

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

DLR Docket No. MUP-19-7261

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 following Romeo's reinstatement as a police officer by 1) failing to allow Romeo to take a lieutenant promotional examination which would have violated civil service law, and 2) failing to restore him to administrative detail duties that had been assigned to others during his absence. Romeo alleges that the Town's actions were taken in retaliation for his union activity and the filing of complaints with the DLR. Romeo specifically limits his appeal to these two issues in his Request for Review.

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. (Request for Review, p. 2) During his tenure Mr. Romeo zealously advocated for the Union and its members.

The Investigator in this case correctly noted that the termination arbitration did not include retaliation. (Investigator Decision, p. 9 n. 17) The Arbitration Decision and Award dated February 26, 2016 found that there was no just cause for Romeo’s termination. Nevertheless, the Arbitrator ordered that Romeo “be given a Written Letter of Warning for not following the Pump Station guidelines.” (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 Appeal Court. Recognizing the limited scope of review courts have of civil service arbitration decisions, the Appeals Court reversed the Superior Court 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. Although Romeo has

filed a number of complaints since his reinstatement, there is no evidence that he filed the complaints prior to the Town's alleged retaliatory actions. (Investigator Decision, p. 8 n. 16)

On October 18, 2018, Bruce Fraser, the same Arbitrator who decided the termination arbitration held a remedy hearing and issued a Remedy Award on January 21, 2019. At the hearing on the remedy, the Town agreed that the Arbitration award included overtime and detail pay as well as lost wages. (Remedy Award) At that time, Romeo did not make any claim based on the argument that had he not been terminated, he would have been promoted to sergeant and was, therefore, entitled to damages for "promotion expectations." Neither did he claim he was entitled to be assigned to administrative and CJIS duties he had performed prior to his termination which would have provided him with compensatory time and "Kelly hours." (See Remedy Award)

By mutual agreement of Romeo and the Town, Romeo sat for a make-up promotional examination for sergeant on October 25, 2018, and passed. On November 10, 2018, Romeo filed an appeal with the Civil Service Commission to be placed at the top of the eligible list for sergeant, and "to be allowed to take an upcoming promotional examination for lieutenant, notwithstanding the civil service law, which states in part, that only those "in the next lower title" (ie. – sergeant) are eligible to sit for the promotional examination (ie. – lieutenant)." (CSC E-18-222 Order of Dismissal, p. 2) In that appeal Romeo argued that the relief was warranted in part because "had he not been terminated, he may have been promoted to sergeant, allowing him to sit for the lieutenant's promotional examination." (CSC E-18-222 Order of Dismissal, p.2) The Civil Service Commission noted that "[t]hree other Winthrop police officers have filed an appeal with the Commission, contesting whether Mr. Romeo should have been able to sit

for the make-up examination on October 25th.” (CSC E-18-222, p. 2 par. 9) On May 9, 2019, the Civil Service Commission dismissed Romeo’s appeal stating: “Mr. Romeo has already received the appropriate relief. Over the objection of other police officers, Mr. Romeo, upon his reinstatement, was allowed to sit for a make-up examination for police sergeant . . . and has now been added to the eligible list, ranked third (within the statutory “2N+1” formula for any future vacancy.) No further relief is warranted.” (CSC E-18-222 Order of Dismissal, pp. 2-3)¹

Romeo was promoted to sergeant on December 8, 2019. (Investigator Decision, p. 3, n. 6)

APPLICABLE STANDARDS

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. 141, §§ 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 three elements of a prima facie case of retaliation, but failed to establish that the Town’s actions were unlawfully motivated. (Investigator’s Decision, pp. 9, 10-12) Absent direct evidence,

¹ Romeo appealed the Order of Dismissal to the Suffolk Superior Court, 1984CV1806, on June 6, 2019. The case was dismissed for failure to prosecute on March 13, 2020.

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.

ARGUMENT

I. Failure To Allow Romeo To Take The Lieutenant Promotional Examination

Officer Romeo contends that the Town retaliated against him by failing to allow him to sit for the December 8, 2018 lieutenant promotional examination. Following his termination on January 9, 2015 and his successful challenge to the termination, 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, he sat for a make-up promotional examination for sergeant on October 25, 2018, passed and on April 1, 2019 was placed third on the updated eligible list for Sergeant. (E-18-222, Order of Dismissal) Romeo was promoted to sergeant on December 8, 2019. (Investigator Decision, p. 3, n. 6)

The issue before the Investigator here was whether Romeo could establish probable cause that the Town was motivated by a retaliatory animus when it did not allow him to sit for the lieutenant promotional examination on December 8, 2018, and if so, whether the Town could produce evidence that a legitimate reason motivated its decision. Romeo then would have the burden to show that “but for” the retaliatory motive, the Town would have allowed him to sit for the lieutenant promotional examination. Romeo cannot meet either the probable cause or “but for” standard as it was simply not permissible or possible for the Town to have allowed him to take the lieutenant promotional examination under the circumstances.

