



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

PHILIP T. ROBERTS
DIRECTOR

CHARLES F. HURLEY BUILDING
19 STANFORD STREET
1ST FLOOR, BOSTON, MA 02114
PHONE: (617) 626-7132
FAX: (617) 626-7157
efile.dlr@mass.gov
www.mass.gov/dlr

COMMONWEALTH
EMPLOYMENT
RELATIONS BOARD
MARJORIE F. WITTNER
CHAIR
KATHERINE G. LEV
BOARD MEMBER
JOAN ACKERSTEIN
BOARD MEMBER

March 13, 2020

Ferruccio Romeo

[REDACTED]
Saugus, MA 01906

Howard Greenspan, Esq.
220 Broadway, Suite 304
Lynnfield, MA 01940

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

Dear Mr. Romeo and Mr. Greenspan:

On April 11, 2019, Ferruccio Romeo (Romeo) filed a charge of prohibited practice with the Department of Labor Relations (DLR), alleging that the Town of Winthrop (Town) had violated Section 10(a)(3), 10(a)(4), and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law).¹ Pursuant to Section 11 of the Law, as amended by Chapter 145 of the Acts of 2007, and Section 15.05 of the DLR's Rules, I conducted an in-person investigation of this allegation on February 24, 2020.² Based on the evidence presented during the investigation, I dismiss the allegations for the reasons explained below.

Background

Romeo has been a police officer in the Town for approximately 24 years. He also served as the President for MASS COP Local 421 (Local 421 or Union) from December 2004 until February 2015. As Union President, Romeo negotiated

¹ At the investigation, Romeo withdrew his allegations that the Town had violated Sections 2 and 5 of the Law. Romeo also withdrew certain of his retaliation allegations, including that the Town had failed to fully comply with an arbitrator's order, that the Town failed to provide him with equal time and material for promotional exams, and the Town unlawfully failed to promote him to a full-time sergeant position.

² I held the record open until February 27, 2020 to enable the parties to provide certain specified additional information.

collective bargaining agreements with the Town and engaged in other protected activity including filing grievances against the Town and filing prohibited practice charges with the DLR.

On or about November 24, 2014, Romeo was assigned to work a detail from 7:00 a.m. until 3:00 p.m. Believing he only had to be "on call" during this detail, Romeo also attended a mediation session for a successor collective bargaining agreement under the auspices of the Joint Labor Management Committee on the same day. On or about December 1, 2014, the Town placed Romeo on paid administrative leave pending an investigation regarding the November 24 paid detail. On December 13, 2014, Romeo filed MUP-14-4210, alleging that the Town placed him on administrative leave in retaliation for his protected activity. After the charge was dismissed, Romeo appealed to the Commonwealth Employment Relations Board (CERB). The Town terminated Romeo on January 9, 2015. Romeo filed a grievance challenging his termination. On June 24, 2015, Romeo also filed MUP-15-4652 alleging that the Town had terminated him for his protected activity.³ The DLR deferred both of his charges to arbitration. On July 13, 2015, Romeo also filed a discrimination lawsuit against the Town in Suffolk Superior Court.

On February 28, 2016, arbitrator Bruce Fraser (Fraser) found that the Town lacked just cause to terminate Romeo and ordered Romeo's reinstatement with back pay. On March 2, 2016, Romeo requested that the DLR revive his two charges, MUP-14-4210 and MUP-15-4652.⁴ The Town filed a Complaint in Superior Court to vacate the arbitrator's award. On April 5, 2017, the Superior Court vacated the arbitration award. Romeo then filed with the Court of Appeals, which, on May 21, 2018, vacated the Superior Courts decision and reinstated the arbitration award.⁵

³ During the in-person investigation, Romeo motioned to consolidate this case with MUP-14-4210 and MUP-15-4652. However, given the fact that I am dismissing this case, consolidation is not appropriate.

⁴ The charges were subsequently referred to mediation but were not resolved.

⁵ In October 2018, Fraser held a remedy hearing. On January 21, 2019, Fraser issued an award detailing what remedy was due Romeo for his termination without just cause, including specific payments for lost straight wages, details, overtime, paid leave, taxes, interest, and the cost of his health insurance. Fraser specifically noted that Romeo had performed additional job duties involving detail maintenance and maintenance of the Department of Criminal Justice Information System (DCJIS), averaging about 90 hours per year of "due time." Fraser ordered the Town to include payment for these 90 hours per year to Romeo.

