



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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September 30, 2020

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

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

On January 10, 2020, Ferruccio Romeo (Romeo) filed a charge of prohibited practice (Charge) with the Department of Labor Relations (DLR), which, as amended on January 15, 2020, alleges that the Town of Winthrop (Town) had violated Section 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, Section 15.05 of the DLR's Rules, and the DLR's Interim Investigation Procedures issued on April 13, 2020, I conducted an investigation of the allegations on September 10, 2020.² Based on the evidence presented during the investigation, I dismiss the allegations for the reasons explained below.

¹ At the investigation, Romeo amended the charge to add an allegation that the Town also violated Section 10(a)(3). I allowed the amendment over the Town's objection because the underlying facts were the same as the Section 10(a)(4) allegation.

² I conducted the investigation remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

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 (Union) from December 2004 until February 2015. As Union President, Romeo negotiated collective bargaining agreements with the Town and engaged in other protected activity including filing grievances against the Town. In December 2014, the Town placed Romeo on paid administrative leave pending an investigation and in 2015, the Town terminated Romeo. On December 13, 2014, Romeo filed Case No. MUP-14-4210, alleging that the Town placed him on administrative leave in retaliation for his protected activity and on June 24, 2015, Romeo filed Case No. MUP-15-4652, alleging that the Town terminated him due to his protected activity. 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 reinstated with back pay. On April 5, 2017, the Superior Court vacated the arbitration award. On May 21, 2018, the Court of Appeals vacated the Superior Courts decision and reinstated the arbitration award. On April 18, 2019, the Union filed Case No. MUP-19-7277, alleging that the Town was not complying with the backpay aspect of Fraser's order. After the Town made certain payments to Romeo, the Union withdrew the charge.

Romeo was reinstated to duty on September 8, 2018. Romeo and another officer sat for an October make-up promotional exam for a sergeant position. On December 18, 2018, the Town promoted Romeo to a sergeant position. Romeo has not assumed any official role with the Union upon his return to duty.

On April 11, 2019, Romeo filed another prohibited practice charge, Case No. MUP-19-7261, alleging that the Town was taking retaliatory actions against him.³

³ After investigators dismissed Case Nos. MUP-14-4210, MUP-15-4652 and MUP-19-7261, Romeo filed appeals on all three charges with the Commonwealth Employment Relations Board (CERB). On July 27, 2020, the CERB found probable cause to believe that the Town violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law when it placed Romeo on administrative leave in 2014 and when it terminated him in 2015. In Case No. MUP-19-7261, the CERB upheld the dismissal in some respects but remanded the allegation that the Town violated 10(a)(1), 10(a)(3) and 10(a)(4), when it failed to reinstate certain of Romeo's duties. The DLR issued Complaints in all three cases but the hearings have not been scheduled.

The Bidding Process

Starting in 2006, the Town commenced a bidding process, that took place either once or twice a year, for officers to select their shifts. In 2007 through 2009, officers picked their shifts in order of seniority in the Police Department. Neither party provided evidence regarding the bidding procedures used between 2010 and 2013.

On April 4, 2014, Sergeant Nancy Dalrymple (Dalrymple) filed grievance after being removed from her usual work shift assignment and assigned to a new shift even though she did not have the lowest seniority in the Police Department. On April 9, 2014, the Chief of Police, Terence Delehanty (Delehanty), denied the grievance. In his response, Delehanty cited section 1.7.5 of the Manual of Rules and Regulations, writing that seniority is calculated first by rank and then by continuous service in that rank.⁴ He also noted that the collective bargaining agreement (CBA) did not cover shift bidding. The Town Manager subsequently denied the grievance at the next step.

On June 2, 2014, Sergeant Stephen Rogers issued a memo about the procedure for the July/August 2014 shift bid, writing “[i]n order to expedite the process every officer not assigned to a specialty shall bid their shift according to in rank seniority...” The Union objected to this change to the definition of seniority being used for the shift bid process. The parties’ CBA contained the following language in Article XXXIII regarding Seniority, “[s]eniority is defined as the length of continuous full-time employment in the Winthrop Police Department.”⁵

⁴ Romeo argues that this rule refers to who is in charge of an investigation or detail and is not applicable to shift bidding.

⁵ The parties provided the 2011 to 2014 CBA and noted that the seniority language remained the same in the 2017-2018 CBA, which was not provided during the investigation. The July 2017-2018 CBA agreement was continued from July 1, 2018 through June 30, 2019, with a few changes. The parties deleted the language in Article XXXIII in its entirety and replaced it with the following:

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...

