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Re: MUP-19-7261, Town of Winthrop and Ferruccio Romeo

Dear Mr. Lichten, Mr. Fowler, Mr. Romeo and Mr. Greenspan:

Ferruccio Romeo (Romeo) appeals from two aspects of a Department of Labor Relations (DLR) Investigator's dismissal of the above-referenced charge of prohibited practice. After reviewing the investigation record, the dismissal and the parties' arguments on review, the Commonwealth Employment Relations Board (CERB) affirms one aspect of the dismissal but remands the other aspect to the Investigator to issue a complaint consistent with this ruling.

Background

This charge concerns the terms under which the Town of Winthrop (Employer or Town) reinstated Romeo to his position as a police officer with the Town's Police Department, where Romeo has served for over twenty years. Romeo also served as Union president for eleven years, from December 2004 until February 2015. In that

capacity, he was involved in contract negotiations and filed grievances. In November 2014, the Town placed Romeo on administrative leave in connection with attending a contract mediation at the same time he was assigned to work a detail. On January 9, 2015, the Town terminated Romeo. In addition to filing two prohibited practice charges over the termination, MUP-14-4210 and MUP-15-4652,¹ Romeo filed a grievance.

On February 26, 2016, an arbitrator issued an opinion concluding that the Employer had not established just cause for Romeo's termination. The arbitrator reduced the discipline to a Letter of Warning and ordered Romeo to be made whole for all lost wages and benefits less offsetting income. The Town filed a complaint to vacate the award pursuant to M.G.L. c. 150C. The Superior Court overturned the award. The Appeals Court subsequently reversed the Superior Court decision and upheld the arbitration award on May 21, 2018.

On July 22, 2018, the Town reinstated Romeo for pay purposes. On September 8, 2018, the Town reinstated him to duty. On January 21, 2019, the arbitrator issued a remedy award adopting the Union's position on backpay owed. On April 11, 2019, Romeo filed the instant charge alleging that, since his reinstatement, the Town had violated Sections 10(a)(3), 10(a)(4) and, derivatively Section 10(a)(1) of the Law by retaliating against him for his protected activities in four different ways.² On April 18, 2019, the Union filed MUP-19-7277, alleging that the Town was not complying with the arbitrator's remedy award in violation of Sections 10(a)(1), (3) and (5) of the Law. Romeo and the Union also sought enforcement of the award in Superior Court. After the Town paid Romeo \$530,000, the Union withdrew MUP-19-7277 before the DLR investigated it.

On March 13, 2020, a DLR Investigator dismissed MUP-19-7261 in its entirety. Romeo filed a timely request for review of two aspects of the charge: 1) that the Town had failed to reassign him to certain duties that he had been assigned to before being

¹ In Case Nos. MUP-14-4210 and MUP-15-4652, Romeo filed charges respectively in his capacity as Union President and as an individual, alleging that the Town's conduct violated Sections 10(a)(1)-(4) of the Law. The dismissal letter in this matter provides the complex procedural background of both these cases. In a ruling issued today, the CERB remanded both charges to the DLR to issue a consolidated complaint alleging that the administrative leave and termination violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. The DLR issued the consolidated complaint today.

² Romeo's original charge in MUP-19-7261 alleged that the Town had failed to bargain in good faith over a successor collective bargaining agreement in violation of Section 10(a)(5), and derivatively Section 10(a)(1) of the Law. The DLR sent a show cause letter to Romeo on April 19, 2019, advising him that individual employees have no standing to file charges alleging that an employer has failed to bargain in good faith. On April 26, 2019, Romeo filed an amended charge alleging that the Town violated Sections 10(a)(1) (3), and (4) of the Law for interference, discrimination and retaliation for his various protected activities since his "unlawful and retaliatory termination."

terminated; and 2) that the Town failed to permit him to participate in a Civil Service examination on December 8, 2018 for promotion to lieutenant.

The first allegation concerned two job duties that Romeo performed before he was terminated: 1) maintaining the Department of Justice Criminal Information Services (DCJIS) system; and 2) detail maintenance. Before he was terminated, Romeo earned "Kelly hours," a form of compensatory time, for performing these duties. Romeo had performed the DCJIS duties for fifteen years. After Romeo's termination, Delehanty reassigned these duties to a lieutenant, who is in a different bargaining unit. Romeo's detail maintenance duties included adjusting hours, scheduling details and following up on collections for details that were not paid. Pursuant to a 2010 agreement, the Union was responsible for pursuing collections. After Romeo's termination, Delehanty assigned two other bargaining unit employees to adjust the detail hours. Upon reinstatement, Romeo asked Delehanty to reassign both the detail and DCJIS duties to him. Although the Chief and the Deputy Chief indicated that they would, they never did and thus, the officers who had been assigned to these duties after Romeo was terminated continued to perform them.

The Investigator dismissed the details allegation because she found no direct or indirect evidence to support the allegation that the Town refused to reassign these duties to Romeo because of his concerted, protected activity. She noted that the Union was in charge of collections, and that Romeo had not been the only bargaining unit member performing the other detail duties. She also found no evidence of disparate treatment or animus toward Romeo's Union activities or the Union generally.

The Investigator dismissed the allegations pertaining to DCJIS responsibilities based on the considerations that the Town raised, i.e., that it had reassigned those duties in the intervening years and, once Romeo was reinstated, opted to keep those duties in a different bargaining unit, rather than reassign them to Romeo.