Thereafter, on April 18, 2019, Local 421 filed a charge, MUP-19-7277, alleging that the Town was not complying with the backpay aspect of Fraser's order. On May

On July 22, 2018 Romeo was reinstated for pay purposes. After attending required training, he was reinstated to duty on September 8, 2018. Romeo has not assumed any official role with Local 421 upon his return to duty.

On April 3, 2018, prior to Romeo's return, the Town had conducted an examination for promotion to sergeant. Based on an unrelated court order, another officer was permitted to sit for a make-up exam on October 25, 2018. Romeo also sat for the October make-up promotional exam for the sergeant positions. On April 1, 2019, an updated eligible list for sergeant was established; Romeo was ranked third.⁶

On April 10, 2019, Romeo attended a Union meeting regarding a proposed Memorandum of Understanding (MOU) for a successor collective bargaining agreement (CBA). Romeo spoke out against the proposed MOU. During an April 17, 2019 Union meeting to vote on the MOU, Romeo again openly voiced his opposition to the MOU. The members voted against the proposed MOU.⁷

In-Service Training

On December 10, 2015, the Police Department issued an employee training policy. Section XII includes a provision that states:

If the employee is attending department approved training and it falls on the employees['] day off the employee shall use his/her Kelly Hours.⁸ If the training is on the employees['] regularly scheduled work day or 6 hours before or 6 hours after employees['] regularly scheduled work day, employee will be placed in training in-lieu of his or her regularly scheduled work day.

16, 2019, Local 421 and Romeo also filed another civil action in Superior Court. After the Town paid Romeo \$530,000, the Union withdrew MUP-19-7277.

⁶ The Town subsequently promoted Romeo to sergeant on December 8, 2019.

⁷ At the in-person investigation, Romeo stated his belief that the Town was aware of his comments because the Acting Union President, James Feeley, is good friends with the Police Chief, Terence Delehanty (Delehanty). However, he presented no evidence to establish that Feeley told Delehanty of Romeo's comments or that Delehanty learned of them any other way.

⁸ When the Police Department changed the officers' schedule to a ten-hour workday, working 4 days on then 4 days off, in order to compensate for additional time off, the officers had to "pay back" 60 hours, called "Kelly hours." The officers could use "Kelly hours" to attend required training or perform certain work-related functions approved by Delehanty.

Romeo and other employees attended in-service training from February 11, 2019 through February 14, 2019. Any employee who attended the training on an off day was credited for 8 hours a day for a total of 32 hours. Any employee who attended the training in lieu of his or her shift was credited for 10 hours a day, for a total of 40 hours. Romeo attended on his off days, so he was only credited for 8 hours a day. He objected when he learned that at least 2 other officers, who attended in lieu of their shifts, were credited with 10 hours per day.

On February 27, 2019, Romeo and another officer filed a grievance because the officers were not receiving an equal amount of credit for attending the in-service training. In his grievance, Romeo quoted Detective Sergeant Steve Rogers' February 15, 2019 email which read, "[a]s has always been the practice in service is 8 Kelly Hours of credit per day attended."

On May 1, 2019, Austin Faison, Town Manager, denied the grievance noting that "the credit for in-service training in lieu of shift as well as the application of Kelly hours for training purposes has been consistently applied in the department since the adoption of the 4 and 4 shift."

Assignment of Prior Duties upon Romeo's Reinstatement

Prior to his termination, Romeo had been assigned two additional job responsibilities which earned him additional "Kelly hours" or compensatory time. One of the extra duties involved maintaining the DCJIS. Romeo, who had been assigned this duty for 15 years prior to his termination, earned 50 hours of compensatory time per year for performing this duty which included certification and maintenance of the system and of the confidential passwords. The other duty involved detail maintenance.⁹ For this duty, Romeo was responsible for adjusting hours, scheduling details and following up on collections for details that were not paid.¹⁰ He received four "Kelly hours" a month for this responsibility. Romeo asked to have both of these duties reassigned to him when he was reinstated. Although Delehanty and the Deputy Chief indicated they would talk about it, the duties have not been reassigned to Romeo. In Romeo's absence, Delehanty assigned the DCJIS duties to a lieutenant, who is in a different labor organization, not Local 421.

