

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

DLR Docket No. MUP-19-7789

FERRUCCIO ROMEO,)
 Charging Party)
)
V.)
)
TOWN OF WINTHROP,)
 Respondent)

RESPONDENT, TOWN OF WINTHROP'S, RESPONSE TO CHARGING PARTY
FERRUCCIO ROMEO'S REQUEST FOR REVIEW
OF DISMISSAL OF CHARGE OF PROHIBITED PRACTICE

The issue presented in this appeal is whether the Investigator was warranted in dismissing the charge that the Town violated Section 10(a)(3) and (4) and, derivatively, Section 10(a)(1) of G.L. c. 150E, by using in-rank seniority, rather than departmental seniority, for shift bidding purposes, which deprived Romeo of his preferred work shift. Romeo alleges that the Town's actions were taken in retaliation for his union activity and the filing of complaints with the Department of Labor Relations.

The Town contends that the dismissal was proper in that there was no adverse action taken against Romeo and no basis to conclude that the Town's action was motivated by unlawful considerations. The in-rank seniority shift bidding process used in December 2019 was consistent with past practice for over a decade, and performed in accordance with the rules and regulations of the Police Department.

STATEMENT OF FACTS

Although Officer Romeo seeks to portray a protracted history of animosity between himself as a Union member and officer, and the Police Department of Winthrop

culminating in repeated acts of discrimination and retaliatory treatment involving his discharge and reinstatement, the facts do not support such a narrative.

Before his termination on January 9, 2015, Mr. Romeo had been a police officer for the Town of Winthrop for nineteen years. During the last eleven of those years, he was president of Winthrop Police M.C.O.P Local 421, AFL-CIO (hereafter “the Union”) and was the Union’s sole officer. (Romeo Memo, p. 2) During his tenure Mr. Romeo zealously advocated for the Union and its members.

The Arbitration Decision and Award dated February 26, 2016 found that there was no just cause for Romeo’s termination.¹ Nevertheless, the Arbitrator ordered that Romeo “be given a Written Letter of Warning for not following the Pump Station guidelines.” (Romeo Exhibit H, Arbitration Decision, p. 24) The Arbitration award noted that Romeo “shall be made whole for all lost wages and benefits, less offsetting income.” As Romeo notes, the Town appealed the Arbitration decision to the Superior Court. On April 3, 2017, the court, Fahey, J., reversed the arbitration decision and vacated the award finding that Romeo’s “termination is warranted because of his dishonesty, compounded by his unwillingness to take responsibility for disobeying the Detail’s rules.” Town of Winthrop v. Winthrop Police Brotherhood Local 421, 93 Mass. App. Ct. 1111 (2018)(Rule 1:28). “The judge determined that Romeo's actions violate "a well-defined, dominant public policy that dishonesty by police officers will not be tolerated," such that "the decision to reinstate him would offend public policy.”” Id. Romeo then further appealed to the Appeals Court. Recognizing the limited scope of review courts have of civil service arbitration decisions, the Appeals Court reversed the Superior Court

¹ The Investigator in MUP-19-7261 correctly noted that the termination arbitration did not include retaliation. (Winthrop Exhibit A, MUP-19-7261 Investigator Decision, p. 9 n. 17)

judgment on May 28, 2018 and reinstated the Arbitration award. Id. Officer Romeo was returned to the payroll on July 22, 2018 and, following training, returned to duty on September 7, 2018. By mutual agreement of Romeo and the Town, Romeo sat for a make-up promotional examination for sergeant on October 25, 2018, over the objection of other Winthrop police officers, and passed.

On April 18, 2019, the Union filed MUP-19-7277, alleging that the Town was not complying with the arbitrator's remedy award. After the Town paid Romeo \$530,000, the Union withdrew MUP-19-7277 before the DLR investigated it. (Romeo Exhibit G, MUP-19-7261 CERB Decision, p. 2) Concurrently, on April 11, 2019, Romeo filed a charge with the DLR alleging that since his reinstatement, the Town had retaliated against him for his protected activities in four different ways. (Romeo Exhibit G, MUP-19-7261 CERB Decision, p. 2) The DLR Investigator dismissed the charge in its entirety on March 13, 2020. (Romeo Exhibit G, MUP-19-7261 CERB Decision, p. 2) Romeo appealed on two aspects of the charge: that the Town failed to reassign him to duties maintaining the Department of Justice Criminal Information Services (DCJIS) system and detail maintenance that he had performed prior to his termination, and that the Town had failed to permit him to take a lieutenant promotional examination. (Romeo Exhibit G, MUP-19-7261 CERB Decision pp. 2-3) On review in 2020, CERB affirmed the Investigator's dismissal in all parts except specifically that "pertaining to the reinstatement of Romeo's DCJIS duties" which they remanded to the DLR for issuance of a complaint. (Romeo Exhibit G, MUP-19-7261 CERB Decision p. 5) While these

cases were pending, Romeo was promoted to sergeant on December 8, 2019.² (MUP-20-7789 Investigator Decision, p. 2 (hereinafter “Investigator Decision”))

