TOWN OF BURLINGTON AND IAFF, LOCAL 2313, MUP-4494 (7/15/82). AMENDED DECISION ON APPEAL OF HEARING OFFICER'S DECISION

(20 Jurisdiction)
27.11 consideration of union activity when appointing to non-unit position
(60 Prohibited Practices by Employer)
63.7 discrimination -- union activity
(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:

Leonard Kopelman, Esq. - Representing the Town of Burlington

John R. Costa, Esq. - Representing International Association of Firefighters, Local 2313

AMENDED DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On January 14, 1982 Hearing Officer Alan Shapiro issued a decision finding inter alia that the Town of Burlington (Town) had violated Sections 10(a)(3) and (1) of General Laws Chapter 150E (the Law) by failing to promote Phillip Pollicelli, an active unionist, to the position of Acting Fire Chief because of his union activities. 8 MLC 1754. The hearing officer ordered the Town to make Pollicelli whole for any loss of wages or other benefits he suffered as a result of the denial of promotion. The Town filed a timely notice of appeal of the decision to the full Commission pursuant to Commission Rules, 402 CMR 13.13(4). Both parties filed supplementary statements which we have considered. For the reasons set forth below, we hereby affirm the hearing officer's decision and remedy.

Findings of Fact

No material facts are in dispute.[1] We therefore adopt the findings of the hearing officer, which, for purposes of this opinion, we summarize as follows.

[1]The Town's supplementary statement in this matter consisted of a two-line letter stating that:

> ...the record of the evidence would show that the employee when asked whether he sould take the job of acting chief if he were given it, stated that he would not have so taken it. Therefore, even if this honorable Commission were to affirm Mr. Shapiro's decision, I would request that the remedy be merely a posting but not back wages. (continued)

In the summer of 1981,[2] the Town was required to appoint an Acting Chief because Fire Chief Herbert Crawford was absent from duty due to extended illness beginning in July. The leading candidates for the position were the two Deputy Chiefs, Larry Rice and Phillip Pollicelli. Although both were members of the Union, Pollicelli was a much more active member, having served as secretary to the Union and chairman of its negotiating team since its inception in 1974.

On two previous occasions, Pollicelli had served as Acting Chief during the Chief's absence. His performance on those occasions had been praised by other firefighters, and he had received no criticism from the Town Administrator, the Board of Selectmen, or the Chief.

On approximately June 25, Town Administrator Mercier disclosed to Pollicelli that he intended to recommend Rice for the Acting Chief job. When Pollicelli asked why, Mercier replied that he had reviewed both candidates and found them equal but that he was concerned about upper level Town officers being part of the Union. He stated that union and management are at different levels and that one cannot change hats from one day to another. When Pollicelli argued that he could make the transition from labor to management and had done so successfully in the past, Mercier reiterated that he felt both men were equally qualified, but that the difficulty of wearing one hat one day and another the next day "tipped the scales" to Rice. In his memorandum to the Board of Selectmen recommending Rice to the position of Acting Chief, Mercier stated that, although Rice and Pollicelli were equal in professional competence and managerial ability, Pollicelli's active unionism called his leadership allegiance into question.

On July 2, Rice was appointed as Acting Chief and served in that capacity until Chief Crawford returned in September.

Hearing Officer's Ruling

Based upon the above facts, the hearing officer found that but for Pollicelli's protected activities he would have been promoted to Acting Fire Chief. The hearing officer also held that the failure to promote a union activist to a managerial

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1 (continued)
Commission Rule 402 CMR 13.13 states in pertinent part that "A party claiming that the hearing officer erred in factual findings shall identify the findings challenged and direct the Commission to evidence supporting the party's proposed findings of fact." In Hadley School Committee, 7 MLC 1632 (1980), we stated that the above-quoted provision obligates a party requesting findings alternative to or in addition to those made by the hearing officer to identify the supporting evidence. The Town's vague allegation quoted above fails to meet either of the requirements and is insufficient to raise an issue of fact.

Moreover, we deem it highly unlikely that Pollicelli would have applied for the position of Acting Chief and filed a charge with this agency based upon the Town's failure to appoint him if he intended to refuse an offer to accept the job.