⁹ During the in-person investigation, Romeo did not provide any information regarding how long he was responsible for these detail-related duties prior to his termination. The Town provided evidence that in 2011-2012, Sgt. Femino was responsible for the detail assignment. In 2012-2013, Julio Bonavita (Bonavita) had been assigned as the detail officer. Both were credited for 40 hours for the year for these duties.

¹⁰ In 2010, the Town and the Union signed an agreement stating that the Town would provide the Union with all invoices that were past due after an officer worked a detail so that the Union could pursue collection.

Delehanty assigned two other bargaining unit employees, William Hagemeister and Bonavita, to adjust detail hours.

Provisional Sergeant Position

In early 2018, the Police Department posted a provisional sergeant position. Romeo and two other employees applied. Romeo was the most senior candidate. Romeo asserts that the past practice was that the most senior officer fills a provisional position.¹¹ At some point, the Acting Town Manager, David Cressmen (Cressmen), opted not to fill the position.¹² During the in-person examination, the Town explained that although it held an April 3, 2018 sergeant promotional exam, the Town was subsequently required to hold a make-up exam, which did not take place until October 25, 2018. Cressmen decided not to fill the provisional sergeant position until the lists from the two exams could be merged. Ultimately, he decided not to fill the provisional sergeant position at all. The Town subsequently placed at least the top three candidates in permanent sergeant positions, including Romeo.¹³

Around this time, Delehanty offered to make Romeo the officer in charge which would have increased his pay. Romeo refused the officer in charge status, in part because that the pay and other benefits were not equal to that of the provisional sergeant position.

Promotion Examination for Lieutenant Position

On December 8, 2018, the Police Department held an examination for the promotion to a lieutenant position. Civil service law states that only employees who had served at least a year in the next lower rank, sergeant, are eligible to sit for the promotional examination for lieutenant.¹⁴ Romeo, who was not a sergeant at the time, was informed he would not be permitted to take the examination.

Prior to the exam, on November 10, 2018, Romeo filed an appeal with the Civil Service Commission. He argued, in part, that had he not been terminated,

¹¹ Around this time, another officer in Local 421's bargaining unit, Judy Racow, became a provisional sergeant through an unrelated civil litigation rather than the posted position.

¹² Neither party provided a date when this decision was made.

¹³ When permanent sergeant positions opened, the Town made appointments by order of civil service ranking off the merged list. Romeo was ranked third. When a third sergeant position was available, the Town promoted Romeo to sergeant on December 8, 2019.

¹⁴ See Massachusetts General Laws Chapter 31, Section 59.

he may have been promoted to sergeant, allowing him to sit for the lieutenant's promotional examination. On May 9, 2019, the Civil Service Commission dismissed Romeo's appeal.

Position of the Parties

Romeo argues that the Town retaliated against him for his protected activity in violation of Sections 10(a)(3) and (4) of the Law by: 1) crediting him for only 32 hours for attending in-service training; 2) failing to reassign him to certain duties he was assigned to prior to his termination, 3) failing to select him as a provisional sergeant; and 4) failing to permit him to participate in an examination for promotion to lieutenant. Romeo argues that the Town's actions retaliated against him for his protected activity prior to his termination, his protected activity of fighting his termination, his filing charges with the DLR and his outspokenness against the proposed MOU for a successor CBA during Union meetings. More specifically, Romeo maintains that he and others were only credited with 32 hours for their attendance at in-service training, but others were credited with 40 hours. Upon his reinstatement, Romeo requested that the Town reassign him to certain duties he held prior to his termination, involving the DCJIS system and detail maintenance, for which he had earned "Kelly hours" and compensatory time. The Town has not reassigned these duties to Romeo, so he is not earning the same "Kelly hours" and compensatory time he earned prior to the termination. Additionally, although the Town posted for a provisional sergeant position, Romeo alleges the Town decided not to fill it after he expressed interest in the position. Romeo notes that, as the most senior candidate, he should have been the successful candidate. Lastly, Romeo believes that he was not permitted to sit for the lieutenant promotional exam because he was not a sergeant, but that he would likely have been a sergeant at that time if not for his unjust termination.