On December 18, 2019, Deputy Chief Goodwin issued General Order 19-09 to all sergeants noting that sergeant shift bidding would start on December 18, 2019, and that “[a]ll Sergeants not assigned to a special assignment shall bid their shift according to rank seniority.” (Investigator Decision, p. 5; Romeo Exhibit D, Shift Bid Notice)

Since at least 2006, the shift bidding process for officers to select their shifts has taken place either once or twice a year. (Investigator Decision, p. 5) “In or around 2005, former Police Chief David Goldstein put into place the presently used bid-shifting [sic] arrangement, where assignments are chosen by seniority in rank. Lieutenants choose first by seniority, then sergeants by seniority, and then patrol officers by seniority.” (Winthrop Exhibit B, MCAD Dalrymple Investigative Disposition, p. 2; Investigator Decision, p. 4) This procedure is consistent with “seniority” as defined in the “Manual of Rules and Regulations for the Government of the Police Department of the Town of Winthrop” (hereinafter “Rules and Regulations”) prepared by then Police Chief David Goldstein and adopted by the Board of Selectmen on February 28, 2005. (Winthrop Exhibit C, Manual of Rules and Regulations) Section 1.7.5 of the Manual of Rules and Regulations states that “[s]eniority shall be determined first by rank, second by continuous service in the rank.” (Winthrop Exhibit C, Manual of Rules and Regulations, p. 9)

This shift-bidding process is also consistent with shift bidding notices from 2007-2009 which request that “every officer according to seniority picks their shift as soon as

² The Investigator Decision in this case states in error at p. 2 that “[o]n December 18, 2018, the Town promoted Romeo to a sergeant position.” The correct date of Romeo’s promotion to sergeant is December 8, 2019. (Romeo Memo. p. 12; Winthrop Exhibit A, MUP-19-7261 Investigator Decision, p. 3 n. 6)

possible.” (Romeo Exhibit C, Shift Bid Notices)³ The Investigator noted that from 2015 through 2018, “the Police Department continued to use in-rank seniority for the purpose of shift-bidding.” (Investigator Decision, pp. 4, 8)

Since 2006 and prior to the current charge, the Union challenged the shift bidding process one time on behalf of Nancy Dalrymple when the process disadvantaged her in 2014, as it does Romeo here, by preventing her from bidding for a shift by departmental seniority rather than in-rank seniority. (Investigator Decision p. 4) At that time, the Union filed for arbitration noting that Dalrymple was assigned to the night shift without following seniority within the Police Department, in order to discriminate against her. (Investigator Decision, p. 4) At that time, Dalrymple also charged 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.” (Investigator Decision, p. 4) In response to the charge, the Police Chief denied the grievance in a letter dated April 9, 2014, stating, “[y]our grievance is denied as it relates to seniority. 1.7.5 of the Manual of Rules and Regulations enacted by my predecessor clearly states how seniority will be calculated. The paragraph clearly states that seniority will be determined first by rank and then by continuous service in that rank.” (Winthrop Exhibit D, Chief Delehanty letter, April 9, 2014) The Union thereafter withdrew the grievance and the arbitration case was closed on February 18, 2016. (Investigator Decision p. 4) In 2016 Dalrymple also filed a complaint against the Town with MCAD alleging that the in-rank bidding process was used to discriminate against her. During the MCAD proceeding the Town again maintained that it had used the in-rank seniority bidding process that had been in place

³ The Investigator incorrectly states that “[i]n 2007 through 2009, officers picked their shifts in order of seniority in the Police Department.” There was no evidence of the shift bidding process presented other than the shift bid memos which refer only to seniority. There was no evidence that the process had changed since the adoption of the 2005 Rules and Regulations defining seniority in terms of in rank seniority.

since 2005. The MCAD did not find probable cause that the Town discriminated against Dalrymple, finding that the Town “provided a legitimate, nondiscriminatory reason for the reassignment. . . . When determining placements, Respondents utilized a bid-shifting [sic] arrangement that has been in place since 2005, whereby rank and seniority are considered.” (Investigator Decision, p. 4 n. 6; Winthrop Exhibit B, MCAD Dalrymple Investigative Disposition, p. 3)

As a result of the shift bidding process for sergeants conducted in December 2019, Romeo who had more seniority in the Police Department than other sergeants, but less in rank seniority, did not receive his preferred shift which he would have received if the bidding occurred using seniority within the entire police department. As a result, Romeo was placed on the night shift. (Investigator Decision, p. 5) Romeo did not present any evidence that this result made any difference of pay, overtime, or any other material harm. (Investigator Decision, p. 5) Although Romeo claims that no other sergeants have been similarly disadvantaged in the use of the shift bidding process through the years, Romeo presented no evidence to support this assertion and Dalrymple’s claim in 2014 stating that that she “as well as other Sergeants within the Department, was not given the opportunity to bid in order of seniority for the Administrative Sergeant’s Position” suggests that there were other sergeants whose departmental seniority differed from their in-rank seniority and were similarly disadvantaged.