[2]All dates refer to calendar year 1981 unless otherwise noted.

position because of her or his protected concerted activities violates Section 10(a)(3) of the Law. In resolving the latter issue, the hearing officer reviewed National Labor Relations Board and Circuit Court precedent holding that the failure to promote a union activist to a supervisory position based upon the employee's protected activities violates Section 8(a)(3) of the National Labor Relations Act (NLRA). Seeing no essential policy distinction between those cases and the instant one involving two public employees, the hearing officer held that opportunities for promotion to a managerial position fall within the realm of terms and conditions of employment protected under Section 2 of the Law and therefore employer discrimination in withholding such promotional opportunities based upon protected activities violates Section 10(a)(3) of the Law.

Opinion

Section 10(a)(3) of the Law prohibits an employer from discriminating against an employee with regard to a condition of employment because of the employee's participation in union or other concerted, protected activity. The burden of persuasion is with the charging party, who must prove by a preponderance of the evidence that, but for the employee's participation in protected activity, she or he would not have suffered the adverse personnel action. See Trustees of Forbes Library v. Labor Relations Commission, Mass. Adv. Sh. (1981) 2183.

In the instant case, Pollicelli's participation in union affairs, the Employer's knowledge of that fact, the denial of the promotion are not in dispute. Pollicelli also produced Mercier's memorandum which demonstrates that Pollicelli's union activity was a motivating consideration in denying the promotion. The Employer came forward with legitimate reasons for promoting Rice, including Rice's extensive education and management's desire to see how Rice would perform as Acting Chief. Nevertheless, the evidence establishes that but for Pollicelli's past protected conduct he would have received the promotion.[3] In his memorandum recommending Rice, Mercier admitted that there was little to separate Rice and Pollicelli in either their professional competence or managerial abilities. Despite this, Mercier recommended Rice based upon concerns regarding Pollicelli's active and vocal union membership. Moreover, when Pollicelli asked Mercier why he was not recommended for the Acting Chief's position, Mercier's only explanation was that he was concerned about upper level Town officers having been part of the Union.

Pollicelli established that but for his prior association with the Union, which is clearly protected activity under the Law, he would have been promoted. We must now consider whether there is any policy reason why the denial of the promotion

[3]Chairman Axten would affirm this aspect of the hearing officer's decision on a different ground. In his view, the determination that, but for Pollicelli's association with the Union, Pollicelli would have obtained the promotion, is purely a finding of fact; because the Employer has not challenged that finding of fact on appeal, the Commission should adopt it pursuant to Commission Rules, 402 CMR 13.13(7).

should not be deemed a violation of Section 10(a)(3) of the Law. This is a difficult issue involving employees' rights under the Law to engage in protected activity and management's right to select key individuals to manage the public enterprise.

As noted by the hearing officer, the failure to promote a private sector union activist to a supervisory position based on the employee's protected activity violates Section 8(a)(3) of the NLRA. St. Anne's Hospital, 245 NLRB No. 130, 102 LRRM 1527 (1979), enf'd. sub nom. NLRB v. St. Anne's Hospital, 648 F.2d 67, 107 LRRM 2354 (1st Cir. 1981). This is so even though supervisors are not covered by the NLRA, and an employee seeking a supervisory position is, like her or his public sector counterpart seeking a managerial position, pursuing a position outside of the statutory definition of "employee." In the public sector, the Supreme Judicial Court has, on at least two occasions, held that individuals discriminatorily denied promotions may be vindicated through the administrative process or arbitration. See Springfield Board of Police Commissioners v. Massachusetts Commission Against Discrimination, 375 Mass. 782, 375 N.E.2d 710 (1978) (black police officer denied sergeant's position; MCAD order remedying violation of G.L. Chapter 151B enforced); Blue Hills Regional District School Committee, Mass. Adv. Sh. (1981) 1240, 421 N.E. 2d 755 (1981) (confirming arbitrator's award holding teacher denied administrative position because of her sex and ordering that she be granted the position sought). Precedent clearly suggests that the basic principle is that management may choose whom to promote so long as its criteria are not statutorily or constitutionally unlawful. Should those criteria found to be illegal, the wronged employee will receive the promotion.

