



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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July 27, 2020

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Re: MUP-14-4210, MUP-15-4652, Town of Winthrop and Ferruccio Romeo

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

On July 9, 2020, the Department of Labor Relations (DLR) consolidated the above referenced charges of prohibited practice for the Commonwealth Employment Relations Board's (CERB) review. For the reasons set forth below, the CERB finds probable cause to believe that the Town of Winthrop (Town) violated Section 10(a)(3), and, derivatively, Section 10(a)(1) of M.G.L. c. 150E when it placed Ferruccio Romeo (Romeo) on administrative leave in 2014 and terminated him in 2015. The CERB therefore reverses the dismissal of MUP-14-4210 and remands both matters to the DLR to issue a complaint consistent with this ruling.

Background

Romeo has been a police officer with the Town's Police Department for over twenty years. From December 2004 until February 2015, Romeo also served as the president of Winthrop Police, MCOP, Local 421, AFL-CIO (Union).

These charges concern the events leading up to Romeo's termination in January 2015. In or around September 2014, Romeo filed a grievance on behalf of a bargaining

unit member and posted documents related to that grievance on a bulletin board at the police station where he worked. On September 12, 2014, Romeo refused requests by the Town's human resource director and police chief to remove the posted documents.

On November 24, 2014, Romeo was assigned to a 7:00 a.m. to 3:00 p.m. detail with the Department of Conservation at a local pump station. That same day, from 10:00 a.m. to 3:00 p.m., Romeo attended a bargaining mediation session at Winthrop Town Hall. On December 1, 2014, the Town placed Romeo on administrative leave pending an investigation into his submitting a detail pay slip for the November 24th pump detail while attending the mediation session. Another employee also attended the mediation while working a detail but did not submit a pay slip.

On December 12, 2014, Romeo, on behalf of the Union, and in his capacity as Union president, filed Case No. MUP-14-4210 with the DLR alleging that the Town had engaged in prohibited practices within the meaning of Sections 10(a)(1), 10(a)(2), 10(a)(3) and 10(a)(4) when it placed him on paid administrative leave.

Around December 18, 2014, the Town held a disciplinary hearing regarding the charges against Romeo. On January 9, 2015, the Town terminated Romeo for: 1) falsifying a detail slip, 2) lying during an investigation; and 3) violating various department rules and regulations.

On January 14, 2015, a DLR Investigator conducted an in-person investigation of MUP-14-4210.¹ The investigation record, including the dismissal letter, reflects that both parties had the opportunity to present evidence and make arguments regarding Romeo's termination at the investigation. On March 5, 2015, the DLR Investigator dismissed MUP-14-4210 on grounds that Romeo had not established that the termination was unlawfully motivated.² The Investigator focused on Romeo's claim that he had been treated

¹ Romeo, who is also an attorney, appeared on behalf of the Union during the investigation. He did not retain counsel until MUP-14-4210 was dismissed.

² Without additional discussion, the Investigator noted that he dismissed the Section 10(a)(4) allegation under the same analysis that he used with the Section 10(a)(3) allegation. In a separate discussion, the Investigator dismissed the Section 10(a)(2) allegation for lack of probable cause to believe that the Town had dominated, interfered, or assisted in the formation, existence or administration of the Union. He also separately analyzed and dismissed the independent Section 10(a)(1) allegations pertaining to the Town's order that Romeo remove the grievance response from the bulletin board and to the termination. In his Request for Review, Romeo did not make any arguments concerning the dismissal of the Section 10(a)(4), 10(a)(2) or independent Section 10(a)(1) allegations. Instead, he repeatedly argued that the only "reasonable," or "plausible" explanation for his termination was his recent Union activity, i.e., supporting the grievances of the two female police officers and refusing to remove grievance-related correspondence from the Union bulletin board. We treat these arguments as seeking

differently than another bargaining unit member who attended the same mediation while also being assigned to a detail. The Investigator dismissed the charge based on his finding that this officer was not similarly situated to Romeo because he did not submit a detail pay slip for the day.

On March 16, 2015, Romeo filed a Request for Review of the dismissal with the CERB, arguing that the Investigator had improperly overlooked several affidavits that he had submitted during the investigation.³ Romeo argues that those affidavits reflect that Romeo reasonably believed that the detail he was assigned to was a “roving” detail, which allowed him to attend the contract negotiations as long as he was available to respond in the event of emergency; that no one had ever objected to or conducted internal investigations into officers attending contract negotiations while being assigned to a detail; and that the discipline imposed differed significantly from the Town’s disciplinary past practice. The Union had also filed a demand to arbitrate Romeo’s grievance over his termination and Romeo alternatively asked the DLR to defer the charge to the arbitration.