APPLICABLE STANDARD

To establish a prima facie case of a Section 10(a)(3) or (4) 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 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). G.L. c. 150E, §§ 10(a)(3) and 10(a)(4) prohibit retaliation or discrimination against an employee for engaging in union activity and for signing, filing a complaint or giving information or testimony to the DLR, respectively.

In this case, the Investigator found that Romeo established the first two elements of a prima facie case of retaliation, but failed to establish that the Town's conduct constituted an adverse action, or that it was unlawfully motivated. (Investigator's Decision, pp. 7-9)

ARGUMENT

I. No Adverse Employment Action

The Investigator concluded that the Town did not take an adverse action against Romeo when it conducted the shift bid process using in-rank seniority. (Investigator Decision, p. 7) "[A]n action taken by an employer is an 'adverse employment action' where it is 'substantial enough to have materially disadvantaged an employee.'" Psy-Ed Corp. v. Klein, 459 Mass. 697, 707-708, 947 N.E.2d 520 (2011). "Material disadvantage for this purpose arises when objective aspects of the work environment are affected." Yee v. Mass. State Police, 481 Mass. 290, 296-297 (2019) quoting King v. Boston, 71 Mass. App. Ct. 460, 469 (2008) "An adverse employment action 'typically involves discrete changes in the terms of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.' " Garmon v. Nat'l R.R. Passenger Corp., 844 F.3d 307, 314 (1st Cir. 2016)

To determine whether an action is materially adverse, a reviewer must engage in an objective, "case-by-case inquiry," recognizing that "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996). "A materially adverse change in the terms and conditions of employment 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.' " Garmon, 844 F.3d at 314. The disadvantage must be objectively apparent to a reasonable person in the employee's position; "subjective feelings of disappointment and disillusionment" will not suffice. Yee, 481 Mass. at 297 citing MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996); see Taylor v. Town of Freetown, 479 F.Supp.2d 227 (D. Mass. 2007)(no adverse employment action where while police officer may have preferred working a day shift, there is no objective evidence that demonstrates he was materially disadvantaged when unilaterally transferred to night shift); Gu v. Bos. Police Dep't., 312 F.3d 6, 14 (1st Cir. 2002)(no adverse employment action when there was no evidence that shift reductions would lead to loss of benefits, such as health insurance, "in the context of a workplace where schedules fluctuate and no employee is entitled to any given shift")

In this case, the Investigator noted that Romeo did not present evidence to demonstrate that he earned a lower salary, or less overtime, or suffered any other material harm due to the fact that he did not receive his preferred shift. (Investigator Decision, p. 7) The Investigator further found that Romeo did not provide evidence that his new shift was less preferable. (Investigator Decision, p. 7)

Romeo argues that his assignment to night shift and switch to an undesirable schedule is an adverse action. (Romeo Memo, pp. 17, 19, 20) The change in his work

schedule, however, was not the result of a unilateral decision or order to a specific shift, but rather the result of the implementation of an unbiased shift bidding process in use at the Winthrop Police Department for over a decade which depended on the choice and preferences of other officers in order of in rank seniority. The Police Chief did not know the outcome of the process prior to the shift bid, nor which shifts would be selected by which officers. The Chief made shift assignments in accordance with the results of the shift bid process. As such, the Investigator properly found that Romeo's assignment to the night shift as a result of the bid shift process did not constitute an adverse employment action.

II. **No Retaliatory Motive**

In addition, the Investigator found that Romeo failed to show that the Town's actions were unlawfully motivated. (Investigator Decision, p. 8) 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)). In 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 the employer produces

one or more legitimate reasons, the charging party must establish that but for the protected activity, the employer would not have taken the adverse action. Id. at 565-566; Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-1498 (June 4, 2001). If a lawful cause would have led the employer to the same conclusion in the absence of protected activity, the employer will prevail. Southern Worcester County Regional Vocational School District v. Labor Relations Commission, 386 Mass. 414, 418-19 (1982) quoting Trustees of Forbes Library, 384 Mass. at 565-566.

“[U]nlawful discrimination is, at its essence, the failure to treat similarly-situated persons similarly for impermissible reasons.” Bridgewater State Univ. v. Bryan, SUP-14-3771 (Nov. 30, 2016). “It is not CERB’s role to second guess the wisdom of an employer’s business decisions, but only that the employer had reasons for the decision and facts to support it.” City of Boston and SENA, Local 9158, MUP-18-6679 (March 31, 2020) citing Trustees of Forbes Library, 384 Mass. at 565.