We can envision circumstances in which a public employer may legally decline to promote an employee to a managerial position because of the employee's union activity. We note, as only one example, the situation in which a union applicant for a managerial position indicates by conduct or comment that she or he will continue to feel aligned with the union following the promotion. Here, however, the record discloses absolutely nothing about Pollicelli's prior association with the Union other than that it was active and vocal. We can find on this record no legitimate interest of the Town which is served by upholding the denial of Pollicelli's promotion. We agree with Commissioner Altman that an employer has a major stake in who its managers will be. There is no suggestion, however, that Pollicelli was in any way unqualified; the evidence, in fact, is quite the reverse. Further, the record demonstrates that Pollicelli served in the temporary managerial position of Acting Chief on two occasions in the past without any problems or complaints from management. In addition, there is no direct or circumstantial evidence warranting an inference that Pollicelli would have been disloyal to management if he assumed the Acting Chief's position on this occasion. Instead, the record indicates that the Employer acted on pure speculation in denying Pollicelli the promotion, based upon nothing but the mere fact that Pollicelli had previously been an active Union leader. All we hold in this case is that a public employer under Chapter 150E cannot deny an employee a promotion to a managerial position solely because of the employee's affiliation with a union.

Conclusion

Based upon the above, we conclude that but for Pollicelli's protected activity he would have been promoted to the position of Acting Fire Chief. We further conclude that the failure to promote Pollicelli to the managerial position based merely upon the existence of his prior union activity violates Sections 10(a)(3) and (1) of the Law. The hearing officer's decision and remedy are hereby affirmed.

Commissioner Dolan, concurring. Although I do not accept all aspects of the hearing officer's analysis of this case, I affirm his conclusion. In my view, the concerns expressed by Commissioner Altman in his dissent are very real and important ones, and I believe his analysis of the relevance of the NLRB's supervisory promotion cases to this managerial promotion case warrants careful consideration. In my opinion, however, this case does not turn on that analysis.

As Commissioner Altman notes in footnote 1 of his dissent, there are differences between foremen and corporate officers which should be reflected in an employer's respective promotional policies. There are, indeed, fundamental and critical issues involved in the selection of key management personnel. That said, however, I know of no area of the law today which permits an employer to disqualify a person for a promotion solely on the basis of her or his membership in a group protected by law or her or his exercise of rights given by statutory or constitutional principles. In this case, we have a finding uncontested by the Town which states that employees Rice and Pollicelli were equally qualified for the promotion. The job was a temporary position one step up from Pollicelli's permanent rank. It was a job he had twice performed with no complaints whatsoever from the Employer. Yet this time he was denied the promotion on the basis of a philosophical belief that his status as a union activist would preclude him from performing the Acting Chief's duties to his employer's satisfaction. This speculation the employer had twice before had the opportunity to test. It had apparently not been borne out since there is no record of complaints and the Town introduced at hearing not one shred of evidence to support its fears.

To reverse the hearing officer's conclusion in this case would result in making lawful exercise of protected rights under Chapter 150E a status crime, to borrow a term from another field of law. To accept the employer's proposition here would mean that employees who hold the status of union activists, women, handicapped people, or religious or ethnic minorities could be disqualified from managerial positions solely on the basis of that status. It must be remembered in this case that there is nothing in the record even indicating, let alone establishing, any bona fide occupational qualification for the Chief's position that Pollicelli lacked by virtue of his prior union activity.

This is the first case of this type in the Commission's recent history. I believe that we must examine each such case on its own facts and perform a balancing test based on the critical employer and employee interests involved. In my view, the hearing officer performed this function correctly, and I affirm his opinion.

ORDER

WHEREFORE, on the basis of the foregoing, IT IS HEREBY ORDERED that the Town of Burlington shall:

1. Cease and desist from:

   a. Interfering with, restraining, and coercing Phillip Pollicelli in the exercise of his rights under the Law;

   b. Discriminating against Phillip Pollicelli in retaliation for his active participation in union affairs.