The Town contends that it did not violate the Law regarding any of the four allegations. The Town followed its training policy and treated Romeo exactly the same as it treated all other employees who attended the in-service training on a day off. As for the second issue, the Town notes that the arbitration award did not require the Town to reassign Romeo to every duty he held prior to his termination. In Romeo's absence, the Town assigned the DCJIS duties to a lieutenant in a different bargaining unit, and the Town believed that the lieutenant should continue to perform those duties. As for the detail-related duties, the Town asserted that it is the Union's responsibility to pursue collection pursuant to the 2010 agreement so the Town does not assign this duty any longer.¹⁵ In regard to the other detail related duties that the Town does assign, those duties have not always been assigned to Romeo. In the past, the Town has assigned these duties to other

¹⁵ During the in-person investigation, Romeo explained that regardless of the 2010 agreement, Delehanty still assigned one or more bargaining unit employees to handle certain responsibilities regarding details, including recording changes based on the actual number of hours that an officer worked on a specific detail.

bargaining unit employees and therefore, the Town maintains that its decision to continue to have other employees perform these duties even after Romeo's reinstatement was not retaliatory. As to the provisional sergeant position, Cressmen opted not to fill that position immediately after it was posted because he wanted to wait until the list from the April exam and the list from the October make-up exam could be merged. Ultimately, no one was ever selected as a provisional sergeant through that posting. The Town asserts that this decision did not have anything to do with Romeo's protected activity, and he was subsequently promoted to a permanent sergeant position. Lastly, Romeo could not sit for the lieutenant promotional examination simply because he did not have the necessary qualifications; he did not have one year of experience as a sergeant. Overall the Town maintains that Romeo's protected activity had no bearing on any of its actions.

Analysis

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Worcester Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). A public employer that retaliates or discriminates against an employee for signing or filing a complaint or giving any information or testimony to the DLR violates Section 10(a)(4) of the Law. Because unlawful retaliation is the essence of a charge under Section 10(a)(3) and 10(a)(4), similar elements of proof apply to both kinds of cases. Commonwealth of Massachusetts, 6 MLC 1397, 1400, SUP-2190 (August 27, 1979).

To establish a prima facie case of retaliation, the charging party must show 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 action was motivated by a desire to penalize or discourage the protected activity. City of Holyoke, 35 MLC 153, 156, MUP-04-4503 (Jan. 9, 2009); Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008); City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009); Town of Clinton, 12 MLC 1361, 1365, MUP-5659 (Nov. 9, 1985).

The CERB has consistently defined adverse action as an adverse personnel action, such as a suspension, discharge, involuntary transfer or reduction in supervisory activity. The mere assignment of additional responsibilities, though possibly inconvenient or even undesirable, does not constitute an adverse employment action unless it materially disadvantages the charging party in some way. City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996)).

Absent direct evidence, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity, triviality of reasons given by the employer, disparate treatment, an employer's deviation from past practices, or expressions of animus or hostility toward a union or the protected activity. Town of Carver, 35 MLC at 48 (citing Melrose School Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006)). Under an indirect, or circumstantial, evidence case, the CERB applies the tri-partite analysis articulated in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981). Under this analysis, once the charging party establishes a prima facie case, the employer may rebut it by producing evidence that a legitimate reason motivated the adverse action. If an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives." The CERB then considers whether the employer would have taken the adverse action but for the employee's protected activity. Suffolk County Sheriff's Department, 27 MLC 155, 160, MUP-1498 (June 4, 2001); Quincy School Committee, 27 MLC 83, 92, MUP-1986 (December 29, 2000). The charging party bears the burden of proving that, but for the protected activity, the employer would not have taken the adverse action. Athol-Royalston Regional School Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002); Town of Athol, 25 MLC 208, 211, MUP-1448 (June 6, 1999).

Romeo established the first three elements of a prima facie case of retaliation. When he served as the Union President from December 2004 until February 2015, Romeo filed numerous grievances and prohibited practice charges against the Town and he participated in bargaining sessions with the Town, which sometimes necessitated the involvement of the JLMC. After he was terminated, Romeo filed a grievance that went to arbitration. He pursued the matter to the Court of Appeals. Romeo also filed and pursued prohibited practice charges, before and after his termination. After his reinstatement, Romeo maintains that he further engaged in protected activity during the two Union meetings in April 2019. Although he claims that the Town may be aware of this activity because the Acting Union President is friends with Delehanty, this is merely speculative. Nevertheless, Romeo has clearly been engaged in other protected activity and there is no dispute that the Town was aware of this protected activity.¹⁶

¹⁶ During the in-person investigation, Romeo mentioned that he has filed a number of grievances since his reinstatement. However, the only grievance specifically referenced was his grievance on February 27, 2019 alleging that the Town violated the CBA pertaining to how time was credited for attending the in-service training. No information was provided about the other grievances and, therefore, there is no evidence to demonstrate that he filed these other grievances prior to the Town's alleged unlawful actions.