The Investigator dismissed the allegation pertaining to the lieutenant's exam on grounds that M.G.L. c. 31, §59 does not permit persons who have not had one year of experience as a sergeant to sit for a lieutenant's exam. Romeo did not directly dispute this statutory requirement but contended that but for his termination, he would have been promoted to sergeant, and thus eligible to sit for the lieutenant's exam. The Investigator rejected this argument as speculative. She further noted that Romeo had presented no evidence of disparate treatment, trivial reasons, or evidence of the Town's animosity toward the Union or to Romeo's protected activity.

On review, Romeo argues with respect to the detail duties that the Investigator failed to consider that, had he not been terminated, he would still have been performing the detail duties, and the only reason he was not was due to his unlawful termination. Romeo asserts that the Town's stated reasons for not reassigning these duties are "red herrings" because the import of the arbitrator's award was to restore Romeo to the position he would have been in had he not been terminated. Romeo also notes that the arbitrator's remedy award compensated Romeo for these lost duties.

Regarding the lieutenant's exam, Romeo disputes that it was speculative that he would have attained sergeant rank had he not been terminated.³ Romeo also claims that, to the extent the Town argues that it could not have permitted Romeo to sit for the exam, he is still owed damages for losing the opportunity to take the exam and be promoted.

Ruling

The CERB affirms the dismissal of the portion of the charge relating to Romeo's sitting for a lieutenant examination. Romeo does not dispute that Civil Service Law, M.G.L. c. 31, §59, states that only employees who have served for a least a year in the next lower rank, sergeant, are eligible to take the lieutenant's exam. Romeo was not a sergeant as of December 2018, when the exam was held. Furthermore, Romeo appealed the Town's decision and the Civil Service Commission denied it. Under these circumstances, given the statutory prohibition on his taking the exam, even assuming that Romeo could establish a prima facie case of a Section 10(a)(3)/Section 10(a)(4) violation, Romeo could not establish that but for his Union or DLR activity, the Town would have allowed Romeo to sit for the exam.⁴

We reach a different conclusion regarding the Town's failure, upon request, to reinstate Romeo to his former DCJIS duties. As the Investigator explained, to establish a prima facie case of a Section 10(a)(3) or Section 10(a)(4) violation, the charging party must demonstrate that (1) the employee engaged in concerted activity protected by Section 2 of the Law; (2) the employer knew of the concerted, protected activity; (3) the employer took adverse action against the employee; and (4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008). It is undisputed that Romeo's protected concerted activity in this case includes not only his pre-termination protected conduct as Union president, but numerous post-termination events of which the Town was aware, including the Union's and his involvement in the arbitration proceeding and its aftermath, and the various prohibited practice charges both he and the Union filed arising out of the termination.

The only disputed aspect of Romeo's prima facie case is the fourth element, unlawful motivation. In the absence of direct evidence, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that

³ Romeo argues that the CERB should presume he would have been promoted because he sat for a make-up sergeant exam on October 25, 2018, ranked third on the list despite having less time to study than other officers, and was promoted to sergeant on December 8, 2019.

⁴ Romeo's assertion that he should, at a minimum, be compensated for his inability to take the exam because he would have been eligible to take it had he not been terminated is a remedy issue arising out of his termination and not properly raised in this proceeding.

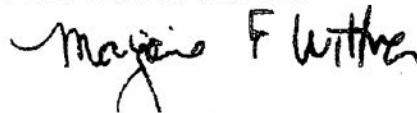
evidence. Id. at 48. Several factors may suggest unlawful motivation, including, among other things, the triviality of reasons given by the employer. Id.

Here, the Town's main reason for not reinstating Romeo to the DCJIS duties is that they were already assigned to a lieutenant, and that the arrangement was "working well." This is a trivial explanation because it fails to explain why the Town could not or did not *return* these duties to Romeo who, prior to his termination, had performed them for fifteen years. The Town also claims that the arbitration award did not require it to restore all of Romeo's former duties. This too is a trivial explanation because, as the Union correctly notes on review, the point of a make-whole remedy is to restore the situation as nearly as possible as that which existed prior to the wrongful conduct. Newton School Committee v. Labor Relations Commission, 388 Mass. 557, 576 (1983) Although, as the Investigator points out, it is true that Romeo failed to present any evidence that the Town treated him differently than other bargaining unit members in not reassigning him to these duties, there is no evidence that any other similarly-situated bargaining unit members existed. Thus, where it is to be expected that an employer will reassign the duties of a terminated employee, the triviality and paucity of the Town's explanation for not restoring those duties to Romeo, after an arbitrator found no just cause for the termination, provides probable cause to believe that they were not restored to retaliate against Romeo for the variety of protected, concerted activity that he has engaged in since 2014 in violation of Sections 10(a)(4), 10(a)(3) and, derivatively, Section 10(a)(1) of the Law. We otherwise summarily affirm the Investigator's decision regarding the detail duties for the reasons set forth in the dismissal letter.

Conclusion

The CERB affirms the dismissal of that part of MUP-19-7261 alleging that the Town violated Section 10(a)(4), Section 10(a)(3) and, derivatively, Section 10(a)(1) by not permitting Romeo to sit for the lieutenant's exam or reassigning him certain detail maintenance duties upon his reinstatement to duty. The CERB remands the allegation that the Town violated Section 10(a)(4), Section 10(a)(3) and, derivatively, Section 10(a)(1) pertaining to the reinstatement of Romeo's DCJIS duties to the DLR to issue a complaint consistent with its ruling.

Very truly yours,
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER**APPEAL RIGHTS⁵**

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30)**

⁵ These appeal rights pertain to the CERB's affirmance of the dismissed allegations in MUP-19-7261 only. A remand to issue a complaint is not a final order within the meaning of Section 11 of the Law.