Far from being retaliatory, the Town had no choice in the matter. Pursuant to G.L. c. 31, § 59 governing civil service promotional examinations, “[a]n examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force, . . . ; provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open. At the time of the lieutenant promotional examination, Romeo had not yet attained the rank of sergeant, and was not qualified to sit for the examination under civil service law.

In addition, on November 10, 2018, after Romeo took the make-up promotional examination for sergeant on October 25, 2018 by mutual agreement of Romeo and the Town, he filed an appeal with the Civil Service Commission to be placed at the top of the eligible list for sergeant, and “to be allowed to take an upcoming promotional examination for lieutenant, notwithstanding the civil service law, which states in part, that only those “in the next lower title” (ie. – sergeant) are eligible to sit for the promotional examination (ie. – lieutenant).” (CSC E-18-222 Order of Dismissal, p. 2) In that appeal Romeo argued that the relief was warranted in part because “had he not been terminated, he may have been promoted to sergeant, allowing him to sit for the lieutenant’s promotional examination.” (CSC E-18-222 Order of Dismissal, p.2) The Civil Service Commission noted that “[t]hree other Winthrop police officers have filed an appeal with the Commission, contesting whether Mr. Romeo should have been able to sit for the make-up examination on October 25th.” (CSC E-18-222, p. 2 par. 9) On May 9, 2019, the Civil Service Commission dismissed Romeo’s appeal stating: “Mr. Romeo has already received the appropriate relief. Over the objection of other police officers, Mr. Romeo, upon his reinstatement, was allowed to sit for a make-up examination for police sergeant . . . and has now been added to the eligible list, ranked third (within the statutory “2N+1” formula for any future vacancy.) No further relief is warranted.” (CSC E-18-222 Order of Dismissal, pp. 2-3)

In the circumstances presented here, under the plain language of civil service law, as later confirmed by the Civil Service Commission, the Town could not allow Romeo to take the lieutenant promotional examination on December 8, 2018. Indeed, the Town had, in fact, agreed and allowed Romeo to take the make-up sergeant promotional examination on October 25, 2018 over the objection of other Winthrop police officers.

“[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). 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.” Id. As the Investigator in this case noted, “[n]either party presented any evidence that the Town ever allowed a non-qualified candidate to sit for a promotional exam in the past. . . . and there is no evidence of disparate treatment or failure to follow the past practice.” (Investigator Decision, p. 11) The Investigator continued that “[t]he Town did not offer trivial reasons for its decision; it was following Civil Service Law.” (Investigator Decision, p. 11)

Romeo also resurrects the argument he made before the Civil Service Commission in November 2018 that he should have been allowed to take the lieutenant promotional examination because he “is still owed damages for the denial of the opportunity to take it and the resulting loss of the opportunity to be promoted.” (Request for Review, p. 17) Citing Selmark Associates, Inc v. Ehrlich, 467 Mass. 525, 545 (2014), Romeo argues that he is entitled to damages for “promotion expectations.” (Request for Review, p. 17)

First, Selmark is a case involving expectation/future damages for breach of contract which does not apply in this case. Second, neither Romeo nor the Union made any argument for the award of such expectation damages at the time of the remedy hearing related to the termination arbitration and the Arbitrator made no such award. Indeed, it would have been beyond the arbitrator’s authority to award such damages. An arbitrator in a civil service arbitration has no authority to promote, cannot promote under civil service law and is prohibited from fashioning an award as though the employee had

been promoted. Somerville v. Somerville Municipal Employees Association, 20 Mass. App. Ct. 594, 599 (1985). Finally, even if Romeo was entitled to such damages, they are beyond the scope of the issue presented here which is whether the Town's failure to permit Romeo to take the lieutenant promotional examination, which would have violated civil service law, was in retaliation for his protected activity.

Based on the above, the Investigator was correct in concluding that Romeo had failed to meet his burden to establish a prima facie case of retaliation for the Town's failure to allow him to take the lieutenant promotional examination in December 2018, and in dismissing the allegation for lack of probable cause.

II. Failure to Reassign Romeo To CJIS And Administrative Duties

Officer Romeo also contends that the Town retaliated against him by failing to restore his administrative duties concerning the Police Department's details as well as his duties as Criminal Justice Information Services ("CJIS") representative which he had performed prior to his termination and which provided him with about 98 hours of compensatory time and "Kelly hours" each year. (Request for Review pp. 9, 14) Following his termination in January 2015 and in Romeo's absence, the Town assigned the CJIS duties to a lieutenant in a different labor organization, not Local 421, and assigned two other bargaining unit employees to adjust the detail hours. (Investigator Decision pp. 4-5, 11-12) Romeo asserts, however, that the Town did not reassign him to these duties upon his reinstatement in retaliation for his protected activity.