Romeo also established that he suffered material harm based on the Town's actions. Romeo was not credited with the same number of hours for attending the in-service training as certain other employees; he was not assigned to all of his previous duties which resulted in him earning less compensatory time and fewer "Kelly hours"; Romeo was not selected for the provisional sergeant position, which would have resulted in higher pay and benefits; and he was not permitted to sit for the lieutenant promotional exam and therefore was not able to be promoted to the higher paying lieutenant position. Given the above, Romeo has established the first three elements of a prima facie case.

In order to establish the fourth and last element needed to establish a prima facie case, Romeo must demonstrate that the Town's actions were unlawfully motivated. Romeo did not provide any direct evidence linking the Town's alleged adverse actions to his protected activity. Instead, Romeo relies on circumstantial evidence and his extensive protected activity. I now address whether Romeo has established that the Town's actions were unlawfully motivated in his four discrete allegations, serially.

In-Service Training

Romeo alleges that the Town's refusal to credit him for the same number of hours that it credited certain other employees for attending the February 2019 in-service training was motivated by an intent to discriminate against him and retaliate against him due to his protected activity. However, Romeo has not established probable cause to believe that the Town was unlawfully motivated when it credited Romeo with 8 hours per day instead of 10 hours a day for his participation at the training. All employees who, like Romeo, attended the training on their days off were credited for 8 "Kelly hours." All employees who were scheduled to work on the training days, and therefore took the training in lieu of their shifts, were credited for 10 hours. Because all the employees who attended the training in lieu of their shifts were treated alike, and all the employees who attended the training on their days off were treated alike, there is no evidence of any disparate treatment between Romeo and similarly situated employees. The Town did not give a trivial reason for its actions; the Town instead followed its training policy, and it acted in accordance with its past practice when it credited Romeo for 8 hours a day for his attendance at the training. Moreover, Romeo did not present any evidence that the Town expressed any animus or hostility toward the Union or his protected activity.¹⁷ Therefore, Romeo has not established the fourth element of a prima facie case of retaliation because there is no basis to conclude that the Town was motivated by any unlawful considerations when it credited Romeo for a total of 32

¹⁷ To the extent that Romeo maintains that the Town terminated him in retaliation for his protected activity, I note that there have been no findings to date, by the arbitrator or by the DLR, to support this conclusion and whether the Town unlawfully terminated Romeo is not at issue in the instant charge.

hours for his attending the in-service training. Consequently, I dismiss this allegation for lack of probable cause.

Provisional Sergeant Position

Romeo contends that the Town opted not to fill the posted provisional sergeant position once he applied for the position in retaliation for his protected activity. Romeo argues that he had the most seniority and should have been selected if the Town filled this position in accordance with its past practice. The Town, though, did not fill the position. Because it did not fill the position, there is no evidence of disparate treatment. Neither party provided any evidence at the in-person investigation that the Town deviated from its past practice by declining to fill the provisional sergeant position after it was posted. In this regard, neither party presented any evidence about whether other posted positions have not been filled in the past. Additionally, Romeo did not provide any evidence that the Town expressed any animus towards the Union or his protected activity. The fact that the Town offered to make Romeo the officer in charge in order to, at least somewhat, increase his compensation to blunt the negative impact of its decision not to fill the provisional sergeant position, and the fact that the Town subsequently promoted Romeo to a permanent sergeant position militates against finding that the Town was unlawfully motivated when it declined to fill the provisional sergeant position.

Even assuming, *arguendo*, that Romeo has established a *prima facie* case of retaliation, the Town produced evidence to show that it had legitimate, non-discriminatory reasons for its actions. The Town decided not to hire anyone as the provisional sergeant until the list from the original examination and the make-up exam, which Romeo took, could be combined. At that point, the Town opted to fill the permanent sergeant positions rather than a provision sergeant position. Romeo was unable to demonstrate that but for his protected activity, the Town would have filled the provisional sergeant job and would have offered the position to him. Accordingly, I dismiss this allegation for lack of probable cause.