Here, the Town did not deviate from past practice in its use of in rank seniority for shift bidding and Romeo presented no evidence of disparate treatment. As discussed above, the Department has used the same shift bid process based on in rank seniority since 2006. Romeo’s argument that the Town “engaged in unlawful discrimination when it refused to accord him more favorable treatment than other similarly-situated employees has no support in common sense or the Law.” Bridgewater State Univ. v. Bryan, SUP-14-3771 (Nov. 30, 2016).

“In or around 2005, former Police Chief David Goldstein put into place the presently used bid-shifting [sic] arrangement, where assignments are chosen by seniority in rank. Lieutenants choose first by seniority, then sergeants by seniority, and then patrol officers by seniority.” (Winthrop Exhibit B, MCAD Dalrymple Investigative Disposition,

pp. 2, 3; Investigator Decision, p. 4) This procedure is consistent with “seniority” as defined in the “Manual of Rules and Regulations for the Government of the Police Department of the Town of Winthrop” (hereinafter “Rules and Regulations”) prepared by then Police Chief David Goldstein and adopted by the Board of Selectmen on February 28, 2005 in accordance with G.L. c. 41, § 97. (Winthrop Exhibit C, Manual of Rules and Regulations) Section 1.7.5 of the Manual of Rules and Regulations states that “[s]eniority shall be determined first by rank, second by continuous service in the rank.” (Winthrop, Exhibit C, Manual of Rules and Regulations)

Romeo relies on seniority as defined in collective bargaining agreement (CBA) at Article XXXIII, in effect at the time of the December 2019 shift bid process, that “Seniority is defined as the length of continuous full-time employment in the Winthrop Police Department” and argues that the CBA definition of seniority must apply to everything affected by seniority. The CBA, however, limits the definition of seniority in the Article XXXIII to the specific conditions of “layoffs due to lack of work.” (Romeo Exhibit A, CBA, p. 27) Nevertheless, following Romeo’s misinterpretation in this case, the parties amended the CBA to add clarifying language to reflect the Department’s longstanding practice of applying departmental seniority to layoffs and in rank seniority for all other purposes as set forth in the Rules and Regulations adopted in 2005. See Investigator’s Decision, pp. 3-4 n. 5; Romeo Exhibit E, Memorandum of Agreement, signed May 29, 2020) In addition, as mentioned in the December 2019 shift bid notice, the CBA specifically provides at Article V – Rights of the Employer that “except as specifically and directly modified by express language in a specific provision of this Agreement, the Employer and its agents, including the Chief of Police, retain all rights and powers . . . granted by law in managing the police Department and directing the

working force . . . includ[ing but not] limited to, the establishment of rules and regulations; . . .” (Winthrop Exhibit E, CBA Article V; Romeo Exhibit D, Shift Bid Notice)

The shift bidding process that has been in effect since 2006 has never been the subject of collective bargaining, and neither the union nor the employer ever made a request that it be included in the CBA prior to 2020. Neither is shift bidding covered under civil service law. Dedham v. Dedham Police Assn., 46 Mass. App. Ct. 418 (1999).

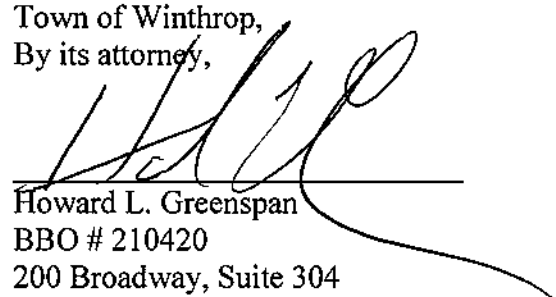
Although Romeo alleged that until the shift bidding process at issue took place in December 2019, there was no difference between the officers who had the highest seniority in the department and those who had the highest in rank seniority, he provided only his assertion that this was the case, and Dalrymple’s complaint in 2014 regarding the same shift bidding process 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” suggests that there were other officers similarly situated through the years who were subjected to and disadvantaged by the same shift bidding process based on in rank seniority. Similarly, the timing of the shift bid process, ten days after Romeo’s promotion to Sergeant, is not evidence of bias, but rather reflects an adjustment of the schedule of the officers in the rank to accommodate a new member.

Based on the above, the Investigator correctly concluded that Romeo had failed to meet his burden to establish a prima facie case of retaliation by the Town for using in-rank seniority for shift bidding purposes, a process the Police Department had used since 2006, which deprived Romeo his preferred work shift. The Investigator, therefore, properly dismissed the allegation of prohibited conduct.

CONCLUSION

For the foregoing reasons, the Investigator's dismissal of the charges should be affirmed.