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

   a. Make Phillip Pollicelli whole for any loss of wages or other benefits he suffered as a result of the denial of his promotion to Acting Fire Chief in July, 1981. This remedy is to include interest on any sums owing computed at ten percent (10%) and compounded quarterly from July 2, 1981;

   b. Post in conspicuous places where Town of Burlington firefighters usually congregate, and leave posted for a period of not less than thirty (30) consecutive days the attached Notice to Employees;

   c. Notify the Commission within thirty (30) 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

Commissioner Gary D. Altman, Dissenting:

The issue is whether a public employer can decide not to hire or appoint a person to an important managerial position because of that person's prior union activities as an employee. In the present case two persons, Deputy Chiefs Larry Rice and Phillip Pollicelli, sought the position as acting Chief of the Burlington Fire Department. The record demonstrates that both applicants were equally qualified and both were union members. The findings of fact indicate, however, that the Town Administrator questioned Pollicelli's leadership allegiance and this fact tipped the scale in favor of Rice. Consequently, the Town Administrator recommended Rice for the position as acting Chief. His recommendation was acted upon favorably by the Selectmen. My colleagues determine that the employer's action amounted to unlawful discrimination against Pollicelli. In my opinion the employer did not violate the Law by considering Pollicelli's prior union activity, and by not appointing

him to Acting Fire Chief because of the employer's uncertainty as to whether he would effectively represent management's interests. I therefore dissent from their opinion.

Chapter 150E recognizes the competing interests of management and labor. Specifically, the law establishes a line between management and labor. The latter group is entitled to collective bargaining rights, and the former group is denied such rights.[1] Employees are defined as managerial if they formulate, determine, and execute the major policies of the employer, especially labor relations policy.[2] See Town of Wellesley School Committee, 1 MLC 1389 (1975), aff'd. School Committee of Wellesley v. Labor Relations Commission et al., 1978 Mass. Adv. Sh. 2207, 379 N.E. 2d 1077 (1978). See also, Bell Aerospace, Division of Textron Corporation v. NLRB, 416 U.S. 267, 85 LRRM 2995 (1974). In other words, because managerial employees are so closely identified with the public employer they are not "employees" under the law. Instead, they are aligned with the public employer in carrying out the employer's mission. For all practical purposes they are the "employer." See Brookline Hospital, Case No. CR-3402 at 16 (1974).

Public employers have the statutory prerogative to select the upper management of the enterprise according to their own criteria. In my opinion a public employer has the right to exercise its prerogative by considering a potential manager's past activities which it may consider antithetical to its best interest, and which may call into question the applicant's ability to function as part of management's team. Moreover, the employer's selection of its high management officials should not be hampered by requiring him to disregard any candidate's attitude toward dealing with the union. The fact that the candidate for a management position is a present employee should not affect the employer's right to hire management personnel who will most effectively represent the employer. "While it may be that an employer is not entitled to have a rule that he will not consider union members...to say that he may not take into account whether an employee is psychologically capable of becoming part of management is unrealistic, unworkable, and I suggest incompatible with the statutory scheme." Comments of former National Labor Relations Board General Counsel John Irving as quoted in Leder, Management's Right to Loyalty of Supervisors. 32 Labor Law Journal 83, 98 (1981).

As a practical matter, if the employer is required to disregard an employee's union activity in the decision to promote he may be compelled to hire, as a manager, an individual who will not adequately represent the employer's interests. Subsequently, under the majority's view, the employer would be allowed under the Law to discharge the manager for his union activity because managerial employees are not protected under the Law. The employer should not be required to assume this risk when it originally and legitimately doubts the employee's ability to act as an effective manager.

Based on the foregoing, I would not find that the employer violated the Law when it decided not to appoint Pollicelli as Acting Fire Chief of the Burlington Fire Department. I respectfully dissent.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION
GARY D. ALTMAN, Commissioner

Town of Burlington and IAFF, Local 2313, 9 MLC 1139

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 Town of Burlington has been found in violation of Sections 10(a)(3) and (1) of Massachusetts General Laws Chapter 150E (the Public Employee Collective Bargaining Law) for failing to promote Deputy Chief Philip Pollicelli to the position of Acting Fire Chief in July, 1981. The Commission found that the promotion was denied Mr. Pollicelli in retaliation for his protected activity as an active member of the I.A.F.F., Local 2313.

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

WE WILL NOT, in any like manner, discriminate against Philip Pollicelli or any other employees in retaliation for their protected activities as union representatives.

WE WILL make Philip Pollicelli whole for any rights, benefits, privileges and monies lost by him as a result of the failure to promote him to the Acting Chief position in July, 1981.

TOWN OF BURLINGTON
Robert A. Mercier,
Town Administrator