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DEPARTMENT OF LABOR RELATIONS

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April 8, 2021

VIA EMAIL

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RE: MUP-20-7789, Town of Winthrop and Ferruccio Romeo:

Dear Attorneys:

Ferruccio Romeo (Romeo), a police sergeant employed by the Town of Winthrop (Town), appeals from a Department of Labor Relations (DLR) Investigator's dismissal of the above-referenced charge of prohibited practice. The charge, as amended on January 15, 2020 and during the investigation, alleges that the Town violated Section 10(a)(4), Section 10(a)(3) and, derivatively Section 10(a)(1) of M.G.L. c. 150E (the Law) by retaliating against Romeo for his protected activity by using his in-rank seniority for shift bidding purposes instead of departmental seniority, thereby denying him his preferred shift. After investigating the charge on September 10, 2020, the Investigator dismissed the charge on September 30, 2020 for lack of probable cause. Romeo filed a timely request for review claiming that the Investigator made erroneous findings and overlooked certain facts which, when considered in the context of Romeo's work history and protected concerted activity since 2014, warrant a probable cause finding. The Town filed a response in opposition to the request. After reviewing the investigation record, the dismissal letter and the parties' arguments on review, the Commonwealth Employment Relations Board (CERB) affirms the dismissal for the following reasons.

Background¹Termination and Reinstatement

Romeo has worked for the Town's Police Department (Department) as a police officer for twenty-four years. From December 2004 until February 2015, Romeo served as the President of MassCOP Local 421 (Union or MassCOP), which represents the Town's police officers and sergeants. In 2014, the Town placed Romeo on administrative leave and in 2015, terminated him under circumstances that are the subject of the prohibited practice charges in Case No. MUP-14-4210 and MUP-15-4652. The Union grieved the termination as lacking just cause and processed the grievance to arbitration. In 2016, an arbitrator issued an award finding that the Town did not have just cause to terminate Romeo and reducing the discipline to a letter of warning. The Town appealed the arbitration award. A Superior Court judge overturned the award, but the Union appealed, and the Appeals Court ultimately affirmed the award in 2018. The Town reinstated Romeo to duty as a police officer in September 2018.

2019 Prohibited Practice Charges

On April 11, 2019, Romeo filed a prohibited practice charge in Case No. MUP-19-7261, alleging that the Town had retaliated against him in a variety of ways since reinstating him.² The Union filed a charge on April 18, 2019 in Case No. MUP-19-7277 alleging that the Town had not complied with the arbitrator's remedy award. The Union withdrew that charge before investigation.³

Promotion to Sergeant and Assignment to Night Shift

In October 2018, Romeo sat for a make-up promotional exam for sergeant and passed. After an opening for permanent sergeant became available, the Town promoted

¹ A more detailed recitation of the background may be found in the Investigator's dismissal letter and the CERB's rulings in Case Nos. MUP-14-4210, MUP-15-4632 and MUP-19-7261.

² The same Investigator that investigated the present charge dismissed Case No. MUP-19-7261 in its entirety. Romeo filed a request for review and the CERB affirmed two aspects of the dismissal but found probable cause to believe that the Town failed to reinstate certain of Romeo's duties in retaliation for his protected, concerted activity. The CERB remanded this aspect of the charge back to the Investigator to issue a Complaint, which she did. That matter, along with Case Nos. MUP-14-4210 and MUP-15-4632, are pending hearing.

³ Romeo states that the Union did so once the Town remitted the amount it agreed to pay him to settle the remedy portion of the Award.

Romeo to sergeant on December 8, 2019.⁴ Ten days later, on December 18, 2019, Deputy Chief Goodwin issued General Order 19-09 (GI-19-09) to the sergeants regarding "Shift bids." The Order stated in part:

Sergeant shift bidding will start on Wednesday, December 18, 2019 at 4 pm and conclude on Thursday, December 26, 2019 at 4PM.

All Sergeants not assigned to a special assignment shall bid their shift according to in rank seniority.

As of this bid, although Romeo had the most departmental seniority, he had the lowest in-rank seniority. Thus, because the Town used in-rank seniority for shift bidding, he was placed on the night shift, which was not his preferred shift.