Respondent,
Town of Winthrop,
By its attorney,



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Town of Winthrop - Exhibit List

Exhibit A – MUP-19-7261 Investigator Decision, March 13, 2020

Exhibit B – MCAD Dalrymple Investigative Disposition, August 10, 2015

Exhibit C – Winthrop Police Dept., Manual of Rules and Regulations, excerpt,
adopted, February 28, 2005

Exhibit D – Chief Delahanty letter to Nancy Dalrymple, April 9, 2014

Exhibit E – CBA, Article V – Rights of the Employer

WINTHROP - EXHIBIT A



CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

PHILIP T. ROBERTS
DIRECTOR

THE COMMONWEALTH OF MASSACHUSETTS
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March 13, 2020

Ferruccio Romeo
9 Hitching Hill Road
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Howard Greenspan, Esq.
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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.

WINTHROP – EXHIBIT B

INVESTIGATIVE DISPOSITION

Case Name: Nancy J. Dalrymple v. James McKenna, Town Manager,
Terence Delehanty, Police Chief
MCAD Docket No.: 15BEM00308
EEOC Docket No.: 16C-2015-00752
No. of Employees: 25+
Investigator: Janet Cha, Compliance Officer I
Recommendation: Lack of Probable Cause

Introduction

On February 18, 2015, Complainant Nancy J. Dalrymple filed a complaint against Respondents James McKenna, Town Manager, Terence Delehanty, Police Chief, alleging discrimination based on gender (female) and retaliation in violation of M.G.L. c. 151B, § 4, §§ 1, 4, 4A, and Title VII, as amended.

Complainant's Allegations

Complainant's three cases (MCAD Docket Nos. 02-BEM-03751, 02-BEM-01174, and 05-BEM02944) against the Town of Winthrop Police Department and individuals were consolidated and heard together in July 2013. On January 22, 2014, the Commission ordered the Winthrop Police Department to promote Complainant to sergeant retroactively with additional settlements for damages and a civil fine.

Complainant's allegations are as follow: In or around July 1980, Complainant began working for Winthrop Police Department as a police officer. On March 31, 2014, Complainant was sworn in as sergeant. However, Respondents did not offer the usual celebration, such as a swearing-in ceremony, photos, and cake.

In early April 2014, Respondent changed Complainant's work hours, and she began working overnight shifts. In late April 2014, Complainant filed a grievance with the union, but it was denied. Since being placed on the overnight shift, Complainant has asked Respondent Delehanty to reassign her, but he has refused.

In June 2014, Respondent Delehanty authorized Sergeant S.R. to conduct a department shift bid. Respondent Delehanty exempted Sergeant S.R. from the shift bid, even though Complainant is more senior in rank. Unlike Complainant, Sergeant S.R. enjoys a flexible schedule. Complainant grieved this issue at a step two hearing on September 11, 2014, but Respondent McKenna and Respondent Delehanty denied Complainant's grievance.

Respondent Delehanty has not invited her to staff meetings. She is the only supervisor to not have attended a staff meeting with Police Chief Delehanty.

Respondent Delehanty has failed to timely notify Complainant about trainings and meetings.

Respondent's Position

Respondent McKenna is the Winthrop Town Manager. Respondent Delehanty is the Winthrop Chief of Police. At present, Complainant is a sergeant for the Town of Winthrop.

Respondents' position is as follows: In March 2014, Complainant sought a low key swearing in ceremony. On March 31, 2014, Complainant's attorney emailed, "I thought we made it clear that Nancy does not want anyone other than her family to be present at the swearing in."

In or around 2005, former Police Chief David Goldstein put into place the presently used bid-shifting arrangement, where assignments are chosen by seniority in rank. Lieutenants choose first by seniority, then sergeants by seniority, and then patrol officers by seniority. Complainant lost her grievance, because her understanding of her seniority rights was incorrect. Nonetheless, Labor Counsel Howard Greenspan wrote to Complainant's attorney on October 2, 2014, stating that the Town was considering a reassignment on the day shift if Complainant withdrew her grievance. Complainant, however, chose to remain on her overnight shift, because the extra pay at night was more important to her. Complainant wrote in an email, dated October 14, 2014, "In light of the fact that I am nearing my retirement which should make SOME very happy my night differential is very important to me. Losing 10% would be a very big loss in salary as well as for retirement purposes. Also the inability of not being able to work any details during my four day shifts on would be a hardship. I would therefore request that I retain my differential." Since April 2014, when she was assigned the overnight shift, Complainant has logged an extra 1,108 hours, in addition to her regular full-time schedule.

Respondent Delehanty selected Sergeant S.R. to work in his administration, as an administrative assistant. Therefore, he was exempt from the shift-bidding arrangement. Sergeant S.R. has an administrative schedule, but works some nights.

Respondents deny excluding Complainant from staff meetings. Respondent Delehanty's practice, prior to Complainant's promotion to sergeant, included lieutenant-only meetings, where lieutenants were expected to disseminate any pertinent information to sergeants under their charge.

Respondents deny not providing Complainant opportunities to attend trainings. Respondents selected Complainant and another officer to become Hostage Negotiators,

which required special training provided by the North Metro Swat Commanders. Complainant attended the training on March 24, 2015.

Summary of Investigation and Analysis

Sex Discrimination (Disparate Treatment)

To establish a prima facie case of discrimination based on sex, Complainant must show she is a member of the protected category, she was adequately performing her job duties, she suffered an adverse employment action and was treated differently from similarly situated co-workers who are not in the same protected classes or the adverse job action occurred under circumstances that raises a reasonable inference of unlawful discrimination. If the Complainant establishes a prima facie case of discrimination, Respondent has the burden of articulating a legitimate, non-discriminatory reason for the termination. Finally, if the Respondent has proffered evidence of a legitimate, non-discriminatory reason for its actions, the Complainant must show that Respondent's reason was a pretext for unlawful discrimination.

Complainant is a female, who is adequately performing her job duties, as she remains employed. Complainant alleges the following adverse actions: (1) Respondent did not prepare the usual celebratory events surrounding her swearing in as a sergeant; (2) Respondent reassigned Complainant to an overnight shift, while Sergeant Rogers is permitted a flexible schedule; (3) Respondent did not include Complainant in staff meetings; and (4) Respondent did not timely notify Complainant of trainings and meetings.

In terms of the swearing in ceremony, Respondents admit that it did not provide the usual celebration. However, Respondents provide a legitimate, nondiscriminatory reason for the pared down swearing in ceremony. Respondents state that Complainant was the one who sought a pared down ceremony. In an email, dated March 31, 2014, Complainant's attorney wrote to the Town of Winthrop's attorney, "I'm sorry, I thought we had made it clear that Nancy does not want anyone other than her family to be present at the swearing in."

In terms of the bid-shifting arrangement, Respondents admit that Complainant was reassigned to the overnight shift and that it denied Complainant's grievance regarding the reassignment. Respondents provide a legitimate, nondiscriminatory reason for the reassignment and denying her grievance. When determining placements, Respondents utilize a bid-shifting arrangement that has been in place since 2005, whereby rank and seniority are considered. Complainant's witness, a sergeant, confirms that the bid-shifting arrangement was properly applied.

Complainant offers Sergeant S.R. as a comparator. She states that she was assigned Sergeant S.R.'s previous overnight shift even though she is more senior. Respondents do not deny that Complainant is more senior. However, Respondents argue that Sergeant S.R. is not an appropriate comparator, because he is serving as an administrative assistant to

Respondent Delehanty. Therefore, Respondents state that Sergeant S.R.'s main hours followed an administrative employee's schedule as opposed to an officer's schedule.

Also, investigation confirms that Respondents offered Complainant an opportunity to work a day shift in exchange for dropping her internal grievance. However, investigation reveals that Complainant declined the offer, because of the pay differential between the two assignments. On October 14, 2014, Complainant emailed Respondents, "In light of the fact that I'm nearing retirement which should make SOME very happy my night differential is very important to me. Losing 10% would be a very high loss in salary as well as for retirement purposes. Also the inability of not being able to work details during my four day shifts on would be a hardship. I would therefore request that I retain my differential as other have." Respondents state that since she was assigned to the overnight shift, Complainant has logged an extra 1,108 hours, in addition to her regular full-time schedule. Also, Respondents state that Complainant bid on and was awarded a day shift, effective July 26, 2015.

Respondents admit that Complainant has not been invited to Respondent Delehanty's staff meetings, but provides a legitimate, nondiscriminatory reason for not including Complainant. Respondent Delehanty states that since becoming chief, he has been attempting to implement a more formal chain of command with more responsibilities given to lieutenants. Investigation reveals that prior to Complainant becoming a sergeant, Respondent Delehanty held lieutenant-only meetings as well as staff meetings that included sergeants and lieutenants. In an email dated, October 20, 2010, Respondent Delehanty wrote, "Their [sic] will be a Lieutenants meeting on October 29th, 2010 at 9 AM in my conference room. Please bring with you a productivity breakdown for each employee under your command and a sick leave analysis for the same, for the last year." In an email dated, January 25, 2012, "All supervisors: Over the next few weeks I will be scheduling a staff meeting for the Lieutenants and Sergeants." Also, investigation reveals that at the lieutenant-only meetings, none of the sergeants, the majority of whom are male, were included; not just Complainant.

Respondents deny that Complainant was not invited to trainings. As evidence Respondents provide an email, dated February 9, 2014, which states, "The training on the 27th has been cancelled...Until they have your email address I will keep you up to date on this training."

Moreover, Complainant does not provide sufficient evidence of discriminatory pretext related to her gender. At present, two of the four sergeants, one of whom is Complainant, are female.

Retaliation

To establish a prima facie case of retaliation, Complainant must demonstrate that she engaged in a protected activity, Respondents were aware that she had engaged in protected activity, Respondents subjected her to an adverse employment action, and a causal

connection exists between the protected activity and the adverse employment action. If Complainant establishes a prima facie case, Respondents may show that legitimate, nondiscriminatory reasons exist for the adverse action. If Respondents succeed in offering such reason, Complainant must then show that Respondents' reasons are pretextual.