Seniority for purposes other than layoffs shall be determined first by rank, second by continuous service in the rank. 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....

On June 12, 2014, Dalrymple filed another grievance which asserted that Dalrymple was

prevented from bidding for a shift in the proper order of my departmental seniority, as specified under the contract. This seniority was already used as a determining factor in a past Grievance. Additionally 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 Union, then represented by the firm Sandulli Grace, filed for arbitration, noting that Dalrymple was assigned to the night shift in violation of the CBA and without following seniority within the Police Department, in order to discriminate against her.⁶ After Romeo's termination, the Union withdrew the grievance, and the arbitration case was closed on February 18, 2016.⁷

Neither party submitted documentary evidence during the investigation to demonstrate the bid process used in 2015 through 2018. However, the Town argued, and Romeo did not dispute, that the Police Department continued to use in-rank seniority for the purpose of shift bidding.⁸

However, the parties did not reach an agreement to change the CBA seniority language until May 28, 2020, after the date of the bidding process at issue in this Charge.

⁶ Dalrymple also filed a complaint against the Town with the Commonwealth of Massachusetts Commission against Discrimination (MCAD) on February 18, 2015, which, in part, pertained to the bidding process. During the MCAD proceeding, the Town maintained that it utilized the bidding process that had been in place since 2005, considering both rank and seniority. The MCAD did not find probable cause that the Town discriminated against Dalrymple, finding in part that the Town "provided a legitimate, nondiscriminatory reason for the reassignment.... When determining placements, Respondents utilized 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."

⁷ Romeo suggests that the arbitration pertained to the Dalrymple's June grievance while the Town suggests that the arbitration referred to her April grievance. My analysis on this case is not dependent on resolving this discrepancy.

⁸ Romeo notes that, until the bidding process at issue in this case that took place in December 2019, there was no difference between the officers who had the highest seniority in the Police Department and the officers who had the highest in-rank seniority.

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 in rank seniority.”

Romeo had more seniority in the Police Department than other sergeants, however, he had less in-rank seniority. Given Romeo’s relative lack of in-rank seniority, he did not receive his preferred shift, as he would have if the Police Department assigned shifts using seniority within the Police Department. As a result, Romeo was placed on the night shift. No evidence was presented that this resulted in any difference of pay, overtime, or any other material harm.⁹

Position of the Parties

Romeo asserts that the Town retaliated against him for his protected activity in violation of Sections 10(a)(3) and 10(a)(4) of the Law by using in-rank seniority for shift bidding purposes rather than using the definition of seniority set forth in the CBA in order to deny Romeo his preferred shift. The first time the Town used in-rank seniority was in 2014, and that was done to retaliate against Dalyrmple. For the next few years, there was no difference between overall seniority and in-rank seniority, so it did not matter which method of determining seniority was used. On December 18, 2018, the Town promoted Romeo to sergeant. Romeo maintains that the Town had little choice but to promote him because he was first on the Civil Service promotional list for sergeant, and there was an open position. Romeo had more department seniority than other sergeants, but less in-rank seniority than others. When the Town used in-rank seniority rather than department-wide seniority for shift bidding in 2019, it harmed Romeo. Romeo argues that in-rank seniority was used specifically for that purpose, to harm him in retaliation for his protected activity.

Romeo maintains that shift bidding is a contractual benefit which cannot be superseded by policy. Seniority was defined in the CBA at that point as the length of continuous full-time employment with the Town’s Police Department. Romeo also questions why the Town and the Union had to subsequently alter the CBA language after Romeo was given an unfavorable shift, if, in fact, the Town had used in-rank seniority for years as it alleges.

The Town contends that it did not violate the Law. Since at least 2014, the Town has used in-rank seniority and it merely continued the process in 2019. This action was not taken to discriminate or retaliate against Romeo. The Town further notes that the CBA does not address the shift bidding process.

⁹ Although no evidence was presented regarding any change in pay for Romeo, I note that at the time of Dalyrmple’s MCAD complaint, she asserted that there was a night differential resulting in 10% additional pay for those on the night shift.

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).

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) (Athol-Royalston); Town of Athol, 25 MLC 208, 211, MUP-1448 (June 6, 1999).

Romeo established the first two elements of a prima facie case of retaliation. When he served as the Union President from December 2004 until February 2015, Romeo bargained with the Town and filed numerous grievances against the Town. 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. There is no dispute that the Town was aware of Romeo's protected activity.