Seniority

Collective Bargaining Agreements

Article XXXIII of the Town's and MassCOP's 2011-2014 CBA, Seniority, stated in pertinent part:

Seniority is defined as the length of continuous full-time employment in the Winthrop Police Department.

The Employer recognizes the principle of seniority in layoffs due to lack of work, provided that the senior employee is available and qualified to do the remaining work.

The Employer, in recognition of seniority, shall allow an employee to bid for a vacancy on a different work shift which is caused by death or retirement as long as it is of comparable duty and rank and does not involve a specialty.⁵

⁴ The record and both parties' submissions on review correct what appears to be a typographical error in the dismissal letter and indicate that Romeo was promoted on December 8, 2019.

⁵ The final paragraph of this provision appears to still be in draft form. It states, verbatim:

That the seniority provisions of the contract relative only to job bidding for vacancies on a different work shift? [sic] would provide a clause that would allow aggrieved members of the Bargaining unit to appeal any seniority decision made by the Chief of Police to the Town Manager, the Town Manager's decision shall be final and binding on both parties. Seniority shall be broken by:

A) Resignation

This seniority provision remained in successor CBAs through 2018, but, as described below, in May 2020, the Town and MassCOP signed a memorandum of agreement for the years July 1, 2018 through June 30, 2019 that deleted Article XXXIII and replaced it with language specifying that shift bidding would be in-rank.

Police Department Rules and Regulations

Section 1.7.5 of the Winthrop Police Department's Rules and Regulations states:

Seniority: Seniority shall be determined first by rank, second by continuous service in the rank. When more than one appointment is made in any rank on any one day, seniority will be determined by the order of appointment.

1. Where two or more Members are assigned to an investigation, case, or a detail and one is designated in charge by a Member having the authority to make the designation, they shall be considered as having seniority for command purposes over other Members assigned to the investigation, detail, or case.
2. In case of several sworn Members of equal rank present at any emergency, the senior Departmental Member at the scene shall command in the absence of a supervisor.

Shift Bidding and the Dalrymple Grievance

Since 2006, the bidding process for officers to select their shifts has taken place either once or twice a year. The shift bidding memos that the Department issued from 2007-2009 state that officers would pick their shifts "according to" or "in order of" seniority. Unlike GI-19-09, however, the memos did not specify that the seniority for shift bidding purposes would be determined by an officer's rank.

The investigative record contains no documentary evidence regarding shift bidding between 2010-2013 and the parties dispute whether shift bidding seniority was determined by rank or department in this time frame. The Town contends that it has used in-rank seniority since 2006. Romeo contends that the Department used departmental seniority until 2014, when Officer Nancy Dalrymple (Dalrymple) was promoted to sergeant pursuant to a decision that the Massachusetts Commission Against Discrimination (MCAD) issued in January 2014. The MCAD held that the Town had unlawfully refused to promote Dalrymple to sergeant based on her gender and in retaliation for her prior complaints against the Town and ordered the Town to promote her as a remedy.

In April 2014, after being promoted and assigned to the night shift, in April 2014, Dalrymple filed a grievance alleging that "during the recent shift bid," she was prevented

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- B) Layoff due to lack of work for a period of sixty (60) days.
 - C) Discharge for just cause

from bidding for the shift by department seniority in violation of the parties' CBA. The second paragraph of the grievance stated:

I am not the Supervisor with the lowest seniority . . . In the past and currently supervisor's [sic] within the [Winthrop Police Department] have been interchangeable without regard to rank. The positions have mirrored each other.

Romeo signed the grievance in his capacity as Union president. Later in April 2014, the Town's police chief and the Town, respectively, denied the grievance at steps 2 and 3 of the grievance procedure, citing Section 1.7.5 of the Department's Rules and Regulations. The Town also disagreed that the CBA addressed shift bidding.

On June 2, 2014, Sgt. Stephen Rogers issued a memo (Rogers Memo) regarding "Procedure for the July/August 2014 shift bid," which stated that the shift bidding would run from June 2 to June 9 and that, "in order to expedite the process every officer not assigned to a specialty shall bid their shift according to in rank seniority as soon as possible." It further stated that all officers who had not picked a shift by the deadline, June 9, 2014, would be "contacted in order of in rank seniority to pick the shift they would like."