On January 22, 2014, after filing three MCAD complaints, the Commission held in Complainant's favor and ordered the Winthrop Police Department to promote Complainant to sergeant retroactively with additional settlements for damages and a civil fine. Approximately three months later, Complainant was reassigned to the overnight shift.

Respondent provides a legitimate, nondiscriminatory reason for reassigning her to the overnight shift, specifically rank and seniority, as discussed in the preceding section. Even if Complainant could show that the Respondents reasons for eliminating staff meetings were at all related to Complainant's complaints of discrimination, she has not shown that the elimination of these meetings materially disadvantaged her, such that it constituted an adverse employment action. Investigation reveals that communications between Complainant and her superiors continued, which served a similar purpose as the staff meetings. Moreover, Complainant does not provide sufficient evidence of discriminatory pretext. Therefore, a lack of probable cause finding is recommended.

Individual Liability

The legal standard for individual liability is that the person named had the authority or duty to act on behalf of the employer and acted in deliberate disregard of the Complainant's rights allowing the inference of intent to discriminate. The Complainant has not presented sufficient evidence upon which a reasonable fact finder could believe Respondents James McKenna and Terence Delehanty is individually liable for discrimination against her based upon gender (female).

Conclusion

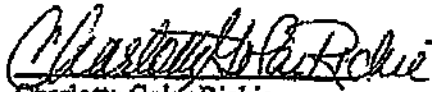
A finding of Lack of Probable Cause is recommended for Complainant's claim[s] of discrimination based on gender (female) against Respondents James McKenna, Town Manager, and Terence Delehanty, Police Chief.


Janet Cha
Investigator

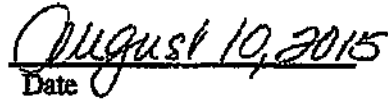

Lila Roberts
Enforcement Advisor

Disposition

Pursuant to section 5 of M.G.L. c. 151B of the Massachusetts General Laws, and in conformity with the foregoing findings, I have this day determined that a Lack of Probable Cause is being rendered on this case. Complainant will be afforded the opportunity to appeal this decision.



Charlotte Golar Richie
Investigating Commissioner


Date

WINTHROP – EXHIBIT C

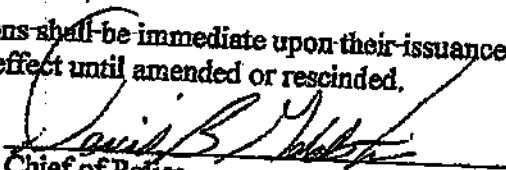
MANUAL OF RULES AND

REGULATIONS

FOR THE GOVERNMENT OF THE POLICE DEPARTMENT OF THE TOWN OF WINTHROP, MASSACHUSETTS

This manual of Rules and Regulations for the government of the Police Department of the Town of Winthrop, Massachusetts was prepared by the Chief of Police and adopted by the Board of Selectmen on 28 February 2005.

The effective date of these Rules and Regulations shall be immediate upon their issuance and they shall remain in full force and effect until amended or rescinded.


Chief of Police

~~Absence or Disability: When the temporary absence or disability of a Member in the chain of command in the Winthrop Police Department prevents the highest-rank officer in the chain of command having the authority to issue such order.~~

RULES & REGS

1.7.5

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.

1.7.6

Supervisory Accountability: A Commanding Officer or supervisor is the delegated individual in charge of a shift, Division, or Unit. In addition to those duties set forth in orders of the Chief, a Commanding Officer or supervisor shall be directly responsible to a designated superior officer in the chain of command for the control and direction of all activities and conduct of personnel under his command. A supervisor shall require satisfactory performance from personnel under his/her command in accordance with the Rules and Regulations, policies and procedures and such orders, written or verbal, as they may receive from the Chief or other superior officers in the chain of command.

1. All supervisors shall be delegated authority commensurate with the responsibility of their position.
2. Supervisors shall be particularly alert in carrying out the orders of the Chief and superior officers. No order shall be countermanded, altered or revised except in cases of emergency and any altered or revised order shall in each instance be immediately reported to the supervisor's superior.
3. In accordance with other provisions of these rules, a supervisor designated by the chief shall investigate all cases of alleged subordinate misconduct. Supervisors may prefer charges to enforce compliance with the Rules and Regulations.

