was withdrawn by the Union, although it was resubmitted ten days to two weeks later. Some of the men did receive a paid Friday afternoon off.

On October 20, the Union filed its charge of prohibited practice in the instant case. On October 30, Paul Hart, Chairman of the Board of Selectmen, summoned Dillon, Higson, and employees John Ferreira and David Tello to a meeting at 2:00 p.m. in the Town Hall. Dillon, Higson, Ferreira and Tello constitute an informal bargaining committee, although they are not authorized to act on behalf of the Union. Also present at the October 30 meeting were Gray and Selectman Claude Harvey. Hart stated that he had received the Union's charge of prohibited practice and wished to discuss it. Dillon, Higson, Ferreira and Tello responded that they could not discuss the matter unless the Union business agent was present.

According to the testimony of Dillon and Higson, Hart then stated that he was about to sign a "job continuation form" for five men but that upon receipt of the Union's charge he had had second thoughts. Hart denied making this statement. He testified that his only comments regarding layoffs were made in response to a question posed by one of the Union participants in the meeting. According to Hart five positions in the Highway Department were budgeted to be eliminated, but he was able to assure the Union participants that no layoffs would occur at least until the end of the year.

Hart testified that no job continuation form exists. Neither of the Union witnesses had ever seen a job continuation form. However, even assuming arguendo that there is not actually a document entitled "job continuation form," we credit the testimony of Dillon and Higson that a comment was made by Hart indicating that after receiving a copy of the Union's prohibited practice charge he had second thoughts about continuing the employment of the five men whose positions were scheduled to be abolished. In doing so, we note that the credibility of these two witnesses' testimony has been borne out elsewhere in this proceeding. Also it is unlikely that the Union would have raised the issue of layoffs when the stated purpose of the meeting was to discuss a prohibited practice charge. Moreover, the record reveals that the meeting was called by the Selectmen and that the Selectmen did almost all of the talking, the employees taking the position that they could not discuss these issues without the presence of the Union business agent. In this context we view it as unlikely that the employees raised the question of potential layoffs.

After being informed by the four employees that they could not discuss the prohibited practice charge unless the Union business agent was present, Hart asked

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5 (continued)
the retention of the winter work hours as they existed prior to the Union's grievance. We credit this testimony because it is not rebutted by the statements of other witnesses. Although in his testimony Gray failed to mention any connection between the time off and the grievance, neither did he deny having made such a connection.

if the Highway Department employees could negotiate a new collective bargaining agreement without the presence of a Union business agent. Hart stated that both sides could save money if the parties returned to the "old fashioned" way of negotiating. Hart additionally stated that the employees would receive higher wages without a business agent present.[6] For at least five years, the Union and the Town have utilized professional negotiators for purposes of collective bargaining.

Opinion

An employer violates Section 10(a)(1) of the Law if it engages in conduct which it may reasonably be said tends to interfere with employees in the free exercise of rights under Section 2 of the Law. City of Boston, 8 MLC 1284 (1980); Lenox School Committee, 7 MLC 1761 (1980).

The Commission has held that proof of illegal employer motivation is not required to make out a violation of Section 10(a)(1). City of Boston, supra, at 1284-85; Bristol County House of Correction and Jail, 6 MLR 1582 (1979). Nonetheless, in its brief, the Town has cited Town of Somerset, 3 MLC 1618 (1977) and Community Child Care of Malden, 4 MLC 1863 (1978) as setting forth the elements of a Section 10(a)(1) violation. These cases are inapposite, since they involve alleged discriminatory conduct in violation of Section 10(a)(3) of the Law, and not of Section 10(a)(1). In City of Boston, supra, at 1284-85 the Commission articulated the distinction between the elements required to make out a violation of Section 10(a)(1) and those needed to establish a violation of Section 10(a)(3). We held that cases involving illegal employer motivation are appropriately analyzed under Section 10(a)(3) rather than under Section 10(a)(1). Thus, where alleged violations of Section 10(a)(1) are involved it is the effect that the employer's action had upon employees, rather than the employer's motivation in taking such action, that is the essence of the case. We must therefore analyze the various incidents which are involved in this case in order to determine whether it may reasonably be said that the Town's actions tended to interfere with employees of the Highway Department in the exercise of their rights under Section 2 of the Law.

1. The August 20 Incident

The Town argues that when Highway Superintendent Gray told Union Steward Dollon that in his opinion the filing of grievances would result in layoffs, he spoke as an individual expressing a personal opinion, and not on behalf of the Employer. Authority to act for and speak on behalf of the employer is governed by principles of agency. Such authority may be actual, implied or apparent. The issue of agency may be gauged from the point of view of the employees. J.S. Abercrombie Co., 83 NLRB 524, enf'd. 180 F.2d 750 (5th Cit., 1950). Under precedent

[6] We credit Dillon's testimony that the comment regarding higher wages was made, since no other witness directly refuted such testimony. Moreover, this testimony is credible because it is consistent with Hart's stated belief that money would be saved if outside negotiators were not brought in.

of the National Labor Relations Board, supervisors are presumed to be acting and speaking for the employer, even when the employer has instructed the supervisor to refrain from such actions, so long as the employer's instructions have not been communicated to employees. Otis L. Broyhill Furniture Co., 94 NLRB 1452 (1952).

Applying these criteria, we find that Gray was unquestionably the agent of the employer. As Superintendent of the Highway Department, Gray is in charge of the overall running of the Department on a day-to-day basis. It is reasonable to presume that employees regarded him as the decision-maker on Highway Department matters.

The Town also argues that Gray's comments fall within parameters of employer free speech, since they constitute mere prophecy about the possible effects of filing grievances. As we noted in Watuppa Oil Co., 2 MLC 1032 (1975), however, employer speech predicting possible consequences of protected activities must include some statement of the basis on which the prediction is made. Gray stated no such basis. He merely said that he believed that the filing of grievances would result in additional layoffs, and that the Union might win some battles but it would lose the war. Also, there is no evidence that there was any objective basis for such a statement. The only grievance which was actually filed within the approximate time frame of Gray's comments related to work schedules, a subject which had no economic consequences that would have required the Town to implement additional reductions in force.

We turn now to the question of whether Gray's comments may reasonably be said to have tended to interfere with the exercise of protected activity. The filing of grievances regarding group concerns is protected activity. City of Worcester, 4 MLC 1654 (1970). We believe that a reasonable employee may indeed have been threatened by Gray's comments connecting the filing of grievances with layoffs. We note that the job security of the Highway Department employees was tenuous, and that they had seen the bargaining unit diminish by more than fifty percent during a two-year period. In such a context reasonable employees may well have been placed in fear that exercising their right to file grievances might cost them their jobs.

2. The August 25 Meeting

Gray informed employees that if they continued doing the jobs that they were told to do, whether or not these tasks were in their job descriptions, they would get through Christmas without any additional layoffs. A likely inference for employees to draw from such a statement is that their jobs might be in jeopardy should they exercise their statutory right to challenge the assignment of work duties not contained in their job descriptions. This inference is particularly warranted inasmuch as the record establishes no logical nexus between employee complaints about the work that they are being required to perform and the economic necessity for further reductions in force. Given the context in which Gray made these remarks to the employees, we conclude that they were part of a coercive climate in violation of the Law.

3. The Meeting Regarding the Winter Work Hours Grievance

Employer action which is said to restrain employees in the exercise of their rights under the Law need not be in the form of a threat. The promise of a benefit may in some contexts be equally coercive. We believe that Gray's action in promising employees an afternoon off with pay if they agreed to the Town's position regarding winter work hours would reasonably tend to have a coercive effect. By so concluding we do not mean to suggest that employers are precluded from trying to settle grievances. Such efforts are to be encouraged when they reflect a good faith desire to resolve a grievance through compromise of the parties' respective positions. In the instant case, however, the Employer held out a benefit which it told employees they deserved because of a job well done, but which they could not receive unless they dropped their work hours grievance. We view such conduct not as a good faith attempt to "meet half way" regarding a dispute over the application of the contract, but rather as an attempt to entice employees away from asserting their contractual rights.

4. The October 20 Meeting

We turn now to the question of whether statements made by Selectman Chairman Hart at the meeting with local Union officials on October 20 would reasonably tend to be coercive within the meaning of Section 10(a)(1).

We find that Hart's statement indicating that he had second thoughts about continuing the jobs of five employees after receiving the prohibited practice charge is unquestionably threatening. The clear message that employees would get from such a comment is that the Town would only keep these five employees on the payroll if they declined to exercise their statutory right to file charges with the Commission.

The comment suggesting that employees would obtain higher wages if outside negotiators were not utilized is perhaps on its face a neutral comment. There is some connection between not hiring professional negotiators and saving money which could be channeled into wages. Moreover, Hart suggested that the Town would also be willing to negotiate without utilizing an outside negotiator. However, in light of the context, we are unpersuaded that this was an innocuous comment. It was made at a meeting whose purpose was to discuss the charge signed and filed by the employees' business agent. At this meeting, the employees involved declined to discuss the matter because the Union business agent was not present. The employees participating in the October 20 meeting may reasonably have derived the impression that their employer would treat them more generously if they abandoned their statutory right to have a representative of their choice protect their interests.

Conclusion

Taking the evidence as a whole, we hold that the Town has violated Section 10(a)(1) of the Law by the actions described above. We believe such conduct would reasonably tend to interfere with the rights which the Town's employees enjoy by virtue of Section 2.

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. The Town of Chelmsford shall cease and desist from restraining, coercing, and interfering with employees in the exercise of rights guaranteed by the Law.

2. The Town of Chelmsford shall take the following affirmative action which will effectuate the purposes of the Law.

   (a) Post immediately in conspicuous places where employees are likely to congregate and leave posted for not less than thirty (30) days, the attached Notice to Employees.

   (b) 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

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

After a hearing before the Labor Relations Commission the Town of Chelmsford has been found to have violated Section 10(a)(1) of the Law by making statements regarding possible consequences of filing grievances and charges of prohibited practice with the Commission, by promising a benefit in exchange for the acceptance by the Union of the Town's position regarding a grievance, and by suggesting that higher wages could be obtained if employees negotiated without the Union business agent.

Section 2 of General Laws Chapter 150E gives public employees the following rights:

to engage in self-organization;
to join or assist any union;
to bargain collectively through representatives of their own choosing;
to act together for the purpose of collective bargaining or mutual aid or protection;
to refrain from any or all of the above.

WE WILL NOT in any way restrain, coerce or interfere with employees in the exercise of these rights.

Paul Hart
Chairman of the Board of
Selectmen