On June 12, 2014, Dalrymple filed a second grievance, in which she again protested that she had been prevented from bidding for a shift during the most recent shift bid in "the proper order of my departmental seniority, as specified under the contract." Dalrymple also stated that "I, as well as other Sergeants within the Department, was not given the opportunity to bid in order of seniority for the created Administrative Sergeant's Position." The Police Chief and Town administrator denied the grievances.

In November 2014, the Union advanced Dalrymple's grievance to arbitration, alleging that the Town had assigned her to the night shift in violation of the CBA and seniority rules in order to discriminate against her.⁶ In December 2014, the Town placed Romeo on administrative leave under circumstances that are the subject of his charges in Case Nos. MUP-14-4210 and MUP-15-4632.

In 2015, Dalrymple filed another MCAD complaint against the Town alleging that the use of in-rank seniority for shift bidding was discriminatory. After investigation, the MCAD dismissed the complaint for lack of probable cause, finding that the Town had "provided a legitimate, nondiscriminatory reason for the reassignment . . . When

⁶ The record is not clear as to whether the Union advanced Dalrymple's April or June 2014 grievance to arbitration.

determining placements, Respondents utilized a bid-shifting [sic] arrangement that has been in place since 2005, whereby rank and seniority are considered.”⁷

In December 2016, after Romeo was terminated, but before he was reinstated, the Union, operating under different leadership, withdrew its demand to arbitrate Dalrymple’s 2014 grievance.

Neither party submitted shift bidding memos or other documentary evidence concerning the type of seniority that would be used for shift bidding purposes between 2014 and 2019, other than the 2014 Rogers Memo and GI-19-09. There is no evidence, and Romeo does not contend, however, that the Town ceased using in-rank seniority for shift bidding purposes in this time frame. Instead, similar to what Dalrymple stated in her April 2014 grievance, Romeo contends that before his December 2019 shift bid, the type of seniority used for shift bidding was not an issue, because there was no difference between officers with the highest in-rank seniority and the highest departmental seniority.⁸

CBA Changes to Definition of Seniority

At the end of May 2020, the Town and the Union entered into a Memorandum of Agreement that extended the terms of their July 1, 2017 to June 30, 2018 CBA with certain changes, including a new seniority provision. Although the provision initially continued to define seniority “as the length of continuous full-time employment in the Winthrop Police Department,” and to “recognize[] the principle of seniority in layoffs,” the provision’s second paragraph stated that “[s]eniority for purposes other than layoffs shall be determined first by rank, second by continuous service in the rank.”

Dismissal and Request for Review

The Investigator dismissed the charge in its entirety. After accurately setting forth the four elements of a prima facie case of discrimination under Section 10(a)(3) and 10(a)(4) of the Law, she found that although Romeo had established the first two elements - that he had engaged in protected, concerted activity and that the Town knew of this activity, he had not established the third and fourth elements - that his assignment to the night shift constituted an adverse action in accord with prior CERB caselaw or that the Town’s decision to use in-rank seniority for shift bidding was motivated by a desire to penalize or discourage his protected, concerted activity. Town of Carver, 35 MLC 29, 47,

⁷ The MCAD dismissal is cited only as part of the history of Dalrymple’s challenge to the June 2014 shift bidding procedure and not for the truth of the MCAD’s findings regarding the use of in-rank seniority for shift bidding before 2014.

⁸ The 2015 MCAD lack of probable cause finding quotes a letter from Dalrymple indicating that she was nearing retirement. If that is the case, then she would no longer have been the exception to in-rank seniority being equal to departmental seniority for the other sergeants.

MUP-02-3094 (June 30, 2008). Using the burden-shifting analysis set forth in Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981), the Investigator further found that, even assuming that Romeo had established a prima facie case, the Town had presented legitimate, non-discriminatory reasons for assigning him to the night shift, and Romeo had not demonstrated that, but for his protected activity, the Town would not have taken the same action. Athol-Royalston Regional School Committee, 28 MLC 204, 214, MUP-2279 (January 14, 2002).