The issue before the Investigator, therefore, was whether Romeo could establish probable cause that the Town was motivated by a retaliatory animus when it did not reassign him to the CJIS and administrative duties upon his reinstatement, and if so,

whether the Town could produce evidence that a legitimate reason motivated its decision. Romeo then would have the burden to show that “but for” the retaliatory motive, the Town would have reassigned him to the CJIS and administrative duties. Romeo cannot meet either the probable cause or “but for” standard under the circumstances.

As the Investigator noted, the Arbitrator accounted for the 90 hours representing the CJIS and administrative duties Romeo lost per year while separated from the service in the Remedy Award for back pay. The Arbitrator, however, did not specifically require the Town to return the duties to Romeo upon his reinstatement. (Investigator Decision, p. 11) Neither did Romeo claim he was entitled to be reassigned to those duties at the Remedy hearing even though he had by then returned to duty for over a month. (Remedy Award)

The Investigator also found that the Town provided legitimate reasons for its decision not to reassign the duties to Romeo. (Investigator Decision, p. 11) Following his termination on January 9, 2015 and in Romeo’s absence, the Town out of necessity assigned the duties to others. The Town assigned the CJIS duties to a lieutenant in a different labor organization, not Local 421. Following Romeo’s reinstatement, the Town opted to keep the duties within the other bargaining unit, assigned to the same lieutenant, rather than restore the duties to Romeo as the arrangement in place was working well. (Investigator Decision, pp. 11-12) With regard to the administrative duties that the Town had assigned to other bargaining unit employees, the Town presented evidence that a 2010 memorandum of agreement makes the Union responsible for certain follow up duties for detail payments, not the Town, and that with regard to other detail-related duties that the Town still assigns, such duties had not been assigned only to Romeo in the past. (Investigator Decision, p. 11) In fact, one of the officers currently performing the

duties had previously performed them in 2012-2013. (Investigator Decision, p. 12) “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. The Investigator further found that Romeo presented no evidence whether any other employees who were absent for a significant time were reassigned to all their former responsibilities upon their return, such that there was no basis to establish that the Town had engaged in disparate treatment or that it departed from past practice. (Investigator Decision, p. 11)

In addition, Romeo’s argument that he was required to be given the specific CJIS and administrative duties going forward as part of the “make whole” award is not tenable. First, as previously noted, reinstatement to the specific duties which amounted to less than 100 hours a year were not contained in or mentioned in the arbitrator’s award. Second, a “make whole” award does not cover compensation going forward, but rather, provides for back pay and benefits as though there had been no separation up to the time of reinstatement, and a “make whole” remedy does not reinstate the employee to duties not covered by civil service law. See Mass. Coalition of Police, Local 165, AFL-CIO v. Town of Northborough, 416 Mass. 252, 256 (1993) Third, the specific duties involved are the subject of other agreements with the Town, including under collective bargaining agreements.

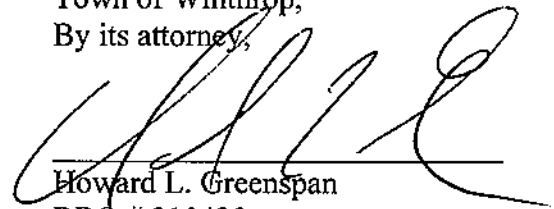
Based on the above, the Investigator was correct in concluding that Romeo had failed to meet his burden to establish a prima facie case of retaliation for the Town’s failure to reassign him to the CJIS and administrative duties, and in further concluding that Romeo did not present any evidence to establish that the Town would have

reassigned the duties to Romeo but for his protected activity. 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.

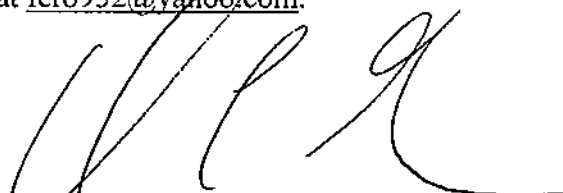
Respondent,
Town of Winthrop,
By its attorney,

A handwritten signature in black ink, appearing to read 'H. Greenspan', is written over a horizontal line.

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CERTIFICATE OF SERVICE

A copy of the foregoing Respondent, Town of Winthrop's, Response To Charging Party Ferruccio Romeo's Request For Review Of Dismissal Of Charge Of Prohibited Practice has been sent via electronic mail this 1st day of May, 2020 to Thomas P. Fowler, Esq., at tfowler@llrlaw.com and Ferruccio Romeo at fero952@yahoo.com.


Howard L. Greenspan