The next question is whether the Town took adverse action against Romeo when it conducted shift bids using in-rank seniority, which resulted in Romeo having less seniority and therefore not receiving his preferred shift. The CERB has consistently defined adverse action as an adverse personnel action, such as a suspension, discharge, involuntary transfer or reduction in supervisory activity. City of Holyoke, 35 MLC 153, 156, MUP-05-4503 (January 9, 2009) (Holyoke) (citing Town of Dracut, 25 MLC 131, 133, MUP-1397 (February 17, 1999)). Many management decisions, though possibly inconvenient or even undesirable, do not constitute adverse employment actions unless the charging party is materially disadvantaged in some way. See City of Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009)(citing MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996)(plaintiff failed to prove adverse action element of a prima facie case of unlawful retaliation where there was no evidence that he had been disadvantaged in respect to salary, grade, or other objective terms and conditions of employment)); Sallis v. Univ. of Minnesota, 408 F.3d 470, 476 (8th Cir. 2005)(termination, reduction in pay or benefit, and changes in employment that significantly affect an employee's future career prospects constitute material employment disadvantage but minor changes that merely inconvenience an employee or alter work responsibilities do not).

Here, the evidence demonstrates that Romeo did not receive his preferred shift. The CERB has found, for instance, that an involuntary transfer to a less preferable position constitutes adverse action. Boston City Hospital, 11 MLC 1065, MUP-4893 (July 25, 1984). The charging party has the burden of showing that the Town's action was adverse to Romeo within the meaning of the Law. However, no evidence was provided 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. See Board of Higher Education, 43 MLC 148, 154, SUP-14-3771 (Nov. 30, 2016) (An employee was not materially disadvantaged when he was not assigned the schedule he wanted where his compensation was not affected). Additionally, the charging party merely stated that Romeo did not receive his preferred shift without providing evidence that Romeo's new shift was a less preferable shift. See Holyoke (The CERB declined to find the respondent took adverse action against an employee where there was insufficient evidence that the position that the employee was transferred to was a less preferable position.)

Even if I assumed that Romeo's inability to receive his preferred shift was an adverse employment action, Romeo also failed to prove that the Town's actions were unlawfully motivated, the fourth and last element needed to establish a prima facie case. 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.

However, Romeo failed to present sufficient circumstantial evidence to demonstrate that the Town's actions regarding the 2019 shift bidding process were unlawfully motivated. Romeo did not provide evidence of any disparate treatment between Romeo and similarly situated employees. The in-rank seniority was applied to all the sergeants. The Town did not give a trivial reason for its actions; the Town continued to use the same seniority formula it had used since 2014 for shift bidding. The Town likewise did not deviate from its past practice. Although Romeo was able to demonstrate that years ago, a different shift bidding process was used, the evidence demonstrated that the Town used the same seniority formula in 2019 that it had used since 2014. As to the timing of this action, although Romeo did engage in a lot of protected activity, none of it was relatively close in time to the Town's actions at issue here. Romeo's prohibited practice charges were filed on December 13, 2014; June 24, 2015; and April 11, 2019. All of his other protected activity predated April 2019. The alleged violation here took place in December 2019, some 8 months after his latest protected activity. Moreover, Romeo did not present any evidence that the Town expressed any animus or hostility toward the Union or Romeo's protected activity.¹⁰ 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 conducted shift bidding using in-rank seniority. Consequently, I dismiss this allegation for lack of probable cause.

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 was following its policy that was in place since at least 2014. Romeo was certainly aware of the use of in-rank seniority for shift bidding in 2014 because he filed a grievance over this on behalf of another employee. The Union later opted not to arbitrate the grievance. The Town asserts that the same in-rank seniority has been utilized for shift bidding ever since then and Romeo did not dispute that fact. Romeo did not provide any evidence to prove that but for his protected activity, the Town would not have used

¹⁰ Romeo alleged in Case No. MUP-19-7261 that the Town took other actions against him in 2018 due to his protected activity, and the DLR issued a complaint of prohibited practice in one of his allegations. However, the alleged unlawful conduct at issue in MUP-19-7261 occurred over a year before the shift bidding action at issue here.

in-rank seniority for the 2019 shift bidding. Therefore, I find no probable cause to believe that the Town violated the Law in the manner alleged and I dismiss the charge in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

A handwritten signature in cursive script that reads "Gail Sorokoff".

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 (CERB) 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 CERB.