Promotional Examination for Lieutenant Position

Romeo contends that he was not permitted to sit for the promotional examination for a lieutenant position on December 8, 2018 because of his protected activity. Civil service law states that only employees who served at least a year in the next lower rank, sergeant, are eligible to sit for the promotional examination for a lieutenant position. Because Romeo was not a sergeant at the time of the promotional examination, he did not have the baseline qualifications to sit for the examination. Romeo suggests that had he not been terminated, he would have been promoted to sergeant and would have been qualified to sit for the December 8, 2018 lieutenant promotional exam. However, this is purely

speculative.¹⁸ The facts remain that at the time of the December 8, 2018 examination, Romeo did not meet the necessary qualifications. Neither party presented any evidence that the Town ever allowed a non-qualified candidate to sit for a promotional exam in the past. Therefore, there is no evidence of disparate treatment or failure to follow the past practice. The Town did not offer trivial reasons for its decision; it was following the Civil Service Law. Lastly, Romeo did not demonstrate any evidence of the Town's animosity towards the Union or towards Romeo's protected activity. Accordingly, Romeo has not established a prima facie case of retaliation. I dismiss this allegation for lack of probable cause.

Assignment of Prior Duties upon Romeo's Reinstatement

Romeo was assigned certain duties, specifically maintaining the DCJIS System and maintaining the detail system, prior to his termination. Upon his reinstatement, Romeo asked Delehanty to reassign these duties to him. Delehanty indicated he would discuss the matter, but then never addressed it with Romeo again. Delehanty did not reassign either of these duties to Romeo. Romeo asserts that the Town did not reassign these duties to him in retaliation for his protected activity.

The issue here is not whether Romeo would have kept these duties had he not been terminated. Arbitrator Fraser addressed that issue by awarding Romeo money for the 90 hours he lost per year for not performing these duties while separated from service. The Town correctly asserted that Fraser's award did not specifically require the Town to return these duties to Romeo upon his reinstatement, so there was no legal requirement for them to do so. The issue here is whether the Town's decision not to reassign these duties to Romeo after his reinstatement was unlawfully motivated.

Romeo did not demonstrate that the Town engaged in any disparate treatment or that the Town expressed any animus or hostility toward the Union or Romeo's protected activity. Neither party presented any evidence as to whether the Town's actions deviated from its past practice. There was no evidence presented whether any other employees who were absent for a significant time were reassigned to all their former responsibilities upon their return. Further, the Town provided reasons for its decision not to reassign the duties to Romeo. First, the Town argues that the 2010 agreement makes the Union responsible for certain follow up duties for detail payments, not the Town. As to the other detail-related duties that the Town still assigns, the Town presented evidence that it had not assigned these duties only to Romeo in the past. Other officers were assigned 40 hours a year in 2011-2012 and 2012-2013 to handle certain detail related duties. As for the DCJIS responsibilities, the Town had reassigned these duties to a

¹⁸ Romeo cited no case law in support of his position that the DLR should assess his situation based on an assumption that he would have held a sergeant position if the Town had not terminated him.

member of a different bargaining unit in the intervening years while Romeo was contesting his termination. Upon Romeo's reinstatement, the Town opted to keep the duties within the other bargaining unit, assigned to the same lieutenant, rather than restore these duties of Romeo. Based on these considerations, I do not find probable cause to believe that the Town's actions were unlawfully motivated.

However, even assuming Romeo did establish a prima facie case, the Town demonstrated that legitimate reasons motivated its decision. First, the Town demonstrated that the Town did not exclusively assign the detail duties to Romeo in the past. In fact, one of the employees who now holds this duty, Bonavita, previously performed these duties in 2012-2013. As for the DCJIS duties, although Romeo performed these duties for numerous years prior to his termination, once he was terminated, out of necessity, the Town assigned these duties to someone else. These duties were assigned to a lieutenant who is outside of Local 421's bargaining unit. Even upon Romeo's return, the Town opted to keep the current arrangement in place as it was working well. Romeo did not present any arguments or evidence establishing that the Town would have assigned these duties to Romeo but for his protected activity. Accordingly, I do not find probable cause to believe that the Town retaliated against Romeo due to his protected activity when it did not reassign him to perform the DCJIS System duties or the detail duties upon his reinstatement. Because I find no probable cause to believe that the Town violated Section 10(a)(1), (3) and (4) of the Law in the manner alleged, I dismiss the charge in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



GAIL SOROKOFF, ESQ.
INVESTIGATOR

APPEAL RIGHTS

The charging party may obtain review of this dismissal by filing a request with the Commonwealth Employment Relations Board (Board) within ten days of receipt of this dismissal, pursuant to DLR Rule 456 CMR 15.05(9). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response with the Board.