1.7.7

Specialty Assignments: The Chief may make appointments to specialty assignments on the basis of the attainment of a high degree of skill, proficiency, and excellence in the performance of a specified duty and/or the successful completion of prescribed courses of training. In filling vacancies

WINTHROP – EXHIBIT D



Terence Deleahanty
Chief of Police

TOWN OF WINTHROP POLICE DEPARTMENT

3 Metcalf Square
Winthrop, MA 02152
Tel: 617.539.5800
Fax: 617.846.3174

April 9, 2014

Sergeant Nancy Dalrymple
Winthrop Police Department
3 Metcalf Square
Winthrop, MA 02152

RE: Grievance filed on April 4, 2014

Sergeant Dalrymple:

I am in receipt of your grievance dated April 4, 2014, which I received on April 7, 2014.

In summary, your grievance alleges that your assignment to Sergeant on group 2 AM's violates the seniority clause of the collective bargaining agreement. You also allege that by placing you on the AM shift that I specifically discriminate against you because of your prior claims. You also allege that unharmonious relations have not been promoted between you and my office, the grievance provision has been violated, the recognition clause has been violated and the vacancy and transfer provision has also been violated. For clarity, I will address each issue in its own paragraph.

Seniority:

Your grievance is denied as it relates to seniority. 1.7.5 of the Manual of Rules and Regulations enacted by my predecessor clearly states how seniority will be calculated. The paragraph clearly states that seniority will be determined first by rank and then by continuous service in that rank. The Manual of Rules and Regulations have all been negotiated with the Union Representatives by my predecessors as representatives of the Town prior to their implementation, as required by the Massachusetts Labor Relations Commission and chapter 150E.

Discrimination:

Your grievance is denied as it relates to discrimination. The only consideration that was given to your assignment is where an opening existed. Sergeant Femino is in fact retiring and a supervisor is needed for that shift. Based on your 2002 seniority and the analysis of the seniority regulation 1.7.5., I determined that the shift was appropriate.

Shift Bidding:

Shift bidding does not exist in the collective bargaining agreement and therefore the grievance and remedies are denied on that basis. However, as a matter of practice the department is allowed to shift bid at a time determined by my office. In the past the time frame for shift bidding has been between July 1 and August 30th of each year. When a shift bid is posted you will be able to bid for shifts that your seniority allows.

Recognition Clause:

Your grievance is denied on the basis this provision is not grievable.

Promoting Harmonious Relations:

Your grievance is denied on the basis that this provision is not grievable and no evidence of contractual violations.

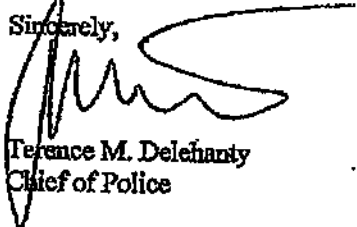
Grievance Provision:

Your grievance is denied on the alleged violation of the grievance provision, which you cited as Article V and in fact it is Article VIII; therefore both Articles are denied.

Vacancies and Transfers:

I am granting your grievance as it relates to Article XI since Sergeant Femino's retirement was not posted on the Union Bulletin Board. The notice will be posted on April 9, 2014 and will close at 8am on April 16th, 2014. Therefore, your assignment is temporary in nature pending the outcome of the posting.

Sincerely,



Terence M. Delehanty
Chief of Police

cc. Union President
HR
Howard Greenspan
James McKenna

WINTHROP – EXHIBIT E

CBA

ARTICLE V RIGHTS OF THE EMPLOYER

Section 1: In recognition of the fact that the laws of the Commonwealth of Massachusetts vest responsibility to the people of the Town of Winthrop in the Employer and the Chief of Police for the efficient and economical operation of the Police Department, it is herein agreed that except as specifically and directly modified by express language in a specific provision of this Agreement, the Employer and its agents, including the Chief of Police, retain all rights and powers that they have or may hereafter be granted by law in managing the police Department and directing the working force and may exercise same without being made the subject of a grievance except as expressly provided herein.

Said rights and powers include but are in no way to be construed as limited to, the establishment of rules and regulations; the right to determine the extent to which work will be performed by members of the bargaining unit; the right to hire, fire, suspend or in any manner discipline for just cause; to classify, promote, demote, transfer permanently or temporarily; to determine hours for and the number of employees required at any location; to determine the qualifications and competence of; to evaluate the performance of; to assign any added, lessened or differed work or responsibility to; to set standards and requirements applicable to and to make determination of the number of steps and eligibility for an in-step wage increase for; to make any pay deduction because of absence or failure to perform work by any employee covered by this Agreement, and to introduce new or to change existing operational methods.

The above rights are solely and exclusively the prerogative of the Employer subject only to such limitations as are expressly provided for in this Agreement.

ARTICLE VI GRIEVANCES INVOLVING CIVIL SERVICE

The Union, in recognition of the Town's having affirmed its belief in and compliance with the state law insofar as they define the rights, duties and obligations of a municipality under the General Laws, under the rules, regulations and procedures of the Civil Service Commission (Massachusetts General Laws, Chapter 31) relative to employees' seniority, promotion, reassignment, discharges, reduction in rank, removals and suspensions, hereby agrees that any grievances, complaint or appeal which under past practices and procedures would normally have