On May 21, 2015, before the CERB ruled on the Request for Review, the DLR granted the request to defer MUP-14-4210 to arbitration. On June 24, 2015, Romeo filed a separate charge, MUP-15-4652, alleging that his January 9, 2015 termination violated Sections 10(a)(1), (2), (3), and (4) of the Law and requesting that it be deferred to arbitration along with MUP-14-4210.⁴ The DLR granted that request without conducting an in-person investigation into MUP-15-4652.

On February 26, 2016, an arbitrator issued an award. On March 2, 2016, Romeo filed a request with the DLR to resume processing both unfair labor practice charges. On August 19, 2019, after the Town had exhausted its judicial appeal of the award pursuant to M.G.L. c. 150C, and subsequent mediation efforts were unsuccessful, the DLR granted Romeo’s request to reopen MUP-14-4210 and MUP-15-4652. On July 9, 2020, the DLR decided to consolidate the matters for the CERB’s review and thus both cases are now before us.

review of the dismissed Section 10(a)(3) allegation only, and, thus, do not address the dismissal of the Section 10(a)(2), 10(a)(4), and independent Section 10(a)(1) allegations.

³ Since filing the request for review, Romeo has been represented by counsel.

⁴ On April 4, 2016, in Romeo’s reply to the Town’s opposition to Romeo’s request to revive both of these charges after the arbitration award issued, Romeo explained that he filed MUP-15-4652 as a procedural formality because when he filed MUP-14-4210, he did so in his capacity as Union president. He thus filed MUP-15-4652 in his individual capacity to ensure that he had standing as an individual to challenge his termination at the DLR.

Ruling

As a preliminary matter, we clarify what the record on review consists of in these consolidated matters. As in all pre-complaint dismissals, the record before us on review of MUP-14-4210 is the investigation record consisting of the charge, the investigation exhibits, the dismissal letter, the Request for Review and the Town's response. 456 CMR 15.05(9); 456 CMR 15.08. Because, as the DLR indicated in the show cause letter, MUP-15-4652 raises an identical issue arising from the same set of facts that Romeo had the opportunity to raise in MUP-14-4210, i.e., whether the Town's decision to terminate Rome was in retaliation for his concerted protected activity in violation of the Law, and because that issue has already been fully investigated by the DLR, the record in MUP-15-4652 consists of the charge and the investigation record in MUP-14-4210.⁵

Turning to the merits, to establish a prima facie case of a Section 10(a)(3) violation, a 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. Town of Carver, 35 MLC 29, 47, MUP-03-3094 (June 30, 2008). It was uncontested during the investigation that the Union had established the first three elements of the prima facie case. The fourth element, unlawful motivation, was contested.

Unlawful motivation can be established by direct evidence or circumstantial evidence and reasonable inferences drawn therefrom. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001). Absent direct evidence of unlawful motivation, several factors may suggest unlawful motivation, including the timing of the alleged discriminatory act in relation to the protected activity; the triviality of reasons given by the employer, or shifting and inconsistent reasons given by the employer; disparate treatment; an employer's deviation from past practices; or expressions of animus or hostility towards a union or the protected activity. Town of Carver, 35 MLC at 47.

In his Request for Review in MUP-14-4210, Romeo contended that the Investigator failed to address the evidence of disparate treatment set forth in the affidavits from police officers and superior officers that Romeo provided during the investigation of his charge, including, in particular, statements made by one or more affiants to the effect that the Town had a longstanding practice of permitting officers to leave fixed details; that the Police Chief had recently received complaints about officers leaving details but, unlike the Department's response to Romeo leaving his detail, had not initiated an internal investigation, disciplined any officers or issued any communications regarding this issue; and that over the years, other officers had left their assigned detail location on many occasions but none had been disciplined or terminated. The CERB agrees that the affidavits contain these statements and that the Investigator did not address this information in the dismissal letter. The CERB has further considered statements in some

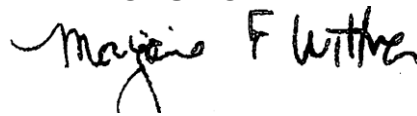
⁵ As noted above, on July 9, 2020, the DLR consolidated MUP-14-4210 with MUP-15

of the affidavits, which assert that the discipline that the Town imposed on Romeo was unduly harsh and disproportionate to the alleged offense. Such evidence of disparate treatment, coupled with the closeness in time between the Town's discipline and the dispute between Romeo and the Town over posting grievance-related materials, provides probable cause to believe that the Town's conduct violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

For these reasons, the CERB remands these charges to the DLR to issue a complaint alleging that the Town's decision to place Romeo on administrative leave in December 2014 and its decision to terminate him in January 2015 violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

SO ORDERED

Very truly yours,
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER