

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

CITY OF WATERBURY

-and-

OCTOBER 17, 2002

LOCAL 353, COUNCIL 4,
AFSCME, AFL-CIO

Case No. MPP-22,454

A P P E A R A N C E S:

Attorney Peter Abare-Brown
For the City

Attorney Eric R. Brown
For Robert Fortier

Attorney J. William Gagne, Jr.
For the Union

EVIDENTIARY RULING

On July 24, 2002, the above-captioned matter came before the Labor Board for a formal hearing. All parties appeared and were represented. During the testimony of City Supervisor Larry Pomeranz, Attorney Brown attempted to introduce what is described as the transcript of a recording of a conversation between Mr. Fortier (the individual who is the subject of the complaint), his former supervisor Larry Pomeranz and Union representative Billy Green. Before the transcript was even properly identified, the City objected to the admission of either the transcript or the tape-recording. The parties were granted permission to brief the issue of the admissibility of the transcript and/or the tape recording. Both parties filed briefs, the last of which was received on October 10, 2002.

The Union argues that the tape was not illegally made and is necessary for a full and complete hearing. In this regard, the Union claims that the recording will provide direct evidence of the real motive for Mr. Fortier's termination and will impeach the testimony of Mr. Pomeranz. The City argues that the surreptitious taping of the conversation constitutes an invasion of privacy and should be disallowed on the policy grounds that such secretive taping does not foster harmonious labor relations.

We do not encourage secret taping of any event between the parties. Certainly, in classic bargaining sessions, this activity is strongly discouraged as it impedes the free flow of discussion and impairs the process. For these reasons, the National Labor Relations Board (NLRB) has disallowed the introduction into evidence of surreptitiously obtained tape recordings of collective bargaining sessions. *Carpenter Sprinkler Corp. v. Road Sprinkler Fitters Local Union 669*, 238 NLRB No. 139, 99 LRRM 1356 (1978), affirmed *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 102 LRRM 2199 (1979); *NLRB v. Maywood Do-Nut Co. Inc.*, 659 F.2d 108, 108 LRRM 2710 (1981). In spite of this stance, the NLRB has allowed the admission of such evidence in some circumstances involving non-bargaining, employer-employee interaction. See: *NLRB v. Savin Business Machines Corp.*, 649 F.2d 89, 107 LRRM 2605 (1981).

This Board has never specifically ruled on the admissibility of secret tape recordings. However, in certain bargaining situations, we have ruled against a party's right to tape record the events. See: *Town of Fairfield*, Decision No. 3059 (1993), affirmed, *Town of Fairfield v. IAFF, Local 1426*, Dkt. No. CV93-0304287 (J.D. Fairfield at Bridgeport, 7/11/94, Maloney, J.).

The tape recording at issue does not appear to violate any federal or state statutory provision. Also, despite the City's argument, it is not clear that the conduct of secretly tape recording a pre-disciplinary hearing would constitute the common law tort of invasion of privacy. See: *WVIT Inc. V. Gray*, 1996 WL 649334 (10/25/96, Lavine, J.)(cause of action for unreasonable intrusion on the privacy of another exists in circumstances where an employee has, for personal reasons, secretly tape recorded "chats" with other employees). Thus, the question becomes whether this Board believes that the benefit of the evidence outweighs any detrimental effect on the collective bargaining process.

At this juncture in the hearing, we cannot say that this evidence is essential to a full and complete record. Specifically, the Union has not presented the testimony of the other two witnesses to the meeting at issue and thus, we do not even know if the City's witness refutes whatever is claimed to have been said. At this point, we believe it would be premature to rule on the need for this evidence.

As we have said above, we are hesitant to allow any evidence of a surreptitious tape recording of events involved in the collective bargaining process. However, we find nothing patently illegal about this evidence. Additionally, this complaint alleges one of the paramount evils that the Act is designed to protect against: termination for engaging in protected activity. Given the competing considerations, once the Union has presented its testimonial evidence and the City has had a chance to rebut any particular testimony offered by the other witnesses to the conversation, we will entertain again the Union's offer of this evidence. If we find that the tape recording is necessary to a complete and full determination in this matter, we will admit the evidence if properly authenticated and verified as to integrity.

If it will assist in expediting the hearing, we will allow the Union's witnesses to identify and authenticate the evidence during their direct testimony. At that time, the City can conduct voir dire and explore any issues of authenticity and integrity of the recording. We will identify the evidence but will not admit it until all the testimony has been heard and only if we find that it is necessary to a full and complete record in this case. If we make such a ruling later in the hearing, we will admit the tape and the transcript as a full exhibit(s).

CONNECTICUT STATE BOARD OF LABOR RELATIONS

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CERTIFICATION

I hereby certify that a copy of the foregoing was sent via facsimile and U.S. mail postage prepaid this 17th day of October, 2002 to the following:

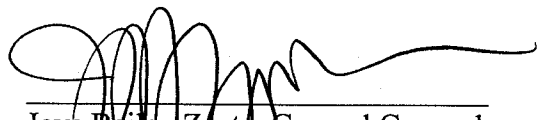
Attorney Eric R. Brown
Secor, Cassidy & McPartland
P.O. Box 2818, 41 Church Street
Waterbury, Connecticut 06723

RRR

Attorney Peter Abare-Brown
City of Waterbury
Corporation Counsel Office
City Hall, 236 Grand Street
Waterbury, Connecticut 06702

RRR

Attorney J. William Gagne, Jr.
Gagne & Associates
1260 Silas Deane Highway
Wethersfield, Connecticut 06109



Jaye Bailey Zantz, General Counsel
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