On review, Romeo argues that the Investigator erred when she determined that being assigned to the night shift was not an adverse action. With respect to motivation, Romeo contends that the Investigator failed to contextualize the Town's use of in-rank seniority for shift bidding. Romeo claims that the Town first used it as means of discriminating and retaliating against Dalrymple by assigning her to the night shift after the MCAD ordered her promotion, followed by the Town applying in-rank seniority in the same retaliatory manner towards him after an arbitrator reinstated him and he was subsequently promoted to sergeant. Romeo also posits that there is a connection between the Town's using in-rank seniority for Dalrymple and for him. He notes that Dalrymple's efforts to challenge her night assignment through arbitration were thwarted when the Town fired him after he advanced her grievance to arbitration, and that the CERB recently found probable cause to believe that the Town terminated and took other adverse action against him in retaliation for his protected, concerted activity, which included his efforts on Dalrymple's behalf. Romeo finally asserts that given the fact-intensive nature of retaliation cases, he should be given the opportunity at hearing to prove the claims he asserts here.

We affirm the dismissal on grounds that Romeo has failed to establish a prima facie case of discrimination, and even if he had, there is not probable cause to believe that the Town would not have assigned him to the night shift had he not engaged in protected, concerted activity.

We start with the prima facie case, focusing on the fourth element, unlawful motivation. In cases where, as here, there is no direct evidence of unlawful discrimination, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn therefrom. Town of Carver, 35 MLC at 48. As the Investigator correctly stated, 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. Id. Romeo's arguments on review rest largely on the fact that the CERB has previously found probable cause to believe that the Town discriminated against him. However the fact that the CERB has found probable cause to believe that the Town's actions were discriminatorily motivated in other contexts does not mean that it will do so in all future actions that Romeo perceives to be adverse in the absence of direct or circumstantial evidence that the conduct was discriminatorily motivated.

Romeo also asks the CERB to make a connection between the Town's using in-rank seniority to assign Dalrymple to the night shift, which he claims was discriminatory, with his assignment to the night shift under similar circumstances. This argument, however, rests on the assumption that Dalrymple's assignment was the result of unlawful discrimination arising under Chapter 151B. However, Romeo's charge concerns him, not Dalrymple, and it is beyond the scope of this charge and the CERB's jurisdiction for the CERB to make this determination.⁹

Further, despite what Romeo claims are the discriminatory roots of the in-rank seniority practice, Romeo provided no evidence that the Town ever *ceased* using in-rank seniority as the basis for shift bidding after 2014, when the Rogers Memo issued, or that he was treated differently than other similarly-situated employees for shift bidding purposes. Rather, because Romeo claims that until he was promoted in 2019, the officers with the highest departmental seniority also had the highest in-rank seniority, in-rank seniority only became an issue after he was promoted in December 2019. This scenario explains both the need and the timing for the Department to issue GI-19-09, i.e., to notify staff, as it did in 2014, that in-rank seniority would be the basis of determining who was assigned to what shift.¹⁰ Romeo has thus not shown that he was treated differently than other similarly-situated persons or that the Employer deviated from past practice when it applied in-rank seniority to him. Even assuming the closeness in time between the 2019 prohibited practice charges and the Town's conduct, it is well-established that timing alone is insufficient to establish circumstantial evidence of unlawful discrimination. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March 20, 1979).

Finally, even assuming that Romeo established a prima face case of discrimination, in the absence of evidence showing that the Town ceased using in-rank seniority for shift bidding purposes since 2014, we agree with the Investigator that there were legitimate, non-discriminatory reasons for the Town's conduct and that Romeo did not provide any evidence to prove that, but for his protected activity, the Town would not have used in-rank seniority for the 2019 bidding.

⁹ As noted above, our determination on this aspect of the case is not affected by the fact that the MCAD dismissed Dalrymple's charge on the same issue for lack of probable cause.

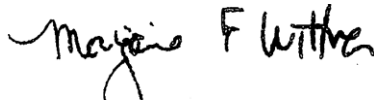
¹⁰ Based on Dalrymple's April 2014 grievance, in which she states that in "the past and currently supervisor's [sic] within the [Winthrop Police Department] have been interchangeable without regard to rank," Dalrymple was in a similar situation.

Conclusion

For the foregoing reasons, we affirm the Investigator's dismissal of the charge.¹¹

Very truly yours,

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER

cc: Howard Greenspan, Esq.
Ferrucio Romeo, Esq.

APPEAL RIGHTS

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) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

¹¹ Because we dismiss on these grounds, we need not address whether Romeo's assignment to the night shift was an adverse employment action.